Federal Regulation Affecting Land Use
RLUIPA Update

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I. Introduction

The focus of this paper is on a federal statute – the Religious Land Use and Institutionalized Persons Act (RLUIPA). Included here is an analysis of RLUIPA's evolution and historical context. Moreover, to understand RLUIPA, one must understand the First Amendment. Therefore, this paper includes relevant basic principles concerning the First Amendment. To round out the readers' understanding, this paper provides case updates on RLUIPA and updates of select First Amendment cases. Finally, this paper briefly explores legal and political phenomena likely to affect federal law regarding religion generally and, derivatively, affecting religious land use.

II. Interrelationship Between the First Amendment and Free Exercise Clause

a. The First Amendment to the United States Constitution provides in relevant part:

> "Congress shall make no law respecting the establishment of religion, or *prohibiting the free exercise thereof* * * *" U.S. Const., Amdt. 1.

III. Some Principles Guiding American Jurisprudence Regarding Religion

The United States was the first government since Roman times where the leader was not picked by God, but rather by the people whom the leader governed.[1] At its base, the freedom so cherished at the inception of our country was freedom from particular religious doctrine enforced by a particular church at a particular time. The freedom to speak and feel what one wants, springs from this basic principle. In *Everson v. Board of Education of Ewing Tp.*, 330 U.S. 1 (1947), the Supreme Court explained:

[1] "All hereditary government is in its nature tyranny. An heritable crown, or an heritable throne, or by what other fanciful name such things may be called, have no other significant explanation than that mankind are heritable property. To inherit a government, is to inherit the people, as if they were flocks and herds." Thomas Paine, *The Rights of Man*.

> "A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy. With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews. In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed. Among the offenses for which these punishments had been inflicted were such things as speaking disrespectfully of the views of ministers of government-established churches, nonattendance at those churches, expressions of non-belief in their doctrines, and failure to pay taxes and tithes to support them." Id., 330 U.S. 1, 9.

It cannot be disputed that the separation of Church and state was a fundamental rationale for the formation of the United States. Escaping the influence of the hereditary government of the monarchy, whose authority was bestowed by a particular God, was a primary moving force in the creation of the government for the new world.

An important corollary and equally fundamental premise for the formation of the United States was that citizens be allowed to freedom of religious exercise, without prohibition or compulsion by the state.

A third indispensable corollary to these principles is the tolerance of a religious marketplace and of freedom within that marketplace. This freedom requires a multiplicity of religious faiths; no state sponsored faith or state sponsorship on the numbers or types of faiths that might exist. Disguised religious litmus tests of any stripe are as repugnant as overt ones. In *Lyng v. Northwest Indian Cemetery Prot. Assn.*, 485 U.S. 439 (1988) the court cited Federalist No. 10 explaining that Federalist Paper 10 "suggest[ed] that the effects of religious factionalism are best restrained through competition among a multiplicity of religious sects)."[2] Evidence of the efficacy of this principle is that churches of all faiths have long been integrated within their communities. No one church can dominate any other and no church

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[2] "A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source. A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it; in the same proportion as such a malady is more likely to taint a particular county or district, than an entire State." Excerpt from Federalist 10

or faith can be prohibited. The proximity of houses of worship to believers provides Americans with realistic opportunities for religious interaction and instruction.

New or expanded churches respond to new or expanded human needs for religious guidance. It is fundamentally *not* the role of government to restrict opportunities the people want for religious guidance in the faith of their choice. Such restriction is a slippery slope for religious intolerance or dominance.

In the context of the free exercise of religion, zoning restrictions have unique potential to stifle or install religion. Such power can be overt, but it is more likely to be indirect. Indirect favoritism or extinguishment of particular faiths in a community or the unavailability of competing faiths in a community can follow an outgrowth of planning decisions regardless of whether they are aimed at manifesting such consequences.

Further, the government's zoning power is uniquely powerful to favor sects and, in particular, to favor only the largest, most organized sects that can afford, planners, lawyers, transportation engineers and public relations people. These professions are the trappings of project approval in many communities. While a for-profit developer may be able and indeed expected to afford such luxuries, a church, especially a small congregation, may be utterly unable to afford these luxuries. Few would dispute that zoning decisions are, without some external restraint, subjective, discretionary and often based on speculative and emotional evidence. The discretion to deny believers access to the church of their choice would, as a practical matter, be nearly unfettered but for the interposition of the First Amendment and the RLUIPA enforcing the First Amendment.

In this regard, Congress heard a great deal of testimony regarding the adverse impact zoning visits on religious free exercise. Local regulators often feel little or no sense of responsibility to the Constitution. Many of you, as the author, have you heard local zoning hearings officers say they do not have to consider constitutional arguments as challenges to zoning decisions or recommendations. The United States Supreme Court has recognized the serious constitutional problem with local bureaucrats possessing discretion in matters affecting individual liberty. In *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 637 (1943), the Court observed:

> "[S]mall and local authority may feel less sense of responsibility to the Constitution and agencies of publicity may be less vigilant in calling it into account. * * *"

RLUIPA's legislative history is filled with examples of such "small and local authority" without a sense of responsibility to the constitution concerning land use actions adversely affecting the free exercise of religion.

RLUIPA was co sponsored by Senators Kennedy and Hatch as a means to enforce the important principles of the First Amendment. RLUIPA, by reinforcing the importance of constitutional religious free exercise maintains these important principles upon which this nation is founded.

IV. Summary of the State of the Law Regarding Free Exercise

1. Neutral, generally applicable laws that have an incidental effect on religion are subject to a rational basis test.

2. Facially neutral laws of general applicability that impose a substantial burden on religion are subject to the compelling state interest test. In this regard, the Supreme Court has stated, "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972).) In *Yoder*, the state requirement for compulsory secondary education was determined to be a heavy burden on the Amish faith and the state's interest in compulsory secondary education was not weighty enough.[3]

3. To determine neutrality examine:

   a. The text of the law;

   b. Indirect or circumstantial evidence regarding enactment of law evidencing hostility toward religious free exercise;

   c. Effect of law on religious free exercise;

   d. Whether the impacts that the state says it is avoiding by the disputed law are, in reality, tolerated by the state in nonreligious contexts. In this regard the *Murphy v. Town of New Milford,* 289 F. Supp. 2d 87(D. Conn.), vacated on other grounds, 402 F.3d 342 (2005). There the District Court explained:

> "The neutrality of the Cease and Desist Order is further suspect because plaintiffs' First Amendment freedoms are curtailed to prevent isolated collateral harms not themselves prohibited by direct regulation. Defendants agree that there is no direct and express regulation limiting the number of visitors, with vehicles or not, that residents of single family homes may have. There is only the ZEO's and/or NMZC's

[3] *Yoder's* articulation of the analysis was in the nature of a balancing act where the rights to religious freedom began with a heavy weight in the balance.

interpretation of what uses are "customary" in plaintiffs' neighborhood.

4. Laws that are not neutral or not generally applicable are subject to: (1) a showing of a compelling state interest to justify them, (2) which compelling interest must be established as implemented by the least restrictive means available. This includes statutes or ordinances the discriminate against or among religious free exercises.

    a. EXCEPTION: State funding statutes excluding religion from receiving state funds are not subjected to the compelling state interest test so long as they do not:

        i. impose a civil or criminal sanction for the law's violation;

        ii. foreclose a minister's right to participate in community political affairs;

        iii. do not require believers to choose between their religious beliefs and receipt of a governmental benefit; and

        iv. no direct or indirect evidence of hostility toward religion is produced.

4. Non-funding laws that do not purport to be generally applicable because they require an individualized governmental assessment of the religious free exercise are subject to the compelling state interest/least restrictive means test. Government may not refuse to grant its system of individualized exemptions to cases of "religious hardship" without a compelling interest implemented by the least restrictive means.

V. <u>Key First Amendment Cases</u>

1. *Sherbert v. Verner*, 374 US 398 (1963). Governmental conditioning of the availability of a governmental benefit (unemployment compensation) on the claimant's willingness to violate a cardinal principle of her religious faith (working on Saturdays) "effectively penalizes the free exercise of her constitutional liberties." In explaining why the compelling state interest applies to such a situation, the Court explained:

> "It is basic that no showing of merely a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, 'only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'"

The Court was unmoved by a distinction between a civil penalty and the denial of unemployment benefits saying the state had:

> "force[d] [the applicant] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion *as would a fine* imposed against [her] for her Saturday worship." (Emphasis supplied). 374 U.S., at 404.

MAJORITY OPINION AUTHORED BY JUSTICE BRENNEN

2. *WALZ v. TAX COMMISSION OF CITY OF NEW YORK*, 397 U.S. 664 (1970). This case upheld property tax exemptions for religious organizations on a tax payer's challenge who said the effect of the disputed tax exemption was to force him to support churches against his will (free exercise challenge) as well to result in the establishment of religion. The Court disagreed on both counts. The Court explained the nature of the First Amendment analytical envelope:

> "The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion is sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.
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> "Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so."

JUSTICE BURGER AUTHORED THE MAJORITY OPINION

3. *Wisconsin v. Yoder*, 406 U.S. 205 (1972). A state statute requiring Amish parents to send their children to secondary school (beyond the 8th grade) improperly burdened free exercise of religion and, on balance, the state did not establish it possessed a compelling state interest in its requirement in the circumstances.

MAJORITY OPINION AUTHORED BY JUSTICE BURGER

4. *McDaniel v. Paty, 435 U.S. 618 (1978).* The plaintiff was an opponent of a candidate to public office. The disputed candidate was a Baptist Minister. The plaintiff argued the minister could not run for public office because of a state prohibition against ministers holding office. Borrowing from the *Sherbert* analysis, the Court determined that conditioning a governmental benefit on surrender of a religious right, violated the Free Exercise Clause. The Court focused on the weight of the asserted governmental interest rather than the weight of the burden on the free exercise of religion. The Court concluded that the weight of the governmental interest in "antiestablishment" of religion had not been proven. The Court observed that while when the country was initially being founded, preventing ministers from holding office might have been a legitimate concern. However, the Court explained that in the context of the 20th century, the state failed to prove the state's fear of ministers in office was still a legitimate antiestablishment concern.

The Court explained:

> "This does not mean, of course, that the disqualification escapes judicial scrutiny or that McDaniel's activity does not enjoy significant First Amendment protection. The Court recently declared in *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972):
>
> > "The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."
>
> "Tennessee asserts that its interest in preventing the establishment of a state religion is consistent with the Establishment Clause and thus of the highest order. The constitutional history of the several States reveals that generally the interest in preventing establishment prompted the adoption of clergy disqualification provisions, * * * Tennessee does not appear to be an exception to this pattern. * * * There is no occasion to inquire whether promoting such an interest is a permissible legislative goal, however, * * * for Tennessee has failed to demonstrate that its views of the dangers of clergy participation in the political process have not lost whatever validity they may once have enjoyed. The essence of the rationale underlying the Tennessee restriction on ministers is that if elected to public office they will necessarily

exercise their powers and influence to promote the interests of one sect or thwart the interests of another, thus pitting one against the others, contrary to the anti-establishment principle with its command of neutrality. *See Walz v. Tax Comm'n*, 397 U.S. 664 (1970). However widely that view may have been held in the 18th century by many, including enlightened statesmen of that day, the American experience provides no persuasive support for the fear that clergymen in public office will be less careful of anti-establishment interests or less faithful to their oaths of civil office than their unordained counterparts."

MAJORITY OPINION AUTHORED BY BURGER

5. *Gillette v. United States*, 401 U.S. 437 (1971). Congress adopted the Military Selective Service Act of 1967. In that Act, it exempted from military service any person who "objected to war in any form." In interpreting this phrase, the Court determined that it was not enough to qualify for exemption to object to a particular war or class of wars. The Court characterized the case as presenting a tension between Congress' power to raise and support armies and the religious guarantees of the First Amendment.

   Gillette was convicted of willful failure to report for induction into the armed forces. His defense was that he should have been relieved of the draft on the basis that he was a conscientious objector to war. He stated he was willing to be involved in a war where the national defense was in issue or a peace-keeping mission. However, he refused to be involved in the Vietnam War on the basis that he held a deep religious conviction that it was an "unjust." war. Gillette explained that as a matter of conscience, he was unable to enter and serve in the military during the Vietnam War. Gillette maintained that, in fact, he was unable to be involved in the Vietnam or any war he felt was unjust "based on a humanist approach to religion." His decision was "guided by fundamental principles of conscience and deeply held views about the purpose and obligation of human existence."

   The Court determined Congress' decision to exempt from military service only those who objected to participation in all wars were a permissible neutral law. In this case, the Court stated the test for neutrality, albeit in the context of an Establishment Clause analysis. However, there is no reason to apply neutrality differently between the Establishment and Free Exercise Clauses. The test for neutrality applied in Gillette is as follows:

   1. Law must be secular in purpose;
   2. Law must be evenhanded in operation ;
   3. Law must be neutral in primary impact.

The Court disposed of the free exercise claim by determining that the burden of participating in a war, against which one had a religious conviction, was an "incidental burden" and that such burden is:

> "justified by the substantial governmental interests that relate directly to the very impacts questioned. And more broadly, of course, there is the Government's interest in procuring the manpower necessary for military purposes, pursuant to the congressional grant of power to Congress to raise armies."

JUSTICE MARSHALL AUTHORED THE MAJORITY OPINION

6. *United States v. Lee*, 455 U.S. 252 (1982). Amish believers objected on religious grounds to paying social security taxes. The Court determined the governmental interest in everyone paying taxes was substantial and sufficiently weighty to place a burden on the free exercise of religion. The Court explained:

> "Unlike the situation presented in *Wisconsin v. Yoder* * * * it would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs. The obligation to pay the social security tax initially is not fundamentally different from the obligation to pay income taxes; the difference - in theory at least - is that the social security tax revenues are segregated for use only in furtherance of the statutory program. There is no principled way, however, for purposes of this case, to distinguish between general taxes and those imposed under the Social Security Act. If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax. The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief. * * * Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax." (Citations omitted).

MAJORITY OPINION AUTHORED BY JUSTICE BURGER

7. *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989). This case presents the genesis of the specific "substantial burden" free exercise test. In *Hernandez*, members of the Church of Scientology were denied a charitable deduction type of federal tax exemption. They claimed that paying for "audit" sessions or church training classes should be treated as a charitable deduction. The Court upheld the government's denial of the claimed exemptions. The Court explained the analysis as follows:

"The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden. *Hobbie v. Unemployment Appeals Comm'n of Fla*., 480 U.S. 136, 141 -142 (1987); *Thomas v. Review Bd. of Indiana Employment Security Div*., 450 U.S., at 717 -719; *Wisconsin v. Yoder*, 406 U.S. 205, 220 -221 (1972). It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds. *Thomas, supra,* at 716. We do, however, have doubts whether the alleged burden imposed by the deduction disallowance on the Scientologists' practices is a substantial one. Neither the payment nor the receipt of taxes is forbidden by the Scientology faith generally, and Scientology does not proscribe the payment of taxes in connection with auditing or training sessions specifically. *Cf. United States v. Lee*, 455 U.S., at 257. Any burden imposed on auditing or training therefore derives solely from the fact that, as a result of the deduction denial, adherents have less money available to gain access to such sessions. This burden is no different from that imposed by any public tax or fee; indeed, the burden imposed by the denial of the "contribution or gift" deduction would seem to pale by comparison to the overall federal income tax burden on an adherent. Likewise, it is unclear why the doctrine of exchange would be violated by a deduction disallowance so long as an adherent is free to equalize "outflow" with "inflow" by paying for as many auditing and training sessions as he wishes. *See* 822 F.2d, at 850-853 (questioning substantiality of burden on Scientologists); 819 F.2d, at 1222-1225 (same).

"In any event, we need not decide whether the burden of disallowing the 170 deduction is a substantial one, for our decision in *Lee* establishes that even a substantial burden would be justified by the "broad public interest in maintaining a sound tax system," free of 'myriad exceptions flowing from a wide variety of religious beliefs.' 455 U.S., at 260. In *Lee*, we rejected an Amish taxpayer's claim that the Free Exercise Clause commanded his exemption from Social Security tax obligations, noting that "[t]he tax system could not function if denominations were allowed to challenge the tax system" on the ground that it operated "in a manner that violates their religious belief." *Ibid.* That these cases involve federal income taxes, not the Social Security system, is of no consequence. *Ibid.* The fact that Congress has already crafted some deductions and exemptions in the Code also is of no consequence, for the guiding principle is that a tax "must be uniformly applicable to all, except as Congress provides explicitly otherwise." *Id.,* at 261 (emphasis added). Indeed, in one

respect, the Government's interest in avoiding an exemption is more powerful here than in *Lee*; the claimed exemption in *Lee* stemmed from a specific doctrinal obligation not to pay taxes, whereas petitioners' claimed exemption stems from the contention that an incrementally larger tax burden interferes with their religious activities. This argument knows no limitation. We accordingly hold that petitioners' free exercise challenge is without merit."

MAJORITY OPINION AUTHORED BY JUSTICE MARSHALL

8. *Thomas v. Review Board, Indiana Employment Security Div*., 450 U.S. 707 (1981). The Supreme Court held that the denial of unemployment benefits to the Jehovah's Witness applicant whose religion forbade him to fabricate weapons violated the claimant's right to free exercise of his religion.

MAJORITY OPINION WRITTEN BY JUSTICE BURGER

9. *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144 (1987). A worker who was a recent convert to the Seventh-Day Adventist religion advised her employer she needed to begin observing her Sabbath by not working on that day. While her immediate supervisor agreed to accommodate her, upper management told her she would either work her schedule or resign. She was fired because she did not agree to either. She then applied for unemployment benefits. She was denied the unemployment benefits for which she applied on the basis that she had been fired for misconduct. The United States Supreme Court held that the denial of unemployment benefits was a substantial burden on the free exercise of Hobbie's religion and the state did not establish a compelling interest in the denial her benefits. The Court explained its decision in this regard was not "fostering an establishment" of the particular religion. The Court explained that extension of unemployment benefits to those whose faith forbade them from working on Saturdays reflected governmental neutrality on religious differences.

MAJORITY OPINION AUTHORED BY JUSTICE BRENNEN

10. *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987). In this case, the Court upheld the Civil Rights Act's exemption authorizing religious organizations to hire only members of the organization's particular religion. While not deciding whether the exemption was *required* under the Free Exercise clause, the Court explained it was a permissible one:

> "[i]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge

would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission."

JUSTICE WHITE AUTHORED THE MAJORITY OPINION

11. *Lyng v. Northwest Indian Cemetery Protection Assn*., 485 U.S. 439 (1988). Characterizing the claimant's position as one creating a "servitude" on land owned by the government, the Court held that the government's use of its own land for harvesting timber may not be circumscribed by the needs for the free exercise of a Native American religion that cherishes the natural environment for some of its practices. The Court acknowledged that the timber sale could have devastating effects on the Native American's religion.

The Court explained the difficulty of drawing the constitutional line in this case:

"Respondents attempt to stress the limits of the religious servitude that they are now seeking to impose on the Chimney Rock area of the Six Rivers National Forest. While defending an injunction against logging operations and the construction of a road, they apparently do not at present object to the area's being used by recreational visitors, other Indians, or forest rangers. Nothing in the principle for which they contend, however, would distinguish this case from another lawsuit in which they (or similarly situated religious objectors) might seek to exclude all human activity but their own from sacred areas of the public lands. * * *"

The Court indicated that as such, the disputed regulation did not impose a substantial burden on the Native Americans because it did not: "have a tendency to coerce individuals into acting contrary to their religious beliefs." 485 U.S. 450.

JUSTICE O'CONNOR AUTHORED THE MAJORITY OPINION

12. *Employment Division v. Smith*, 494 US 872 (1990). The Court determined that neutral laws of general applicability that incidentally burden religion standing alone does not violate the Free Exercise Clause. A state law criminalizing the ingestion of Peyote in Native American Church ceremonies was violated by Native American state workers who participated in such church ceremony. The Native Americans were fired by their state employer for participating in the ceremony and were denied unemployment compensation because they were fired for breaking state law. The Supreme Court stated this situation involved a neutral law of general applicability and did not trigger strict scrutiny. Under a rational basis test, the state's interest in preventing illegal drug use authorized the state to refuse unemployment benefits without violating the First Amendment's rationality requirement.

In *Smith*, the Court further observed that laws of general application burdening free exercise and some other constitutional right (hybrid claims) are subject to heightened scrutiny. The Court characterized the *Yoder* case as a hybrid claim case implicating parents' fundamental rights to make decisions regarding their children as well as the Free Exercise Clause. But the Court explained that the *Smith* facts did not present a hybrid claim.

MAJORITY OPTION AUTHORED BY JUSTICE SCALIA

13. *Church of the Lukumi Babalu Aye v. City of Hialea*, 508 US 520 (1993) The Court determined that local ordinances forbidding by criminalization, the slaughter of animals (except in specific circumstances the ordinance approved) was not a neutral law of general applicability. Because it was permissible under the disputed ordinances to kill animals for food, research, hides, and recreation, but not permissible to kill animals in the context of religious sacrifice, the Court found the law was neither neutral nor generally applicable.

    The Court set out general tests for determining if a law possessed neutrality and general applicability. Regarding the neutrality test, the Court explained the following benchmarks:

    1. Neutrality: "if the object of a law is to infringe upon or restrict religious practices because of their religious motivation, then the law is not neutral * * *"

        a. The Supreme Court used a multi-step test for determining the object of a law:

            i. Facial: Examine the text of the law. The text of a law may not "discriminate on its face."

            "A law lacks facial neutrality if it refers to a religious practice if it refers to a religious practice without a secular meaning discernable from the language or context."

            ii. Circumstantial non-neutrality from text and surrounding circumstances of adoption:

            "Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise clause protects against governmental hostility which is masked as well as overt. 'The Court must survey meticulously the circumstances of governmental

categories to eliminate * * * religious gerrymandering.'" (Citation omitted.)"

ii. Effect of the disputed law:

"Apart from the text, the *effect* of a law in its real operation is strong evidence of its object."

1. To determine the effect of the disputed law, consider whether the law impacts religion or a particular kind of religion.

2. Consider also whether the impacts the government claims are avoided with the law, are actually tolerated in non religious contexts. If so, then this is evidence that government is singling out religion for impermissible discriminatory treatment.

    a. "A pattern of exemptions parallels the pattern of narrow prohibitions. Each contributes to the gerrymander."

    b. It is important to understand that citation of the government's legitimate governmental interests does not negate a finding that the law violates the First Amendment:

"The legitimate governmental interests in protecting the public health and preventing cruelty to animals could be addressed by restrictions stopping far short of a flat prohibition of all Santeria sacrificial practice. If improper disposal, not sacrifice itself is the harm to be prevented, the city could have imposed a general regulation on the disposal of organic garbage. * * *"[4]

2. General Law: A law is not considered a general one if it requires an individualized governmental assessment of the free exercise of religion:

"Further, because [the ordinance] requires an evaluation of the particular justification for the killing, this ordinance represents a system of 'individualized governmental assessment of the reasons for the relevant conduct (citing *Smith*). As we noted in *Smith*, in circumstances in which individualized exemptions from a general requirement are available, the government 'may not refuse to extend

[4] The city's lawyer also admitted at oral argument that the sacrificing of animals would be unlawful even in a slaughterhouse zoning district and even if the practice was inspected.

that system to cases of religious hardship without compelling reason.'" (Citations omitted.)

a. Regarding the general applicability test, the court explained the benchmarks of this test, but expressly declined to provide an analytical formulae for analysis. Rather the Court explained that the *Lukumi* ordinances "f[e]ll well below the minimum necessary to protect First Amendment rights." Nevertheless, the Court did provide some benchmarks as follows:

i. General applicability – a law is not generally applicable where it (1) has an incidental effect on religion, and (2) the state interests stated to be advanced by the disputed law are "underinclusive:"

"[The disputed ordinances] fail to prohibit nonreligious conduct that endangers those interests in a similar or greater degree than [the religious animal sacrifice]. The underinclusion is substantial not inconsequential."

b. The consequence of determining the law burdens religion and is not neutral or of generally applicable are:

i. Law must advance interests of the highest order (compelling state interest), and

ii. The law must be narrowly tailored in pursuit of those interests (it must employ the least restrictive means available to meeting those interests).

NOTE: Interestingly, Justice Scalia in his majority option in *Smith* used the district court's *Lukumi* case as an example of a case where the First Amendment would <u>not</u> prevent governmental regulation. Specifically, Justice Scalia stated that applying the compelling state interest test as the native American respondent suggested, amounted to a rule that would:

"open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind ranging from compulsory military service * * * to animal cruelty laws, *see e.g., Church of the Lukumi Babalu Aye Inc. v. City of Hialeah*, 723 F Supp 1467 (SD Fla.1989)."

MAJORITY OPINION AUTHORED BY JUSTICE KENNEDY

16. <u>Locke v. Davey</u>: The State of Washington provides scholarship money for meritorious high school students to enable them to attend colleges, including

private non secular ones. However, the state forbids paying for a devotional theology degree at such a college because the state's constitution forbids paying for the education of ministers. The Supreme Court characterized this case as one that implicates the "play in the joints" between the establishment and free exercise clause of the federal constitution. The Supreme Court explained that while under the federal constitution's Establishment Clause the state is permitted to provide the scholarship to students who wish to pursue a theology degree, the first amendment does not require that the state do so.

The Court cited historical precedents to explain that funding religious instruction with public tax dollars has long been a legitimate interest in the antiestablishment of religion in many states and is reflected in the constitutions of many states. The Court also cited works of founding fathers of the United States that warned against funding religion. The Court concluded that funding religion was of a "different ilk" than other free exercise issues. The Court did not expressly say what standard of review (compelling interest, intermediate scrutiny or rational basis) it used in this religious funding case. However, it appears that the Court applied an intermediate test, although the Court signaled it would heighten the scrutiny if religious hostility was directly or indirectly evident in a funding case. However, that something other than the compelling state interest test was used is evident in the following passage of the Court's opinion:

> "Without a presumption of unconstitutionality, Davey's claim must fail. The State's interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places a relatively minor burden on Promise Scholars. If any room exists between the two Religion Clauses, it must be here. We need not venture further into this difficult area in order to uphold the Promise Scholarship Program as currently operated by the State of Washington."

Instead, the Court upheld the disputed state funding law on the basis of an entirely different kind of analysis than was applied in *Lukumi*. It appears that religious funding is not compelled under the United States Constitution and facial discrimination in state funding of religion is allowed in certain circumstances. Specifically, it appears that because the statute at issue expressly prohibited state money being used to fund a theology degree (but funded nonsecular schools and, therefore, some of the required religious instruction that was a prerequisite to any degree); Locke created an exception to the facial discrimination prohibition outlined in *Lukumi*. Under the decision in *Locke*, a law that on its face discriminates against funding religion is allowed so long as it meets the following tests:

1. The law imposes no civil or criminal sanction for it's violation;

2. The law does not foreclose ministers the right to participate in community political affairs; and
3. The law does not require believers to choose between their religious beliefs and receipt of a governmental benefit. Specifically the Court explained:

> "In the present case, the State's disfavor of religion (if it can be called that) * * * imposes neither criminal nor civil sanctions on any type of religious service or rite. It does not deny to ministers the right to participate in the political affairs of the community. See *McDaniel* v. *Paty*, 435 U. S. 618 (1978). And it does not require students to choose between their religious beliefs and receiving a government benefit. *See ibid.; Hobbie* v. *Unemployment Appeals Comm'n of Fla.*, 480 U. S. 136 (1987); *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707 (1981); *Sherbert* v. *Verner*, 374 U. S. 398 (1963). The State has merely chosen not to fund a distinct category of instruction."

4. Finally, as with neutrality, regarding general applicability, the Court reinforced that if there was any evidence, indirect or direct that the funding statute was based on hostility toward religion, then it would be subjected to strict scrutiny.

JUSTICE REHNQUIST AUTHORED THE MAJORITY OPINION

14. The 2005 Ten Commandments Duet

On June 27, 2005, the United States Supreme Court handed down two cases challenging governmental displays of the Ten Commandments. One display was held to violate the establishment clause (Kentucky [*McCreary County]* case). The other display was held not to violate the Establishment Clause (Austin Texas [*Van Orden*] case).

To understand these cases, you must understand that the composition of the majority and dissent were identical in both cases, *except t*hat Justice Breyer changed his vote to create the majority opinions in both cases. Specifically, in *McCreary Coun*ty he voted with the majority holding that the display was one that violated the Establishment Clause. In the *Van Orden* case, he voted with the majority (but wrote a concurring opinion) that the Ten Commandments display was one that did not violate the Establishment Clause.

A. **Ten Commandments Case No. 1:** *McCreary County v. American Civil Liberties Union*, United States Supreme Court June 27, 2005

Two Kentucky counties adopted resolutions supporting the posting of the Ten Commandments in each county court house. A variety of reasons were cited as support but the reasons had a sole common element of religion. The Supreme Court determined the posting violated the Establishment Clause.

The Supreme Court applied the traditional *Lemon v. Kurtzman* establishment test. The case principally turned on Lemon's "secular legislative purpose" prong and determined this meant the court should evaluate:

1. The Federal court system will not put form over substance: Even where government steadfastly asserts a secular purpose, the court will not take the government's word for it. The purpose of the enactment of the resolution and decision to post the Ten Commandments is determined based on the (a) legislative history, (b) text of the enactment, and (C) the context for the controversy including the implementation of the enactment or comparable official acts associated with the enactment. Statements of secular purpose are examined to ensure the statements are not a sham. The evolution of the decision to post the Ten Commandments is relevant to the inquiry and this includes attempts to cure flaws determined by the district court during the history of the case as it wound its way through the legal system.

2. The Court also explained that the Establishment Clause inquiry examines how an objective observer of the posted Ten Commandments would fairly understand about them – as having a religious or a secular purpose. In other words, would a viewer be induced to believe the government was taking sides.

Justice Souter who authored the majority opinion observed:

> "The divisiveness of religion in current public life is inescapable. This is not the time to deny the prudence of understanding the Establishment Clause to require the government to stay neutral on religious belief, which is reserved for the conscience of the individual."

Justice Souter was joined in the 5-4 majority by Stevens, O'Connor (who wrote a concurring opinion), Ginsberg and Breyer.

Justice Scalia wrote the dissent which he read from the bench. Joining him were Chief Justice Rehnquist, Thomas and Kennedy.

Justice Scalia noted:

> "the interest of the overwhelming majority of religious believers in being able to give God thanks and supplication as a people, and with respect to our national endeavors."

B. Ten Commandments Case No 2: *Van Orden v. Perry* (United States Supreme Court June 27, 2005)

In 1961, the Fraternal Order of the Eagles donated a six-foot tall granite Ten Commandments monument to the City of Austin Texas which monument was placed on land composed of about 20 acres within the grounds of the state capital, on which land 17 other monuments and 21 historical markers were also placed. The Fraternal Order of the Eagles

donated 4000 similar monuments to cities all across the nation with support from Cecil DeMille who was the director of the 1956 movie "The Ten Commandments."

A lawyer challenged the Ten Commandments monument in 2002.

The Court first determined the traditional Establishment Clause test in *Lemon v. Kurtzman* test "was not useful in dealing with the sort of passive monument" at issue. The Court explained: "Instead, our analysis is driven by both the nature of the monument and by our Nation's history." The Court pointed to the numerous Ten Commandments paintings, sculptures, medallions and the like on various federal properties including the Supreme Court itself, the National Archives, and U.S. House of Representatives.

The Court stated the Ten Commandments and the monument in question had religious significance, but "Moses was a lawgiver as well as a religious leader. And the Ten Commandments have an undeniable historical meaning * * *. Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause."

The Court affirmed its commitment to previous cases forbidding on Establishment grounds displays of the Ten Commandments in public schools and noting the "particular concerns that arise in the context of public elementary and secondary schools." But the Court stated no similar concern is extended to "a legislative chamber * * * or to capitol grounds."

The Court noted no one had challenged the monument for the period of 40 years it had existed on the state grounds with other monuments that "represent several strands in the State's political and legal history. The inclusion of the Ten Commandments monument in this group has a dual significance, partaking of both religion and government. We cannot say that Texas' display of this monument violates the Establishment Clause."

The opinion was written by Chief Justice Rehnquist, and was joined by Justice Scalia, Kennedy and Thomas.

Justice Scalia wrote a short concurring opinion citing his dissent in *McCreary County, supra*, which stated the following and one other sentence:

> "I would prefer to reach the same result by adopting an Establishment Clause jurisprudence that is in accord with our Nation's past and present practices, and that can be consistently applied – the central relevant feature of which is that there is nothing unconstitutional in a State's favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments."

Justice Thomas urges a bright line between passive religious messages and symbols and government sponsored religious compulsion: "In no sense does Texas compel [Van Orden] to do anything. The only injury to him is that he takes offense at seeing the

monument as he passes it on his way to the Texas Supreme Court Library. He need not stop to read it or even look at it, let alone express support for it or adopt the Commandments as guides for his life."

Justice Thomas went on to express the following concern: "The unintelligibility of this Court's precedent raises the further concern that, either in appearance or in fact, adjudication of Establishment Clause challenges turns on judicial predilections."

Justice Breyer agreed with the result but wrote an independent concurring opinion that characterizing the case as a "borderline" one for which the *Lemon v. Kurtzman* test is unhelpful and stated:

> "* * * I see no test-related substitute for the exercise of legal judgment. * * * That judgment is not a personal judgment. Rather, as in all constitutional cases, it must reflect and remain faithful to the underlying purposes of the Clauses, and it must take account of context and consequences measured in light of those purposes. While the Court's prior tests provide useful guideposts – and might well lead to the same result the Court reaches today [citing *Lemon* and another case] – no exact formula can dictate a resolution to such fact-intensive cases."

Justice Beyer also stated "a further factor is determinative here" and that is a period of 40 years passed and no one challenged the monument in question.

VI. Two Cases of Interest Applying the First Amendment Specifically in the Land Use Context Mix: *Cleburne* and *Cam*

1. In *Cleburn Living Center v. City of Cleburn*, 473 U.S. 432 (1985), the Court explained that applying a rational basis test (because the interests at stake were not properly characterized as fundamental constitutional rights) to a zoning classification that treated group homes for the retarded differently than other homes for nonretarded people was irrational and failed the rational basis test. *Cleburne* is also important and helpful for its holding that government has to show the prohibited or restricted use in the zoning district has some facially threatening impacts not present from the uses permitted in the zone. Importantly to the constitutional analysis, the case holds that speculation is not the equivalent of substantial evidence.

2. *Cam v. Marion County*, 987 F. Supp 854 (1997) while a district court case, is particularly interesting in the land use context. This case acknowledges the applicability of the compelling interest test, but the court explained that Oregon's "high value farm land" zoning rules prohibiting new churches, failed to pass even the rational basis test in the First Amendment land use context. The court found an Oregon land use program, as applied to a particular church, violated the First Amendment under even the rational basis test. First, the court said that the state tolerated the same structure with the same impacts when it was a barn as when it was a church. As a barn, square dancing and social gatherings were allowed. But as soon as the county "discovered" people praying the barn, the adherents were subject to code compliance action for violating zoning laws that did not allow churches. Second, the

instigator of the code compliance case was a rival church. The rival church while virtually "across the street" and on an identical type of land, the rival church was allowed by zoning authorities. The court stated it was improper for the county to lend its power to one sect of religion over another and that was while unintended, what, in effect, the county had done.

VII. What is on the First Amendment Horizon? "Intelligent Design"

The next First Amendment battle will take place in the nation's public schools over whether creationism must be taught along side evolution as a legitimate science. Two articles are attached that explain the controversy. The subject is too broad to be explored in this paper. However, for who represent public entities, religious institutions and private citizens, the issue is tremendously important and controversial. Intelligent Design in the public schools implicates the First Amendment at its most fundamental level. Derivatively, if it is determined the First Amendment forbids teaching "Intelligent Design" in the public schools, expect religious schools to use RLUIPA to argue land use refusal to allow establishment of a private religious school in order to teach the subject is a substantial burden.

The attached articles are excellent summaries of the battle sure to come. One article and comment is from New Scientist Magazine, the July 9-15, 2005 issue. The other summary and article is from the "Intelligentdesign.com" website; and the article printed from there is posted on the web from the National Catholic Bioethics Quarterly, Autumn 2003.

VIII. A Note About Local Zoning Power in the Constitutional Context

Zoning authorities have great discretion to make the zoning decisions they want to make based on subjective and emotional responses to applications and to controversy concerning those applications. However, zoning has its constitutional limits and RLUIPA expresses them in the context of religious land uses. In this regard, zoning has long been subject to federal law. The United States Supreme Court has stated:

> "The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities. *But the zoning power is not infinite and unchallengeable; it 'must be exercised within constitutional limits*.' Accordingly, it is subject to judicial review; and [as] is most often the case, the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed." (Emphasis supplied.) *Schad v. Borough of Ephraim*, 452 U.S. 61, 68 (1981) (citations omitted).

IX. RFRA:

1. Congress adopted the Religious Freedom Restoration Act in 1993 in response to the Supreme Court's *Smith* decision. RFRA was adopted for the express purposes:

> "(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b).

2. RFRA's reach applied to any state or local activity that substantially burdened religion and required that any such substantial burden be justified by a compelling governmental interest implemented by the least restrictive means available. RFRA was not limited to land use regulations or institutionalized persons.

3. *City of Boerne v. Flores*, 521 U.S. 507 (1997). This case overturned RFRA as applied to nonfederal government actors. In *Boerne*, a Catholic Church sought to enlarge a church to add capacity for the growing membership. The city denied the church's request to enlarge the facility asserting that its historic designation prevented the proposal because the proposal would alter the historic structure. The church challenged the city's denial under RFRA. The United States Supreme Court determined that RFRA was beyond congressional authority because instead of enforcing the First Amendment under Congress' 14th Amendment Article 5 enforcement powers, Congress changed the substantive meaning of the First Amendment. The Court explained that for Congress' 14th Amendment's Article 5 powers to be exercised, there must be evidence of abuses of First Amendment rights and the RFRA record lacked such evidence. The Court elaborated that Congress had a great deal of latitude to provide a "proportionate and congruent" response to a national constitutional problem, but it had to establish evidence of the problem. The Court explained that Congress had not established there was a problem to justify the RFRA "solution." However, Congress will receive great deference on its factual findings if it develops an adequate factual record. In fact, the *Boerne* Court explained:

> > "When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution. This has been clear from the early days of the Republic. In 1789, when a Member of the House of Representatives objected to a debate on the constitutionality of legislation based on the theory that "it would be officious" to consider the constitutionality of a measure that did not affect the House, James Madison explained that 'it is incontrovertibly of as much importance to this branch of the Government as to any other, that the constitution should be preserved entire. It is our duty.' 1

> Annals of Congress 500 (1789). Were it otherwise, we would not afford Congress the presumption of validity its enactments now enjoy."

MAJORITY OPINION AUTHORED BY JUSTICE KENNEDY

JUSTICES O'CONNOR AND BREYER DISSENTED ARGUING THAT SMITH WAS WRONGLY DECIDED.

4. RFRA continues to be a valid exercise of Congressional authority over federal actors. *Saenz v. Department of Interior* 297 F3d 1116, 1125 (10th Cir., 2001); *Kikumura v. Hurley*, 242 F3d 950, 958-59 (10th Cir 2001); *Sutton v. Providence St. Joseph Med. Ctr*., 192 F3d 836 (9th Cir., 1999), *Christians v. Crystal Evangelical Free Church*, 141 F.3d 854 (8th Cir., 1998), *cert den.* 525 US 811 (1998). Therefore, all federal programs continue to be subject to RFRA.

IX. RLUIPA Structure

RLUIPA is a federal civil rights statute that protects the free exercise of religion. RLUIPA 42 U.S.C. 2000cc –4(c) provides for attorney fees under 42 U.S.C. 1983 and 42 U.S.C. 1988(b). RLUIPA Section 8(4)(A) expressly states RLUIPA applies to "a state, county, municipality, or other governmental entity created under the authority of a State; and any branch, department, agency, instrumentality, or official of an entity [previously] listed."

RLUIPA protects civil rights of the free exercise of religion in the context of land use regulation and landmarking regulations[5] in two broadly different ways: protecting against substantial burdens and against discrimination within a community and exclusion from a community

Section 2(a) of the Act protects against the imposition of substantial burdens on free exercise in the context of landmarking laws and land use regulations.[6] Under Section 2(a),

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[5] A recent case holds that a local requirement to hook into a public sewer system in neither a land use nor a land marking regulation under RLUIPA and, therefore, a challenge to a requirement to hook into the public sewer system is not cognizable under RLUIPA. *Second Baptist Church of Leechburg v. Gilpin Township*, 2004 U.S. App. LEXIS 26858;118 Fed. Appx. 615 (December 16, 2004).

[6] RLUIPA, 42 U.S.C. Section 20000cc-5(5), "land use regulation" is defined as:

> "[A] zoning or landmarking law * * * that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant haws an ownership, leasehold, easement, servitude or other property interest in the regulated land or a contract or option to acquire such an interest."

This is distinguished from a decision to construct a roadway which has been interpreted as not the implementation of a land use regulation (*i.e.* not a zoning or a landmarking law) as defined in RLUIPA. *Prater v. City of Burnside*, 289 F3.d 417 (6th Cir. 2002).

where a substantial burden on the religious exercise[7] is established, the government is required to establish that it has a compelling interest supported by the least restrictive means available to justify the substantial burden. RLUIPA's substantial burden provision applies where the substantial burden is imposed: (1) in connection with a federally-funded activity; (2) where the burden affects interstate commerce; or (3) for the implementation or imposition of a land use regulation, where the burden is imposed in the context of a scheme whereby the state makes "individualized assessments" regarding the property involved. *See* 42 U.S.C. 2000cc(a)(2), 2000cc-1(b).

Under Section 2(b), government may not "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." Further, government is forbidden from imposing or implementing "a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination." Moreover, government is forbidden from imposing or implementing a land use regulation that either "totally excludes religious assemblies from a jurisdiction" or "unreasonably limits religious assemblies, institutions, or structures within a jurisdiction."

These RLUIPA proscriptions in 42 U.S.C. 2000cc(2)(b) do not require a showing of a substantial burden on the free exercise of religion. Rather, these proscriptions are expressed as elements that operate independently of the substantial burden elements of RLUIPA in 42 U.S.C. 2000cc(2)(a). Similarly, a governmental compelling interest, furthered through the least restrictive means, are not stated as defenses to RLUIPA's discrimination and exclusion prohibitions of 42 U.S.C. 2000cc(2)(b).

The Joint Statement supporting RLUIPA contains several statements that support the reading of RLUIPA that the substantial burden prohibition and the exclusions and limits clauses operate independently of one another:

> "[RLUIPA] applies the standard of the Religious Freedom Restoration Act, 42 U.S.C. s2000bb-1 (1994): if government substantially burdens the exercise of religion, it must demonstrate that imposing that burden on the claimant serves a compelling interest by the least restrictive means. *In addition*, with respect to land use regulation, the bill specifically prohibits various forms of religious discrimination and exclusion." (Emphasis supplied.) Joint Statement 146 Cong. Rec. 7774-01.

The Joint Statement further provides:

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[7] The terms "religious exercise" are defined in RLUIPA as: "The 'term religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief. * * * The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose."

> "The state may eliminate the discrimination *or* burden in any way it chooses, so long as the discrimination or substantial burden is actually eliminated." (Emphasis supplied.) Joint Statement 146, Cong. Rec. 7776-01.

The Joint Statement goes on to explain:

> "The General Rules in 2(a)(1), requiring that substantial burdens on religious exercise be justified by a compelling interest, applies only to cases within the spending power or the commerce power, or to cases where government has authority to make individualized assessments of the proposed uses to which the property will be put. Where government makes such individualized assessments, permitting some uses and excluding others, it cannot exclude religious uses without compelling justification. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537-38 (1993); *Employment Division v. Smith*, 494 U.S. 872, 884 (1990).
>
> "Sections 2(b)(1) and (2) prohibit various forms of discrimination against or among religious land uses. These sections enforce the Free Exercise Clause rule against laws that burden religion and are not neutral and generally applicable.
>
> "Section 2(b)(3), on exclusion or unreasonable limitation of religious uses, enforces the Free Speech Clause as interpreted in *Schad v. Borough of Mount Ephraim*, 425 U.S. 61 (1981), which held that a municipality cannot entirely exclude a category of first amendment activity. Moreover, the Court distinguished zoning laws that burden 'a protected liberty' from those that burden only property rights; the former require far more constitutional justification. *Id.* at 68-69. Section 2(b)(3) enforces the right to assemble for worship or other religious exercise under the Free Exercise Clause, and the hybrid free speech and free exercise right to assemble for worship or other religious exercise under *Schad* and *Smith*." Joint Statement 146 Cong. Rec. 7775-76-01.

It should be underscored that where a religious claimant makes a substantial burden claim under RLUIPA or a Free Exercise claim, the religious claimant must establish a prima facia case of substantial burden on the free exercise of religion. 42 U.S.C. 2000cc4(b). Once the religious claimant satisfies this burden, then the government bears the burden of persuasion to establish the compelling governmental interest and that any such interest is advanced using the least restrictive means available.

X. INTERPRETING RLUIPA

RLUIPA is to be interpreted broadly to protect religious freedom. 42 U.S.C. 2000cc-5(g). RLUIPA expressly states that it must thus be construed to broadly protect religious exercise "to the maximum extent permitted by the terms of this Act and the Constitution." *Id.*

XI. DOES RLUIPA INCLUDE A "RIPENESS" or an "EXHAUSTION" REQUIREMENT?

In *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), the United States Supreme Court developed a specific type of ripeness requirement applicable Fifth Amendment takings claims in the context of a land use controversy. The first prong requires a final determination from the local government on the disputed land use controversy so the court can see how far the local regulation goes. Otherwise, under taking jurisprudence, the high court explained it cold not know if a local regulation "goes too far."

In *Murphy v. Town of New Milford*, 402 F.3d 342 (2005), the 2nd Circuit vacated the lower court's decision finding substantial burden under RLUIPA (district court decision is discussed *infra*) on the grounds that the religious claimant was required to seek a local appeal of the cease and desist order and a variance citing the first prong of *Williamson County, supra*. The 2nd Circuit held:

> "[W]e conclude that it is appropriate to apply *Williamson County's* prong-one finality requirement to each of the Murphys' claims. Thus, the Murphys may not proceed in federal court until they have obtained a final, definitive position from local authorities as to how their property may be used. Because such a decision has not yet been rendered, we lack jurisdiction."

The district court had determined the Murphys' claim was both "ripe" for judicial review and there was no requirement for "exhaustion" of state remedies.

Specifically, first, the district court determined there was no exhaustion requirement for the RLUIPA claim which had been brought under 42 USC 1983. For this, the district court had relied on *Patsy v. Bd. of Regents of the State of Florida*, 457 U.S. 496 (1982), which holds state requirements for exhaustion of state administrative remedies do not apply to 1983 claims. *Accord, Konikov v. Orange County*, 2005 U.S. App. LEXIS 10176 (11th Cir. June 3, 2005). *Murphy v. Town of New Milford*, 148 F.Supp.2d at 181-182. Second, the district court explained the requirement that a claim be "ripe" follows a different analysis. The district court had determined that the RLUIPA claim was ripe and the Murphys were not required to locally appeal the cease and desist order or file a request for a special permit or a variance. The district court explained:

> "The court has been unable to find, and neither party has presented, any evidence to indicate that Congress intended to require an individual, whose right to the free exercise of her religious beliefs has been substantially burdened by a town's land use regulations, to then appeal the town's decision or apply for a special use permit. In fact, a finding that an individual is required to appeal an order or apply for a special permit seems to run contrary to Congress' purpose of protecting the religious freedom of individuals. To require an individual whose free exercise rights have allegedly already been

> impermissibly burdened by a town's actions to appeal those actions could place an additional and distinct burden on the individual rights RLUIPA was intended to protect. * * *" *Id*. at 185.

Konikov cited *supra* holds essentially the same. In *Konikov*, the 11th Circuit determined a county's decision to enforce an ordinance against religious free exercise means that :

> "ripeness is apparent because the zoning code at issue has, in fact, been applied to Konikov. The Code Enforcement Board, after its March 22 hearing, found Konikov in violation and fined him for failing to bring his property into compliance. He suffers from an actual, concrete injury. The imposition of the fine indicates that the Code Enforcement Board had made a final decision to apply the Code to Konikov. Therefore, his as-applied claims are ripe for our review. As for the distinct question of whether a plaintiff must exhaust administrative remedies before bringing a § 1983 claim, *Patsy v. Florida Board of Regents* has already answered in the negative. 457 U.S. 496, 102 S. Ct. 2557 (1982)." (Citations omitted).

Fairly read, it appears at least for the substantial burden prong, that the RLUIPA legislative history anticipates that persons will apply for land use permission and, if denied, they will be in a position to bring their RLUIPA claim. *See Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227, 1235 n.17 (11th Cir. 2004) *cert den* 125 S Ct 1295 (2005). However, once a religious applicant applies and is turned down or after a local government enforcement action is started to prevent or restrict free exercise, it seems far less clear that the *Williamson County* approach is correct. Nothing in the legislative history suggests successive applications or ripening measures are required prerequisites to a successful RLUIPA claim.

The converse is more intuitive. If the idea is to protect against substantial burdens, it makes little sense to prolong the impact of the substantial burden in local appeals of otherwise final local orders prohibiting religious free exercise. In this regard, it cannot be disputed that the application of the *Williamson County* analysis to private property rights cases have wrecked havoc for plaintiffs and have made taking claims practically impossible for ordinary mortals to bring in any meaningful way with any meaningful consequence. The average time it takes to adjudicate a taking claim under the *Williamson County* analysis is about 9 years. This is an area in RLUIPA practice to certainly watch. It may be that RLUIPA will serve as a vehicle to entice the Supreme Court's to reevaluate *Williamson County* or it may be that *Williamson County* defenses represents the emerging way local governments can best avoid RLUIPA's protective provisions in favor of land use restrictions on religious and other land uses.

XII. RLUIPA Individualized Assessment/Substantial Burden/Compelling Interest Generally (Land Use Context):

1. Individual Assessment Basis for RLUIPA: RLUIPA is designed to implement the First Amendment's protection of free religious exercise. *Smith* makes clear that heightened judicial scrutiny is properly applied to cases where there is an individualized assessment of the appropriateness of the free exercise. The Congressional Joint Statement supporting the adoption of RLUIPA explains the record Congress compiled in its adoption of RLUIPA states that this record "demonstrates a widespread practice of individualized decisions to grant or refuse permission to use property for religious purposes"; that these "individualized assessments readily lend themselves to discrimination," and that such assessments by their nature "make it difficult to prove discrimination in any individual case." 146 Cong Rec. S7775-01. In observance of the Supreme Court's standard in *City of Boerne v. Flores,* the co-sponsors concluded that the RLUIPA constitutes a "proportionate and congruent responses to the problems documented in this factual record." 146 Cong Rec. S7775-01.

That it is difficult to prove discrimination in an individual case is not a new concept. It is easy to write land use decisional findings denying a church on some nonreligious basis. RLUIPA requires such findings be subjected to greater scrutiny than in traditional zoning cases where the "real" reason for denial of a religious land use can otherwise be masked.[8] In this regard, in *American Friends of the Society of St. Pius, Inc., v. Schwab,* 417 N.Y.S.2d 991 (N.Y. App. Div. 1979), the court observed:

> "[H]uman experience teaches us that public officials, when faced with pressure to bar church uses by those residing in a residential neighborhood, tend to avoid any appearance of an antireligious stance and temper their decision by carefully couching their grounds [on some other basis]."

This is why in the context of the individualized determinations of zoning decisions the exercise of Congressional enforcement authority is perhaps the best way to ensure the guarantee of the free exercise of religion.

2. Substantial Burden on free exercise can only be imposed by government in discretionary land use cases if justified by a compelling state interest implemented by the least restrictive means.

a. On the substantial burden (as well as compelling state interest) parts of RLUIPA, there is dispute about whether RLUIPA simply codifies existing First Amendment jurisprudence or provides greater protection to religious

[8] An analogous principle has been noted in the unconstitutional takings context: "In Justice Blackmun's view, even with respect to regulations that deprive an owner of all developmental or economically beneficial land uses, the test for required compensation is whether the legislature has recited a harm preventing justification for its action. See *post*, at 5, 13-17. Since such a justification can be formulated in practically every case, this *amounts to a test of whether the legislature has a stupid staff*. We think the Takings Clause requires courts to do more than insist upon artful harm preventing characterizations." (Emphasis supplied). *Lucas v. S. Carolina Coastal Comm*, 505 U.S. 1003 n 12 (1992).

exercise than the First Amendment. So far the majority of courts to consider the issue have interpreting RLUIPA have found it to essentially codify the First Amendment.

b. The Joint Statement of RLUIPA's co-sponsors explains that RLUIPA's failure to define the term "substantial burden" is intentional in order for that term to have its First Amendment meaning:

> "The Act does not include a definition of the term 'substantial burden' because it is not the intent of this Act to create a new standard for the definition of 'substantial burden' on religious exercise. Instead, that term as used in the Act should be interpreted by reference to Supreme Court jurisprudence. Nothing in this Act, including the requirement in Section 5(g) that its terms be broadly construed, is intended to change that principle. 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." Joint Statement 146 Cong. Rec. 7776-01.

c. RLUIPA Record. RLUIPA has a record of zoning abuses of free religious exercise. It is likely a congruent and proportional response to solve those abuses. Therefore, so long as RLUIPA essentially codifies the First Amendment, then the Fourteenth Amendment Section 5 source of its authority to do so that was struck down in *Boerne*, should stand.

d. RLUIPA: Practical Problems. The practical problem with RLUIPA as a codification of the First Amendment is that there is not a bright line about how the First Amendment is applied by the judiciary and even what the standard of proof is in the review of land use regulations in the land use application context. Nevertheless, there were Supreme Court cases that applied a substantial burden test to Free Exercise Claims. There were Supreme Court cases that applied a compelling state interest test to governmental action under Free Exercise claims. Certainly the manner in which these tests were analyzed in particular cases shifted over time. However, there can be no doubt that there is Supreme Court First Amendment jurisprudence supporting the tests of RLUIPA.

The fact that First Amendment legal analysis has not always lead to victory for the religious claimant does not modify the tests of RLUIPA's constitutionality. There is an extensive Congressional record supporting Congress' findings that in land use, there have been frequent and largely unchecked Free Exercise violations. It is this Congressional record that caused Congress to protect religious free exercise with the RLUIPA. It seems relatively clear that for the United States Supreme Court to find RLUIPA unconstitutional under the enforcement provisions of the Fourteenth Amendment, the Supreme Court would have to disbelieve the congressional record and Congress' findings concerning it – something the Court is unlikely to do as well as to distinguish, limit or overrule the Supreme Court precedent upon which RLUIPA is based. It is fair to say that RLUIPA, viewed from the vantage of existing precedent, it is not inconsistent with that precedent.

As a statutory right of action, Congress allocated the burdens of proof in RLUIPA. This is not unusual. When Congress creates an affirmative defense rather than an element of a claim, it does the same thing. RLUIPA provides as follows regarding the allocations of the burdens in the substantial burden/compelling interest part of the test:[9]

In this regard, RLUIPA, 42 USC section 2000cc-2, provides, in part:

> "(b) Burden of persuasion
>
> "If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2000cc of this title, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is ******* challenged by the claim substantially burdens the plaintiff's exercise of religion."

Professor Laycock explained in his 1998 testimony to Congress:

> "[RLUIPA] Section 3(a) provides that if a claimant demonstrates a prima facie violation of the Free Exercise Clause, the burden of persuasion then shifts to the government on all issues except burden on religious exercise. No element of the Court's definition of a free exercise violation is changed, but in cases where a court is unsure of the facts, the risk of nonpersuasion is placed on government instead of on the claim of religious liberty. This provision facilitates enforcement of the constitutional right as the Supreme Court has defined it. *City of Boerne* v. *Flores*, 117 S.Ct. 2157 (1997), of course reaffirms broad Congressional power to enforce constitutional rights as interpreted by the Supreme Court.
>
> "This provision applies to any means of proving a free exercise violation recognized under judicial interpretations. *See generally Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993); *Employment Division* v. *Smith*, 494 U.S. 872 (1990). Thus, if the claimant shows a burden on religious exercise and prima facie evidence of an anti-religious motivation, government would bear the burden of persuasion on the question of motivation, on compelling interest, and on any other issue except burden on religious exercise. If the claimant shows a burden on religious exercise and prima facie evidence that the burdensome law is not generally applicable, government would bear the burden of persuasion on the question of general applicability, on compelling interest, and on any other issue except burden on religious exercise. If the claimant shows a burden on religion and prima facie evidence of a hybrid right, government would

[9]

bear the burden of persuasion on the claim of hybrid right, including all issues except burden on religion. In general, where there is a burden on religious exercise and prima facie evidence of a constitutional violation, the risk of nonpersuasion is to be allocated in favor of protecting the constitutional right.

"The protective parts of the *Smith* and *Lukumi* rules create many difficult issues of proof and comparison. Motive is notoriously difficult to litigate, and the court is often left uncertain. The general applicability requirement means that when government exempts or fails to regulate secular activities, it must have a compelling reason for regulating religious activities that are substantially the same or that cause the same harm. *See, e.g., Lukumi*, 508 U.S. at 543 ("The ordinances * * * fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree"); *id.* at 538–39 (noting that disposal by restaurants and other sources of organic garbage created the same problems as animal sacrifice). But there can be endless arguments about whether the burdened religious activity and the less burdened secular activity are sufficiently alike, or cause sufficiently similar harms, to trigger this part of the rule. The scope of hybrid rights claims remains uncertain. Burden of persuasion matters only when the court is uncertain, but, as these examples show, the structure of the Supreme Court's rules leave many occasions for uncertainty.

b. Does *Locke v. Davey,* 540 U.S. 712 (2004) limit substantial burden and compelling state interest to only apply where there is evidence of religious hostility*?* Some of RLUIPA's opponents argue *Locke*[10] limits the substantial

[10] *Locke v. Davey*, 540 U.S. 712, 124 S.Ct. 1307, 158 L.Ed.2d 1 (2004), states:

"Davey * * * contends that under the rule we enunciated in *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah, supra,* the [state] program is presumptively unconstitutional because it is not facially neutral with respect to religion. We reject his claim of presumptive unconstitutionality, however; to do otherwise would extend the *Lukumi* line of cases well beyond not only their facts but their reasoning. In *Lukumi*, the City of Hialeah made it a crime to engage in certain kinds of animal slaughter. We found that the law sought to suppress ritualistic animal sacrifices of the Santeria religion. 508 U. S., at 535. In the present case, the State's disfavor of religion (if it can be called that) is of a far milder kind. It imposes neither criminal nor civil sanctions on any type of religious service or rite. It does not deny to ministers the right to participate in the political affairs of the community. *See McDaniel* v. *Paty*, 435 U. S. 618 (1978). And it does not require students to choose between their religious beliefs and receiving a government benefit. *See ibid.; Hobbie* v. *Unemployment Appeals Comm'n of Fla.*, 480 U. S. 136 (1987); *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707 (1981); *Sherbert* v. *Verner*, 374 U. S. 398 (1963). The State has merely chosen not to fund a distinct category of instruction.

"* * * * *

"In short, we find neither in the history or text of Article I, §11 of the Washington Constitution, nor in the operation of the Promise Scholarship Program, anything that suggests

burden/compelling state interest test of the First Amendment and derivatively of RLUIPA, such that these tests may only be successfully applied where there is evidence of hostility or animus toward the religious user or religion generally. *Locke* opens the door to this argument in the sense that it holds against the religious claimants and in so doing distinguishes *Lukumi* in which case there was evidence of governmental hostility. The issue of whether hostility or animus is a necessary prerequisite to a First Amendment claim has not been recently addressed or clearly resolved by the United States Supreme Court. However, Supreme Court precedents do not establish a bright line test requiring that free exercise violations include as a required element governmental hostility or animus. In this regard, the Court has recognized that government can achieve inappropriate burdens on free exercise as well as nefarious ends without providing a paper trail proving that it is doing so, including a paper trail of animus or hostility.[11] The weight of Supreme Court case law has nothing to do with animus or hostility. In this regard, neither *Sherbert, Hobbie, Yoder* nor *Thomas* includes any suggestion that an element of a First Amendment case requires the claimant to prove hostility or animus. Therefore, this should not provide a basis to overturn RLUIPA.

2. If RLUIPA provides impermissible protection for the free exercise of religion under Congress' authority under the Fourteenth Amendment Section 5 enforcement powers, Congress nevertheless has authority to provide protection under the following powers where they apply in particular cases:

   a. Congress has the power to protect free exercise under its commerce clause power;

   b. Congress also has power under the spending clause to only spend federal funds on programs that protect religious free exercise as Congress deems appropriate. There should be a relationship between the federal funds and the state program that impermissibly burdens religious exercise.

3. Select Substantial Burden Cases

> animus towards religion. Given the historic and substantial state interest at issue, we therefore cannot conclude that the denial of funding for vocational religious instruction alone is inherently constitutionally suspect." (Footnotes omitted).

[11] In *American Friends of the Society of St. Pius, Inc., v. Schwab*, 417 N.Y.S.2d 991 (N.Y. App. Div. 1979), the court observed:

> "[H]uman experience teaches us that public officials, when faced with pressure to bar church uses by those residing in a residential neighborhood, tend to avoid any appearance of an antireligious stance and temper their decision by carefully couching their grounds [on some other basis]."

The substantial burden prong of RLUIPA is where the action is. The trend is that most cases rise or fall under RLUIPA's substantial burden claim. In 2005, more RLUIPA cases were lost than won on substantial burden. The trend under substantial burden applied by most courts in 2005 is for RLUIPA claimants to have to apply for numerous land use permissions in order to attempt to address local land use concerns. This is not to say the religious claimant will not ultimately prevail in her RLUIPA claim. Rather, it means there is something akin to a ripeness requirement emerging as an element of substantial burden in some of the RLUIPA cases.[12]

a. *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1226 (C.D. Cal. 2002). Denial of a church's application for a conditional use permit is a substantial burden.

b. *Elsinore Christian Center v. City of Lake Elsinore*, 291 F. Supp. 2d 1083 (C.D. Cal. Aug. 21, 2003). Denial of conditional use permit forecloses a church from any church use of its real property "thereby imposing the ultimate burden on the use of that land." *Id.* at 1090. The *Elsinore* court stated that if substantial burden was ambiguous, then the court was to be guided by RLUIPA 42 USC § 2000cc-3(g) "in favor of a broad protection of religious exercise." The court went on to be one of the only courts to find RLUIPA unconstitutional.

c. *Murphy v. Zoning Comm'n of Town of New Milford*, 289 F.Supp.2d 87 (D.Conn.2003), *vacated on other grounds* 402 F.3d 342 (2005). Zoning enforcement order prohibition limiting the number of worshippers at a person's home for prayer meetings to 25 unrelated persons and 10 family members requires "turning people away from," Sunday meetings and is a substantial burden. *Id.* at 113-14.

d. *Williams Island Synagogue, Inc. v. City of Aventura*, 358 F. Supp. 2d 1207 (S.D. Fla. 2005): is an example of a case where an existing facility was inadequate for religious worship precisely as religious doctrine would require but the denial to relocate to a facility in a residential zone where religious uses are only conditionally allowed did not offend RLUIPA.

In *Williams Island*, an Orthodox Jewish synagogue sought land use permission to move its services to a facility on Residentially zoned land where their religious use was conditionally permitted. The city denied the synagogue's application for a CUP. The synagogue argued the denial of its application for CUP constituted a substantial burden because three different aspects of its religion could not be properly practiced in the existing facility. Two of the problems were based on distractions inherent in the existing space. The first was that women mixed with men in the existing facility causing the men to be distracted. Second, there was only space for the preparing of certain ceremonial meals in the prayer area and this was also a distraction. Finally, Orthodox Judaism requires the members to pray

[12] In fact, as explained *supra*, the 2nd Circuit in *Murphy v. Town of New Milford*, *supra (*2005) expressly adopted the *Williamson County* Fifth Amendment ripeness test as a prerequisite for bringing a RLUIPA case.

facing Jerusalem and the existing building was not situated to facilitate eastward prayer. The court determined that the cited problems with the existing facility did not establish that the denial of its application was a substantial burden under RLUIPA. The court determined as a matter of law the denial was not a "substantial burden" on free exercise that directly coerces conformity to a standard that is inconsistent with the orthodox Jewish religion. Summary judgment was granted in favor of the city.

e. *Westchester Day School v. Village of Mamaroneck*, 386 F.3d 183 (2004). the Village denied a religious school's land use application to construct new school buildings.

> The Federal District Court granted summary judgment for the religious institution, finding the existing building that the school used was "inadequate for activities plaintiff deems necessary for its educational and religious mission." The district court determined that while it was possible for the school to use the existing structure for its existing programs and its existing student body, the denial of the application for permission to construct the new buildings constituted a substantial burden because (1) the quality of the instruction suffered in the cramped quarters; (2) the "religious experience is limited by the current size and condition of the school buildings"; and (3) denial meant the school was unable to accommodate a "growing number of students" requiring religious education. *Id.*, 280 F Supp 2d 230, 241-42 (2003).
>
> The Second Circuit vacated and remanded the district court's decision, determining the record did not support summary judgment.
>
> The Second Circuit determined: "Read in its entirety, the Board's resolution seems to imply that the Board did not purport to pronounce the death knell of the School's proposed renovations in their entirety, but rather to deny only the application submitted, leaving open the possibility that a modification of the proposal, coupled with the submission of satisfactory data found to be lacking in the earlier proceedings, would result in approval." *Id.*, 386 F.3d 188.
>
> The court also noted that on remand, those aspects of the school fairly characterized as religious would be the ones subject to RLUIPA's protection. The court stressed that there may be aspects of the school that are akin to any other public school and that as such the religious school should not receive preferential treatment for its nonreligious elements.
>
> Finally the court determined that it was aware of no cases holding traffic problems could never be a "compelling state interest". The court expressly determined it would not decide that question and reversed the district court's finding that traffic problems could never be deemed a compelling state interest.

f. *Castle Hills First Baptist Church v. City of Castle Hills*, 2004 WL 546792 (W.D. Tex. Mar. 17, 2004) Denial of special use permit to finish the fourth floor of a building for church uses was a substantial burden. Denial of an application for expanded parking to accommodate the church's parking needs was not a substantial burden.

g. *Shepherd Montessori Center v. Milan.* Denial of a religious daycare facility's application to expand to add a religious primary school was determined to be a substantial burden. Evidence of the substantial burden was (1) it would be infeasible to establish the school in a location apart from its day care facility "because of the burdens of having duplicate administration" and (2) a separate location apart from the day care was far from where parents worked and it was not clear the religious school could be successful at another location. The court stated several factors it felt were relevant to the determination of substantial burden:

> "We believe that the determination whether plaintiff has suffered a substantial burden on religious exercise requires us to focus on numerous factors and considerations that were not addressed by either party. Those factors include: whether there are alternate locations in the area that would allow the school consistent with the zoning laws; the actual availability of alternate property, either by sale or lease, in the area; the availability of property that would be suitable for a K-3 school; the proximity of the homes of parents who would send their children to the school; and the economic burdens of alternate locations. These types of factors must be taken into consideration in determining whether there has been a substantial burden on religious activity."

Because of the allegations of plaintiff regarding the infeasibility of another location and the paucity of evidence on the factors the court was interested in to determine substantial burden, the court determined that summary judgment against the school was improper.

h. *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752 (7th Cir. 2003) (C.L.U.B.). A group of churches sued the City of Chicago under RLUIPA claiming there was not enough land zoned to allow religious land uses and where such uses were allowed churches were extremely difficult and expensive to site, if at all. The court held these difficulties were "incidental to any high-density urban land use." The court determined the claimants did not establish a "substantial burden" under RLUIPA and denied the RLUIPA claim. The court determined that in order to show a substantial burden, the claimant is required to show the land use regulation "necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise – including the use of real property for the purpose thereof within the regulated jurisdiction generally – effectively impracticable." This case is the genesis of the "impracticable" for religious exercise standard.

i. *Sts. Constantine and Helen Greek Orthodox Church v. City of New Berlin*, 396 F.3d 895 (7th Cir. 2005) (*New Berlin*). This case limits the C.L.U.B. case. In *New Berlin*, the Greek Orthodox Church bought a residentially zoned parcel for which a church was not an allowed use. However on one side of the church's land was a protestant church and on the other land owned by the protestant church. The church first applied to rezone the land to Institutional so a church would be an allowed use. The city was concerned that if the land were zoned Institutional that it might ultimately be put to some use other than for the Greek Orthodox Church. The city suggested the church apply for a PUD as well as a rezone to Institutional use with the PUD expressly restricting the use of the land to a church. The church changed its application and applied for the Institutional zone but also for the PUD restricting the use of the property to a church. The city staff then recommended approval.

The planning commission recommended denial and the city council affirmed denial on the basis that it did not believe the PUD would actually have the legal effect of limiting the use of the land to a church.

The 7th Circuit held the city council was wrong, that the PUD would have the effect of limiting the land to only a church use.

The city argued that the church could apply for a conditional use permit to allow the church in the Residential zone, eliminating the need for the rezone in the first place. The city argued that it was reasonable and not a substantial burden to require the church to apply for a CUP and that the CUP could be extended beyond the usual period of one year for which CUPs are otherwise valid. The court cited city code language that foreclosed such an extension, stated CUPs require construction to begin within one year, cited the church's evidence that the church had to raise $12 million to build the church and a one year period was insufficient time to raise the money and begin to build the church. After so observing, the court stated:

> "The repeated legal errors by the City's officials casts doubt on their good faith."

Here, a different panel of the 7th Circuit was faced with a lower court ruling that followed C.L.U.B. holding the church had to find some place else for its church or apply for the CUP. This panel of the 7th Circuit disagreed and distinguished C.L.U.B. This 7th Circuit panel explained that in C.L.U.B, the churches' substantial burden was characterized as having to apply for a land use permit. The 7th Circuit panel in *New Berlin*, characterized the Greek Orthodox church's claim to a substantial burden as not about simply having to apply for a permit. Rather, the *New Berlin* substantial burden was "having either to sell the land that it bought in New Berlin and find a suitable alternative location or be subjected to unreasonable delay by having to restart the permit process to satisfy the Planning Commission about a contingency for which the Church has already provided complete satisfaction." The *New Berlin* court rejected the district court's C.L.U.B. analysis that substantial burden could only be established after

the church had demonstrated there was no other land to suit its needs within the jurisdiction.

The court was unimpressed by the city's argument that everyone is treated like the church in New Berlin zoning matters and the church is not entitled under RLUIPA to be treated better than every one else. The court explained:

> "No doubt secular applicants for zoning variances often run into similar legal difficulties with zoning boards that, lacking legal sophistication and unwilling to take legal advice, may end up fearing legal chimeras. On that basis, the City, flaunting as it were its own incompetence, suggests that the Church can't complain about being treated badly so long as it is treated no worse than other applicants for zoning variances. But that is a misreading of RLUIPA."

The court went on to hold that this argument implicates the equal terms provision of RLUIPA, but has nothing to do with the separate substantial burden provision also in RLUIPA. The court noted that the limitation on substantial burden is that RLUIPA cannot treat churches too favorably, lest the substantial burden prong would run into an Establishment Clause problem. The court also observed that this point was not argued and even if it had been the church would still have won because churches, especially those outside of the mainstream, are vulnerable:

> "to subtle forms of discrimination when, as in the case of the grant or denial of zoning variances, a state delegates essentially standardless discretion to nonprofessionals operating without procedural safeguards." (Citations omitted).

The court determined that the city had not advanced a justification for denial (other than the specious idea that the PUD was inadequate to limit the land to church use only) and this created an inference of animus.

The court held the fact that the burden the city wanted to impose on the church to file more applications or look for other land was "not insuperable" but that did "not make it insubstantial."

j. *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024 (9th Cir. 2004). Borrowing from the C.L.U.B. analysis, the court determined that to show a substantial burden a religious use or user must show the land use regulation produces a "significantly great restriction or onus" on the free exercise of religion that such exercise is "effectively impracticable." Thus, denial of an application for rezoning of property purchased for religious educational use did not impose a substantial burden under RLUIPA. Rather the zoning decision "merely" required college to submit a land use application under the existing zone or go somewhere else where the land was properly zoned for what the college wanted to do.

k. *In Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004), *cert den* 125 S Ct 1295 (2005), a congregation was required to apply for permission to construct a place of worship on property elsewhere, other than on the property that the church owned. The 11th Circuit determined that this did not constitute a "substantial burden" as the court defined that term. The court determined RLUIPA's substantial burden required the following elements:

> "[A] "substantial burden" must place more than an inconvenience on religious exercise; a "substantial burden" is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct."

However, because the city code authorized private clubs and the like but not churches on the land the congregation owned, the governmental refusal to allow the church to be constructed on the land the congregation owned violated RLUIPA's equal terms provisions, as explained below.

l. *Vineyard Christian Fellowship v. City of Evanston, 250 F.Supp.2d 961 (N.D.Ill.2003).* In this case, the court determined that the denial of church altogether on property that the church purchased for that purpose did not impose a substantial burden. The court determined a regulation that "merely" operates so as to make religious exercise more expensive does not constitute a substantial burden. Because the church had continued to hold worship services at its existing albeit overcrowded location, the court did not believe the church suffered a substantial burden by not being able to build a new facility. The court held that although the church had "undoubtedly suffered serious hardships, first in its attempt to find a suitable property, and, once it found one * * * in attempting to win approval for the intended uses," the burden imposed by the land use regulation at issue was not substantial." *Id.* at 991-92.

l. *Petra Presbyterian Church*. This case relies on *Vineyard Christian Fellowship* and *CLUB* and determines that a land use ordinance prohibiting churches altogether in specified zones does not impose a substantial burden on free exercise.

m. *Corporation of the Presiding Bishop v. City of West Linn*, 111 P3d 1123 (May 2005).

In this case, the city staff determined the new church ward could be built consistently with land use standards with conditions of approval. The city council presented with neighborhood pressure to deny the church application altogether, denied the application on compatibility grounds.

The court first stated it was adopting the 11 Circuit's substantial burden test of requiring a showing that the government has pressured or forced a "choice between following religious precepts and forfeiting certain benefits, on the one hand, and abandoning one or more of those precepts in order to obtain the benefits on the other." The court held that a requirement to submit a new application was not a substantial burden under this test. The court noted there was no evidence in the record that the crowded conditions in the existing meeting house had caused the church to turn congregants away. The court also noted there was no evidence of religious animus or hostility toward the church.

n. *Konikov v. Orange County,* 2005 U.S. App. LEXIS 10176 (11th Cir. June 3, 2005), the county initiated and completed enforcement proceedings against a rabbi to prevent him from holding Jewish services at his home. A fine of $50 per day was assessed against Konikov. Konikov was instructed by the zoning authorities to either stop conducting religious activities at his home or apply for and obtain permission for so conducting such religious services at his home. Konikov refused to apply for permission or stop his religious activities at his home. The court applied the 11th Circuit's *Midrash* substantial burden test and on substantial burden held:

> "The zoning ordinance at issue requires Konikov to apply to the Board of Zoning Adjustment for a special exception in order to operate a "religious organization." It does not prohibit Konikov from engaging in religious activity. Because application for a special exception does not coerce conformity of a religious adherent's behavior, we hold that such an application requirement does not impose a substantial burden as defined by RLUIPA."

However, as explained below, the 11th Circuit did find a RLUIPA violation in this case under RLUIPA's equal terms provisions.

XII. Equal Terms

RLUIPA's equal terms provisions essentially prevent a state from treating churches on less than equal terms than other community uses, discriminate among faiths, against faiths, or unreasonably restrict religious uses.

Two cases from the 11th Circuit are particularly illustrative of the equal terms provisions of RLUIPA and how they are distinct from RLUIPA's substantial burden provisions.

1. In *Midrash Sephardi, Inc. v. Town of Surfside,* 366 F.3d 1214 (11th Cir. 2004), *cert den* 125 S Ct 1295 (2005), under the applicable zoning code a church was required to apply for permission to construct a facility in some place other than where the church acquired property. The court determined that requiring the church to build its facility

someplace else was not a substantial burden. Therefore, the church's substantial burden claim failed.

However, the church's RLUIPA equal terms claim carried the day. This is because the Town of Surfside allows clubs and places of public assembly in the disputed zoning district that was applicable to the location of the church's choice. The court explained that substantial burden was not a relevant consideration in the equal terms claim. Accordingly, the court held that the zoning ordinance provision excluding churches and synagogues from locations where private clubs and places of public assemble are authorized is contrary to RLUIPA's equal terms provision.

2. In *Konikov v. Orange County*, 2005 U.S. App. LEXIS 10176 (11th Cir June 3, 2005), the 11th Circuit explained under RLUIPA's equal terms provisions: "the question is whether the land use regulation or its enforcement treats religious assemblies and institutions on less than equal terms with nonreligious assemblies and institutions." The court explained the evidence in the record established that if family or other social gatherings such as cub scouts took place in a home three days week, that such would not violate the county's zoning ordinance. The court stated: "In other words, a group meeting with the same frequency as Konikov's would not violate the Code, *so long as religion is not discussed*. This is the heart of our discomfort with the enforcement of this provision." The 11th Circuit held that this violated RLUIPA's equal terms provisions. The court went on to determine the county failed to supply a compelling governmental interest for the dissimilar treatment and, therefore, found the county's enforcement against Konikov to violate RLUIPA.

An interesting aspect of the 11th Circuit's decision in *Konikov* is the court's determination that the code's failure to define an impermissible "religious organization" that would result in zoning enforcement lent itself to discriminatory enforcement and, therefore, was unconstitutionally vague.

XIII. A Word on RLUIPA's and Its Constitutionality

This paper has not delved into the cases regarding RLUIPA's constitutionality. The weight of the cases regarding RLUIPA, have found RLUIPA to be constitutional. The United States Supreme Court determined RLUIPA to be constitutional against an Establishment Clause challenge in the prisoner context in *Cutter v. Wilkinson*, 544 U.S. ___, 125 S. Ct. 2113 (2005). It seems increasingly unlikely that RLUIPA will be determined to be unconstitutional.

The composition of the court will change in the near future with Justice O'Connor's retirement and the seemingly imminent retirement of Chief Justice Rehnquist. Given the two Supreme Court 2005 Ten Commandments cases and the trend favoring judicial judgment over more objective tests in determining whether a given federal regulation "Establishes" religion in violation of the First Amendment, the fate of RLUIPA should be closely watched as the justices on the Supreme Court change.