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God and the Land: A Holy War Between Religious Exercise and  
Community Planning and Development  
Patricia E. Salkin\* and Amy Lavine\*

The Religious Land Use and Institutionalized Persons Act (RLUIPA)<sup>1</sup> has a curious history and far reaching consequences. It was the culmination of a tug-of-war between Congress and the Supreme Court that started in 1990, when the high court held that Free Exercise claims would be subject to only rational basis review as long as the government action at issue was neutral and generally applicable.<sup>2</sup> Prior to 1990, the Supreme Court analyzed religious freedom claims using strict scrutiny,<sup>3</sup> and although the doctrinal shift was motivated by a desire to prevent the religious observer from “becom[ing] a law unto himself,” Congress was not happy with the result. By 1993, the Religious Freedom Restoration Act (RFRA)<sup>4</sup> had been enacted. It attempted to exhume the strict scrutiny test for all free exercise actions, but the Supreme Court concluded that it was unconstitutional a mere four years later. Its reach was found to be too broad, surpassing Congress’s authority under the enforcement clause of the Fourteenth Amendment, and the Court alluded to its violation of the separation of powers doctrine and constitutional amendment requirements.<sup>5</sup>

RLUIPA, a more narrowly drawn statute, was passed in 2000. It brought together the odd bedfellows of land use laws and regulations affecting institutionalized persons (most of whom are prisoners), and it required the strict scrutiny test to be applied in these two limited areas. With Congressional findings to the effect that “covert” religious discrimination was particularly frequent in these contexts,<sup>6</sup> RLUIPA was specifically written to avoid the constitutional infirmities that RFRA was found to suffer from. In 2005, the Supreme Court

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<sup>1</sup> 42 U.S.C. §§ 2000cc–2000cc-5 (2000).

<sup>2</sup> *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990).

<sup>3</sup> *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (“[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.”); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (“It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, [o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation. . . .”).

<sup>4</sup> 42 U.S.C. §§ 2000bb–2000bb-4.

<sup>5</sup> *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (holding RFRA unconstitutional as exceeding Congress’s authority under section five of the Fourteenth Amendment).

<sup>6</sup> 146 CONG. REC. S7774, S7775 (2000) (joint statement of Sens. Hatch, Kennedy, and Reid).

upheld the statute's institutionalized persons component against a claim that it impermissibly established religion over non-religion.<sup>7</sup> While the Court neither addressed the constitutionality of the act's land use provisions nor discussed whether RLUIPA was subject to the same constitutional flaws as RFRA, many lower federal courts have since held RLUIPA's land use component to be constitutional.<sup>8</sup>

As a law regarding religious freedom and discrimination, RLUIPA goes to the heart of issues that are both controversial and essential to the foundations of American constitutional law. James Madison wrote in 1823 that “a legal establishment of religion without a toleration could not be thought of, and without a toleration, is no security for public quiet & harmony, but rather a source itself of discord & animosity.”<sup>9</sup> RLUIPA was undoubtedly intended to foster this type of religious tolerance in contexts where discrimination can be easily hidden and difficult to prove. Its land use provisions include a requirement of equal treatment—“No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.”<sup>10</sup> It also provides that the government may not “substantially burden” religious land uses unless doing so is the least restrictive way of serving a compelling government interest.<sup>11</sup> These standards were designed to ensure that local governments cannot discriminate against religious groups or assemblies that desire to site buildings and otherwise engage in religious exercise, and more significantly, that the government must have cogent reasons for imposing restrictions on them. In a world where financially strapped religious organizations can be defeated by lengthy and costly permitting rules, and where non-tax generating land uses are often disfavored, RLUIPA can be viewed as providing an essential backstop to the Free Exercise Clause of the First Amendment.

However, RLUIPA's religious protections can sometimes seem overbroad. For all of RLUIPA's noble intentions, and despite its drafters' belief that it does not give religious groups “immunity” from zoning laws,<sup>12</sup> the statute can potentially be invoked to shield religious

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<sup>7</sup> See *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005).

<sup>8</sup> See Patricia E. Salkin & Amy Lavine, *The Genesis of RLUIPA and Federalism: Evaluating the Creation of a Federal Statutory Right and Its Impact on Local Government*, 40 URB. LAW. 195, 208-19 (2008).

<sup>9</sup> JAMES MADISON, *Letter to Edward Everett, March 19, 1823*, in THE WRITINGS OF JAMES MADISON 127 (Gaillard Hunt ed., 1910).

<sup>10</sup> 42 U.S.C. § 2000cc(b) (2000).

<sup>11</sup> 42 U.S.C. § 2000cc(a).

<sup>12</sup> 146 CONG. REC. S7774, S7776 (2000) (joint statement of Sens. Hatch, Kennedy, and Reid).

organizations from valid concerns about development patterns and community character. It has been relied on, for example, by a church seeking to use its land for outdoor concerts,<sup>13</sup> and by another wishing to erect an electronic billboard not permitted by the local sign code.<sup>14</sup> Big box churches<sup>15</sup> and houses of worship seeking to build entertainment facilities,<sup>16</sup> rehabilitation centers,<sup>17</sup> offices,<sup>18</sup> and other auxiliary uses<sup>19</sup> have also sought the protections of the statute, sometimes with success. These types of land uses, whether religious or not, raise legitimate concerns among local governments and nearby property owners, and while they may not always be “compelling,” requiring them to pass strict scrutiny can seem to give religious organizations an unfair advantage in the land development process. RLUIPA also imposes a federal standard on an area of law that has traditionally been local in nature; indeed, few things are more local than decisions affecting communities’ growth and development. The threat of RLUIPA litigation and the costs that it entails, however, give local governments a strong disincentive to impose limitations on development projects proposed by religious groups, even where they might conflict with long term plans and legitimate community concerns.

Since the enactment of the statute, the floodgates have burst open with litigation in attempts to clarify RLUIPA’s statutory ambiguities. The statute, for example, defines “religious exercise” to include “[t]he use, building, or conversion of real property for the purpose of

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<sup>13</sup> Church of Universal Love and Music v. Fayette County, No. 06-872, 2008 WL 4006690, at \*1, 2008 U.S. Dist. LEXIS 65564, at \*1-\*2 (W.D. Pa. Aug. 26, 2008).

<sup>14</sup> Trinity Assembly of God of Balt. City, Inc. v. People’s Counsel for Balt. County, 941 A.2d 560, 563 (Md. Ct. Spec. App. 2008).

<sup>15</sup> See, e.g., Rocky Mountain Christian Church v. Bd. of County Comm’rs, No. 06-cv-00554-REB-BNB, 2008 U.S. Dist. LEXIS 28942, at \*8 (D. Colo. March 31, 2008); Cottonwood Christian Ctr. v. Cypress Redev. Agency, 218 F. Supp. 2d 1203, 1209 (C.D. Cal. 2002) (seeking to build 4,700 square foot church).

<sup>16</sup> See, e.g., Scottish Rite Cathedral Ass’n v. City of L.A., 67 Cal. Rptr. 3d 207, 210 (Cal. Ct. App. 2008) (questioning whether a church could build a theater and banquet space rentals); City of Hope v. Sadsbury Twp. Zoning Hearing Bd., 890 A.2d 1137, 1140 (Pa. Commw. Ct. 2006) (seeking to use land for campground).

<sup>17</sup> See Calvary Temple Assembly of God v. City of Marinette, No. 06-c-1148, 2008 U.S. Dist. LEXIS 55500, at \*1 (E.D. Wis. July 18, 2008); Family Life Church v. City of Elgin, 561 F. Supp. 2d 978, 982 (N.D. Ill. 2008); Men of Destiny Ministries, Inc. v. Osceola County, No. 6:06-cv-624-Orl-31DAB, 2006 WL 321932, at \*1 (M.D. Fla. Nov. 6, 2006); New Life Ministries v. Charter Twp. of Mt. Morris, No. 05-74339, 2006 U.S. Dist. LEXIS 63848, at \*2 (E.D. Mich. Sept. 7, 2006).

<sup>18</sup> See N. Pac. Union Conference Ass’n v. Clark County, 74 P.3d 140, 142 (Wash. Ct. App. 2003).

<sup>19</sup> See, e.g., Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 647 (10th Cir. 2006) (involving a church operated day care); DiLaura v. Ann Arbor Charter Twp., 30 F. App’x 501, 503 (6th Cir. 2002) (involving the use of a house as a religious retreat for a Catholic organization); Sisters of St. Francis Health Servs. v. Morgan County, 397 F. Supp. 2d 1032, 1036 (S.D. Ind. 2005) (involving a religious hospital); Life Teen, Inc. v. Yavapi County, No. CIV 01-1490 PCT RCB, 2003 U.S. Dist. LEXIS 24363, at \*2 (D. Ariz. Mar. 26, 2003) (involving the establishment of a youth camp affiliated with a Catholic organization); Greater Bible Way Temple v. City of Jackson, 733 N.W.2d 734, 737 (Mich. 2007) (involving the establishment of an apartment complex by a religious organization).

religious exercise,<sup>20</sup> and the courts have struggled to demarcate the point at which a house of worship's accessory facilities lose their religious qualities.<sup>21</sup> The courts have also had to decide whether the term "land use regulation"—defined to include zoning and landmarking laws<sup>22</sup>—applies to such things as building code requirements,<sup>23</sup> open space plans,<sup>24</sup> and the use of eminent domain.<sup>25</sup> RLUIPA's substantial burden provision, however, has caused the most disagreement among the courts, as the statute fails to define the phrase. This has resulted in an inconsistent application of the statutory standard across the country,<sup>26</sup> and combined with the fact-intensive inquiries conducted by most courts, RLUIPA's prohibition on substantial burdens has seemed, at times, to cause unpredictable results.<sup>27</sup> A number of organizations, from the U.S. Department of Justice<sup>28</sup> to the Becket Fund for Religious Liberty,<sup>29</sup> have been actively engaged in litigation protecting the statutory right to religious exercise under the statute.

In the fall of 2009, the *Albany Government Law Review* hosted a national symposium entitled *God and the Land: Conflicts Over Land Use and Religious Freedom*. The symposium brought together leading scholars, practitioners, and jurists to encourage dialogue about the strengths and deficiencies in what has proven to be a controversial statute. The speakers who attended the program, as well as the authors who contributed to this issue of the *Law Review*, articulated diverse opinions on the need for RLUIPA and about the effectiveness of the statute.

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<sup>20</sup> 42 U.S.C. § 2000cc-5(7)(B) (2000).

<sup>21</sup> See, e.g., *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 347-48 (2d Cir. 2007) (finding the expansion of a religious school to be a "religious exercise" where the facilities were to be used primarily for religious education, but questioning whether the construction of recreational facilities or a headmaster's residence as part of a religious school would fall within RLUIPA's protections); *Mintz v. Roman Catholic Bishop*, 424 F. Supp. 2d 309, 318 (D. Mass. 2006) ("Of course, every building owned by a religious organization does not fall within this definition. Buildings used by religious organizations for secular activities or to generate revenue to finance religious activities are not automatically protected.").

<sup>22</sup> 42 U.S.C. § 2000cc-5(5).

<sup>23</sup> See, e.g., *Second Baptist Church v. Gilpin Twp.*, 118 F. App'x 615, 617 (3d Cir. 2004) (holding that a mandatory sewer connection ordinance was not subject to RLUIPA); *Beechy v. Cent. Mich. Dist. Health Dep't*, 475 F. Supp. 2d 671, 680-84 (E.D. Mich. 2007) (applying RLUIPA to a septic system requirement).

<sup>24</sup> See *Albanian Associated Fund v. Twp. of Wayne*, No. 06-cv-3217 (PGS), 2007 WL 2904194, at \*8 (D.N.J. Oct. 1, 2007) (holding that a township open space plan is a land use regulation subject to RLUIPA).

<sup>25</sup> See *St. John's United Church of Christ v. City of Chi.*, 502 F.3d 616, 641-42 (7th Cir. 2007) (concluding that the taking of religious property was not subject to RLUIPA); *Albanian Associated Fund*, 2007 WL 2904194, \*8 (holding that although the condemnation could not be challenged under RLUIPA, the implementation of the land use plan under which the condemnation was initiated did fall within the scope of RLUIPA).

<sup>26</sup> See Salkin & Lavine, *supra* note 8, at 259-67.

<sup>27</sup> See *id.* at 228-34.

<sup>28</sup> First Freedom Project, <http://www.firstfreedom.gov> (last visited Apr. 20, 2009).

<sup>29</sup> RLUIPA.org, <http://www.rluipa.org> (last visited Apr. 20, 2009).

Addressing the need for a RLUIPA-type statute, Professor Angela Carmella asserts that the law is necessary to protect the freedom to use private property for religious uses—a freedom that she believes to be inadequately assured by the First Amendment alone. Attorney Wendie Kellington focuses her article on the value that RLUIPA provides in ensuring a robust protection of American secular democracy and maintaining a multiplicity of faiths. Professor Marci Hamilton, on the other hand, argues that RLUIPA is primarily a federal intrusion into local governments’ autonomy in the land use context, and that the statute does more harm than good by giving religious institutions the upper hand. She also highlights those portions of RLUIPA that possibly conflict with the Establishment Clause and the Separation of Powers doctrine. Professor Elizabeth Reilly also expresses skepticism about RLUIPA’s framework in her article. She argues that religious land use disputes would be better handled by first assessing them under the Establishment and Equal Protection Clauses, and only as a last resort under the Free Exercise Clause.

Other authors in this volume choose to set aside debates about the constitutionality and efficacy of RLUIPA in order to gain a better understanding of the law’s application and to provide advice for litigants and advocates. Attorney Dwight Merriam, who has represented both religious organizations and local governments in RLUIPA disputes, writes with Karla Chafee about the history of the statute and its contentious nature. Their article also discusses the difficulties that courts have faced in interpreting RLUIPA’s substantial burden provision consistently, and it provides advice for local governments and religious organizations to help to resolve religious land use disputes without resorting to litigation. Professor Shelley Ross Saxer tackles the question of whether building codes, aesthetic regulations, and historic preservation laws should be considered “land use regulations” subject to RLUIPA, and she concludes that they should, given the purposes and structure of the statute. The remedies available under RLUIPA, including damages, costs, and injunctive relief, are discussed in attorney Daniel Dalton’s article. He contends that the statute should be read to allow nominal, punitive, and compensatory damages as “appropriate relief,” in addition to injunctive and declaratory relief.

While some local officials have called for the repeal of RLUIPA,<sup>30</sup> it remains to be seen whether Congress will amend RLUIPA to clarify its terms, or whether the Supreme Court will

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<sup>30</sup> For example, at least four villages in Rockland County, NY have adopted resolutions seeking Congressional repeal of RLUIPA (Airmont, Pomona, Chestnut Ridge and Wesley Hills). *See* Village of Airmont, AIRMONT

hold all or part of the statute's land use provisions to be unconstitutional. In the meantime, discussions such as the ones heard at the God and the Land Symposium will be important in shaping the lower courts' interpretations and applications of the law. This is especially true given the difficulty in finding equilibrium between local land use laws intended to promote the welfare of the community as a whole and RLUIPA's anti-discrimination measures that grant broad preferences for religious land users. The reality is that RLUIPA is not likely to go away. Efforts to educate all of the players in the land use field when it comes to religious uses—including religious organizations, local government officials, and community planners—may lead to better understandings of their positions and result in better, most appropriate decision making on the part of all participants in the process. The articles contained in this symposium contribute to the ongoing robust debate over the practical applications of RLUIPA.

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VILLAGER, Apr./May 2007, *available at* [http://www.airmont.org/newsletters/Villager\\_200704.pdf](http://www.airmont.org/newsletters/Villager_200704.pdf). In addition, there is at least one blog dedicated to defeating RLUIPA. *See* Defeat RLUIPA, <http://defeat-rluipa.blogspot.com> (last visited Apr. 20, 2009).