

Abandoning the Use of Abstract Formulations in Interpreting RLUIPA's Substantial Burden Provision in Religious Land Use Cases

Robert M. Bernstein*

INTRODUCTION

“[P]robably the city’s most unfriendly and depressing piece of spiritual architecture” was how *Washington Post* columnist Marc Fisher described Washington, D.C.’s Third Church of Christ, Scientist in 2007.¹ For decades, the small Christian Scientist congregation, situated two blocks from the White House, had struggled to fulfill its spiritual mission within the confines of its octagonal concrete structure.² Built in 1971, the building was meant to be the permanent spiritual home of the small church, which had existed in downtown Washington, D.C. since 1918.³ Within ten years, the church was already looking for a new home.⁴ The building’s three windowless, sixty-foot high concrete walls proved a poor design choice for a religious assembly.⁵ The church found a number of architectural features objectionable: the hidden front entrance to the building; the reinforced concrete wall framing the courtyard; the cavernous auditorium, over twice as large as desired; the poor natural light; the lack of a steeple; and the massive exterior concrete walls.⁶ According to the church, these austere features prevented the church from expressing its religious message and from ministering to the community.⁷ Demolition, however, was not possible: in December 2007, the city designated the thirty-seven-year-old building as a historic landmark.⁸

What felt like a concrete spiritual coffin to the church was viewed as an architectural masterpiece by others in the Washington, D.C. community. The church enjoyed the distinction of having been built in the Brutalist architectural

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1. Marc Fisher, *A Place Unfit for a Congregation, Much Less a Historic Designation*, WASH. POST, Nov. 1, 2007, at B1.

2. Complaint ¶¶ 17, 23, *Third Church of Christ, Scientist, Washington, D.C. v. D.C. Historic Preservation Review Bd.*, No. 1:08-cv-01371-JR (D.D.C. Aug. 7., 2008).

3. *Id.* ¶¶ 10, 16.

4. *Id.* ¶ 29.

5. *See id.* ¶¶ 17, 24.

6. *Id.*

7. *See id.* ¶¶ 21, 24.

8. *Id.* ¶¶ 1, 32.

style by a partner at I.M. Pei's firm.⁹ Preservationists viewed the church as "one of the best examples of Brutalism in the Washington area and one of the most important Modernist churches."¹⁰ According to the city's Historical Preservation Review Board, Brutalism celebrates "the use of exposed, unadorned, cast concrete to construct buildings of 'stark forms and raw surfaces.'"¹¹ A local preservationist group first asked the Board to designate the church a landmark in 1991, but no final action was taken until 1997.¹² In the sixteen-year interim, the church was a "proposed landmark" and was forced to maintain a structure it found inadequate for its religious needs.¹³ The eventual landmark designation prevented the church from razing, altering, or renovating the building without obtaining a special permit from the Review Board.¹⁴

In 2008, Third Church filed suit against Washington, D.C. and its Historic Preservation Review Board, alleging a violation of the Religious Land Use and Institutionalized Persons Act (RLUIPA).¹⁵ Specifically, Third Church alleged that the city imposed a substantial burden on its religious exercise in the absence of any compelling governmental interest.¹⁶ In November 2010, after years of dispute, Third Church and the preservationists reached a settlement agreement allowing the church to demolish the structure.¹⁷ Because the district court stayed the federal lawsuit, the D.C. Circuit never had the opportunity to consider whether the city did in fact impose a substantial burden on Third Church's religious exercise and violate RLUIPA.¹⁸

9. Designation, D.C. Historic Preservation Review Bd., No. 91-05, at 1–2 [hereinafter HPRB Designation].

10. *Id.* at 1.

11. *Id.*

12. Complaint, *supra* note 2, ¶¶ 30–32.

13. *Id.* ¶¶ 44–46.

14. *Id.* ¶ 48.

15. *See id.* ¶¶ 73–74.

16. *Id.* ¶ 74.

17. *See* Settlement Agreement Executed by D.C. Pres. League, Third Church of Christ, Scientist and ICG 16th Street Assocs., LLC (Nov. 9, 2010), available at <http://temp-4.watersward.com/Download-document/102-Settlement-Agreement-Executed-by-DC-Preservation-League-Third-Church-and-ICG-Properties.html>. The dispute ultimately involved lawsuits in federal district court and in "state" court in the District of Columbia, as well as proceedings before multiple municipal entities. Both Third Church and a local preservationist group maintain websites providing comprehensive accounts of the process; Third Church's online archives of the historical and administrative record are particularly detailed. *See* THIRD CHURCH FREEDOM, <http://www.thirdchurchfreedom.org> (last visited Jan. 29, 2013); *The Third Church of Christ, Scientist*, COMMITTEE OF 100 ON THE FED. CITY, <http://www.committeeof100.net/subcommittees/historic-preservation/the-third-church-of-christ-scientist/> (last visited Jan. 29, 2013).

On October 25, 2012—over twenty years after preservationists filed a landmark application for the church—the D.C. Historic Preservation Review Board approved redevelopment plans for the Third Church site. *See* Hearing, D.C. Historic Preservation Review Bd., HPA No. 12-344 (Oct. 25, 2012). Third Church estimates that construction will begin in January 2014 and conclude in spring 2016. *See Current Design Concept*, THIRD CHURCH FREEDOM, <http://www.thirdchurchfreedom.org/design.html> (last visited Jan. 29, 2013).

18. *See* Memorandum Order, Third Church of Christ, Scientist, Washington, D.C. v. D.C. Historic Preservation Review Bd., No. 1:08-cv-01371-JR (D.D.C. Jan. 5, 2010) (staying all proceedings

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The D.C. Circuit, which, like the Supreme Court, has yet to determine the meaning of “substantial burden” as used in RLUIPA, would have been hard-pressed to resolve the dispute. Courts disagree pointedly over what “substantial burden” means for RLUIPA purposes. Although circuit courts have offered an array of abstract formulations for interpreting RLUIPA’s substantial burden term, there is deep disagreement among them over which formulation is preferable.

The Third Church dispute highlights significant tensions between architectural and historic preservation, on the one hand, and religious liberty, on the other. There is no reason to think these disputes will subside in the future. But the courts have yet to develop a satisfying and workable approach to balancing the cities’ interest in historic preservation of architecturally important structures with the right of churches to define their own sacred space. The courts of appeals have noted with frustration that RLUPA does not define “substantial burden,” and they have offered remarkably different vague formulations of the term.¹⁹ Although some commentators have taken note of these different definitions,²⁰ they have done so in a largely descriptive fashion.²¹

This Note argues that the circuits’ use of vague formulations in interpreting RLUIPA is overly restrictive and that an alternative multifactor approach—one that considers both the manner in which the state implements its law and the manner in which the church experiences the burden—would provide a more practical, workable paradigm for courts to employ in the future in resolving actual historic preservation and land use disputes. That is, this Note suggests that it is the circuits’ very reliance on talismanic formulations that is problematic because RLUIPA’s substantial burden provision, particularly in the land use context, does not lend itself to the kind of bright-line definitions that the circuits have developed. The solution is not to choose among the circuits’ formulations but to chart a new approach entirely. To clear some underbrush, Part I introduces the structure and text of RLUIPA and outlines the colorful legislative history of the statute. This

in the district court case).

19. *E.g.*, *Living Water Church of God v. Charter Twp. of Meridian*, Nos. 05-2309, 06-1210, 2007 WL 4322157, *1, *5 (6th Cir. Dec. 10, 2007) (“Neither does the statute itself contain any definition of the term.”); *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004) (“RLUIPA does not define ‘substantial burden.’”); *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 760 (7th Cir. 2003) (“[T]he text of the statute contains no . . . express definition of the term ‘substantial burden’ . . .”).

20. *See, e.g.*, Sara C. Galvan, *Beyond Worship: The Religious Land Use and Institutionalized Persons Act of 2000 and Religious Institutions’ Auxiliary Uses*, 24 *YALE L. & POL’Y REV.* 207, 225–26 (2006); Daniel P. Lenington, *Thou Shalt Not Zone: The Overbroad Applications and Troubling Implications of RLUIPA’s Land Use Provisions*, 29 *SEATTLE U. L. REV.* 805, 822–828 (2006); 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, 219–234 (2008).

21. This is not to say that *all* work in this area is such. For what I consider to be the leading normative commentary in this area, see 1 KENT GREENAWALT, *Difficult Determinations: Burden and Government Interest and Land Development and Regulation*, in *RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS* 201, 233 (2006). This work has had enormous impact on the development of ideas in this Note and, more generally, on the author’s interest in this topic.

Part sketches the roughly ten-year prelude to RLUIPA, which commenced with the Supreme Court's landmark free exercise decision in *Employment Division, Department of Human Resources of Oregon v. Smith* and climaxed with a constitutional waltz between Congress and the Court.²² Part II provides an in-depth examination and critique of regnant approaches to interpreting RLUIPA's substantial burden provision. It argues that the various formulations relied on by the circuits, though derived through different means, are problematic in that they do not provide a workable framework for courts to use in deciding actual disputes. Part III first proposes an alternative multifactor framework that courts can employ to resolve real RLUIPA controversies. It then illustrates the utility of this analytical approach by applying it to the case of the Third Church.

I.

Congress unanimously passed the Religious Land Use and Institutionalized Persons Act in 2000.²³ On its face, the statute restricts when government can impose a substantial burden on religious exercise in two specific contexts: land use and prisons.²⁴ Section 2 of the Act protects religious institutions from certain land use regulations, and section 3 protects the free exercise of prisoners and other institutionalized persons.²⁵

The land use section itself contains two major subparts: a substantial burden provision, which mandates a strict scrutiny standard when government implements a land use regulation in a way that infringes a church's free exercise, and an antidiscrimination provision that prohibits government from treating religious organizations "on less than equal terms" with nonreligious organizations.²⁶ The substantial burden provision provides:

(a) Substantial burdens.—

(1) General rule.—No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person,

22. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

23. Pub. L. No. 106-274, 114 Stat. 803 (2000) (codified at 42 U.S.C. §§ 2000cc-2000cc-5).

24. *Id.* § 2.

25. *Id.* § 3.

26. *Id.* § 2(a)–(b). Although section 2(b) of RLUIPA, containing the antidiscrimination provisions, is not the focus of this Note, it has generated its own share of interpretative difficulties. For instance, section 2(b)(1), the "equal terms" provision, forbids government from "impos[ing] a or implement[ing] 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." This section has produced a particularly pronounced intercircuit conflict. *Compare* *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1228–35 (11th Cir. 2004) (declining to import a "similarly situated comparator" requirement into RLUIPA equal-terms analysis), *with* *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 264–69 (3d Cir. 2007) (requiring a similarly situated comparator and requiring a religious assembly to show it was treated less well than a secular assembly "similarly situated *as to the regulatory purpose*"). For a particularly persuasive interpretation of the equal terms provision, see *River of Life Kingdom Ministries v. Vill. of Hazel Crest, Ill.*, 611 F.3d 367, 377–92 (7th Cir. 2010) (Sykes, J., dissenting).

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including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.²⁷

Section 8 provides definitions for “government,” “land use regulation,” “religious exercise,” and even “demonstrates,” but the statute nowhere explains what constitutes a “substantial burden” or a “compelling governmental interest.”²⁸ This has led the federal courts of appeals to interpret RLUIPA’s substantial burden provision in significantly different ways.

Legislative history, however, offers some guidance on how to interpret the term. On July 27, 2000, Senator Hatch delivered remarks on the floor of the Senate in anticipation of RLUIPA’s passage.²⁹ At the conclusion of his speech, Senator Hatch requested that a joint interpretive statement by himself and Senator Kennedy be inserted into the record.³⁰ The joint statement amounts to a lengthy interpretive memorandum, containing a section titled “Definition of substantial burden.”³¹ It reads:

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 on religious exercise.³²

The passage twice references Supreme Court free exercise jurisprudence, and Senators Hatch and Kennedy made no secret of what they had in mind.

RLUIPA represented the latest incarnation of Congress’ attempts to respond to the Supreme Court’s 1990 decision in *Smith*, what one leading religion and law scholar describes as “the controversial cornerstone of modern free exercise law.”³³ In *Smith*, the Court determined that Oregon could constitutionally deny members of the Native American Church unemployment compensation after they had been dismissed from jobs for religious drug use that was a central element of worship services.³⁴ The message of *Smith* was that states were not obligated to grant

27. Pub. L. No. 106-274, § 2(a)(1).

28. See *id.* § 8 (providing various definitions and failing to define “substantial burden” and “compelling governmental interest”).

29. See 146 CONG. REC. S7774 (daily ed. July 27, 2000) (statement of Sen. Hatch).

30. *Id.*

31. *Id.* at S7776 (joint statement of Sens. Hatch and Kennedy).

32. *Id.*

33. GREENAWALT, *supra* note 21, at 12.

34. 494 U.S. 872, 890 (1990).

religious exemptions to laws that were neutral and generally applicable.³⁵

Congress was not pleased. In response to *Smith*, Congress in 1993 enacted the Religious Freedom Restoration Act (RFRA), which required all levels of government to demonstrate a compelling interest before imposing a substantial burden on free exercise.³⁶ Senator Hatch, a lead sponsor of RLUIPA, apparently viewed RFRA as the beginning of Congress' post-*Smith* fight to protect religious liberty—a fight which culminated with the passage of RLUIPA.³⁷

Then, in 1997, the Supreme Court in *City of Boerne v. Flores* declared RFRA unconstitutional as applied to the states and local governments.³⁸ Specifically, the Court found that Congress had exceeded its Enforcement Clause powers under section 5 of the Fourteenth Amendment by passing a law that defined the scope of constitutional rights rather than one that was remedial and preventative in nature.³⁹

Congress again tried to respond to the Court, this time with the benevolently named Religious Liberty Protection Act (RLPA).⁴⁰ The Act accomplished similar ends as RFRA, but Congress relied on its powers under the Spending and Commerce Clauses. The bill overwhelmingly passed the House but lingered in the Senate due to concerns over the bill's impact on civil rights, especially regarding housing and employment.⁴¹

When RLUIPA was finally drafted, it represented a compromise in that it offered religious liberty protections in only two areas—but areas where Congress believed religion was frequently burdened: land use regulation and institutionalized persons.⁴² These two areas were ones on which Congress had focused in nine different hearings over a three-year period.⁴³ Congress, as with the RLPA bill, grounded its authority in the Spending and Commerce Clauses, as well as in the Enforcement Clause.⁴⁴ The result was one of the most significant developments in American church-state law in the last quarter-century. Although the Supreme Court has not addressed the constitutionality of the land use provisions, it upheld the prisoner provisions in 2006, which suggests the land use component will be treated as valid as well.⁴⁵ The Supreme Court has also left it to the courts of appeals to grapple with determining the meaning of “substantial burden” as used in RLUIPA.

Artistic preservation cases are particularly ripe for analysis because they have heretofore received scant analysis and because they highlight some of the central problems in interpreting RLUIPA's substantial burden provision. This context

35. See *id.* at 885–86; see also GREENAWALT, *supra* note 21, at 31.

36. Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb–2000bb-4).

37. See 146 CONG. REC. S7774 (statement of Sen. Hatch).

38. 521 U.S. 507 (1997).

39. *Id.* at 532–36.

40. H.R. 4019, 105th Cong. (1998); S. 2148, 105th Cong. (1998).

41. See 146 CONG. REC. S7778 (statement of Sen. Reid).

42. *Id.* at S7774 (joint statement of Sens. Hatch and Kennedy).

43. *Id.*

44. *Id.* at S7775.

45. See *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

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provides an especially instructive RLUIPA case study because it requires courts to consider two extremely delicate questions: on one hand, the religious significance of a church's desire to have a particular façade and, on the other hand, the intrinsic value of and interest in architectural preservation.

II.

A. "BY REFERENCE TO SUPREME COURT JURISPRUDENCE"

Because "substantial burden" is a term of art, one common interpretative approach is to turn to the Supreme Court's free exercise jurisprudence. This approach, though offering the discrete benefit of fidelity to legislative intent, ultimately has limited usefulness because the Court's prior attempts to formulate a definition of "substantial burden" were not developed with a land use context in mind. As discussed in Part I, the drafters of the legislation indicated that the term "should be interpreted by reference to Supreme Court jurisprudence" and "is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden or religious exercise."⁴⁶ Several points are immediately worth noting. First, the statement explicitly assumes that the Supreme Court has a body of jurisprudence explicating what "substantial burden" means, and it implicitly suggests that such jurisprudence is relevant to construing RLUIPA's "substantial burden" term. Second, the statement posits that the Court's jurisprudence establishes the interpretative outer bounds of a "substantial burden," implying that courts plausibly might interpret the term in a narrower way than the Court's own reading.

Consequently, several circuits have attempted to follow this approach by closely hewing their interpretation of RLUIPA to the Supreme Court's jurisprudence.⁴⁷ The insurmountable problem with this approach, though, is that the Supreme Court has only articulated a very limited understanding of what counts as a "substantial burden"—and it has done so in contexts quite unlike the land use regulations at issue in RLUIPA. The circuits almost invariably begin their analysis with homage to the Warren's Court's landmark decision in *Sherbert v. Verner*, in which South Carolina denied a Seventh-Day Adventist unemployment compensation after she was fired from her job for refusing to work on Saturday, her Sabbath day.⁴⁸ *Sherbert* produced the much-quoted dictate that a substantial burden exists when government places an individual in the cruel dilemma of "choos[ing] between following the precepts of her religion and forfeiting benefits, on the one hand, and

46. 146 CONG. REC. S7776 (joint statement of Sens. Hatch and Kennedy).

47. See, e.g., *Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006) ("[T]he Supreme Court has defined the term in the related context of the Free Exercise Clause.") (interpreting RLUIPA in the context of an institutionalized person case); *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 760 (7th Cir. 2003) ("RLUIPA's legislative history indicates that it is to be interpreted by reference to . . . First Amendment jurisprudence.").

48. 374 U.S. 398, 399–402 (1963).

abandoning one of the precepts of her religion in order to accept work, on the other hand.”⁴⁹ This is, on its face, a rather narrow test about public welfare legislation. Generally omitted from *Sherbert’s* famous quotation is the subject of the sentence: it is the state supreme court “*ruling*” that created the cruel dilemma;⁵⁰ it is not at all clear that the Court intended this formulation as a test to be applied in other contexts or even other cases. The context of the quote suggests the Court was simply characterizing the effect of the state supreme court decision.⁵¹

In a series of unemployment compensation cases, the Court reaffirmed that a substantial burden on religion exists when a state conditions receipt of a government benefit on behavior prohibited by religious faith.⁵² *Thomas* involved a Jehovah’s Witness to whom Indiana denied unemployment compensation after he quit his job because he was asked to help manufacture weapons.⁵³ Later, *Hobbie* again involved a Seventh-Day Adventist who was denied unemployment benefits after she was fired from her job after refusing to work on her Sabbath.⁵⁴ The unemployment compensation trilogy offers one articulation, albeit a nebulous one, of what amounts to an undue burden on religion: “substantial pressure on an adherent to modify his behavior and to violate his beliefs.”⁵⁵

Aside from the three unemployment decisions,⁵⁶ the Court has only once found government action so oppressive as to be a substantial burden on religion.⁵⁷ In *Wisconsin v. Yoder*, the celebrated decision long considered to be the high watermark of the Court’s free exercise jurisprudence,⁵⁸ the Justices determined that a state law requiring the Amish to send their children to school until age sixteen, under the threat of criminal punishment, presented an undue burden on the Amish’s religious practice.⁵⁹ Despite its long, discursive opinion, the Court never offered a

49. *Id.* at 404.

50. *Id.* (emphasis added). The full quote reads: “The [South Carolina Supreme Court] ruling forces her 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.”

51. *See id.* at 403–04.

52. *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 141 (1987); *Thomas v. Review Bd. of the Ind. Emp’t Sec. Div.*, 450 U.S. 707, 717–18 (1981).

53. *Thomas*, 450 U.S. at 710–12.

54. *Hobbie*, 480 U.S. at 138–39.

55. *Thomas*, 450 U.S. at 718.

56. The Court decided a fourth unemployment compensation case in 1989, but that case is largely indistinguishable from the prior three. *See Frazee v. Ill. Dept. of Emp’t Sec.*, 489 U.S. 829 (1989) (finding a violation of the Free Exercise Clause when the state denied unemployment benefits to a Christian who refused to work on Sunday, even though he did not belong to a particular church or sect).

57. To be fair, the Court has not taken a substantial number of cases where this was at issue. The Court did, though, reject a substantial burden claim in *Jimmy Swaggart Ministries v. Bd. of Equalization*, where it found that the collection of a generally applicable tax did not impose a substantial burden. 493 U.S. 378, 392 (1990). In other religious freedom cases in the 1980s, the Court seemed to assume a substantial burden existed and decided the case based on whether a compelling government interest existed. *See Bowen v. Roy*, 476 U.S. 693 (1986); *United States v. Lee*, 455 U.S. 252 (1982).

58. *E.g.*, *Free Exercise Clause (I): History, Background, Framing*, in *ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES* 625 (Paul Finkelman ed., 2006) (“The ‘high water mark’ for free exercise clause protection . . . came in *Wisconsin v. Yoder* (1972) . . .”).

59. 406 U.S. 205, 218, 235–36 (1972). Parents who violated the state compulsory attendance

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clear articulation of what it was about Wisconsin's law that presented the substantial burden.⁶⁰ It suggested, though, that a substantial burden on religion exists when government induces a person to violate religious precepts in order to avoid criminal sanctions.⁶¹

In the context of land use and historic preservation, it is difficult to know what a judge interpreting RLUIPA's substantial burden provision is to make of the Supreme Court's minimal enunciations of the term. Substantial burdens certainly exist when government creates religious coercion by forcing individuals to choose between religious commitments and government benefits or punishment. *Sherbert* and *Yoder* are two sides of the same coin. Beyond this framework, the Court has never found a substantial burden on free exercise.⁶² This is hardly a sturdy framework on which to rely. Even the Court has said it does not see meaningful substantive differences among the three unemployment cases.⁶³

Overreliance on the Supreme Court's free exercise jurisprudence, then, may lead judges interpreting RLUIPA to adopt an overly restrictive and narrow conception of a substantial burden. For example, the Ninth Circuit, in a recent en banc opinion, announced that a substantial burden, at least in the context of the Religious Freedom Restoration Act, can *never* exist outside of the *Sherbert/Yoder* framework.⁶⁴ Such an interpretation does not seem to be what Congress had in mind in enacting RLUIPA, for the statute calls for a "constru[ction] in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution."⁶⁵ Yet the contradiction exists—one that has gone unnoted in the literature on RLUIPA. The drafters did not intend for judges to give RLUIPA's substantial burden term "any broader definition" than the Supreme Court has articulated, yet they envisioned a statute to safeguard religious

law could be fined up to \$5 or imprisoned for up to three months; the Amish parents involved in *Yoder* were only fined \$5 each. *Id.* at 207–08.

60. Justice Burger's majority opinion, at over 7,500 words, is over three times longer than Justice Brennan's decision in *Sherbert*, at just over 2,400 words. The Court did display particular concern with the impact of complying with the state law on the Amish's traditional lifestyle. See discussion *infra* text accompanying notes 113–15.

61. *Yoder*, 406 U.S. at 218 ("The impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs.").

62. See *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1075 (9th Cir. 2008) (en banc) ("[T]he dissent cannot point to a single Supreme Court case where the Court found a substantial burden on the free exercise of religion outside the *Sherbert/Yoder* framework. The reason is simple: There is none.").

63. *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 141 (1987) ("We see no meaningful distinction among the situations of *Sherbert*, *Thomas*, and *Hobbie*.").

64. See *Navajo Nation*, 535 F.3d at 1069–70 ("Under RFRA, a 'substantial burden' is imposed *only* when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*). Any burden imposed on the exercise of religion short of that described by *Sherbert* and *Yoder* is not a 'substantial burden' within the meaning of RFRA. . . .") (emphasis added).

65. 42 U.S.C. § 2000cc-3(g) (2012).

freedom.⁶⁶ Interpreting RLUIPA's land-use substantial burden provision in the light of the Court's free exercise jurisprudence, then, seems to be an exercise in futility.⁶⁷

Two further complications exist. First, the Court's free exercise jurisprudence is an arena in which every "Hamilton may be matched against a Madison."⁶⁸ That is, for every case in which the Court found a substantial burden on religion, there is another in which the Court declined to find such a burden.⁶⁹ The Court's jurisprudence in this area is not entirely coherent. In *Braunfeld v. Brown*, which preceded *Sherbert*, the Court suggested that a general law advancing secular goals will not impose a substantial burden on religion, even if it indirectly affects religious observance.⁷⁰ There, an Orthodox Jewish merchant claimed a state law mandating the closure of retail shops on Sunday burdened his free exercise of religion.⁷¹ Because the state enacted the statute to advance purely secular goals, no substantial burden existed.⁷² And if *Yoder* represents the high watermark in the Court's free exercise cases, the low watermark is surely *Lyng v. Northwest Indian Cemetery Protective Ass'n*, where the Court—declining even to apply the *Sherbert* analysis—sanctioned government action that "could have devastating effects on traditional Indian religious practices."⁷³ This is all to say that if judges are to interpret RLUIPA's substantial burden clause with reference to the Court's free exercise jurisprudence,⁷⁴ it is not clear to which jurisprudence they should look.⁷⁵

66. 146 CONG. REC. S7776 (daily ed. July 27, 2000) (joint statement of Sens. Hatch and Kennedy).

67. Interpreting the substantial burden term in RLUIPA's prisoner section is a different task entirely.

68. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 n.1 (1952) (Jackson, J., concurring).

69. Compare *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378 (1990), *Hernandez v. Comm'r*, 490 U.S. 680 (1989), *Bowen v. Roy*, 476 U.S. 693 (1986), and *Braunfeld v. Brown*, 366 U.S. 599 (1961) (declining to find a substantial burden on religion), with *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987), *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981), and *Sherbert v. Verner*, 374 U.S. 398 (1963) (finding a substantial burden on religion).

70. 366 U.S. 599, 607 (1961).

71. *Id.* at 601.

72. *Id.* at 607.

73. 485 U.S. 439, 451 (1988). It is not altogether clear that the *Lyng* court was engaged in making a substantial burden determination. On the one hand, the Court focused heavily on the word "prohibit" in the Free Exercise Clause and seemed to conclude that the government had enacted no prohibitions. See *id.* On the other hand, the respondents framed the case in classic strict scrutiny terms, and the Court seemed to accept this framework, even though it disagreed with respondents over whether any burden was weighty enough to trigger the compelling governmental interest requirement. See *id.* at 447. Still, Justice Scalia, writing for the majority in *Smith*, did not view *Lyng* as a case where the Court applied the *Sherbert* framework. See *Emp't Div., Dept. of Human Res. of Or., v. Smith*, 494 U.S. 872, 883 (1990) ("In [*Lyng*,] . . . we declined to apply *Sherbert* analysis to the Government's logging and road construction activities on lands used for religious purposes by several Native American Tribes . . .").

74. *Gonzalez v. O Centro* is a recent landmark case in the Court's free exercise jurisprudence, but its relevance for the present discussion is limited. See 546 U.S. 418 (2006). There, the government conceded that its law substantially burdened the claimant's sincere exercise of religion. *Id.* at 426. The case turned entirely on whether the uniform application of the law was the least restrictive means of

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The second—and most significant—objection to interpreting RLUIPA’s substantial burden provision through the Court’s case law is not just that the Court’s articulation is narrow but that it is not germane. The discretionary distribution of unemployment benefits seemingly has little to do with land use. Additionally, individuals are likely to experience religious burdens differently than churches and other organizations do. Even within the context of RLUIPA, land use regulations may impede religious exercise in different ways. For example, a local zoning board’s denial of a permit may prevent a church from renovating or expanding its facilities.⁷⁶ In other cases, a zoning ordinance requiring churches to apply for a permit to operate in a particular zoning district may effectively bar religious institutions from an entire municipality.⁷⁷ And in the case of architectural preservation, a historic landmark designation may entirely prevent a church from making any exterior alterations to its structure—a status quo that the Third Church described as “religious stasis.”⁷⁸ Religious institutions subject to land use ordinances do not experience burdens in the same way as welfare applicants.⁷⁹

Some courts have half-heartedly flagged this problem but have failed to solve it. Consider the interpretive move taken by the Second Circuit in *Westchester Day School v. City of Mamaroneck*.⁸⁰ The case involved a local zoning authority’s opposition to the efforts of a Jewish day school to expand its facilities.⁸¹ The court purports to depart from its sister circuits which use the *Sherbert* test as “the starting point for determining what is a substantial burden under RLUIPA.”⁸² It noted that land use restrictions do not place religious institutions in the same cruel dilemma of choosing between faith and a state entitlement: “When a municipality denies a religious institution the right to expand its facilities, it is more difficult to speak of substantial pressure to change religious behavior, because in light of the denial the renovation simply cannot proceed.”⁸³ Having noted this problem,⁸⁴ the panel curiously adopts a substantial burden standard nearly indistinguishable from those

advancing a compelling governmental interest. *Id.*

75. The Eleventh Circuit has offered this understatement: “The Court’s articulation of what constitutes a ‘substantial burden’ has varied over time.” *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1226 (11th Cir. 2004).

76. *E.g.*, *Living Water Church of God v. Charter Twp. of Meridian*, 258 Fed App’x. 729, 732 (6th Cir. 2007); *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 345–46 (2d Cir. 2007).

77. *E.g.*, *Midrash Sephardi*, 366 F.3d at 1219, 1225.

78. Complaint, *supra* note 2, ¶¶ 33, 48.

79. *Members* of religious institutions may in fact experience some burden in a manner akin to individuals applying for unemployment benefits, but RLUIPA protects the religious exercise of “religious assemb[lies]” and “institution[s]” along with that of individual persons. *See* 42 U.S.C. § 2000cc(a)(1) (2012).

80. *See Westchester Day Sch.*, 504 F.3d at 345.

81. *Id.* at 345–46.

82. *Id.* at 348.

83. *Id.* at 349.

84. It is not entirely clear whether the court sees itself as noting a problem or as simply explaining why the substantial burden showing will be difficult to establish in the land use context. This passage in the opinion can be read both ways.

that it criticizes.⁸⁵ Adopting a version of the Eleventh Circuit's formulation, the court in *Westchester Day School* concluded that a substantial burden is one that "directly coerces the religious institution to change its behavior."⁸⁶ This is inadequate because although all land use regulations are coercive in some ways—restricting desired change even if not requiring change—such laws do not subject religious institutions to the same kind of cruel dilemma that was at the heart of *Sherbert*: that of choosing between abiding by one's religious conscience and receiving government benefits. Rather, the primary burden imposed by land use regulations is that it locks institutions into a religious stasis. Thus, the Second Circuit's *Westchester Day School* is simply not much of a departure from the *Sherbert/Yoder* framework.

There are two immediate objections to the Second Circuit's formulation. First, as noted, it is nearly identical to the standard found in the unemployment trilogy, which the Second Circuit identifies as unworkable, or at least difficult to apply, in the land use context. It is hard to divine a difference between "substantial pressure to modify behavior" and "direct coercion to change behavior." Second, the *Westchester Day School* panel styles its standard after the Eleventh Circuit's approach: "significant pressure which directly coerces [a church] . . . to conform . . . [its] behavior."⁸⁷ The Eleventh Circuit derives this formulation, though, by collecting the Supreme Court's free exercise cases⁸⁸—the exact interpretive move that the Second Circuit sees as having limited usefulness.

In summary, the Supreme Court's free exercise line of cases has limited usefulness in constructing a workable understanding of what is a "substantial burden" under RLUIPA. The formulations offered by the Court do not make sense in the context of land use restrictions that restrict a religious institution from undertaking a desired course of action. The Second Circuit's interpretive gymnastics in *Westchester Day School* illustrate the trouble with grounding an interpretation of RLUIPA in the Court's jurisprudence and, perhaps more importantly, of attempting even to develop a talismanic incantation at all. Finally, it bears noting that for all the scrutiny the circuits have devoted to the *Sherbert/Yoder* framework in their RLUIPA cases,⁸⁹ neither *Sherbert* nor *Yoder* ever use the phrase "substantial burden."⁹⁰

85. The *Westchester Day School* court attempts to frame its test in reaction to the Fourth Circuit's own standard in *Lovelace v. Lee*, an inmate case that held that for RLUIPA purposes, a substantial burden exists when government puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006) (citing *Thomas v. Review Bd. of Ind. Emp't Sec. Dev.*, 450 U.S. 707, 718 (1981)).

86. *Westchester Day Sch.*, 504 F.3d at 349.

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

88. *Id.* at 1226–27.

89. There is also an important body of cases that interprets "substantial burden" under the Religious Freedom Restoration Act. One notable example is *Mack v. O'Leary*. See 80 F.3d 1175, 1179 (7th Cir. 1996). Early RLUIPA decisions relied on such cases, e.g., *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 761 (7th Cir. 2003), but there is at this point a sufficiently robust RLUIPA corpus such that it is no longer necessary to rely on older RFRA decisions.

90. *Sherbert v. Verner*, 374 U.S. 398, 403 (1963), spoke of a "burden on the free exercise of . . .

B. “ORDINARY, CONTEMPORARY, COMMON MEANING”

A second, predictable approach to interpreting RLUIPA’s substantial burden provision is recourse to plain meaning. RLUIPA offers no definition of substantial burden, so the canons of construction would suggest that courts, as the Eleventh Circuit purportedly did, give “the term its ordinary or natural meaning.”⁹¹ This is no easy task. Although “substantial burden” does in fact have something like a plain meaning,⁹² the history of the term and the way it functions in Supreme Court opinions suggest that the jurisprudential meaning diverges in important ways from the plain meaning. RLUIPA treats the phrase as a term of art, as evidenced by the expectation that the term would mean whatever the Supreme Court has used it to mean.⁹³ Where the statute in question utilizes a phrase as a term of art, courts should attempt to do so as well. And it is the nature of a term of art to convey meaning by reference to a specialized body of knowledge and to depart from ordinary usage.⁹⁴ Interpreting RLUIPA’s substantial burden provision is not analogous to determining what “modify” or “personnel” means in a particular statute.⁹⁵ Terms of art should not fall on what plain meaning dictates or what the dictionary says.⁹⁶ Whatever “substantial burdens” means, it is the operative term in 42 U.S.C. § 2000cc(a). Indeed, Congress titled this section of the statute “Substantial burdens.”⁹⁷

The Ninth Circuit’s interpretation of RLUIPA illustrates the mistake of relying on plain meaning. In *San Jose Christian College v. City of Morgan Hill*, the court looked to “ordinary, contemporary, common meaning” to interpret the substantial

religion,” and *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972), of a government law that “unduly burdens” religion. The origins of the use of “substantial burden” as shorthand for a restriction on free exercise sufficiently great to trigger a compelling interest inquiry is unclear. Credit is perhaps due to Justice Marshall and his opinion in *Hernandez v. Comm’r*. There, Justice Marshall explained: “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.” *Hernandez v. Comm’r*, 490 U.S. 680, 699 (1989). The term, in the context of free exercise, then began to resurface with regularity in the Court’s opinions. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Emp’t Div., Dep’t. of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990); *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378 (1990).

91. *Midrash Sephardi*, 366 F.3d at 1226. Though the Eleventh Circuit claims to use plain meaning as its starting point, it does so by relying heavily on the Supreme Court’s articulations of “substantial burden.” *See id.* at 1226–27.

92. For example, if one says, “That’s a substantial financial burden to me!” we have a sense of what that person means.

93. *See* 146 CONG. REC. S7776 (joint statement of Sens. Hatch and Kennedy).

94. BLACK’S LAW DICTIONARY 1610 (9th ed. 2009) (“A word or phrase having a specific, precise meaning in a given specialty, apart from its general meaning in ordinary contexts.”).

95. *See Milner v. Dep’t of Navy*, 131 S. Ct. 1259 (2011) (discussing the meaning of “personnel” in the context of the Freedom of Information Act, 5 U.S.C. § 552(b)(2)); *MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218 (1994) (discussing the meaning of “modify” in the context of the Communications Act, 47 U.S.C. § 203(b)).

96. *But see Gonzales v. Raich*, 545 U.S. 1, 25–26 (2005) (defining “economics” in the context of the Commerce Clause with a dictionary definition).

97. 42 U.S.C. § 2000cc(a) (2012).

burden provision.⁹⁸ The case concerned a religious school's attempts to construct educational facilities.⁹⁹ The Ninth Circuit panel resolved to ground its interpretation in plain meaning, which led it to turn to the pages of the dictionary.¹⁰⁰ Using *Black's Law Dictionary*, it defined "burden" as "something that is oppressive," and relying on *Merriam-Webster's*, it defined "substantial" as "significantly great."¹⁰¹ From these definitions, it concluded that a substantial burden on religious exercise "must impose a significantly great restriction or onus upon such exercise."¹⁰² The words "substantial" and "burden" each independently may be of ordinary usage, but it does not syllogistically follow that "substantial burden" can be deconstructed so simply.¹⁰³ The Ninth Circuit's formulation is too vague to yield practical substantive meaning.¹⁰⁴

It is equally, if not more, unworkable as *Thomas*' "substantial pressure" test to determine when a land use restriction infringes religious freedom so greatly that it can only be justified by a compelling interest. Under the facts of *San Jose Christian College*, it is unclear how a court could determine whether the city's land development requirements imposed a significantly great onus on the school's religious exercise.¹⁰⁵ Even the Ninth Circuit itself, sitting en banc, later criticized its plain meaning reading of the substantial burden provision: "That 'substantial burden' means 'a significantly great restriction or onus' says nothing about what kind or level of restriction is 'significantly great.'"¹⁰⁶ Such an approach provides little, if any, guidance to courts in determining whether impositions on free exercise are unlawful under RLUIPA.

The problem with the *San Jose Christian College* reading of the statute is not just the lack of guidance it provides but its propensity to serve as an artifice with which judges can support their outcomes in particular cases. It is less a test than a label a court can stamp onto its conclusion. The malleability of the Ninth Circuit's formulation lends it to arbitrary application. For example, the court in *San Jose Christian College* ultimately applied its newly invented "significantly great onus" test and determined that the city's denial of the college's rezoning application did not amount to a substantial burden on religion.¹⁰⁷ Two years later, in 2006, the

98. 360 F.3d 1024, 1034 (9th Cir. 2004) (citing *A-Z Int'l. v. Phillips*, 323 F.3d 1141, 1146 (9th Cir. 2003)).

99. *Id.* at 1027–29.

100. *Id.* at 1034.

101. *Id.*

102. *Id.*

103. Congress used "substantial burden" as a term of art in RLUIPA. Although "substantial burden" may convey some ordinary meaning, this is not how the term is used in the statute. See discussion *supra* text accompanying notes 92–97.

104. It is questionable how much more precise the court could be, but that quandary illustrates the limited usefulness of vague formulations: they are only capable of conveying so much meaning.

105. In most RLUIPA cases, there is no issue whether religious exercise is involved because the statute defines religion exercise as including "[t]he use, building, or conversion of real property for the purpose of religious exercise." 42 U.S.C. § 2000cc-5(7)(B) (2012).

106. *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1078 (9th Cir. 2008) (en banc).

107. *San Jose Christian College*, 360 F.3d at 1035–36.

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Ninth Circuit in another religious land use case applied the same test but found that a city's denial of a conditional use permit for a religious institution *did* present a substantial burden.¹⁰⁸ That two different panels reached different conclusions under the same standard in cases with different facts is not itself revealing. What is relevant, though, is the minimal role the Ninth Circuit's formulation plays in the analysis of the facts in each case. Each court anchors its result in the Ninth Circuit's definition of a substantial burden, but the test can hardly be detected in the background of either court's analysis. The ability of the Ninth Circuit's formulation to buttress conflicting outcomes is not surprising, for vacuous words make for fickle standards.

RLUIPA interlocutors inclined to honor the statute's plain meaning are also likely to emphasize that any reading must emphasize the role of the adjective "substantial" in modifying "burden." That is, to adhere to the canon of statutory construction requiring that each word in a statute should be endowed with meaning, a court must formulate an interpretation that bestows meaning on "substantial" as a modifier. This is a principle the Seventh Circuit has taken to heart in various RLUIPA decisions.¹⁰⁹ For instance, Judge Posner argues: "Any land-use regulation that a church would like not to have to comply with imposes a 'burden' on it, and so the adjective 'substantial' must be taken seriously lest RLUIPA be interpreted to grant churches a blanket immunity from land use regulation."¹¹⁰ In a different Seventh Circuit opinion, Judge Bauer also expressed concern about interpreting RLUIPA in a way that would "render meaningless the word 'substantial.'"¹¹¹ The use of the word "substantial" does seem to imply that Congress foresaw some minor burdens on religious exercise that would not trigger RLUIPA's compelling interest requirement. But the Seventh Circuit, in its desire to avoid vitiating the meaning in "substantial," ignores other interpretive possibilities that focus less on statutory syntax.

Judge Posner's observation that any land use restriction that a church wishes to avoid amounts to a burden is not necessarily correct. His statement assumes what may seem self-evident to him but what other courts view as contestable: that whether a burden on a church exists is determined solely by whether the church feels it is burdened.¹¹² To understand this point, consider the example of a schoolboy struggling with hours of homework each night. The homework prevents him from pursuing his hobbies, and he feels burdened. It is a fair assessment to say the boy is burdened. Now assume that the boy receives only ten minutes of homework each night but that he whines miserably about it. The *effects* of the

108. See *Guru Nanak Sikh Soc'y v. Cnty. of Sutter*, 456 F.3d 978, 992 (9th Cir. 2006).

109. See, e.g., *World Outreach Conference Ctr. v. City of Chi.*, 591 F.3d 531 (7th Cir. 2009); *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752 (7th Cir. 2003).

110. *World Outreach Conference Ctr.*, 591 F.3d at 539.

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

112. Such a view is not necessarily misguided, but neither is it necessarily correct. As discussed below, such a view is, if not misguided, at least problematic in that it aggravates constitutional problems by requiring courts to make religious judgments. See discussion *infra* text accompanying notes 122–26.

homework on the boy may be great and the boy may *feel* burdened, but an objective observer may reasonably conclude that there is no burden and that the problem is with the boy and not with any overbearing teacher. Assume once more that the child receives thirty minutes of homework each night but that he is the only student in his class given any homework. The thirty minutes of work itself may not be a burden, but an objective observer might reasonably conclude that targeting the boy for selective treatment is burdensome. So too with churches. In this light, one can find error in Judge Posner's statement that any land use regulation that a church would like not to have to comply with imposes a burden on it. That is only true if the church's perspective is the only one that matters and if a court only considers the *effects* of a government action on a religious institution.

One can broadly differentiate, then, between two approaches to interpreting and applying RLUIPA's substantial burden provision: one focuses exclusively on the effects of a challenged state regulation on a church, and the other considers effects along with other factors like the manner in which the state regulation is applied to the church. Each offers benefits along with pitfalls.

Courts that emphasize a plain meaning interpretation of RLUIPA also tend to adopt the effects-based view of substantial burden. For example, the Ninth Circuit panel in *Guru Nanak Sikh Society v. County of Sutter* adhered to a plain meaning approach, and its finding that the county had imposed a substantial burden was predicated on "the net *effect*" of the county's denial of a permit on the religious institution's ability to find a suitable parcel of land within the county.¹¹³ The effects-based interpretation also appears to jive with the *Sherbert/Yoder* framework, which—at least at first glance—emphasizes the effects of the state action on individuals' free exercise. The Court's ostensible concern in the *Sherbert* trilogy was not whether government was targeting Seventh-day Adventists and Jehovah's Witnesses,¹¹⁴ but with how Ms. Sherbert and Mr. Thomas experienced state action. Similarly, Chief Justice Burger's sympathies in *Yoder* were with the Yoder family and the "impact of the compulsory-attendance law on . . . the Amish religion."¹¹⁵ An interpretation of substantial burden under RLUIPA, then, which prioritizes how the church *experiences* the state action appears to have the benefit of fidelity to the statute's plain language and of not stretching the ordinary meaning of words.

The problem, though, is that the possibility exists that it is a misreading—or, at least, a myopic reading—of *Sherbert* and a misconstruction of the Court's other free exercise cases to suggest they establish a purely effects-based approach in which the substantial burden determination is made solely by looking at how an individual *experiences* the challenged state action. *Sherbet* states directly that the opinion is limited to situations in which a state arbitrarily applies a law in a way

113. *Guru Nanak Sikh Soc'y v. Cnty. of Sutter*, 456 F.3d 978, 992 (9th Cir. 2006) (emphasis added).

114. For a discussion of the significance, in RLUIPA cases, of government actors targeting religious minorities, see *infra* text accompanying notes 181–94.

115. *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972).

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that stifles religious exercise.¹¹⁶ That is, *Sherbert* perhaps is not exclusively about how individuals *experience* state action but is also in part about how the state *applies* its own laws. Often overlooked in *Sherbert* is the Court's statement: "Our holding is only that South Carolina may not constitutionally *apply* the eligibility provisions so as to constrain a worker to abandon his religious convictions . . ." ¹¹⁷ This focus on state action and behavior is consistent with Justice Douglas' pithy observation that "the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government."¹¹⁸

The Court has also emphatically rejected the notion that a purely effects-based approach is proper in applying the substantial burden standard; the line between unconstitutional infringements on religious freedom and legitimate government conduct "cannot depend on measuring the *effects* of a governmental action on a religious objector's spiritual development."¹¹⁹ This rejection of a purely effect-based approach helps explain the result in *Jimmy Swaggart Ministries v. Board of Equalization*, where the Court found that a generally applicable tax that had the *effect* of decreasing the amount of money the petitioner had to spend on religious activities did not impose a substantial burden on religious exercise.¹²⁰ Even in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, where the Court *did* find a substantial burden on religion, the Court rejected an effects-focused analysis in favor of one emphasizing the "impermissible *object*" of the challenged law.¹²¹

There is, however, a more serious objection to determining the substantiality of the burden through a primary focus on how the church experiences state action: the effects-centered approach is fatally flawed because it requires courts to assess the relative religious importance of church beliefs and practices—inquiries that courts are generally ill-suited to undertake. Professors Lupu and Tuttle underscore this point in an important recent article.¹²² They argue that courts are unable to appraise questions that are uniquely religious in nature.¹²³ Any "jurisprudence that propels judges into evaluation of such questions is a contra-constitutional excursion into appraising theological questions," they claim.¹²⁴ The purely effects-based approach to applying RLUIPA's substantial burden term invites "judgments [that] are not just *about* religion. They *are* *religious* judgments about the meaning or

116. *Sherbert v. Verner*, 374 U.S. 398, 410 (1963).

117. *Id.* (emphasis added).

118. *Id.* at 412 (Douglas, J., concurring).

119. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988) (emphasis added); *see also* discussion *supra* note 73.

120. *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 392 (1990).

121. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524 (1993) (emphasis added). Impermissible targeting of a religious group is a separate basis to strike down a law. *City of Hialeah* empowers courts to strike down laws directed against a particular religion, even if the burden imposed does not rise to the level of substantiality. *See id.*

122. *See* Ira C. Lupu & Robert W. Tuttle, *The Forms and Limits of Religious Accommodation: The Case of RLUIPA*, 32 CARDOZO L. REV. 1907 (2011).

123. *Id.* at 1916–1919.

124. *Id.* at 1916–1917.

relative significance of beliefs or practices within a particular tradition . . . [which] fall outside the secular competence of government officials.”¹²⁵ In the context of RLUIPA, Professors Lupu and Tuttle suggest that courts should interpret the statute in a way that avoids religious judgments. They view RLUIPA’s substantial burden provision as the most “troublesome” in the statute and envision few viable solutions to the problem they address.¹²⁶

The problem is most severe, though, only if one accepts the view that a court should evaluate the substantiality of the burden by looking exclusively at whether the church feels it is burdened. By moving away from the view that it is the church’s perspective alone that matters, one mitigates Professors Lupu and Tuttle’s problem. It is productive, then, to consider effects on the church along with factors associated with the manner in which a state *applies* its regulation to a church. Indeed, this Note shows in the final Part that it is these factors that courts actually focus on in deciding land use cases under RLUIPA.¹²⁷

C. THE SEVENTH CIRCUIT’S EXAMPLE

The above discussion of the two dominant approaches to interpreting RLUIPA’s substantial burden provision does not place much faith in the potential for vague formulations to resolve the most puzzling RLUIPA cases. To see further why such formulations promise much but deliver little, it is instructive to consider the course charted by the Seventh Circuit, which, in contrast to its sister circuits, has had the most opportunity to refine and apply its own “substantial burden” formulation.¹²⁸ The Seventh Circuit was also one of the first federal appellate courts to construe RLUIPA’s substantial burden provision in the land use context, so it did not have the benefit (or detriment) of being able to follow the lead of other circuits.¹²⁹

The Seventh Circuit’s early attempt to interpret RLUIPA is admirable, if not ultimately successful. The court attempted to offer an articulation of “substantial burden” under RLUIPA that was workable and flexible while not vacuous; it tried to ground its formulation in the Supreme Court’s free exercise jurisprudence while reformulating it for the context of land use regulations. In 2003, in one of the earliest cases attempting to define RLUIPA’s substantial burden provision, a group of churches claimed their free exercise was substantially burdened by Chicago’s zoning scheme.¹³⁰ That case, *Civil Liberties for Urban Believers v. City of Chicago*, led the Seventh Circuit to offer this formulation: “a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears

125. *Id.* at 1927.

126. *Id.* at 1936, 1930–31.

127. *See infra* Part III.

128. *See* *World Outreach Conference Ctr. v. City of Chi.*, 591 F.3d 531 (7th Cir. 2009); *Vision Church v. Vill. of Long Grove*, 468 F.3d 975 (7th Cir. 2006); *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895 (7th Cir. 2005); *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752 (7th Cir. 2003).

129. *E.g.*, *Civil Liberties for Urban Believers*, 342 F.3d at 752.

130. *Id.* at 755–59.

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direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable.”¹³¹ The formulation is, on its face, startlingly narrow and would seem to permit a broad host of land use regulations. The Seventh Circuit panel appeared to have had several considerations in mind when developing this standard. Paramount among these was a desire to balance RLUIPA’s “broad definition of religious exercise” with a narrow definition of substantial burden.¹³²

The *Civil Liberties for Urban Believers* panel also appeared concerned with the canon of construction that every word in a statute should be endowed with independent meaning. If Congress intended *every* obstacle to religious exercise to trigger RLUIPA’s compelling interest test, the court reasoned, Congress would not have modified “burden” with the adjective “substantial.” As the court reasoned, “Application of the substantial burden provision to a regulation inhibiting or constraining *any* religious exercise . . . would render meaningless the word ‘substantial,’ because the slightest obstacle to religious exercise . . . could then constitute a burden sufficient to trigger RLUIPA’s [compelling governmental interest requirement].”¹³³ This is a principle that Judge Posner would defend in a later RLUIPA case.¹³⁴

A final motivating principle for the Seventh Circuit in *Civil Liberties for Urban Believers* was its interest in devising a formulation that encompassed the market factors unique to the disposal of real property within a municipality. The court reasoned that conditions simply inherent in land use—such as the cost of land and the permit-approval process—should not give rise to a substantial burden on religion.¹³⁵ In the court’s view, “[t]he harsh reality of the marketplace sometimes dictates that certain facilities are not available to those who desire them.”¹³⁶ *Civil Liberties* involved a group of churches attempting to acquire property within Chicago’s city limits.¹³⁷ The situation is a bit different in historic preservation cases, where a church may wish not to acquire property in a city but to alter its existing structure. Still, what is relevant was the Seventh Circuit’s interest in interpreting the substantial burden provision in a way that was mindful of the specificities of the land use context. The court suggested that a church cannot show a substantial burden when it encounters the same land use difficulties it would face as a nonreligious organization.¹³⁸ The panel emphasized that a land use regulation does not impose a substantial burden simply because it requires a church to spend more money than it would in the absence of the regulation.¹³⁹

Although the *Civil Liberties for Urban Believers* formulation is ultimately

131. *Id.* at 761.

132. *Id.*

133. *Id.*

134. *See* World Outreach Conference Ctr. v. City of Chi., 591 F.3d 531, 539 (7th Cir. 2009); *see also supra* text accompanying notes 109–11.

135. *Civil Liberties for Urban Believers*, 342 F.2d at 761.

136. *Id.* (quoting Love Church v. City of Evanston, 896 F.2d 1082, 1086 (7th Cir. 1990)).

137. *Id.* at 755–59.

138. *Id.* at 761.

139. *Id.* at 761–62.

problematic, this early Seventh Circuit formulation is admirable because it was seemingly developed thoughtfully and in a less haphazard manner than that shown by other federal courts of appeals. But even the Seventh Circuit's "effectively impracticable" standard has proven to be of limited usefulness as the court has encountered diverse land use cases under RLUIPA. The land use context in *Civil Liberties* involved a challenge to Chicago's zoning scheme.¹⁴⁰ Professors Lupu and Tuttle find this type of case untroublesome because they believe courts can decide such cases without making religious judgments.¹⁴¹ To decide these cases, courts can "examine the relevant zoning map and real estate market to determine whether the claimant had other sites reasonably available and approved for its desired use."¹⁴² For the most part, that is how the *Civil Liberties* panel decided the case and concluded that the claimants could not show a substantial burden.¹⁴³

Two years later, the Seventh Circuit in a similar case tried to retreat from—without overruling—its *Civil Liberties for Urban Believers* formulation.¹⁴⁴ *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin* also involved a church challenging a city's zoning ordinance, but the case presented a sympathetic plaintiff, and the panel labored to distinguish the zoning scheme from that in *Civil Liberties*.¹⁴⁵ No longer did establishing a substantial burden require a church "to show that there was no other parcel of land on which it could build its church."¹⁴⁶ In *Greek Orthodox Church*, the court concluded that a substantial burden existed.¹⁴⁷ It is not itself remarkable that the two cases produced different results. But the two cases do not read like they were written by the same court. Further, Judge Evans joined the panel decision in each case, so the different outcomes cannot simply be explained by different benches. As discussed below in Part III.A, several factors can help reconcile the cases, but what is noteworthy for present purposes is the unsatisfactory role that the Seventh Circuit's formulation plays in *Greek Orthodox Church*.¹⁴⁸ This suggests that the *Civil Liberties* formulation may have been a standard good for one day only—a problem found in other circuits as well. *Greek Orthodox Church* offers an example of how successfully to decide a complicated RLUIPA case, but to paraphrase Judge Posner, one must follow not what the courts of appeals say they are doing but what they actually do.¹⁴⁹

The "effectively impracticable" standard rears its head in two additional

140. *Id.* at 755–59.

141. Lupu & Tuttle, *supra* note 122, at 1928–29.

142. *Id.* at 1929.

143. *Civil Liberties for Urban Believers*, 342 F.3d at 762.

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

145. *Id.* at 899–900.

146. *Id.* at 899.

147. *Id.* at 901.

148. *See infra* text accompanying notes 170–76.

149. *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 769 (7th Cir. 2003) (Posner, J., dissenting) ("We should follow what the Supreme Court does and not just what it says it is doing.")

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significant RLUIPA decisions. The claimant in *Vision Church v. Village of Long Grove* was a church contesting a municipality's annexation of its vacant property, previously unincorporated land.¹⁵⁰ Though the court determined that the church could not establish a substantial burden, what is significant is the minimal role that the Seventh Circuit's formulation plays in the actual analysis.¹⁵¹ The court recites its formulation but then seemingly does not know how to apply it in a case with different facts than those found in *Civil Liberties*.¹⁵² *Vision Church* illustrates the limited usefulness of the circuit's formulation.

Finally, there is the Seventh Circuit's 2009 decision in *World Outreach Conference Center v. City of Chicago*, where Judge Posner did not even pay lip service to the Circuit's substantial burden formulation—or those used by any other circuit. The court consolidated two RLUIPA cases, deciding one in favor of the religious organization and one in favor of the city.¹⁵³ For present purposes, what is relevant is that Judge Posner did not outright reject the vague formulations; he simply ignored them. The case is one of the most recent to assess a substantial burden claim under RLUIPA,¹⁵⁴ and so it is too soon to tell whether the case will signal a shift away from courts' reliance on vague formulations.

D. COMPELLING GOVERNMENT INTEREST

There is another piece of the puzzle not yet explored. It is worth keeping in mind that the requisite showing that a substantial burden exists does not in itself invalidate a land use regulation. After a religious organization establishes that a substantial burden hinders its free exercise, the burden shifts to the state to advance a compelling interest to justify the infringement—what Professors Lupu and Tuttle see as “a secular inquiry that avoids any need to consider religious questions.”¹⁵⁵ Of the roughly dozen major federal appellate cases interpreting the substantial burden provision in the land use context, none feature the compelling state interest requirement prominently.¹⁵⁶ This is surprising, for in cases where the court finds a

150. *Vision Church v. Vill. of Long Grove*, 468 F.3d 975 (7th Cir. 2006).

151. *Id.* at 997–1000.

152. *See id.* at 997.

153. *See infra* text accompanying notes 177–81.

154. Along with *World Outreach Conference Center*, the other most recent cases to apply RLUIPA's substantial provision in a significant way in the land use context are *Fortress Bible Church v. Feiner*, 694 F.3d 208 (2d Cir. 2012), and *Int'l Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059 (9th Cir. 2011).

155. Lupu & Tuttle, *supra* note 122, at 1930.

156. In cases in which courts answer the threshold substantial burden question in the negative, courts logically do not reach the compelling state interest inquiry. *E.g.*, *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1228 (11th Cir. 2004) (“Because we cannot say that the [city] imposes a substantial burden on religious exercise, . . . [w]e need not reach the question of whether Surfside can justify the burden created by articulating a compelling government interest . . .”). But even in cases where courts do find a substantial burden, they still tend to avoid the difficult compelling interest analysis. *See, e.g.*, *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 900–01 (7th Cir. 2005).

substantial burden, RLUIPA then requires courts to apply a strict scrutiny standard in evaluating state interests. *Westchester Day School* is unusual in that it devotes a full three paragraphs even to acknowledging the role of the compelling interest requirement.¹⁵⁷

One explanation for why the compelling state interest test does not play a more prominent role in RLUIPA cases may be that judges are loath, once they conclude a substantial burden exists, to find that a government interest is compelling enough to justify the harm on religious freedom. The kinds of state interests justifying land use regulations are likely to relate to things like traffic, open space and noise—not exactly concerns that make it easy for a judge to explain why religious infringement is justified. It seems the rare case where a municipality can legitimately claim that its land use regulation is justified by an interest in something like national security or public health. In the case of historic and architectural preservation, the interest that is at stake is almost certainly a purely aesthetic one—a tough sell as a “compelling” interest.

A second reason courts may downplay the strict scrutiny portion of RLUIPA is that the compelling interest requirement makes a difficult determination even more difficult. Just as there is no consensus about what constitutes a substantial burden, there is far from any accord about what makes certain interests compelling enough to survive strict scrutiny in religious freedom cases. The Supreme Court, for one, has never clarified precisely what makes certain government interests compelling. It has occasionally offered general guidance, such as when it characterized compelling interests as “those interests of the highest order and those not otherwise served.”¹⁵⁸ This provides little direction to courts in RLUIPA cases tasked with evaluating whether a government interest is weighty enough to justify a state action.¹⁵⁹ Justice Blackmun sagely noted that he could never fully “appreciate just what a ‘compelling state interest’ is.”¹⁶⁰ Perhaps cognizant of Professor Gunther’s quip that strict scrutiny was “‘strict’ in theory and fatal in fact,”¹⁶¹ Justice Blackmun recognized that if “compelling governmental interest” means “‘incapable of being overcome,’ upon any balancing process, then, of course, the test merely announces an inevitable result, and the test is no test at all.”¹⁶²

It may be for these reasons that RLUIPA cases seem to turn almost entirely on

157. See *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 353 (2d Cir. 2007).

158. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

159. Professor Winkler, in a fascinating empirical study of strict scrutiny in the federal courts, demonstrates that strict scrutiny has never been as “strict” in religion cases as it is in race and free speech cases. He finds that religious liberty cases have “the highest survival rate of any area of law in which strict scrutiny applies: 59 percent, more than double the mean of the other doctrinal categories.” Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 857–58 (2006).

160. *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 188 (1979) (Blackmun, J., concurring).

161. Gerald Gunther, *The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

162. *Ill. State Bd. of Elections*, 440 U.S. at 188 (Blackmun, J., concurring).

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the substantial burden determination. Hence, this Note devotes its attention to the substantial burden term, which, at least for the foreseeable future, does the heavy lifting in RLUIPA cases.

III.

The various opinions of the courts of appeals offer a pastiche of RLUIPA interpretative principles from which it is quite difficult to glean a coherent picture. Courts, going forward, lack a stable framework to apply in historic preservation and other land use cases. One approach—the dominant one and arguably a legitimate one—holds that “substantial burden” is a vague phrase and that churches can satisfy the standard by showing something more than a minimal burden. This Note suggests that a different approach altogether is appropriate and would be instructive for courts to adopt. If the roughly dozen regnant circuit opinions interpreting RLUIPA’s substantial burden provision in land use cases demonstrate anything, it is that no single interpretation is ideal. Interpretative problems arise when courts attempt to derive some single talismanic formulation.

This Note has attempted to illuminate problems with some of the most common approaches courts have taken—particularly reliance on Supreme Court jurisprudence and recourse to ordinary meaning. Even within the land use context, the gamut of factual scenarios is too diverse to rely on any single bright-line “definition” of substantial burden. It is unwise that the circuits (namely, the Second, Fourth, Fifth, Sixth, Ninth and Eleventh) have attempted to do so. The use—and misuse—of different formulations has engendered poor RLUIPA decisions. Even when results may be correct, reasoning may be tortured, as courts try to conform their reasoning to their various arbitrary formulations. Something more is needed in the way courts treat RLUIPA’s “substantial burden” language.

In interpreting RLUIPA, courts ought to do something other than engage in a game of legal Mad Libs. The circuits’ RLUIPA decisions provide sufficient data points through which it is possible to construct a best-fit line that can be used to gauge how courts should decide RLUIPA cases in the future. That is, this Note attempts not to articulate how courts *say* they decide land use cases but to elucidate how they *actually* decide the cases. The decisions often turn on a variety of factors which courts do not address specifically but which can be determinative. Thus, this Part offers a multifactor approach that courts can employ to resolve RLUIPA disputes in lieu of relying on any one formulation. This approach has the potential to serve as an alternative navigational tool judges can use to wade through RLUIPA’s interpretative thicket. At the very least, it can provide judges with a complimentary approach that casts new light on how they view the vague substantial burden formulations.

Finally, a few words are in order regarding the use of a multifactor paradigm. Any multifactor or totality-of-the-circumstances approach is necessarily malleable, and this Note has questioned the enduring feasibility of vague formulations, in part, because they fail to provide courts with guidance. It would not do to replace one

uninstructive approach with an equally obscure one. Yet there is an important distinction between malleability and meaninglessness. It is not simply the case that the vague formulations are malleable; rather, the problem is that they are void of meaning. Courts, with no viable alternative, cite them but then proceed to decide RLUIPA cases in a seemingly haphazard way, leaving the vague formulations in the dust. Any alternative approach, even a malleable multifactor one, would seem to be an improvement. Accordingly, the multifactor paradigm developed in Part III attempts to make sense of the seeming haphazardness. Divergent cases that appear difficult to reconcile through the lens of the vague formulations may, in fact, be rationally explained when viewed through a different prism.

A. FOUR FACTORS

One factor that courts might look to in evaluating substantiality is whether the municipality's land use decision was fair and impartial or whether it was unduly influenced by special interests. A process that is decisively skewed toward special interests may pose a procedural due process violation, but often the facts are not overt enough to establish this. The facts may instead be hazy, such that one can only glean the taint of impropriety. Certain impropriety may also not rise to the level of an outright due process violation. Consider the *Westchester Day School* case, discussed above. Recall that the case involved a Jewish day school's efforts to expand its facilities.¹⁶³ The case is best known for the Second Circuit's development and elucidation of its substantial burden formulation.¹⁶⁴ It is also noteworthy for the court's reaction to what it seemed to perceive as nimbyism.

In October 2001, Westchester Day School applied to the Mamaroneck zoning board for a permit to undergo a \$12 million expansion that would create a dozen new classrooms and substantial multipurpose educational space.¹⁶⁵ In February 2002, the five-member zoning board unanimously gave the project a green light.¹⁶⁶ The court notes that opposition then formed from a "small but vocal group" in the community, and in August, the zoning board reversed course and rescinded its approval.¹⁶⁷ The court did not offer direct evidence linking the two, and no due process issue was before the court. Nonetheless, a current of suspicion of the zoning board runs through the court's opinion. The court noted that the zoning board's "stated reasons" for blocking the school were "conceived after the [board] closed its hearing."¹⁶⁸ The court also pointed out that the district court judge believed the board denied the school's permit because it "gave undue deference to

163. *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 344–46 (2d Cir. 2007).

164. In a recent 2012 opinion, the Second Circuit further developed and refined its interpretation of RLUIPA's substantial burden provision. *See Fortress Bible Church v. Feiner*, 694 F.3d 208, 218–220 (2d Cir. 2012).

165. *Id.* at 345.

166. *Id.*

167. *Id.* at 346.

168. *Id.*

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the public opposition of the small but influential group of neighbors.”¹⁶⁹ The court concluded that a substantial burden existed, but its opinion seemed to turn less on its newly constructed formulation than on its belief that the zoning board acted with “an arbitrary blindness to the facts.”¹⁷⁰

Other cases, as well, seem to turn on intangible factors in which cities act with bad faith. For example, in *Greek Orthodox Church*, the court seemed to have little patience for what it viewed as the city’s masked hostility to religion¹⁷¹—a second significant relevant factor. The Greek Orthodox congregation wished to rezone a portion of its vacant property so that it could construct a church building.¹⁷² Despite abiding by all regulations, it was repeatedly frustrated by the municipal bureaucracy, which committed “repeated legal errors.”¹⁷³ It was “obvious” to the court that the town “unless deeply confused about the law, was playing a delaying game.”¹⁷⁴ This led the court to state, “If a land-use decision, in this case the denial of a zoning variance, imposes a substantial burden on religious exercise . . . and the decision maker cannot justify it, the inference arises that hostility to religion . . . influenced the decision.”¹⁷⁵

Similar to the impropriety lurking in the actions of the zoning board in *Westchester Day School*, the town’s possible hostility to religion in *Greek Orthodox Church* is not overt enough to present a constitutional violation itself. Outright discrimination against religious organizations would directly violate the Free Exercise Clause.¹⁷⁶ Discrimination may occur, however, without it being possible to establish overt targeting.

The same factor—subtle hostility to religion—also helps explain the outcome in *World Outreach Conference Center*, where the court found that the City of Chicago interfered with a religious group’s mission in a way that would violate RLUIPA.¹⁷⁷ There, the claimant wished to operate a religious YMCA-like community center, but the city erected numerous bureaucratic hurdles to prevent the center from operating.¹⁷⁸ It even filed a “frivolous” lawsuit against the center.¹⁷⁹ This is a case where evaluating the substantiality of the religious group’s burden using an abstract

169. *Id.*

170. *Id.* at 352.

171. It is not clear whether this masked hostility was directed at religion generally or specifically at the Greek Orthodox. There is reason to suspect the latter, *see infra* text accompanying notes 182–84, but one reaches the same conclusion either way. The factors brought to light in Part III are not mandatory criteria that must be met for a church to show substantiality, but rather are lenses that courts can apply to different cases to understand what is occurring.

172. *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 898 (7th Cir. 2005).

173. *Id.* at 899.

174. *Id.*

175. *Id.* at 900.

176. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (“[A] law targeting religious beliefs . . . is never permissible.”).

177. *World Outreach Conference Ctr. v. City of Chi.*, 591 F.3d 531, 537–38 (7th Cir. 2009).

178. *Id.* at 536–37.

179. *Id.* at 536.

formulation would be neither simple nor productive. The totality of the circumstances, though, made it a simple case for Judge Posner, who astutely focused on the overall “picture painted by the complaint.”¹⁸⁰ From this overall picture, Judge Posner could glean “malicious prosecution of a religious organization by City officials.”¹⁸¹ This helps explain the outcome in the case in a more satisfactory way than any vague formulation could.

A third factor that is significant in RLUIPA cases is whether there are reasons to think a city is treating a religious group differently based on the identity of the religion. Again, any overt targeting would violate the Free Exercise Clause, but churches may be unable to establish as much. Issues about the identity of the religion have long played a role in free exercise jurisprudence. In *Yoder*, for example, Chief Justice Burger’s adoration of the pastoral life of the Amish led Justice Douglas to wonder “how the Catholics, Episcopalians, the Baptists, Jehovah’s Witnesses, the Unitarians, and my own Presbyterians would make out if subjected” to the Court’s reasoning.¹⁸² In *Greek Orthodox Church*, Judge Posner noted that the congregation’s property was bordered by a plot of land that was owned by a different Protestant denomination and that the town had consented to rezone that land to allow a church to be built—exactly what the Greek Orthodox claimant sought to do.¹⁸³ Judge Posner was particularly concerned about the “the vulnerability of religious institutions—especially those not affiliated with the mainstream Protestant sects or the Roman Catholic Church—to subtle forms of discrimination”¹⁸⁴ Courts in the future should follow suit and be particularly attuned to subtle forms of religious discrimination when they make substantial burden determinations.

Subtle hostility to a less mainstream religious group can also help explain the outcome in *Guru Nanak Sikh Society*, the Ninth Circuit case where the court found that a county’s repeated denials of a construction permit presented a substantial burden for a small Sikh temple.¹⁸⁵ In 2001, the tiny congregation applied for a permit to construct a temple on its two-acre parcel of land.¹⁸⁶ At a public meeting, the planning commission voted to deny the permit, “based on citizens’ voiced fears that the resulting noise and traffic would interfere with the existing neighborhood.”¹⁸⁷ Rather than contest the decision, Guru Nanak acquired a new thirty-acre lot in a rural, unincorporated area of the country.¹⁸⁸ It again applied for

180. *Id.* at 537.

181. *Id.*

182. *Wisconsin v. Yoder*, 406 U.S. 205, 246 (1972) (Douglas, J., dissenting in part). What is telling is that Justice Douglas in *Yoder* was thinking about the role that the Amish religion in particular—opposed to religion in general—played in the Court’s analysis.

183. *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 898 (7th Cir. 2005).

184. *Id.* at 900.

185. *Guru Nanak Sikh Soc’y v. Cnty. of Sutter*, 456 F.3d 978 (9th Cir. 2006).

186. *Id.* at 981–82.

187. *Id.* at 982.

188. *Id.*

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a permit to build a small seventy-five-person temple on its large parcel, and it agreed to all the county's conditions.¹⁸⁹ At the public meeting, neighbors again "spoke against the proposed temple, complaining mainly that the temple would increase traffic and noise, interfere with the agricultural use of their land, and lower property values."¹⁹⁰ The commission voted to approve the permit by a one-person margin.¹⁹¹ The neighbors appealed the decision to the county board of supervisors, which unanimously reversed the commission's decision and denied the temple its permit.¹⁹² It is with this background that the court decided the case.

The county's faintly veiled hostility to the Sikh temple more satisfactorily explains why the court found that a substantial burden existed than does the application of the Ninth Circuit's vague formulation to the case. To be sure, the court in *Guru Nanak* did purport to "[a]pply[] *San Jose Christian College's* definition of a substantial burden"—a significantly great restriction or onus upon religious exercise—"to the particular facts" of the case, but that does not get one very far.¹⁹³ Rather, the actual factor that led the court to decide the way it did was the county's impudent treatment of the Sikh temple. For example, the court noted with concern that "Guru Nanak readily agreed to every mitigation measure suggested . . . but the County, without explanation, found such cooperation insufficient."¹⁹⁴ The court never outright accused the county of discriminating against Sikhs, but it had no problem making out the overall picture.

This case also highlights a fourth factor that leads courts to find substantiality: the relative size of the religious organization. Courts seem to be sensitive to the hardships faced by small churches subjected to individualized assessments by municipal zoning bodies, which may operate with standardless discretion and few, if any, procedural safeguards. Recently, Judge Posner best captured this idea in *World Outreach Conference Center* when he explained that "burden is relative to the weakness of the burdened."¹⁹⁵ In that case, Judge Posner seemed taken by the fact that the claimant, a small "Christian sect" that ministered to the urban poor, confronted what he paints as a large, incompetent, and corrupt bureaucratic apparatus.¹⁹⁶ The thread runs throughout the opinion and helps explain the court's strong ruling against the city.

This cognizance of the relative size of the religious organization emerges in other key RLUIPA decisions as well. In *Westchester Day School*, a small school confronted what the Second Circuit depicted as a zoning board prone to "miscalculation" and to making decisions "without a basis in fact," "unsupported by [the board's] own experts."¹⁹⁷ The court sketches a bumbling bureaucracy

189. *Id.* at 983.

190. *Id.*

191. *Id.*

192. *Id.* at 983–84.

193. *Id.* at 989.

194. *Id.*

195. *World Outreach Conference Ctr. v. City of Chi.*, 591 F.3d 531, 537 (7th Cir. 2009).

196. *Id.* at 535–37.

197. *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 351 (2d Cir. 2007).

interfering with a school's expansion in arbitrary ways. Again, in *Greek Orthodox Church*, the Seventh Circuit found substantiality because it seemed certain that the church, were it to continue to file additional permit applications with the city, would only encounter "delay, uncertainty, and expense."¹⁹⁸ In *Trinity Evangelical Lutheran Church v. City of Peoria*, the companion case to *World Outreach Conference Center*, Judge Posner was far less sympathetic to the claimant, "a substantial religious organization," when it sought what he saw as an exemption to a historic preservation designation.¹⁹⁹ Judge Posner, in that case, articulated a principle that judges would be wise to follow in future cases: "whether a given burden is substantial depends on its magnitude in relation to the needs and resources of the religious organization in question."²⁰⁰

B. THIRD CHURCH

To see further how these factors might operate in practice, consider the case of the Third Church of Christ, Scientist discussed in the Introduction.²⁰¹ From the church's perspective, Washington, D.C.'s landmark designation burdened its religious exercise in four significant ways. First, it forced the church to "pray in and pay for" a structure that the small congregation found unwelcoming and unreflective of its spiritual mission.²⁰² The building features a four-hundred-person auditorium that, according to the church, creates "a dark, broken-up and unfriendly atmosphere."²⁰³ Second, apart from the building's impact on the church's subjective religious experience, the structure itself is deteriorating.²⁰⁴ According to the church, water permeates the concrete walls, which has created multiple construction problems, including poor insulation, an inability to control the interior temperature, a damp smell and large-scale structural weakening.²⁰⁵ The landmark designation forced Third Church to bear the brunt of these costs. For instance, the church has to operate its central heating and cooling system full-time in order to keep the building's interior bearable for visitors.²⁰⁶ Additionally, changing even one of the auditorium ceiling's electric light bulbs requires scaffolding installation at a cost of \$8,000.²⁰⁷ As the church explained, it wishes to use its funds to further its religious mission and "not for the maintenance of a Brutalist building."²⁰⁸ Third, the designation prevents the church from razing its building and constructing

198. *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 901 (7th Cir. 2005).

199. 591 F.3d 531, 538, 539 (7th Cir. 2009).

200. *Id.* at 539.

201. *See supra* text accompanying notes 1–18.

202. Complaint, *supra* note 2, ¶¶ 21, 24, 46.

203. *Id.* ¶ 23.

204. *Id.* ¶ 25.

205. *Id.*

206. *Id.* ¶ 26.

207. *Id.* ¶ 27; Benjamin Forgey, *Where Historic and Modern Meet: The Debate over Preservation of the Christian Science Complex*, WASH. POST, Jan. 11, 1992, at G1.

208. Complaint, *supra* note 2, ¶ 28.

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a more suitable building on the property.²⁰⁹ And fourth, the designation creates an unreasonable economic hardship for the church, which it predicted would likely lead to its demise by 2017.²¹⁰ The landmark designation threatened the church's existence both financially and spiritually.

Had Third Church not settled with the preservations and continued to litigate in court, it would have been unlikely, however, to succeed on a Free Exercise Clause claim under *City of Hialeah* because there is little evidence that Washington, D.C. overtly discriminated against it in landmarking the church building. The church's claim that the city violated RLUIPA would stand a greater chance of success, but a court would have to determine whether the city's actions imposed a substantial burden on the church's religious exercise. The D.C. Circuit has not adopted an interpretation of the substantial burden provision, but supposing it chose to apply the Seventh Circuit's formulation, the court would ask whether the landmark designation "bears direct, primary, and fundamental responsibility for rendering [the church's] religious exercise . . . effectively impracticable."²¹¹ This inquiry focuses the court's attention on how Third Church experiences the landmark designation in the context of its religious exercise. The city might argue that the church had been functioning adequately for decades and that the designation had no discernible impact on the church's religious exercise. Who, however, is ultimately to say whether the landmark status rendered Third Church's free exercise "effectively impracticable"? The court, even if it knew how to answer such a question, would be deciding a theological matter—one that falls "outside the secular competence" of government officials.²¹²

The multifactor approach outlined above, though, offers a structured way to view the facts of the case and to derive a logical resolution consistent with precedent. First, the court might consider the role of any special interests in the city's decision to preserve the church's architecture. The initial application to the city's Historic Preservation Review Board to landmark Third Church was filed by a nonprofit land use organization called the Committee of 100 on the Federal City.²¹³ The private group lodged its landmark application against the church's will.²¹⁴ Even more disconcerting is the fact that the chairman of the Review Board, who presided over the hearing on whether to landmark the church building, was a member, former trustee and former chair of the Committee of 100, the organization pressing for the designation.²¹⁵ The Review Board chairman did not recuse himself or disclose his affiliation with the Committee of 100.²¹⁶ Moreover, he declined to

209. *Id.* ¶ 58.

210. *In re* Third Church of Christ, Scientist, Washington, D.C. Application for Demolition of Church Building at 900 16th Street, N.W., HPA No. 08-141, at 12 (D.C. Office of Planning, Historic Preservation Office May 12, 2009).

211. *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 761 (7th Cir. 2003).

212. *Lupu & Tuttle*, *supra* note 122, at 1927.

213. Complaint, *supra* note 2, ¶ 30.

214. *Id.*

215. *Id.*

216. *Id.* ¶ 41.

consider the church's religious interests²¹⁷ and informed the church that it could "challenge the landmarking in any court of your choice."²¹⁸ Despite the church's local neighborhood commission strongly opposing the landmark designation, the Review Board rejected each of the commission's stated concerns.²¹⁹ Seen in light of these facts, the "picture painted by the complaint" begins to come into focus.²²⁰

There is also evidence that the Review Board directed particular attention at Third Church because of its status as a religious organization. That is, the city may not have been as interested in preserving a Brutalist building as it was interested in preserving a Brutalist church. The Board viewed the church "within the context of local Modernist churches" and described it as "one of [Washington's] most important Modernist churches."²²¹ The Board also incorporated into its findings an architectural review that described Third Church as a "notable contribution to the city's famous 'street of churches,'" which suggests that the city's interest in preserving Third Church had to do with more than just Brutalist preservation.²²² Especially revealing is the Board's faint acknowledgement—couched in a footnote—that the city contains other Brutalist buildings, including "a firehouse, a couple of schools, public housing, [and] the FBI building," but it deems these "largely public buildings" less important and "less successful" than the church edifice.²²³ One *Washington Post* columnist easily recounted a number of other prominent Brutalist buildings in the city: "[Washington Metropolitan Area Transit Authority] headquarters, the FBI building, the University of the District of Columbia, and the Forrestal and [the Department of Housing and Urban Development] government office buildings."²²⁴ This context indicates that the Review Board may have been more interested in Third Church qua Brutalist church than qua Brutalist building.

Finally, a court trying to determine whether the city imposed a substantial burden on the church might consider the relative size of the religious organization. Despite the large size of the church's auditorium, the small Christian Scientist congregation tops out at around sixty Sunday attendees.²²⁵ As of 2009, the church

217. *Id.* ¶ 55; Marc Fisher, *State vs. Church: March of the Preservation Police*, WASH. POST RAW FISHER BLOG (Dec. 7, 2007, 6:07 AM), http://blog.washingtonpost.com/rawfisher/2007/12/state_vs_church_march_of_the_p.html ("[W]hen Advisory Neighborhood Commissioner Mike Silverstein of the Dupont Circle commission tried to bring up [the] topic [of religious liberty] at yesterday's preservation board hearing, board chairman Tersh Boasberg interrupted, saying, 'We're not here to discuss the First Amendment. We're here to discuss whether the church meets the criteria' set out in the city's landmarking law.").

218. Complaint, *supra* note 2, ¶ 55.

219. See HPRB Designation, *supra* note 9, at 11–14 (discussing at length a Nov. 25, 2007 letter from Advisory Neighborhood Commission 2B).

220. *World Outreach Conference Ctr. v. City of Chi.*, 591 F.3d 531, 537 (7th Cir. 2009).

221. See HPRB Designation, *supra* note 9, at 1.

222. *Id.* at 6.

223. *Id.* at 10 n.11.

224. Fisher, *supra* note 217.

225. Complaint, *supra* note 2, ¶ 23.

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had received no bequests in recent years, though its expenses were mounting.²²⁶ In 2007, the church's income was \$225,000 and its expenses were \$269,000, including \$126,000 in building maintenance alone.²²⁷ In the ten-year period prior to 2007, the church operated with a deficit every year.²²⁸ Further, the church has no assets to secure a loan other than its deteriorating building.²²⁹ The church's resources are minimal, and if substantiality "depends on its magnitude in relation to the needs and resources of the religious organization in question,"²³⁰ Third Church would have a strong likelihood of success in demonstrating that the city imposed a substantial burden on its religious exercise.

IV. CONCLUSION

There is nothing groundbreaking about the four factors discussed above, yet courts shy away from identifying the factors as such. This list of factors is far from exhaustive, but it provides an idea of how courts can tackle difficult RLUIPA cases in the future. One advantage of relying on these factors in assessing substantiality is that, as seen above, courts already in fact do so—albeit in backhanded ways. Courts rely on the factors without being forthright about it and continue to place their faith in vague formulations, which play little role in their actual analyses. One reason for the enduring popularity of the vague formulations might be that they serve as an anchor for the rule of law. Candidly recognizing the role that the multifactor approach plays in deciding RLUIPA cases perhaps comes too close to an acknowledgment that courts simply look at whether the municipal actors manifested bad faith. As the Second Circuit stated, "The same reasoning that precludes a religious organization from demonstrating [a] substantial burden in the neutral application of legitimate land use restrictions may, in fact, support a substantial burden claim where land use restrictions are imposed on the religious institution arbitrarily, capriciously, or unlawfully."²³¹ That is, a church experiencing a detriment may be unable to show a substantial burden when a city applies a land use regulation in a neutral and legitimate way, but it might succeed on its substantiality claim, even with the same detriment, if the city is acting arbitrarily.²³² To return to the point made earlier in this Note, this kind of thinking

226. *In re* Third Church of Christ, Scientist, Washington, D.C. Application for Demolition of Church Building at 900 16th Street, N.W., HPA No. 08-141, at 12 (D.C. Office of Planning, Historic Preservation Office May 12, 2009).

227. *Id.*

228. *Id.*

229. *Id.* at 13.

230. *World Outreach Conference Ctr. v. City of Chi.*, 591 F.3d 531, 539 (7th Cir. 2009).

231. *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 350 (2d Cir. 2007).

232. The Second Circuit's recent opinion in *Fortress Bible Church v. Feiner* underscores this point and offers one of the most thoughtful analyses of a RLUIPA claim to date. There, the court acknowledged that when a "town's actions are arbitrary, capricious, unlawful, or taken in bad faith, a substantial burden may be imposed because it appears that the applicant may have been discriminated against on the basis of its status as a religious institution." *Fortress Bible Church v. Feiner*, 694 F.3d 208, 219 (2d Cir. 2012). It is too early to say whether Judge Walker's thoughtful opinion signals a move

focuses the court's attention on the way a city *applies* its laws and not purely on how a church *experiences* state action.²³³

Another reason courts may be hesitant to embrace the multifactor thinking—for it is more a way of viewing the problem than an actual test—is that it also comes close to reducing RLUIPA's substantial burden provision to a tool for policing religious targeting and discrimination. This would render the provision a redundancy, since it is foremost the Free Exercise Clause itself which protects against religious discrimination and targeting. Any religious targeting would constitute a violation of the actual First Amendment. RLUIPA's substantial burden provision seems more relevant for situations when targeting *cannot* be proven. Yet, as the cases discussed in this Note highlight, there is a vast gray area of situations where religious discrimination cannot be overtly proven but where it nonetheless occurs. In these cases there may be insufficient evidence for a church to show it was overtly targeted in a way that would establish a First Amendment violation under *City of Hialeah*. RLUIPA, then, is necessary because of “the vulnerability of religious institutions . . . to *subtle* forms of discrimination.”²³⁴ Judge's Posner's characterization is revealing: “[T]he ‘substantial burden’ provision backstops the explicit prohibition of religious discrimination . . . much as the disparate-impact theory of employment discrimination backstops the prohibition of intentional discrimination.”²³⁵ Though the multifactor approach illustrates how RLUIPA can serve as an engine to limit religious discrimination, the substantial burden provision does work differently from and complementarily to the Free Exercise Clause.

The multifactor approach provides an analytic framework with which courts can decide actual RLUIPA cases. Evaluating the substantiality of the detriment felt by a church—as well as whether a state's proffered interests are sufficiently compelling—will remain “difficult determinations.”²³⁶ But until the Supreme Court offers a solution, courts will require some means to trudge through the morass and make these difficult determinations. The reliance on vague formulations has proven insufficient. Going forward, courts can apply the multifactor perspective in historic preservation and other land-use cases. It is not an ideal solution, but it does offer an alternative way to interpret RLUIPA's “substantial burden” language.

away from courts' reliance on vague formulations. Other circuits would do well to note the nuanced analysis in *Fortress Bible*.

233. See *supra* text accompanying notes 116–21.

234. *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 900 (7th Cir. 2005) (emphasis added).

235. *Id.*

236. 1 GREENAWALT, *supra* note 21, at 201.