

5-1-2012

The Role of Economics in the Discourse on RLUIPA and the Nondiscrimination in Religious Land Use

Tokufumi Noda

Recommended Citation

Tokufumi Noda, *The Role of Economics in the Discourse on RLUIPA and the Nondiscrimination in Religious Land Use*, 53 B.C.L. Rev. 1089 (2012), <http://lawdigitalcommons.bc.edu/bclr/vol53/iss3/6>

This Notes is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law Review by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact emick@bc.edu.

THE ROLE OF ECONOMICS IN THE DISCOURSE ON RLUIPA AND NONDISCRIMINATION IN RELIGIOUS LAND USE

Abstract: In the context of land use, the Religious Land Use and Institutionalized Persons Act (RLUIPA) allows religious institutions to challenge land-use decisions that unfairly discriminate against religious land use. Of the various mechanisms in the statute that provide relief, the substantial burden and equal terms provisions have created confusion in the courts and controversy among scholars. Oftentimes, courts and scholars have framed the discussion of RLUIPA's substantial burden and equal terms provisions as a matter of power and control. A law and economics approach, however, can allow courts and scholars to balance competing concerns by weighing them against relevant facts that are specific to each community. This Note first discusses the state of the law and scholarship on RLUIPA's substantial burden and equal terms provisions. Then, this Note analyzes Judge Richard Posner's application of these provisions to provide a fresh look on RLUIPA's application. Finally, this Note assesses the merits and potential challenges in taking a community-specific, fact-intensive approach to RLUIPA. Although the economic view is certainly not a fail-safe approach, it can at least refract the discussion on RLUIPA's application to open new ways of thinking about religious discrimination in land use.

INTRODUCTION

Recent controversies surrounding mosques have brought the legal implications of religious land use to the forefront of public discussion.¹ In 2010, President Barack Obama sparked public discussion by affirming the legal right of Muslims to build a mosque near Ground Zero.² Beyond the legal issues, politicians have drawn on the highly emotional atmosphere and framed the question of mosque location as a political

¹ Ashby Jones, "This Is a Circus": Tennessee Mosque Trial Takes Strange Turn, WALL ST. J.—L. BLOG (Nov. 12, 2010, 9:17 AM), <http://blogs.wsj.com/law/2010/11/12/this-is-a-circus-tennessee-mosque-trial-takes-strange-turns/>.

² Sheryl Gay Stolberg, *Obama Says Mosque Upholds Principle of Equal Treatment*, N.Y. TIMES, Aug. 14, 2010, http://www.nytimes.com/2010/08/15/us/politics/15islamcenter.html?page_wanted=all.

issue.³ Newt Gingrich, for example, has expressed his view that the proposed mosque near Ground Zero represents an Islamic political and cultural offensive aimed at American society.⁴ Themes of power, control, and self-assertion pervade this debate.⁵

Likewise, both courts and scholars have framed the conversation regarding the Religious Land Use and Institutionalized Persons Act (RLUIPA)—which, in relevant part, allows religious institutions to circumvent burdensome zoning restrictions—through both legal and political lenses.⁶ In cases involving religious land use, however, the legal and political lenses are not so clearly distinguishable.⁷ Rather, the legal analyses of these cases have focused on the policy concerns regarding control over land-use regulations.⁸ Courts and scholars have divided over the proper application of RLUIPA's provisions in religious land-use cases.⁹

A law and economics approach, however, can refract the debate on RLUIPA's application.¹⁰ Economic principles can guide a more fact-sensitive application of RLUIPA's provisions.¹¹ Using this approach,

³ Devin Dwyer, *Sarah Palin: Proposed "Mosque" Like a Weapon*, ABC NEWS: THE NOTE (Aug. 17, 2010, 10:21 AM), <http://blogs.abcnews.com/thenote/2010/08/sarah-palin-proposed-mosque-like-a-weapon.html>.

⁴ Newt Gingrich, *No Mosque at Ground Zero*, HUM. EVENTS (July 28, 2010), <http://www.humanevents.com/article.php?id=38282>.

⁵ See *id.*

⁶ See *infra* notes 23–130 and accompanying text. This Note will focus on the provisions regarding religious nondiscrimination in land-use regulations and not the sections concerning institutionalized persons. See *infra* notes 23–130 and accompanying text.

⁷ See *infra* notes 23–130 and accompanying text.

⁸ See *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 266–69 (3d Cir. 2007); *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cnty.*, 450 F.3d 1295, 1308–14 (11th Cir. 2006); *Konikov v. Orange Cnty.*, 410 F.3d 1317, 1324–25 (11th Cir. 2005); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1230–31 & n.14 (11th Cir. 2004); *Civil Liberties for Urban Believers v. City of Chicago (CLUB)*, 342 F.3d 752, 760–61 (7th Cir. 2003).

⁹ See Marci A. Hamilton, *Why Federalism Must Be Enforced: A Response to Professor Kramer*, 46 VILL. L. REV. 1069, 1082–83 (2001); Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 775–84 (1999); Ashira Pelman Ostrow, *Judicial Review of Local Land Use Decisions: Lessons from RLUIPA*, 31 HARV. J.L. & PUB. POL'Y 717, 735–37 (2008); Richard C. Schragger, *The Role of the Local in the Doctrine and the Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1844–46 (2004).

¹⁰ See *River of Life Kingdom Ministries v. Vill. of Hazel Crest*, 611 F.3d 367, 369–71 (7th Cir. 2010) (en banc); *World Outreach Conference Ctr. v. City of Chicago*, 591 F.3d 531, 539 (7th Cir. 2009); *Petra Presbyterian Church v. Vill. of Northbrook*, 489 F.3d 846, 851 (7th Cir. 2007); *Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 899–901 (7th Cir. 2005).

¹¹ See *River of Life*, 611 F.3d at 371; *World Outreach*, 591 F.3d at 539; *Saints Constantine*, 396 F.3d at 899–901.

courts can better balance competing concerns by weighing them against relevant facts that are specific to each affected community.¹² Nevertheless, although the economic approach offers an alternative application of RLUIPA, it too is flawed.¹³

In Part I, this Note explores the application of and literature on RLUIPA's "Substantial Burden" and "Equal Terms" provisions.¹⁴ This Part first describes the background of RLUIPA generally.¹⁵ Second, this Part maps courts' disagreements over the application of RLUIPA's provisions in face of competing concerns regarding who—municipalities or religious institutions—should control land-use regulations.¹⁶ Third, this Part explores the literature on RLUIPA in light of these competing concerns over control and power.¹⁷

Part II recasts the debate through the law and economics lens.¹⁸ This Part observes the use of economic concepts in Judge Richard Posner's decisions and dissents.¹⁹ This Part argues that the economic approach can guide a more balanced application of RLUIPA's provisions.²⁰ Part III argues that the economic approach to RLUIPA's application is also imperfect, particularly in light of the alternative Equal Protection Clause analysis.²¹ Additionally, the economic approach to RLUIPA's application raises new tensions which do not exist in the power and control framework.²²

I. RLUIPA AND THE DIVISION REGARDING CONTROL OVER LAND-USE REGULATIONS

Courts and scholars have divided on the proper application of RLUIPA.²³ In particular, courts and scholars have had trouble balancing the competing concerns between municipalities and religious insti-

¹² See *River of Life*, 611 F.3d at 369–71; *World Outreach*, 591 F.3d at 539; *Saints Constantine*, 396 F.3d at 899–901.

¹³ See *River of Life*, 611 F.3d at 372–74; *CLUB*, 342 F.3d at 768–74 (Posner, J., dissenting).

¹⁴ See *infra* notes 23–130 and accompanying text.

¹⁵ See *infra* notes 29–39 and accompanying text.

¹⁶ See *infra* notes 40–88 and accompanying text.

¹⁷ See *infra* notes 89–130 and accompanying text.

¹⁸ See *infra* notes 131–229 and accompanying text.

¹⁹ See *infra* notes 174–229 and accompanying text.

²⁰ See *infra* notes 131–229 and accompanying text.

²¹ See *infra* notes 230–258 and accompanying text.

²² See *infra* notes 258–273 and accompanying text.

²³ See *Lighthouse Inst.*, 510 F.3d at 266–69; *Primera Iglesia*, 450 F.3d at 1308–11; *Konikou*, 410 F.3d at 1324–25; *Midrash Sephardi*, 366 F.3d at 1230–31; *CLUB*, 342 F.3d at 760–61; Schragger, *supra* note 9, at 1844–46; see also Laycock, *supra* note 9, at 775–76, 784 (arguing for legislation against discriminatory land-use regulations).

tutions regarding who should control land-use regulations.²⁴ The resultant division has created uncertainty in the application of RLUIPA.²⁵

In this Part, Section A provides general background on RLUIPA's history.²⁶ Then, Section B discusses how the circuit splits in the application of RLUIPA's various provisions reflect competition for control over land-use regulations.²⁷ Finally, Section C discusses how scholars have framed the issue in terms of power and control, only to exacerbate the division in judicial approaches to applying RLUIPA.²⁸

A. RLUIPA

RLUIPA is the latest chapter in the history of federal legislation protecting religious liberty.²⁹ Several years prior to RLUIPA's enactment, Congress, in 1993, enacted the Religious Freedom Restoration Act (RFRA).³⁰ RFRA provided that a "substantial burden" on religion could only be justified if it was the least restrictive means of furthering a compelling state interest.³¹ The Supreme Court, however, in 1997 in *City of Boerne v. Flores* struck down RFRA as applied to the States because it exceeded Congress's power under the Enforcement Clause of the Fourteenth Amendment.³² In part, the Court reasoned that RFRA exceeded Congress's authority because it had no termination date, affected all levels of state and federal government, and did not distinguish between burdens on religious and nonreligious institutions.³³

In 2000, Congress enacted RLUIPA, which narrowly addresses only land-use regulations and the religious rights of institutionalized persons.³⁴ As applied, scholars have pointed out a number of issues with

²⁴ See *Lighthouse Inst.*, 510 F.3d at 266–69; *Primera Iglesia*, 450 F.3d at 1308–11; *Konikov*, 410 F.3d at 1324–25; *Midrash Sephardi*, 366 F.3d at 1230–31; Schragger, *supra* note 9, at 1844–46; see also Laycock, *supra* note 9, at 775–76, 784. In this Note, "local" government, "municipal" government, and "municipalities" are used interchangeably.

²⁵ See *Lighthouse Inst.*, 510 F.3d at 266–69; *Primera Iglesia*, 450 F.3d at 1308–11; *Konikov*, 410 F.3d at 1324–25; *Midrash Sephardi*, 366 F.3d at 1230–31; Schragger, *supra* note 9, at 1844–46; see also Laycock, *supra* note 9, at 775–76, 784.

²⁶ See *infra* notes 29–39 and accompanying text.

²⁷ See *infra* notes 40–88 and accompanying text.

²⁸ See *infra* notes 89–130 and accompanying text.

²⁹ *Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005); see 146 CONG. REC. 16,702 (2000) (statement of Sen. Reid).

³⁰ RFRA of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (formerly codified at 42 U.S.C. §§ 2000bb-1 to 2000bb-4 (1994)), *invalidated by* *City of Boerne v. Flores*, 521 U.S. 507 (1997).

³¹ RFRA § 3 (formerly codified at 42 U.S.C. § 2000bb-1 (1994)).

³² 521 U.S. at 536.

³³ *Id.* at 532.

³⁴ 42 U.S.C. § 2000cc (2006).

the RLUIPA involving the Fourteenth and First Amendments, statutory construction, local land-use regulation, federalism, and religious liberty.³⁵

Plaintiffs can sue under numerous provisions of RLUIPA, which are broadly categorized into the “Substantial Burden” (§ 2000cc(a)) and the “Equal Terms” (§ 2000cc(b), or “Discrimination and Exclusion”) sections.³⁶ Under the Substantial Burden section, the government must justify land-use regulations that substantially burden the religious exercise of a person, assembly, or institution by showing that the regulation is “in furtherance of a compelling governmental interest” and “is the least restrictive means of furthering that compelling governmental interest.”³⁷ Under the Equal Terms section, religious institutions must be treated as well as comparable secular institutions.³⁸ Furthermore, zoning ordinances may not discriminate among religions, totally exclude religious assemblies from a jurisdiction, or unreasonably limit houses of worship.³⁹

B. *The Courts and the Confused Application of RLUIPA Within the Framework of Power and Control*

The principal challenges to RLUIPA are to the Substantial Burden and Equal Terms provisions.⁴⁰ In court, the diverse applications of these provisions reflect a conflict over whether municipalities or religious institutions should control land-use regulations.⁴¹ This conflict contributes to the confusion as to how to apply RLUIPA consistently.⁴²

³⁵ See generally Anthony Lazzaro Minervini, Comment, *Freedom from Religion: RLUIPA, Religious Freedom, and Representative Democracy on Trial*, 158 U. PA. L. REV. 571 (2010) (discussing RLUIPA’s history and the application of the Equal Terms provision).

³⁶ 42 U.S.C. § 2000cc(a)–(b); DOJ, REPORT ON THE TENTH ANNIVERSARY OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT 7 (2010), available at http://www.justice.gov/crt/rluipa_report_092210.pdf (noting three categories that fall under the two statutory provisions).

³⁷ 42 U.S.C. § 2000cc(a).

³⁸ *Id.* § 2000cc(b).

³⁹ *Id.* Plaintiffs need only show one of these to sue under RLUIPA. See *id.* § 2000cc(a)–(b).

⁴⁰ Sarah Keeton Campbell, Note, *Restoring RLUIPA’s Equal Terms Provision*, 58 DUKE L.J. 1071, 1073–74 (2009).

⁴¹ See *infra* notes 43–88 and accompanying text.

⁴² See *infra* notes 43–88 and accompanying text.

1. Substantial Burden Provision

Courts are fairly consistent in their construction of “substantial burden” for the purposes of RLUIPA claims.⁴³ Generally, a substantial burden on religious exercise occurs when a plaintiff must forego a religious precept because of a land-use regulation.⁴⁴ For example, if a land-use regulation prevents a church from using a building for religious education, church services, etc., that regulation may violate RLUIPA.⁴⁵ Nevertheless, in this example and indeed in every RLUIPA case, the application of the provision raises the basic question of what amounts to a substantial burden.⁴⁶ Courts have answered this question by looking to the policy regarding control over land-use regulations.⁴⁷

In applying the substantial burden test, courts have regarded the U.S. Court of Appeals for the Seventh Circuit’s 2003 case, *Civil Liberties for Urban Believers v. City of Chicago (CLUB)*, as a high-water mark of municipal control over land-use regulations.⁴⁸ In *CLUB*, the Seventh Circuit held that a regulation substantially burdened the exercise of religion if it rendered that exercise “effectively impracticable.”⁴⁹ The court explained that to have held otherwise would have been to require municipalities to favor religious land uses by exempting them from land-use regulations.⁵⁰

Since *CLUB*, many courts have looked to it for guidance, but have not adopted its “effectively impracticable” standard.⁵¹ For example, the Court of Appeals of Maryland in 2008 upheld an ordinance that prevented an institution from putting up a sign.⁵² The court held that a zoning board’s restriction on religious land use is *not* a substantial burden if the ordinance will only have a “minimal impact” on an institu-

⁴³ Edward W. McClenathan, *Swinging the Big Stick: How the Circuits Have Interpreted RLUIPA and What Practitioners Need to Know*, 36 REAL EST. L.J. 405, 425 (2008).

⁴⁴ *Id.*

⁴⁵ See *Mintz v. Roman Catholic Bishop of Springfield*, 424 F. Supp. 2d 309, 318–19 (D. Mass. 2006); cf. *Midrash Sephardi*, 366 F.3d at 1228 (holding that a regulation that forced congregants to walk farther to a synagogue, perhaps preventing the elderly or the ill from attending services, was not a substantial burden).

⁴⁶ See *infra* notes 48–66 and accompanying text.

⁴⁷ See *infra* notes 48–66 and accompanying text.

⁴⁸ See 342 F.3d at 760–61; McClenathan, *supra* note 43, at 415–18, 425.

⁴⁹ 342 F.3d at 761.

⁵⁰ *Id.* at 762.

⁵¹ *Midrash Sephardi*, 366 F.3d at 1227; *Trinity Assembly of God of Balt. City, Inc. v. People’s Counsel for Balt. Cnty.*, 962 A.2d 404, 429 n.23 (Md. 2008); see McClenathan, *supra* note 43, at 425.

⁵² *Trinity Assembly*, 962 A.2d at 429.

tion's religious exercise.⁵³ In a footnote, the court refrained from adopting *CLUB*'s high substantial burden threshold.⁵⁴ Instead, the court found an area between "minimal impact" and "effectively impracticable" in which an ordinance may be construed as having a substantial burden.⁵⁵

Likewise, other courts have applied the Substantial Burden provision by finding an area between "minimal impact" and "effectively impracticable."⁵⁶ In *Midrash Sephardi, Inc. v. Town of Surfside*, for example, in 2004, the U.S. Court of Appeals for the Eleventh Circuit defined the threshold of a substantial burden as a regulation that places "more than an inconvenience on religious exercise."⁵⁷ The court also declined to adopt the *CLUB* standard and held that a substantial burden is akin to pressure which directly coerces the religious adherent to forego religious precepts or mandates religious conduct.⁵⁸ That courts have developed different language to discover what constitutes a substantial burden reveals that courts are mired in the gray area between two poles: "minimal impact" and "effectively impracticable."⁵⁹

In deciding cases involving RLUIPA's Substantial Burden provision, courts have considered competing concerns: the need to combat religious discrimination versus the fear that religious land uses would get a free pass to build irrespective of land-use regulations.⁶⁰ Accordingly, some courts have maintained a high bar for religious plaintiffs out of fear that religious organizations would wield too much control over land-use regulations.⁶¹ For example, the Seventh Circuit, in *Petra Presbyterian Church v. Village of Northbrook* in 2007, expressed a fear that

⁵³ *Id.*

⁵⁴ *Id.* at 429 n.23.

⁵⁵ *Id.* at 429 & n.23.

⁵⁶ *Midrash Sephardi*, 366 F.3d at 1227.

⁵⁷ *Id.* at 1227.

⁵⁸ *Id.*

⁵⁹ See *supra* notes 48–58 and accompanying text.

⁶⁰ See *Petra Presbyterian*, 489 F.3d at 851; *CLUB*, 342 F.3d at 760–62. Additionally, Congress outlined these competing concerns in the legislative history of RLUIPA. 146 CONG. REC. 16,700 (2000) (Joint Statement of Sen. Hatch and Sen. Kennedy on RLUIPA) [hereinafter Joint Statement]. Congress recognized that RLUIPA should not exempt religious uses from land-use regulation. *Id.* ("The General Rule does not exempt religious uses from land use regulation; rather, it requires regulators to more fully justify substantial burdens on religious exercise."). Conversely, Congress noted that RLUIPA should force regulators to justify substantial burdens on religious exercise so as to curb religious discrimination. *Id.*

⁶¹ *Petra Presbyterian*, 489 F.3d at 851; *Midrash Sephardi*, 366 F.3d at 1228; *CLUB*, 342 F.3d at 762 ("Otherwise, compliance with RLUIPA would require municipal governments not merely to treat religious land uses on an equal footing with nonreligious land uses, but rather to favor them in the form of an outright exemption from land-use regulations.").

religious organizations would be free from zoning restrictions of any kind.⁶² By contrast, other courts have looked to the legislative history and purpose of the statute to suggest that religious institutions should have some recourse against municipalities in the battle over land-use regulations.⁶³ For example, the legislative history of RLUIPA reveals a concern for the plight of minority religions in light of discriminatory zoning practices.⁶⁴

Nevertheless, the use of these policy rationales does not clarify how much of a burden amounts to a *substantial* burden.⁶⁵ Consequently, courts continue to struggle to define substantial burden as somewhere between “effectively impracticable” and “minimal impact.”⁶⁶

2. Equal Terms Provision

Ambiguity in the application of RLUIPA’s provisions is even more pronounced in context of the Equal Terms provision.⁶⁷ Nevertheless, the split in courts’ applications reflects the same conflicting concerns regarding land-use control.⁶⁸

Suits brought under the Equal Terms provision of RLUIPA largely turn on the construction of the “equal terms” language itself.⁶⁹ In particular, courts have generally split over whether there is a need to compare institutions in light of a regulatory purpose and whether to apply strict liability in face of an Equal Terms provision violation or to first conduct a strict scrutiny analysis before issuing a judgment.⁷⁰

⁶² 489 F.3d at 851.

⁶³ See *Guru Nanak Sikh Soc’y of Yuba City v. Cnty. of Sutter*, 326 F. Supp. 2d 1140, 1153–54 (E.D. Cal. 2003), *aff’d*, 456 F.3d 978 (9th Cir. 2006) (“[The *CLUB*] test reads quite a bit more into the word “substantial” than is warranted by the text, purpose or history of the statute.”).

⁶⁴ See Joint Statement, *supra* note 60, at 16,698. The legislative history notes that “new, small, or unfamiliar” religious institutions are particularly vulnerable to discriminatory land-use regulations. *Id.* The Joint Statement also noted that discrimination against new religious institutions often comes hand in hand with racial discrimination, as in the case of black churches and Jewish synagogues. *Id.*

⁶⁵ See *Petra Presbyterian*, 489 F.3d at 851; *Midrash Sephardi*, 366 F.3d at 1228; *CLUB*, 342 F.3d at 762; *Guru Nanak Sikh Soc’y*, 326 F. Supp. 2d at 1153–54.

⁶⁶ See *Midrash Sephardi*, 366 F.3d at 1227; *Trinity Assembly*, 962 A.2d at 429 & n.23.

⁶⁷ See *infra* notes 71–88 and accompanying text.

⁶⁸ See *infra* notes 71–88 and accompanying text.

⁶⁹ See *Lighthouse Inst.*, 510 F.3d at 266–69; *Primeria Iglesia*, 450 F.3d at 1308–11; *Konikov*, 410 F.3d at 1324–25; *Midrash Sephardi*, 366 F.3d at 1228–35; Campbell, *supra* note 40, at 1073–74; Minervini, *supra* note 35, at 574–75 (discussing RLUIPA’s history and the application of the Equal Terms provision).

⁷⁰ See Campbell, *supra* note 40, at 1073–74; Minervini, *supra* note 35, at 574–75; *infra* notes 73–79 and accompanying text.

The U.S. Court of Appeals for the Third Circuit has held that the application of the Equal Terms provision first requires the identification of a regulatory purpose and then a comparison of the religious assembly to a secular group in light of the identified regulatory purpose.⁷¹ A zoning ordinance, in other words, violates the Equal Terms provision if secular and religious assemblies do not materially differ with regards to the regulatory purpose and the ordinance still treats the religious institution worse.⁷² Furthermore, the Third Circuit held that the application of the Equal Terms provision warrants strict liability in face of an Equal Terms provision violation, rather than strict scrutiny analysis.⁷³ For example, in 2007 in *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, in which a religious institution challenged an ordinance treating religious institutions on unequal terms, the Third Circuit held that a court should not undergo a strict scrutiny analysis if an ordinance violates the Equal Terms provision.⁷⁴

In contrast, the Eleventh Circuit does not require a court to compare religious with secular uses according to regulatory purposes.⁷⁵ Instead, the Eleventh Circuit has defined any “assembly” broadly as a group gathered for a common purpose.⁷⁶ For example, in 2004, the Eleventh Circuit in *Midrash Sephardi* held that private clubs, like churches and synagogues, are assemblies; in other words, religious institutions should be compared with a broad range of assemblies, including private clubs.⁷⁷ In addition, the Eleventh Circuit held that unequal treatment of religious uses calls for strict scrutiny analysis.⁷⁸ If an ordinance survives strict scrutiny, it does not violate RLUIPA.⁷⁹

Just as courts have struggled between opposite poles in applying the Substantial Burden provision of RLUIPA, courts have been similarly

⁷¹ *Lighthouse Inst.*, 510 F.3d at 266–69.

⁷² *Id.*

⁷³ *Id.* at 269. Under the strict liability standard, if a regulation treats religious institutions on less than equal terms compared to nonreligious institutions, the regulation automatically fails under RLUIPA. *Id.* Under the strict scrutiny standard, however, the finding of unequal treatment is not fatal to a land-use regulation if the government can establish that the regulation uses a narrowly tailored means of achieving a compelling government interest. *Primera Iglesia*, 450 F.3d at 1308.

⁷⁴ *Lighthouse Inst.*, 510 F.3d at 268–73.

⁷⁵ See *Midrash Sephardi*, 366 F.3d at 1230–31 (construing terms according to their dictionary definitions).

⁷⁶ *Id.* at 1231.

⁷⁷ *Id.*

⁷⁸ *Id.* at 1232.

⁷⁹ See *id.*

polarized in their application of the Equal Terms provision.⁸⁰ Like the division over the application of the Substantial Burden provision, the circuit split in the application of RLUIPA's Equal Terms provision also reveals the conflict between municipalities and religious institutions over land-use control.⁸¹

On the one hand, the Third Circuit adopted the regulatory purpose test to signal that municipalities should have greater control over land-use regulations.⁸² The Third Circuit in *Lighthouse Institute* criticized the Eleventh Circuit's broad construction of the Equal Terms provision, stating that it would contradict Congress's intent and give religious institutions a "free pass" to locate wherever they like.⁸³ The Third Circuit looked to the *Congressional Record* and echoed the position that RLUIPA does not grant religious institutions immunity from land-use regulations.⁸⁴ The Seventh Circuit, in *River of Life Kingdom Ministries v. Village of Hazel Crest* in 2010, likewise raised the concern that the Eleventh Circuit's test may disproportionately favor religious institutions.⁸⁵

On the other hand, the Eleventh Circuit's reasoning suggests that RLUIPA should grant more power over land use to religious institutions.⁸⁶ For example, the Eleventh Circuit in *Midrash Sephardi* defined "assembly" in accordance with its dictionary definition to broaden the protections afforded to religious institutions under RLUIPA.⁸⁷ This construction of the provision drew on legislators' intent to protect religious institutions from discrimination.⁸⁸

C. *Scholarship on RLUIPA: Power and Control Theories and Qualitative Uncertainty*

As the courts have vacillated between the different poles of municipal or religious-institutional control over land-use regulations, scholars have also framed the discussion in terms of power and control.⁸⁹ Furthermore, the inconclusiveness of data and resultant ambiguities exac-

⁸⁰ See *supra* notes 43–66, 82–88 and accompanying text.

⁸¹ See *supra* notes 82–88 and accompanying text.

⁸² See *Lighthouse Inst.*, 510 F.3d at 268.

⁸³ *Id.*

⁸⁴ *Id.*; see Joint Statement, *supra* note 60, at 16,700 ("This Act does not provide religious institutions with immunity from land-use regulations . . .").

⁸⁵ 611 F.3d at 370.

⁸⁶ See *Midrash Sephardi*, 366 F.3d at 1231 & n.14.

⁸⁷ *Id.* at 1230–31.

⁸⁸ See *id.* at 1231 n.14.

⁸⁹ See *infra* notes 91–119 and accompanying text.

erbrates the divide in the scholarship on appropriate application of RLUIPA.⁹⁰

1. The Divide in the Scholarship on RLUIPA According to Power and Control

Theorists on RLUIPA largely fall into two categories.⁹¹ The first expresses concern that RLUIPA, as a federal act, confers too much power on the federal government and, relatedly, to religious institutions.⁹² The second group expresses a distrust of local governments.⁹³

One group of scholars raises several concerns over the federalization of religious liberty as a check on local control.⁹⁴ First, these scholars are skeptical of the concentration of power at the federal level.⁹⁵ In particular, they are wary of powerful religious groups influencing federal lawmakers.⁹⁶ These scholars also raise the problem of special interest groups controlling local governments through federal legislation.⁹⁷

Second, these scholars point to the particular virtues of letting local governments tailor zoning regulations.⁹⁸ For example, one scholar argues that local governments are better able to balance the secular and religious needs of a community and that many local governments already exempt religious uses from certain regulations.⁹⁹ Even if there is religious discrimination at the local level, in other words, those harms are fairly localized and contained.¹⁰⁰ Conversely, a centralized, federal act like RFRA or RLUIPA is far from narrowly tailored to balance religious and secular interests.¹⁰¹ Rather, such a blanket appropriation of privilege raises Establishment Clause concerns, as it might treat religious institutions as a favored class under the law.¹⁰²

By contrast, another group of scholars points to the need to combat discrimination at the local level and expresses a distrust of munici-

⁹⁰ See *infra* notes 120–130 and accompanying text.

⁹¹ See *infra* notes 92–119 and accompanying text.

⁹² See *infra* notes 94–102 and accompanying text.

⁹³ See *infra* notes 103–116 and accompanying text.

⁹⁴ See Hamilton, *supra* note 9, at 1082–83; Schragger, *supra* note 9, at 1844–46.

⁹⁵ See Hamilton, *supra* note 9, at 1082–83; Schragger, *supra* note 9, at 1844–46.

⁹⁶ See Hamilton, *supra* note 9, at 1082–83; Schragger, *supra* note 9, at 1844–46.

⁹⁷ See Hamilton, *supra* note 9, at 1082–83; Schragger, *supra* note 9, at 1844–45.

⁹⁸ See Schragger, *supra* note 9, at 1846–47; Marci Hamilton, *Struggling with Churches as Neighbors*, FINDLAW (Jan. 17, 2002), <http://writ.news.findlaw.com/hamilton/20020117.html>.

⁹⁹ See Schragger, *supra* note 9, at 1846.

¹⁰⁰ See *id.*

¹⁰¹ See *id.* at 1846–47.

¹⁰² See *id.* at 1847.

pal governments.¹⁰³ These scholars raise a number of concerns with the local zoning process with regard to religious discrimination.¹⁰⁴ First, these scholars point to the subjectivity inherent in the process, which exacerbates the problem of discrimination.¹⁰⁵ One scholar notes that there are no objective measures for zoning ordinances.¹⁰⁶ Said differently, zoning officials make typical zoning decisions, such as whether to issue variances, special-use permits, etc., on a discretionary, ad hoc basis.¹⁰⁷ Furthermore, this subjectivity is exacerbated by the fact that zoning officials often have no training or planning experience.¹⁰⁸

Thus, the highly subjective nature of the zoning process also makes the zoning procedure susceptible to authorities or local constituencies' latent discriminatory attitudes.¹⁰⁹ Douglas Laycock, a known scholar in the area of religious land use, cites a Gallup Poll to observe that many Americans have demonstrated public hostility to "fundamentalists" and minority religions.¹¹⁰ He goes on to state that the "hostile attitudes are real . . . and individualized processes under vague standards give such attitudes ample opportunity for expression."¹¹¹

This subjective, ad hoc, decision-making process, furthermore, lacks the proper procedural safeguards.¹¹² For example, one scholar notes that zoning decisions can be issued without findings of fact or statements of reasons.¹¹³ Because of their small size, local zoning boards are more susceptible to a certain group's political capture than the larger legislature, which must broker compromises between disparate interests.¹¹⁴

Finally, Congress and scholars have also observed that instances of discrimination are hard to prove.¹¹⁵ For example, Congress stated that discrimination often lurks behind stated reasons for land-use regula-

¹⁰³ See Laycock, *supra* note 9, at 775–76; Ostrow, *supra* note 9, at 735–37.

¹⁰⁴ See Laycock, *supra* note 9, at 775–76; Ostrow, *supra* note 9, at 735–37.

¹⁰⁵ See, e.g., Ostrow, *supra* note 9, at 735–37.

¹⁰⁶ See *id.* at 735.

¹⁰⁷ See *id.* at 735–36.

¹⁰⁸ See *id.* at 735–37.

¹⁰⁹ See Laycock, *supra* note 9, at 775–76; Ostrow, *supra* note 9, at 736–37.

¹¹⁰ Laycock, *supra* note 9, at 775–76.

¹¹¹ *Id.*

¹¹² See Ostrow, *supra* note 9, at 736–37.

¹¹³ See *id.*

¹¹⁴ See *id.*

¹¹⁵ See Joint Statement, *supra* note 60, at 16,699; Laycock, *supra* note 9, at 776.

tion, such as traffic or aesthetic improvement, or general inconsistency with a city's land-use plan.¹¹⁶

The way the debate is framed, however, has driven the discussion on RLUIPA into an either/or, paradoxical conundrum.¹¹⁷ Either RLUIPA affords too much power to religious institutions or risks discriminating against religious institutions.¹¹⁸ Scholars, however, have not trusted any one institution to create balanced zoning regulations.¹¹⁹

2. The Ambiguity of Inconclusive Data

Another source of tension in the scholarship on RLUIPA concerns the empirical data regarding discrimination against minority religions in land-use regulations.¹²⁰ The discrepancy in the data also contributes to the polarization of the scholarship on RLUIPA's appropriateness as a federal act.¹²¹

At first glance, the legislative history shows that discrimination against minority religions is indeed a national problem.¹²² For example, the Joint Statement of Senator Orrin Hatch and Senator Ted Kennedy drew upon nationwide surveys of cases, anecdotal evidence, and scholarly literature to conclude that there is "massive evidence" that religious institutions are being discriminated against in land-use matters.¹²³ Douglass Laycock, one scholar the Senators drew upon in particular, cites various studies to demonstrate that minority religious institutions, as compared to traditional faith groups, are more likely to litigate cases based on discriminatory zoning practices; this, according to Laycock, indicated that minority religious groups are more likely to face illegal discrimination than traditional faith groups.¹²⁴

¹¹⁶ See Joint Statement, *supra* note 60, at 16,698. Laycock also argues, however, that federal or state legislation cannot magically solve the problem of discrimination at the local level. See Laycock, *supra* note 9, at 783–84. Rather, having legislation would replace the need to prove overt discrimination by instead showing a substantial burden on an institution's exercise of religion. See *id.* Furthermore, enacting legislation is only the beginning. See *id.* Through vigorous litigation of religious land-use matters under statutes like RLUIPA, Laycock argues that political and economic incentives will help empower local authorities in ensuring the constitutional rights of religious institutions. See *id.*

¹¹⁷ See *supra* notes 91–116 and accompanying text.

¹¹⁸ See *supra* notes 91–116 and accompanying text.

¹¹⁹ See *supra* notes 91–116 and accompanying text.

¹²⁰ See *infra* notes 122–130 and accompanying text.

¹²¹ See *infra* notes 122–130 and accompanying text.

¹²² Joint Statement, *supra* note 60, at 16,698–99.

¹²³ *Id.*

¹²⁴ Laycock, *supra* note 9, at 761 & n.16, 770–74 (citing *RLPA of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong.

Many scholars criticized this evidence and proposed that religious discrimination in land-use regulation is not a problem, or at least not a national one.¹²⁵ Some scholars criticized the “massive evidence” Congress compiled as too anecdotal.¹²⁶ Furthermore, they proposed that the reason that minority faith groups litigate land-use matters is because traditional faith groups already have sufficient worship space.¹²⁷

Moreover, other scholars offered their own empirical evidence to discount the idea that discrimination against religious institutions in zoning practices exists.¹²⁸ For example, one scholar studied the zoning patterns before RLUIPA’s enactment in New Haven, Connecticut and found that the zoning board did not distinguish between religious and secular land uses or between minority and mainstream religions.¹²⁹ Parking concerns and neighborhood character in fact played the greatest roles in shaping regulations that affected church behavior.¹³⁰

II. LAW AND ECONOMICS OF RLUIPA

Courts and scholars have struggled to provide sufficient protection for religious institutions without affording them too much protection.¹³¹ Courts and scholars have typically framed this tension in terms of who should control land-use regulations: municipalities or religious institutions.¹³² A law and economics approach, however, can recast the

100 (1998); RELIGIOUS LIBERTY PROTECTION ACT: COMPILATION OF ZONING PROVISIONS AFFECTING CHURCHES IN 29 SUBURBS OF NORTHERN COOK COUNTY BY JOHN W. MAUCK AS OF 7/10/1998 BASED UPON 1995 PUBLISHED STANDARDS 7 (1998), available at <http://judiciary.house.gov/legacy/mauck.pdf>).

¹²⁵ See Patricia E. Salkin & Amy Lavine, *The Genesis of RLUIPA and Federalism: Evaluating the Creation of a Federal Statutory Right and Its Impact on Local Government*, 40 URB. LAW. 195, 256–57 (2008).

¹²⁶ *Id.* at 257.

¹²⁷ *Id.*

¹²⁸ Stephen Clowney, Comment, *An Empirical Look at Churches in the Zoning Process*, 116 YALE L.J. 859, 868 (2007).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ See *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 266–69 (3d Cir. 2007); *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cnty.*, 450 F.3d 1295, 1308–11 (11th Cir. 2006); *Konikov v. Orange Cnty.*, 410 F.3d 1317, 1324–29 (11th Cir. 2005); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1230–31 (11th Cir. 2004); *Civil Liberties for Urban Believers v. City of Chicago (CLUB)*, 342 F.3d 752, 760–61 (7th Cir. 2003); Laycock, *supra* note 9, at 775–76; Schragger, *supra* note 9, at 1844–47.

¹³² See *supra* notes 40–130 and accompanying text.

debate in a new light.¹³³ In particular, one can observe the use of economic concepts to balance competing concerns in applying RLUIPA in Judge Posner's opinions.¹³⁴ These economic principles can help strike a compromise in the application of RLUIPA and bridge the divide in the scholarship on RLUIPA.¹³⁵

Section A first outlines a brief history of law and economics to narrow the focus of this Note.¹³⁶ Then, Section B discusses how economics can be a useful approach to understand (1) discrimination, (2) antidiscrimination legislation, and thus (3) legislation aimed at antidiscrimination in the context of religious land use.¹³⁷ With this as a foundation, Section C observes the use of some economic concepts in Judge Posner's decisions and how these concepts are applied to strike a balance between competing concerns.¹³⁸

This Part draws on the writings and decisions of Judge Posner.¹³⁹ Although there may be other economic approaches to RLUIPA, limiting this Part to the writings of one individual offers a consistent, alternative approach to the application of RLUIPA.¹⁴⁰

A. *Law and Economics—A Brief History*

The history of law and economics as a discipline can be broadly traced to two branches.¹⁴¹ The first branch concerns the economic analysis of laws regulating markets.¹⁴² Over time, the economic analysis of laws governing markets developed as economics gathered steam and government regulation expanded, starting with Adam Smith's comments on trade through the rich body of antitrust economics devel-

¹³³ See *River of Life Kingdom Ministries v. Vill. of Hazel Crest*, 611 F.3d 367, 369–71 (7th Cir. 2010) (en banc); *World Outreach Conference Ctr. v. City of Chicago*, 591 F.3d 531, 539 (7th Cir. 2009); *Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 899–901 (7th Cir. 2005); RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 351–63 (1981).

¹³⁴ See *River of Life*, 611 F.3d at 369–71; *World Outreach*, 591 F.3d at 539; *Saints Constantine*, 396 F.3d at 899–901.

¹³⁵ See *River of Life*, 611 F.3d at 369–71; *World Outreach*, 591 F.3d at 539; *Saints Constantine*, 396 F.3d at 899–901.

¹³⁶ See *infra* notes 141–154 and accompanying text.

¹³⁷ See *infra* notes 155–173 and accompanying text.

¹³⁸ See *infra* notes 174–229 and accompanying text.

¹³⁹ See *infra* notes 141–229 and accompanying text.

¹⁴⁰ See *infra* notes 141–229 and accompanying text.

¹⁴¹ Richard Posner, *Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 281, 281–84 (1979).

¹⁴² *Id.* at 281–82.

oped in the past century.¹⁴³ The second branch concerns the economics of nonmarket, legal regulation.¹⁴⁴ In this second branch, Gary Becker's article on the economics of discrimination, Ronald Coase's article on social cost, and Guido Calabresi's article on tort law and risk distribution are the milestones.¹⁴⁵ This second branch is significant particularly against the backdrop of a shift towards scientific analysis of nonmarket behavior.¹⁴⁶

Furthermore, the field of law and economics draws a distinction between a normative and positive analysis of the law.¹⁴⁷ Although a positive analysis of the law can contribute to normative considerations (e.g., how much weight to give to a certain behavior-altering incentive), the economic analysis itself does not necessarily lead to normative policy recommendations.¹⁴⁸ An economic analysis of the law simply questions the behaviors regulated by, and patterns within, a system.¹⁴⁹

This Note merely observes the use of economic principles in Judge Posner's application of RLUIPA.¹⁵⁰ In so doing, however, this Note further posits that the economic lens yields a different perspective than that afforded by a lens focusing on control over land-use regulations.¹⁵¹ Thus, this economic lens, as a positive observation of system-specific effects of zoning in a particular case, can broker a compromise between broad political and normative policy objectives in RLUIPA cases.¹⁵²

As a final matter, this Note does not suggest that courts either were or were not already developing efficient common law; this Note also does not address some scholars' hypothesis that the common law has

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 282.

¹⁴⁵ *Id.* at 283 (citing GARY BECKER, *THE ECONOMICS OF DISCRIMINATION* (1959); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 *YALE L.J.* 499 (1961); Ronald Coase, *The Problem of Social Cost*, 3 *J.L. & ECON.* 1 (1960)).

¹⁴⁶ *Id.* at 284. This Note, however, will not address the larger controversy regarding the application of economics to nonmarket human behavior. *See id.* at 284 & n.14 (citing GARY BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* (1976); Ronald Coase, *Economics and Contiguous Disciplines*, 7 *J. LEGAL STUD.* 201 (1978)).

¹⁴⁷ *See* Posner, *supra* note 141, at 284–87.

¹⁴⁸ *See id.*

¹⁴⁹ *See id.* Thus, one hypothesis is that the common law, like effective competition, promotes efficiency. *See id.* at 288–89.

¹⁵⁰ *See infra* notes 174–229 and accompanying text. Also, this Note does not conduct an economic analysis of RLUIPA's effect on local zoning systems; rather, this Note simply notices how courts can use an economic perspective to inform other policy objectives at stake in a RLUIPA claim. *See infra* notes 174–229 and accompanying text.

¹⁵¹ *See infra* notes 174–229 and accompanying text.

¹⁵² *See infra* notes 174–229 and accompanying text.

developed so as to improve efficiency.¹⁵³ Rather, this Note draws on the language in Judge Posner's opinions to explore the application of RLUIPA from a new perspective.¹⁵⁴

B. *Legitimizing an Antidiscrimination Act with Economics*

As an initial matter, the economic approach can be an appropriate method to understand a statute aimed at antidiscrimination for two reasons.¹⁵⁵ First, the economic approach legitimizes a prohibition against religious discrimination.¹⁵⁶ Second, the economic approach legitimizes the creation of a healthy, pluralistic, religious marketplace.¹⁵⁷

First, the economic approach justifies the constitutional prohibition against racial discrimination by state action that can then be extended to religious discrimination by local governments in the context of RLUIPA.¹⁵⁸ In particular, a neutral antidiscrimination principle can be justified on economic grounds by identifying the distributive effects of discrimination.¹⁵⁹ According to the law and economics of discrimination, Judge Posner, for example, describes the preference not to associate with certain groups of people as a real cost imposed on those with a "taste for discrimination."¹⁶⁰ There are, in addition, economic forces at work to minimize discrimination in the competitive market because the least prejudiced sellers, who do not discriminate in their consumer base, incur less cost to increase their market share.¹⁶¹ Nevertheless, in a regulated market where monopolies are not necessarily freely transferrable, market forces may not mitigate the effects of dis-

¹⁵³ See Posner, *supra* note 141, at 288–89. Importantly, some laws do not develop in keeping with efficiency norms. See POSNER, *supra* note 133, at 355, 362–63. For example, because racial discrimination can be seen as an efficient way to lower information costs, laws targeted against this efficient yet undesirable behavior do not promote efficiency. *Id.* Importantly, the economic approach can provide a neutral, nondiscrimination principle. See *id.* at 355; *infra* notes 155–173 and accompanying text.

¹⁵⁴ See *infra* notes 155–229 and accompanying text.

¹⁵⁵ See *infra* notes 158–173 and accompanying text. Although this Note suggests that the economic perspective is useful in RLUIPA cases, this Note does not go further to conduct a more rigorous economic analysis of the effect of RLUIPA on local zoning systems. See generally Michael W. McConnell & Richard Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1 (1989) (taking a thorough economic approach to issues of religious freedom).

¹⁵⁶ See *infra* notes 158–173 and accompanying text.

¹⁵⁷ See *infra* notes 169–173 and accompanying text.

¹⁵⁸ See POSNER, *supra* note 133, at 358.

¹⁵⁹ *Id.* at 351–58 & n.1 (citing BECKER, *supra* note 145).

¹⁶⁰ *Id.* at 351–52.

¹⁶¹ *Id.* at 352.

crimination.¹⁶² Thus, government regulations, especially discriminatory regulations, may increase discrimination above the level that would exist in an unregulated market.¹⁶³

Furthermore, the economic approach merely considers the redistributive effects of discrimination.¹⁶⁴ For example, segregation can be viewed as reducing the opportunity of racial and economic minorities to engage in valuable interracial associations.¹⁶⁵ Under the economic view, desegregation is not a way of devaluing the freedom of association of racial and economic majorities.¹⁶⁶ Rather, the economic approach is simply a tool to assess the distributive effects of a given regulation's costs and burdens.¹⁶⁷ Properly understood, therefore, the economic approach is neutral in that it merely considers the systemic redistributive effects of discrimination.¹⁶⁸

Second, the economic approach allows scholars to examine issues of religious freedom from the perspective of competition, costs, and benefits.¹⁶⁹ In Judge Posner's dissent in *Civil Liberties for Urban Believers v. City of Chicago (CLUB)*, he reasoned that "the greater vitality of American religion . . . owes much to our unwillingness to allow government to favor particular sects."¹⁷⁰ The focus on competition shifts our attention away from the gridlock between the poles of favoring religion versus fighting religious discrimination and identifies a common goal for communities and religious institutions alike: the creation of a healthy, religious marketplace.¹⁷¹ Furthermore, religious organizations compete with each other to confer external benefits on society in the form of services for the community.¹⁷² The economic approach is thus particularly useful in analyzing issues of religious freedom because it examines how the forces of competition, costs, and benefits can converge to foster a common goal: religious freedom in the marketplace.¹⁷³

¹⁶² *Id.* at 353.

¹⁶³ *Id.* at 352–58.

¹⁶⁴ See POSNER, *supra* note 133, at 352, 355.

¹⁶⁵ See *id.* at 355.

¹⁶⁶ See *id.*

¹⁶⁷ See *id.*

¹⁶⁸ See *id.*

¹⁶⁹ *CLUB*, 342 F.3d at 770 (Posner, J., dissenting).

¹⁷⁰ *Id.*

¹⁷¹ See *id.*

¹⁷² McConnell & Posner, *supra* note 155, at 2.

¹⁷³ *Id.*

C. *Economic Principles in the Application of RLUIPA*

Although courts and scholars have struggled over competing concerns in the application of RLUIPA, Judge Posner's decisions and dissents offer a number of ways to balance these concerns.¹⁷⁴ In a series of Seventh Circuit cases, Judge Posner's opinions reflect a balancing act between competing policies that underlie the application of RLUIPA's Substantial Burden and Equal Terms provisions.¹⁷⁵ Further, one can trace the use of economic concepts in striking this balance between competing policy concerns.¹⁷⁶ Thus, the economic approach to the application of RLUIPA can be a helpful way to recast the debate historically framed in terms of control and power.¹⁷⁷

The next Section observes the use of economic concepts in Judge Posner's decisions in two ways.¹⁷⁸ First, Judge Posner prefers a particularized inquiry in applying the RLUIPA's Substantial Burden and Equal Terms provisions.¹⁷⁹ Second, this Part touches on Judge Posner's idea of RLUIPA's effect on risk distribution.¹⁸⁰

1. The Use of a Particularized Inquiry

In applying both the Substantial Burden and Equal Terms provisions of RLUIPA, Judge Posner struck a compromise between competing views regarding who—municipalities or religious institutions—should control land-use regulations by using a fact-intensive inquiry

¹⁷⁴ See *River of Life*, 611 F.3d at 369–71 (balancing competing interests using a new regulatory criteria test in cases implicating RLUIPA's Equal Terms provision); *World Outreach*, 591 F.3d at 539 (balancing competing interests by weighing a substantial burden against an institution's needs and resources in cases involving RLUIPA's Substantial Burden provision); *Saints Constantine*, 396 F.3d at 899–901 (drawing on the idea of assumption of risk to balance municipal or religious-institutional control over land-use regulations). To be fair, other courts have also applied RLUIPA in a very fact-intensive manner. See McClenathan, *supra* note 43, at 426. One scholar argued that most courts use the fact-intensive inquiry to come to the "right" result. *Id.* The main difference between those decisions and Judge Posner's opinions is that Judge Posner's opinions often articulate why and how facts are relevant in the balancing act. See *River of Life*, 611 F.3d at 369–71; *World Outreach*, 591 F.3d at 539; *Saints Constantine*, 396 F.3d at 899–901.

¹⁷⁵ See *River of Life*, 611 F.3d at 369–71; *World Outreach*, 591 F.3d at 539; *Saints Constantine*, 396 F.3d at 899–901.

¹⁷⁶ See *River of Life*, 611 F.3d at 369–71; *World Outreach*, 591 F.3d at 539; *Saints Constantine*, 396 F.3d at 899–901.

¹⁷⁷ See *River of Life*, 611 F.3d at 369–71; *World Outreach*, 591 F.3d at 539; *Saints Constantine*, 396 F.3d at 899–901.

¹⁷⁸ See *infra* notes 181–229 and accompanying text.

¹⁷⁹ See *infra* notes 181–218 and accompanying text.

¹⁸⁰ See *infra* notes 219–229 and accompanying text.

particular to the religious institution and zoning scheme in question.¹⁸¹ This approach reflects a law and economics approach to zoning.¹⁸² According to one scholar's exposition of the application of the Coase Theorem to zoning system, the value judgment of a zoning system is specific and particular to each system's institutional design and rights distribution.¹⁸³ The use of economics thus requires one to refrain from a categorical value judgment regarding a land-use regulation.¹⁸⁴ Rather, as Judge Posner has demonstrated, the application of RLUIPA's Substantial Burden and Equal Terms provisions can be value-neutral by employing a fact-intensive, particularized approach.¹⁸⁵

a. *The Substantial Burden Provision and the System Specific Inquiry*

In *World Outreach Conference Center v. City of Chicago* and *Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, Seventh Circuit cases in 2009 and 2005 respectively, Judge Posner discussed the competing policy concerns that underlie the alternative applications of RLUIPA.¹⁸⁶ In *Saints Constantine*, Judge Posner outlined the competing concerns in the application of RLUIPA's Substantial Burdens provision.¹⁸⁷ First, he took into consideration the concern that the provision could give religious institutions too much control over land-use regulations, which may implicate the Constitution's Establishment Clause.¹⁸⁸ Likewise in *World Outreach*, he noted that the term "substantial" must be interpreted so that churches would not be granted "blanket immunity from land-use regulation."¹⁸⁹ But, Judge Posner then counter-argued that religious institutions, especially those of a minority religion, are

¹⁸¹ See *infra* notes 186–218 and accompanying text.

¹⁸² See Lawrence Lai Wai Chung, *The Economics of Land-Use Zoning*, 65 TOWN PLAN. REV., no. 1, 1994 at 77, 92.

¹⁸³ *Id.* Thus, an economic analysis of a zoning system would examine, first, the institutional design of the system and, second, the effect of that design on the distribution of rights. *Id.* Furthermore, in an economic analysis of zoning regulations, one would refrain from making quick, broad generalizations about all cities and towns; instead, the economic approach would be fine-tuned to examine the effect of zoning on the distribution of rights in a specific town. See *id.* Instead, the economic approach would be particularized, fine-tuned to examine the effect of a system of zoning on the distribution of rights for religious institutions. See *id.*

¹⁸⁴ See *id.*

¹⁸⁵ See *infra* notes 186–218 and accompanying text.

¹⁸⁶ See *World Outreach*, 591 F.3d at 539; *Saints Constantine*, 396 F.3d at 899–901.

¹⁸⁷ See *Saints Constantine*, 396 F.3d at 899–901.

¹⁸⁸ See *id.* at 900.

¹⁸⁹ 591 F.3d at 539.

vulnerable to subtle forms of discrimination by local zoning officials acting without procedural safeguards.¹⁹⁰

Other courts, as described in Section I.B, have identified a murky area between “minimal impact” and “effectively impracticable” where an ordinance may be construed as having a substantial burden.¹⁹¹ Judge Posner, however, defined a flexible, fact-intensive compromise between the two poles:

We shall assume that determining whether a burden is substantial (and if so whether it is nevertheless justifiable) is ordinarily an issue of fact (oddly we cannot find a reported opinion that addresses the question) and that substantiality is a relative term—whether a given burden is substantial depends on its magnitude in relation to the needs and resources of the religious organization in question.¹⁹²

In other words, what hits the moving target between “minimal impact” and “effectively impracticable” depends on the individual needs of the religious institution.¹⁹³ For example, in *World Outreach*, Judge Posner outlined the needs and resources of the particular religious organization to assess the weight of the burden imposed on the church.¹⁹⁴ In that case, the court upheld the landmark designation that prevented the church from demolishing an apartment house.¹⁹⁵ The court determined that the costs to the church were modest and that those costs could be offset by the prospect of selling the landmark and putting the proceeds towards the proposed construction of a family-life center.¹⁹⁶

In *Saints Constantine*, Judge Posner conducted a similar cost analysis and held that an ordinance imposed a substantial burden.¹⁹⁷ Fur-

¹⁹⁰ *Saints Constantine*, 396 F.3d at 900 (citing *Emp’t Div. v. Smith*, 494 U.S. 872, 884 (1990); *Akers v. McGinnis*, 352 F.3d 1030, 1041–42 (6th Cir. 2003); *CLUB*, 342 F.3d at 764; *Am. Jewish Congress v. City of Beverly Hills*, 90 F.3d 379, 383–86 (9th Cir. 1996) (en banc)).

¹⁹¹ See *supra* notes 43–66 and accompanying text.

¹⁹² *World Outreach*, 591 F.3d at 539 (citing *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 349 (2d Cir. 2007); *Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 999–1000 (7th Cir. 2006)).

¹⁹³ See *id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Saints Constantine*, 396 F.3d at 899–901; see also *Westchester Day Sch.*, 504 F.3d at 352 (using a particularized inquiry to take the distribution of costs in a zoning system into account).

thermore, Judge Posner fine-tuned the balancing act in the competition for control over land-use regulations by likening the substantial burden analysis to the disparate-impact theory of employment discrimination.¹⁹⁸ In so doing, Judge Posner reasoned that a finding of a substantial burden merely raises the inference of discrimination.¹⁹⁹

b. *The Equal Terms Provision and the Particularized Inquiry*

In *River of Life Kingdom Ministries v. Village of Hazel Crest*, a 2010, en banc Seventh Circuit case, Judge Posner wrote for the majority to address the competing concerns over the application of RLUIPA's Equal Terms provisions.²⁰⁰ As in the Substantial Burdens context, Judge Posner turned to a flexible inquiry to strike a compromise between competing policies regarding whether municipalities or religious institutions should control land-use regulations.²⁰¹

In *River of Life*, Judge Posner discussed the Eleventh and Third Circuits' different constructions of the Equal Terms provision.²⁰² On the one hand, the court criticized the broad reading of the term "assembly" as one that may grant preferential treatment to religious land uses and violate the Establishment Clause.²⁰³ In addition, the court criticized the construction of the term as being so broad that it required courts to compare incommensurable uses of land.²⁰⁴

In equal part, the court also expressed its concerns with the Third Circuit's application of the Equal Terms provision.²⁰⁵ In particular, the court explained that the Third Circuit's application allowed self-serving zoning officials to disguise systematic discrimination of a religious institution under the "regulatory purpose" guise.²⁰⁶

In an effort to balance the two approaches, the court formed the "accepted zoning criteria" test—a particularized approach.²⁰⁷ The test states that "[i]f a church and a community center, though different in many respects, do not differ with respect to any accepted zoning criterion, then an ordinance that allows one and forbids the other denies

¹⁹⁸ *Saints Constantine*, 396 F.3d at 900.

¹⁹⁹ *Id.*

²⁰⁰ 611 F.3d at 368–71.

²⁰¹ *See id.* at 371.

²⁰² *Id.* at 368–71.

²⁰³ *Id.* at 370.

²⁰⁴ *Id.* at 371.

²⁰⁵ *Id.*

²⁰⁶ *River of Life*, 611 F.3d at 371.

²⁰⁷ *Id.*

equality and violates the equal terms provision.”²⁰⁸ In looking to these “accepted zoning criteria,” the court reasoned that the concept of equality in the land-use context must be measured against objective factors.²⁰⁹

Furthermore, a judge should conduct this particularized inquiry.²¹⁰ For example, the main difference between the accepted zoning criteria and regulatory purposes tests is that, at trial, a federal judge would determine certain objective, regulatory, zoning criteria as opposed to taking the regulatory purposes put forth by zoning officials at face value.²¹¹ Put differently, the court in *River of Life* followed the Third Circuit’s narrow reading of “assembly,” but shifted the focus from the stated regulatory purpose (which would have been taken at face value) to objective regulatory criteria (which a judge would determine).²¹² In this way, a court would avoid the hazards of subjective and potentially self-serving testimonies by local officials.²¹³ Rather, the inquiry would depend on judge-determined, objective standards.²¹⁴

Finally, the court did not adopt the Eleventh Circuit’s use of the strict scrutiny analysis.²¹⁵ The court reasoned that the analysis lacked textual basis and would only have been required to counterbalance the Eleventh Circuit’s over-protection of religious institutions.²¹⁶

Thus, the “accepted zoning criteria” test would allow judges to act in the place of Congress when striking a compromise with municipalities in the application of RLUIPA.²¹⁷ In a vein similar to Judge Posner’s articulation of the proper application of the substantial burdens provision, judges would apply an objective, yet flexible standard.²¹⁸

2. Assumption of Risk

In both the application of the Substantial Burdens and Equal Terms provisions, Judge Posner invokes the concept of assumption of

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.* (stating that “it is federal judges who will apply the criteria to resolve the issue”).

²¹² See *River of Life*, 611 F.3d at 371.

²¹³ See *id.*

²¹⁴ *Id.*

²¹⁵ *Id.* at 370–71.

²¹⁶ *Id.*

²¹⁷ See *id.*

²¹⁸ See *River of Life*, 611 F.3d at 371.

risk.²¹⁹ In *Petra Presbyterian Church v. Village of Northbrook*, the Seventh Circuit drew on *Saints Constantine* to affirm that, once an organization has bought property “reasonably expecting to obtain a permit,” the subsequent denial of the permit may constitute a substantial burden.²²⁰ In *Petra Presbyterian*, however, the court held that the institution did not reasonably expect to obtain a permit.²²¹ Rather, the institution assumed the risk that they would not be granted a permit and so the denial of the permit did not constitute a substantial burden.²²²

In the same case, Judge Posner used the assumption of risk concept in applying the Equal Terms provision.²²³ Although a previous ordinance may conceivably have violated RLUIPA’s Equal Terms provision, the court held that the plaintiff institution “knew or should have known” that the town could change its ordinance to comply with the Equal Terms provision in two ways.²²⁴ First, the town could permit religious organizations in the zone; second, the town could forbid all membership organizations in the zone.²²⁵ The court held that the institution could not reasonably assume that the municipality would choose the first option, and therefore did not reasonably rely on the illegality of the previous ordinance.²²⁶ Thus, the institution assumed the risk that an ordinance could continue to prohibit religious uses on a certain piece of property.²²⁷

Petra Presbyterian evinces a reluctance to apply RLUIPA to provide plaintiffs with insurance against risky behavior in the marketplace for

²¹⁹ *Petra Presbyterian Church v. Vill. of Northbrook*, 489 F.3d 846, 849–51 (7th Cir. 2007). Although the concept is used in other areas such as torts, the application of the assumption of risk concept in zoning cases can be pursued further. See generally Calabresi, *supra* note 145 (applying the idea of risk distribution to tort law). Also, analogues in the law on takings provide a fruitful comparison. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 315 (2002); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1034 (1992) (Kennedy, J., concurring); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978); John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003, 1037 (2003). See generally John A. Kupiec, Note, *Returning to Principles of “Fairness and Justice”: The Role of Investment-Backed Expectations in Total Regulatory Taking Claims*, 49 B.C. L. REV. 865 (2008) (discussing the use of investment-backed expectations in total regulatory taking cases).

²²⁰ *Petra Presbyterian*, 489 F.3d at 851.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.* at 849.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Petra Presbyterian*, 489 F.3d at 849.

²²⁷ *Id.*

property.²²⁸ In this way, Judge Posner affirms the role of RLUIPA in protecting institutions against discrimination, but does not extend its protection to economically risky behavior.²²⁹

III. THE ECONOMIC APPROACH TO THE APPLICATION OF RLUIPA, ITS LIMITS, AND ITS EFFECT ON THE BALANCE OF POWER

Although Judge Posner's use of economic concepts is a way to resolve the tension regarding whether local governments or religious institutions should control land-use regulations, his opinions unearth new tensions in the application of RLUIPA.²³⁰ First, Judge Posner's RLUIPA analysis, especially under the Equal Terms provision, may be insufficient for making finer, factual distinctions.²³¹ Second, like the control and power framework, Judge Posner's economic approach in general also does not provide clear guidance for the application of RLUIPA.²³²

A. *The Limits of RLUIPA's Equal Terms Provision*

In cases involving commercially zoned areas, the language of Judge Posner's opinions suggests that RLUIPA's Equal Terms provision is ill-fitted for dealing with finer, factual distinctions.²³³ In particular, commercially zoned areas that are not purely commercial complicate the Seventh Circuit's "accepted zoning criteria" test.²³⁴ Thus, Judge Posner's application of RLUIPA's Equal Terms provisions falls short of the particularized analysis the economic approach advocates.²³⁵

Judge Posner recently discussed the right of a municipality to foster commercial growth by creating zones that are purely commercial.²³⁶ He wrote for the majority in *River of Life Kingdom Ministries v. Village of Hazel Crest*—a 2010 en banc Seventh Circuit opinion—and stated that

²²⁸ See *id.* at 849–51.

²²⁹ See *id.*

²³⁰ See *infra* notes 233–273 and accompanying text.

²³¹ See *infra* notes 233–257 and accompanying text.

²³² See *infra* notes 259–273 and accompanying text.

²³³ See *River of Life Kingdom Ministries v. Vill. of Hazel Crest*, 611 F.3d 367, 372–74 (7th Cir. 2010) (en banc); *Civil Liberties for Urban Believers v. City of Chicago (CLUB)*, 342 F.3d 752, 768–74 (7th Cir. 2003) (Posner, J., dissenting) (dissenting on equal protection grounds in a RLUIPA case).

²³⁴ See *River of Life*, 611 F.3d at 372–74; *CLUB*, 342 F.3d at 768–74 (Posner, J., dissenting).

²³⁵ See *River of Life*, 611 F.3d at 372–74; *CLUB*, 342 F.3d at 768–74 (Posner, J., dissenting).

²³⁶ *River of Life*, 611 F.3d at 372–73.

“it seems clear that industry and commerce are also necessary and desirable and that a proper environment for them will promote the general welfare of the public.”²³⁷ Thus, claims brought under RLUIPA’s Equal Terms provision against ordinances that purport to create a purely commercial zone are likely to fail.²³⁸

At the end of the opinion, however, Judge Posner suggested that the accepted zoning criteria test was limited and did not account for cases involving variances and special-use permits that blur an area’s character.²³⁹ In those cases, the area in question may not be neatly characterized as a purely “commercial district” or a “residential district.”²⁴⁰ Judge Posner further emphasized that there are other, more effective grounds to challenge RLUIPA’s validity.²⁴¹

One such ground is the Equal Protection Clause of the Fourteenth Amendment, which Judge Posner relied on in dissenting in *Civil Liberties for Urban Believers v. City of Chicago (CLUB)*.²⁴² In *CLUB*, Judge Posner was faced exactly with the sort of factually difficult situation imagined, wherein a commercially zoned area already has mixed uses.²⁴³ First, Judge Posner noted that the City of Chicago already had mixed uses (including churches) in commercially zoned areas.²⁴⁴ Second, the zoning ordinance in *CLUB* simply required special-use permits to operate in a commercially zoned area; it was not a categorical ban of non-commercial uses as in *River of Life*.²⁴⁵

In his dissent, Judge Posner concluded that the zoning regulation that treated religious uses differently to achieve commercial purposes violated the Equal Protection Clause.²⁴⁶ In particular, Judge Posner noted that, when a land-use regulation targets churches, the risk of discrimination against particular sects, not against religious uses generally, warrants “more careful judicial scrutiny” than regular equal protection challenges.²⁴⁷ Furthermore, Judge Posner stated that the ordinance did in fact discriminate against lesser known sects.²⁴⁸ He explained that an

²³⁷ *Id.* at 372.

²³⁸ *Id.* at 373–74.

²³⁹ *Id.*

²⁴⁰ *See id.* at 373–74.

²⁴¹ *Id.* at 374.

²⁴² 342 F.3d at 768–74.

²⁴³ *See id.* at 771–72; *see also River of Life*, 611 F.3d at 373–74.

²⁴⁴ *CLUB*, 342 F.3d at 771–72 (Posner, J., dissenting).

²⁴⁵ *See id.* at 771; *see also River of Life*, 611 F.3d at 368.

²⁴⁶ *See CLUB*, 342 F.3d at 768 (Posner, J., dissenting).

²⁴⁷ *Id.* at 770.

²⁴⁸ *Id.*

ordinance that makes it expensive for minority churches to build in commercially zoned areas disparately impacts minority churches as compared to well-known sects.²⁴⁹ This was because the entry costs of minority religions into the religious marketplace would be lower if they could open “storefront” churches in a commercial zone.²⁵⁰ Thus, even though the prohibition against religious uses was not absolute, the mechanism by which municipalities imposed prohibitive cost burdens on marginal institutions violated the Equal Protection Clause.²⁵¹

In light of this alternative method, the Seventh Circuit’s “accepted zoning criterion” test reveals the analysis’s limitations in allowing judges to take into account finer, factual differences.²⁵² Judges following the Seventh Circuit’s test will constantly be required to read meaning into RLUIPA’s text and redefine “zoning criterion” when faced with zones that are not purely commercial.²⁵³ By contrast, the use of the Equal Protection Clause allowed Judge Posner to take into account the factually ambiguous nature of the zone and the ordinance.²⁵⁴ Furthermore, the use of the Equal Protection Clause allowed for a more detailed inquiry into particular costs to religious minorities, not just to religious land uses generally.²⁵⁵

In a similar vein, one scholar looked to the text of RLUIPA to argue that the overly broad language of RLUIPA has caused considerable confusion in the courts.²⁵⁶ Furthermore, this result is at odds with the legislative intent (that religious institutions should not be immune from local zoning laws) and so courts are required to read new meaning into the text to try to strike a balance between municipal and religious-institutional interests in the application of RLUIPA.²⁵⁷

²⁴⁹ *Id.* at 770–71.

²⁵⁰ *Id.*

²⁵¹ *See id.*

²⁵² *See River of Life*, 611 F.3d at 372–74; *CLUB*, 342 F.3d at 768–74 (Posner, J., dissenting).

²⁵³ *See River of Life*, 611 F.3d at 373–74.

²⁵⁴ *See CLUB*, 342 F.3d at 768–74 (Posner, J., dissenting).

²⁵⁵ *See id.* at 768–74.

²⁵⁶ *See* Daniel P. Lennington, *Thou Shalt Not Zone: The Overbroad Applications and Troubling Implications of RLUIPA’s Land Use Provisions*, 29 SEATTLE U. L. REV. 805, 806, 834–36 (2006).

²⁵⁷ *See id.*

B. *The Economic Approach to the Application of RLUIPA and
Its Effect on the Balance of Power*

One can also examine the effect of the economic approach in applying RLUIPA as compared to the debate framed in terms of power and control.²⁵⁸ Although the economic approach refracts the debate to allow for a compromise between competing concerns over whether municipalities or religious institutions should control land-use regulations, the economic approach introduces new tensions in the balance of power.²⁵⁹

In particular, the use of economic principles takes power out of the hands of local governments and religious institutions and places it into the hands of courts.²⁶⁰ For example, the new test proposed by the Seventh Circuit in *River of Life* would require judges to determine regulatory objectives.²⁶¹ Likewise, in the substantial burden context, judges would be heavily engaged in a particularized inquiry.²⁶²

This shift in power reveals the limitations of an economic approach in applying RLUIPA's provisions.²⁶³ In particular, judges may be ill-equipped to use economic principles to apply RLUIPA's provisions.²⁶⁴ For example, as Judge Ann Williams rose in her dissent in *River of Life*, the Seventh Circuit's test is vague and difficult for judges to apply.²⁶⁵ Furthermore, under the Seventh Circuit's test, judges may look to local officials' stated regulatory purposes anyway in determining a regulatory objective.²⁶⁶ Finally, zoning officials could still couch discriminatory zoning policies in terms of accepted regulatory objectives.²⁶⁷

Further, this shift in the balance of power is accompanied by a broader tension when viewed in light of the balance of power between the federal government and municipalities.²⁶⁸ In fact, judges may end up eschewing the legitimacy of a federal act intended to solve a nationwide problem by focusing on the system-specific distributive effects of a

²⁵⁸ See *infra* notes 260–273 and accompanying text.

²⁵⁹ See *infra* notes 260–273 and accompanying text.

²⁶⁰ See *River of Life*, 611 F.3d at 371; *World Outreach Conference Ctr. v. City of Chicago*, 591 F.3d 531, 539 (7th Cir. 2009) (suggesting that judges would be required to do more fact-intensive balancing).

²⁶¹ 611 F.3d at 371.

²⁶² See *World Outreach*, 591 F.3d at 539.

²⁶³ See *River of Life*, 611 F.3d at 376–77 (Williams, J., concurring).

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 376.

²⁶⁶ *Id.* at 376–77.

²⁶⁷ *Id.*

²⁶⁸ See *infra* notes 269–273 and accompanying text.

zoning regulation.²⁶⁹ Consequently, the economic approach may bolster the position of scholars who propose that local governments are better able to balance community-specific concerns.²⁷⁰

Finally, this tension is further exacerbated by the inconclusiveness of the data regarding discrimination against religious institutions.²⁷¹ In the context of RLUIPA, courts are faced with various, conflicting sets of data on the distributive effects of zoning regulations in both the local and federal contexts.²⁷² This highlights the need to carefully consider how exactly courts should take into account system-specific data while respecting the congressional intent to provide federal protection for religious institutions.²⁷³

CONCLUSION

Given the limitations of RLUIPA and its potential to disturb the balance of power, the use of economic analysis is not an instant way to resolve the tensions inherent in RLUIPA's application. Nevertheless, the use of economic concepts can still guide a more balanced discussion and application of RLUIPA. Thus, the limitations of RLUIPA do not render the economic approach of RLUIPA meaningless, but rather point out flaws even in the alternative approach.

First, there must be a more nuanced understanding of the balance of power between religious institutions, municipalities, and the federal government. In particular, this understanding should take into account the role of the courts in either upsetting or correcting this balance of power in the context of religious discrimination. Second, there should be a more rigorous economic study of the effect of zoning and of RLUIPA cases on the distribution of rights. This Note merely points out the use of economic concepts and the analysis is a far cry from a detailed, scientific inquiry. Such an inquiry would involve a rigorous eco-

²⁶⁹ Joint Statement, *supra* note 60, at 16,699. In relevant part, the *Congressional Record* provides:

The discrimination against religious uses is a nationwide problem. It does not occur in every jurisdiction with land use authority, but it occurs in many such jurisdictions throughout the nation. Where it occurs, it is often covert. It is impossible to make separate findings about every jurisdiction, or to legislate in a way that reaches only those jurisdictions that are guilty.

Id.

²⁷⁰ See Schragger, *supra* note 9, at 1846–47; Hamilton, *supra* note 98.

²⁷¹ See *supra* notes 120–130 and accompanying text.

²⁷² See *supra* notes 120–130 and accompanying text.

²⁷³ See *supra* notes 120–130 and accompanying text.

conomic analysis of RLUIPA's effect on local zoning systems. Furthermore, this sort of inquiry can help scholars answer the questions of whether RLUIPA is actually an effective means to combat religious discrimination.

As of now, RLUIPA's efficacy seems limited, and the discussion about its usefulness is deadlocked. By looking at the issues through multiple lenses, however, perhaps we can discover a new avenue in the fight against religious discrimination in land-use regulations.

TOKUFUMI NODA