HISTORIC PRESERVATION and RLUIPA: Finding an Appropriate Balance between America's Heritage and the Free Exercise Clause

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I. INTRODUCTION

The National Trust for Historic Preservation, the preeminent historic preservation organization in the United States, posits, "Churches, synagogues, temples and mosques are often the most ambitious, beloved, and architecturally significant buildings in any given urban neighborhood. Their domes, towers, and spires provide identifying elements in the local skyline, and they attest to the diverse traditions that have created cities and towns across the country."[1] Furthermore, it warns, "Abandoning these buildings would mean losing an irretrievable part of the nation's cultural heritage that extends from before the Revolutionary War to the modern Civil Rights Movement."[2]

This Comment examines real and potential constitutional conflicts arising when historic preservation is confronted by the powerful land use provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA).[3] The development of historic preservation in the United States is summarized, as is the federal jurisprudence and legislative history leading to the enactment of RLUIPA. Specific clauses within the Act are individually examined and critiqued from the perspective of existing Supreme Court jurisprudence and the Congressional Record at the time of passage. New methods for

interpreting RLUIPA provisions are then proposed to reconcile case law and the Congressional Record with the "plain" language of the Act. These new synthesized interpretations are applied to typical historic preservation issues, as they pertain to religious institutions. The hypothetical results are analyzed to predict how religious institutions, locally protected historic districts and landmark laws might be affected and/or clarified to avoid future conflicts between these worthy causes. Finally, because future conflicts between RLUIPA and protected historic districts and/or landmark buildings seem unavoidable, the Author proposes five specific amendments to the RLUIPA to mitigate the potentially devastating and irreversible affects on society that the current Act may entail.

II. BACKGROUND ON HISTORIC PRESERVATION LAW IN THE UNITED STATES

Some legal scholars have opined that the niche profession of U.S. historic preservation law began as an outgrowth of 20th century property law, specifically under the concept of servitudes.[4] "Interest in preserving open space, historic buildings, scenic views, and wildlife habitat, beginning the late 1950s and early 1960s, led to increased demand for servitudes that could serve those purposes."[5] However, before there was Historic Preservation law in the United States, there was historic preservation. Private interests in American historic preservation date as far back as the mid-18th century[6] although most preservationists will cite 1812 as the birth of American historic preservation; this was the year that famed early-American architect Robert Mills began the restoration of the steeple on Independence Hall.

Following is a summary of the progress of historic preservation in the United States, the government's inevitable involvement, and finally, how historic preservation law developed as a result.

A. The Origin and Development of Historic Preservation in the United States

Without the extensive cultural history of Europe or Asia as a visual guide, early American settlers undoubtedly saw little benefit to preserving old structures in the New World. The earliest "American" architecture was largely utilitarian or defensive in nature by necessity. Only after political and racial stability could be achieved would refined architecture be a possibility.[7] Subsequently, historic preservation would not see widespread acceptance until more and more towns became cities, and regional architecture began to develop recognizable styles or identities.

However, preservation of American culture gained popularity after the Civil War as social and economic change was thrust upon the nation.[8] This era saw the formation of dedicated private groups that would later bring public attention and much-needed charitable funding to the cause. In 1885, the Trustees of Scenic and Historic Places and Objects was founded in New York. Its mission was "the Protection of Natural Scenery, the Preservation of Historic Landmarks and the Improvement of Cities."[9] In 1889, the Association for the Preservation of Virginia became the first statewide preservation society of its kind, self-charged with preserving, interpreting and promoting, "real and personal property relating to the history and people of Virginia."[10]

An annual report published by the American Scenic and Historic Preservation Society, circa 1911, indicates that public support for historic preservation to have been

robust, especially in academic circles. The presidents of Yale, Harvard and Columbia Universities all wrote thoughtful letters of support for the group.[11] An especially moving letter from the Rev. H. M. MacCracken, DD., LL.D., chancellor of New York University stated:

> All American universities, inasmuch as they are charged with the highest responsibility for the education of American youth, must welcome the existence [of your Society]. Scenic and historic places and objects teach patriotism and nourish moral sentiments, while they care also in some measure for the esthetic nature. When once established, these famous places become unsalaried teachers. They never die, never ask to be retired on pensions, and their voices grow stronger and more convincing with increased age. May your Society be prospered in adding to the roll of these immortal teachers.[12]

It would seem difficult for one of Rev. McCracken's contemporaries to question support, monetarily or otherwise, for groups promoting the causes of American "patriotism" and "moral sentiments."

B. Government Involvement in Historic Preservation

These early preservation societies began as private or quasi-public entities but it did not take long for government to take up the torch of Rev. MacCracken's "patriotism" and "moral sentiments." Predictably, as public support grew, presumably within wealthy and educated circles, Congress also became involved in preservation, passing the American Antiquities Act of 1906.[13] The Act authorized the President to designate and protect "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest … to be national monuments. . . ." In 1928, Colonial Williamsburg began its own comprehensive restoration program, although it also received significant private help from John D. Rockefeller.[14] Then, in 1931, Charleston,

South Carolina became the first community in the nation to enact an historic preservation ordinance, followed by New Orleans in 1936.[15]

Support for historic preservation, both public and private, came into bud in the 1930s. In 1933, the federal government initiated the Historical American Buildings Survey (HABS), a program for documenting historic buildings in a nationwide inventory. Tragically, more than half of the documented historic buildings would be destroyed within the first fifty years of the program's birth.[16] Shortly thereafter, Congress passed the Historic Sites Act of 1935.[17] This act stated that, "it is a national policy to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States." As with any new field, government involvement inevitably accelerated the creation of the relevant specialty law.

In 1966, Congress enacted the National Historic Preservation Act, stating, "The spirit and direction of the Nation are founded upon and reflected in its historic heritage and … the historical and cultural foundations of the Nation should be preserved as a living part of our community life." The NHPA authorized the creation of the National Register for Historic Places. To date, the "Register" has on its roles approximately 75,000 properties designated National Historic Landmarks by the Secretary of Interior.[18]

It is also worth noting here the phenomenon of "urban renewal," which ravaged American cities after the Second World War until its much-welcomed death in the 1970s.[19] Returning "GIs" needed homes and the Housing Act of 1949 provided cities with the financial vehicle for clearing "slums," typically older parts of a city, to make way for new development. For example, in 1954, a unanimous Supreme Court ruled in *Berman v. Parker*[20] that the public welfare was compelling enough to justify large-scale

imminent domain proceedings, effectively wiping out wholesale portions of Washington, D.C. slums. The Court declared, "The concept of the public welfare is broad and inclusive. The values it represents are *spiritual as well as physical, aesthetic as well as monetary*. [Legislatures may] determine that the community should be *beautiful* as well as healthy…, well-balanced as well as carefully patrolled."[21] While the court did not judge the desirability of new neighborhoods versus old neighborhoods, it is notable that it used the term, "beautiful." Lawmakers at all levels were thus given constitutional reinforcement that "beauty" could at least be legislated, if not specifically defined.

Imminent domain actions across the nation undoubtedly removed blight and urban decay from inner cities, however much cultural and architectural history was lost too. Nationally, historic courthouses, city halls, libraries, hotels and other irreplaceable buildings, sometimes even architectural masterpieces, were tragically lost in the name of "progress." During this period, a new breed of citizen was born – the amateur preservationist. It was during this period that phrases like, "standing before the wrecking ball," and "lying down in front of the bulldozer," entered the American English lexicon.

C. Initial Legal Challenges to Historic Preservation

As redevelopment of urban areas raced across the American landscape, several states and cities enacted local Landmark Laws and Historic Preservation Commissions at the state and local level to protect their remaining architectural legacies. Predictably, disputes arose occasionally but neither side appeared to press its luck on a national level and an uneasy balance remained. As long as a "taking" could be avoided, the

preservationists still had a horse in the race. However, it was unavoidable that a large-scale project would eventually arrive and push both sides to the brink.

1. Exterior Alterations

The rallying cry for historic preservationists eventually came in the 1978 Supreme Court decision in *Penn Central Transportation Co. v. New York City*,[22] in which the Court ruled that aesthetics and preservation, as valid forms of general welfare, and that, "Legislation designed to promote the general welfare commonly burdens some more than others."[23] The Court also ruled that, constitutionally, local ordinances could legally limit (but not ban) development of historic landmark properties without compensating the owner. Preservation efforts typically focused on building exteriors and the famed "Grand Central case" was no different. It involved plans to erect a Modernist 55-story[24] or alternately a 53-story[25] office building atop the famous French Beaux Arts landmark, Grand Central Station in Manhattan.[26]

The New York Landmarks Preservation Commission was not amused. It denied the requisite certificate to the owner and the owner sued. The Commission testified that the proposed "addition" would effectively force the landmark to become a subservient afterthought to the new building:

> [We have] no fixed rule against making additions to designated buildings – it all depends on how they are done . . . . But to balance a 55-story office tower above a flamboyant Beaux-Arts facade seems nothing more than an aesthetic joke. Quite simply, the tower would overwhelm the Terminal by its sheer mass. The 'addition' would be four times as high as the existing structure and would reduce the Landmark itself to the status of a curiosity.[27]

The developer argued, among other things that the inability to build the tower was a governmental "taking" without due process; his airspace rights had been taken without just compensation. The Court recognized that it had previously ruled that a Fifth Amendment "taking" can be established for airspace violations, e.g., where low-flying military aircraft routinely traversed a property owner's land.[28] However, this government action was not physically invasive, but merely restrictive of the owner's use of the airspace. This seemed significant in determining the constitutionality of the government's actions.

The court also acknowledged that conservation efforts could amount to a taking, where coal mining was disallowed where surface settling would result.[29] Justice Brennan wrote, "(T)he submission that appellants may establish a "taking" simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable." Furthermore, the law was perfectly neutral insofar as allowable uses were concerned:

> [T]he New York City law does not interfere in any way with the present uses of the Terminal. Its designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions … [and allows] a "reasonable return" on its investment.[30]

Therefore, by its very definition, "preservation" exempted the government from having to compensate the owner for potential future income. As long as the owner could *continue* to use the property in the manner in which it had been used historically, there was no "taking." Lest there be any confusion about its position, the Court felt the need to clarify further the city's Landmark law:

> Landmark laws are not like discriminatory, or 'reverse spot,' zoning: that is, a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones. In contrast to discriminatory zoning, which is the antithesis of land-use control as part of some comprehensive plan, the New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city. . . .[31]

In 1990, the Second Circuit affirmed a federal court ruling that rejected a Free Exercise claim pertaining to a city's refusal to remove an historic building. In *St. Bartholomew's Church v. City of New York*,[32] the City of New York, via the Landmarks Commission, denied the plaintiff's certificate of appropriateness "to replace [its] Community House[33] with a fifty-nine story[34] office tower"[35] was denied and the church filed a claim alleging *inter alia* a Free Exercise violation. Note however that *St. Bartholomew's Church* was heard just three months after the Supreme Court's decision in *Employment Division v. Smith*.[36] *Smith* would later become the catalyst for the Religious Freedom Restoration Act of 1993, which will be discussed below.

The Second Circuit ruled that disallowing the demolition of the historic structure, and the construction of the church's proposed office tower, did not "impair[] the Church's ability to carry on and expand the ministerial and charitable activities that are central to its religious mission."[37] Furthermore, having failed to establish a nexus between the Landmark Commission's decision and "discriminatory motive, coercion in religious practice or the Church's inability to carry out its religious mission in its existing facilities,"[38] the church's claims were dismissed. In both of these historic preservation cases, it is worth noting that historic structures would be compromised or destroyed to

make way for huge financial windfalls (high-rises) for the owners due to the prevailing local real estate values.

2. Interior Alterations

Not all free exercise challenges to historic preservation efforts were unsuccessful. Historically, land use laws rarely ran afoul of free exercise. [39] The two familiar interferences were landmark laws and wherever, "[a] church can prove that unyielding enforcement of a landmark ordinance will result in a forced cessation of religious worship and practice in the landmarked building . . . ."[40] In preservation cases, it is generally established that building interiors are beyond the jurisdiction of historic preservation commissions.[41] "The interiors of religious spaces undoubtedly possess great architectural, historical, and cultural significance, but they are also the places in which the faith envelops believers in the imagery and experience of reverence."[42] For example, in the pre-RLUIPA *Society of Jesus v. Boston Landmarks Commission*,[43] a Jesuit church acknowledged landmark jurisdiction on the exterior of the church[44] but argued that interior controls violated the state's constitution. The Massachusetts Supreme Court agreed:

> The configuration of the church interior is so freighted with religious meaning that it must be considered part and parcel of the Jesuits' religious worship. We conclude, therefore, that [the state constitution] protects the right freely to design interior spaces for religious worship, thus barring the government from regulating changes in such places, provided that no public safety question is presented.[45]

In December of 2000, the California Supreme Court followed *Society of Jesus* in its decision in *East Bay Asian Local Development Corporation v. California*,[46] an

Establishment Clause case in which the city of San Francisco and several non-profit groups challenged a landmark law that exempted religious properties as being facially invalid. The California Supreme Court validated the landmark law and reiterated that, among other things, "Application of a landmark regulation to control the arrangement or appearance of the interior of a house of worship, or exterior features with religious significance, poses a significant threat of government interference in religious practices."[47] The court also placed heavy weight on a comprehensive academic work, The Myth of Ministry vs. Mortar: a Legal and Policy Analysis of Landmark Designation of Religious Institutions, by Professor Alan C. Weinstein.[48] The court wrote:

> In Weinstein's summary, "[i]t seems clear that interior designation, and exterior designation that would constrain the 'theological aspects of building design' or have the effect of forcing a church to cease religious worship at a given site because of physical or financial exigency, would constitute a burden. Conversely, the denial of permission for commercial development would not appear to constitute a burden."[49]

There are two good reasons for the distinction. First, the aesthetic and cultural value that society places on preserving historic and architecturally significant structures relies heavily on the contribution of the structure to the *character* of its neighborhood. Therefore, the primary value is largely visual to area residents, businesses, tourists and passersby. This is truer in designated "historic districts" than in stand-alone "landmarks." If, for example, a town's historic courthouse receives an interior remodeling, or if a church moves its altar, the surrounding neighborhood remains unaffected and there will be no detrimental effect. Second, if historic preservation commissions oversaw interior remodeling and other changes that weigh heavily on the day-to-day functions of the occupants, not only would the government be setting a collision course with free

exercise, but a property owner's fundamental privacy rights would also be next in line to be threatened. This could create the "hybrid"[50] case that automatically and perhaps correctly triggers the strict scrutiny that Justice Scalia's majority tried so hard to avoid in *Employment Division v. Smith*.[51] For these reasons, U.S. preservation efforts should limit their jurisdiction to exterior features only.

III. BACKGROUND ON RLUIPA

The road to RLUIPA runs along peaks and valleys. Although its true origin begins with the Free Exercise Clause of the First and Fourteenth Amendments, its birth is commonly attributed to the religious backlash after the 1990 *Employment Division v. Smith* decision.

A. Legislative History Leading to RLUIPA

Before the *Smith* decision, the U.S. Supreme Court had established that the proper standard for review in free exercise cases was that of Strict Scrutiny. This standard was determined to be appropriate in the 1963 case, *Sherbert v. Verner*,[52] where the Court resolved that any governmental regulation that created a substantial burden on a religious practitioner must have a "compelling governmental interest."[53]

1. Employment Division v. Smith

With this test firmly established for over a quarter of a century, the plaintiff-respondents[54] in *Smith* confidently challenged a state's denial of unemployment benefits to them after they were fired from their jobs at a drug rehabilitation clinic for, ironically,

using drugs. Their defense was that the drug in question, a hallucinogen known as peyote,[55] was commonly used "for sacramental purposes at a ceremony of [their church,] the Native American Church."[56] The respondents argued that the Oregon statute that barred unemployment benefits could not withstand strict scrutiny.

However, the Court ruled that strict scrutiny was not the proper standard. Where "neutral, generally applicable law [burdens] religiously motivated action," the Court stated, no compelling government interest need be shown.[57] Justice Scalia wrote for the majority, attempting to explain the apparent reversal in policy, "The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause *in conjunction with other constitutional protections*. . . ."[58] In other words, when two or more fundamental rights were burdened, strict scrutiny *might* be available to those burdened. However, when the law (1) burdened only free exercise; (2) was itself not religiously motivated (facially neutral); and (3) had general applications, such as anti-drug laws, strict scrutiny was off the table. Consequently, the respondents lost their case.

2. The Religious Freedom Restoration Act

Smith angered and activated religious institutions across the country. Perceiving *Smith* to be an unconstitutional outcome, many felt that the Court had upheld states' rights at the expense of personal religious freedoms. Religious activists, both conservative and liberal, demanded that Congress enact legislation aimed at protecting religion from subsequent government interference and activist courts. The result was the

provocatively named Religious Freedom Restoration Act, or RFRA,[59] which cites exactly one case in its Congressional Findings: *Smith*.[60] This 1993 act reinstated strict scrutiny, *even in laws of general applicability*, wherever government regulation substantially burdens one's free exercise, unless the regulation furthers a compelling governmental interest and does so with the least restrictive means available.[61] The battle, however, was far from over.

3. City of Boerne v. Flores

Interestingly, or perhaps tragically, an historic landmarks case all but killed off the RFRA in 1997. Settled in 1849, the town of Boerne (pronounced "BUR-nee"), Texas was no stranger to conflicts between church and state; nor, for that matter, was the church in this case. The Boerne Convention & Visitors Bureau reveals:

> Because Boerne had been established by "free thinkers" – Germans who had no religion – churches were not permitted in Boerne. Legend tells of signs posted outside the city limits warning that preachers found inside the town after sunset would be shot. George Wilkins Kendall decided to build a Catholic church to honor his wife in 1860, and he was forced to build south of town, outside the city limits. St. Peter's Church stands on what is now Main Street.[62]

The St. Peter Catholic Church had been seeking ways to accommodate its growing congregation. "The church seated about 230 worshippers…[s]ome 40 to 60 [too small for] some Sunday masses."[63] It had four obvious options: (1) do nothing and allow the congregation size to adapt, through attrition, to the building; (2) enlarge its existing facility; (3) move to a larger facility at a new location; or (4) form a second church in or near Boerne to accommodate its flourishing congregation. Eventually, church administrators decided to enlarge its existing structure and this plan received the

blessings of the Archbishop. The church was located within a locally protected historic district, so the proposed plans for expansion would require review and approval by the city's Historic Landmark Commission. There is no mention of whether the church's plans met the design standards or whether the church even knew of the Commission's existence. The record merely states that the city denied an application for a building permit and the church sued under the RFRA.

As the case unfolded, what at first appeared to be a simple historic preservation issue quickly turned into a serious Separation of Powers matter. The courts focused squarely on the RFRA and its constitutionality, looking at whether "Congress exceeded the scope of its enforcement power under § 5 of the Fourteenth Amendment."[64] The Court was skeptical of Congress' claim that the RFRA was a remedial measure, and observed, "RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years."[65] The Court seems to have viewed the Act not as a remedial measure but as an attempt at amending the U.S. Constitution. In a carefully but powerfully worded rejoinder, the Court reiterated that Congress' power under § 5 applied *only* to enforcement.

> The design of the [Fourteenth] Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. *It has been given the power "to enforce," not the power to determine what constitutes a constutional violation*.[66]

The Court thus rejected this expansion of Congress' role and reiterated in its opinion that the Judicial Branch, not the Legislative Branch, determined whether laws were constitutional: the "powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."[67] The Court ruled that the RFRA was subsequently unconstitutional as it applied to the States, but it was disinclined to opine whether the act was constitutional as it applied to federal laws. Therefore, while the RFRA was not completely "dead," it was now badly weakened.

As with the *Smith* decision, *Boerne* mobilized RFRA proponents. This time, Congress was more careful in its approach and great care was taken to avoid the pitfalls found in the RFRA language. The result was the Religious Land Use and Institutionalized Persons Act (RLUIPA), which attempted to fix the broken RFRA. Stung by the judicial reproach in *Boerne*, Congress needed to locate a stronger basis for ratifying the Act than § 5 of the Fourteenth Amendment. It found that authority in the Commerce and Spending Clauses, as well as the Fourteenth Amendment. Next, it narrowed the Act's purview to two manageable focuses: land use laws and prisoners' rights, although a review of reported RLUIPA claims completed in late September 2003 showed that a "clear majority" pertained to the institutionalized persons half of the Act.[68] While the reach of the RLUIPA was greatly reduced from that of the RFRA, this act of self-limiting made it stronger and more enforceable.

B. RLUIPA's Questionable Legislative History

While this Comment does not address the root Constitutionality of RLUIPA, the post-mortem of any legislative session adds color to the topic at hand. A well-known

RLUIPA scholar, Professor Marci A. Hamilton,[69] has voiced unusually strong criticism of Congress' rush to ratify the Act. She has documented an extensive history of the Act's behind-the-scenes birth and passage. The information is revealing and may aid in understanding the legislative intent in future historic preservation claims, especially as it pertains to the credibility and validity of land use evidence in the legislative histories.

In her 2003 article, Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act,[70] Prof. Hamilton explains that the "RFRA triggered the court to clarify that prophylactic legislation must be justified by widespread and persisting state constitutional abuses."[71] When *Boerne* disclaimed any remedial aspect in RFRA, Congress tried to prepare itself for similar scrutiny in its unsuccessful and little-known attempt to revive the RFRA entitled the Religious Liberty Protection Act Bills of 1998 and 1999 (RLPA).[72] Anecdotes, allegations and court cases were entered into the legislative history as evidence of religious persecution by land use authorities. Prof. Hamilton was nonplussed with Congress' efforts to show "a *widespread recent pattern* of *unconstitutional* conduct in the states":[73]

> The RLPA legislative history on alleged land use abuses falls into one of five categories….: (1) two instances of unconstitutional state action; (2) two allegations of facts purporting to show unconstitutional government action; (3) two references to cases where the courts did not find constitutional violations and the religious entity criticized the result; (4) multiple references to garden variety zoning laws applied to churches; and (5) private, rather than governmental, expression that does not implicate constitutional violations. The House Report attempts to meet its burden through an adjective, summarizing this evidence as "massive"….

Although the RLPA bills failed to pass, RLUIPA soon followed. New evidence was available by then, including one study[74] that refuted evidence in the record. This study revealed, "[T]hat only one percent of those religious institutions seeking a permit or

license were [sic] denied. Moreover, of those six congregations that encountered problems in the zoning process, five were from mainstream religious groups, not minority religions as the Brigham Young study cited in the RLPA testimony claims."[75] Also of interest was a letter from Mayor Rudolph Giuliani of New York City, imploring "the members to slow RLUIPA down and to permit the cities to become involved in the dialogue."[76] However, Congress, apparently satisfied with the evidence and anecdotes on hand, declined to include any of this new evidence in the RLUIPA legislative record.

When RLUIPA was being drafted, local government groups attempted to testify before Congress to express concern over the federal stripping away of power from local and state levels. "Despite persistent requests by … the National League of Cities and the National Association of Counties, they were never permitted to get on the record. The best they were able to do was to organize an off-the-record "briefing" sessions [with staffers] in the House when RLPA was pending."[77] Furthermore, opponents of RLUIPA were notified that no vote would occur before the summer recess; however, a late voice vote passed in both Houses during the evening immediately preceding the summer recess.[78] It is also interesting to note that a voice vote does not record the tally of votes, which members were present or how they voted. She concludes that, at the end of the day, "No opponents testified (other than myself on constitutional issues), no floor debate occurred … [and] less than a handful of the members of either house were present."[79]

C. The Land Use Tests of RLUIPA

RLUIPA limits its targets to programs or activities "that receive[] Federal financial assistance…."[80] This Comment assumes that the vast majority of historic

preservation commissions around the United States receives some form of federal assistance or grant money.[81] Assuming also that future jurisprudence upholds the constitutionality of RLUIPA, fully or in part,[82] all state and local land use regulations that impose a "substantial burden" on one's "religious exercise" must survive a Compelling Government Interest and a Least Restrictive Means tests. However, there is much debate over what constitutes a substantial burden and religious exercise. Note that in addition to the above elements, RLUIPA also restricts local government further by prohibiting land use regulations that discriminate against, exclude, or unreasonably limit religious assemblies, institutions or structures within a district.[83]

1. Substantial Burden

The Substantial Burden provision is familiar to students of 20th century church and state jurisprudence. The Supreme Court established this strict test in unemployment cases where a regulation prohibited one from practicing his religion, or forced one to violate his or her religious tenets. Famous examples include cases where a plaintiff was denied unemployment benefits because she declined to work on her Sabbath[84] or where the plaintiff refused to take part in producing items repugnant to his religion.[85] The test was also used in "hybrid rights" cases, where two or more fundamental rights were burdened simultaneously, such as "free exercise plus free speech" claims[86] or "free exercise plus right to privacy/raise children" claims.[87]

The Substantial Burden language was specifically included in the RFRA.[88] While "religious exercise" was somewhat defined in the Act, no definition of "substantial burden" was included. Was the omission intentional? Omissions can be useful when left

to interpretation. If a synagogue could just as easily purchase a properly zoned lot down the street, then perhaps denying a variance of land use is not a substantial burden. If a church simply needed to select an architect better suited to designing appropriate "infill" architecture in historic areas in order to receive a certificate of appropriateness, the burden might still be insubstantial. On the other hand, if a place of worship were told that it is to offer worship services only on Thursday nights, the burden would be indisputably substantial.

No uniform definition of "substantial burden" has been formed among the federal courts, and this has caused some scholars, such as Steven G. Gey,[89] to speculate that the courts are merely "importing" their own interpretation of the idiom, as it existed during the days of the RFRA.[90] Even under the RFRA, there was no consensus on its definition. As one might expect, defining "substantial burden" from case to case risked the appearance of inconsistency. As with any indefinite directive, courts developed tests to apply to the facts of each, although no single test seemed to win over all other circuit courts.

Professor Gey noted that three different tests were created under the RFRA by the various circuit courts. The Fourth, Ninth and Eleventh Circuits used a fairly restrictive (in the interpretive sense) approach, in which the regulation in question must actually force a person to act, or prohibit one from acting, in violation of one's religious tenets, i.e., forcing one to work on her Sabbath, or prohibiting one from praying the requisite number of times per day.[91] On the other end of the spectrum are the Eight and Tenth Circuits, which defined it as any action compelling a follower to "refrain from religiously motivated conduct."[92] Somewhere in the middle lies the Sixth Circuit, which defined a

substantial burden as inhibiting any action that is "essential" or "fundamental" to one's religion.[93]

In the few land use RLUIPA cases where a circuit court has defined a substantial burden, the definitions are equally varied. The Ninth Circuit's used a "plain meaning" approach. "When a statute does not define a term, a court should construe that term in accordance with its 'ordinary, contemporary, common meaning.'"[94] Therefore, it determined that a substantial burden was any imposition of, "a significantly great restriction or onus upon such [religious] exercise."[95] In the Seventh Circuit's decision in *C.L.U.B. v. Chicago*,[96] explained, "A substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise--including the use of real property for the purpose thereof within the regulated jurisdiction generally--effectively impracticable. The Eleventh Circuit took issue with this definition, stating that such a definition would "render § b(3)'s total exclusion prohibition meaningless."[97] In its view, the Eleventh Circuit explained that a substantial burden went beyond mere inconvenience, but "a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct."[98]

So which, if any, approach is preferable? This Comment proposes that the Sixth Circuit, in its RFRA era, was on to something. Some will find it troubling to take the narrow view of "substantial burden" because there will always be the threat that a bigoted official may be appointed or elected to a zoning board or commission, and he or she will

find a way to discriminate against one or more religions. Likewise, the sweeping powers of the broader views should strike fear into anyone concerned with Congress respecting the establishment of religion, especially historic preservationists and proponents of land use ordinances.

The Sixth Circuit's middle-of-the-road approach appears to satisfy largely both camps. By barring government's encroachment only when it burdens actions that are "essential" or "fundamental" to the religion, the courts would be leaving room for interpretation, which is necessary to assess each claim in such a sweeping legal (and political) milieu. In addition to appealing to reason, the Sixth Circuit's balanced approach accomplishes three other goals within society. First, by leveling the playing field, it allows state and local zoning and preservation boards to select which religious "offenses" are egregious enough to challenge without fear of a no-win lawsuit (and attorney fees to the victor). Formerly aggressive commissions will still be less inclined to litigate than they were before the RFRA/RLUIPA, but nor will they be bullied into submission at the mere mention of "RLUIPA claim." Next, returning some power to the states will also promote efficiency and fairness because land use and historic preservation will work more intuitively and efficiently when administered at a local level, where relevant issues and histories are known to those making the decisions.

Third, the fundamental right of free expression remains protected. Only actions that are non-essential and non-fundamental to exercising one's religion may be burdened, such as appropriately designed building additions, painting schemes, and parking stall widths.[99] Similarly, laws that prohibit churches from being built within the city limits or that prohibit worshiping a certain religion, but not others, will not be tolerated. For these

reasons, the most prudent option would be for all courts to adopt the Sixth Circuit's intermediate interpretation of "Substantial Burden."

2. Religious Exercise

Next is whether the regulated activity is a "religious exercise." There are a few examples of "religious exercise" defined and nearly all favor a broad interpretation.[100] In layman's terms, "religious exercise" might include worship, ceremonial practices, proselytizing, etc. In other words, actions *directly* related to practicing one's religious beliefs. However, RLUIPA statutorily defines religious exercise as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[101] This rather expansive, if not unhelpful, definition becomes even further detached by also explicitly including actions not typically associated with worship or practicing religion, i.e., "[t]he use, building, or conversion of real property for the purpose of religious exercise…."[102] This language is extraordinary. The "plain language" might indicate that Congress intended to grant wholesale exemptions to all faiths from following all zoning ordinance or historic preservation law (and perhaps, it could be argued, building codes)[103] in the land, at any level. As long as the person is using, building upon or demolishing structures on her property for "the purpose of religious exercise," whatever that might be, governmental regulation of such is automatically suspect.

However, there does appear to be a limit to how much a court will swallow. In a Wyoming case,[104] the court questioned the sincerity of a church claim that its proposed daycare center, located in a residential district, was for a religious use. The city produced documentation and affidavits showing that the use was intended to be a commercial

operation; only after the variance was denied by the city did the RLUIPA claim arise. The court seemed skeptical of the church's claim:

> In this case, Defendants have pointed to evidence which indicates that: (1) Grace United's proposed day care may not be religious in nature; and (2) even if it is a "religious school," as Plaintiff now contends, Reverend Laughlin labeled it as such *for legal protection*. A reasonable jury could conclude either way on the evidence presented in the motions for summary judgment.[105]

Therefore, while there is considerable leniency toward religious claimants, the presumption is only automatic until faced with credible contradictory evidence.

3. Compelling Governmental Interest

So what exactly is a Compelling Governmental Interest? Health and Safety concerns are obvious compelling governmental interests. "There appears to be no dispute that local governments have a compelling interest in protecting the *health and safety* of their communities through the enforcement of the local zoning regulations."[106] The general welfare of the people, however, is a less obvious candidate for a compelling interest because of its vagueness. What constitutes welfare? The government's interest in aesthetics, comprehensive land-use plans and wetland preservation are more difficult to assess.

Historic preservationists will need to demonstrate how preservation benefits the immediate community, and how these benefits collectively, and often indirectly, advance the public welfare. Fortunately, examples are plentiful. Historic preservation and landmark laws "are justified as promoting the general welfare to the extent that they stimulate tourism and related economic growth, provide cultural and educational

enrichment for local communities, increase local property values, or improve aesthetics."[107] Nevertheless, it will be up to the finders of fact to determine, on a case-by-case basis, exactly how compelling each governmental interest really is.

4. Least Restrictive Means

Prof. Gey reports that, "The cases more often turn on the least restrictive means analysis [than the compelling interest analysis]."[108] For example, in *Elsinore Christian Center v. City of Lake Elsinore*,[109] the court ruled that while "curbing urban blight" might be a compelling interest, the city still had the burden to "show that its regulation is the least restrictive means of advancing a compelling governmental interest."[110] The means in question revolved around the city's refusal to grant a conditional permit to a church to displace the local grocery store in a depressed area. The city argued, among other things, that the loss of a grocery store would greatly accelerate the blight afflicting the neighborhood. The court determined that the city had not met the burden of showing that its solution to blight was the least restrictive means available to it. The court even provided examples: showing that no other nearby lots were available for the grocer, or that if such lots were available, why they were not practicable.[111]

Assuming that a court can be persuaded of the compelling interest element, the taxpayers must then show that the government's imposed burden was the least restrictive means to accomplish its compelling interest. In historic preservation cases, common conflicts with religious institutions include (1) requests to demolish historically or architecturally significant structures, (2) requests to alter original structures or construct architecturally inappropriate or otherwise insensitive additions to historic structures, and

(3) requests for inappropriate land uses within protected districts. Finding the least restrictive means to defend against RLUIPA claims should in theory be simple.

First, denying requests to demolish significant buildings or landmarks is typically a straightforward because of the ease of the burden. There is no less restrictive means of preserving a building than disallowing its destruction. If a demolition case is lost, it is to be lost in the compelling governmental interest analysis.

Next, insensitive additions and alterations to historic structures are more delicate. The nature of the conflict requires the finder of fact to be educated on matters of architectural style, aesthetics and often, religious history. Testimony by expert witnesses can be helpful. The least restrictive means to prohibit inappropriate alterations or additions will depend on the preservation approach to new construction to which each commission subscribes. There are two primary approaches to new construction within preservation districts: (1) new construction must replicate the style, massing and construction of the original (or existing) buildings, or (2) new construction must appear to be from the time or era in which it is built. The first approach is appeals to important landmarks or neighborhoods where the history of the property or area is well documented.

If, for example, a building in Colonial Williamsburg burned to the ground, its replacement would likely be an exact match of what was there before because the desired effect is for visitors to absorb and appreciate the atmosphere of the original town. On the other hand, in the more common setting of an historic neighborhood or business district, the desire is to preserve the buildings that are considered contributing to the character of

the area while simultaneously inviting contemporary "infill" architecture to complement the older buildings.[112]

The least restrictive means test, as it applies to architectural alterations and additions, is an unpredictable thing. Because the question of appropriateness will hinge on one's interpretation of "appropriate," the least restrictive means risks the chance of being boiled down to "good enough to pass muster," and this will nearly always depend on the level of sophistication of the observer. For example, a Prairie-style[113] addition on a Georgian-style[114] mansion will likely appear ridiculous even to the layperson. However, the same Prairie-style addition on a simply detailed Mission-style[115] building might seem innocuous to the untrained eye, but still embarrassingly absurd to an historian or architect. Therefore, when the issue arises of whether the government could have regulated the burden in a less restrictive manner, the proponent of preservation will seek to show why no other scheme but an "appropriate" design will work. The RLUIPA plaintiff will need to show why their addition is the most they can afford, why religious beliefs prevent them from meeting the design guidelines or some other substantial burden prevents them from meeting the design guidelines.

The finder of fact will then have to whittle away at both sides' arguments to find justice. In districts where exact replicas of historic buildings are sought, the preservationists will be in a stronger position to dictate the least restrictive means, because in these settings, just one out-of-place, anachronistic building can ruin the atmosphere. However, in the more common "living" historic districts, preservationists will need to be more flexible in determining what is appropriate. Courts are likely to

interpret that allowing additions or alterations that are inferior in construction, design or layout are less restrictive means than strict adherence to architectural design.

Finally, when preservation commissions deny inappropriate rezonings, it will be difficult to illustrate why the denial was the least restrictive method of furthering the compelling interest. Typically, when a proposed land use runs contra to the local comprehensive land use plan, boards of zoning appeals will entertain petitions for variances, or exceptions to the zoning ordinance, rather than deny outright a request to rezone the property. Commitments can be attached to variances (and to rezonings) so that the negative impact to the neighbors is minimized. For example, if a church needed to provide off-street parking on its residentially zoned property, and learned that surface lots were not permitted in residential districts, the church could simply apply for the variance to this rule rather than asking to rezone the property to commercial use or any other use that allows parking lots. The zoning board might ask for a commitment from the church that the variance will expire when the church ceases to use the property for worship services; if the church sells the property or uses it as a commercial parking lot, the variance dies and the church would be in violation of the zoning ordinance. Therefore, a flat-out denial of a rezoning request is rarely the least restrictive means. Creative variances, expiration dates and other commitments often allow both sides to attain their goals, if but on different timetables.

5. Discrimination, Exclusion and Unreasonable Limitation

Courts have determined that RLUIPA's language, as it pertains to prohibiting government from disparate treatment of religious compared to nonreligious assembly or

intuitions, is unambiguous.[116] "No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution."[117] This language proved fatal in the 2004 *Midrash* case: "Because we have concluded that private clubs, churches and synagogues fall under the umbrella of "assembly or institution" as those terms are used in RLUIPA, this differential treatment constitutes a violation of § (b)(1) of RLUIPA."[118]

The application to historic preservation may seem distant at first. However, this section may be one of the most important weapons against historic preservation regulations available to religious institutions. For example, it is not uncommon for local preservation commissions to authorize demolition or otherwise inappropriate actions where large commercial projects are proposed in historic commercial districts. The rationale is that by compromising a relatively small area, the greater area will benefit. One common example is the removal of a (typically small) historic building to accommodate a larger commercial building or complex.[119] The new commercial center could benefit local property owners in three immediate ways: (1) by replacing unused or underused buildings with functional and occupied facilities, the public's perception of commercial activity will promote a sense of stability and prosperity, thus perpetuating commercial growth; (2) by moving amenities to the neighborhood that would otherwise be lacking to the local inhabitants, e.g. supermarkets, banks, restaurants, etc.; and (3) by drawing non-local business into the area that would, in theory, create collateral business for the existing businesses in the district. The improved business climate, therefore, allows the property owners to allocate more capital funds to the preservation and improvement of their own historic buildings and preservation goals are thereby attained.

The conflict becomes readily apparent when the same commission is approached by a religious entity that seeks to demolish an historic building in order to construct a new worship hall, for example. Under this scenario, the incentives for the preservation commission to compromise are removed because the church, arguably, will be unable to generate the same financial boon to the local economy that a market or mixed-use center might. In this setting, the church will have a clear "Equal Terms" case against the city if its application is refused. The church need only point to the precedent of other similar situations involving commercial development where demolition applications were approved. Despite the obvious differences between these two hypothetical situations, it appears unlikely that courts will rule in favor of preservationists if the broad *Midrash* interpretation of "Equal Terms" is categorically adopted without allowing local governments to argue the obvious and perhaps reasonable distinctions.

IV. THE APPROPRIATE BALANCE

As a Fundamental Right, the free exercise of religion obviously trumps society's interest in preserving its culture heritage and architectural landmarks. Certainly, the Constitution makes precious few mentions of specific protections, but religion is mentioned twice within the First Amendment. Even the most ardent historic preservationist would be disinclined to compare the gravity of these two issues. This comparison, however, has never been the issue.

A. Competing Interests

The true conflict is between communities trying to preserve the cultural heritage and architectural character of their neighborhoods, and religious congregations

attempting to worship and practice their faiths to the best of their abilities. When these two noble and worthy pursuits occasionally collide, the response should be a thoughtful and honest dialog between the parties. Too often, however, well-intentioned legislation intensifies a conflict to the point of making the parties polarized enemies. RLUIPA is an example of legislation that has the potential to do more harm than good by encouraging litigation by both its relative ease for plaintiffs to meet their initial burden, and by its provision allowing the award of attorney fees to victorious plaintiffs.[120] These two provisions create an incentive for plaintiffs to "roll the dice" of litigation rather than encouraging the parties to work out problems on a level playing field. One might argue that such approaches have a chilling effect on local governments that wish to avoid expending taxpayer dollars on even the most frivolous RLUIPA litigation, being more inclined to let individual neighbors and neighborhoods suffer the ills of the proposed inappropriate land uses. A better law would promote alternate dispute resolution, such as mediation or arbitration, and thus avoid both potentially unnecessary litigation and the very real negative impacts of inappropriate land uses. It seems curious that the authors of the RLUIPA did not consider inclusion of this option, given the sweeping power invested in the Act.

B. Consistency is the Better Part of Preservation

The arguably "remedial" aspect of RLUIPA brings another question to the front. Why should something as fundamental as free exercise be defended against remedially? The first defense of historic preservation against religious persecution claims is the fair administration of historic preservation law. This can be promoted by any national

preservation entity or agency that receives federal funding. [121] Preservationists will be the first to assert that each historic property or landmark is unique, and must be assessed individually; however, consistency is still possible on a broader level. By utilizing consistent standards and policies, preservation commissions may both reduce frivolous claims of persecution and prevent renegade boards from bullying or discriminating against religious groups. For example, state historic preservation offices and local historic preservation commissions that receive federal funding are typically required to follow the Secretary of the Interior's Standards for Rehabilitation when assessing tax credit applications or Certificates of Appropriateness for non-religious properties.[122] These standards are administered through the National Park Service. These ten simple standards are surprisingly succinct and form the framework of preservation commissions across the nation. Each standard is between one and three sentences long, and written in plain, non-technical language:[123]

1. A property shall be used for its historic purpose or be placed in a new use that requires minimal change to the defining characteristics of the building and its site and environment.
2. The historic character of a property shall be retained and preserved. The removal of historic materials or alteration of features and spaces that characterize a property shall be avoided.
3. Each property shall be recognized as a physical record of its time, place, and use. Changes that create a false sense of historical development, such as adding conjectural features or architectural elements from other buildings, shall not be undertaken.
4. Most properties change over time; those changes that have acquired historic significance in their own right shall be retained and preserved.
5. Distinctive features, finishes, and construction techniques or examples of craftsmanship that characterize a historic property shall be preserved.
6. Deteriorated historic features shall be repaired rather than replaced. Where the severity of deterioration requires replacement of a distinctive feature, the new feature shall match the old in design, color, texture, and other visual qualities and, where possible,

materials. Replacement of missing features shall be substantiated by documentary, physical, or pictorial evidence.

7. Chemical or physical treatments, such as sandblasting, that cause damage to historic materials shall not be used. The surface cleaning of structures, if appropriate, shall be undertaken using the gentlest means possible.
8. Significant archeological resources affected by a project shall be protected and preserved. If such resources must be disturbed, mitigation measures shall be undertaken.
9. New additions, exterior alterations, or related new construction shall not destroy historic materials that characterize the property. The new work shall be differentiated from the old and shall be compatible with the massing, size, scale, and architectural features to protect the historic integrity of the property and its environment.
10. New additions and adjacent or related new construction shall be undertaken in such a manner that if removed in the future, the essential form and integrity of the historic property and its environment would be unimpaired.

These guidelines could be easily adapted to apply to religious institutions; exceptions would need to be made to accommodate special circumstances unique to spiritual matters, but the resulting set of religious facilities guidelines would be fair, predictable and easily understood by laypersons and architects alike.

To avoid the potential for local bias against religious institutions, amendments to the National Historic Preservation Act could be made, or perhaps entities and agencies at the national level, such as the National Trust for Historic Preservation or the National Park Service, might be called upon to develop similar, but more specialized guidelines for local government to use when dealing with religious land use applications affecting historic properties. Regardless of the method of implementation, the key is for historic preservation commissions to be consistent, fair and predictable in their decisionmaking, regardless of region or religion.

C. The Establishment Clause Gambit

Finally, there is the issue of the establishment clause. This Comment has focused primarily on the free exercise clause, but it has been argued that although intended to be a shield, RLUIPA is equally effective as a sword. By offering religious institutions a weapon as formidable as RLUIPA, government has perhaps unwittingly made a law that respects an establishment of religion, as opposed to irreligion, in violation of the First Amendment. For example, Atheists, Deists, Agnostics and other faiths that are averse to meeting in worship halls or utilizing real estate for religious purposes are simply left out of RLUIPA, although they have every right to expect the benefits of land use and preservation laws, benefits that can be dissolved by RLUIPA.

Much has been written and litigated regarding the establishment clause problems of RLUIPA.[124] "[T]he state should be forbidden to subsidize what it cannot regulate, because the subsidy will inevitably be accompanied by regulatory conditions."[125] This Comment makes only one observation on the matter. Once an architectural masterpiece, historic cathedral or natural landmark is gone, no amount of reconstruction or replication can return it to society.[126] The value of preservation is maintaining the original, not a well-done copy. Therefore, in the world of historic preservation, the establishment clause is the lesser concern. It is nearly always preferable for government to risk an occasional establishment clause claim by awarding grants to religious institutions to restore historic buildings than it is for government to risk a single free exercise defeat by a religious institution, determined to demolish an old building that it can no longer afford to maintain.

V. CONCLUSION

As long as RLUIPA exists, debate over "how much land use regulation is too much?" will be hotly contested. Sides will continue to polarize, with religious institutions and First Amendment supporters on one side and local governments, preservationists, neighborhood groups and property owners on the other. Courts will continue to struggle with the question, continuously creating and modifying rules for determining discrimination. Until Congress acknowledges that RLUIPA is overly broad in its powers, and either amends RLUIPA or abandons it for something better, the conflict will continue needlessly. The easiest way to solve the problem as it pertains to historic preservation conflicts is to amend RLUIPA to include the following new provisions:

1) Spell out that interiors are generally off-limits to preservation review;
2) Redefine or clarify specific clauses such as "substantial burden";
3) Develop national consistency with standard historic preservation guidelines as they pertain to religious institutions;
4) Include a provision requiring parties to participate in alternate dispute resolution (ADR) prior to litigating; and
5) Revise the attorney fees award provision such that it only applies if a finder of fact determines the existence of scienter on the part of the government.

The last two revisions are more important than they might seem. Only when the threat of needless and expensive litigation is removed from play can the opposing sides address the underlying problems. The problems will vary wildly, from funding to congregation

size, from parking lots to orthodox beliefs. Many perhaps will be unable to be resolved without the proverbial day in court, but the vast majority should be solvable in the calmer province of alternate dispute resolution. There is too much at stake, in both camps, to bypass the opportunity to talk, and to be heard.

FOOTNOTES

[1] Partners for Sacred Places, *America's Endangered Historic Urban Houses of Worship* (2003), *available at* http://www.nationaltrust.org/issues/downloads/worship_endangered_urban.pdf, at 2 (as of July 14, 2006).

[2] *Id*. at 2.

[3] Religious Land Use and Institutionalized Persons Act (2000), 42 U.S.C. §§ 2000cc – 2000cc-5 (hereinafter "RLUIPA").

[4] A. JAMES CASNER ET AL., CASES AND TEXT ON PROPERTY 982 (5th ed. 2004).

[5] *Id*. at 982.

[6] William J. Murtagh, KEEPING TIME: THE HISTORY AND THEORY OF PRESERVATION IN AMERICA 207 (John Wiley & Sons, 1997).

[7] This is not to say that utilitarian constructions are not worthy of preserving; certainly structures such as the Roman aqueducts, the Great Wall of China, etc. are also irreplaceable structures worth preserving. *See also* note 8, *infra*.

[8] PATRICIA PETERSEN & DR. KAROLIN FRANK, HISTORIC PRESERVATION IN THE USA 32 (Hannah M. Mowat & Jeff Smith trans., Springer eds., 2002) (in which the first recorded attempt at historic preservation in what is now the U.S. is attributed to Peter Kahm, a Swedish botanist who, in 1749, preserved a "wooden hut" built by early pioneers).

[9] As inscribed in the Title Page of an undated annual report, c.1911. Ironically, the original document was unable to be preserved; however, an electronic facsimile exists in the Cornell University Library New York State Historical Literature collection. *Available at* http://historical.library.cornell.edu/nys/browse.html (as of July 14, 2006) under the society's "new" name (as of 1901), the American Scenic and Historic Preservation Society.

[10] Association of for the Preservation of Virginia, APVA Fact Sheet (2006).

[11] *Id*. at 32.

[12] *Id*.

[13] American Antiquities Act (1906), 16 U.S.C. § 431.

[14] RICHARD HANDLER AND ERIC GABLE, THE NEW HISTORY IN AN OLD MUSEUM: CREATING THE PAST AT COLONIAL WILLIAMSBURG 32 (Duke Univ. Press 1997).

[15] BARRY J CULLINGWORTH ET AL., PLANNING IN THE USA: POLICIES, ISSUES, AND PROCESSES 58-59 (Routledge 1997).

[16] See Costonis, The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks, 85 Harv. L. Rev. 574, 574 n. 1 (1972) citing Huxtable, Bank's Building Plan Sets Off Debate on "Progress," N. Y. Times, Jan. 17, 1971, section 8, p. 1, col. 2.

[17] Historic Sites Act (1935), 16 U.S.C. §§ 461-467.

[18] National Park Service, *available at* http://www.cr.nps.gov/places.htm (as of July 14, 2006).

[19] *But see* Kelo v. City of New London, 126 S. Ct. 24.

[20] Berman v. Parker, 348 U.S. 26 (1954).

[21] *Id*. at 33 (emphasis added) (citation omitted).

[22] Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978).

[23] *Id*. at 133.

[24] *Id*. at 116.

[25] *Id*. at 117.

[26] Also known as Grand Central Terminal.

[27] Record at 2251.

[28] United States v. Causby et ux., 328 U.S. 256 (1946).

[29] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

[30] Penn Central Transportation Co., 438 U.S. at 136.

[31] *Id*. at 132 (emphasis added).

[32] St. Bartholomew's Church v. City of New York, 914 F.2d 348 (1990).

[33] The "community house" in question was an historic and architecturally notable 7-story structure.

[34] Later reduced to "only" 48 stories.

[35] *Id*. at 351.

[36] Employment Division v. Smith, 494 U.S. 872 (1990) (state law applying facially neutral anti-drug laws to religious use of peyote did not violate the free exercise clause).

[37] St. Bartholomew's Church, 914 F.2d at 353.

[38] *Id*. at 355.

[39] E. Bay Asian Local Dev. Corp. v. Cal., 24 Cal. 4th 693, 737-738 (2000).

[40] *Id*. at 738, (quoting Weinstein, The Myth of Ministry vs. Mortar: A Legal and Policy Analysis of Landmark Designation of Religious Institutions (1992) 65 Temp. L.Rev. 91, 151.

[41] *See* Society of Jesus v. Boston Landmarks Com., 409 Mass. 38 (1990).

[42] IRA C. LUPU & ROBERT W. TUTTLE, HISTORIC PRESERVATION GRANTS TO HOUSES OF WORSHIP: A CASE STUDY IN THE SURVIVAL OF SEPARATIONISM, 43 B.C. L. REV 1139, 1174 (2002).

[43] Society of Jesus, 409 Mass. 38 (1990).

[44] *See* Opinion of the Justices, 333 Mass. 783 (1955) (historic preservation of building exterior does not violate state constitution).

[45] Society of Jesus, 409 Mass. at 42.

[46] E. Bay Asian Local Dev. Corp. v. Cal., 24 Cal. 4th 693 (2000).

[47] *Id*. at 738.

[48] ALAN C. WEINSTEIN, THE MYTH OF MINISTRY VS. MORTAR: A LEGAL AND POLICY ANALYSIS OF LANDMARK DESIGNATION OF RELIGIOUS INSTITUTIONS, 65 Temp. L.Rev. 91 (1992).

[49] E. Bay Asian Local Dev. Corp., 24 Cal. 4th at 738 (quoting WEINSTEIN, *supra* at 151).

[50] Smith, 494 U.S. at 896.

[51] *Id*. at 908.

[52] Sherbert v. Verner, 374 U.S. 398 (1963) (employee declined to work on Saturday, her Sabbath, but offered to work on Sundays instead, a day when all area factories were closed).

[53] *Id*. at 402-403.

[54] Hereinafter respondents.

[55] Smith at 874.

[56] *Id*. at 874.

[57] *Id*. at 881.

[58] *Id*. at 881 (emphasis added); see generally Cantwell v. Connecticut, 310 U.S. 296 (1940) (invalidating discretionary issuance of religious solicitation licenses); Wisconsin v. Yoder, 406 U.S. 205 (1972) (compulsory school attendance law invalidated).

[59] Religious Freedom Restoration Act (1993), 42 U.S.C. §§ 2000bb *et seq*.

[60] *See id*. § 2000bb(a)(4).

[61] *See id*. § 2000bb-1.

[62] Boerne Convention & Visitors Bureau, http://www.visitboerne.org/About+Boerne/Boerne+History/default.aspx (as of July 14, 2006).

[63] City of Boerne v. Flores, 521 U.S. 507, 512 (1997).

[64] *Id*. at 512.

[65] *Id*. at 530.

[66] *Id*. at 519 (citations omitted).

[67] *Id*. at 516 (citing Marbury v. Madison, 1 Cranch 137, 176 (1803).

[68] James D. McWilliams, *Zoning Religion: the Battle over RLUIPA*, FIRST AMENDMENT CENTER ONLINE, n.9 (2003, updated 2005), *available at* http://www.firstamendmentcenter.org/analysis.aspx?id=15646#f9 (as of July 14, 2006).

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[70] MARCI A. HAMILTON, FEDERALISM AND THE PUBLIC GOOD: THE TRUE STORY BEHIND THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT, 78 Ind. L.J. 311 (2003).

[71] HAMILTON, *supra* note 70, at 324.

[72] H.R. 4019, 105th Cong. (1998) and H.R. 1691, 106th Cong. (1999).

[73] HAMILTON, *supra* note 70, at n.131 (explaining deficiency in the legislative record compared to Supreme Court precedent for reviewing such evidence) (emphasis in the original).

[74] MARK CHAVES AND WILLIAM TSITSOS, ARE CONGREGATIONS CONSTRAINED BY GOVERNMENT? EMPIRICAL RESULTS FROM THE NATIONAL CONGREGATIONS STUDY, 42 J. CHURCH AND STATE 335, 337 (2000).

[75] HAMILTON, *supra* note 70, at 351-352.

[76] Letter from Rudolph Giuliani, Mayor of New York, to Charles E. Schumer, United States Senator (D-NY) and Daniel P. Moynihan, United States Senator (D-NY) (July 25, 2000) (on file with Professor Marci A. Hamilton).

[77] HAMILTON, *supra* note 70, at 342.

[78] 146 CONG. REC. S7, 779 (daily ed. July 27, 2000); 146 CONG. REC. H7, 191 (daily ed. July 27, 2000) (passed at 6:27 p.m.).

[79] HAMILTON, *supra* note 70, at 331 (footnote omitted).

[80] RLUIPA, at § 2(a)(2)(A).

[81] This includes the Author's employer, the Indianapolis Historic Preservation Commission.

[82] *See* 42 U.S.C. §§ 2000cc sec. 5(i) (RLUIPA severability clause allowing the Act to stand even if a provision is found to be unconstitutional).

[83] RLUIPA, at § 2(b)(1 – 3).

[84] *See* Sherbert.

[85] Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707 (1981) (employee refused to manufacture parts for military tanks but offered to fabricate non-weaponry parts).

[86] Cantwell v. Connecticut, 310 U.S. 296 (1940) (Jehovah's Witness may distribute literature and proselytize on the street without fear of local breach of peace ordinance; State may not legislate "prior restraint" laws to restrict door-to-door religious solicitations).

[87] Wisconsin v. Yoder, 406 U.S. 205 (1972) (Amish sect not required to fully comply with state law that mandated student enrollment in public schools, where compliance would be inherently detrimental to the survival of the religion).

[88] Religious Freedom Restoration Act (1993), 42 U.S.C. § 2000bb – 2000bb-4

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[90] STEVEN G. GEY, RELIGION AND THE STATE 164 (LexisNexis ed., 2005 Supplement).

[91] *See* Mack v. O'Leary, 80 F.3d 1175, 1178 (9th Cir. 1996).

[92] *See* Brown-El v. Harris, 26 F.3d 68, 70 (8th Cir. 1994).

[93] *See* Abdur-Rahman v. Michigan Dept. of Corrections, 65 F.3d 489, 491-92 (6th Cir. 1995)

[94] A-Z Int'l v. Phillips, 323 F.3d 1141, 1146 (9th Cir. 2003) (citation omitted in original).

[95] San Jose Christian College v. City of Morgan Hill, 360 F.3d 1024, 1034 (9th Cir. 2004) (college's rezoning was incompatible with generally applicable and facially neutral zoning law).

[96] Civil liberties for Urban Believers (CLUB) v. Chicago, 342 F.3d 752, 761 (7th Cir. 2003), *cert. denied*, 124 S.Ct. 2816 (2004).

[97] Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004), *cert. denied*, 125 S.Ct. 1295 (2005) (congregants were not substantially burdened by having to walk a few more blocks to attend services).

[98] *Id*. at 1227.

[99] It is predicted, for example, that the ruling in Employment Division v. Smith would not survive a Sixth Circuit interpretation (because the use of peyote was "essential" or "fundamental" to the plaintiffs' religious beliefs) but that Smith could survive the narrower interpretation of the Fourth, Ninth and Eleventh Circuits.

[100] *See generally* Midrash Sephardi, Inc. v. Town of Surfside, *supra* note 92; San Jose Christian College v. City of Morgan Hill, 360 F.3d 1024 (9th Cir. 2004) (an adaptive reuse of a hospital into a Christian college).

[101] RLUIPA, at § 8(7)(A)

[102] *Id*.

[103] It seems unlikely that a religious institute would desire to argue religious exercise in a building code scenario, and States have an obviously compelling government interest in safe buildings.

[104] Grace United Methodist Church v. City of Cheyenne, 235 F.Supp.2d 1186, 1196-1998 (D. Wyo. 2002) (disputed claim was a valid question of fact for a jury to decide), aff'd, 427 F.3d 775 (10th Cir. 2005).

[105] Grace United Methodist Church v. City of Cheyenne, 235 F.Supp.2d at 1198 (D. Wyo. 2002) (emphasis added).

[106] Murphy v. Zoning Commission of the Town of New Milford, 148 F.Supp.2d 173, 190 (D.Conn.2001); *but see* Westchester Day School v. Village of Mamaroneck, 280 F. Supp. 2d 230 (S.D. N.Y. 2003) (emphasis added) (town's traffic and parking concerns found not to be compelling interests).

[107] ARIEL GRAFF, CALIBRATING THE BALANCE OF FREE EXERCISE, RELIGIOUS ESTABLISHMENT, AND LAND USE REGULATION: IS RLUIPA AN UNCONSTITUTIONAL RESPONSE TO AN OVERSTATED PROBLEM? 53 UCLA L. Rev. 485, 489-490 (2005) (citing RICHARD POWELL, POWELL ON REAL PROPERTY 79C.03[2][c], 79D.02[3][b] (Michael Allan Wolf ed., Matthew Bender 2005) (1949).

[108] GEY, *supra* note 82, at 167.

[109] Elsinore Christian Center v. City of Lake Elsinore, 270 F. Supp.2d 1163 (C.D. Cal. 2003).

[110] *Id*. at 1174.

[111] *Id*.

[112] The National Park Service defines the following terms explicitly, although they are often used interchangeably around the country:

A. **Preservation** focuses on the maintenance and repair of existing historic materials and retention of a property's form as it has evolved over time. (Protection and Stabilization have now been consolidated under this treatment.)

B. **Rehabilitation** acknowledges the need to alter or add to a historic property to meet continuing or changing uses while retaining the property's historic character.

C. **Restoration** depicts a property at a particular period of time in its history, while removing evidence of other periods.

D. **Reconstruction** re-creates vanished or non-surviving portions of a property for interpretive purposes.

[113] The Prairie style is an early 20th century style often recognizable by its use of masonry, sprawling horizontal profile, open floor plans, low-pitched roofs with wide overhanging eaves and superb craftsmanship. It originated near Chicago and was popular in the American Midwest.

[114] The Georgian style originated in England during the 18th century and was popular in the American colonies until the American Revolution. It is notable for its tall, multi-storied presence, stately grace, formal detailing and sense of balance, mass, proportion, order and symmetry.

[115] The Mission style was common in the 19th century in what is now the American southwest and Mexico. Derived from earlier Spanish mission buildings, the style utilized expansive covered verandas, clay tile roofing, adobe, stone and rough-hewn wood building elements.

[116] *See generally* San Jose Christian College v. City of Morgan Hill, 360 F.3d 1024 (9th Cir. 2004); Civil Liberties for Urban Believers (CLUB) v. City of Chicago, 342 F.3d 752 (7th Cir. 2003), cert. denied, 541 U.S. 1096 (2004); Cottonwood Christian Center v. Cypress Redevelopment Agency, 218 F.Supp.2d 1203 (C.D. Cal. 2002) (zoning may not favor commercial land use over similar but non-commercial use by religious institution).

[117] RLUIPA, at § 2(b)(1).

[118] Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d at 1231 (similar commercial uses were not similarly prohibited by zoning; only religious based uses were discriminated against).

[119] *See generally* Indianapolis Historic Preservation Commission, case COA #04-020 (CA) (developer authorized to demolish an historic one-story pharmacy building on prominent city corner to construct a 5-story, mixed-use building featuring retail shops, underground parking garage and luxury condominiums).

[120] Attorney's fees may be awarded to a prevailing plaintiff in RLUIPA cases at the court's discretion, under the authority of 42 U.S.C.S. § 1988(b). This means that a city that loses an RLUIPA claim might be forced to pay the attorney fees for both parties. However, the reverse is not true; if the city overcomes an RLUIPA claim, the city must still pay its own fees.

[121] Most local historic preservation commissions depend on federal funding. A large share is distributed through annual Community Development Block Grants (CDBG), issued through the U.S. Department of Housing and Urban Development (HUD) and through matching Historic Preservation Fund grants, authorized through the National Historic Preservation Act of 1966 (NHPA). Note that federal funding triggers such programs and activities to fall under RLUIPA's application. *See* RLUIPA, at § 2(a)(2)(A).

[122] U.S. Department of the Interior regulations, 36 CFR 67, *also available at* http://www.cr.nps.gov/hps/tps/tax/taxregs.htm, (as of July 14, 2006).

[123] *Id.*, *also available at* http://www.cr.nps.gov/hps/tps/tax/rehabstandards.htm, (as of July 14, 2006).

[124] *See generally* CHRISTEN SPROULE, FEDERAL FUNDING FOR THE PRESERVATION OF RELIGIOUS HISTORIC PLACES: OLD NORTH CHURCH AND THE NEW ESTABLISHMENT CLAUSE, 3 GEO. J.L. & PUB. POL'Y 151 (2005); IRA C. LUPU & ROBERT W. TUTTLE, *supra* note 41 (2002).

[125] IRA C. LUPU & ROBERT W. TUTTLE, *supra* note 41, at 1174 (2002).

[126] For an inimical and extreme analogy, see Prof. W.L. Rathje, Why the Taliban are destroying Buddhas, USA Today, March 22, 2001, *also available at* http://www.usatoday.com/news/science/archaeology/2001-03-22-afghan-buddhas.htm (as of July 14, 2006) ("explosives, tanks, and anti-aircraft weapons" were used to destroy two colossal 1,500 year old statues of Buddha in Bamiyan Province, Afghanistan, 150 miles from Kabul).