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# Judicial Review of Local Land Use Decisions: Lessons from RLUIPA

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# JUDICIAL REVIEW OF LOCAL LAND USE DECISIONS: LESSONS FROM RLUIPA

ASHIRA PELMAN OSTROW\*

*This Article questions whether traditional judicial deference to local land use regulators is justified in light of the highly discretionary, and often corrupt, modern system of land use regulation. In 2000, Congress determined, first, that unlike other forms of economic legislation, land use regulation lacks objective, generally applicable standards, leaving zoning officials with unlimited discretion in granting or denying zoning applications, and second, that this unlimited discretion lends itself to religious discrimination. Congress therefore enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA), which requires courts to apply strict scrutiny review to land use decisions that impact religious land uses.*

*Since its enactment, the constitutionality of RLUIPA has been debated extensively. Many scholars maintain that the statute is an overly broad exemption that creates a privileged class of land users and allows religious institutions to avoid a community's reasonable land use concerns. In contrast, this Article argues that in enacting RLUIPA, Congress identified a global flaw in land use regulation that impacts all land users, but limited its remedy to religious land users. While RLUIPA's strict scrutiny review is clearly inappropriate for land use cases that involve neither fundamental rights nor suspect classes, traditional judicial deference is equally inappropriate in light of the discretionary nature of modern zoning. Fortunately, the Supreme Court established the appropriate standard of review in its earliest zoning cases. This Article thus maintains that RLUIPA is significant because it highlights a fundamental flaw in local land use regulation, and because its bifurcated approach to judicial review of zoning decisions revives an early facial/as-applied dichotomy in land use jurisprudence and encourages more meaningful judicial review of all as-applied land use decisions.*

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## INTRODUCTION

In 2000, the city of New London, Connecticut, undertook a redevelopment project designed to rejuvenate the economically depressed Fort Trumbull portion of the city. As part of that plan, the city condemned several private homes and transferred them to a private developer. In what is now a well-known story, the Supreme Court, in *Kelo v. City of New London*,<sup>1</sup> upheld the transfer as a valid public use under the Takings Clause.<sup>2</sup> The *Kelo* decision sparked a public outcry, with many

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1. 545 U.S. 469 (2005).

2. *See id.* at 488–90.



worrying that it cast all private property rights into doubt.<sup>3</sup> In the year following *Kelo*, twenty-nine states acted to restrict the use of the eminent domain power.<sup>4</sup> In light of this tremendous resurgence of private property rights protection in the eminent domain arena, it is surprising that so little attention has been paid to a more common threat to private property rights: local zoning.<sup>5</sup> This Article seeks to bridge that gap by focusing more broadly on judicial review of local land use regulation.

In the United States, zoning has traditionally been a function of local governments.<sup>6</sup> Despite the universality of local control, as the pace and complexity of development has increased in recent decades, both scholars and planning experts have begun to question the value of localism in the context of land use regulation.<sup>7</sup> In fact, there is a growing belief that excessive re-

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3. See, e.g., Marc B. Mihaly, *Public-Private Redevelopment Partnerships and the Supreme Court: Kelo v. City of New London*, 7 VT. J. ENVT'L. L. 41, 41 (2006) ("[P]roperty rights groups and libertarian think tanks excoriated the majority opinion and celebrated the dissents[,] . . . [and] Americans of most political persuasions found the majority decision wrong-headed and oppressive."); Paul Craig Roberts, Commentary, *The Kelo Calamity*, WASH. TIMES, Aug. 7, 2005, at B4 (arguing that "[t]he *Kelo* decision threatens all private property" by eliminating the distinction between public and private uses); Ilya Somin, *Robin Hood in Reverse: The Case Against Economic Development Takings*, 535 POL'Y ANALYSIS 1, 4 (2005), available at <http://www.cato.org/pubs/pas/pa535.pdf> (describing the "the economic development rationale for condemnation" as a "blank check" for the use of the power of eminent domain on behalf of private interests).

4. U.S. GOV'T ACCOUNTABILITY OFFICE, PUBL'N NO. GAO-07-28, EMINENT DOMAIN: INFORMATION ABOUT ITS USES AND EFFECT ON PROPERTY OWNERS AND COMMUNITIES IS LIMITED 5 (2006), available at <http://www.gao.gov/new.items/d0728.pdf>.

5. The extreme reaction to *Kelo* and to the use of eminent domain can be explained in part by the fact that "the opponents of eminent domain for economic development have a leading national libertarian law firm funding a country-wide media campaign about the individual and community effects of a legal tool available to government." Patricia E. Salkin & Amy Lavine, *The Genesis of RLUIPA and Federalism: Evaluating the Creation of a Federal Statutory Right and its Impact on Local Governments* 51 (Jan. 3, 2008) (unpublished manuscript available at <http://ssrn.com/abstract=1081492>).

6. See, e.g., Jeffrey H. Goldfien, *Thou Shalt Love Thy Neighbor: RLUIPA and the Mediation of Religious Land Use Disputes*, 2006 J. DISP. RESOL. 435, 435 (2006); 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, 335 (2003).

7. In fact, some scholars have advocated national, as opposed to local, land use regulation. See, e.g., Jerold S. Kayden, *National Land-Use Planning in America: Something Whose Time Has Never Come*, 3 WASH. U. J.L. & POL'Y 445 (2000) (discussing national land use planning); Patricia E. Salkin, *Smart Growth and Sustainable Development: Threads of a National Land Use Policy*, 36 VAL. U. L. REV. 381 (2002) (describing previous efforts at national land use reform); Edward J. Sullivan & Carrie



liance upon local governments to regulate land use has not only failed to achieve satisfactory results, but has also created problems such as exclusionary zoning,<sup>8</sup> fiscal zoning,<sup>9</sup> environmental degradation,<sup>10</sup> and conflicting land uses at municipal borders.<sup>11</sup> At the same time, scholars and planning experts have realized that local governments are often unable to resolve intra-local land use disputes fairly and rationally.<sup>12</sup>

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Richter, *Out of the Chaos: Towards a National System of Land-Use Procedures*, 34 URB. LAW. 449, 450–51 (2002) (recommending national reforms to land use decision making procedures). Additionally, some courts have suggested that national land use regulation could be accomplished under the Commerce Clause. See, e.g., *Freedom Baptist Church v. Twp. of Middletown*, 204 F. Supp. 2d 857, 867 (E.D. Pa. 2002) (“[T]he mere fact that zoning is traditionally a local matter does not answer Congress’s undoubtedly broad authority . . . to regulate economic activity even when it is primarily intrastate in nature.”).

8. See, e.g., 5 ZONING AND LAND USE CONTROLS § 33.01 n.3 (Eric D. Kelly ed. 2007) (“The local zoning ordinance, which is the mainstay of land use control in the United States, has proved relatively ineffective to deal with statewide social and environmental problems.”); Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 453 (1990) (highlighting the downside of local autonomy and arguing that in order to reduce inequality and improve race and class relations, the view of the superiority of local power must be abandoned); Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1082 (1996) (arguing that zoning is used to keep out “‘the wrong kind of people’—those who have to be excluded in order to make a residential neighborhood seem desirable”).

9. Fiscal zoning seeks to increase municipal revenues and limit municipal expenses through a variety of zoning devices that raise barriers against low- and moderate-income people, who are seen as requiring a high level of municipal services while contributing relatively little in taxes. See, e.g., *S. Burlington County NAACP v. Twp. of Mt. Laurel*, 336 A.2d 713, 732 (N.J. 1975) (explaining the exclusionary impact of fiscal zoning and holding that municipalities “must zone primarily for the living welfare of people and not for the benefit of the local tax rate”).

10. As Professor Carol Rose has noted, “environmentalism heightened national awareness of other consequences of local land use decisions allowing too much new development, e.g., downstream siltification, increased auto fumes, and the loss of historical landmarks and fragile ecosystems.” Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 840 n.4 (1983). See generally David L. Callies, *The Quiet Revolution Revisited: A Quarter Century of Progress*, 21 ENVTL. & URB. ISSUES 1 (1994); James H. Wickersham, *The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes*, 18 HARV. ENVTL. L. REV. 489 (1994).

11. See, for example, *Watab Township Citizen Alliance v. Benton County Board of Commissioners*, 728 N.W.2d 82, 91 (Minn. Ct. App. 2007), in which a proposed project would “create a[] . . . residential zone within an . . . agricultural zone located four miles from the nearest city limits,” and *Borough of Cresskill v. Borough of Dumont*, 100 A.2d 182, 185 (N.J. Super. 1953), *aff’d*, 104 A.2d 441 (N.J. 1954), in which one side of a street was zoned for single-family residences and the other was zoned for industrial purposes.

12. See Rose, *supra* note 10, at 839 (arguing that local governments are unable to make small-scale land use decisions “fairly and rationally—that is, with a reason-



The original advocates of zoning believed that local legislatures would create fixed plans of development that zoning officials would have little discretion in implementing.<sup>13</sup> Modern zoning, however, is far removed from its theoretical underpinnings. In place of substantive planning, municipalities have adopted a "wait and see" approach to zoning, designed to maintain flexibility and to allow localities to deal with property owners on an individual basis.<sup>14</sup> Under this modern approach, local zoning officials, who generally lack any training or experience with land use planning,<sup>15</sup> have no objective standards against which to measure individual zoning requests. Thus, in most jurisdictions, standard zoning decisions are made through subjective, case-by-case assessments of the proposed use of the property.<sup>16</sup>

Historically, local control over land use planning has been reinforced by a deferential standard of judicial review. Land use decisions, made by local administrative or legislative bodies, are accorded a formal presumption of rationality and constitutionality, and are upheld unless unreasonable.<sup>17</sup> Although perhaps justifiable under the original conception of zoning, the discretionary nature of modern zoning does not warrant such judicial deference. In fact, judicial deference to subjective zoning decisions has made it difficult to remedy even the most egregious

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able distribution of burdens among individuals, and with the care and deliberation commensurate with the long-term implications of land development").

13. See *infra* Part I.A (discussing the original conception of zoning).

14. Rather than devise a general plan of development, under the so called "wait and see" approach to zoning, all undeveloped land in a municipality is underzoned. As a result, property owners seeking to develop their land must strike a bargain with the municipality in order to receive the necessary zoning approvals. For further discussion, see *infra* Part I.A.

15. See *infra* note 78 and accompanying text.

16. See *infra* note 34; see also *infra* Part I.B.

17. See *infra* Part I.A.



abuses of zoning power.<sup>18</sup> Moreover, where remedies do exist, they are applied inconsistently within and across jurisdictions.<sup>19</sup>

It is within this context that Congress enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA) to provide a uniform and meaningful judicial remedy to religious land users. Prior to enacting RLUIPA, Congress held nine hearings over a three-year period and compiled evidence of religious discrimination in land use regulation.<sup>20</sup> Congress determined that, in contrast to other forms of economic legislation, land use regulations lack objective, generally applicable standards, leaving zoning officials with virtually unlimited discretion in granting or denying zoning requests. Congress further concluded that this highly discretionary context readily lends itself to religious discrimination.<sup>21</sup> In passing RLUIPA, Congress sought to prevent such discrimination by requiring courts to apply strict scrutiny

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18. See Rose, *supra* note 10, at 842 (arguing that deferential judicial review of zoning decisions cannot effectively address the fairness claims of individual property owners whose interests are impacted by zoning decisions); Charles L. Siemon & Julie P. Kendig, *Judicial Review of Local Government Decisions: "Midnight in the Garden of Good and Evil,"* 20 NOVA L. REV. 707, 710 (1996) (arguing that deferential judicial review of zoning decisions "so badly imbalanced public and private interests in regard to the use of land that it is practically impossible to redress even outrageous abuses of the zoning power").

19. For example, some state courts have applied increased scrutiny in cases of suspected spot zoning. See, e.g., *Fritts v. City of Ashland*, 348 S.W.2d 712, 713 (Ky. 1961) (invalidating a rezoning to industrial uses because "[t]here was no evidence of any change in the neighborhood since the enactment of the original zoning ordinance in 1955, nor was there proof that the . . . tract was . . . distinguishable in character from the surrounding . . . property[;] [t]herefore, . . . the burden was on the city authorities to justify the change"); *Randolph v. Town of Brookhaven*, 337 N.E.2d 763, 764 (N.Y. 1975) (requiring a showing that a "zoning amendment was made in accordance with a comprehensive plan" in cases of suspected spot zoning (internal quotation marks omitted)); *Godfrey v. Union County Bd. of Comm'rs*, 300 S.E.2d 273, 275-76 (N.C. Ct. App. 1983) (requiring a "clear showing of a reasonable basis for suspected spot zoning" (quotation marks omitted) (quoting *Blades v. City of Raleigh*, 187 S.E.2d 35, 45 (N.C. 1972))); see also *infra* notes 184-91 and accompanying text.

20. In their Joint Statement in support of RLUIPA, Senators Hatch and Kennedy noted that the statute "is based on three years of hearings—three hearings before the Senate Committee on the Judiciary and six before the House Subcommittee on the Constitution—that addressed in great detail both the need for legislation and the scope of Congressional power to enact such legislation." 146 CONG. REC. S7774 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000) [hereinafter Joint Statement].

21. See HOUSE JUDICIARY COMMITTEE, RELIGIOUS LIBERTY PROTECTION ACT OF 1999, H.R. REP. NO. 106-219, at 18 (1999).



review to local land use decisions that impose a substantial burden on religious exercise if such decisions are made through "individualized assessments" of the proposed use of the property.<sup>22</sup>

Since its passage, the constitutional validity of RLUIPA has been extensively debated.<sup>23</sup> Although the Supreme Court has upheld RLUIPA's institutionalized persons provisions against an Establishment Clause attack,<sup>24</sup> it has yet to pass judgment upon the constitutionality of its land use provisions.<sup>25</sup> It seems likely that as RLUIPA's land use cases continue to make their way through the federal courts, the Supreme Court will be called upon to resolve the debate.

Regardless of the statute's ultimate fate in the courts, this Article argues that in enacting RLUIPA, Congress identified a fundamental flaw in the zoning process and that RLUIPA is significant because its bifurcated approach to judicial review of religious zoning decisions provides a framework for reviewing all land use decisions. Specifically, RLUIPA distinguishes between objective zoning ordinances and the subjective application of such ordinances to individual parcels of land through a

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22. 42 U.S.C. § 2000cc(a)(2)(C) (2000).

23. For arguments that RLUIPA is constitutional, see, for example, Frank T. Santoro, *Section Five of the Fourteenth Amendment and the Religious Land Use and Institutionalized Persons Act*, 24 WHITTIER L. REV. 493 (2002); Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON L. REV. 929 (2001); and Aaron Keesler, Note, *Religious Land-Use and the Fourteenth Amendment's Enforcement Clause: How the FMLA Paved the Way to the RLUIPA's Constitutionality*, 3 AVE MARIA L. REV. 315 (2005).

For arguments that RLUIPA is unconstitutional, see, for example, Hamilton, *supra* note 6; Julie M. Osborn, *RLUIPA's Land Use Provisions: Congress' Unconstitutional Response to City of Boerne*, 28 ENVIRONS ENVTL. L. & POL'Y J. 155 (2004); Caroline R. Adams, Note, *The Constitutional Validity of the Religious Land Use and Institutionalized Persons Act of 2000: Will RLUIPA's Strict Scrutiny Survive the Supreme Court's Strict Scrutiny?*, 70 FORDHAM L. REV. 2361 (2002); Shawn Jensvold, Note, *The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA): A Valid Exercise of Congressional Power?*, 16 BYU J. PUB. L. 1 (2001).

24. See *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (holding that the institutionalized persons provision is compatible with the Establishment Clause "because it alleviates exceptional government-created burdens on private religious exercise"). For further discussion of RLUIPA's prisoner provisions, see Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 HARV. J.L. & PUB. POL'Y 501 (2005).

25. The lower federal courts seem to have agreed, however, that "the reasons given by the Court for upholding the individualized persons aspect of the Act apply equally to the section dealing with land use." Salkin & Lavine, *supra* note 5, at 15-16 & n.78 (citing federal cases).



system of individualized assessments.<sup>26</sup> The application of a zoning ordinance in a particular case requires more meaningful judicial review because a subjective system of individualized assessments readily lends itself to abuse.<sup>27</sup>

Under RLUIPA, *facial* challenges to zoning ordinances, or challenges to objective, generally applicable ordinances, are decided using a deferential standard of judicial review. In contrast, challenges to a zoning ordinance *as applied*<sup>28</sup> to a particular piece of property through a subjective, individualized assessment, are strictly scrutinized to ensure that the decision is the least restrictive means of achieving a compelling government interest.<sup>29</sup>

The strict scrutiny review mandated by RLUIPA is clearly inappropriate for as-applied land use decisions that impact neither fundamental rights nor suspect classes. Yet, given RLUIPA's recognition of the discretionary nature of local land use regulation, traditional judicial deference seems equally inappropriate. Fortunately, the Supreme Court provided the correct standard of review in its earliest land use decisions. Indeed, after announcing a highly deferential standard of review for zoning ordinances in *Village of Euclid v. Ambler Realty Co.*,<sup>30</sup> the Court explicitly limited its holding to *facial* challenges and

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26. In determining whether a particular zoning decision was arrived at through an individualized assessment, courts look to whether the decision was subjective in nature. See *infra* note 130 and accompanying text.

27. See *infra* Part II.B (describing the dangers of a system of individualized assessments).

28. In *WMX Technologies, Inc. v. Gasconade County*, 105 F.3d 1195 (8th Cir. 1997), the Eighth Circuit explained the distinction between facial and as-applied due process challenges in the land use context as follows:

A "facial" substantive due process challenge to a land use ordinance bears important differences to an "as applied" substantive due process challenge to the same ordinance. As noted, when one makes a "facial" challenge, he or she argues that *any* application of the ordinance is unconstitutional. . . . When one makes an "as applied" challenge, he or she is attacking only the decision that applied the ordinance to his or her property, not the ordinance in general.

*Id.* at 1198 n.1. In the land use context, the remedy for a facial challenge "is the striking down of the regulation," while the remedy for an as-applied challenge "is an injunction preventing the unconstitutional application of the regulation to plaintiff's property and/or damages resulting from the unconstitutional application." *Eide v. Sarasota County*, 908 F.2d 716, 722 (11th Cir. 1990).

29. See *infra* Part II.C.

30. 272 U.S. 365 (1926).



warned that the application of a zoning ordinance to a particular piece of property might be found unreasonable.<sup>31</sup>

Less than two years later, in *Nectow v. City of Cambridge*,<sup>32</sup> the Supreme Court reviewed such an ordinance as applied to a particular property. Although *Nectow* involved neither a fundamental right nor a suspect class, the Court engaged in a more rigorous review of the underlying record and ultimately concluded that the ordinance, as applied, violated the property owner's due process rights because it lacked a substantial relationship to the public health, safety, or welfare. The facial/as-applied dichotomy that emerges from these cases provides that facial challenges to zoning ordinances are reviewed under *Euclid's* highly deferential standard, while as-applied land use challenges are reviewed under *Nectow's* less deferential, fact-oriented approach.

Despite these precedents, most courts ignore the facial/as-applied dichotomy and review both facial and as-applied challenges deferentially.<sup>33</sup> Thus, this Article argues that RLUIPA's primary value lies in its recognition of the discretionary nature of local land use laws and its potential to encourage meaningful judicial review of all as-applied land use decisions. The facial/as-applied dichotomy advanced by this Article rejects traditional judicial deference to local officials as unwarranted in light of the highly discretionary,<sup>34</sup> inconsistent,<sup>35</sup> and often cor-

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31. See *id.* at 395.

32. 277 U.S. 183 (1928).

33. See *infra* Part III.B.

34. See *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 738 (1997) (noting "the high degree of discretion characteristically possessed by land-use boards in softening the strictures of the general regulations they administer"); Goldfien, *supra* note 6, at 438 (describing the discretion afforded to local land use regulators); Daniel R. Mandelker, *Model Legislation for Land Use Decisions*, 35 URB. LAW. 635, 635 (2003) (noting that the Standard State Zoning Enabling Act, upon which most state zoning acts are based, "did not contemplate the extensive use of discretion that occurs today"); Erin Ryan, *Zoning, Taking, and Dealing: The Problems and Promise of Bargaining in Land Use Planning Conflicts*, 7 HARV. NEGOT. L. REV. 337, 349 (2002) (noting that land use decision making has grown increasingly discretionary and "has shifted significantly from the planned to the particularized, affording a more ad hoc response to individual development proposals").

35. See *Bd. of County Comm'rs v. Snyder*, 627 So. 2d 469, 472 (Fla. 1993) ("Inhibited only by the loose judicial scrutiny afforded by the fairly debatable rule, local zoning systems developed in a markedly inconsistent manner."); Goldfien, *supra* note 6, at 437 n.9 (noting that inconsistency "is troubling for many, especially in the developer community, and [that] there have been periodic calls for the devel-



rupt system of land use regulation that prevails throughout the country.<sup>36</sup> Rather than deferring to local decision makers, *Nectow's* as-applied review requires courts to examine the underlying record to determine whether the government's justifications for its decision can be supported by factual findings.<sup>37</sup>

Part I of this Article describes the rise of zoning and the origins of the deferential standard of review. It then explores the discretionary nature of modern zoning and questions the appropriateness of judicial deference in this context. Part II reviews the history and purpose of RLUIPA's land use provisions. In particular, it analyzes RLUIPA's application of the Free Exercise Clause's individualized assessments doctrine and RLUIPA's bifurcated approach to judicial review of land use regulation. Part III demonstrates that RLUIPA's main insight—that zoning ordinances applied in a subjective fashion are undeserving of judicial deference—impacts all land users. Thus, this Article argues for a less deferential standard of judicial re-

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opment and adoption of more uniform laws and regulations"); Sullivan & Richter, *supra* note 7, at 451 (recommending reform of "the current Balkanized systems of planning").

36. See, e.g., ROBERT C. ELLICKSON & VICKIE L. BEEN, LAND USE CONTROLS 308 (2005) (describing the land use system as one which "has long been tainted with discoveries and allegations of corruption"); PETER D. SALINS & GERARD C.S. MILDNER, SCARCITY BY DESIGN: THE LEGACY OF NEW YORK CITY'S HOUSING POLICIES 42 (1992) (discussing corruption in the administration of New York City's housing code); Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions: Installment One*, 24 STAN. ENVTL. L.J. 3, 42 (2005) (noting that "[t]here are many accounts of unfair dealing facilitated by bilateral deal-making in local land use regulation—with outright corruption of local officials as the extreme, although not exceptional, case"); David A. Dana, *Land Use Regulation in an Age of Heightened Scrutiny*, 75 N.C. L. REV. 1243, 1272–74 (1997) (discussing accounts of bribery and developers' influence in local government); Patricia E. Salkin, *Ethical Considerations in Land Use Decision Making: 2006 Annual Review of Cases and Opinions*, 38 URB. LAW. 669, 669 (2006) (summarizing "reported cases and opinions documenting allegations of unethical conduct involved in land use planning and zoning decision making").

For older studies documenting corruption in land use decision making, see GEORGE AMICK, THE AMERICAN WAY OF GRAFT 77 (1976) (surveying corrupt practices in several contexts, and concluding that land use control is the governmental activity "most closely associated with corruption in the public's mind"); JOHN A. GARDINER & THEODORE R. LYMAN, DECISIONS FOR SALE: CORRUPTION AND REFORM IN LAND-USE AND BUILDING REGULATION (1978) (reporting instances of corruption in six states).

37. See *infra* Part III.B.



view, modeled after the Supreme Court's review in *Nectow*, in all as-applied land use cases.

### I. JUDICIAL DEFERENCE AND THE DISCRETIONARY NATURE OF LOCAL LAND USE REGULATION

Although zoning originated as an effort to create legislatively-fixed plans of community development, almost a century of experience in zoning reveals that municipalities rarely create such substantive plans, preferring instead to zone individual parcels on a highly discretionary, case-by-case basis. The absence of substantive planning means that zoning officials, who often lack training or planning expertise, have no objective guidelines against which to measure individual zoning requests. Moreover, in many localities, zoning hearings lack basic procedural safeguards. Not surprisingly, this combination of factors leaves ample room for inconsistency and corruption in the zoning process. As Professor Carol Rose has noted,

[s]ince the middle 1960's, legal scholars have complained that local land decisions can make a mockery of orderly and predictable planned development. Individual land decisions, the critics say, amount to deals with landowners and developers; these deals gut the local plan (if indeed any exists) and are merely ad hoc impulse choices that neither safeguard the surroundings for present and future residents, nor enable those residents and would-be developers to predict future actions.<sup>38</sup>

This Part argues that the formal presumption of validity and deferential judicial review accorded to general economic legislation is not appropriate in the context of modern, discretionary, "wait and see" zoning.

#### A. *The Rise of Zoning and the Origins of Judicial Deference*

Today, zoning is the primary means for regulating and coordinating land use. Local governments use zoning to control local aesthetics and local finances, and even to confer competitive

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38. Rose, *supra* note 10, at 841; see also Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 URB. LAW. 1, 5 (1992) (noting that over the past few decades, "[c]ourts became increasingly aware that many local decisions were highly arbitrary to the two major stakeholders in the process, landowners and neighbors, as well as to those whose potentially legitimate claims were excluded from the process").



advantages on one area of a municipality over another.<sup>39</sup> But zoning was not always used so extensively. Early land use ordinances were limited in scope, focusing on fire prevention and building standards,<sup>40</sup> or on restricting noxious uses in or near residential neighborhoods.<sup>41</sup>

By the end of the nineteenth century, however, local governments became increasingly concerned about the compatibility of land uses within municipalities.<sup>42</sup> By separating residential districts from commercial and industrial areas, early city planners hoped to stabilize neighborhoods and protect property values.<sup>43</sup> In 1916, New York City passed a widely-publicized comprehensive zoning ordinance, inspiring then-Secretary of Commerce Herbert Hoover to convene a committee to study zoning.<sup>44</sup> In 1922, the committee promulgated the Standard State Zone Enabling Act (SZEa) to assist states in authorizing municipalities to zone.

Municipalities were eager to exercise the zoning power. In fact, urban America was in something of a crisis in the early 1920's. Like a patient who could endure his fever until he

39. See Mandelkar & Tarlock, *supra* note 38, at 4.

40. See ELLICKSON & BEEN, *supra* note 36, at 75 (describing the limited purpose of early regulatory efforts); Charles L. Siemon, *The Paradox of "In Accordance with a Comprehensive Plan" and Post Hoc Rationalizations: The Need for Efficient and Effective Judicial Review of Land Use Regulations*, 16 STETSON L. REV. 603, 607 (1987) (noting that prior to the Civil War, "local land use controls were limited in focus and generally related to fire and building standards").

41. See, e.g., *In re Hang Kie*, 10 P. 327 (Cal. 1886) (upholding an ordinance restricting the operation of laundries); *Shea v. City of Muncie*, 46 N.E. 138 (Ind. 1897) (upholding an ordinance restricting the operation of taverns and liquor stores); *Cronin v. People*, 82 N.Y. 318 (1880) (upholding an ordinance restricting the operation of slaughterhouses).

42. As the Supreme Court noted in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926):

Building zone laws are of modern origin. They began in this country about 25 years ago. Until recent years, urban life was comparatively simple; but, with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities.

*Id.* at 386-87 (1926); see also Siemon & Kendig, *supra* note 18, at 724; Katia Brener, Note, *Belle Terre and Single-Family Home Ordinances: Judicial Perceptions of Local Government and the Presumption of Validity*, 74 N.Y.U. L. REV. 447, 465 (1999).

43. See J. Gregory Richards, *Zoning for Direct Social Control*, 1982 DUKE L.J. 761, 762.

44. Richard H. Chused, *Euclid's Historical Imagery*, 51 CASE W. RES. L. REV. 597, 598 (2001).



suddenly learned that there was now a new remedy for it and who was then impatient to be cured, urban America was now sure that it would perish if it did not have zoning . . . . Zoning was the heaven-sent nostrum for sick cities, the wonder drug of the planners, the balm sought by lending institutions and householders alike. City after city worked itself into a state of acute apprehension until it could adopt a zoning ordinance.<sup>45</sup>

The practice of zoning spread rapidly, and "[b]y 1930, 35 states had passed zoning enabling acts patterned after the SZEAs."<sup>46</sup>

In its landmark decision of *Village of Euclid v. Ambler Realty Co.*,<sup>47</sup> the Supreme Court confirmed the validity of zoning as a proper exercise of the state's police power,<sup>48</sup> thus solidifying zoning's place as the primary means of land use regulation in the United States. The property owner in *Euclid* brought a facial challenge to a zoning ordinance that divided all land in the municipality into various use districts. The Supreme Court upheld the ordinance, concluding that a zoning ordinance violates due process only if it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."<sup>49</sup> Moreover, the Court held that "[i]f the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."<sup>50</sup>

*Euclid's* characterization of a zoning ordinance as a legislative judgment established the presumption of constitutionality and the related tradition of judicial deference in land use cases.<sup>51</sup> Courts examine due process claims against zoning or-

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45. Siemon, *supra* note 40, at 608 (quoting M. SCOTT, AMERICAN CITY PLANNING SINCE 1890 (1969)).

46. ELLICKSON & BEEN, *supra* note 36, at 76; see also DANIEL R. MANDELKER, LAND USE LAW § 4.15 (5th ed. 2003) ("All state zoning legislation is based on [the] Standard Zoning Enabling Act. . . . Although many States have modified the Standard Zoning Act," the basic statutory framework has remained relatively unchanged.).

47. 272 U.S. 365 (1926).

48. *Id.* at 390.

49. *Id.* at 395.

50. *Id.* at 388 (emphasis added).

51. See Mandelker & Tarlock, *supra* note 38, at 7; see also *City of Lowell v. M & N Mobile Home Park, Inc.*, 916 S.W.2d 95, 98 (Ark. 1996) (noting that when zoning ordinances are reviewed, "there is a presumption that the legislative branch acted in a reasonable manner, and the burden is on the moving party to prove that the enactment was arbitrary"); *Bd. of County Comm'rs v. City of Olathe*, 952 P.2d 1302, 1309 (Kan. 1998) (stating that the zoning authority is presumed to have acted



dinances, as well as other legislation affecting property rights, under a loose reasonableness standard.<sup>52</sup> Under this standard, the purpose of challenged legislation is presumed valid, and the reviewing court evaluates whether the means are reasonably calculated to achieve the stated purpose.

In practice, this test grants great deference to legislative judgments because the link between the means and the purpose of the legislation is satisfied by any conceivable rational basis, regardless of whether it was the actual basis of the legislative action.<sup>53</sup> As the First Circuit explained in upholding a zoning ordinance, "the 'true' purpose of the Ordinance, (e.g., the actual purpose that may have motivated its proponents, assuming this can be known) is irrelevant for rational basis analysis. The question is only whether a rational relationship exists between the Ordinance and a *conceivable* legitimate governmental objec-

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reasonably when it prescribes, changes, or refuses to change zoning); *Goldberg Cos. v. Council of Richmond Heights*, 690 N.E.2d 510, 514–15 (Ohio 1998) (following *Euclid* and holding that "a zoning regulation is presumed to be constitutional unless determined by a court to be clearly arbitrary and unreasonable").

52. See 1 ARDEN H. RATHKOPF ET AL., *RATHKOPF'S THE LAW OF ZONING AND PLANNING* § 3.13 (4th ed. Supp. 2005) ("As a matter of judicial deference, the legislative branch of government is presumed to have made a reasonable judgment that the law in question will further the public purposes underlying enactment of the law.").

In land use decisions that implicate the Due Process Clause, heightened scrutiny is generally required only where the legislative classification is considered to be "suspect" (such as race), or where a "fundamental right" (such as speech or religion) is involved. See, e.g., *State v. Champoux*, 566 N.W.2d 763, 765 (Neb. 1997) (asserting that "when a fundamental right or suspect classification is not involved in the legislation, the legislative act is a valid exercise of the police power if the act is rationally related to a legitimate state interest"); *Fanelli v. City of Trenton*, 641 A.2d 541, 546 (N.J. 1994) (noting that the plaintiff's federal and state due process challenges to a zoning ordinance should be analyzed "under minimum scrutiny, because the ordinance is an economic regulation that does not affect a suspect class").

53. See, e.g., *Restigouche, Inc. v. Town of Jupiter*, 59 F.3d 1208, 1214 (11th Cir. 1995) ("The proper inquiry is concerned with the *existence* of a conceivably rational basis, not whether that basis was actually considered by the legislative body.") (quotation marks omitted) (quoting *Panama City Med. Diagnostic Ltd. v. Williams*, 13 F.3d 1541, 1547 (11th Cir. 1994)); *Dodd v. Hood River County*, 59 F.3d 852, 865 (9th Cir. 1995) (holding that a zoning action will be upheld so long as "the issue of whether the County acted arbitrarily and without a legitimate and rational basis for its decision is 'at least debatable'"); *City of Lilburn v. Sanchez*, 491 S.E.2d 353, 355 (Ga. 1997) (holding that under the rational basis test "any plausible or arguable reason that supports an ordinance will satisfy substantive due process"); see generally Siemon, *supra* note 40 (arguing against the use of post-hoc rationalizations in upholding the validity of zoning regulations).



tive.”<sup>54</sup> Since the Supreme Court’s decision in *Euclid*, courts have reviewed land use decisions made by both local administrative and legislative bodies under this highly deferential reasonableness standard.<sup>55</sup>

Moreover, in the land use context, courts have frequently warned against substituting their judgment for that of a community’s elected representatives.<sup>56</sup> For example, in overturning

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54. *Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield*, 907 F.2d 239, 246 (1st Cir. 1990).

55. *See, e.g., Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1222–24 (6th Cir. 1992) (articulating a highly deferential standard of review for both local administrative and legislative zoning decisions); *see also Mandelker & Tarlock, supra* note 38, at 1 (noting that zoning bodies can perform both legislative and administrative functions and that courts often extend the presumption of rationality to both functions); *Rose, supra* note 10, at 842 (noting that small-scale land use decisions have traditionally been “tested only within the ample girth of a loose reasonableness standard”).

More specifically, zonings and rezonings are considered legislative actions and are reviewed under a highly deferential “fairly debatable” rule, which has also been termed the “anything goes” rule. *See Siemon & Kendig, supra* note 18, at 710. Variances and conditional use permits are considered local administrative actions and in the state courts are ostensibly held to a higher, “substantial evidence” standard of review. In practice, however, these administrative, or “quasi-judicial” actions, are reviewed under certiorari review, which is “every bit as deferential to local decision-makers’ prerogatives as is . . . fairly debatable review.” *Id.* at 738–39. In contrast to the state courts, in the federal courts local administrative acts are held to an even more deferential “shock the conscience” standard. *See, e.g., Natale v. Town of Ridgefield*, 170 F.3d 258 (2d Cir. 1999); *Anderson v. Douglas County*, 4 F.3d 574 (8th Cir. 1993).

56. *See, e.g., Burnham v. Planning & Zoning Comm’n*, 455 A.2d 339, 341 (Conn. 1983) (“We have said on many occasions that courts cannot substitute their judgment for the wide and liberal discretion vested in local zoning authorities when they have acted within their prescribed legislative powers. Courts must not disturb the decision of a zoning commission unless the party aggrieved by that decision establishes that the commission acted arbitrarily or illegally.”); *Oak Park Trust & Sav. Bank v. City of Chicago*, 438 N.E.2d 630, 635 (Ill. App. Ct. 1982) (“It is within the province of the local municipal body to determine the uses of property and establish zoning classifications.”); *Prete v. City of Morgantown*, 456 S.E.2d 498, 500 (W. Va. 1995) (“In passing upon an ordinance imposing zoning restrictions courts will not substitute their judgment for that of the legislative body charged with the duty of determining the necessity for and the character of zoning regulations and, where the question whether they are arbitrary or unreasonable is fairly debatable, will not interfere with the action of the public authorities.” (quoting *Carter v. City of Bluefield*, 54 S.E.2d 747, 761 (W. Va. 1949))).

In the post-*Lochner* era, courts are particularly wary of substituting their judgment for that of the community’s elected representatives when examining economic legislation. The *Lochner* era refers to a period of time in which the Court invalidated regulatory economic legislation because it disagreed with its legislative purpose. *See Lochner v. New York*, 198 U.S. 45 (1905) (striking down a state



an appellate court decision that had overturned a local zoning decision, the Supreme Court of Ohio stated that

[n]o appellate court, under the guise of judicial review, should nullify the zoning code, which has been written and adopted by the members of a city council, the duly-elected representatives of the people. It is better to leave the formulation and implementation of zoning policy to the city council, or other legislative body, which has not only the expertise and staff, but also, the constitutional responsibility to police this area effectively.<sup>57</sup>

Traditional judicial deference, stemming from *Euclid's* characterization of zoning as a legislative judgment, is best understood in the context of the SZEA and the early conception of "Euclidean Zoning."<sup>58</sup> The SZEA was based on several crucial assumptions: first, that segregating uses within a city would create a "quality urban environment";<sup>59</sup> second, that it would be possible to "formulate an intelligent, all-at-once decision to which the market would conform";<sup>60</sup> and third, that once the comprehensive plan was in place, zoning officials "would rarely change the rules."<sup>61</sup> In other words, as originally conceived, the zoning map would embody a legislative blueprint for local land use that would rarely need to be amended.<sup>62</sup> Zon-

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law regulating employment in the bakery industry because the law unreasonably interfered with employers' and workers' freedom of contract); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 8-2 to 8-7 (2d ed. 1988) (discussing the *Lochner* era and the reaction against the Court's holding in *Lochner*). As the Supreme Court has stated, "[t]he day is gone when this Court uses the Due Process Clause . . . to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson v. Lee Optical*, 348 U.S. 483, 488 (1955).

57. *Leslie v. City of Toledo*, 423 N.E.2d 123, 125 (Ohio 1981).

58. Traditional Euclidean Zoning divides a city into use districts, and prescribes architectural and structural regulations as well as the permissible uses for buildings in each district.

59. Ira Michael Heyman, *Legal Assaults on Municipal Land Use Regulation*, 5 *URB. LAW.* 1, 2 (1973).

60. *Id.*; see also Rose, *supra* note 10, at 849 (noting that when zoning first emerged "[i]t was widely assumed that localities could indeed set their goals far in advance, that changes in land regulation would therefore seldom be necessary, and that citizens would not face fluctuations in the status of their own or their neighbors' land").

61. Heyman, *supra* note 59, at 2.

62. See MANDELMER, *supra* note 46, § 4.18 (noting that the drafters of the Standard Zoning Enabling Act treated the adoption and amendment of a zoning ordinance as a legislative act).



ing officials would have had little discretion in implementing the plan, as they would have merely applied the rules set out in the zoning ordinance. Indeed, as one court explained,

[t]he original zoning ordinances were to have broad uniform application to all. It was believed that the local governmental body would allow or disallow under fixed terms, applicable to all, a particular type of development in a particular area. Development was seen as a matter of right if the fixed criteria of the zoning ordinances was satisfied.<sup>63</sup>

When zoning ordinances embody a legislative plan of development and zoning officials have little discretion in implementing the plan, judicial deference to zoning decisions made in accordance with the plan is entirely reasonable. As the next section will explain, however, neither of these assumptions holds true. Instead, modern zoning ordinances bear little resemblance to legislative plans of development, and modern zoning officials have virtually unlimited discretion in making zoning decisions. Thus, according a formal presumption of rationality and judicial deference to zoning decisions made in this context cannot be justified.

#### B. *Judicial Deference in Light of Discretionary Modern Zoning Practice*

Although the original proponents of zoning envisioned a system in which local legislatures would enact an "intelligent all-at-once" plan for local development, "as early as the 1930s, planners began to turn away from static end-state plans and to shift the focus of zoning away from fixed advance allocations and toward case-by-case review of landowners' or developers' proposed development plans."<sup>64</sup> In place of a comprehensive legislative plan, at the inception of zoning "most land was

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63. *Snyder v. Bd. of County Comm'rs*, 595 So. 2d 65, 72 (Fla. Dist. Ct. App. 1991), *quashed*, 627 So. 2d 469 (Fla. 1993).

64. ELLICKSON & BEEN, *supra* note 36, at 90 ("Experience quickly revealed that it is not practicably possible to predict future market demand, and that zoning provisions that run counter to the market create great political pressure for change and are apt to be amended."); *see also* MANDELMER, *supra* note 46, § 4.15 ("Although the drafters contemplated a zoning system in which uses are permitted as of right and modifications few, everyone knows that municipalities do not manage the zoning process in this manner.").



zoned according to its then use, exceptions were grandfathered in and most vacant land was underzoned or 'short-zoned.'"<sup>65</sup>

Modern zoning ordinances similarly assign most undeveloped land to low-density, residential zones that do not permit intensive land development. Individual parcels are then rezoned on an ad hoc basis in response to particular development proposals. As the Florida District Court of Appeal explained,

in reality most development has not occurred "as-of-right" under actual zoning practices. Most communities in actual practice have zoned their undeveloped land under a highly restrictive classification such as "general use" and agriculture. . . . The original intent was not to permanently preclude more intensive development but to adopt a "wait and see" attitude toward the direction of future development.<sup>66</sup>

This "wait and see" approach to zoning "allows local zoning agencies to exercise considerable control over the land development process"<sup>67</sup> and to extract concessions from developers in exchange for granting zoning requests.<sup>68</sup>

Scholars have long condemned municipalities for enacting zoning ordinances without adequate substantive planning.<sup>69</sup> As early as the 1950s, Professor Charles Haar argued that

any zoning done before a formal master plan has been considered and promulgated is per se unreasonable, because of failure to consider as a whole the complex relationships between

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65. *Snyder*, 595 So. 2d at 73 (citing 3 RATHKOPF ET AL., *supra* note 52, § 27A-5 (4th ed. Supp. 2006)).

66. *Id.* at 72-73.

67. MANDELKER, *supra* note 46, § 4.15.

68. See ELLICKSON & BEEN, *supra* note 36, at 90 (noting that modern zoning ordinances assign undeveloped land to "holding zones," or overly restrictive zoning classifications, to enable the municipality to extract concessions from developers in exchange for rezoning to a less restrictive use); JOHN M. LEVY, CONTEMPORARY URBAN PLANNING 123-25 (6th ed. 2003) (noting that zoning officials admit that they often zone large tracts restrictively to create an artificially strong bargaining position).

69. See, e.g., Charles M. Haar, "In Accordance with a Comprehensive Plan," 68 HARV. L. REV. 1154, 1174 (1955); Daniel R. Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899, 909-10 (1976) (arguing that the SZA's failure to require comprehensive zoning at the local government level was a serious oversight); Siemon, *supra* note 40, at 606-07 (arguing that "zoning without planning lacks coherence" and should not be entitled to a judicial presumption of validity).



the various controls which a municipality may seek to exercise over its inhabitants in furtherance of the general welfare.<sup>70</sup>

In addition, because localities lack coherent substantive plans for development, there are no objective standards upon which to base individual zoning decisions.<sup>71</sup> This leaves zoning officials to make typical zoning decisions—involving the issuance of variances,<sup>72</sup> special use permits,<sup>73</sup> and single-parcel rezonings—on a highly discretionary, ad hoc basis.<sup>74</sup> Moreover, local governments continue to develop new techniques—including floating zones,<sup>75</sup> planned unit developments,<sup>76</sup> and development agreements<sup>77</sup>—that are specifically designed to maintain local discretion by affording zoning authorities the ability to make zoning decisions on a case-by-case basis.

The problems caused by subjectivity are exacerbated by the fact that zoning officials, either appointed to administrative boards or elected to legislatures, often have no training or plan-

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70. Haar, *supra* note 69, at 1174.

71. Carol M. Rose, *New Models for Local Land Use Decisions*, 79 NW. U. L. REV. 1155, 1162 (1985) (noting that municipal land use plans, which are “notoriously vague, . . . provide no genuine standards for individual zoning decisions”).

72. In theory, variances are granted in cases of unusual hardship. In practice, variances have often been freely granted in spite of the contrary recommendations of the local planning staff. See RATHKOPF ET AL., *supra* note 52, §§ 58:1–58:2; see also Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 COLUM. L. REV. 883, 918 (2007).

73. According to Professor Rose, “[t]he discretionary character of such special permits makes them attractive to municipalities wishing to exercise case-by-case control” over land use development. Rose, *supra* note 10, at 841 n.8.

74. ELLICKSON & BEEN, *supra* note 36, at 308; Goldfien, *supra* note 6, at 438 (describing the discretion accorded to local land use regulators); Ryan, *supra* note 34 (describing the ad hoc nature of modern zoning).

75. Floating zones are zoning classifications that are approved in a zoning ordinance but not placed on a zoning map. A floating zone allows the municipality discretion to locate the zone on the map in conjunction with a particular development proposal. See generally ZONING AND LAND USE CONTROLS, *supra* note 8, § 13.01.

76. Planned unit developments, or cluster zoning, introduce flexibility into the rezoning process by replacing the lot-by-lot requirements of Euclidean Zoning with a site plan review process, under which the overall density of the preexisting Euclidean Zoning remains in place, but the placement of individual improvements may be clustered. See generally *id.* § 12.01.

77. Development agreements are formal contracts between a developer and the local government that limit the power of the government to apply newly enacted ordinances to ongoing developments. The developer gains stability, and the municipality gains concessions and land development conditions beyond what it could reasonably require through ordinary conditions, subdivision exactions, or impact fees. See *id.* § 9A.01.



ning experience.<sup>78</sup> Moreover, the zoning decision making process, particularly for rezoning decisions, often lacks procedural safeguards. For example, in many jurisdictions zoning "hearings are not transcribed and decisions are issued without findings of fact or statements of reasons."<sup>79</sup>

In addition, individual zoning decisions made by the local legislature lack certain democratic safeguards that legitimize decisions of larger legislatures. In making individual zoning decisions "which involve only a few interested parties meeting only on single issues, legislatures are restrained neither by a coalition-building process that assures the fairness of the decisions, nor by a clash of interests that gives time for sober consideration."<sup>80</sup> Moreover, because of their small size and homogeneous constituency, local decision making bodies are particularly vulnerable to political capture by a single interest or faction.<sup>81</sup> Factional domination can manifest itself in several ways at the local level:

One is sheer corruption, made possible in smaller representative bodies because a limited number of persons have influence which must be bought. Another possibility is domination by a few who are perceived by others as the powerful. The decisions of these few can affect many within the community; others must curry their favor, and even larger interests find difficulty in organizing against their "cabals." Finally . . . is the factional domination created by a

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78. ELLICKSON & BEEN, *supra* note 36, at 308 ("[Zoning officials] range from citizen volunteers with no training or expertise in administration or land use, to persons chosen more for their political connections than for their expertise or wisdom, to professionals."); Goldfien, *supra* note 6, at 440 (noting that zoning officials "are not planning or technical experts"); Serkin, *supra* note 72, at 919 ("[M]ost zoning boards charged with granting variances are staffed by laypeople who make their decisions informally and in relative secrecy."); Sullivan & Richter, *supra* note 7, at 473 (stating that "planning commissions, in many cases, are comprised of local volunteers who have neither the expertise nor the time" to make land use decisions).

79. ELLICKSON & BEEN, *supra* note 36, at 308; see also Mandelker, *supra* note 34, at 639 (describing decision making under the SZE as "chaotic," with "no real attempt at a fair process that includes necessary procedural safeguards").

80. Rose, *supra* note 10, at 856.

81. Mandelker & Tarlock, *supra* note 38, at 36 ("Capture theory was initially developed to explain why administrative agencies were unresponsive to new values, but can also be applied to local government politics.").



popular “passion”—sometimes a sudden whim, sometimes a longstanding prejudice—that carries a majority before it.<sup>82</sup>

Indeed, a review of the modern zoning process led one court to conclude that

rezoning is granted not solely on the basis of the land’s suitability to the new zoning classification and compatibility with the use of surrounding acreage, but, also, and perhaps foremost, on local political considerations including who the owner is, who the objectors are, the particular and exact land improvement and use that is intended to be made and whose ox is being fattened or gored by the granting or denial of the rezoning request.<sup>83</sup>

Judicial deference to this process—in which decisions are made in the absence of procedural safeguards, by untrained zoning officials, on a subjective and highly discretionary basis—cannot be considered reasonable. In fact, judicial deference has made it almost impossible to remedy abuses of the zoning power.<sup>84</sup> In enacting RLUIPA, Congress recognized that judicial deference is inappropriate in the free exercise context and created a statutory remedy for religious land users. The next Part of this Article explores RLUIPA’s remedy, focusing in particular on RLUIPA’s bifurcated approach to judicial review of local land use decisions.

## II. RLUIPA’S LAND USE PROVISIONS AND THE “INDIVIDUALIZED ASSESSMENTS” DOCTRINE

Since RLUIPA’s enactment in 2000, its constitutionality and effectiveness have been extensively debated.<sup>85</sup> To Congress and religious advocates,

RLUIPA is necessary to prevent local governments from discriminating against particular religions (or religion in general) by limiting religious congregations’ ability to build or

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82. Rose, *supra* note 10, at 855 (footnotes omitted).

83. *Snyder v. Bd. of County Comm’rs of Brevard*, 595 So. 2d 65, 73 (Fla. Dist. Ct. App. 1991) (footnote omitted), *quashed* 627 So. 2d 469 (Fla. 1993); *see also* Mandelker & Tarlock, *supra* note 38, at 2 (“[Z]oning decisions are too often ad hoc, sloppy and self-serving decisions with well-defined adverse consequences without off-setting benefits.”).

84. *See supra* note 18 and accompanying text.

85. *See supra* note 23 and accompanying text.



expand places of worship. The charge is that localities enforce religious bigotry through the strategic use of often vague and standardless land-use ordinances and development processes.<sup>86</sup>

To others, RLUIPA unnecessarily interferes with local governments' ability to enforce generally applicable land use regulation and creates an overly broad exemption that allows religious institutions to avoid a community's reasonable land-use concerns.<sup>87</sup> To these critics, RLUIPA is particularly objectionable because it represents a federal intrusion into an area traditionally regulated by local governments.<sup>88</sup> The following sections explore the history of RLUIPA and the mechanics of the remedy it provides.

#### A. *The History and Purpose of RLUIPA's Land Use Provisions*

RLUIPA is the product of a decade-long struggle between Congress and the Supreme Court over the scope of the Free Exercise Clause of the First Amendment.<sup>89</sup> The battle began in 1990 with the Supreme Court's decision in *Employment Division v. Smith*.<sup>90</sup> In contrast to earlier Free Exercise Clause decisions that applied strict scrutiny review to laws burdening religious exercise,<sup>91</sup> *Smith* applied rational basis review and held that the

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86. Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1839 (2004) (footnotes omitted).

87. See *id.*; see also Hamilton, *supra* note 6, at 335–41 (arguing that RLUIPA inappropriately interferes with local governments' ability to regulate land use planning); MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* 95–96 (2005) ("Before RLUIPA, religious landowners in virtually every jurisdiction were just landowners, required to abide by zoning and land-use restrictions, with the concomitant market price for property and for obtaining zoning alterations. . . . RFRA and then RLUIPA changed all that.").

88. Schragger, *supra* note 86, at 1839 ("RLUIPA is, in essence, the first national land-use ordinance.").

89. As the Supreme Court has noted, RLUIPA is "the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens, consistent with [Supreme Court] precedents." *Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005); see also 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, 806–12 (2006) (describing the "tug of war" between Congress and the Supreme Court that eventually led to the enactment of RLUIPA); Schragger, *supra* note 86, at 1838 ("RLUIPA is Congress's latest salvo in its war with the Court over free exercise.").

90. 494 U.S. 872 (1990).

91. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 234–36 (1972) (applying strict scrutiny and holding that the Free Exercise Clause provided the Amish with an exemption from compulsory school attendance laws); *Sherbert v. Verner*, 374 U.S.



right to free exercise of religion does not relieve individuals of the obligation to comply with valid, religiously neutral laws of general application.<sup>92</sup> The Court, therefore, upheld a criminal law that banned the use of peyote, even though the law resulted in the denial of unemployment benefits to Native Americans who used peyote for sacramental purposes.<sup>93</sup>

The *Smith* decision was met with public outrage,<sup>94</sup> prompting Congress to react. In 1993, Congress attempted to overturn the holding of *Smith* through the passage of the Religious Freedom Restoration Act (RFRA).<sup>95</sup> The text of RFRA explicitly stated that the Act was intended to restore the strict scrutiny review employed by the Supreme Court before *Smith* to evaluate laws that substantially burden the free exercise of religion.<sup>96</sup> Thus, RFRA broadly prohibited states and the federal government from placing a "substantial burden" on religious exercise without first demonstrating that the action was in furtherance of a compelling governmental interest and was the least restrictive means of furthering that compelling interest.<sup>97</sup>

Four years later, in *City of Boerne v. Flores*,<sup>98</sup> the Supreme Court responded by finding that RFRA, as applied to the states, unconstitutionally exceeded Congress's enforcement power

398, 403–06 (1963) (applying strict scrutiny and mandating an exemption to a state law that prevented a Seventh-Day Adventist from receiving unemployment benefits because the claimant could not work on Saturdays).

92. *Smith*, 494 U.S. at 878–79; see also ZONING AND LAND USE CONTROLS, *supra* note 8, § 7.04 ("The Court refused in *Smith* to apply its doctrine from *Sherbert v. Verner*, which would essentially have shifted the burden of proof to the state and required that it demonstrate a 'compelling state interest' for the apparent burden imposed on a religious practice by its criminal laws.").

93. 494 U.S. at 878–79.

94. See, e.g., John Dart, *Religious Faiths Decry High Court Ruling; Constitution: Critics say a basic freedom is imperiled by the opinion in the peyote case that religious exemptions are a 'luxury'*, L.A. TIMES, Apr. 21, 1990, at F14; Linda Greenhouse, *Court is Urged to Rehear Case on Ritual Drugs*, N.Y. TIMES, May 11, 1990, at A16 (noting that an "unusually diverse coalition of religious groups and constitutional scholars" petitioned for a rehearing of the case); Nat Hentoff, Editorial, *Justice Scalia Vs. the Free Exercise of Religion*, WASH. POST, May 19, 1990, at A25 (describing the *Smith* holding as a "radical revision of the First Amendment").

95. 42 U.S.C. §§ 2000bb, 2000bb-1 to bb-4 (2003).

96. *Id.* § 2000bb(a)–(b).

97. *Id.* § 2000bb-1(b) (2003) ("Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.").

98. 521 U.S. 507 (1997).



under the Fourteenth Amendment. The Court held that although Section 5 of the Fourteenth Amendment grants Congress the authority to remedy unconstitutional behavior,<sup>99</sup> Congress must first establish the pervasiveness of such behavior and then enact a proportionate remedy.<sup>100</sup> Using this "congruence and proportionality" standard, the Court found that "RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections."<sup>101</sup>

After the Supreme Court invalidated RFRA, Congress once again attempted to increase protection for religious freedom through passage of a more narrowly tailored statute—RLUIPA.<sup>102</sup> Mindful of the need for legislative findings of un-

99. U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

100. *Flores*, 521 U.S. at 519–20; see also Hamilton, *supra* note 6, at 324 ("The severe disproportion between the scope of RFRA and any evidence of state malfeasance led the Court to announce the principle that a prophylactic law must be 'congruent and proportional' to the record of state unconstitutional actions.").

101. *Flores*, 521 U.S. at 532.

102. In contrast to RFRA, which applied to every state and federal law, RLUIPA applies to two specific areas of law: land use and institutionalized persons. See 42 U.S.C. § 2000cc (2003) (zoning); 42 U.S.C. § 2000cc-1 (institutionalized persons). Additionally, in order to avoid the pitfalls of RFRA, RLUIPA applies only in narrow circumstances in which Congress is empowered to act.

First, RLUIPA applies when a substantial burden is imposed by a program that receives federal financial assistance. 42 U.S.C. § 2000cc(a)(2)(A). This section was designed to fall within Congress's power under the Spending Clause. See generally *South Dakota v. Dole*, 483 U.S. 203 (1987) (explaining the parameters of congressional power under the Spending Clause).

Second, RLUIPA applies when the substantial burden affects interstate commerce. 42 U.S.C. § 2000cc(a)(2)(B). This section was designed to fall within Congress's power under the Commerce Clause. See generally *United States v. Lopez*, 514 U.S. 549 (1995) (explaining the requirement of a jurisdictional hook for Congress to properly exercise power under the Commerce Clause).

Third, RLUIPA applies when the substantial burden is imposed through an individualized assessment. 42 U.S.C. § 2000cc(a)(2)(C). This section was designed to fall within Congress's remedial power under Section 5 of the Fourteenth Amendment. See Joint Statement, *supra* note 20, at S7775; H.R. REP. NO. 106-219, at 12–13 (1999). An individualized assessment serves as the jurisdictional basis for most of the land use cases litigated under RLUIPA. See, e.g., *Guru Nanak Sikh Soc. of Yuba City v. County of Sutter*, 456 F.3d 978, 985 (9th Cir. 2006) ("We decide that the County made an individualized assessment of Guru Nanak's [conditional use permit], thereby making RLUIPA applicable . . ."); *Konikov v. Orange County*, 410 F.3d 1317, 1323 (11th Cir. 2005) ("We may exercise jurisdiction in this case because the [zoning ordinance] is a 'land use regulation . . . under which a gov-



constitutional behavior, Congress held hearings over the course of three years—including three hearings before the Senate Committee on the Judiciary and six hearings before the House Subcommittee on the Constitution—to determine the scope of religious discrimination throughout American society.<sup>103</sup>

The congressional hearings revealed evidence of religious discrimination in land use regulation.<sup>104</sup> In particular, Congress found that

[s]ome [land use regulations] deliberately exclude all new churches from an entire city, others refuse to permit churches to use existing buildings that non-religious assemblies had previously used, and some intentionally change a zone to exclude a church. For example, churches who applied for permits to use a flower shop, a bank, and a theater were excluded when the land use regulators rezoned each small parcel of land into a tiny manufacturing zone.<sup>105</sup>

The hearings also revealed that “[c]hurches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation.”<sup>106</sup> This discrimination often “lurks behind such vague and universally applicable reasons as traffic, aesthetics, or ‘not consistent with the city’s land use plan.’”<sup>107</sup>

In analyzing the evidence, Congress determined that land use decision making processes are particularly susceptible to religious discrimination because land use regulations lack objective and generally applicable standards, leaving zoning offi-

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ernment makes . . . individualized assessments of the proposed uses for the property involved.” (quoting 42 U.S.C. § 2000cc(a)(2)(C)); *Midrash Sephardi v. Town of Surfside*, 366 F.3d 1214, 1225 (11th Cir. 2004) (finding jurisdiction because zoning officials made an individualized assessment in denying zoning permit); *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1222 (C.D. Cal. 2002) (same); *Freedom Baptist Church of Del. County v. Twp. of Middletown*, 204 F. Supp. 2d 857, 868–69 (E.D. Pa. 2002) (same). For further discussion of this jurisdictional hook, see *infra* Part II.B.

103. Congress thus sought to comply with *Flores* by compiling a legislative record that would satisfy *Flores*’s “congruence and proportionality” test even if RLUIPA were to exceed existing constitutional requirements. See Joint Statement, *supra* note 20, at S7774–75.

104. See 146 CONG. REC. E1564–67 (daily ed. Sept. 22, 2000) (statement of Rep. Hyde).

105. 146 CONG. REC. E1235 (daily ed. July 14, 2000) (statement of Rep. Canady).

106. Joint Statement, *supra* note 20, at S7774.

107. *Id.*



cials with "virtually unlimited discretion in granting or denying permits for land use and in other aspects of implementing zoning laws."<sup>108</sup> As the Seventh Circuit similarly noted, discrimination is likely "when, as in the case of the grant or denial of zoning variances, a state delegates essentially standardless discretion to nonprofessionals operating without procedural safeguards."<sup>109</sup> Congress, therefore, enacted RLUIPA in order to protect religious land users from religious discrimination made possible by the highly subjective nature of modern zoning.

B. *The "Individualized Assessments" Doctrine*

In contrast to the contentions of its critics, RLUIPA was not intended to exempt religious institutions from generally applicable land use regulations. Indeed, the Hatch-Kennedy Joint Statement contains a section entitled, "Not Land Use Immunity," which explicitly states that "[t]his Act does not provide religious institutions with immunity from land use regulation, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations, where available without discrimination or unfair delay."<sup>110</sup>

Instead, as the Supreme Court explained in upholding RLUIPA's institutionalized persons provisions, "RLUIPA is . . . [a] congressional effort[] to accord religious exercise heightened protection from government-imposed burdens, consistent with this Court's precedents."<sup>111</sup>

This disclaimer is necessary because most zoning ordinances are facially neutral and generally applicable. In other words, zoning ordinances are not aimed at religious organizations but apply to all land users. As the Supreme Court held in *Employment Division v. Smith*,<sup>112</sup> such generally applicable laws are to be analyzed under rational basis review. RLUIPA, however, takes advantage of an exception created by *Smith* for laws that are implemented through a system of individualized assessments.<sup>113</sup>

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108. H.R. REP. NO. 106-219, at 20 (1999).

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

110. Joint Statement, *supra* note 20, at S7776.

111. *Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005).

112. 494 U.S. 872 (1990).

113. *Id.* at 884.



Under the individualized assessments exception, strict scrutiny is used to review governmental decisions made pursuant to a system "in which case-by-case inquiries are routinely made, such that there is an 'individualized governmental assessment of the reasons for the relevant conduct' that 'invite[s] considerations of the particular circumstances' involved in the particular case."<sup>114</sup>

The individualized assessments doctrine originated in 1963 with the Supreme Court's decision in *Sherbert v. Verner*.<sup>115</sup> In *Sherbert*, the Court held that South Carolina could not withhold unemployment benefits from a member of the Seventh-Day Adventist Church because she refused to work on Saturdays.<sup>116</sup> The unemployment statute at issue in *Sherbert* provided that a person was not eligible for unemployment compensation benefits if, "without good cause," he had quit work or refused available work.<sup>117</sup> The Court held that because the unemployment statute permitted "individualized exemptions" based on "good cause," South Carolina could not refuse to consider a religious reason for refusing to work on Saturday a "good cause" unless such refusal satisfied strict scrutiny.<sup>118</sup>

In *Smith*, the Supreme Court refused to apply the strict scrutiny standard from *Sherbert* to a neutral law of general applicability.<sup>119</sup> The Court distinguished *Sherbert* by explaining that the test in that case "was developed in a context that lent itself to individualized governmental assessment of the reasons for

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114. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1297 (10th Cir. 2004) (quoting *Smith*, 494 U.S. at 884); see also *infra* notes 129–134 and accompanying text.

115. 374 U.S. 398 (1963); see also *Freedom Baptist Church of Del. County v. Twp. of Middletown*, 204 F. Supp. 2d 857, 868–69 (E.D. Pa. 2002) ("What Congress manifestly has done in this subsection is to codify the individualized assessments jurisprudence in Free Exercise cases that originated with the Supreme Court's decision in *Sherbert v. Verner* . . ."); Joint Statement, *supra* note 20, at S7775; H.R. REP. NO. 106-219, at 17 (1999).

116. *Sherbert*, 374 U.S. at 399, 410.

117. *Id.* at 400–01.

118. In the words of Justice Brennan, writing for the Court, "to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." *Id.* at 406; see also *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 141 (1987) (reaffirming that strict scrutiny remains the standard of review in an unemployment benefits case involving a religious applicant); *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest.").

119. *Employment Div. v. Smith*, 494 U.S. 872, 878–79 (1990).



the relevant conduct."<sup>120</sup> According to the Court in *Smith*, "our decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."<sup>121</sup>

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,<sup>122</sup> decided three years after *Smith*, the Supreme Court extended the "individualized assessments" doctrine beyond the unemployment compensation arena.<sup>123</sup> *Lukumi* involved an animal cruelty ordinance that punished anyone who killed an animal "unnecessarily."<sup>124</sup> The Court determined that the ordinance constituted "a system of 'individualized governmental assessment'" because the law required government officials to decide which animal killings were "necessary" and which were "unnecessary."<sup>125</sup>

Although the animal cruelty ordinance was facially neutral and generally applicable, the Supreme Court looked behind the law's written provisions and held that "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked as well as overt."<sup>126</sup>

The *Lukumi* Court, following *Smith's* reading of *Sherbert*, stated that "in circumstances in which individualized exemptions from a general requirement are available, the government 'may not refuse to extend that system to cases of "religious hardship" without compelling reason.'"<sup>127</sup> *Lukumi* concluded by reaffirming that "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny."<sup>128</sup>

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120. *Id.* at 884.

121. *Id.*

122. 508 U.S. 520 (1993).

123. *Id.* at 537-38.

124. *Id.* at 537.

125. *Id.* (quoting *Smith*, 494 U.S. at 884). Although government officials considered the killing of animals for religious sacrifice unnecessary, they considered hunting and many other secular killings necessary. *Id.*

126. *Id.* at 534.

127. *Id.* at 537 (quoting *Smith*, 494 U.S. at 884).

128. *Id.* at 546.



The rule that emerges from *Sherbert*, *Smith*, and *Lukumi* is that neutral, generally applicable laws are subject to rational basis review, while neutral, generally applicable laws that are implemented through a system of individualized assessments are subject to strict scrutiny. Although the Supreme Court has not explicitly provided a standard by which to distinguish between laws of general applicability and individualized assessments,<sup>129</sup> the “general rule that emerges from the case law is that the determination of whether the governmental action is an ‘individualized assessment’ depends on whether the decision was *subjective* in nature.”<sup>130</sup>

In *Blackhawk v. Pennsylvania*,<sup>131</sup> the Third Circuit explained that “a law must satisfy strict scrutiny if it permits individualized, discretionary exemptions because such a regime creates the opportunity for a facially neutral and generally applicable standard to be applied in practice in a way that discriminates against religiously motivated conduct.”<sup>132</sup> Indeed, “[t]he real problem with discretionary systems of individualized exemptions is . . . that such subjective review creates too great a risk of discrimination and bias against unpopular or minority religious beliefs.”<sup>133</sup>

An analogous situation can be seen in the delegation of discretionary authority to government officials to license parades and other expressive activity.<sup>134</sup> Such delegation is unconstitutional because “the risk is too great that government officials will abuse this discretion by refusing to license unpopular

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129. See *id.* at 543–45 (expressly declining to define precisely the appropriate standard for determining whether a law is one of general applicability).

130. *Westchester Day Sch. v. Vill. of Mamaroneck*, 417 F. Supp. 2d 477, 541–42 (S.D.N.Y. 2006), *aff’d*, 504 F.3d 338 (2d Cir. 2007) (emphasis added) (quoting *Living Water Church of God v. Charter Twp. of Meridian*, 384 F. Supp. 2d 1123, 1130 (W.D. Mich. 2005)); see also *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1297 (10th Cir. 2004) (finding that individualized assessments involve considerations of the particular circumstances involved in the particular case); *Town of Foxfield v. Archdiocese of Denver*, 148 P.3d 339, 345 (Colo. Ct. App. 2006) (holding that “an action constitutes an individualized assessment when the decision is based upon a subjective determination”). For further discussion, see *infra* notes 150–55 and accompanying text.

131. 381 F.3d 202 (3d Cir. 2004).

132. *Id.* at 209.

133. Richard F. Duncan, *Free Exercise and Individualized Exemptions: Herein of Smith, Sherbert, Hogwarts, and Religious Liberty*, 83 NEB. L. REV. 1178, 1202 (2005).

134. Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119, 193–94 (2002).



speech or disfavored opinions.”<sup>135</sup> Similarly, a discretionary system of individual assessments for zoning decisions permits inexperienced zoning officials to make subjective zoning decisions in an arbitrary, inconsistent, and discriminatory manner.

C. *RLUIPA's Bifurcated Framework for Judicial Review*

1. *Zoning Ordinances "As Applied" Through Individualized Assessments*

In enacting RLUIPA, Congress determined, first, that land use regulations lack objective standards, leaving zoning officials with unlimited authority to make zoning decisions on an individual, ad hoc basis,<sup>136</sup> and second, that these “individualized [zoning] assessments readily lend themselves to discrimination, and . . . make it difficult to prove discrimination in any individual case.”<sup>137</sup>

Section 2000cc(a)(2)(C) of RLUIPA, therefore, applies *Smith's* “individualized assessments” exception by prohibiting the government from imposing a substantial burden on a person’s religious exercise “in the implementation of a land use regulation or system of land use regulations, under which a government makes . . . individualized assessments of the proposed uses for the property involved,”<sup>138</sup> unless the government demonstrates that the imposition of the burden (a) “is in furtherance of a

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135. *Duncan*, *supra* note 133, at 1187; *see also* *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 772 (1988) (holding unconstitutional an ordinance giving the mayor “unfettered discretion to deny a permit application and unbounded authority to condition the permit on any additional terms he deems ‘necessary and reasonable’”); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969) (ruling that a “municipality may not empower its licensing officials to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade, according to their own opinions regarding the potential effect of the activity in question on the ‘welfare,’ ‘decency,’ or ‘morals’ of the community”); *MacDonald v. City of Chicago*, 243 F.3d 1021, 1026 (7th Cir. 2001) (“It is well established that where a statute or ordinance vests the government with virtually unlimited authority to grant or deny a permit, that law violates the First Amendment’s guarantee of free speech.”).

136. Joint Statement, *supra* note 20, at S7775 (“The hearing record demonstrates a widespread practice of individualized decisions to grant or refuse permission to use property for religious purposes.”); H.R. REP. NO. 106-219, at 20 (1999).

137. Joint Statement, *supra* note 20, at S7775.

138. 42 U.S.C. § 2000cc(a)(2)(C) (emphasis added).



compelling government interest” and (b) “is the least restrictive means of furthering that . . . interest.”<sup>139</sup>

In *Corporation of the Presiding Bishop v. City of West Linn*,<sup>140</sup> the Court of Appeals of Oregon explained RLUIPA’s bifurcated framework as follows:

By its terms, [42 U.S.C. § 2000cc(a)(2)(C)] refers to both “a land use regulation or system of land use regulations,” on the one hand, and “individualized assessments” made under such a regulation or system of regulations, on the other. Based on that text and structure, we understand the former phrase to refer to *preexisting, generally applicable laws* and the latter phrase to refer to the *application of those laws to particular facts* or sets of facts.<sup>141</sup>

RLUIPA thus distinguishes between the zoning ordinance itself, and the *application* of the zoning ordinance in a particular case. In *Guru Nanak Sikh Society of Yuba City v. County of Sutter*,<sup>142</sup> the Ninth Circuit agreed that RLUIPA “does not apply directly to land use regulations . . . which typically are written in general and neutral terms.”<sup>143</sup> Instead, RLUIPA is triggered when the zoning code is “applied to grant or deny a certain use to a particular parcel of land.”<sup>144</sup> Similarly, other courts have noted that “even assuming that a governmental entity’s enactments are neutral laws of general applicability, *their application to particular facts* nevertheless can constitute an individualized assessment—particularly where . . . the application does not involve a mere numerical or mechanistic assessment, but [involves] criteria that are at least partially subjective in nature.”<sup>145</sup>

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139. *Id.* § 2000cc(a).

140. 86 P.3d 1140 (Or. Ct. App. 2004).

141. *Id.* at 1148 (emphasis added).

142. 456 F.3d 978 (9th Cir. 2006).

143. *Id.* at 987.

144. *Id.* RLUIPA cases arise in three common types of zoning circumstances: requests to rezone, special use permits, and variances. See *Lennington*, *supra* note 89, at 821 n.88. Although the majority of cases have determined that RLUIPA applies to all individual land use decisions, several cases have distinguished between rezoning decisions, on the one hand, and variance or conditional use permit decisions, on the other. See, e.g., *Greater Bible Way Temple of Jackson v. City of Jackson*, 733 N.W.2d 734, 754 (Mich. 2007) (holding that the denial of a rezoning request did not involve an individualized assessment).

145. *Lighthouse Cmty. Church of God v. City of Southfield*, No. 05-40220, 2007 U.S. Dist. LEXIS 28, at \*15 (D. Mich. Jan. 3, 2007) (emphasis added); see also *Westchester Day Sch. v. Vill. of Mamaroneck*, 417 F. Supp. 2d 477 (S.D.N.Y. 2006)



Indeed, the vast majority of courts reviewing zoning ordinances "as applied" to a particular property have concluded that, in contrast to the ordinance itself, the application of the zoning ordinance in a particular instance involves an individualized assessment of the proposed use of the property.<sup>146</sup> For example, in *Freedom Baptist Church of Delaware County v. Township of Middletown*,<sup>147</sup> the first federal court to address the constitutionality of RLUIPA held that

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(emphasis added) (quoting *Living Water Church of God v. Charter Twp. of Meridian*, 384 F. Supp. 2d 1123, 1130 (W.D. Mich. 2005)) (holding that the denial of a special use permit was an "individualized assessment" where the determination was based on subjective criteria), *aff'd*, 2007 U.S. App. LEXIS 24267 (2d Cir. Oct. 17, 2007); *Town of Foxfield v. Archdiocese of Denver*, 148 P.3d 339, 345 (Colo. Ct. App. 2006) (same); *Castle Hills First Baptist Church v. City of Castle Hills*, No. SA-01-CA-1149-RF, 2004 U.S. Dist. LEXIS 4669, at \*61 (W.D. Tex. Mar. 17, 2004) (finding that the city's land use decisions are not generally applicable laws, and that "[z]oning, and the special use permit application process specifically, inherently depend upon a system of individualized assessment").

146. See, e.g., *Westchester Day Sch.*, 417 F. Supp. 2d at 541-42; *Castle Hills*, 2004 U.S. Dist. LEXIS 4669, at \*61; see also *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1225 (11th Cir. 2004) (holding that the town's procedure for granting or denying conditional use permits, which involved a "case-by-case evaluation of the proposed activity of religious organizations," was "quintessentially an 'individual assessment' regime"); *Living Water Church of God v. Charter Twp. of Meridian*, 384 F. Supp. 2d 1123, 1130-31 (W.D. Mich. 2005) (finding that zoning officials made an individualized assessment in denying zoning permit); *United States v. Maui County*, 298 F. Supp. 2d 1010, 1016 (D. Haw. 2003) (finding that even without RLUIPA, strict scrutiny applies where a "generally applicable and neutral [zoning] law also contains exceptions based upon 'individualized assessments' which can be used in a pretextual manner"); *Hale O Kaula Church v. Maui Planning Comm'n*, 229 F. Supp. 2d 1056, 1073 (D. Haw. 2002) (finding that a county's denial of a special use permit involved an individualized assessment where the underlying statute permitted issuance of special use permits for "unusual and reasonable" uses); *Cottonwood Christian Ctr. v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203, 1222-23 (C.D. Cal. 2002) ("Defendants' land use decisions here are not generally applicable laws. . . . [T]he City's refusal to grant Cottonwood's application for a [conditional use permit] invite[s] individualized assessments of the subject property and the owner's use of such property, and contain[s] mechanisms for individualized exceptions.") (emphasis added) (internal quotation marks omitted); *Keeler v. Mayor & City Council of Cumberland*, 940 F. Supp. 879, 885 (D. Md. 1996) (holding that a generally applicable landmark ordinance "has in place a system of individualized exemptions"); *Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp.*, 675 N.W.2d 271, 279-80 (Mich. Ct. App. 2003) (finding that zoning officials made an individualized assessment in denying zoning permit); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. City of West Linn*, 86 P.3d 1140, 1148 (Or. Ct. App. 2004) (finding that a neutral law of general applicability constitutes an individualized assessment when applied using subjective criteria).

147. 204 F. Supp. 2d 857 (E.D. Pa. 2002).



zoning ordinances must by their nature impose individual assessment regimes. That is to say, *land use regulations through zoning codes necessarily involve case-by-case evaluations of the propriety of proposed activity against extant land use regulations*. They are, therefore, of necessity different from laws of general applicability which do not admit to exceptions on Free Exercise grounds.<sup>148</sup>

In *Guru Nanak*, the Ninth Circuit also determined that the application of a zoning ordinance involved an individualized assessment of the proposed use of the property at issue.<sup>149</sup> In that case, a religious organization claimed that the county's denial of a conditional use permit to build a Sikh temple on land zoned for agricultural use violated RLUIPA.<sup>150</sup> The county argued that its denial of the conditional use permit did not implicate RLUIPA, because its use permit process constituted a neutral law of general applicability.<sup>151</sup>

In rejecting the county's argument, the Ninth Circuit held that "RLUIPA applies when the government may take into account the particular details of an applicant's proposed use of land when deciding to permit or deny that use."<sup>152</sup> The court focused on the discretion afforded the planning commission to approve a use permit following a finding that the use, under the circumstances of the particular case, will not be detrimental to the neighborhood.<sup>153</sup> The court concluded that RLUIPA applied, because the "Zoning Code directed the Planning Commission and the Board of Supervisors to 'implement [its] system of land use regulations [by making] individualized assessments of the proposed uses of the land involved.'"<sup>154</sup>

Similarly, in *Konikov v. Orange County*,<sup>155</sup> the Eleventh Circuit found that a zoning ordinance that included a procedure for

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148. *Id.* at 868 (emphasis added).

149. *Guru Nanak Sikh Soc. of Yuba City v. County of Sutter*, 456 F.3d 978, 985 (9th Cir. 2006) ("We decide that the County made an individualized assessment of Guru Nanak's [conditional use permit], thereby making RLUIPA applicable.").

150. *Id.* at 981.

151. *Id.* at 986 ("The County argues that its denial of Guru Nanak's second [conditional use permit] application falls outside the legislative scope of RLUIPA because its use permit process is a neutral law of general applicability.").

152. *Id.*

153. *Id.* at 986–87 & n.9 (noting that "Sutter County's Zoning Code implementation process is individualized and discretionary").

154. *Id.* at 987 (quoting 42 U.S.C. § 2000cc).

155. 410 F.3d 1317 (11th Cir. 2005).



obtaining special exception approval involved an individualized assessment.<sup>156</sup> Although the court held that applying for a special use permit did not constitute a “substantial burden” under RLUIPA, it determined that the zoning code

is a “land use regulation . . . under which a government makes . . . individualized assessments of the proposed uses for the property involved.” . . . The Code Enforcement Officers and the [Code Enforcement Board] must determine in each case whether a particular use of the land goes beyond occasional, casual gatherings and constitutes an “organization” in violation of the Code. *Congress was concerned about such individualized scrutiny because it runs the risk that the standards in such regulations will be applied in an unequal fashion.*<sup>157</sup>

In determining whether land use *decisions*—that is, land use ordinances *as applied* to particular pieces of property—constitute individualized assessments, courts generally focus on the subjective and discretionary nature of the government action. As a result, if an individual zoning decision is based on objective criteria, it is not an individualized assessment. For example, in *Grace United Methodist Church v. City of Cheyenne*,<sup>158</sup> the Tenth Circuit concluded that the zoning board’s non-discretionary denial of a variance to operate a daycare center was not an individualized assessment.<sup>159</sup> The court determined that the application of the zoning ordinance was based on objective criteria, and that the board lacked the authority or discretion to grant the requested variance.<sup>160</sup> The court explicitly distinguished this non-discretionary denial from the individualized assessment in *Sherbert* by noting that the “Board’s *mandatory* denial of the Church’s variance in this case is thus very different from the government employee’s *discretionary* denial of Ms. Sherbert’s unemployment benefits in *Sherbert*.”<sup>161</sup>

In *Mount St. Scholastica, Inc. v. City of Atchison*,<sup>162</sup> the United States District Court for the District of Kansas confirmed that

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156. *Id.* at 1323.

157. *Id.* (emphasis added) (quoting 42 U.S.C. § 2000cc(a)(2)(C)); see also *Midrash Sephardi v. Town of Surfside*, 366 F.3d 1214, 1225 (11th Cir. 2004).

158. 451 F.3d 643 (10th Cir. 2006).

159. *Id.* at 654.

160. *Id.*

161. *Id.* (citation omitted) (emphasis added).

162. 482 F. Supp. 2d 1281 (D. Kan. 2007).



*Grace United Methodist* turned on the zoning board's lack of discretion under the particular circumstances of that case. In *Mount St. Scholastica*, a monastic community was denied a demolition permit under the Kansas Historic Preservation Act.<sup>163</sup> The district court considered the Tenth Circuit's decision in *Grace United Methodist*, concluding that unlike the zoning board in *Grace United Methodist*,

it is clear that the City in this case had the "authority or discretion" to permit the requested construction. *This ability to grant or deny the requested construction based on subjective criteria is the key distinction.* Because the decision was necessarily made on a case-by-case basis with individualized scrutiny, the facts of this case are similar to the distinctions hypothesized in *Grace United Methodist*.<sup>164</sup>

## 2. The Facial/As-Applied Dichotomy

The preceding review of RLUIPA cases reveals a clear dichotomy between zoning ordinances generally and the application of a zoning ordinance in a particular case: although land use ordinances are often facially neutral laws of general applicability, such laws are *applied* to individual parcels of land through a subjective system of individualized assessments. As a result, under RLUIPA, *facial* challenges to zoning ordinances are subject to *Smith's* deferential review, while challenges to zoning ordinances *as applied* to individual parcels of land through a system of individualized assessments are subject to *Sherbert's* strict scrutiny review.<sup>165</sup>

The logic of this distinction is clear: Facial challenges involve claims that a particular religious entity should be *exempt* from a process with which all other entities must comply—a process that includes applying for rezonings, variances, and special use permits.<sup>166</sup> A challenge to a particular land use decision, how-

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163. *Id.* at 1287.

164. *Id.* at 1294 (citation omitted) (emphasis added).

165. For a discussion of the distinction between facial and as-applied land use challenges, see *supra* note 28.

166. See, e.g., *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 764 (7th Cir. 2003) (finding that a zoning ordinance which mandates application for a special use permit is generally applicable, and noting that "Appellants appear to confuse exemption from a particular zoning provision (in the form of Special Use, Map Amendment, or Planned Development approval) with exemption from the procedural *system* by which such approval may be sought"); *Cornerstone*



ever, involves "examination of government action that employs great discretion and much subjective analysis."<sup>167</sup>

Although RLUIPA is expressly limited to cases of religious land use, the statute's recognition of the subjective nature of the land use decision making process implicates all land users. Indeed, because the application of a zoning ordinance to an individual parcel of land is made on a discretionary, case-by-case basis, individual zoning decisions cannot be equated with ordinary economic legislation, which is entitled to traditional judicial deference and a presumption of constitutionality. The question, then, is what standard of judicial review is appropriate for as-applied land use challenges that do not involve the free exercise of religion.

### III. LOOKING BEYOND RELIGIOUS LAND USE

Judicial review of local zoning decisions has traditionally been limited. Local zoning decisions are considered either legislative or administrative acts, both of which are accorded a strong presumption of constitutionality and are upheld so long as they are not arbitrary or capricious. Although perhaps justifiable in the context of early Euclidean Zoning, judicial deference to local land use decisions is unwarranted in light of "wait and see" zoning and the tremendous discretion afforded to modern zoning officials. Indeed, as Professor Rose has argued, the traditional arbitrary and capricious standard "is too broad to treat seriously the fairness claims of the individual property owners with interests at stake in piecemeal changes."<sup>168</sup>

RLUIPA explicitly recognizes the subjective nature of local zoning and establishes a bifurcated framework for review of local land use decisions. Under RLUIPA, facial challenges to objective land use ordinances are reviewed deferentially, while challenges to land use ordinances as applied through subjective "individualized assessments" are strictly scrutinized.

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*Bible Church v. City of Hastings*, 948 F.2d 464, 472 (8th Cir. 1991) (holding that the zoning code in the whole was generally applicable and that the instant lawsuit was a facial challenge to exclusion of churches from the central business district, rather than an as-applied challenge to a particular zoning decision).

167. Brief Amicus Curiae of the Becket Fund for Religious Liberty in Support of Plaintiff-Appellant and in Support of Reversal at 6, *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643 (10th Cir. 2006) (No. 03-8060).

168. Rose, *supra* note 10, at 842.



Although RLUIPA was enacted to prevent religious discrimination in land use regulation, the true extent of such discrimination in land use is unknown. In fact, it seems likely that many of the obstacles faced by religious land users are no different than the obstacles faced by ordinary land users in the subjective zoning process.<sup>169</sup> While most would agree that strict scrutiny review is inappropriate for as-applied land use challenges involving neither fundamental rights nor suspect classes, traditional judicial deference is equally inappropriate.

Fortunately, the Supreme Court established the correct standard of review in its early zoning jurisprudence. Under existing precedent, facial challenges to generally applicable zoning ordinances are subject to the deferential standard of review set out in *Village of Euclid v. Ambler Realty Co.*<sup>170</sup> In contrast, as-applied challenges are reviewed less deferentially in accordance with *Nectow v. City of Cambridge*. *Nectow's* less deferential, as-applied review helps limit the discretion of zoning officials by ensuring that the challenged zoning decision is substantially related to the public health, safety, or welfare.

#### A. *Religious Discrimination or Zoning as Usual?*

RLUIPA was enacted to protect religious land users from religious discrimination in the highly discretionary zoning process.<sup>171</sup> Yet, despite RLUIPA's extensive legislative history, the scope of antireligious bias in zoning is actually subject to heated debate. Although some argue that religious discrimination is rampant in the zoning context,<sup>172</sup> others maintain that

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169. See *infra* Part III.A.

170. 272 U.S. 365, 388 (1926) ("If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.").

171. See 146 CONG. REC. E1235 (daily ed. July 14, 2000) (statement of Rep. Canady) (noting that RLUIPA is "designed to remedy the well-documented and abusive treatment suffered by religious individuals and organizations in the land use context"); see also *Faith Temple Church v. Town of Brighton*, 405 F. Supp. 2d 250, 255 (W.D.N.Y. 2005) ("The legislative history indicates that Congress was concerned about local governments' use of their zoning authority to discriminate against religious groups by making it difficult or impossible for them to build places of worship or other facilities."); Lennington, *supra* note 89, at 816 ("The overriding message from the legislative history is that religious institutions suffer from intentional discrimination in the zoning context; it is this intentional discrimination that RLUIPA seeks to remedy.").

172. See, e.g., Von G. Keetch & Matthew K. Richards, *The Need for Legislation to Enshrine Free Exercise in the Land Use Context*, 32 U.C. DAVIS L. REV. 725 (1999);



religious institutions are not discriminated against, and in fact, are often treated more favorably than secular institutions.<sup>173</sup>

During RLUIPA's congressional hearings, proponents of the law introduced a study from Brigham Young University that found substantial discrimination against minority religions.<sup>174</sup> More recent scholarship, however, has challenged the study's methodology and conclusions.<sup>175</sup> Moreover, subsequent empirical studies have concluded that religious institutions are not discriminated against in the land use context. For example, one frequently cited study determined that "[t]he nearly universal experience of American congregations seeking government authorization to do something they want to do is one of facilitation rather than roadblock."<sup>176</sup> Another empirical study of religious institutions in New Haven, Connecticut found that "religious institutions, both large and small, face little discernable discrimination from municipal land use regulations."<sup>177</sup>

Given the empirical uncertainty, it is possible that what Congress and some scholars termed "religious discrimination" is actually no different than the obstacles faced by any land user navigating the discretionary zoning process.<sup>178</sup> As the Seventh

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Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755 (1999); Jane Lampman, *Uneasy Neighbors: Religious Groups Find Cities Less Hospitable on Zoning Matters*, CHRISTIAN SCI. MONITOR, Sept. 21, 2000, at 13–14 ("While issues of building size and traffic are familiar local concerns, religious groups say the problems they confront today are diverse: from zoning codes that favor secular over religious uses, to discrimination against certain faiths, to exclusion of churches altogether from land-use plans.").

173. See, e.g., Stephen Clowney, Comment, *An Empirical Look at Churches in the Zoning Process*, 116 YALE L.J. 859, 859–60 (2007) (concluding that religious institutions in New Haven are not subject to discrimination in the zoning process); Hamilton, *supra* note 6, at 341–52 (analyzing the legislative history of RLUIPA and concluding that religious institutions are not subject to pervasive discrimination in land use).

174. Keetch & Richards, *supra* note 172, at 729–31. The complete study is available at *id.* app. A, at 736–42.

175. See Adams, *supra* note 23, at 2397–400 (outlining problems with the BYU study, including its use of outdated statistics and its examination of only those zoning decisions appealed to the courts); see also Clowney, *supra* note 173, at 865 n.29 (challenging the methodology of the BYU study).

176. Mark Chaves & William Tsitsos, *Are Congregations Constrained by Government? Empirical Results from the National Congregations Study*, 42 J. CHURCH & ST. 335, 341 (2000).

177. Clowney, *supra* note 173, at 860.

178. See Hamilton, *supra* note 6, at 348 ("The vast majority of the evidence gathered by Congress regarding land use authorities and churches involved garden variety land use laws.").



Circuit explained in a pre-RLUIPA church-zoning case, "whatever specific difficulties [the plaintiff church] claims to have encountered, they are the same ones that face all renters."<sup>179</sup>

This is not meant to imply that strict scrutiny is inappropriate for religious land use cases. As the *Freedom Baptist* court noted:

Whatever the true percentage of cases in which religious organizations have improperly suffered at the hands of local zoning authorities, we certainly are in no position to quibble with Congress's ultimate judgment that the undeniably low visibility of land regulation decisions may well have worked to undermine the Free Exercise rights of religious organizations around the country.<sup>180</sup>

Rather, the argument presented here is that all land users are vulnerable to discrimination, inconsistency,<sup>181</sup> and corruption in land use regulation.<sup>182</sup> As Congress recognized in drafting RLUIPA, many of the difficulties that land users face stem from the fact that objective zoning ordinances are applied through a discretionary system of individualized assessments that leaves room for the consideration of factors unrelated to zoning. Traditional judicial deference does not provide an adequate remedy for property owners injured by this process. Fortunately, as the next section will demonstrate, a remedy for all land users can be found in the Supreme Court's land use jurisprudence.

*B. Judicial Review of As Applied Land Use Decisions:  
Euclid and Nectow*

The dichotomy that RLUIPA creates between zoning ordinances generally and zoning ordinances *as applied* to a particular piece of property through a system of individualized assessments is reminiscent of an earlier dichotomy established by the Supreme Court in its first two zoning cases, *Village of Euclid v. Ambler Realty Co.* and *Nectow v. City of Cambridge*.

The property owner in *Euclid* challenged the municipality's power to divide the land in the municipality into zones and to

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

180. *Freedom Baptist Church of Del. County v. Twp. of Middletown*, 204 F. Supp. 2d 857, 867 (E.D. Pa. 2002).

181. See *supra* note 35 and accompanying text.

182. See *supra* note 36 and accompanying text.



restrict certain uses in each zone.<sup>183</sup> The Supreme Court upheld the ordinance as a valid exercise of the police power and determined that a zoning ordinance violates due process only if it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."<sup>184</sup> The Court, however, explicitly limited its holding to a facial challenge, emphasizing that

when, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be *concretely applied to particular premises*, . . . or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable.<sup>185</sup>

Thus, according to the *Euclid* Court, a zoning ordinance, though valid on its face, might be invalid and unreasonable as applied to particular premises if it lacks a "substantial relation" to the alleged purpose of the regulation.<sup>186</sup>

In *Nectow*, a case decided less than two years after *Euclid*, the Supreme Court set forth the standard of review for determining whether the application of a zoning ordinance to a particular tract of land bears a substantial relationship to the purpose of the regulation.<sup>187</sup> In *Nectow*, a portion of the plaintiff's land was zoned for residential use, a portion was zoned for industrial use, and a portion was not restricted.<sup>188</sup> In contrast to *Euclid*'s facial challenge, the zoning ordinance in *Nectow* was challenged on the grounds that "as specifically applied to plaintiff in error, it deprived him of his property without due process of law in contravention of the Fourteenth Amendment."<sup>189</sup>

Although the Court reiterated the "arbitrary and capricious" standard of review established in *Euclid*, it undertook a far more critical review of the factual record to determine whether the or-

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183. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (noting that the plaintiff's claim rested "upon the broad ground that the mere existence and threatened enforcement of the ordinance, by materially and adversely affecting values and curtailing the opportunities of the market, constitute a present and irreparable injury").

184. *Id.*

185. *Id.* (emphasis added).

186. *Id.*

187. *Nectow v. City of Cambridge*, 277 U.S. 183, 183 (1928).

188. *Id.* at 186-87.

189. *Id.* at 185.



dinance as applied violated the due process rights of the plaintiff. The *Nectow* Court began by citing *Euclid* for the proposition that a court should uphold a public officer's zoning action "unless it is clear that their action 'has no foundation in reason and is a mere arbitrary or irrational exercise of [the police] power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense.'"<sup>190</sup>

The *Nectow* Court then undertook a substantive review of the factual circumstances underlying the challenged zoning decision, including "[a]n inspection of a plat of the city upon which the zoning districts are outlined" and a review of the findings of the special master to whom the case had been referred.<sup>191</sup> Based on its review, the Court determined that the inclusion of the plaintiff's land in a residential district had "no foundation in reason," and that, as applied to the plaintiff's land, the zoning action appeared to be a mere arbitrary and irrational exercise of the police power without "a substantial relation to the public health, safety, morals, or general welfare" of the community.<sup>192</sup> Because the required connection to the public welfare did not exist, the Court held that the residential restriction as applied to plaintiff's land was an unconstitutional deprivation of the owner's property interests without due process of law.<sup>193</sup>

The facial/as-applied dichotomy that emerges from the Supreme Court's decisions in *Euclid* and *Nectow* mirrors RLUIPA's bifurcated approach to judicial review of land use decisions. Although deferential, rational-basis review is appropriate for facial challenges to generally applicable legislative acts, such as zoning ordinances, a more intense factual review is required when zoning ordinances are applied to particular property in order to determine whether the application is substantially related to legitimate zoning interests. Unlike the statutory remedy created by RLUIPA, however, *Nectow's* as-applied rational review involves analyzing the factual record whenever a zoning ordinance is applied to a particular parcel of land, even if the application does not involve a fundamental right.

After *Euclid* and *Nectow*, the Supreme Court declined to decide another zoning case for over 50 years, leaving the lower federal

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190. *Id.* at 187–88 (quoting *Euclid*, 272 U.S. at 395).

191. *Id.* at 188.

192. *Id.* at 187–88.

193. *Id.* at 188–89.



and state courts to elaborate upon the facial/as-applied dichotomy established by those cases.<sup>194</sup> Unfortunately, "the lower federal courts have had limited enthusiasm for cost/benefit balancing like that the *Nectow* special master performed."<sup>195</sup> Instead, most federal courts have applied *Euclid's* deferential review to both facial and as-applied zoning challenges.<sup>196</sup>

Some state courts, however, have been more open to implementing the facial/as-applied dichotomy and have adopted *Nectow's* standard of review for as-applied cases.<sup>197</sup> Some have gone so far as to compile lists of factors to be used to determine whether zoning ordinances are reasonable as applied to a property owner.<sup>198</sup> For example, in *Oak Lawn Trust & Savings*

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194. See Douglas W. Kmiec, *Permit Conditions and the Takings Clause: Did the Supreme Court Mean What It Said in the Nollan Case?*, 6 PREVIEW U.S. SUP. CT. CAS. 225, 225 (1994) ("Ever since [*Euclid*] (upholding the facial constitutionality of zoning), municipalities have had broad authority to regulate land use; and ever since [*Nectow*] (striking down zoning as applied), landowners have had spotty success in arguing that a particular land-use regulation exceeds the scope of the authority sanctioned in *Euclid*." (citations omitted)).

195. ELLICKSON & BEEN, *supra* note 36, at 98.

196. See, e.g., *Tex. Manufactured Hous. Ass'n v. City of Nederland*, 101 F.3d 1095, 1106 (5th Cir. 1996) (applying a highly deferential standard of review to a denial of a zoning permit); *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1221-23 (6th Cir. 1992) (articulating a highly deferential standard of review for both local administrative and legislative zoning decisions); see also RATHKOPF ET AL., *supra* note 52, § 3.15 n.4 ("Federal courts apply the 'minimum rationality' due process test for both original zoning ordinances and amendments and in determining the reasonableness of an ordinance both on its face and as-applied.").

197. See, e.g., *Town of Tyrone v. Tyrone, LLC*, 565 S.E.2d 806, 809 (Ga. 2002) (holding an agricultural-residential zoning of fifty-three acres of land invalid because testimony established that the land could not feasibly be developed for economic uses); *Rogers v. City of Allen Park*, 463 N.W.2d 431 (Mich. Ct. App. 1990) (holding that a single-family restriction was arbitrary as applied to plaintiffs whose houses were located on a divided highway that served as a major exchange connecting two interstate highways); *Pheasant Bridge Corp. v. Twp. of Warren*, 777 A.2d 334, 341 (N.J. 2001) (holding an increase in a minimum lot size requirement unreasonable and unconstitutional as applied to an owner's tract of land); *Shemo v. Mayfield Heights*, 722 N.E.2d 1018, 1024 (Ohio 2000) (holding that, as applied to the owner's land, "the city lack[ed] any legitimate governmental health, safety, and welfare concerns" in zoning the property for residential use).

198. See e.g., *Sellars v. Cherokee County*, 330 S.E.2d 882, 884 (Ga. 1985) (holding that an applicant for rezoning "is entitled to have the application scrutinized in light of the character of the land in question and the impact of the zoning decision upon property owner's rights . . . [because a] failure to afford this scrutiny under the facts in evidence amounts to a denial of due process"); *Taco Bell v. City of Mission*, 678 P.2d 133, 140 (Kan. 1984) (finding the city's zoning action arbitrary, in light of "(1) the character of the neighborhood; (2) the zoning and uses of properties nearby; (3) the suitability of the subject property for the uses to which it has been restricted; (4) the extent



*Bank v. City of Palos Heights*,<sup>199</sup> the Appellate Court of Illinois listed a number of factors that should be considered in determining the validity of an ordinance as applied to a property owner, including:

(1) [T]he existing uses and zoning of nearby property; (2) the extent to which property values are diminished by the particular zoning restriction; (3) the extent to which the destruction of property values of plaintiff promotes the health, safety, morals or general welfare of the public; (4) the relative gain to the public as compared to the hardship imposed upon the individual property owner; (5) the suitability of the subject property for the zoned purposes; and (6) the length of time the property has been vacant as zoned, considered in the context of land development in the area in the vicinity of the subject property.<sup>200</sup>

The *Oak Lawn* court undertook an extensive analysis of each factor in light of the underlying factual record and concluded that the ordinance was invalid as applied to the property owner's land.<sup>201</sup>

A majority of state courts, however, follow the lead of the federal courts and apply a deferential standard of review to as-applied zoning challenges.<sup>202</sup> Yet, as this Article has argued, increased judicial review of as-applied zoning decisions is required both under existing Supreme Court precedent and in light of Congress's recognition that the discretionary, individualized land use decision making process differs from ordinary economic legislation and is particularly susceptible to abuse.<sup>203</sup>

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to which removal of the restrictions will detrimentally affect nearby property; (5) the length of time the subject property has remained vacant as zoned; (6) the relative gain to the public health, safety, and welfare by the destruction of the value of plaintiff's property as compared to the hardship imposed upon the individual landowner; . . . [(7)] the recommendations of . . . staff; and (8)] the conformance of the requested change to the [city's] adopted or recognized master plan" (quotation marks omitted)).

199. 450 N.E.2d 788 (Ill. App. Ct. 1983).

200. *Id.* at 793.

201. *See id.* at 793-97.

202. *See e.g.*, *City of Conway v. Hous. Auth. of Conway*, 584 S.W.2d 10 (Ark. 1979) (requiring a showing of arbitrariness to sustain an as-applied challenge); *City Council of Salem v. Wendy's of W. Va., Inc.*, 471 S.E.2d 469, 470 (Va. 1996) (applying a "fairly debatable" standard to an as-applied challenge).

203. H.R. REP. NO. 106-219, at 20 (1999); *see also id.* at 17.



## CONCLUSION

Since RLUIPA was enacted in 2000, many more zoning cases have been brought in federal courts. Both federal and state courts now have the opportunity, indeed the responsibility, to explicitly acknowledge that traditional judicial deference to local land use decisions, based initially on the characterization of zoning decisions as "legislative," is not appropriate in light of the discretionary, highly subjective nature of modern zoning.

RLUIPA recognizes that objective, generally applicable zoning ordinances are applied to individual parcels of land through a discretionary, case-by-case assessment of the proposed use of the land. As a result, under RLUIPA's bifurcated approach to judicial review of land use decisions, the zoning ordinance itself is subject to deferential rational basis review, while the application of the zoning ordinance to an individual parcel of property through an individualized assessment is subjected to strict scrutiny review.

RLUIPA's bifurcated approach to judicial review of land use regulation hearkens back to the facial/as-applied dichotomy established by the Supreme Court in its earliest zoning cases. Under this approach, facial challenges to zoning ordinances are reviewed under *Euclid's* highly deferential rational basis review, while as-applied challenges are more strictly scrutinized under *Nectow* to ensure that the zoning decision is substantially related to a legitimate government interest. By reviving this facial/as-applied dichotomy, RLUIPA provides a framework through which to review all as-applied land use decisions and encourages more meaningful review of those decisions.