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**Note**

**Super-Sized with Fries:**
**Regulating Religious Land Use in the Era of Megachurches**

*David B. Zucco*  

A McDonald's may be opening in your neighborhood. The fast-food giant is not coming to an area strip mall or to a new, over-conceptualized gas station, surprisingly, but to a location many residents might find unsettling—the local church.¹ They are known as “megachurches,”² and in an America obsessed with size and “one stop” convenience, the huge congregations³ that make up these institutions are the fastest growing in the country.⁴ While there is no universal definition,⁵ megachurches can be broadly characterized as religious institutions working to establish “full-service” havens that oftentimes are available “24/7.”⁶ As such, megachurches present a significant problem for city planners: How should a place where it is feasible to “eat, shop, go to school, bank, work out, scale a rock-climbing
wall and pray . . . all without leaving the grounds" be regulator? Put another way, to buy a home next to a church offering a few weekend services is one thing; it is quite another matter to invest in property only to have a neighboring church build a Christian-themed water park complete with laser-light shows depicting Jonah and the whale.

September 22, 2000, marked the beginning of the latest chapter in the ongoing conflict between municipalities and churches over religious land use. On that day, President Clinton signed the Religious Land Use and Institutionalized Persons Act (RLUIPA) into law. RLUIPA, intended to protect "one of our country's greatest liberties," provides that if a state or local government in the process of regulating land "substantially burdens the exercise of religion, it must demonstrate that imposing that burden on the claimant serves a compelling interest by the least restrictive means." It has been hailed by many as a wake-up call to insensitive zoning officials who push churches from their jurisdictions, while others have recoiled in horror at the thought of churches being able to use RLUIPA to charge "discrimination" any time they do not want to comply with a reasonably neutral law.

Megachurches, in a sense, are at the heart of this matter, which some believe to be one of the country's "next big issues."

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7. Id.
8. See id. (reporting that a Phoenix-area church is planning such a place).
12. See infra notes 156–60 and accompanying text.
Megachurches beg the following question: What does it mean to "exercise" religion in contemporary society? While some might attest that the change in the way Americans worship has resulted in discriminatory zoning practices, others might posit that this change—this abandonment of “centuries of European tradition and Christian habit”\textsuperscript{14}—has produced religious environments unimaginable to the planning pioneers of the early twentieth century and thus requires a reevaluation of how churches should be situated in a community. While the long-term viability of RLUIPA is still up for debate,\textsuperscript{15} it is certain that the Act impacts today’s decisions concerning the regulation of religious property, and as such, governments and religious leaders must work to understand the law’s true meaning.

This Note explores the possibility of regulating megachurches in the context of RLUIPA. Part I provides a framework for the problem by tracing the history of religious land use in this country and the advent of megachurches. Part II details RLUIPA, its predecessor, the Religious Freedom Restoration Act (RFRA), and the Supreme Court decisions to which the Acts respond. Part III examines this legal landscape and then suggests a system that categorically restricts megachurches to nonresidential areas to balance the interests of the churches and the general public. This Note concludes that such a strategy stands up to RLUIPA’s strict scrutiny standard.

I. REGULATING THE RELIGIOUS USE OF LAND: THE CONFLICT IN CONTEXT

The implementation of land use planning has had a dramatic effect on the shape of American cities.\textsuperscript{16} While it is a relatively new concept, investigations into its beginnings reveal a

\textsuperscript{14}. Trueheart, \textit{supra} note 2, at 37.


\textsuperscript{16}. \textit{See infra} notes 17–32 and accompanying text.
rationale for its hierarchical system that might be surprising to some. This historical background is necessary to understand the place churches held—and hold—in cities across the country.

A. A NOVEL APPROACH TO A CITY'S ILLS

Zoning is "the division of land into districts having different regulations." The concept is a relatively new one. In 1916, New York City adopted the nation's first zoning ordinance. The city's plan stemmed from nuisance law, the earliest form of land use control. The doctrine of nuisance affords an individual remedies for any unreasonable interferences with the use and enjoyment of his or her land. Historically, most nuisance cases involved the establishment of a commercial or industrial use within a residential area. Over time, judges came to realize that, while not inherently injurious, some uses, like factories and refineries, were nuisances per se in certain neighborhoods. In other words, even before the advent of zoning, courts were comfortable concluding that because of their geography or pattern of development, particular localities are "properly and primarily devoted to certain activities and that the introduction of incompatible activities must be deemed unreasonable." A comprehensive set of regulatory ordinances like New York City's, then, merely codified this notion by dividing the city into three use districts: residential, commercial, and industrial. Indeed, "[z]oning is recognizing through law and ordinance the

18. Id. at 20–21. The city, driven by an understanding that, among other things, "the conformation of Manhattan island tended to produce buildings of great height and to cause congestion of housing and street traffic," id. at 23, knew that simply regulating the height of buildings could only solve so many problems. City officials were also concerned with the introduction of "improper uses" into otherwise homogeneous areas, which generally resulted in the "premature depreciation of settled localities." Id. at 25. The officials began, then, to explore the possibility of a more comprehensive plan that would, under state police power, regulate the use of buildings and land, in addition to height. Id. at 23–27. The novelty of this plan was that it provided for different regulations in different districts. Id. at 26.
21. MANDELKER, supra note 19, § 1.04.
22. MANDELKER & PAYNE, supra note 20, at 59–60.
23. Id. at 60.
24. See MANDELKER, supra note 19, § 1.04.
fact that all parts of a city are not alike and that for the purpose of health, morals or the general welfare of the community, they should not be alike."

The need for a comprehensive land use plan was soon felt by other large American cities, and eventually the United States Department of Commerce stepped in to aid the process. In the 1920s, a committee was appointed to prepare a standardized zoning enabling act to serve as a model for future state legislation. While some have modified its framework, the Department's Standard Zoning Enabling Act (SZEA) has been used by every state in drafting zoning legislation. The SZEA was crafted along the lines of New York City's zoning scheme, in that it was rooted in the nuisance concept that established residential districts must be shielded from offensive uses. The Act empowered communities to divide themselves into zoning districts to ensure that compatible and incompatible uses were appropriately segregated. Section 3 of the SZEA elaborated its purpose of promoting, among other things, the health, safety, and general welfare of communities.

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25. CIVIC DEVELOPMENT DEPARTMENT, CHAMBER OF COMMERCE OF THE UNITED STATES, ZONING: A STATEMENT OF PRINCIPLES AND PROCEDURE 11 (1929) [hereinafter PRINCIPLES].

26. See BASSETT, supra note 17, at 45.

27. PRINCIPLES, supra note 25, at 7.

28. Id.

29. MANDELKER, supra note 19, § 4.15.

30. See id.

31. Id. The constitutionality of zoning districts was confirmed by the Supreme Court in Village of Euclid v. Ambler Realty, 272 U.S. 365 (1926). The Court's logic mirrored that of the New York planning pioneers ten years before. "Until recent years," the Court reasoned, "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 . . . ." Id. at 386-87.

32. MANDELKER, supra note 19, § 4.16. The SZEA's purpose statement was recorded as follows:

Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its particular suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality.
B. "CHURCH PURPOSES ARE PUBLIC PURPOSES" 33

Religious land use was not an issue in the early zoning debates. In a statement explaining zoning principles and procedures issued by the United States Chamber of Commerce in 1929, to give an example, there is no discussion of how churches came to fit into a city's zoning scheme. 34 Nevertheless, churches would remain unquestioned for years because the word appeared in the exalted "Detached One-Family Dwellings" division of the SZE A. 35 Edward Bassett, considered the founder of modern zoning, 36 gave a reason for this occurrence in his description of the deliberations surrounding the country's first attempt at zoning:

When in 1916 the framers of the Greater New York building zone resolution were discussing what buildings and uses should be excluded from residence districts, it did not occur to them that there was the remotest possibility that churches, schools, and hospitals could properly be excluded from any districts. They considered that these concomitants of civilized residential life had a proper place in the best and most open localities. 37

At the turn of the twentieth century, the nature of political-ecclesiastical legislation in the United States was "one of religious freedom in favor of the churches and not against them." 38 It followed that churches, long familiar with governmental favors, 39 would also find themselves in a special position with regard to the new zoning regulations. 40

Even before comprehensive zoning became common, many municipalities adopted ordinances that protected churches. 41

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33. City of Hannibal v. Draper, 15 Mo. 634, 639 (1852) ("It is presumed that in the nineteenth century, in a Christian land, no argument is necessary to show that church purposes are public purposes, and that inhabitants of a town have an interest in ground reserved for such use.").
34. See PRINCIPLES, supra note 25, at 11.
35. The "Detached One-Family Dwellings" delineation is described as "exalted," because in a standard zoning scheme, "[t]he district of less restricted use always admits the uses of the more restricted ones." BASSETT, supra note 17, at 63. "Detached One-Family Dwellings" are the least restricted use. See PRINCIPLES, supra note 25, at 12; infra note 49 and accompanying text.
36. MANDELKER & PAYNE, supra note 20, at 197.
37. BASSETT, supra note 17, at 70 (emphasis added).
38. 3 ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 369 (1950) (quoting LUIGI LUZZATTI, GOD IN FREEDOM 20 (1908)).
39. See id. at 418–28 (discussing, among other privileges, the exemption from taxation of church property).
40. See id. at 369.
41. See JAMES E. CURRY, PUBLIC REGULATION OF THE RELIGIOUS USE OF
For example, certain types of establishments, such as theaters, fire stations, and bars, were often excluded within a certain distance from churches, or permitted only with church consent. In a "Christian land," the argument went, "church purposes are public purposes," and as such, every effort was to be made to ensure the "maintenance, support, and propagation" of the religion. Minimizing the types of businesses that might be "demoralizing or annoying" to churchgoers, then, was one such way.

It was against this background that city planners crafted the first zoning ordinances. Given the quasi-public status of churches, excluding a church from any use district was nonsensical because exclusion would bear no substantial relationship to the public health, safety, morals, or general welfare of society. Additionally, churches were perceived as being attached to residential districts. Bassett explained: "It was also recognized that churches should be in quiet localities, and as they are so intimately connected with home life they should be in home communities." He continued that:

[i]t would be unreasonable to force them into business districts where there is noise and where land values are high . . . . Some people claim that [in residential districts] the numerous churchgoers crowd the street, that their automobiles line the curbs, and that the music and preaching disturb the neighbors. Communities that are too sensitive to welcome churches should protect themselves by private restrictions.

LAND 3 (1964).

42. STOKES, supra note 38, at 369.
43. Id. at 419 (quoting City of Hannibal v. Draper, 15 Mo. 634, 639 (1852)). Stokes pointed to this Missouri Supreme Court decision to illustrate that courts frequently refer to the idea that churches confer a public benefit. See id. It has been stated that churches receive exemptions (e.g., exemption from taxation) because Congress believes any benefit conferred on the public is a "relief to some extent of the burdens of the State in protecting the welfare of its citizens." Id.
44. See id. at 369.
45. BASSETT, supra note 17, at 72. Zoning ordinances are only upheld if they have a "substantial relation to the health, safety, morals, comfort, convenience, and general welfare of the community." Id. at 54; see also Storzer & Picarello, Jr., supra note 15, at 930 (collecting cases holding that churches promote general welfare); supra note 32 and accompanying text.
46. BASSETT, supra note 17, at 70.
47. Id.
48. Id. at 200. The Supreme Court of Wisconsin summarized this way of positioning a church within a community:

The church in our society has long been identified with family and residential life. Churches traditionally have been and should be lo-
It was not until 1949 that a court held land use regulation could be "fully effective with respect to churches." Not surprisingly, in the years that followed, the number of church zoning cases increased dramatically. Today, the courts are divided on whether churches may be zoned out of residential areas. Some courts hold that religious institutions may be excluded if they create problems, such as traffic or lower property values. Several of these cases suggest classifying the institutions as "conditional uses," stating that a city may prohibit a church in a residential district only if problems are extreme. Other courts, however, treat churches as "preferred uses," holding that an ordinance may not push a church from a residential district under any circumstance.

C. THE RAPID GROWTH OF MEGACHURCHES

The recent increase in the number of megachurches has received much attention and will undoubtedly push courts to come to a consensus on their status in residential districts. National publications like the New York Times and the Atlantic Monthly have detailed their practices, and religious scholars and members of Congress have discussed their future. The megachurch phenomenon is directly linked to changes in modern American society and culture. As has been previously noted, megachurches are difficult to define. Scott Thumma, a

cated in that part of the community where people live. They should be easily and conveniently located to the home. Churches are not super markets, manufacturing plants or commercial establishments and should not be restricted to such areas. How can the exclusion of churches from a residential area promote public morals or the general welfare? To so hold is a failure to understand the purpose and the influence of churches.

State ex rel. Lake Drive Baptist Church v. Bayside Bd. of Trs., 108 N.W.2d 288, 301 (Wis. 1961) (Hallows, J., concurring).

49. CURRY, supra note 41, at 9 (citing Corp. of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. City of Porterville, 203 P.2d 823 (1949)).

50. Id. at 14.

51. MANDELKER, supra note 19, § 5.58 (collecting cases).

52. Id. (collecting cases).

53. Id. (collecting cases).

54. See supra notes 1–2 and accompanying text; infra note 137 and accompanying text.


56. See supra notes 2, 5 and accompanying text.
scholar at the Hartford Institute for Religion Research, described megachurches at their most basic level as "congregation[s] which [have] two thousand or more worship attenders in a week."

But most commentators stress the all-encompassing, "24/7" nature of the institutions as their defining characteristic, rather than sheer size and number of congregants. Whatever the definition, the megachurch model makes sense to many. In addition to being an effective way to communicate with individuals living in an increasingly secular society, it also responds to the unique spiritual needs of the early twenty-first century. To others, however, megachurches present an unbearable stress on surrounding areas and thus, the newest "not-in-my-back-yard" land use.

Driven by marketing principles, megachurches seek to determine the needs of potential parishioners and deliver appropriate messages to them in a way they can understand. To this end, dynamic multimedia presentations in neutral settings are often used to appeal to the average American's more secular—and thus familiar—experiences. Leith Anderson, a leading megachurch pastor, notes in his book A Church for the 21st Century that the New Testament of the Bible is "surprisingly silent about matters that we [traditionally] associate with church structure and life." The logic goes, then, that getting an individual to join a church via a sports league, for example, is no less churchlike than delivering a sermon to him or her from a pulpit.

Megachurches are positioned to manage the needs of contemporary society. Megachurches have been described as "Christian cocoon[s]" and "parallel universe[s] that [are] Christianized." Their practices reflect a desire by parishioners to be submersed in "a universe where everything from the temperature to the theology is safely controlled." Dr. Randall Ballmer,

57. Thumma, supra note 55.
58. See, e.g., Brown, supra note 1.
59. See infra notes 62–65 and accompanying text.
60. See infra notes 66–69 and accompanying text.
61. See Schwab, supra note 5, at 1. "Not-in-my-back-yard" is also commonly referred to as NIMBY.
62. Trueheart, supra note 2, at 40.
63. See Brown, supra note 1; Trueheart, supra note 2, at 40–44.
64. See Trueheart, supra note 2, at 40–44.
65. Id. at 43.
67. Id.
a religion professor at Barnard College, posits that this all-encompassing nature of megachurches protects congregants from "a broader society that seems unsafe, unpredictable and out of control, underscored by school shootings and terrorism." The McDonald's restaurant at Brentwood Baptist, for example, is opening to "create a controlled, protective setting for... kids."

From a theological perspective, this cocooning represents a departure from the more traditional Christian mission of neighborhood outreach. Megachurches concentrate most intensely on personal growth, rather than on interpersonal relationships. While some might think this approach to be problematic on an abstract level, others are more concerned about the concrete effects megachurches have on surrounding communities. The more use a church gets, logically, the more it burdens its neighbors. With each new use comes "a slew of negative secondary effects" like traffic and noise. Moreover, the average megachurch parishioner is not drawn from his or her institution's immediate vicinity, which means a guaranteed influx of foreign vehicles.

II. REVOLT AND RETALIATION: A HALF-CENTURY OF FREE EXERCISE JURISPRUDENCE

Land use conflicts between churches and municipal authorities are most often rooted in the Free Exercise Clause of the United States Constitution. Its guarantee is generally un-

68. Id.
69. Id.
71. See id.
72. See Brown, supra note 1.
74. Id.
75. See Schwab, supra note 5, at 1 (stating that most megachurch members "drive to services from as far as 50 miles away").
76. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." U.S. CONST. amend. I (emphasis added). Arguments based on other constitutional provisions are possible, of course, but over time, the Free Exercise Clause has proven to be the most popular. The other religion clause of the First Amendment, the Establishment Clause, would seem to be particularly appropriate. In fact, many have tried, albeit unsuccessfully, to invoke this clause in religious land use contexts. See,
understood to mean that the government cannot improperly interfere with religious activity. The evolution of modern free exercise jurisprudence has been particularly volatile, and to apply the current law as dictated by RLUIPA, it is indispensable to appreciate the Clause's past.

A. THE BEGINNING OF THE MODERN PERIOD

Two cases serve as the foundation for modern interpretation of the Free Exercise Clause. In Sherbert v. Verner, a Seventh-Day Adventist was denied unemployment compensation after having been fired from her job for refusing to work on Saturday, her faith's Sabbath day. The Court engaged in a two-part inquiry to evaluate the validity of the respondent's claim that her right to the free exercise of religion had been violated. While the Court conceded that it was not possible for acts prompted by religious beliefs to be completely free from "legislative restrictions," it asserted that, to withstand a free exercise challenge, a law must not actually infringe on this constitutional right or alternatively, if a law does so infringe, it must be justified by a compelling state interest. Moreover, it must be demonstrated that there are "no alternative forms of regulation" that could serve the compelling interest without compromising First Amendment rights.

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e.g., City of Boerne v. Flores, 521 U.S. 507, 536–37 (1997) (Stevens, J., concurring). A due process or equal protection argument might also seem apt, but such a case can only be made if churches are being completely zoned out of a jurisdiction. See generally Note, Churches and Zoning, 70 HARV. L. REV. 1428 (1957) (discussing possible arguments to support religious rights in zoning disputes). Arguments based on state legislation are beyond the scope of this Note.

77. See Weinstein, supra note 13, at 148–50.
79. Sherbert, 374 U.S. at 399. The Employment Security Commission of South Carolina found that her inability to work Saturdays was a disqualification for benefits because she failed, without "good cause," to "accept 'suitable work' when offered . . . by the employment office or the employer." Id. at 400–01.
80. See id. at 402–03.
81. Id. at 407. This criterion became better known as the "least restrictive means" analysis. See, e.g., Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 578 (1993) (requiring that a state must "justify [a substantial burden on religious exercise] by 'showing that it is the least restrictive means of achieving some compelling state interest'" (quoting Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 718 (1981) (Blackmun, J., concurring))). The first time such an analysis was applied to a religious freedom concern was in Cantwell v. Connecticut, 310 U.S. 296 (1940).
The burdensome nature of the South Carolina legislation was obvious to the Court. If the respondent were not exempted from the reach of the contested unemployment provisions, she would be forced "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." The lack of a compelling state interest was also apparent. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation, according to the Court, and such threats were not to be found in the record; the Employment Commission merely suggested that without the challenged provision, claimants might invent religious objections to fraudulently obtain benefits. Finally, the state could not establish the impossibility of less restrictive means to prevent fraudulent claims.

Nine years later, the Court passionately reaffirmed the Sherbert doctrine in Wisconsin v. Yoder. In Yoder, the Court held that the Free Exercise Clause stops states from enforcing compulsory school attendance laws. One of the respondents, an Amish man, claimed religious beliefs exempted his daughter from such laws. The Court set out to assess this claim by first

_Cantwell_, the Court held that, while a state has an interest in preventing frauds on the public "under the cloak of religion," requiring a license to solicit religious views is unconstitutional because more narrow means are available to arrive at that end (e.g., the state could regulate the time and manner of solicitation generally). _Id._ at 306–07.

82. _Sherbert_, 374 U.S. at 403.
83. _Id._ at 404.
84. _See id._ at 406–09.
85. _Id._ at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).
86. _Id._ at 407. This was compared to the logic of _Braunfeld v. Brown_, 366 U.S. 599 (1961), where a compelling state interest was found in offering a standardized day of rest for all workers. In _Braunfeld_, the Court recognized that, while it might make "the practice of [the Orthodox Jewish merchants'] religious beliefs more expensive," the benefits of a "Sunday closing law" trumped this incidental burden on a group's religious exercise. _Braunfeld_, 366 U.S. at 605.
87. _Sherbert_, 374 U.S. at 407.
89. _Id._ at 234 (noting the First and Fourteenth Amendments prevent the state from requiring children to attend high school until age sixteen).
90. One of the respondents, a member of the Old Order Amish religion, pulled his fifteen-year-old daughter out of public school after the eighth grade because he believed his child's attendance at high school was contrary to his religion and way of life. _Id._ at 207–09. Specifically, he believed that such schooling resulted in "an impermissible exposure . . . to a 'worldly' influence in conflict with [his] beliefs." _Id._ at 211. The school district, however, did not see
reiterating the Sherbert test. Yoder's substantial burden discussion, however, addressed a question unasked by the Sherbert Court: What constitutes a religious belief? To have First Amendment protection, the Court noted that a claim must be grounded in a religious belief: "[A] way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation... if it is based on purely secular considerations." A remaining question was how to accurately determine what is religious and what is secular. The Court admitted the question was a "delicate" one, but nevertheless, it hazarded a guess. After "unchallenged" expert testimony concerning "almost 300 years of consistent practice," in addition to "strong evidence of a sustained faith pervading... [the] respondent[s'] entire mode of life," the Court concluded that a compulsory formal education requirement "would gravely endanger if not destroy the free exercise of [the] respondent[s'] religious beliefs."

To this very substantial burden the State of Wisconsin was expected to respond with a compelling interest. While the State had Jeffersonian wisdom on its side, its arguments could not pass constitutional muster. The State claimed that, though brief, the additional period of formal education the Amish wanted to avoid was necessary to foster their effective and intelligent participation in the democratic process. The Court, however, deemed the prospect of enlightened citizenship "speculative," and concluded that, given the commendable

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the situation in that light; following a complaint by the school district administrator, the county court convicted the respondent of violating a Wisconsin law that required children to attend school until they reach age sixteen. Id. at 207-08.

91. See id. at 214-16 (explaining that "it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection").

92. See id.

93. Id. at 215.

94. Id.

95. Id. at 219.

96. See id. at 221 ("[The State] notes, as Thomas Jefferson pointed out early in our history, that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.").

97. See id. at 222.

98. See id. at 221, 225.

99. Id. at 227.
Amish system of informal vocational education, the State's interest in compelling a few more years of school was "somewhat less substantial than requiring such attendance for children generally." The compulsory school attendance law, therefore, could not stand.

B. THE SMITH REVOLUTION AND AN UNCONSTITUTIONAL RESPONSE

The eventual questioning of Sherbert and Yoder's logic stemmed from an unlikely source: peyote. In Employment Division v. Smith, the Supreme Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes),'" thereby rejecting the traditional paradigm. The respondents in Smith were denied unemployment benefits because they had been fired for using peyote at a Native American church ceremony. Since the ingestion of the drug had a sacramental purpose within their religion, the plaintiffs argued the state's refusal of compensation violated their First Amendment rights.

The Court's analysis suggested a fundamental difference between religious beliefs and religious practices. While the government may not be able to interfere with religious beliefs, laws certainly can, in the Court's opinion, be crafted to regulate religious practices. If this were otherwise, "professed doc-

100. See id. at 223–25.
101. Id. at 228–29.
103. Id. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).
104. Under an Oregon statute, the "knowing or intentional possession of a 'controlled substance'" was prohibited unless a medical practitioner had prescribed the substance. Id. at 874 (quoting ORE. REV. STAT. § 475.992(4) (1987)). Peyote was considered to be within the definition of "controlled substance," and therefore according to the state, the plaintiffs engaged in illegal activity that merited a denial of state benefits. Id. at 875–76.
105. See id. at 875.
106. Unpacking the true significance of "free exercise," the Court concluded the free exercise of religion meant "the right to believe and profess whatever religious doctrine one desires." Id. at 877. But the Court did not limit its meaning to the profession of beliefs. It noted that exercising religion often involves more physical acts, such as "assembling with others for a worship service" or "abstaining from . . . certain modes of transportation." Id.
107. To be sure, government would be inhibiting the free exercise of relig-
trines of religious belief [would be] superior to the law of the land." Moreover, religiously motivated physical acts do not even merit evaluation for a "religious exemption" as defined by Sherbert and Yoder. Such a balancing test, the Court determined, is inherently flawed because it requires a determination of what is "central" to an individual's faith—an inquiry beyond the competence of the judiciary.

Nothing could soften Smith's blow. No further action by the Supreme Court could quell the fear of many that, because of Smith, "[i]n time, every religion in America will suffer." In 1993, Congress passed the Religious Freedom Restoration Act (RFRA) in direct response to the decision. The authors of the Act believed "government should not substantially burden religious exercise without compelling justification," because

108. Id. at 879 (quoting Reynolds v. United States, 98 U.S. 145, 166-67 (1878)).
109. See id. at 882-89.
110. Before applying a "compelling interest" test, it is necessary to determine what is "central" to an individual's religion. See id. at 886-87. And "[w]hat principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is 'central' to his personal faith?" Id. at 887. On many different occasions, the Court noted, it had warned against the dangers of "determin[ing] the place of a particular belief in a religion or the plausibility of a religious claim." Id.
111. 139 CONG. REC. S14351 (1993) (statement of Sen. Kennedy) (quoting the Rev. Oliver S. Thomas). This statement takes into consideration the Court's decision in Church of Lukumi Babalu Aye v. City of Hialeah. Id. There, the Court held that, while in Smith it held that neutral laws of general applicability that incidentally burden a religious practice need not be subjected to strict scrutiny, it did not in any way mean to suggest that the purported neutrality of a law go unquestioned. See Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531-32 (1993). "[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral." Id. at 533 (emphasis added).
113. Id. § 2000bb-(a)(4) ("The Congress finds that . . . (4) in [Smith] the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and (5) the compelling interest test as set forth in prior Federal court rulings is a workable test . . . ").
even "neutral" laws may "burden religious exercise as surely as laws intended to interfere with religious exercise."\textsuperscript{114} Therefore, the purpose of the Act was to restore the compelling interest test "as set forth in prior Federal court rulings."\textsuperscript{115} This meant that, under RFRA, "[g]overnment [could] substantially burden a person's exercise of religion only if it [demonstrated] 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."\textsuperscript{116}

Soon after its enactment, however, a challenge was brought to RFRA, or more accurately, to the authority of Congress to enact such legislation.\textsuperscript{117} In City of Boerne v. Flores,\textsuperscript{118} the Supreme Court held that Congress overstepped its ability to enact legislation in reliance on its Fourteenth Amendment enforcement power.\textsuperscript{119} The Court's analysis centered on the fact that the power driving the Enforcement Clause is remedial, not substantive.\textsuperscript{120} Using a proportionality analysis,\textsuperscript{121} the Court

\textsuperscript{114} \textit{Id.} § 2000bb-(a)(2), (3); see also 139 CONG. REC. S14351 (1993) (statement of Sen. Kennedy) ("[F]ew states would be so naive as to enact a law directly prohibiting . . . a religious practice as such. Our free exercise cases have all concerned generally applicable laws that had the effect of significantly burdening a religious practice." (quoting Emp. Division v. Smith, 494 U.S., 872, 893 (1990) (O'Connor, J., dissenting))).

\textsuperscript{115} 42 U.S.C. § 2000bb-(b)(5); see also infra notes 164--65 and accompanying text.

\textsuperscript{116} 42 U.S.C. § 2000bb-1(b).

\textsuperscript{117} \textit{See infra} notes 118--23 and accompanying text.

\textsuperscript{118} 521 U.S. 507 (1997).

\textsuperscript{119} \textit{Id.} at 532. Boerne involved a small church in Boerne, Texas, that challenged the denial of a building permit based on a city historic preservation ordinance restricting its ability to expand its facilities to meet the needs of its growing congregation. \textit{Id.} at 511--12. While the complaint included other claims, the thrust of the litigation fell under RFRA. \textit{Id.} at 512.

\textsuperscript{120} \textit{Id.} at 519--20. Undeniably, Section 5 of the Fourteenth Amendment is "a positive grant of legislative power." \textit{Id.} at 517 (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 (1966)). But the Court was quick to point out that this power is not limitless; a survey of the Amendment's history and relevant case law indicated the nature of the remedial/substantive distinction. \textit{Id.} at 518--20. In other words, legislation is appropriately ratified if it prevents or ameliorates a constitutional violation, but legislation cannot define the essence of such a violation. \textit{See id.} at 516--19 (explaining that altering the meaning of a constitutional clause cannot be considered the same as enforcing the clause). If Congress could do otherwise, it would render void the basic principles of constitutional interpretation set forth in \textit{Marbury v. Madison}. \textit{See id.} at 529 ("If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.'" (quoting \textit{Marbury v. Madison}, 1 Cranch 137,
concluded that because RFRA applied to every conceivable level of government and did not target any specific subject matter, the Act was "completely out of proportion to a[ny] supposed remedial . . . object[ives]." Under RFRA, the Court determined, "[a]ny law is subject to challenge at any time by any individual who alleges a substantial burden on his or her free exercise of religion."  

C. REMIXED, REMADE, REMODELED

With RFRA invalidated, Congress immediately began to redraft religious freedom legislation that would be able to withstand the Court's constitutional scrutiny. After an unsuccessful initial attempt, Congress set in motion a bill that would eventually be enacted as the Religious Land Use and Institutionalized Persons Act of 2000. RLUIPA, as previously mentioned, provides that if a state or local government in the process of regulating land "substantially burdens the exercise of religion, it must demonstrate that imposing that burden on the claimant serves a compelling interest by the least restrictive means." The effect of the Act, at first glance, is identical to RFRA, but RLUIPA distinguishes itself from its failed predecessor in its scope, the authority by which it was enacted, and its legal standards.

Understanding the logic underlying *Boerne*, the drafters

177 (1803)).

121. See id. at 530. "While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved." Id.

122. Id.

123. Id. at 532.

124. See infra notes 125–26 and accompanying text.


128. As its name implies, RLUIPA is relevant only to free exercise violations in the areas of land use and prisons. Id. Moreover, within those two spheres, RLUIPA responds only to "substantial burdens" that are found within cases Congress has the power to regulate by the spending, commerce, or other powers in Section 5 of the Fourteenth Amendment. Id. Whereas in *Boerne* the Court noted that RFRA "infiltrated" every level of government, 521 U.S. 507, 532 (1997), RLUIPA's narrow focus was intended to guarantee that it would not meet an immediate demise like its predecessors. See 146 CONG. REC. S7775 (2000) (joint statement of Sen. Hatch and Sen. Kennedy).

129. See discussion supra notes 117–23.
of RLUIPA carefully crafted the Act to fall within the Fourteenth Amendment's enforcement power. The Court in Boerne concluded that Congress could not act to enforce a constitutional provision unless it had "reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional." The legislative history goes to great lengths to prove the Act "more than satisfies [this] standard." Unlike the paucity of evidence underlying RFRA, a "massive" amount of data was introduced during RLUIPA's hearings to demonstrate a "widespread pattern of discrimination against churches as compared to secular places of assembly." Such a factual record, it is contended, is enough support for a set of "prophylactic rules" like RLUIPA.

The evidence of discrimination in RLUIPA's hearing record ranged from statistical surveys to that which was more anecdotal in nature. Much of this evidence was taken from the testimony and writing of Professor Douglas Laycock. Professor Laycock attempted to document the "widespread obstacles to worship," and specifically, among other issues, to explain "not only why large free-standing churches are not wanted in suburban, residential neighborhoods, but also why they are not wanted in commercial districts." He opined that such churches are more susceptible to NIMBY hostility than other

130. See 146 CONG. REC. S7774 (2000) (joint statement of Sen. Hatch and Sen. Kennedy). RLUIPA also derives its power from the Commerce and Spending Clauses. Id. The legislative history of the Act justifies the use of these two constitutional provisions summarily; the Spending Clause provisions of the Act are taken directly from comparable civil rights law, while the Commerce Clause provisions provide a "jurisdictional element," stating that the "burden in question" affects interstate commerce. Id. (citing United States v. Lopez, 514 U.S. 549, 561 (1995)). For a discussion of the propriety of RLUIPA's use of the Commerce Clause, see Evan M. Shapiro, Note, The Religious Land Use and Institutionalized Persons Act: An Analysis Under the Commerce Clause, 76 WASH. L. REV. 1255 (2001), which concludes that Congress exceeded its Commerce Clause power in enacting RLUIPA.


132. Id.

133. Id.

134. Id.

135. Id.

136. Id.


138. Id. at 758–59.

139. See supra note 61 and accompanying text.
institutions of similar scale, because "any one church may have only a few potential members in the immediate neighbor-

hood." Additionally, a good deal of neighborhood opposition to development stems from bare animus. Many Americans are especially adverse to "high intensity faiths" and churches that can be considered "conservative" or "evangelical." Laycock reported that in 1993 "45% of Americans admitted to 'mostly unfavorable' or 'very unfavorable' opinions of 'religious fundamentalists.'"

RLUIPA's record also pointed to the legal difficulties churches encounter when land use is at stake. Professor Laycock suggested the majority of problems follow from the fact that zoning law generally vests wide-ranging discretion in local zoning officials. Even in locations with zoning codes that allow for them, the building and renovation of churches is often conditioned upon the receipt of a special use permit. Such permits are only granted when all listed requirements are met, yet the same zoning officials granting the permits are responsible for drafting their terms. Confounding this problem, judicial review of a local authority's grant or denial of a permit is largely deferential and furthermore, litigation is often too

140. Laycock, supra note 137, at 759. "Only 40% of the population reports regular church attendance." Id.; see also supra note 75 and accompanying text. Professor Laycock notes that, given the potential number of customers who would find such services convenient, the neighborhood response to the proposed development of a new grocery store or movie theater would be markedly different. See Laycock, supra note 137, at 759.

141. See Laycock, supra note 137, at 760.

142. Id.

143. Id. (quoting a Gallup poll).

144. See id. at 763–69.

145. Id. at 764–65.

146. Id. at 765; see also supra notes 52–53 and accompanying text.

147. See Laycock, supra note 137, at 765.

In a survey of Presbyterian congregations, 32% of the congregations that had needed a land use permit reported that "no clear rules permitted or forbade what we wanted to do, and everything was decided based on the specifics of this particular case (e.g., variance, waiver, special use permit, conditional use permit, amendment to the zoning ordinance, etc.)." Another 15% reported that "even though a clear rule seemed to permit or forbid what we wanted to do, the land use authority's principal decision involved granting exceptions to the rule based on the specifics of this particular case." Id. at 767–68 (quoting Religious Liberty Protection Act of 1998: Hearing on S2148 Before the Senate Comm. on the Judiciary, 105th Cong. (statement of Professor Douglas Laycock, Univ. of Texas, 14–16 & Appendix, Question 9)).
expensive for a church to undertake.\textsuperscript{148}

According to its proponents, RLUIPA also satisfies the legal aspect of the constitutional standard set out in \textit{Boerne}.\textsuperscript{149} It is clear that RFRA was intended to usurp a portion of the Court's power,\textsuperscript{150} but each of RLUIPA's subsections was written to codify the legal standards "in one or more Supreme Court opinions."\textsuperscript{151} RLUIPA, then, does not provide a new definition for "substantial burden"; nothing in the Act is meant to give the term "any broader interpretation than the Supreme Court's articulation of the concept."\textsuperscript{152} But the Act does characterize the nature of "religious exercise" that might be potentially burdened:

(a) In general

The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(b) Rule

The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.\textsuperscript{153}

The legislative history, however, clarifies that not every religious activity constitutes "religious exercise."\textsuperscript{154} RLUIPA's drafters understood that religious institutions often have objects similar to those of other, more secular, institutions. To give an example, if a regulation burdens a commercial building connected to a church through its financial support of church activities, it is not considered to be a substantial burden on religious exercise.\textsuperscript{155}

Responses to RLUIPA's passage were wildly divergent. Religious and civil rights groups, from the ACLU to the Catholic

\textsuperscript{148} \textit{Id.} at 765.

\textsuperscript{149} \textit{See}, e.g., 146 CONG. REC. S7775 (2000) (joint statement of Sen. Hatch and Sen. Kennedy) (stating that the constitutional standard set forth in \textit{Boerne} "is not certainty, but 'reason to believe' and 'significant likelihood'"). RLUIPA "more than satisfies [this] standard—in two independent ways." \textit{Id.}

\textsuperscript{150} \textit{See supra} note 113 and accompanying text.


\textsuperscript{152} 146 CONG. REC. S7776 (2000) (joint statement of Sen. Hatch and Sen. Kennedy); \textit{see supra} note 151 and accompanying text.


\textsuperscript{155} \textit{Id.}
Church, praised RLUIPA’s power to compel “religiously insensitive” zoning officials to make religious freedom a part of the planning process. In their view, “[w]hile churches are being eliminated from downtown and commercial areas because municipalities believe that such uses do not attract enough traffic to generate retail and tax revenues for surrounding areas, they are simultaneously being eradicated from residential districts for creating too much traffic and noise.” Others, mainly those involved in local government, such as the National League of Cities and the National Trust for Historic Preservation, contended that RLUIPA is an attack on zoning authority and that the Act invites religious groups to cite “discrimination” whenever they want to avoid a reasonably neutral law.

III. REGULATIONS RESTRICTING MEGACHURCHES TO NONRESIDENTIAL AREAS STAND UP TO RLUIPA’S STRICT SCRUTINY STANDARD

The emotional investment Americans have in their churches makes the debate over religious land use regulation a difficult one to adjudicate. Coupled with this more intangible problem is the disjointed character of the last half-century of Supreme Court free exercise jurisprudence and congressional religious freedom legislation. Whether a reviewing court would uphold an ordinance restricting the land use of a reli-

156. The Act was “actively supported by a coalition of more than 60 groups, including the ACLU, the Family Research Council, the Baptist Joint Committee, the Christian Legal Society, the American Jewish Congress, and groups representing Christian denominations from Catholics to Mormons to Seventh Day Adventists.” Press Release, American Civil Liberties Union, Final Passage of Breakthrough Religious Freedom Bill Hailed By Religious and Civil Rights Groups (July 28, 2000), http://www.aclu.org/news/NewsPrint.cfm?ID=8053&c=142.
158. Id.
159. See, e.g., NATIONAL LEAGUE OF CITIES, RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT (RLUIPA) 1 (2001), http://www.rluipa.com/generaldocs/NLC.pdf (“RLUIPA is a fundamental attack on local zoning authority . . . .”); Stuart Meck, Religious Land Use and Institutionalized Persons Act, ZONING NEWS, Jan. 2001, at 3 (reporting that the American Planning Association “opposes RLUIPA because it believes the law effectively preempts local land-use authority” and that former New York City Mayor Rudolph Giuliani has been sharply critical of the bill).
160. See Hamilton, supra note 73.
161. See discussion supra Part II.
igious institution, however, presently depends on the application of RLUIPA's strict scrutiny standard.\textsuperscript{162} There have not yet been any opportunities to truly test this model.\textsuperscript{163} To predict the likely outcome of litigation under the Act, however, it makes sense to root an analysis in pre-\textit{Smith} free exercise jurisprudence. RLUIPA's legislative history, it will be remembered, explicitly states that the Act's standard is exactly the same as that of RFRA\textsuperscript{164} and RFRA specifically declared as its objective an overruling of \textit{Smith} to reinstate the compelling interest test set forth in \textit{Sherbert} and \textit{Yoder}.\textsuperscript{165}

To explore the possibility of regulating megachurches within this context, it is necessary to create a system of regulation against which RLUIPA's standards can be applied. Categorically confining churches to a municipality's nonresidential areas when they reach megachurch status makes sense as a test model—it addresses the public concern over the effect the institutions have on neighboring properties and, perhaps more importantly, it eliminates the possibility of discriminatory decision making on the part of planning officials. An analysis reveals that such a system does not run afoul of RLUIPA because it does not burden the exercise of religious beliefs. Alternatively, even if found to substantially burden religious exercise, the government could demonstrate that the system was enacted in response to a compelling interest and that its methods are the least restrictive means to that end.

\textbf{A. CATEGORICALLY Restricting Megachurches TO Nonresidential Zones Is Not A Substantial Burden On Religious Exercise}

The party claiming a violation of RLUIPA bears the burden of proof in showing a substantial burden on its free exercise of religion.\textsuperscript{166} If a party cannot meet its burden, its action fails

\begin{itemize}
\item \textsuperscript{162} See infra notes 164–65 and accompanying text.
\item \textsuperscript{163} See \textit{supra} note 15 and accompanying text.
\item \textsuperscript{165} 42 U.S.C. § 2000bb-(b)(1) (2000) ("The purposes of this chapter are... to restore the compelling interest test as set forth in [\textit{Sherbert}] and [\textit{Yoder}] and to guarantee its application in all cases where free exercise of religion is substantially burdened.").
\end{itemize}
"without further consideration." RLUIPA makes it relatively easy for parties to establish a burden on their religious exercise, but there is a limit to their success. That is to say, determining a substantial burden depends on the definition of "religious exercise," and not every activity carried out by a religious entity or individual constitutes "religious exercise." It is not possible for religion to be completely "free from legislative restrictions," and the actions of religious individuals or institutions, "however virtuous and admirable," do not merit free exercise protection if they are secular in nature. An investigation into a violation of RLUIPA, then, must lead with the following question: Does the regulation burden a religious or secular activity?

The answer is as difficult as the question is "delicate." To respond satisfactorily, a court must be able to determine the makeup of religious beliefs and activities. According to Justice Scalia, such philosophical investigations are beyond the competence of the judiciary. But RLUIPA's drafters rejected his wisdom and, consequently, decision makers are left to deal with a few sentences from the Act's legislative history and a sketchy guide left by the Court in Yoder.

Restricting megachurches to nonresidential areas potentially burdens the free exercise of religion because such a regulatory system limits a megachurch's ability to locate, as a right, wherever it pleases within a community. The burden, however, is not one of total exclusion. The system does not mean to say that building a church within a given jurisdiction is impossible. Rather, it is premised on the understanding that churches are not immune from land use control under

167. Id.
168. RLUIPA's definition of "religious exercise" is quite broad. See supra note 153 and accompanying text.
169. See supra note 154 and accompanying text.
172. Id.
173. Employment Div. v. Smith, 494 U.S. 872, 887 (1990). This logic was the driving force behind Smith. It is not surprising that such wisdom was rejected; it flies in the face of the once generally accepted notion that religion could do no wrong.
174. See discussion supra Part I.B.
RLUIPA and, because of the unique characteristics of megachurches, the system does not "unreasonably limit[]" their geographic destinies. In essence, a city's willingness to adopt the system would stem from the repercussions it feels due to these churches having thousands of parishioners and operating "24/7." Therefore, to investigate the validity of such a scheme under RLUIPA, it is necessary to determine whether gathering in huge numbers is part of a system of religious belief—and whether having, for example, an onsite coffee shop is a necessary component of a church's religious practice.

In an attempt to deconstruct the practices of megachurches, a case study is invaluable. Grace Church in Eden Prairie, Minnesota, is an institution with 4500 members and is illustrative of megachurches across the country. On Sundays, vehicles are directed by city police officers into one of two "stadium-size" parking lots, while those who have already exited their vehicles are guided by "waving fluorescent wands" towards the sanctuary, the crown jewel of Grace's $48 million, 62-acre campus. The sanctuary is surrounded by glass-enclosed seating areas and the stage features two 18-by-32-foot video screens to lead parishioners in hymns accompanied by a full orchestra.

The construction of an elaborate sanctuary, however, can hardly be seen as a novel concept in the grand scheme of religious tradition. The unique features of Grace's practice lie elsewhere. Grace's experience is not meant to end by noon on Sundays. Not only are churchgoers given the opportunity to extend their worship through "commemorative videos, CDs, and cassettes in the sweet-scented bookstore/gift shop just outside [the] sanctuary," they are invited to spend more and more time at the establishment by, for example, purchasing tickets at the church's ticket booth for an upcoming national rock concert in the auditorium or by utilizing some of the church's more daily services: professional child care, chemical dependency

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178. See Brown supra note 1.
179. See Schimke, supra note 70, at 19.
180. Id. at 17.
181. Id.
182. Id.
programs, its health club, or teen center.\textsuperscript{183}

Grace's non-Sunday services "provide a place where families can have all their needs met in a single location."\textsuperscript{184} They are meant to give "practical support," to "help[] with the children," and to "give[] people a place to socialize and recreate."\textsuperscript{185} The Grace program for singles is a good example of how these services operate. Each Friday evening, young singles congregate at the Divine Grind coffee shop, near the church's main entrance, to socialize.\textsuperscript{186} Those in attendance come to the gathering because of a lack of other appropriate activities for "a Christian single" to do and because, as one single remarked, "(it's a place where you know you're going to be loved no matter what you do.)\textsuperscript{187}

The "extra-religious"\textsuperscript{188} activities of megachurches like those of Grace Church seriously call into question whether the bread and butter of megachurch practice—the reason for which many municipalities want to regulate the massive institutions\textsuperscript{189}—falls within the meaning of "religious exercise" as understood by RLUIPA.\textsuperscript{190} RLUIPA's drafters were correct to point out that sometimes religious institutions use real property for "purposes that are comparable to those carried out by other institutions."\textsuperscript{191} They also were smart to clarify that even if revenue generated by these "other purposes" is used to further religious activity, that fact alone does not bring such ventures within the Act's understanding of "religious exercise."\textsuperscript{192} To say otherwise would be to create a loophole every church could use; churches are not-for-profit enterprises, so save corruption, any profit they receive goes back to foster religious activities.

The megachurch model is, at its base, more like a business than a religious one. Steeped in the teachings of marketing executives,\textsuperscript{193} megachurches are run like efficient corporations, determining parishioners' needs and building churches accord-

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\begin{footnotesize}
\textsuperscript{183} See id. at 19.
\textsuperscript{184} Id. at 21.
\textsuperscript{185} Id.
\textsuperscript{186} Id. at 23.
\textsuperscript{187} Id.
\textsuperscript{188} See supra notes 182–87 and accompanying text.
\textsuperscript{189} See supra note 74 and accompanying text.
\textsuperscript{190} See supra note 153 and accompanying text.
\textsuperscript{191} See supra note 154 and accompanying text.
\textsuperscript{192} See supra note 154 and accompanying text.
\textsuperscript{193} See supra note 62 and accompanying text.
\end{footnotesize}
\end{flushleft}
ingly. Grace Church, for example, knows what today's churchgoers lack, and in addition to providing the word of God, it is a place to help churchgoers with their daily tasks in a shopping-mall-like environment; megachurches are employers, entertainers, dating services, and personal trainers. Religion, some might say, is not all that is being exercised at a typical megachurch.

The religious nature of some megachurch activity is also called into question by Supreme Court precedent. In *Yoder*, the Court set out to determine whether protecting children from the influence of public education was a valid part of Amish religious practice. To do so, the Court relied on evidence of a "consistent practice" and a "sustained faith pervading . . . respondent's entire mode of life." Unlike the Amish practice of shielding their children from "worldly influence," a megachurch member's desire for "one-stop-shopping" is an entirely new phenomenon. Nothing like it can be found in the Christian tradition. The idea is not rooted in anything religious; the Amish practice, on the other hand, is based on a literal interpretation of the Bible. Moreover, limiting the possible locations of a megachurch does not burden institutional leaders with a "lose-lose" situation. In other words, whereas the respondent in *Yoder* was forced to choose between honoring his religious convictions and breaking the law, megachurch officials are not presented with such a predicament; officials can exercise their faith and their civic duty by merely limiting their worship to two out of three areas of a city.

The argument is often made that churches should not be separated from the community, meaning, of course, from residential areas. To separate churches from their parishioners, the logic goes, would be a substantial burden like no other. "[W]herever the souls of men are found, there the house of God

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195. See supra notes 182–87 and accompanying text.
197. See id. at 219.
198. See supra note 14 and accompanying text.
199. See supra note 14 and accompanying text.
201. The Court concluded that such a choice rises to the level of a substantial burden in *Sherbert*, too. See supra note 83 and accompanying text.
belongs.\textsuperscript{203} But for megachurches, this line of reasoning is weak. The typical megachurch does not identify with residential life. First, megachurches do not draw their worshippers from their immediate vicinity.\textsuperscript{204} Second, the \textit{raison d'être} of megachurches is to withdraw from community life.\textsuperscript{205} They have been described as cocoons and parallel Christian universes.\textsuperscript{206} The practices of megachurches reflect an unapologetic desire by parishioners to be submerged in a world where everything is controlled.\textsuperscript{207} And from a theological standpoint, their departure from the traditional Christian notion of community works and outreach\textsuperscript{208} means that location is not an important part of megachurches' mission. Restricting megachurches to the nonresidential areas of a municipality, then, is not a substantial burden of their religious freedom under RLUIPA; their practices would not be affected by such regulation.

B. GOVERNMENTS HAVE A COMPPELLING INTEREST IN CATEGORICALLY REGULATING MEGACHURCHES TO NONRESIDENTIAL AREAS

Even if a reviewing court finds that keeping megachurches out of residential areas constitutes a substantial burden on religious exercise, a government could prove that it has a compelling interest to do so. A government justifies a typical zoning ordinance by demonstrating that the regulation is rationally related to society’s health, safety, or general welfare.\textsuperscript{209} RLUIPA rejects this deferential standard with regards to religious land use,\textsuperscript{210} and \textit{Sherbert} and \textit{Yoder} provide an indication of what the Act’s backers had in mind for its heightened level of review.\textsuperscript{211}

Together, \textit{Sherbert} and \textit{Yoder} stand for the proposition that only “non-speculative”\textsuperscript{212} interests of the “highest order”\textsuperscript{213}

\begin{itemize}
\item \textsuperscript{203} \textit{Id.} at 934 (quoting O'Brien v. City of Chicago, 105 N.E.2d 917, 920 (Ill. App. Ct. 1952)).
\item \textsuperscript{204} See supra note 8 and accompanying text.
\item \textsuperscript{205} See supra notes 66–69 and accompanying text.
\item \textsuperscript{206} See supra note 66 and accompanying text.
\item \textsuperscript{207} See supra note 67 and accompanying text.
\item \textsuperscript{208} See supra notes 70–71 and accompanying text.
\item \textsuperscript{209} See supra note 32 and accompanying text.
\item \textsuperscript{210} See supra note 127 and accompanying text.
\item \textsuperscript{211} See supra note 127 and accompanying text.
\item \textsuperscript{213} Yoder, 406 U.S. at 215.
\end{itemize}
can stand up to a legitimate free exercise claim. The Sherbert Court was correct to dismiss South Carolina's argument that the withholding of benefits from non-Sabbath workers was constitutional, because the state was unable to show even the smallest bit of evidence that unemployment funds would be diluted through false claims if the validity of the law were otherwise. 214 The state interest in Yoder, too, was not deemed compelling, but there the Court was presented with a more complicated fact pattern. Wisconsin's interest in education, unlike Sherbert's paltry claim of monetary loss, did seem to border on those of the highest order, 215 but still, the Court was not convinced. Again, the fears of the State were unfounded: 216 No evidence was introduced to establish the State's contention that the Amish would fall into "a state of ignorance" without compulsory education.

A government's interests in regulating megachurches are distinctly different from those in Sherbert and Yoder. The importance of property ownership rights in this country is not up for debate. Further, protecting citizens from unreasonable interference with their land is at the heart of government. 218 But what most favors a municipality seeking to impose a religious land use restriction are the undeniable stresses megachurches place on a community. 219 Whereas in Sherbert and Yoder the Court did not think there was enough evidence to establish a definite detrimental effect on alleged governmental interests, the potentially disastrous effects of a megachurch on a surrounding residential area are understandable even by a layperson. The larger the church, the greater the stress on its surroundings. With congregations exceeding 2000 and members going to and from the institution seven days a week, it is far from an unfounded fear to believe that megachurches will bring, for example, traffic, noise, and safety concerns that will overwhelm the single-family homes for which a residential area was designed.

At the base of the megachurch land use problem is the re-

214. See supra note 86 and accompanying text.
215. Yoder, 406 U.S. at 221. The importance of education as an interest is apparent, given the lengthy treatment of the State's argument compared to Sherbert. See id. at 221–29.
216. See id. at 227.
217. See id.
218. See supra note 19 and accompanying text.
219. See supra notes 73–75 and accompanying text.
ality that times have changed. When imaginative city planners began to dream up the idea of zoning, a church was not in any way seen as a nuisance to a community.\(^{220}\) In fact, churches were viewed as the opposite of nuisances.\(^{221}\) Church life was confined primarily to Sundays, and the temporary influx in traffic experienced by surrounding neighborhoods was tolerated because churches, composed primarily of those living nearby, were seen as working to foster the general welfare of the community.\(^{222}\) The new breed of megachurch, however, is not so connected to its surroundings.\(^{223}\)

A look back to the purposes behind the SZEA is revealing. Cities were encouraged to divide themselves into use districts because it was the most efficient way to ensure, in addition to the broad goals of health and general welfare, the appropriate distribution of public requirements such as water and transportation, the preservation of neighborhood character, and that overcrowding would be kept in check.\(^{224}\) Indeed, to think another solution appropriate is to deny the absolute truth that all parts of a city are different.\(^{225}\) But many still believe that churches—even when they reach "mega" proportions—should be able to locate, without debate, in any area of a city.\(^{226}\) Churches, somehow, transcend the realities of a growing population and cultural trends, always maintaining a consistent character. This point of view defies the logic behind zoning. As the Supreme Court noted in Village of Euclid v. Ambler Realty, the nature of land use in this country is in a constant state of change, and when problems arise, new restrictions will forever be required to deal with their repercussions.\(^{227}\) To be sure, the latest chapter in Christian America presents such an issue, and local governments thus have a compelling interest to deal with it.

\(^{220}\) See supra notes 37–48 and accompanying text.
\(^{221}\) See supra note 45 and accompanying text.
\(^{222}\) See supra notes 46–47 and accompanying text.
\(^{223}\) See supra notes 66–71 and accompanying text.
\(^{224}\) See supra note 32 and accompanying text.
\(^{225}\) See supra note 25 and accompanying text.
\(^{226}\) See, e.g., Storzer & Picarello, Jr., supra note 15, at 930.
\(^{227}\) See 272 U.S. 365, 386–87.
C. CATEGORICAL REGULATION OF MEGACHURCHES
IS THE LEAST RESTRICTIVE MEANS TO THE GOVERNMENT'S
COMPELLING END

Categorical regulation is the least restrictive way for a local government to manage the potential public concerns over megachurches. The additional "least restrictive means" requirement to the compelling interest standard is undoubtedly important. Limiting religious freedom, no matter what the cause, should never be done in a haphazard fashion. The yardstick set out in Sherbert, then, is reasonable and clear: There must not be any "alternative forms of regulation" that could accomplish the same governmental goals with less impact on First Amendment rights. Instead of denying any and all opportunity to provide benefits to those who have religious objections to work on the Sabbath, to use the facts of Sherbert as an example, it would be more in line with the Constitution to establish a program of simple background checks to address the potential for fraud by religious impostors. To proceed along the lines of the former would be a grossly over-inclusive way to attack the problem. That is to say, to reject all compensation claims would preempt a few con artists, but such a system would also eliminate the possibility of benefits for a potentially huge number of religious individuals with legitimate Sabbath scruples.

Unlike the uncompromising statute in Sherbert, categorically restricting megachurches to development beyond residential areas is by no means over-inclusive. Megachurches, by their very definition, are big. And by the very nature of their practices, the use of megachurches is guaranteed to be intense. Grace Church, with its stadium-size parking lots and its myriad non-Sunday programs, is, if the base public concern over megachurches is rooted in increased traffic and noise, problematic per se. The church, which might be described as relatively small, is guaranteed to have at least a thousand cars (with even more noise-producing passengers) at any given time. And nuisances of this nature can only be measured quan-

228. See supra note 81 and accompanying text.
229. See supra notes 76–87 and accompanying text.
230. See supra notes 3, 57 and accompanying text.
231. See discussion supra Part I.C.
232. See supra notes 179–87 and accompanying text.
233. See supra note 3 and accompanying text.
titatively, not qualitatively. When churches reach “mega” proportions, therefore, it follows that they automatically become problematic in residential areas. It is not possible to believe that a few churches would be unfairly ousted from a residential area under a system of categorical regulation because their cars do not pose traffic problems.

In response to this line of reasoning, however, it might be argued that, while over-inclusiveness is not an issue, categorically regulating megachurches has the potential to be dangerously under-inclusive. Since there is no agreed-upon cut-off for megachurch status,\(^{234}\) is it logical to assert that a church of 2000 members is possibly annoying to its neighbors whereas one of 1000 is not? This point is conceded. But when it comes to addressing religious land use, “legal difficulties”\(^ {235}\) necessitate such line drawing. In fact, looking at the predicament more closely, the system proposed is the only way to balance the greater public concern of general welfare and the free exercise issues of paramount importance to religious institutions.

Ironically, it is the religious groups seeking to build or expand churches that would benefit the most from categorical regulation. RLUIPA, enacted with the explicit purpose to protect such development,\(^ {236}\) brought to light the problems religious institutions often face when their proposals hit the desks of local zoning authorities.\(^ {237}\) Through statistics and anecdotal evidence,\(^ {238}\) it was clear not only that bare animus was often at work,\(^ {239}\) but also that the unfettered discretion the law affords local officials can—and does—frequently result in discriminatory decision making.\(^ {240}\) The beauty of the system proposed by this Note, then, is in its objectivity. While it is unfortunately impossible for a law to alter personal prejudices, it is feasible to draft statutes that take decisions with grave First Amendment repercussions out of the hands of uninformed or insensitive individuals. Local zoning boards have in their tool bags a means to accomplish just about any ends.\(^ {241}\) Whether with a variance or a special use permit, a zoning official can find a way to grant

\(^{234}\) See supra notes 5, 57 and accompanying text.

\(^{235}\) See supra notes 144–48 and accompanying text.

\(^{236}\) See supra note 10 and accompanying text.

\(^{237}\) See supra notes 145–48 and accompanying text.

\(^{238}\) See supra note 135 and accompanying text.

\(^{239}\) See supra notes 141–48 and accompanying text.

\(^{240}\) See supra notes 145–47 and accompanying text.

\(^{241}\) See supra note 147 and accompanying text.
or deny whatever he or she pleases. Categorical regulation, by guaranteeing that two out of three areas of a city are reserved—as a right—for church development, is the only way to keep this danger in check and to satisfy the divergent opinions on the matter, any other system poses free exercise problems far beyond those that might stem from disallowing residential development.

CONCLUSION

The advent of megachurches in American society has created problems for land use regulation unknown to the planning pioneers of the early twentieth century. RLUIPA, enacted to ensure the free exercise of religion, adds another dimension to this problem by mandating a heightened standard of review for all land use regulations that potentially burden religious freedom. Implementing a system of categorical regulation that restricts megachurches to develop in nonresidential areas of a city does not create a substantial burden on these institutions' exercise of religion, because the system burdens secular practices, not religious beliefs. Even if such a system were deemed burdensome, governments could demonstrate a compelling interest in adopting it given the fundamental change in the way these churches operate as opposed to those of the past. Moreover, governments could prove the system is the least restrictive means to further governmental interests, because it is not over-inclusive and is the only way to eliminate the discretionary decision making that oftentimes results in religious discrimination. This system of categorical regulation is thus the best way to balance the greater public concern of general welfare and the free exercise issues of paramount importance to religious institutions.

242. See supra note 147 and accompanying text.
243. See supra notes 156–60 and accompanying text.