

**LAND, LIBATIONS, AND LIBERTY:
RLUIPA AND THE SPECTER OF
LIQUOR CONTROL LAWS**

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LAND, LIBATIONS, AND LIBERTY: RLUIPA AND THE SPECTER OF LIQUOR CONTROL LAWS

COMMENT

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I. INTRODUCTION

Now when the adversaries of Judah and Benjamin heard that the returned exiles were building a temple to the LORD, the God of Israel . . . [they] discouraged the people of Judah and made them afraid to build and bribed counselors against them to frustrate their purpose, all the days of Cyrus king of Persia¹

Imagine that you are part of an organization that wants to use a piece of property for weekly meetings and activities. It is located in a downtown district that the city plans to convert into an entertainment district designed to generate a high revenue yield. The building already exists, so you simply need to apply for a conditional use permit. This permit is required because your proposed use is not specifically enumerated as a permitted use in the city zoning ordinance. But the city denies your application; you find out that there is a state law prohibiting alcohol establishments from locating within three hundred feet of your institution. The city planned to bring a number of bars and taverns into this area to stimulate the local economy. To favor alcohol use and preserve the opportunity to generate more revenue, the city decided to keep your institution out of the area.

Your organization brings in a lawyer to explain the options to the ruling board of your institution: Can you simply waive this statutory protection and allow alcohol establishments nearby? He says that is not an option. Apparently the Supreme Court has said that allowing your type of organization to waive this protection would violate the Constitution. Why? Because your institution is a religious one, and allowing it to waive the protection would violate the Establishment Clause. On the other hand, if the institution was a Boy Scouts chapter or an atheist reading room and event center, with the same basic use of the land, the alcohol “dry zone” law would not apply and the permit would have been issued.

The attorney tells your group that, ironically, the dry zone law was originally designed to protect churches and other religious institutions from the injurious effects of alcohol establishments. The ruling board decides to consider its alternatives, since it looks like fighting the situation is more trouble than it’s worth; the institution will have to make do with the crowded facilities it currently inhabits. But you are still left wondering how a city could take a law originally designed to protect your institution and use it as an excuse to keep it outside of the heart of the community.

The above dilemma was demonstrated recently in the 2011 case of *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, out of the Ninth Circuit Court of Appeals.² There, the City of Yuma denied a conditional use permit to a local church that wanted to use a former retail

1. *Ezra* 4:1–5 (English Standard Version).

2. *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163 (9th Cir. 2011).

store as a meeting facility.³ The City had decided that the presence of the church would destroy the viability of the city's entertainment district because it would carry with it a three hundred foot dry zone, preventing bars and taverns from locating in the area.⁴ In arguing that it should be allowed to use the property for religious purposes, the plaintiff church relied on a federal statute, the Religious Land Use and Institutionalized Persons Act (RLUIPA).⁵ More specifically, the church invoked the Equal Terms Provision of RLUIPA,⁶ seeking declaratory and injunctive relief to enable it to conduct its religious activities at the old retail building.⁷ The church eventually prevailed on appeal,⁸ but this situation was not an isolated incident. Other cases, both before and after *Centro Familiar*, have produced similar exclusionary effects on religious assemblies and institutions.

RLUIPA was formulated by Congress as a remedial measure to combat widespread discrimination against religious institutions through land use controls. But since its passage in 2000, RLUIPA has generated confusion among the federal courts of appeals.⁹ This confusion has been especially acute regarding the Equal Terms Provision, which has been called into action by religious organizations facing the dry zone law problem. The federal circuit courts disagree about how to construe and apply the Equal Terms Provision to the cases that have come before them; they have separately developed six different ways to interpret and apply the Provision. *Centro Familiar* is simply one of the most recent in a line of appellate cases producing varying solutions to the same problem.

The overriding question remains: Will any of these tests strike the proper balance between economic development in cities and the rights of religious entities and their members? Will religious institutions be forced to look elsewhere for ways to assert their First Amendment rights against local land use laws? Or is the Equal Terms Provision an appropriate avenue to do so? Answering these questions requires an examination of the existing circuit tests to decide which can best embody Congress's intent to protect religious organizations from discriminatory land use laws, while allowing cities to reasonably continue their plans for economic development. Beyond that, the problem also requires a determination of whether any of those tests can be modified to more perfectly realize RLUIPA's goals.

3. *Id.* at 1166.

4. *Id.* ("[The city concluded] use of the building as a church would be inconsistent with a '24/7 downtown neighborhood involving retail, residential, office and entertainment.' The liquor license problem was the 'pivotal factor.'").

5. *Id.* at 1167.

6. 42 U.S.C. § 2000cc(b)(1) (2006) ("No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less-than-equal terms with a nonreligious assembly or institution.").

7. *Centro Familiar*, 651 F.3d at 1167.

8. *Id.* at 1175.

9. *See infra* Part III.

Upon analysis, the best approach is the Seventh Circuit's *River of Life* test.¹⁰ The *River of Life* test compares religious institutions with nonreligious institutions on the basis of acceptable zoning criteria. Because of the proxy nature of the dry zone law, the historical shift of societal attitudes toward alcohol away from the mindset that originally justified dry zone laws, and the lack of control afforded to religious entities in the dry zone protection, the effect of those dry zone laws should not be considered acceptable zoning criteria. Thus, in situations like the one laid out above, the *River of Life* test, when properly applied, would not allow a local government to exclude the religious institution on the basis of the dry zone effect.

Part II of this article will review the liquor dry zone laws and their origin, along with the changing American attitudes toward alcohol that have made these laws out of touch with current social values. Part III will explore the origin, context, and purpose of RLUIPA and its Equal Terms Provision. Part IV will lay out the various circuit approaches to interpreting the Equal Terms Provision and the cases that have primarily defined them. Part V will analyze the problem to find the test best suited to solve the dry zone law problem, and will recommend further modifications to that test to give the fullest effect to the intent behind RLUIPA's Equal Terms Provision.

II. LIQUOR AND THE LAW

*You have asked me how I feel about whiskey. All right, here is how I feel about whiskey. If . . . you mean the devil's brew . . . that defiles innocence . . . destroys the home . . . topples the Christian man and woman from the pinnacle of righteous, gracious living . . . then certainly I am against it. But if . . . you mean the oil of conservation, the philosophic wine . . . the drink which enables a man to magnify his joy and his happiness . . . that drink the sale of which pours into our treasuries untold millions of dollars . . . then certainly I am for it.*¹¹

A. Bane and Boon: Historical American Attitudes Toward Alcohol

Even in early days of the republic, Americans had a split attitude toward intoxicating spirits: they were an indispensable commodity, but also socially volatile substances.¹² Both attitudes toward drink have manifested themselves in different facets of American history and socie-

10. See *infra* Part V.

11. Miss. State Representative Noah S. Sweat, The Whiskey Speech (Apr. 4, 1952), available at http://www.bettertransportation.org/2004_retreat/whiskey_speech.pdf.

12. Carole L. Jurkiewicz & Murphy J. Painter, *Why We Control Alcohol the Way We Do*, in *SOCIAL AND ECONOMIC CONTROL OF ALCOHOL* 1, 2 (Carole L. Jurkiewicz & Murphy J. Painter, eds., 2008). When the Mayflower first arrived on the shores of North America in 1620, it was transporting forty-two tons of beer and ten thousand gallons of wine. *Id.* at 3–4.

ty up to the present day. From the time of the Whiskey Rebellion¹³ to Prohibition, societal attitudes toward alcohol were mixed and often came into sharp disagreement. Organizations directly opposed to one another, such as the American Temperance Society and the U.S. Brewers Association were created during the nineteenth century.¹⁴ The rise of the Anti-Saloon League gave popular shape to the wider temperance movement; its origins were of conspicuously religious motivation, growing out of the efforts of several Christian ministers in Ohio.¹⁵ Only ten years later, the League was already being “recognized as the real agency through which the church was directing its fight against the liquor traffic.”¹⁶

The efforts of the temperance movement and opposition to the alcohol industry and its perceived evils came to ultimate fruition with the Prohibition.¹⁷ The results of this absolute ban on alcohol have been described as disastrous by some modern scholars.¹⁸ While alcohol consumption seemed to generally decrease during Prohibition, some economics scholars have concluded that this was only a short-term effect.¹⁹ The more visible effect was an increase in organized crime, and disillusionment with government regulation of controlled substances.²⁰ Just fourteen years later, the Twenty-First Amendment returned control of alcohol back to the states, which is the system in place today.²¹ States are free to decide how they want to regulate (or not regulate) the alcohol industry, and that power may be exercised through land use controls.²² Since Prohibition, competing attitudes toward alcohol have persisted, with one important twist.

Present day, the characterization of alcohol-related problems has changed: drunkenness is viewed less as a morally objectionable activity and more like a morally neutral disease or medical condition that must

13. Michael Hoover, *The Whiskey Rebellion*, ALCOHOL AND TOBACCO TAX AND TRADE BUREAU, http://ttb.gov/public_info/whisky_rebellion.shtml (last visited Oct. 24, 2012). The incident is particularly interesting because it demonstrated early on the government's desire to utilize alcohol taxes to pay off Revolutionary War debt.

14. Jurkiewicz & Painter, *supra* note 12, at 4.

15. *About*, AMERICAN COUNCIL ON ALCOHOL PROBLEMS, http://sapacap.com/?page_id=2 (last visited Oct. 24, 2012); ERNEST HURST CHERRINGTON, *HISTORY OF THE ANTI-SALOON LEAGUE* 9–11 (1913), available at <http://books.google.com/books/about/books?id=19sXAAAAYAAJ>.

16. CHERRINGTON, *supra* note 15, at 74.

17. Jurkiewicz & Painter, *supra* note 12, at 5–6.

18. See, e.g., MARK THORNTON, *ALCOHOL PROHIBITION WAS A FAILURE* (Cato Institute Policy Analysis No. 157, 1991), available at <http://www.cato.org/pubs/pas/pa157.pdf>.

19. Angela K. Dills et al., *The Effect of Alcohol Prohibition on Alcohol Consumption: Evidence from Drunkenness Arrests* 86 *ECONOMICS LETTERS* 279, 281–83, sec. 3 (2005) available at <http://users.nber.org/~jacobson/Dillsetal2005.pdf>.

20. Jurkiewicz & Painter, *supra* note 12, at 6.

21. *Id.* at 7.

22. *Id.* The authors note that the modern system led to the fact that “[c]ontrol of intoxicating liquors does not dominate politics as it did [before the Prohibition].” *Id.* at 15.

be treated individually, not condemned.²³ Because alcohol is no longer viewed by the general public as a moral evil to combat, but rather a powerful commodity to harness, governments are much more willing to encourage production and consumption while reaping the tax rewards. Because they will not face the kind of backlash characteristic of the American Temperance Society or the Anti-Saloon League for making “vice money” in alcohol taxation, cities need not be so concerned with public image—they will not look like they are profiting from promoting a moral evil.²⁴ Essentially, contemporary policy has come full circle to the initial justifications for the tax that incited the Whiskey Rebellion: the increase of tax revenue to fill government treasuries.²⁵

This shift in cultural values and attitudes undergirds much of the conflict between municipal governments seeking vibrant revenue sources and churches seeking a place to worship. Cities see enormous direct economic benefits from alcohol-serving establishments, but receive no such direct benefit from churches. The decision of municipalities to favor alcohol over religion has been made possible by the change in the moral economy; alcohol-related problems are now a public ill rather than a moral evil, and religious institutions are just another land use rather than pillars of the community. Alcohol and religion have been placed on the same level, and with the extra monetary incentive provided by bars and nightclubs, cities see less incentive to give churches room.

The exclusion of churches from community centers is a natural side effect of the shift; religious institutions have been demonized because, through the dry zone laws, they rob cities of the opportunity to make more money. Churches have acquired the stigma of being economy killers, regardless of whether or not they want dry zone law protection. Religious institutions simply want to exercise their property rights like any non-religious organization can, yet they are haunted by the specter

23. Compare Leah Rae Berk, *Temperance and Prohibition Era Propaganda: A Study in Rhetoric*, BROWN UNIVERSITY LIBRARY CENTER FOR DIGITAL SCHOLARSHIP, library.brown.edu/cds/temperance/essay.html (last visited Oct. 24, 2012) (indicating that “[r]eligious leaders supporting the Temperance movement . . . saw the fight against intemperance as a crusade . . . [appealing] to deeply held American values and Puritan morals, describing intemperance as a threat to democracy and morality”), with *Alcoholism*, UNIVERSITY OF MARYLAND MEDICAL CENTER, <http://www.umm.edu/altmed/articles/alcoholism-000002.htm> (last visited Oct. 24, 2012) (describing alcoholism as “a chronic, often progressive disease”); see also Stanton Peele, *Alcohol, Necessary Evil or Positive Good?*, THE STANTON PEELE ADDICTION WEBSITE, <http://www.peele.net/lib/positivedrinking.html> (last visited Oct. 24, 2012).

24. See Hoover, *supra* note 13 and accompanying text; see also Jordan E. Otero, *Banking on Sin: States Profit as Taxes Rise on Vice*, THE WASHINGTON TIMES, (Oct. 26, 2011) www.washingtontimes.com/news/2011/oct/26/banking-on-sin-states-profit-as-taxes-rise-on-vice/?page=all.

25. Hoover, *supra* note 13. See also Mike Kallenberger, *The Future of American Attitudes Toward Alcohol*, BREWERS ASSOCIATION, <http://www.brewersassociation.org/pages/business-tools/publications/the-new-brewer/online-extras/show?title=american-attitudes-toward-alcohol> (last visited Oct. 24, 2012) (suggesting that American attitudes toward alcohol follow a cyclical progression).

establishment.³⁰ Societal norms of the time presumed that the effects of alcohol were “inimical” to the public welfare.³¹

The second case where this same attitude is evident is the *425-429* case.³² There, restaurant owners sought a transfer of a liquor license to a new location, but the local board denied the request after finding that the new location was within 300 feet of eight different religious institutions.³³ The owners sought to introduce evidence of their good reputation and non-offensive style of business management to overturn the board’s denial.³⁴ In a five-to-one decision, the superior court said that the local board had the discretion to deny the application, and the license applicants could not successfully overturn its decision on the basis of their good reputations.³⁵ The court also found that dry zone laws were designed to protect churches, saying, “[c]learly, the policy of the legislature was to discourage the sale of liquor in close proximity to the restrictive institution and we must therefore interpret the provisions of the Act in a light most favorable to the accomplishment of that purpose.”³⁶

The presumption was that alcohol and religious activities were inherently incompatible, unless the local board thought otherwise. This attitude was suggestive of the paternalistic legal approach that came to eventual fulfillment in the Supreme Court’s opinion twenty-seven years later in *Grendel’s Den*; government was placing itself in the *sole* position to decide whether land uses permitting the sale of alcohol were compatible with religious institutions.

Lastly, the Michigan Supreme Court addressed a dry zone law in the *Big Bear Markets* case.³⁷ The local liquor control commission originally granted a license to the plaintiff, Big Bear Markets, in 1953, but then notified it of the cancellation of that license only one year later, because the alcohol-serving establishment would be located within 500 feet of a religious institution.³⁸ Big Bear Markets brought a suit in equity to prevent the license revocation, primarily arguing that the religious institution in question did not oppose the licensing of the plaintiff in that zone.³⁹ With one abstention, a unanimous Michigan Supreme Court rejected that argument, saying that the legislative intent of the dry zone law was designed to be mandatory, not subject to waiver through consent of the religious institution.⁴⁰

Big Bear Markets serves two purposes for this analysis. First, the parties were in the opposite positions from where they are in current cases like *Centro Familiar*. The plaintiff in *Big Bear Markets* was an

30. *Id.*

31. *Id.*

32. *In re Appeal of 425-429, Inc.*, 116 A.2d 79 (Pa. Super. 1955).

33. *Id.* at 80–81.

34. *Id.* at 81.

35. *Id.* at 81–82.

36. *Id.* at 83 (citing *Appeal of DiRocco*, 74 A.2d 501 (Pa. Super. Ct. 1950)).

37. *Big Bear Mkts. v. Mich. Liquor Control Comm’n*, 77 N.W.2d 135 (Mich. 1956).

38. *Id.* at 137–38.

39. *Id.*

40. *Id.* at 138–39.

churches, hospitals and the like by exercise of reasonable zoning laws.⁴⁶

The purpose of §16C, as described by the District Court, is to “protect[] spiritual, cultural, and educational centers from the ‘hurly-burly’ associated with liquor outlets.” There can be little doubt that this embraces valid secular legislative purposes.⁴⁷

The court ruled that dry zone laws could not effectively function to provide for religious vetoes, since such a system would violate the Establishment Clause.⁴⁸ So while the court upheld the effect of the laws, it took away from religious institutions the ability to control the application of that protective separation.

This decision finalized the conundrum that religious institutions now face in Equal Terms cases: churches are forcibly “protected” from the perceived ills arising from alcohol purveyors by having a mandatory dry zone radiate from the religious institution. This zone cannot be waived by religious institutions, since such an option would violate the Establishment Clause. Changing attitudes toward alcohol and the rising emphasis on creating high revenue for municipalities have pushed economy-conscious cities to favor commercial alcohol establishments over non-profit religious uses. Religious institutions and assemblies would cause economic dead spots in downtown areas, a fact that cities use to distinguish such religious institutions from secular institutions in land-use controls. They reason that if the institution affects the area differently, it can be treated differently.

But this argument is fundamentally unfair, because religious entities have no control over their dry zones; the only reason they affect the area differently is because of governmental fiat. Furthermore, control of the dry zone might even be in the hands of the same local government that is excluding them from the particular property in question. Thus, in almost the same breath, a local government could provide dry zone protection to churches and then exclude them for depressing the economic opportunity to allow alcohol-serving establishments in the area. Because of the changing mind-set regarding alcohol, this distortion of the law is not always obvious. But remembering that these were laws made to protect religious practices instead of oust them, their use in a manner contrary to their original purpose becomes evident.

III. RLUIPA: HISTORY AND EFFECT

“Each blade of grass has its spot on earth whence it draws its life, its strength; and so is man rooted to the land from which he draws his faith together with his life.”⁴⁹

46. *Id.* at 121.

47. *Id.* at 123 (citation omitted).

48. *Id.* at 127.

49. JOSEPH CONRAD, LORD JIM 207 (4th ed. 1899).

A. The Road to RLUIPA

Since the early twentieth century, local governments have utilized zoning and other land use controls to shape communities. Over the years, this authority over land use has expanded to encompass an impressive range of matters, from health and safety issues to aesthetic design of storefronts. Cities are increasingly concerned about distinguishing themselves as attractive places to live and about maintaining a stable tax base.⁵⁰ Municipalities and the legal practitioners who represent them see zoning as an effective and customizable means to both of those ends; by physically structuring their contents, cities are able to experiment with different ways to achieve these goals.⁵¹

But like all government action, land use controls are limited by the First Amendment's Free Exercise Clause.⁵² The most recent congressional attempt to strengthen the First Amendment is the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).⁵³ Knowing the effect of RLUIPA is critical to understanding how far local governments can go in zoning and other land use controls. Yet facial interpretation of the statute is only the beginning; the history of RLUIPA's introduction and passage was colored with a decade of controversy, playing a large role in how courts have interpreted its provisions.

In the early 1990s, the Supreme Court decided several cases concerning the Free Exercise Clause of the First Amendment which fundamentally altered the environment of religious civil rights.⁵⁴ The Supreme Court in *Employment Division, Department of Human Resources of Oregon v. Smith* modified earlier case law to reduce what it saw as the overreaching scope and effect of the prior Free Exercise Clause jurisprudence.⁵⁵ Prior case law had established that if government action imposed a "substantial burden" on a religious practice, then it would need to be justified by strict scrutiny in order to avoid a First Amendment violation.⁵⁶ Where the previous test began by determining whether the government action imposed a "substantial burden" on a religious practice,⁵⁷ the new *Smith* test began first by asking whether the action

50. *E.g.*, Letter from Leif J. Ahnell, City Manager, City of Boca Raton, to Mayor and City Council Members, City of Boca Raton (Oct. 1, 2007) available at <http://www.ci.boca-raton.fl.us/fin/pdf/budget/2008/Approved%20Budget/Transmittal/Budget%20Message.pdf>.

51. *See, e.g.*, Stewart H. Diamond & Derke J. Price, ZONING ADMIN. TOOLS OF THE TRADE 1 (AnceI, Glink, Diamond, Bush, DiCianni & Krafthefer, P.C., 2007), available at <http://www.ancelglink.com/publications/ZoningToolsOfTheTrade.pdf>.

52. U.S. CONST. amend. I ("Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof . . .").

53. 28 U.S.C. § 2000cc (2006).

54. *Emp't Div., Dept. of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

55. *Smith*, 494 U.S. at 882–83.

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

57. *Smith*, 494 U.S. at 883.

was “neutral [and] generally applicable.”⁵⁸ If the government action was neutral and generally applicable, then it would not need to withstand a strict scrutiny analysis.⁵⁹ The Justices later expanded the role of this test and split “neutrality” and “general applicability” into separate elements in *Church of Lukumi Babalu Aye v. City of Hialeah*.⁶⁰ This repetition of the same test in a different context meant that it was not confined to employment benefits as it was used in *Smith*, but that it was the new flagship test for First Amendment religious liberty issues.

To combat this change, Congress adopted the Religious Freedom Restoration Act of 1993 (RFRA).⁶¹ The Act attempted to reinstate prior Free Exercise jurisprudence.⁶² Although the constitutional basis for the RFRA was the Fourteenth Amendment Enforcement Clause,⁶³ the Supreme Court held that the Act was unconstitutional in *City of Boerne v. Flores*.⁶⁴ The Court reasoned that the RFRA “[could not] be considered remedial, preventive legislation” under the Fourteenth Amendment’s Enforcement Clause because it lacked “congruence between the means used and the ends to be achieved” and was “out of proportion” to the ill to be combated.⁶⁵ The Court found that the law “attempt[ed] a substantive change in constitutional protections,” something the Court considered a violation of constitutional principles.⁶⁶ If Congress could substantively change constitutional protections through a law passed under the Enforcement Clause, then it could essentially effect a constitutional amendment without following the necessary amendment process.⁶⁷

The law failed the congruence and proportionality test because the “legislative record lack[ed] examples of modern instances” of religious persecution, and the law imposed “[s]weeping coverage . . . at every level of government, displacing laws and prohibiting official actions of almost every description . . . regardless of subject matter.”⁶⁸ In summary, the Court decided that the law could not limit state and local governments because (1) the legislative record was not sufficiently developed to allege a problem requiring remediation, and (2) the statute over broadly sought to affect all state and local laws, not just those most likely to violate the First Amendment.

Boerne thus explicitly stands for the proposition that Congress’s Fourteenth Amendment enforcement power has limits in applying the

58. *Id.* at 879–82.

59. *Id.*

60. *Lukumi*, 508 U.S. at 531–32.

61. 42 U.S.C. § 2000bb (2006).

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

63. U.S. CONST.amend. XIV, § 5.

64. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

65. *Id.* at 530, 532.

66. *Id.*

67. *Id.* at 519 (“Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power ‘to enforce,’ not the power to determine what constitutes a constitutional violation.”).

68. *Id.* at 530, 532.

Bill of Rights to state and local governments. But it also implicitly stands for the proposition that the Supreme Court is the sole authority to determine what constitutes a violation of the First Amendment Free Exercise Clause. With the RFRA rejected, Congress returned to the drawing board, determined to amplify protections for religious liberty through the Enforcement Clause. In light of the *Boerne* decision, legislators knew that they would have to approach the next law differently: they would need to provide a sufficient evidentiary foundation for the law and limit it to affect only those laws that threatened First Amendment rights.

B. Customized Remedy for a Social Ill: Making an Effective and Constitutional RLUIPA

Foiled by the Supreme Court in *Boerne*, Congress decided to try again. It began with the proposal of the Religious Liberty Protection Act of 1999 (RLPA).⁶⁹ The RLPA contained a clause virtually identical to the Equal Terms Provision of RLUIPA.⁷⁰ In early floor debates, the intent of the RLPA was clearly articulated—overturn the Supreme Court’s decision in *Smith* and provide greater protection for religious practices.⁷¹ Unlike the RFRA, the RLPA limited its scope to specific areas of concern rather than adopting sweeping rules that risked overstepping the “congruent and proportional” limits established in *Boerne*. Specifically, the RLPA focused on limiting government action regulating religious practice within the contexts of federal spending power and land use laws.⁷²

In further debates, House representatives framed the RLPA as remedial legislation.⁷³ Congressman Canady, the bill’s sponsor, explained that the land use provisions (which included the Equal Terms forerunner provision) were “necessary to effectively remedy the pervasive pattern . . . of discriminatory and abusive treatment suffered by religious individuals and organizations in the land-use context.”⁷⁴ Most interesting was an exchange between Canady and Congressman Bereuter of

69. Religious Liberty Protection Act of 1999, H.R. 1691, 106th Cong. (1999).

70. Compare H.R. 1691, § 3(b)(1)(B) (“No government shall impose or implement a land use regulation in a manner that does not treat religious assemblies or institutions on equal terms with nonreligious assemblies or institutions.”), with Religious Land Use and Institutionalized Persons Act of 2000, S. 2869, 106th Cong. § 2(b)(1) (2000) (enacted) (“No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.”).

71. 145 Cong. Rec. 5580H5580-02, 5581 (daily ed. July 15, 1999) (statement of Rep. Sue Myrick) (“The [RLPA] would essentially overturn the *Smith* decision and return religious expression to its rightful place.”).

72. H.R. 1691.

73. 145 Cong. Rec. 5580H5580-02, 5583 (daily ed. July 15, 1999) (Congressman Blunt of Missouri indicated that “infringements on religious liberty” were “not pervasive yet, but they [were] certainly prevalent.”).

74. *Id.* at 5587–88.

Nebraska, who identified himself as an urban land planner by trade.⁷⁵ In this colloquy, Canady admitted that the RLPA would “[n]ot ordinarily” prevent a local government from “precluding religious uses in a particular category of zoning such as an industrial zone.”⁷⁶ Canady explained further, however, that one of the specific ills targeted was the use of such zoning regulations to completely “exclude churches from commercial zones, knowing it is impractical to locate a church in a built-up residential area.”⁷⁷ After debate in the House, the RLPA was passed, but it stalled in the Senate and was never enacted.⁷⁸ The idea was re-born, however, with the introduction of Senate Bill 2081 in July 2000 by Senator Orrin Hatch;⁷⁹ this was the bill that would eventually be enacted as RLUIPA.

The new bill closely tracked the ideas behind the RLPA. It contained the same “substantial burden” language in its first section and also included similar land use provisions.⁸⁰ But it also addressed concerns about prison practices instead of federal spending.⁸¹ The new bill made only slight modifications to the previous Equal Terms Provision in the land use sections. The text of the currently applicable Equal Terms Provision reads: “No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less-than-equal terms with a nonreligious assembly or institution.”⁸²

Unlike the RLPA, RLUIPA gained enough support to pass both houses and was signed into law. The fact that Congress enacted RLUIPA, after the failure of both the RFRA and the RLPA, suggests that the legislative branch had decided to reverse the situation brewing in the judiciary. These laws were designed to change Supreme Court constructions of First Amendment rights. This was no easy task, especially after the resounding disapproval in *Boerne* of similar statutory attempts.

Congress designed RLUIPA to overcome the problems laid out in *Boerne* by providing a sufficient foundation in the legislative record and limiting its scope. The law was uniquely tailored to fit within the boundaries of the Fourteenth Amendment’s Enforcement Clause as interpreted in *Boerne*, avoiding the risk of a constitutional challenge. Supporting this conclusion is the fact that the bill sponsors provided an extensive list of “Examples of Land Use Restrictions on Religious Liberty.”⁸³ Furthermore, congressional members specified that the land use provisions of RLUIPA were “proportionate and congruent responses to

75. *Id.* at 5595.

76. *Id.*

77. *Id.*

78. *Religious Liberty Protection Act of 1999*, GOVTRACK.US, www.govtrack.us/congress/bills/106hr1691 (last visited Oct. 24, 2012).

79. Religious Land Use and Institutionalized Persons Act of 2000, 2869, 106th Cong. (2000) (enacted).

80. *Id.*

81. *Id.*

82. 42 U.S.C. § 2000cc(b)(1) (2006).

83. 146 Cong. Rec. S6678-02, 6689.6690 (daily ed. July 13, 2000).

the problems documented in [the] factual record”⁸⁴ The bill sponsors intended to characterize land use as an area that needed remedial legislation under the Enforcement Clause, allowing Congress to reach beyond Supreme Court precedent and provide for greater protections to religious liberty in specified instances.

At the same time, the sponsors also said that the land use provisions were designed to “closely track[] the legal standards in one or more Supreme Court opinions, codifying those standards for greater visibility and easier enforceability.”⁸⁵ Specifically addressing the Equal Terms Provision, the sponsors stated that it prohibited “various forms of discrimination against or among religious land uses” and that it would “enforce the Free Exercise Clause rule against laws that burden religion and are not neutral and generally applicable.”⁸⁶ With this additional detail, Congress seems to have hedged its bets in developing the text. By giving a nod to the language in Supreme Court precedent, it intended to prevent future constitutional challenges. With this addition, the legislative history seems to point both to a new standard that superseded Supreme Court precedent *and* a codification of Supreme Court precedent.

The ambiguity engendered by this split message has contributed to the federal circuit split. The Eleventh Circuit prefers the idea that RLUIPA is nothing more than a simple codification of Court precedent.⁸⁷ The Third Circuit and others are willing to give the RLUIPA Equal Terms a more original reading.⁸⁸ The practical outer limits of RLUIPA are twofold: First, it will be formally limited by *Boerne’s* requirement for a proportional and congruent response. Second, it will be informally limited by how far the courts are willing to construe the statute’s provisions. The Congressional strategy in crafting RLUIPA shows an intent to maximize the law to its constitutional limits so that the courts would essentially bring the remedy to the brink of *Boerne* proportional and congruent power. The best evidence for this intent is the statute itself: “This chapter [RLUIPA] shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.”⁸⁹

The congressional debates provide valuable additional insight for interpreting the Equal Terms Provision. The bill sponsors indicated that “zoning codes frequently exclude[d] churches where they permit[ted] theaters, meeting halls, and other places where large groups of people assemble for secular purposes” or allowed local zoning boards to discrim-

84. 146 Cong. Rec. S 7774, 7775 (daily ed. July 27, 2000).

85. *Id.*

86. *Id.* at 7776.

87. *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F. 1214 1231–32 (11th Cir. 2004).

88. *See, e.g., Lighthouse Inst. for Evangelism, Inc., v. City of Long Branch*, 510 F. 3d 253 (3d Cir. 2007).

89. 42 U.S.C. § 2000cc-3(g) (2006).

inate against churches in discretionary actions.⁹⁰ The sponsors further noted that land use discrimination often lurked behind facially valid concerns such as “traffic, aesthetics, or ‘not consistent with the city’s land use plan.’”⁹¹ Where land use regulations invoking equal protection concerns are usually viewed under the soft eye of rational basis scrutiny,⁹² RLUIPA seems to cast a shadow of doubt over those regulations which purport to have a legitimate purpose, but actually have deeper, more sinister aims. Later debates continued to clarify the law’s practical intentions; one supporter, Senator Kennedy, acknowledged that RLUIPA would “not affect the ability of the states and localities to enforce fire codes, building codes, and other measures to protect the health and safety of people using the land or buildings.”⁹³

Post-legislative events also led to a broader picture of RLUIPA and its effects. After a decade of RLUIPA’s enforcement, a Department of Justice report analyzed RLUIPA’s provisions and concluded that “local governments can avoid violating [the Equal Terms Provision] by ensuring that their regulations focus on external factors . . . [that is,] objective criteria in regulating land uses.”⁹⁴ This subsequent history, along with the majority of circuit approaches, indicates that RLUIPA is more than just a codification of Supreme Court precedent. Instead, it should be seen as an amplification of First Amendment protections in its own right and should be interpreted more originally than a simple codification.⁹⁵

IV. THE EQUAL TERMS PROVISION CIRCUIT SPLIT

*“Justice, I think, is the tolerable accommodation of the conflicting interests of society . . . and I don’t believe there is any royal road to attain such accommodations concretely.”*⁹⁶

Federal circuit courts have developed six different approaches to determine whether a government has violated RLUIPA by treating a religious entity on “less than equal terms” than a nonreligious entity. While these approaches share certain elements, each is unique enough to lead to different outcomes from case to case. The tests developed chronologically in response to earlier formulations. Overall, the development has been strongly influenced by the first two tests—the *Surfside* test and the *Lighthouse* test.

90. 146 Cong. Rec. S7774, 7774. (daily ed. July 27, 2000).

91. *Id.*

92. *See, e.g.,* Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000).

93. 146 Cong. Rec. S 10992-01 (2000) (statement of Sen. Dewine).

94. U.S. DEPT. OF JUSTICE, STATEMENT OF THE DEPARTMENT OF JUSTICE ON THE LAND-USE PROVISIONS OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT 7–8 (2010).

95. Accord Sarah Keeton Campbell, Note, *Restoring RLUIPA’s Equal Terms Provision*, 58 DUKE L.J. 1071, 1094–1104 (2009).

96. Philip Hamburger, *The Great Judge*, LIFE, Nov. 4, 1946, at 122, 125 (quoting Judge Learned Hand).

The first court to develop a test was the Eleventh Circuit, starting in 2004 with *Midrash Sephardi, Inc. v. Town of Surfside*.⁹⁷ The other line of tests has developed on the basis of the Third Circuit's treatment of the Equal Terms Provision in *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*.⁹⁸ The foundation of the *Lighthouse* test has proven to be more popular among the circuits, with other approaches modifying and incorporating its principles instead of the older *Surfside* test. *Surfside* has been criticized for extra-textually importing the strict scrutiny standard to limit its reach.⁹⁹ *Lighthouse* is popular because it relies on a narrower concept of a "similarly situated comparator" commonly found in the Supreme Court's equal protection jurisprudence relating to land use decisions.¹⁰⁰

Under the "similarly situated" family are roughly three separate pure approaches: (1) the "regulatory purpose" test, (2) the "accepted zoning criteria" test, and (3) the "functional intents and purposes" test. *Centro Familiar* and *Opulent Life* combine the "regulatory purpose" and "accepted zoning criteria" tests into a single hybrid analysis.¹⁰¹ Each approach attempts to compare a religious entity to a nonreligious entity on the basis of a chosen aspect. If the two entities exhibit the same traits on that aspect, then they must be treated similarly. But if they do not exhibit the same traits, then the local government may have a legitimate reason to treat the two differently. The Tenth Circuit has chosen to make the issue a pure jury question, unlike the other circuits. A graphical view of the various approaches is available in Appendix A.

A. The Eleventh Circuit's Approach: The *Surfside* Test

As the First Circuit attempted to construe the Equal Terms Provision, the Eleventh Circuit had little guidance and much freedom in deciding how to interpret and apply it. The result was a test designed to prevent a constitutional violation by reading the Equal Terms Provision simply as a codification of Supreme Court precedent.

The *Surfside* test first determines if a religious entity is an "assembly or institution" within the natural meaning of those words.¹⁰² If so, it

97. *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004) (The Seventh Circuit utilized this approach at one point in time, but later rejected it. *See River of Life Kingdom Ministries v. Village of Hazel Crest, Illinois*, 611 F.3d 367 (7th Cir. 2007) (en banc, Posner, J., writing for the court)).

98. *Lighthouse Institute for Evangelism, Inc., v. City of Long Branch*, 510 F. 3d 253, 253 (3d Cir. 2007).

99. Sean Foley, Comment, *RLUIPA's Equal-Terms Provision's Troubling Definition of Equal: Why the Equal-Terms Provision Must Be Interpreted Narrowly*, 60 KAN. LAW. REV. 193, 214, 219–20 (indicating that the *Surfside* test would lead to "bizarre and unintended consequences," and that strict scrutiny is improper because Congress did not intend to include that standard in the Equal Terms clause); *see also* Campbell, *supra* note 95, at 1100.

100. *See* PATRICIA E. SALKIN, *AMERICAN LAW OF ZONING* § 15:4 (5th ed. 2011). *See also* *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

101. *Opulent Life* does so explicitly. *Centro Familiar* does so implicitly.

102.. *Surfside*, 366 F.3d at 1230.

then analyzes any less-than-equal treatment with other assemblies or institutions under a standard of strict scrutiny.¹⁰³ Later modifications of the test differentiate between facial and as-applied challenges: in as-applied challenges, the plaintiff may establish a similarly situated comparator if there is a comparable community impact. On the whole, however, the Eleventh Circuit has a fairly low threshold for plaintiff's prima facie case, as demonstrated in the flagship case, *Midrash Sephardi, Inc v. Town of Surfside*.

1. The *Surfside* Case

In July 1999, two Jewish congregations in the town of Surfside, Florida brought suit to enjoin the town from enforcing its zoning code to prevent the operation of synagogues in the downtown "business district."¹⁰⁴ Congress passed RLUIPA in September 2000, and the plaintiff synagogues filed an amended complaint in November raising claims under the new law.¹⁰⁵ The federal district court granted summary judgment against the synagogues on "all aspects" of the RLUIPA claim, and the synagogue appealed.¹⁰⁶

The Eleventh Circuit characterized Surfside's zoning scheme as "permissive" because "any use not specifically permitted [was] prohibited."¹⁰⁷ Churches and synagogues were required to apply for conditional use permits (CUPs) in the one zone where they were allowed,¹⁰⁸ but in the downtown business district they were not even allowed to apply for CUPs.¹⁰⁹ In contrast, the business district would have permitted "private clubs, social clubs, lodges or theaters," though none were actually there at the time.¹¹⁰

The court initially stated two conclusions that are relevant in its construction of a judicial test for the Equal Terms Provision: it expressly rejected the use of a "similarly situated comparator" analysis and asserted that a municipality violating the Equal Terms Provision would be strictly liable for that violation.¹¹¹ But the court's characterization of its conclusions is misleading. It is more accurate to say that the court modified the test for a "similarly situated comparator" derived from Equal

103. *Id.*

104. *Id.* at 1219–20, 1222.

105. *Id.* at 1223.

106. *Id.* at 1222.

107. *Id.* at 1219.

108. The court indicated that "churches and synagogues [were] prohibited in seven of the eight zoning districts." *Id.*

109. *Id.* at 1220.

110. *Id.*

111. *Id.* at 1229 ("[W]hile [the Equal Terms Provision] has the 'feel' of an equal protection law, it lacks the 'similarly situated' requirement usually found in equal protection analysis. . . . [U]nlike [the Substantial Burden Provision, the Equal Terms Provision] renders a municipality strictly liable for its violation.").

ferential treatment constitutes a violation of § (b)(1) of RLUIPA.¹²² Despite having found a violation of the Equal Terms Provision, and its claim that strict liability applied, the panel went on to analyze government action under strict scrutiny.¹²³ After finding that the zoning code was neither neutral nor generally applicable,¹²⁴ the court applied a strict scrutiny standard to determine whether the Town of Surfside could justify its differential treatment with “interests of the highest order” expressed through narrowly tailored regulation.¹²⁵

The Eleventh Circuit reasoned that congressional intent in the Equal Terms Provision was simply to “codify] the *Smith-Lukumi* line of precedent.”¹²⁶ Based on this point of departure, the court proceeded to directly apply Free Exercise case law to the zoning code, because in the court’s view “RLUIPA allow[ed] courts to determine whether a particular system of classifications adopted by a city subtly or covertly departs from requirements of neutrality and general applicability.”¹²⁷ Relying on *Lukumi*,¹²⁸ the court determined that because the law was not neutral and generally applicable, strict scrutiny must be applied.¹²⁹ Upon applying strict scrutiny, the court found that the zoning code was not narrowly tailored because it was both “overinclusive and underinclusive in substantial respects.”¹³⁰ Ultimately, the Eleventh Circuit determined that the Surfside zoning code violated the Equal Terms Provision of RLUIPA and the Free Exercise jurisprudence that the court supposed the provision codified.¹³¹

In its discussion of the town’s arguments, the court found it necessary to analyze the constitutionality of RLUIPA.¹³² After reviewing the history of conflict between the Supreme Court and Congress that led up to RLUIPA’s passage,¹³³ the opinion considered the main principles of the *Boerne* case,¹³⁴ which had struck down the RFRA.¹³⁵ *Boerne*’s analysis addressed the two main questions in the court’s mind: (1) “whether Congress has the authority to enact legislation to enforce the rights guaranteed by the First Amendment” and (2) “whether RLUIPA ‘enforc-

122. *Id.*

123. *Id.* at 1229, 1231. *See also* SALKIN *supra* note 97.

124. *See supra* Part III.

125. *Surfside*, 366 F.3d at 1232–35.

126. *Id.* at 1232.

127. *Id.*

128. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

129. “Thus, a violation of § (b)’s equal treatment provision, consistent with the analysis employed in *Lukumi*, must undergo strict scrutiny.” *Surfside*, 366 F.3d at 1232. This language seems to reflect the court’s belief that a § (b)(1) violation is functionally equivalent to a failure of the “neutral and generally applicable” test in pre-existing case law.

130. Once again, the court seems to suggest that a violation of the Equal Terms Provision is synonymous with violation of a strict scrutiny standard. Exactly how the court conceives of this relationship is unclear. *Id.* at 1235.

131. *Id.*

132. *Id.* at 1235–36.

133. *Id.* at 1236–37.

134. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

135. 42 U.S.C. §§ 2000bb (2006).

es' a constitutional right without substantively altering that right."¹³⁶ The court relied on *Boerne's* rule that Congress did have authority to enforce First Amendment rights.¹³⁷ To answer the second question, the court engaged in a "saving" interpretation of the statute:

Because § (b)(1) of RLUIPA codifies existing Free Exercise, Establishment Clause and Equal Protection rights against the states and municipalities that treat religious assemblies or institutions 'on less than equal terms' than secular institutions, § (b) is an appropriate and constitutional use of Congress's authority under § 5 of the Fourteenth Amendment.¹³⁸

While this statement led the court to approve the constitutionality of the Equal Terms Provision, it is somewhat unusual considering previous statements in the opinion. The court had earlier explained that particular portions of Equal Protection jurisprudence were *not* included in the provision, but here explained that Congress directly intended to codify Equal Protection rights.¹³⁹ Thus, the court decided that only some parts of equal protection jurisprudence could apply through RLUIPA.

Nevertheless, the court solved, to its satisfaction, the question of RLUIPA's constitutionality by reducing it to a codification of Free Exercise case law. Yet it would find itself addressing the same issue the very next year in the case of *Konikov v. Orange Cnty.*¹⁴⁰

2. The *Konikov* Case

In *Konikov* the plaintiff was a Jewish rabbi who had allegedly been operating a religious organization in a residential district without a "special exemption" issued by the local zoning board.¹⁴¹ The zoning ordinance allowed family day care homes, model homes, and home occupations in the district without special exemptions.¹⁴² In a nutshell, the court found that the zoning code did not facially violate the Equal Terms Provision as it had in *Surfside* because none of the uses allowed without a special exception could be said to fall within the natural perimeter of "assembly or institution."¹⁴³

But, after this, the court expanded its analysis to include as-applied challenges to the implementation of land use regulations.¹⁴⁴ Uncomfortable with letting the disparate treatment go unrecognized, the court articulated an additional as-applied threshold analysis, saying:

136. *Surfside*, 366 F.3d at 1237 (citing *City of Boerne*, 521 U.S. at 519).

137. *Id.*

138. *Id.* at 1239–40.

139. *See id.* at 1229.

140. *Konikov v. Orange Cnty.*, 410 F.3d 1317 (11th Cir. 2005).

141. *Id.* at 1320–21.

142. *Id.* at 1325–26.

143. *Id.* at 1326–27.

144. *Id.* at 1327–29.

Even though the Code, on its face, treats all of the relevant comparable groups the same, in practice it is possible for the [local zoning board] to treat religious organizations on less than equal terms than nonreligious ones. If, as here, the [board] deems a group that meets three times per week a religious organization, but does not consider a group having comparable community impact a “social organization,” that is a violation.¹⁴⁵

The court set a different initial standard under *Konikov* than it had in *Surfside*, saying that if the implementation of a land use regulation led to discrimination between secular and religious groups having “comparable community impact,” then it would constitute a violation of the Equal Terms Provision.

The Eleventh Circuit then applied this new standard to the facts of the case. In analyzing Orange County’s actions, the court found that one of the Code Enforcement Officers “testified that it would not be a violation for a group to meet with the same frequency as [the plaintiff] if the group had a social or family-related purpose” instead of a religious one.¹⁴⁶ The court explained that the “heart of [its] discomfort” with Orange County’s implementation was the fact that “[g]roups that meet with similar frequency are in violation of the Code only if the purpose of their assembly is religious.”¹⁴⁷ As a result, the court held that the zoning code, as applied, violated the Equal Terms Provision.¹⁴⁸ After finding a violation, the court went on to explain that Orange County’s implementation failed strict scrutiny because the government gave no compelling reason for its disparate treatment of secular and religious groups in the residential district.¹⁴⁹

In *Konikov*, the Eleventh Circuit modified the *Surfside* test. *Konikov* asserts that when a land use regulation is challenged on an as-applied basis, governments will violate the Equal Terms Provision if they do not treat entities with a “comparable community impact” the same, unless the government can demonstrate a narrowly tailored compelling interest. Apparently, facial challenges would simply follow the previous analysis set forth in *Surfside*.¹⁵⁰

B. The Third Circuit’s Approach: The *Lighthouse* Test

Until 2007, the *Surfside* test was the only direct interpretation of the Equal Terms Provision developed by a federal court of appeals. The Third Circuit’s *Lighthouse* test changed all that. In essence, the Third

145. *Id.* at 1327.

146. *Id.* at 1328.

147. *Id.* at 1328–29.

148. *Id.*

149. *Id.* at 1329.

150. This distinction between facial and as-applied challenges was affirmed in a later case. *See Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cnty.*, 450 F.3d 1295 (11th Cir. 2006).

courts to engage in a “saving” interpretation of the statute, one that would prevent unconstitutional application of RLUIPA.

Like the Eleventh Circuit, the Third Circuit relied on the idea that RLUIPA largely involved just the codification of existing Free Exercise jurisprudence.¹⁵⁶ Nevertheless, the result of the Third Circuit’s analysis is quite different from the Eleventh Circuit’s product in *Surfside*. The court decided to expressly adopt the equal protection concept of “similarly situated” comparators into its test; the Eleventh Circuit had been much more hesitant to acknowledge that connection. The court summarized by explaining that, “the Equal Terms provision does in fact require . . . a secular comparator that is similarly situated as to the regulatory purpose of the regulation in question—similar to First Amendment Free Exercise jurisprudence.”¹⁵⁷ It further elaborated, saying that “[t]he impact of the allowed use and forbidden behaviors must be examined in light of the purpose of the regulation.”¹⁵⁸ This focus on the purpose of the land use regulation in question is prominent throughout the Third Circuit’s opinion.

Also prominent is the court’s criticism of the *Surfside* test as having far too low of an initial threshold for Equal Terms claims.¹⁵⁹ The Third Circuit believed that the Eleventh Circuit’s use of a natural perimeter test encompassing the dictionary terms of assembly or institution was a “broad scope comparator” that would be far too lenient for plaintiffs.¹⁶⁰ The court warned that:

[U]nder the [*Surfside* test], if a town allows a local, ten-member book club to meet in the senior center, it must also permit a large church with a thousand members . . . to locate in the same neighborhood regardless of the impact such a religious entity might have on the envisioned character of the area.¹⁶¹

This passage has sparked responses from other circuits in addressing the split on tests, and is a concrete statement of what the courts have struggled with in their search for an optimal approach to the Equal Terms provision: finding a way to protect religious rights, without tying the hands of local governments trying to develop a sense of place in their jurisdictions.

Unlike the Eleventh Circuit, the Third Circuit in *Lighthouse* rejected the use of a strict scrutiny analysis, saying, “Congress clearly signaled its intent *not* to include strict scrutiny.”¹⁶² The court reasoned that because in another section of RLUIPA, the Substantial Burden Provi-

156. “It is undisputed that, when drafting the Equal Terms provision, Congress intended to codify the existing jurisprudence interpreting the Free Exercise Clause.” *Id.* at 264.

157. *Id.*

158. *Id.* at 265.

159. *Id.* at 267 n.11, 268 & nn.12–13.

160. *Id.* at 268 & nn.12–13.

161. *Id.* at 268.

162. *Id.* at 269 (emphasis in original).

sion, did include strict scrutiny analysis in its text,¹⁶³ whereas the Equal Terms Provision omitted that analysis, Congress intended not to incorporate that standard into the Equal Terms Provision.¹⁶⁴ The *Lighthouse* test instead imposes a standard of strict liability.¹⁶⁵ The Third Circuit also explained why a strict liability standard was appropriate in light of the constitutional concerns surrounding RLUIPA. Where the Eleventh Circuit hesitated to give RLUIPA broader reach at the risk of overstepping its constitutional limits, the Third Circuit believed that its higher initial threshold would properly limit the reach of the Equal Terms Provision.¹⁶⁶ In the Third Circuit's view, strict liability would not be such a strong burden on local governments when fewer plaintiffs would actually be able to show a similarly situated secular comparator in their *prima facie* case.

C. Variations on a Theme: Circuit Tests Derived from Previous Approaches

With the development of the *Lighthouse* test, the doors for judicial experimentation had been thrown wide open. The changing winds had opened up new possibilities for judges looking for opportunities to improve on the formulation of Equal Terms analysis. In addition, the Third Circuit's wider affirmation of RLUIPA's validity and reach had likely inspired more judicial confidence in the statute. Thus, a series of variations on the previous tests began to appear and vie for recognition.

1. The Seventh Circuit *River of Life* Test

Initially, the Seventh Circuit had adopted and applied the *Surfside* test to its own Equal Terms cases.¹⁶⁷ But that trend changed with the *River of Life* case, which appeared before the Seventh Circuit, en banc, in 2010.¹⁶⁸ Judge Posner authored the panel's decision, reversing course on the Eleventh Circuit's approach and instead choosing to adopt a modified *Lighthouse* test.¹⁶⁹ In *River of Life*, the plaintiff church sought to enjoin the enforcement of the Hazel Crest zoning code, which had desig-

163. 42 U.S.C. § 2000cc(a)(1) (2006).

164. *Lighthouse*, 510 F.3d at 269.

165. *Id.* Strict liability may be a confusing term here because of its varying use across different legal subjects. In this case, it simply means that the local government cannot justify its behavior in less-than-equal treatment. The only way it can escape liability is to disprove an element of the *prima facie* case.

166. "It is because the [*Surfside*] court defined 'comparator' so broadly . . . that, in order to conform to Free Exercise jurisprudence, the court had to create a 'strict scrutiny' element in [the Equal Terms Provision]." *Id.* at 269 n.14.

167. See *River of Life Kingdom Ministries v. Village of Hazel Crest, Ill.*, 611 F.3d 367 (7th Cir. 2010). The two cases that had been heard before the Seventh Circuit on RLUIPA Equal Terms grounds were *Digrugilliers v. Consolidated City of Indianapolis*, 506 F.3d 612 (7th Cir. 2007) and *Vision Church v. Village of Long Grove*, 468 F.3d 975 (7th Cir. 2006).

168. *River of Life*, 611 F.3d at 368.

169. *Id.* at 371.

nated a commercial district where “noncommercial uses” were prohibited, including “churches . . . community centers, schools, and art galleries.”¹⁷⁰

Posner elaborated on the competing approaches of *Surfside* and *Lighthouse* before laying out the new test.¹⁷¹ He faulted the *Surfside* test for its tendency to “give religious land uses favored treatment,” and suggested that it may in fact “be *too* friendly to religious land uses, unduly limiting municipal regulation and maybe even violating the First Amendment’s prohibition against establishment of religion.”¹⁷² All this led to the Seventh Circuit’s rejection of *Surfside*’s initial plain language test regarding “assembly or institution.” But the court also rejected what Posner called the strict scrutiny “gloss” of *Surfside*, saying that it had “no textual basis” in RLUIPA and that it “was needed only to solve a problem of the court’s own creation”—the overprotection of religious entities in land use law.¹⁷³

Regarding the Third Circuit *Lighthouse* test, Posner indicated that it “imperfectly realized” the true aim of the Equal Terms Provision.¹⁷⁴ What troubled the Seventh Circuit was the fact that using the regulatory purpose of a zoning code or land use law would:

invite[] speculation concerning the reason behind exclusion of churches; invite[] self-serving testimony by zoning officials and hired expert witnesses; facilitate[] zoning classifications thinly disguised as neutral but actually systematically unfavorable to churches . . . and make[] the meaning of “equal terms” in a federal statute depend on the intentions of local government officials.¹⁷⁵

In an effort to remedy the problems described above, the Seventh Circuit suggested that instead of using “regulatory *purpose*,” courts should focus instead on comparing assemblies and institutions on the basis of “accepted zoning *criteria*.”¹⁷⁶ Posner suggested this modification on the basis of an attempt to properly understand the idea of equality:

“[E]quality,” except when used of mathematical or scientific relations, signifies not equivalence or identity but proper relation to relevant concerns. It would not promote equality to require that all men wear shirts that have 15-inch collars, or that the number of churches in a state equal the number of casinos, or that all workers should have the same wages. But it does promote equality to require equal pay for equal work, even though workers differ in a variety of respects, such as race and sex. If a

170. *Id.* at 368.

171. *Id.* at 368–71.

172. *Id.* at 369–70 (emphasis in original).

173. *Id.* at 370–71.

174. *Id.* at 371.

175. *Id.*

176. *Id.* (emphasis in original).

church and a community center, though different in many respects, do not differ with respect to any accepted zoning criterion, then an ordinance that allows one and forbids the other denies equality and violates the equal-terms provision.¹⁷⁷

In applying this standard, the Seventh Circuit concluded that the Hazel Crest zoning code did not violate RLUIPA; the creation of an exclusively commercial zone would reasonably enhance the “general welfare of the public” and churches were equally excluded from the zone along with other noncommercial assemblies.¹⁷⁸

Posner also addressed concerns that cities would use “commercial” exclusion to create purely secular districts, saying, for example, that churches would be similar enough to movie theaters to require that those uses be included or excluded together.¹⁷⁹ In addition, the opinion also indicated that in future decisions, discretionary actions, such as variances and special use permits, may require closer scrutiny.¹⁸⁰ The court also included dicta stating that if a government “create[s] what purports to be a pure commercial district and then allow[s] other uses, a church would have an easy victory if the [government] kept it out.”¹⁸¹

The decision included several concurrences by other judges in the panel, mostly affirming the same points made by Posner, but also suggesting a closer conformance to the original *Lighthouse* test¹⁸² and expressing concern over the idea that the *Surfside* test might be too friendly to religious entities.¹⁸³ Finally, a lengthy dissent by Judge Sykes argued for continued adherence to the *Surfside* test, and questioned the effect of the decision on the previous Seventh Circuit Equal Terms cases, *Digrugilliers* and *Vision Church*.¹⁸⁴ Most notably, Judge Sykes believed that the new formulation based on “accepted zoning criteria” would “doom[] most, if not all, equal-terms claims.”¹⁸⁵ He attacked Posner’s new approach saying:

Zoning authorities will have little difficulty articulating their objectives in such a way as to prevent an excluded religious assembly from identifying a better-treated nonreligious secular comparator that has an equivalent negative effect on either the

177. *Id.* at 371. This language would later be echoed in *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1172 (9th Cir. 2011).

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

179. *Id.* at 373.

180. *Id.* at 374.

181. *Id.*

182. *Id.* at 374–75 (Cudahy, J., concurring), 376–77 (Williams, J., concurring). The judges ascribing to these concurrences generally agreed that using the *Lighthouse* test without modification would not usually result in undesirable consequences and would be simpler to apply.

183. *Id.* at 375–76 (Manion, J., concurring).

184. *Id.* at 385 (Sykes, J., dissenting).

185. *Id.* at 386.

“purpose” or the “criteria” of the challenged land-use regulation.¹⁸⁶

Sykes finished by analyzing how a consistent application of the *Surfside* test would result in protecting the plaintiff in the case before the court.¹⁸⁷

Overall, *River of Life* represents a modest departure from the *Lighthouse* test; the approach is unique enough to be different, but close enough to be considered in the same “family” of tests coming from the Third Circuit’s analysis. The Seventh Circuit has not revisited *River of Life* since the opinion was issued, though other circuits have critiqued and analyzed its reasoning and effects.

a. The *Digrugilliers* Dilemma

As previously mentioned, the Seventh Circuit encountered two major Equal Terms cases prior to *River of Life* in which the court applied the *Surfside* test.¹⁸⁸ *Digrugilliers* is an especially relevant case in the conflict between municipal development and RLUIPA.

The plaintiff was a Baptist pastor of a small congregation that was located in a zoning district that prohibited “religious use . . . without a zoning variance.”¹⁸⁹ In spite of this restriction on religious uses, the City of Indianapolis allowed, inter alia, “auditoriums, assembly halls, community centers . . . [and] civic clubs” to locate in the zone.¹⁹⁰ The plaintiff filed for a preliminary injunction which the district court denied because it found the RLUIPA suit had “negligible prospects of success.”¹⁹¹ One of the district court’s justifications for denial of the injunction was that “Indiana law forbid[] the sale of liquor within 200 feet of a church, or pornography within 500 feet.”¹⁹² In the lower court’s view, this interplay between the dry zone law and the church’s presence allowed the City to treat it on less-than-equal terms, because it affected the area differently than another use that did not generate the protective zone.¹⁹³

The denial was appealed to the Seventh Circuit, where Posner wrote the opinion for the court.¹⁹⁴ When focusing on the dry zone law argument, the opinion stated that “Government cannot, by granting churches special privileges (the right of a church to reside in a building in a nonresidential district or the right of a church to be free from offensive land uses in its vicinity), furnish the premise for excluding churches

186. *Id.*

187. *Id.* at 389–91.

188. *Digrugilliers v. Consol. City of Indianapolis*, 506 F.3d 612 (7th Cir. 2007); *Vision Church v. Village of Long Grove*, 468 F.3d 975 (7th Cir. 2006).

189. *Digrugilliers*, 506 F.3d at 614.

190. *Id.* at 614–15.

191. *Id.* at 614.

192. *Id.* at 616.

193. *Id.*

194. *Id.* Note, this mindset resurfaced in *River of Life*, where Posner suggested that the *Surfside* test may have been too friendly to religion and close to violating the Establishment Clause.

dressed this problem directly, the question of how *River of Life* would handle dry zone laws is still unresolved.

If *Digrugilliers* is going to remain relevant in protecting religious organizations, it must either stand for a separate and idiosyncratic rule (e.g., “governments cannot use dry zone laws as an excuse for less-than-equal treatment”), or its principles must be integrated into whichever Equal Terms test best addresses the dry zone law problem.

2. The Second Circuit *Third Church* Test

In 2010 the Second Circuit decided *Third Church of Christ, Scientist v. City of New York* which muddied the waters of Equal Terms Provision interpretation further.²⁰⁰ The Second Circuit test determines whether a religious assembly or institution is similarly situated based on “all functional intents and purposes.”²⁰¹ This catch-all test arose out of an attempt to avoid choosing between then-existing tests. Although similar to the *River of Life* test, it relies more heavily on judicial definition of important considerations rather than on criteria enumerated in zoning ordinances. What exactly constitutes a “functional intent or purpose” is most likely defined by the trial judge in each Equal Terms case.

In *Third Church*, the City of New York revoked an accessory use permit issued to the plaintiff organization for engaging in catering activities beyond simply an accessory use.²⁰² In response, the organization sued under the Equal Terms provision.²⁰³ Unlike prior equal terms cases, the church produced evidence of nonreligious entities engaging in similar land use activities.²⁰⁴ A hotel and an apartment building had the same accessory use permits, but also ostensibly operated catering services beyond simple accessory use.²⁰⁵ Yet the City had not revoked their permits.²⁰⁶ Consequently, the district court issued a permanent injunction preventing revocation of the church’s accessory use permit, and the city appealed.²⁰⁷

The Second Circuit noted that different approaches to the Equal Terms provision existed, but declined to expressly adopt *Surfside*, *Lighthouse*, or *River of Life*.²⁰⁸ Instead, the court settled on a unique approach, saying that “it suffice[d] . . . that the district court concluded that the [plaintiff]’s and the hotels’ catering activities were similarly situated with regard to their legality under New York City law.”²⁰⁹ The court also explained its idea of the goals and purposes of the Equal

200. *Third Church of Christ, Scientist v. City of N.Y.*, 626 F.3d 667 (2d Cir. 2010).

201. *Id.* at 668.

202. *Id.* at 668.

203. *Id.* at 669.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* “The differences in the mechanism for selecting an appropriate secular comparator that these cases present need not concern us today.” *Id.* at 670.

209. *Id.*

Terms Provision: “RLUIPA . . . is less concerned with whether formal differences may be found between religious and non-religious institutions—they almost always can—than with whether, in practical terms, secular and religious institutions are treated equally.”²¹⁰ Judge Calebrese, in the opening of the opinion, stated that “the institutions [plaintiff church and the hotels] are similarly situated for all functional intents and purposes relevant here.”²¹¹

It is difficult to glean a particular standard from the court’s statements. Even within the opinion there does not seem to be a definitive description of the approach, most likely because the Second Circuit was trying to avoid choosing among multiple tests. Essentially, though, the Second Circuit espoused an approach granting wide discretion to courts under the *Third Church* standard. When using the “all functional intents and purposes” language, each court has the ability in the context to decide what those are and to react accordingly.²¹² In contrast to the *River of Life* standard, courts would not need to consult the applicable zoning code and other land use regulations to find specific acceptable zoning criteria. The Second Circuit reasoned that RLUIPA is more concerned about the practical “on the ground” effects of land use regulations on religious organizations, so the judiciary should be free to liberally apply the protections afforded therein. These rationales explain why the *Third Church* test is so nebulous: It envisions the Equal Terms provision as compatible with a direct application to the facts of the case, needing no intermediate analysis by courts.

3. The Tenth Circuit *Rocky Mountain* Approach

Perhaps the simplest approach has been to hand the question wholesale to juries and let them decide the issue. The Tenth Circuit Court of Appeals decided to take this avenue in *Rocky Mountain Christian Church v. Board of County Commissioners*.²¹³ There, the county government had denied a special use application to expand a portion of the Rocky Mountain Christian Church’s operations, adding increased capacity at their facility.²¹⁴ The district court handled the matter by substantially copying and pasting the Equal Terms Provision as a jury instruction, asking the jurors whether the county had treated the church “less favorably in processing, determining, and deciding the 2004

210. *Id.* at 671.

211. *Id.* at 668. This language was later seized upon by the Fifth Circuit to describe the *Third Church* test. *See* *Elijah Group, Inc. v. City of Leon Valley*, 643 F.3d 419 (5th Cir. 2011).

212. *Third Church*, 626 F.3d at 668.

213. *Rocky Mtn. Christian Church v. Bd. of Cnty. Comm’rs*, 613 F.3d 1229 (10th Cir. 2010), *cert. denied*, 131 S.Ct. 978 (2011).

214. *Id.* at 1233–35.

special use application of the [RMCC] than [the County] treated a similarly situated nonreligious assembly or institution.”²¹⁵

On appeal, the county had argued that insufficient evidence had been presented for the jury to find an Equal Terms violation.²¹⁶ In the trial below, the plaintiff church had been compared to a nearby educational institution known as the Dawson School, which had been allowed to proceed with its own expansion.²¹⁷ The Tenth Circuit panel concluded that, “[a]lthough the two proposed expansions were not identical, the many substantial similarities allow for a reasonable jury to conclude that RMCC and Dawson School were similarly situated.”²¹⁸

Ultimately, the Tenth Circuit avoided choosing an analytical judicial test, and decided that a jury was able and entitled to decide the matter given the proper showing of evidence at trial. Such an estimation of jury competence is another approach, but one that does not strongly factor into how Equal Terms should be construed by federal courts. Leaving this determination to the “black box” jury process would likely engender too much uncertainty and lack the uniformity desired for First Amendment rights. Furthermore, in the absence of a jury, reliance on simple discretion of trial judges would lead to the application of the *Elijah Group* decision, explained below.

4. The Fifth Circuit *Opulent Life Church* Test

The Fifth Circuit initially refused to take any strong stance on the proper test for the Equal Terms Provision but later delineated an approach that explicitly hybridized the “regulatory purpose” and “zoning criteria.”

In *Elijah Group, Inc. v. City of Leon Valley, Tex.* the Fifth Circuit determined that a municipality had violated the Equal Terms Provision by discriminating in its zoning procedures.²¹⁹ The plaintiff church sued the City of Leon Valley after the municipality obtained a temporary restraining order prohibiting the use of property in a business district for religious activities (but allowing “nonreligious activities” to be conducted there).²²⁰ The plaintiff challenged the validity of the zoning ordinance, which excluded churches from a “retail corridor” designed to “stimulat[e] the local economy.”²²¹ Previously, churches had been allowed to apply for a special use permit (SUP) in the zone where they desired to locate in the immediate instance.²²²

The court began its analysis by noting its initial interpretation of the Equal Terms Provision: “When we focus on the text of the Clause,

215. *Id.* at 1236.

216. *Id.*

217. *Id.*

218. *Id.* at 1237.

219. *Elijah Group*, 643 F.3d 419.

220. *Id.* at 421.

221. *Id.*

222. *Id.*

we read it as prohibiting government from ‘imposing,’ i.e., enacting, a facially discriminatory ordinance or ‘implementing, i.e., enforcing a facially neutral ordinance in a discriminatory manner.’²²³ The judges determined that the plaintiff was bringing a facial challenge to the zoning ordinance and then embarked on a survey of the circuit tests available up to that point.²²⁴ Unfortunately, the Fifth Circuit decided not to expressly adopt any of the previous circuit tests, instead opting to specifically *deny* adoption of any of them.²²⁵

If the Fifth Circuit did not adopt any of the previous tests, what did it apply? Essentially, the court decided that Leon Valley’s ordinance violated the Equal Terms provision because it did not afford the same administrative or procedural options available to secular institutions. The court suggested that the “‘less than equal terms’ must be measured by the ordinance itself and the criteria by which it treats institutions differently.”²²⁶ It applied this concept by saying that the ordinance was

invalid because it prohibit[ed] the [plaintiff] Church from even applying for a SUP when, e.g., a nonreligious private club may apply for a SUP despite the obvious conclusion that the Church and a private club must be treated the same, i.e., on ‘equal terms’ by the ordinance, given the similar [zoning classification] of each.²²⁷

As close as this analysis looked to the *River of Life* or *Lighthouse* tests, the Fifth Circuit specifically took pains to not choose sides.²²⁸ Earlier in the opinion it pointed out that the Second Circuit had created its own separate test in *Third Church* because it had “attempted to avoid choosing among the other . . . tests.”²²⁹ Ironically, *Elijah Group* did the same thing. Fortunately, the Fifth Circuit issued a later opinion explicitly outlining a two-part test for Equal Terms cases.

In *Opulent Life Church v. City of Holly Springs Mississippi*, the Fifth Circuit vacated a lower court’s decision to deny a preliminary injunction preventing the City of Holly Springs from enforcing its zoning code.²³⁰ Opulent Life Church had negotiated a lease of property on the Holly Springs courthouse square but could not occupy the premises until it gained zoning approval from the city.²³¹ Holly Springs denied Opulent Life’s applications for a renovation permit on the basis of its zoning

223. *Id.* at 422.

224. *Id.*

225. *Id.* at 424, 424 n.19 (“This analysis should not be interpreted as necessarily adopting any of the tests heretofore adopted by the other circuits.”).

226. *Id.* at 424.

227. *Id.* (footnote 19 omitted from the end of excerpt).

228. *See supra* text accompanying note 225.

229. *Id.* at 423.

230. *Opulent Life Church v. City of Holly Springs Miss.*, No. 12-60052, 2012 U.S. App. LEXIS 20283, at *2–3 (5th Cir. Sept. 27, 2012).

231. *Id.* at *2.

code, which imposed special restrictions applying only to churches.²³² The church filed suit and requested a preliminary injunction to enjoin enforcement of the zoning code, a request that the district court denied.²³³

On the eve of oral argument before the Fifth Circuit, the City of Holly Springs amended its zoning code to exclude *all* religious facilities from the courthouse square district.²³⁴ The Fifth Circuit denied the city's arguments that the matter was moot and lacked ripeness.²³⁵ Moving on to the merits of the preliminary injunction, the court addressed the likelihood of Opulent Life's success on the merits of the lawsuit.²³⁶ Opulent Life primarily relied on the Equal Terms Provision to make its claim against the city, and the Fifth Circuit limited its discussion to that issue.²³⁷

After reviewing RLUIPA and the circuit split, the court once again refused to take sides among the different circuit tests, as it had in *Elijah Group*.²³⁸ But unlike *Elijah Group*, *Opulent Life* delineated a two-part test for Equal Terms Provision analysis:

[A court] must determine: (1) the regulatory purpose or zoning criterion behind the regulation at issue, as stated explicitly in the text of the ordinance or regulation; and (2) whether the religious assembly or institution is treated as well as every other nonreligious assembly or institution that is "similarly situated" with respect to the stated purpose or criterion.²³⁹

The test described in this passage is an explicit hybridization of the "regulatory purpose" and "zoning criteria" tests. While the Fifth Circuit avoids choosing between the tests, it uses components from both of them. Holly Springs admitted at oral argument that the prior ordinance violated the Equal Terms Provision.²⁴⁰ With respect to the new ban on all religious facilities, the court determined that Holly Springs had yet to put forward any purpose or criterion for the ordinance because of the procedural posture of the case.²⁴¹

It remains unclear under this explicit hybrid test whether a government needs to satisfy both a regulatory purpose inquiry and a zoning criteria inquiry. While the test has been clearly articulated by the Fifth Circuit, it has yet to be applied. What is clear is that the Fifth Circuit is

232. *Id.* at *5–7 (among other requirements, the zoning code indicated that churches would only be permitted where 60% of the property owners within 1300 feet, along with the mayor and board of aldermen approved the use).

233. *Id.* at *8–9.

234. *Id.* at *9–11.

235. *Id.* at *11–20.

236. *Id.* at *22.

237. *Id.*

238. *Id.* at *32 n.13.

239. *Id.* at *32.

240. *Id.* at *33.

241. *Id.* at *36–39.

concerned about strict adherence to textual evidence of what the regulatory purpose or zoning criteria are.²⁴² This recent case places the Fifth Circuit in the same category as the Ninth Circuit; both circuits hybridize the “regulatory purpose” and “zoning criteria” tests. Where the Fifth Circuit did so explicitly in *Opulent Life*, the Ninth Circuit did so implicitly in *Centro Familiar*.

5. The Ninth Circuit *Centro Familiar* Test

The Ninth Circuit faced its own opportunity to address the Equal Terms Provision in 2011. *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma* presented the Ninth Circuit with a situation similar to *Digrugilliers* and *Lighthouse*: The city zoning and planning commission denied the plaintiff church a conditional use permit to practice religious activities in a former retail space in Old Town District.²⁴³ The city’s zoning ordinance prevented religious institutions from locating in the downtown corridor (designed to be a high impact revenue zone) because, among other things, the city argued that the churches affected the area differently than other institutions.²⁴⁴ This was because a state statute created a dry zone around churches, preventing the licensing of alcohol establishments within three hundred feet of the institution.²⁴⁵ Like the *Third Church* and *Elijah Group* courts, the Ninth Circuit also developed a unique approach to handle the Equal Terms Provision, resulting in a hybridization of the *Lighthouse* and *River of Life* approaches.

To begin its analysis, the panel focused on the city ordinance itself, which stated that “[m]embership organizations (except religious organizations . . .)” could operate in the Old Town District without needing to apply for a conditional use permit.²⁴⁶ The court noted on the other hand that “[a]uditoriums, performing art centers, and . . . even jails and prisons may operate” in the same district as of right.²⁴⁷ After narrowing its focus to the Equal Terms Provision, the court pointed out several inconsistencies with the city’s justifications for the facial exclusion of religious organizations. It pointed out that correctional facilities and multiple family dwellings would create the same “dead block” effect as churches allegedly would under the City of Yuma’s argument, because prisons, apartment complexes, and churches would all depress the high revenue expectations and disrupt the plan for a vibrant entertainment

242. See *id.* at *30, 32 (“The ‘less than equal terms’ must be measured by the ordinance itself . . . regulatory purpose or zoning criterion . . . as stated explicitly in the ordinance or regulation . . .”) (emphasis supplied).

243. *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1165–67 (9th Cir. 2011).

244. *Id.* at 1166–67.

245. *Id.* The court noted that the dry zone statute had been amended by the State of Arizona in such a way to allow the City of Yuma to exempt institutions on a case-by-case basis near an entertainment district. See *id.* at 1167 n.10.

246. *Id.*

247. *Id.* at 1167.

district. But those uses were allowed as of right, where religious activities had to secure a conditional use permit.²⁴⁸ In other words, the court found the land use regulation to be underinclusive.

The court continued, stating that the facial distinction between religious and non-religious membership organizations had already supplied the plaintiffs with their prima facie case for an Equal Terms violation.²⁴⁹ The court then indicated that the government was shouldered with the burden of persuasion to show that there was no less-than-equal treatment, or that it was justified.²⁵⁰ Under RLUIPA, once the plaintiff presents its prima facie case, the burden of persuasion on all elements of the case shifts to the government, except for showing a substantial burden on religious practice.²⁵¹

The court first borrowed language from the *River of Life* decision, repeating Judge Posner's explanation that equality needed to relate to relevant concerns.²⁵² It concluded from this proposition that at least some disparate treatment could be justified. It continued by saying that the city could justify its distinction if it could "demonstrate that the less-than-equal-terms are on account of a legitimate regulatory purpose" consciously echoing the *Lighthouse* test.²⁵³ The court then added that a closer *River of Life* "accepted zoning criteria" inquiry may be appropriate to prevent evasion of the statutory standard by local governments but believed that it made "no practical difference in this case."²⁵⁴

The court saw the dry zone law as the only possibly valid justification for the disparate treatment and decided to analyze it as the city's defense of its facial discrimination.²⁵⁵ But the court rejected that defense for three reasons: (1) the language of the ordinance did not specifically link itself to uses which invoked the liquor dry zone, (2) the ordinance over broadly excluded religious uses that would not invoke the liquor dry zone, and (3) permitted uses as of right would have the same potentially blighting effect as the dry zone.²⁵⁶ Essentially, the court determined that because Yuma's code was not consistent with the purposes it asserted, it could not show a legitimate regulatory purpose for the kind of ban it enforced.

Ultimately the Ninth Circuit created a new hybrid method of analysis, one that mixed the facial and as-applied inquiry of later Eleventh Circuit decisions with the Third and Seventh Circuit approaches. The analysis is a two-step process, applying two very similar standards to each possible violation. Thus, first a court would apply a *Lighthouse*

248. *Id.* at 1171.

249. *Id.*

250. *Id.*

251. 42 U.S.C. § 2000cc-2(b) (2006). Under the Equal Terms Provision, there is no textual requirement to show a substantial burden on religious practice, so the government bears the entire burden of persuasion once a prima facie case is established.

252. *Centro Familiar*, 651 F.3d at 1172.

253. *Id.*

254. *Id.* at 1173.

255. *Id.*

256. *Id.* at 1173–74.

“regulatory purpose” standard. If there are special reasons to do so, it would also apply a *River of Life* “acceptable zoning criteria” standard. However, the court was unclear exactly what situations would require a *River of Life* analysis, because it found the Third and Seventh Circuit approaches to be nearly identical in their reach and effect.²⁵⁷

The court in *Centro Familiar* determined that appealing to the dry zone law failed its initial scrutiny, probably because the differing treatment was poorly drafted into the city code. The separate treatment of religious organizations was quite obvious to the circuit court, and the land use laws of the local government seemed to treat religious organizations differently from non-religious ones across the board in each category. But not every violation of RLUIPA Equal Terms will be that blatant, and closer questions will likely present themselves over time.

D. Untangling the Judicial Threads

So far, the tests described above have been vying for acceptance and legitimacy amongst the many other questions to be answered by the Supreme Court about RLUIPA. Spectators should not hold their breath; the Court does not seem to be particularly eager to address the question of Equal Terms interpretation, having denied three separate filings for writ of certiorari.²⁵⁸ But with a circuit split this schizophrenic, the Court may find a pressing need to address the issue in a number of years.

For now, the issue of how to construe RLUIPA’s Equal Terms Provision remains open in the field of legal academia and public discussion. Considering the nature of the rights at stake, founded upon the First Amendment Free Exercise Clause, it is vital that they be explained in a uniform manner across federal jurisdictions. While a majority of the tests agree on the use of a “similarly situated” analysis, exactly how to engineer that comparison is a point of contention. And there are still several circuits that have not weighed in on the question. Certainly those courts will be looking for further guidance when deciding whether to adopt an existing test or formulate their own.

V. FINDING THE BEST APPROACH

*“Meditation brings wisdom; lack of meditation leaves ignorance. Know well what leads you forward and what holds you back, and choose the path that leads to wisdom.”*²⁵⁹

257. *Id.* at 1173 n.46.

258. *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004), *cert. denied*, 543 U.S. 1146 (2005); *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253 (3d Cir. 2007), *cert. denied*, 553 U.S. 1065 (2008); *Rocky Mountain Christian Church v. Bd. of Cnty. Comm’rs*, 613 F.3d 1229 (10th Cir. 2010), *cert. denied*, 131 S.Ct. 978 (2011).

259. JULIEN R. FIELDING, *DISCOVERING WORLD RELIGIONS AT 24 FRAMES PER SECOND* 15 (2008) (traditional Buddhist proverb).

Religious assemblies and institutions generally face an uphill battle in securing property, a fact acknowledged by Congress in its remedial legislation. To make matters worse, they are experiencing discrimination from dry zone laws that were meant to protect them. In response to the problematic confluence of dry zone laws, city goals, and RLUIPA, the Seventh Circuit *River of Life* test appears to be best suited to solve the situation. *River of Life* would provide ample protection to religious entities using land, while allowing maneuvering room to cities in shaping their communities. More precisely, the *River of Life* test is superior to the other approaches in five areas.

First, *River of Life* has a sound basis in textual interpretation and logic. Second, it has greater potential for uniformity and ease of application. Third, it still provides flexibility of results among cases. Fourth, it sufficiently maximizes the effect and reach of RLUIPA. Finally, it demonstrates greater immunity against tampering and evasion by local governments.

Beyond these advantages, however, it is still possible to strengthen the focus of *River of Life* regarding dry zone laws in particular. The fact that the Seventh Circuit already addressed that concern directly in *Digrugilliers* is encouraging because it suggests that *River of Life* may already contemplate the danger posed by dry zone laws. But to fully integrate the *Digrugilliers* principle against perversion of dry zone laws, it is necessary to specify further, exactly what zoning criteria should be considered “acceptable.”

A. Good Vintage: The *River of Life* Advantage over Competing Approaches

*“For a bottle of good wine, like a good act, shines ever in the retrospect.”*²⁶⁰

The *River of Life* test is particularly well grounded among the circuit tests in terms of its basis in the text of RLUIPA and in logic. Its focus is eminently appropriate when related to the Equal Terms text: It zeroes in on the individual criteria by which a zoning or land use authority makes its decisions. This idea tracks closely with the language of RLUIPA, which is concerned with treating religious institutions on “equal terms.” The word “terms” suggests a specific set of individual items. In land use applications and permits, terms would aptly suggest the conditions that must be met for a conditional use permit to be granted. *River of Life* fits neatly into the idea of specific terms being equalized between secular and religious land uses; the acceptable zoning criteria are the terms that must be equal.

The logical foundation for *River of Life* is also strong. Posner’s explanation of equality regarding relevant concerns is correct. For things to be equal, they do not need to be the same in every aspect—only in

260. ROBERT LOUIS STEVENSON, *THE SILVERADO SQUATTERS* 47 (1884).

those aspects which are relevant. Thus, two persons could be equally strong, and that statement remains correct even if one is more intelligent than the other. In that equality, intelligence is an irrelevant aspect. In RLUIPA equality of terms, two organizations are equal if they would warrant the same treatment under acceptable zoning criteria. The irrelevant aspect of that analysis is the religious or secular nature of the two entities. In the way that local governments use them to distinguish religious institutions, the legal effect of dry zone laws becomes a surrogate for the religious nature of the entity in question. The previously irrelevant aspect has been made relevant in an inappropriate manner. Therefore, the dry zone effect should not be considered an acceptable zoning criterion in those cases.

The *River of Life* test also has better potential for uniform judicial application than the other approaches, while still allowing for flexibility in case outcomes. While the test does rely on acceptable zoning criteria, which may vary among local governments, those criteria are based on what each community finds to be acceptable limits on the use of land. The test is also easier to apply than other tests. Zoning criteria tend to be specifically enumerated in zoning ordinances, and more precisely defined than general regulatory purpose statements. That specific enumeration will assist courts in applying the test, since they will not have to generate their own points of scrutiny, but only have to rely upon the local criteria directly pulled from the zoning ordinance.

While *River of Life* demonstrates great potential for uniformity and ease of application, it also provides sufficient room for mixed outcomes. Arguably, the Equal Terms Provision would be too strong if it allowed religious entities to be placed wherever and however they wanted to be placed in a community. If religious entities could overpower local government intent on every occasion, they may be unfairly exempted from *all* land use controls. A good test will balance local government goals with the freedom of religion adherents and allow for flexibility in case results. The *River of Life* case itself ruled that the city could exclude a religious institution from a zone of the city: this is patent evidence that the test is not a one-way street. *River of Life* does place restrictions on land use authorities, but not to an unreasonable extent. It is balanced enough to contemplate both local economic goals and freedom of religious practice.

One of the most important advantages of the *River of Life* test is its ability to give the Equal Terms Provision an expanded original reading that conforms to the limitations set forth in *City of Boerne*. Unlike *Surfside*, the Seventh Circuit test does not shy away from producing a new standard for RLUIPA, a standard not tied to Supreme Court precedent alone. Under *River of Life*, courts are given the best power to review local land use decisions: the judiciary can directly analyze the facts that may or may not justify differential treatment and ensure that they are not used to discriminate against religion. The test does not restrict the

analysis to an extra-textual inquiry, and it carries the proper wary mindset toward local government regulations. This appropriately reflects congressional intent in creating RLUIPA, understanding that such an exercise is truly within its Fourteenth Amendment enforcement power.

Finally, *River of Life* provides ample protection against the intervention of local governments that would try to skew the analysis in their favor. This is because the test focuses not on the regulatory purpose or on the nebulous “functional intents and purposes” of the land use laws. Rather, it is grounded in the relatively stable and clear statements of zoning criteria in the zoning ordinance itself. Covert manipulation of land use equality is much more difficult to do with zoning criteria than with the regulatory purpose of a law. In addition, *River of Life* would scrutinize the criteria themselves, to make sure that they are, in fact, acceptable criteria, and not the result of local government caprice.

The Eleventh Circuit *Surfside* test fails to surpass the advantages of *River of Life* in several aspects. First, it has been open to criticism for its extra-textual importation of the strict scrutiny standard.²⁶¹ That is its major flaw, signaling that the test does not properly concern itself with a close interpretation of RLUIPA and congressional intent. Secondly, the Eleventh Circuit test is not nearly as flexible as *River of Life*; its low initial threshold for the plaintiff brings in many litigants but imposes strict scrutiny analysis on almost all of them. Theoretically, if strict scrutiny is properly applied, it will generate a very one-sided set of results, and possibly form a basis for practical immunity of religious entities from land use controls. Another possibility is that strict scrutiny would be diluted as a standard of analysis, because courts would avoid trying to create such one-sided effects. The weakening of strict scrutiny would not be in the interest of any party that is currently protected by its mandates. Finally, *Surfside* is analytically clumsy, acting like a patchwork of single rules rather than a cohesive singular concept. With differences between the initial threshold for facial and as-applied cases, along with the protracted strict scrutiny analysis afterward, *Surfside* simply has too many moving parts.

Lighthouse is perhaps a closer competitor to *River of Life*, but its main fault persists in the fact that it cannot protect against local government “tampering” as well as the Seventh Circuit’s approach can. By relying on the regulatory purpose of a land use law, the courts must engage in an uncertain determination of what the local governments want, rather than looking at what Congress intended in RLUIPA. This shift of inquiry in essence allows local governments to set the rules and, if they so desire, win the case before it even begins. The result was aptly seen in the *Lighthouse* case itself, where the local government was allowed to place economic concerns in a position to override religious liberty. In addition, the textual and logical basis of the Third Circuit test is not geared toward the idea of “equal terms.” Instead, it militates more to-

261. See Foley, *supra* note 99, at 220; see also Campbell, *supra* note 95, at 1100.

As matters currently stand, the *River of Life* test shows the best potential to successfully address the dry zone law problem. The main question is what constitutes “accepted” zoning criteria: If this category does not include dry zone laws, then it provides adequate protection for religious entities because they will not be seen as different from nonreligious assemblies or institutions. However, if it does include dry zone laws, then *River of Life* does not provide much more protection than many of the tests.²⁶³

Instead of a wide interpretation of “accepted zoning criteria,” courts should adopt boundaries that properly exclude dry zone laws from being accepted criteria. Concerns over traffic, noise, pollution, building safety, and even certain aspects of economic development, can appropriately be factored into the decisions of local zoning and land use boards without discriminating against religious assemblies and institutions that are seeking to establish a place for religious activities. But the guiding principle of *Digrugilliers* should be incorporated into a fuller understanding of the *River of Life* test: Government cannot, by granting churches special privileges, furnish the premise for excluding churches from otherwise suitable districts. Laws establishing dry zones around religious assemblies and institutions should not be considered acceptable zoning criteria for three reasons.

First, dry zones have a tendency to become nothing more than a useful proxy for the religious nature of an assembly or institution. Second, the purpose of the dry zone laws is no longer consistent with social attitudes toward alcohol, and the laws have essentially become vestigial regulations that should not be given effect in this context. Lastly, religious assemblies and institutions should not be penalized for an attribute over which they have no control.

Dry zone laws have become a proxy for religious identity for two reasons: First, the dry zone laws were originally predicated on protecting religious entities and thus closely coincide with the same group. While schools and some other institutions may also be granted the same protection, religious institutions are the main focus of these laws. Second, dry zone laws are easy for cities to camouflage as economic concerns instead of ways to exclude religious organizations. A city will not say that a dry zone law is a proxy for religious identity, but rather that a religious entity will destroy the economic potential of the area. On those grounds, cities can slip by judicial scrutiny undetected.

The close proxy nature of dry zone laws makes them vulnerable to abuse. Courts should be wary, as the Seventh Circuit was in *River of Life*, when a city argues that religious entities were excluded because they did not represent the same kind of revenue stream as other uses. Such economic shorthand could easily be used to discriminate among different religious entities and become selective in the zoning process. That danger is amplified with a dry zone law because it has the indicia

263. The *Surfside* test may provide more protection in this case, but as discussed above, it comes at the cost of flexibility to local governments.

of legitimate government interests and incorporates both economic motivations with a proxy for religious identity. In sum, a dry zone law is the Trojan horse of religious land use discrimination, the problem RLUIPA seeks to eliminate.

Because dry zone laws no longer reflect a prevailing attitude toward the mixture of alcohol and religion, they should not be considered acceptable criteria to judge the similarity of religious assemblies and institutions to nonreligious assemblies and institutions. With the temperance movement largely in the past and moral neutrality toward alcohol the norm, the strict application of the dry zone laws is a peculiar phenomenon.

Dry zone laws presume that there is something inherently incompatible between religious institutions and the purveyance of alcohol. As we have seen, much of this presumption sprang from religious attitudes originally but transmuted into a paternalistic exercise of state governments. This change made religious entities powerless to decide their effect in the community. Because of that fact, religious assemblies and institutions should not suffer a protection that more often acts like a hindrance. Alternative methods of protection for religious, or nonreligious, assemblies and institutions do exist. If a church does find the use incompatible with its operations, it can sue on the basis of nuisance law, arguing that the bars and night clubs are utilizing the property in a way that harms the surrounding community.

It is also unfair to attribute a mandatory quality to a religious institution and then penalize it for exhibiting that quality. Since *Grendel's Den*, religious entities cannot rid themselves of the dry zone protections where they are given; such an effect becomes an immutable attribute as long as the entity identifies itself as religious. But an Equal Terms test which counts this immutable attribute against a religious assembly or institution fails to protect it from discrimination. Nonreligious assemblies and institutions do not face the same mandatory legal hurdle in their bid for a meeting place. This is the kind of unequal treatment that RLUIPA was meant to stop.

Digrugilliers is right: It would be unacceptable for a government to lavish a legal protection upon a religious entity, and then blithely use that same protection as an excuse to exclude that entity from certain parts of the community, while letting nonreligious entities come and go as they please. That contrary use of police power is obvious once it is unmasked. And that is why dry zone laws must not be allowed to pass by the judicial radar undetected.

Limiting the category of accepted zoning criteria to exclude dry zone laws is preferable because it protects religious assemblies and institutions in a manner consistent with RLUIPA's purpose. Ultimately, such a solution is more likely to reach the goal that Congress originally intended: preventing widespread religious discrimination in local land use laws.

C. Tying Up the Loose Ends: What Becomes of Dry Zone Laws?

“Simple does not mean easy.”

The final issue is how dry zone laws would fit into the judicial picture with an innovated *River of Life* test. There are several possibilities. First, dry zone laws may remain on the books but be unenforced in situations covered by the Equal Terms Provision. Second, the laws may not be enforced at all and yet still remain on the books as a dead letter. Third, the laws may be repealed or struck down after they are found to be improper bases for zoning criteria under the Equal Terms Provision. Lastly, they may remain enforced and local governments may simply have to work around their prohibitions on the mixture of religious land uses and alcohol-serving establishments.

Considering the principle of federal preemption, the non-enforcement of dry zone laws under the Equal Terms Provision is an acceptable solution. Dry zone laws do not always pose the problem that they do when a church attempts to enter a zone where nonreligious assemblies and institutions are allowed. They could still, in fact, keep a bar or nightclub away from an already existing religious use without violating the Equal Terms Provision. These circumstances can be distinguished from the problematic *Centro Familiar* instances by the fact that local governments would be considering the application of the bar or nightclub, not the religious entity. So a dry zone law can still work *for* a religious assembly or institution, just not *against* it.

Given that the unequal effect of the above solution may experience an Establishment Clause challenge, a cleaner solution may be to stop enforcement of the dry zone law altogether. As a prelude to repeal, this strategy would work well. But as an indefinite state of dead letter law, this approach would suffer complications when a religious entity would seek to invoke the protection. Such a selective method of enforcement, only when the religious entity requests the protection, would likely violate the principles of *Grendel's Den*. And to refuse to enforce the law completely would be unseemly because it would run counter to the concept of rule of law.

A better plan would be to repeal the dry zone laws completely; such an approach would essentially eliminate the root cause of the problem and prevent cases like *Centro Familiar* from cropping up again. But this preventative tool is not available to local governments in all circumstances because many dry zone laws are state statutes, not local ordinances. Local governments would have no guarantee that they could successfully petition for a repeal of the dry zone laws. Where the state refuses to repeal the law, local governments will have to find alternative solutions to the problem.

These alternative solutions do exist, though cities may have to be creative. The important goal, however, is to craft solutions that fit with the Equal Terms Provision of RLUIPA. One way would be to eliminate the separate identity of churches from zoning codes, and make all as-

the original intent of the dry zone laws because they cannot understand or relate to their original purpose.

Finding a place of worship, or meditation, or other spiritual encouragement has become increasingly difficult—churches can find themselves relegated to the edge of town, hidden in an obscure corner of the community. This situation arises from the supposed “protection” of the old dry zone laws. And it is entirely unsatisfactory to say that they are stuck with it because of the government’s decisions over the years. Such responses shake confidence in the First Amendment’s meaning for all American citizens.

The better path is to understand how courts can fill the gaps and remain faithful to the laws designed to protect religious liberty. This does not require freezing economic development in hurting cities, but current policy must be tempered by the understanding that money is not the only factor to play into the regulation of land. Courts would do well to apply the *River of Life* test and interpret it to preclude the discriminatory use of dry zone laws. In this way they can uphold the values of RLUIPA, land use authority, and the First Amendment itself.

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APPENDIX A

