The Religious Land Use and Institutionalized Persons Act: An Analysis under the Commerce Clause

Evan M. Shapior
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Evan M. Shapiro

Abstract: Congress based the Religious Land Use and Institutionalized Persons Act (RLUIPA) on accumulated evidence suggesting that the land use decisions of local governments unfairly burden religious uses. The RLUIPA is narrower in scope than two previous statutes aimed at protecting religious liberty. The United States Supreme Court held the first of these religious liberty statutes unconstitutional, and Congress failed to enact the other. This Comment examines the constitutionality of the RLUIPA under the Commerce Clause and argues that Congress exceeded its Commerce Clause authority because (1) land use regulation does not constitute "economic activity" as defined by the United States Supreme Court in United States v. Lopez and United States v. Morrison and (2) land use regulation is insufficiently connected to interstate commerce.

Congress has recognized that religious institutions are often overly burdened by local land use decisions. For example, a local ordinance might limit the size of houses of worship in commercial or residential zones. Congress determined that such zoning laws often facially discriminate against religion, and that zoning boards may apply neutral zoning laws discriminatorily. As a remedy, Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA), in part, to protect religious institutions from local governments' land use decisions. The RLUIPA prohibits local governments from substantially burdening religion with their land use determinations unless the local regulation furthers a compelling government interest and is the least restrictive means to accomplish that interest.

Congress's authority to enact legislation is limited and must be based on a constitutionally granted power. Congress based its authority to

3. 42 U.S.C. §§ 2000cc to cc-5 (2000). The RLUIPA also protects institutionalized persons' right to freely exercise their religion. See id. However, this Comment discusses only the land use portion of the law.
4. Id. § 2000cc(a)(1).
enact the RLUIPA on several constitutional provisions,\(^6\) including the Commerce Clause.\(^7\) The Commerce Clause grants Congress the power to regulate commerce among the states.\(^8\) Although the Supreme Court has struck down previous legislation aimed at protecting religious liberty,\(^9\) the RLUIPA is much more limited in scope.\(^10\)

This Comment argues that Congress unconstitutionally exceeded its Commerce Clause power by enacting the land use portion of the RLUIPA.\(^11\) Congress has authority under the Commerce Clause to regulate those activities that are economic in nature and that substantially affect interstate commerce.\(^12\) The regulated activity at issue in the RLUIPA is land use regulation, which does not constitute "economic activity" as recently defined by the Court.\(^13\) When enacting the RLUIPA, Congress additionally failed to satisfy the elements the Court has set forth to ensure that the regulated activity has substantial effects on interstate commerce.\(^14\)

Part I of this Comment discusses the relationship between land use and religion, and explains local governments' justifications for excluding religious uses from certain zones. Part II details the provisions of the RLUIPA, its legislative history, and previous statutes. Part III describes the U.S. Supreme Court's past and current interpretations of Congress's Commerce Clause power. Part IV argues that Congress exceeded its authority in enacting the RLUIPA because land use regulation does not

\(^7\) Id.
\(^8\) U.S. CONST. art. I, § 8, cl. 3.
\(^11\) Although this Comment contends that Congress did not have authority to enact the RLUIPA under its Commerce Clause power, Congress supported the RLUIPA through other constitutional powers such as the Spending Clause and Section Five of the Fourteenth Amendment. 146 CONG. REC. S7774 (exhibit 1). Thus, even if, as argued in this Comment, Congress unconstitutionally exceeded its Commerce Clause powers, the statute may be deemed constitutional under these other powers. However, such an analysis is beyond the scope of this Comment.
\(^13\) See infra Part IV.A.
\(^14\) See infra Part IV.B
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relate to an economic endeavor or commercial transaction and is insufficiently connected to interstate commerce.

I. LAND USE REGULATION AND RELIGION: THE NATURE OF THE PROBLEM

Local governments historically have based their land use decisions on considerations such as public safety, aesthetics, and economics. Religious uses often conflict with these concerns. In fact, courts have often upheld local governments’ justifications for excluding religious uses in both residential and industrial zones. To prevent exclusion of religious uses, Congress promulgated the RLUIPA to regulate local governments’ land use determinations.

A. The Nature of Land Use Regulation

The growth of land use regulation across the country was spurred by concerns of public safety and aesthetics. In 1922, the United States Department of Commerce promulgated the Standard State Zoning Enabling Act (SZEA). The SZEA authorized municipalities to establish zoning districts in which compatible uses are grouped together and incompatible ones are excluded. Section Three of the SZEA sets out the purposes of zoning: to ensure safety from fire and other dangers, provide adequate air and light, lessen street congestion, promote health and general welfare, regulate land use intensity and population density, and


facilitate public services. Additionally, a local government should regulate with reasonable consideration of the district’s characteristics and with the aim of preserving the value of buildings.

The United States Supreme Court has recognized the beneficial purposes of zoning systems. In Village of Euclid v. Ambler Realty Co., the Court upheld segregation of residential, business, and industrial uses. The Court expressed that the benefits of zoning include an increase in the safety and security of home life, fewer street accidents due to reduced traffic, lower noise levels in residential neighborhoods, and a better environment in which to raise children.

The Court continues to affirm the validity of zoning regulations based on the rationale expressed in Euclid. For example, in Village of Belle Terre v. Boraas, the Court upheld a zoning ordinance limiting the occupancy of single-family houses to traditional families or to groups including only two unrelated persons. The Court stated that government may create zones for the purpose of providing families and youth with secluded, clean areas of sanctuary.

B. Justifications for Land Use Regulation of Religious Uses

Courts have upheld local governments’ decisions to exclude religious uses from both residential and industrial zones. These cases illustrate the nature and purpose of land use determinations. For residential areas, zoning ordinances and decisions are often based on aesthetic, nuisance-

25. See id. at 397; MANDELKER, supra note 15, § 2.40, at 56.
29. Id. at 8–10.
30. Id. at 9.
31. See supra note 16. Exclusion of religious uses from entire zones raises First Amendment issues, a discussion of which is outside the scope of this Comment.
type, and property-value concerns. In commercial and industrial areas, economic considerations may impact zoning ordinances and decisions.

1. Residential Areas

Reasons for excluding religious uses from residential zones mirror some of the purposes of land use regulation expressed in the SZEA. Perceived detrimental effects of religious uses on municipal services, property values, and traffic congestion often explain local governments’ decisions. In *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville*, the California Court of Appeals held that a land use ordinance excluding religious uses from residential zones based on factors such as potential noise, traffic, and parking problems constituted a proper exercise of a city’s zoning power. Likewise, the local government in *Seward Chapel, Inc. v. City of Seward* was justified in implementing an ordinance excluding religious schools from residential zones based on concerns of excess traffic, noise, and other nuisances.

Local ordinances dedicated to preserving landmarks with historical or architectural value also may conflict with religious uses. Historical preservation laws prohibit demolition of historic buildings and require a certain level of maintenance. The United States Supreme Court’s recent decisions indicate that historical preservation laws do not violate the Free


34. See, e.g., Lakewood Congregation, 699 F.2d at 305, 308; Seward Chapel, 655 P.2d at 1297–99; Porterville, 203 P.2d at 825; Lutheran High School Ass’n, 381 N.W.2d at 419, 421.

35. MANDELKER, supra note 15, § 5.58, at 187.

36. 203 P.2d 823 (6th Cir. 1983).

37. *Id.* at 825.

38. 655 P.2d 1293 (Alaska 1982).

39. *Id.* at 1297–99.

40. MANDELKER, supra note 15, § 11.24, at 462.
Exercise Clause. Courts have held that local governments are justified both in excluding new churches from residential zones and in preventing renovations of historical church buildings already located in such zones.

2. Commercial and Industrial Zones

In industrial and commercial areas, safety and aesthetic concerns may be secondary to economic considerations. For example, in City of Chicago Heights v. Living Word Outreach Full Gospel Church and Ministries, Inc., the local government adopted a city ordinance that required religious institutions to apply for a special use permit to locate a house of worship in a commercial zone. An Illinois Court of Appeals accepted the city's rationale for adopting the ordinance, which was intended to reinvigorate falling revenues and provide a stable tax base, and denying the special use permit. The court stated that the city's effort to designate certain areas for commercial activity encouraged economic growth and stability.

41. See MANDELKER, supra note 15, § 11.35, at 471-72. Recently, the Court denied certiorari in Rector, Wardens & Members of Vestry of St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990), cert. denied, 499 U.S. 905 (1991), where the issue was whether a New York City ordinance could prevent a church from replacing a church-owned building with an office tower. Id. at 350. The court of appeals held that the ordinance did not violate the Free Exercise Clause of the U.S. Constitution. Id. at 353-56. On the same day, the Supreme Court remanded a Washington State Supreme Court decision that held that a historical landmark law interfered with the practice of religion. First Covenant Church of Seattle v. City of Seattle, 114 Wash.2d 392, 787 P.2d 1352 (Wash. 1990), vacated and remanded, 499 U.S. 901 (1990).

42. See supra notes 37, 39, 41 and accompanying text.

43. See, e.g., Cornerstone Bible Church v. City of Hastings, 740 F. Supp. 654, 661 (D. Minn. 1990); City of Chi. Heights v. Living Word Outreach Full Gospel Church and Ministries, Inc., 707 N.E.2d 53, 59 (Ill. App. 1999), rev'd in part, 749 N.E.2d 916, 932 (Ill. 2001) (holding that denial of special use permit was improper because it conflicted with the zoning ordinance's legislative history stating that churches are compatible with other uses in the commercial district).


45. A special use permit is necessary in situations in which a zoning ordinance authorizes a particular use in a district only with the approval of a local zoning board or agency. DANIEL R. MANDELKER ET AL., PLANNING AND CONTROL OF LAND DEVELOPMENT 473 (4th ed. 1995).

46. City of Chicago Heights, 707 N.E.2d at 55.

47. Id. at 59. In addition to the ordinance's valid purpose of maintaining a stable economy within the industrial zone, the Court held that "public health, safety and morals are served by the ordinance." Id.

48. Id.
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A Federal District Court in Minnesota upheld a similar ordinance in Cornerstone Bible Church v. City of Hastings. The court validated an ordinance because its purpose was to allow the city to develop the downtown area commercially and set aside space for industrial uses, while preserving the quality of the residential areas. These cases illustrate that local governments’ purposes for excluding religious uses often include economic considerations as well as nuisance-type concerns.

C. Impact of Land Use Regulation on Religion

Local governments’ land use regulations impact both the construction of a religious facility in a zone and the use of a facility already located in a zone. In addition, religious uses may conflict with lot and building size regulations. This is particularly common when the religious institution desires to build a “megachurch” or construct several buildings in one location.

Land use regulation may result in the outright exclusion of religious uses from entire zones. Although churches that have been in residential communities prior to a zoning change would not be threatened by outright removal, new churches often are unable to locate in residential neighborhoods. In most states, local governments may not exclude churches from residential areas; however, at least one commentator has asserted that the actual effect of land use regulation is much less favorable than this general rule would suggest. Although most land use cases relate to religious uses in residential zones, more recent cases also

50. Id. at 661.
52. Id.
55. See Douglas Laycock, State RFRAs and Land Use Regulation, 32 U.C. DAVIS L. REV. 755, 763-64 (1999). "The actual experience of many churches is more in line with the hostile federal cases than with the more encouraging summaries of state zoning doctrine. ... Commentators writing from the land use perspective share my sense that the climate has changed and that churches now face less sympathetic regulation." Id. at 764 (internal citations omitted).
56. Id. at 763-64.
have involved religious uses in industrial and commercial zones.\textsuperscript{57} It is often a challenge to locate religious facilities in these zones as well.\textsuperscript{58}

Local government action that results in the outright exclusion of religious uses from a zone generally takes one of two forms: (1) the zoning code on its face excludes religious uses from certain zones or (2) zoning boards refuse to grant permits for religious uses.\textsuperscript{59} One expert claims that zoning codes, by design, frequently treat religious uses less favorably than secular uses.\textsuperscript{60} For example, a land use attorney’s survey of Chicago-area land use laws found evidence that Chicago’s zoning codes facially discriminate against religion.\textsuperscript{61} In several zoning codes, there was no place a church could locate within a suburb without a special use permit.\textsuperscript{62}

Furthermore, Congress has found evidence that zoning boards discriminate in their application of facially neutral zoning laws.\textsuperscript{63} Land use zoning boards have a significant amount of discretion in applying zoning laws.\textsuperscript{64} Congress has explained that discrimination against religious uses often “lurks behind such vague and universally applicable reasons as traffic, aesthetics, or ‘[inconsistency] with the city’s land use plan.’”\textsuperscript{65} The outright exclusion of religious uses from both residential and commercial zones often is due to zoning codes that facially exclude religious uses or a zoning board’s application of neutral laws.\textsuperscript{66}

\textsuperscript{57} \textit{Id.} at 761.
\textsuperscript{60} Laycock, \textit{supra} note 55, at 776.
\textsuperscript{62} Laycock, \textit{supra} note 55, at 773.
\textsuperscript{63} See H.R. REP. NO. 106-219, at 18; 146 CONG. REC. S7774 (exhibit 1).
\textsuperscript{64} Laycock, \textit{supra} note 55, at 764–65.
\textsuperscript{65} 146 CONG. REC. S7774 (exhibit 1).
\textsuperscript{66} See \textit{supra} notes 59–65 and accompanying text.
II. RECENT CONGRESSIONAL ATTEMPTS TO PROTECT RELIGIOUS LIBERTY

Since 1993, Congress has considered three bills that attempted to protect religious liberty. The first was the Religious Freedom and Restoration Act of 1993 (RFRA), which the U.S. Supreme Court held to be unconstitutional in 1997. The second, the Religious Liberty Protection Act of 1999 (RLPA), failed to pass in the Senate in 1999. Finally, in 2000, Congress enacted the RLUIPA, which is narrower in scope than the two previous acts, focusing only on local land use regulation and institutionalized persons.

A. The Religious Freedom Restoration Act: An Initial Attempt To Restore Protection to Religion

Congress passed the RFRA in 1993 in response to the Court’s decision in Employment Division v. Smith, which held that generally applicable laws that burdened religion were not subject to a strict scrutiny standard. Under a strict scrutiny standard, a government would be required to show a “compelling governmental interest” to justify zoning decisions that negatively impact religious uses. The RFRA was enacted to restore protection to religion by requiring that governments refrain from substantially burdening religion absent a compelling state interest. The U.S. Supreme Court in City of Boerne v. Flores struck down the RFRA, at least as it applied to state and local governments, by

72. See supra, note 10.
75. See Employment Div., 494 U.S. at 876–82; Conkle, supra note 74, at 637.
79. The Court did not address the validity of the RFRA with regard to federal laws and practices. Conkle, supra note 74, at 633 n.5.
holding that Congress exceeded its power under the Fourteenth Amendment. As a result, the rule in Smith persisted: generally applicable, religion-neutral state or local laws could burden religiously-motivated conduct without triggering heightened judicial scrutiny.

B. The Religious Liberty Protection Act: An Attempt To Pass Constitutional Muster with Additional Constitutional Authority

In response to the Court's holding that the RFRA was unconstitutional, some members of Congress attempted to adopt new legislation that would survive a constitutional challenge and protect religious liberty. The goal of the new legislation (RLPA) mirrored that of the RFRA, but the new act relied on additional constitutional authority. The Flores decision led Congress to believe that its ability to enact religious liberty bills was limited to its Spending Clause power, its Commerce Clause power, and its power to remedy states' constitutional violations under the Fourteenth Amendment. The drafters used all of these constitutional powers to justify their authority to enact and implement the RLPA.

The validity of the drafters' constitutional justifications was never tested because Congress failed to pass the RLPA, due in part to fears that

80. See Flores, 521 U.S. at 516-36. Section One of the Fourteenth Amendment states, in part, that

[U.S. CONST. amend. XIV, § 1. Section Five of the Fourteenth Amendment states that “Congress shall have power to enforce by appropriate legislation, the provisions of this article.” U.S. CONST. amend. XIV, § 5.

81. See Conkle, supra note 74, at 633.

82. During the 105th Congress, the Subcommittee on the Constitution held five hearings on the RLPA. Congress took no further action in 1998, but in the 106th Congress, the Subcommittee on the Constitution held a hearing and two markup sessions on the RLPA. H.R. REP. NO. 106-219, at 5 (1999).


85. Id. at 12.

86. Id. at 12-18.
its protection was too expansive.\textsuperscript{87} Many Senators were concerned that the RLPA could violate various citizens' civil rights.\textsuperscript{88} For example, one could foresee conflict between a state's interest in eliminating sexual discrimination and the freedom of religious institutions to adhere to practices of limiting eligibility for ordination into the clergy based on sex.\textsuperscript{89} Therefore, although the House of Representatives passed the RLPA overwhelmingly, it was never enacted into law.\textsuperscript{90}

C. The Religious Land Use and Institutionalized Persons Act: A Narrower Statute for Religious Protection

After the Senate rejected the RLPA, Congress focused on drafting a new statute that would provide much more limited protection to religion.\textsuperscript{91} The RLUIPA prohibits state and local governments from imposing land use regulations that substantially burden the religious exercise of a person or institution unless the government demonstrates that the regulation serves a compelling governmental interest and is the least restrictive means of furthering that interest.\textsuperscript{92}

Although the RLUIPA codifies the same strict scrutiny standard found in the RFRA and the RLPA, the RLUIPA has a more narrow scope. Whereas the RFRA and the RLPA applied to any state action that offended the free exercise of religion,\textsuperscript{93} the RLUIPA only addresses burdens imposed on religion through land use decisions and through regulation of persons housed in state institutions.\textsuperscript{94} Thus, Congress minimized potential conflicts with some civil rights.\textsuperscript{95} The American Civil Liberties Union and other groups who had expressed concerns about the RLPA's impact on civil rights supported the RLUIPA.\textsuperscript{96}

\begin{thebibliography}{96}
\bibitem{89} See \textit{id.} at 14.
\bibitem{92} Id. § 2000cc(a)(1).
\bibitem{94} Id. §§ 2000cc to cc-5.
\end{thebibliography}
1. **RLUIPA's Purpose: To Protect the Right To Gather and Worship**

The land use provision of the RLUIPA is intended to protect the right to "gather and worship." Although the legislative history behind the RLUIPA is limited because it passed both houses without committee action, speeches in both the House and the Senate provide some background. Senators Hatch and Kennedy indicated that the RLUIPA targets land use regulation because local land use decisions frequently burden religious liberty. As justification for the RLUIPA's land use provision, Senators Hatch and Kennedy referred to evidence showing that zoning codes facially discriminate against churches and that zoning boards frequently apply neutral regulations in a discriminatory manner.

2. **Congress's Constitutional Authority for Enacting the RLUIPA**

Legislative history and the express language of the statute reveal Congress's determination that it had the constitutional authority to enact the RLUIPA based in part on the Commerce Clause. Under the Commerce Clause, Congress can "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The RLUIPA states that the statute applies in any case in which "the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with the Indian Tribes." The substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with

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100. 146 CONG. REC. S7774–95 (exhibit 1).

101. 146 CONG. REC. S7774–75 (exhibit 1). Support for this conclusion took the form of anecdotes and statistics from national surveys, summarized in the report of the House Committee on the Judiciary regarding the RLPA. H.R. REP. 106-219, at 18–24 (1999); see also Issues Relating to Religious Liberty Protection, and Focusing on the Constitutionality of a Religious Protection Measure: Hearing Before the Senate Committee on the Judiciary, 106th Cong. 72-101 (1999) (statement of Douglas Laycock, Alice McKean Young Regents Chair in Law, University of Texas School of Law); Laycock, supra note 55, at 769–83.


103. U.S. CONST. art. I, § 8, cl. 3.
Indian tribes, even if the burden results from a rule of general applicability.\textsuperscript{104}

Congress determined that land use regulations that burden religion substantially affect interstate commerce,\textsuperscript{105} basing this finding primarily on the legislative history of the RLPA. Congress relied on Marc Stern's testimony to the House Subcommittee on the Constitution regarding the RLPA on June 16, 1998.\textsuperscript{106} His comments were aimed at demonstrating that religion, as a whole, is a major economic factor in the United States.\textsuperscript{107} In his written statement, he cited statistics regarding property controlled by religious institutions, noting that these institutions spent $6 billion in 1992 on capital improvements and construction.\textsuperscript{108} In New York and Wisconsin, the value of property controlled by religious institutions was $17.1 billion and $5 billion, respectively.\textsuperscript{109} He also opined, without citing statistics, that land use regulation limiting the ability of religious institutions to build or expand affects interstate movement of goods and services.\textsuperscript{110}

After two failed attempts to implement a broader religious freedom statute, Congress adopted the more narrow statute focused on local governments' land use regulation.\textsuperscript{111} One of the primary objectives of the RLUIPA is to prevent local governments from substantially burdening religion with their land use regulations.\textsuperscript{112} Congress asserted that it had the authority to adopt the RLUIPA based, in part, on the Commerce Clause because it believed land use regulation substantially affects interstate commerce.\textsuperscript{113}

\textsuperscript{106} Id. Mr. Stern, the Director of the Legal Department of the American Jewish Congress, provided oral testimony and a prepared written statement to the House Subcommittee. See Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcommittee on the Constitution of the Committee on the Judiciary, 105th Cong. 54–65 (1998) [hereinafter 1998 RLPA] (statement of Marc Stern, Director, Legal Department, American Jewish Congress).
\textsuperscript{107} 1998 RLPA, supra note 106, at 54–65.
\textsuperscript{108} 1998 RLPA, supra note 106, at 54–65.
\textsuperscript{109} 1998 RLPA, supra note 106, at 59.
\textsuperscript{110} 1998 RLPA, supra note 106, at 58.
\textsuperscript{112} Id. § 2000cc(a)(1).
III. THE COMMERCE CLAUSE: A LIMITATION ON CONGRESS'S AUTHORITY TO REGULATE INTRASTATE ACTIVITY

Congress must base its authority to regulate local governments' land use decisions on a constitutionally granted power. Since 1824, the U.S. Supreme Court has limited to varying degrees Congress's power under the Commerce Clause. In 1995, in United States v. Lopez, the Court returned to a narrow interpretation of Congress's Commerce Clause power, allowing regulation only of those activities that are economic in nature and that have a substantial effect on interstate commerce. This narrow interpretation was reinforced in 2000, in United States v. Morrison.

A. Pre-Lopez Interpretation of the Commerce Clause

Gibbons v. Ogden, decided in 1824, was the first U.S. Supreme Court case to define "commerce." In Gibbons, Justice Marshall expressed a broad notion of commerce, stating that it represents more than just "buying and selling, or the interchange of commodities." The Court defined commerce as "the commercial intercourse between nations and parts of nations," but also reasoned that, although the commercial activity must affect commerce between the states, commerce power could reach within the borders of a state.

After 1888, the Court began narrowing its interpretation of the Commerce Clause. At the turn of the century, the Court invoked a formulistic approach for invalidating federal social and economic

117. Id. at 559–68.
122. Id. at 189–90.
123. Id. at 194.
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It began distinguishing between regulations "directly" and "indirectly" affecting interstate commerce; those regulations only "indirectly" affecting commerce exceeded Congress's federal powers. For example, the Court held that regulations relating to "manufacturing" were invalid because they only indirectly affected commerce.

The Court's approach to the Commerce Clause changed dramatically in *NLRB v. Jones & Laughlin Steel Corp.* Specifically, the *Jones & Laughlin* Court addressed the constitutionality of the National Labor Relations Act of 1935 (NLRA), which established a comprehensive system for regulating labor relations in all industries affecting interstate commerce. The Court abandoned its previous distinction between "indirect" and "direct" effects on interstate commerce, and instead adopted a "substantial relations" test. The Court stated that although activities—when considered separately—may be intrastate in nature, Congress may regulate the activities "if they have such a close and substantial relation to interstate commerce that their control" is necessary to protect commerce from interference.

The Court continued its broad view of the Commerce Clause in *Wickard v. Filburn*. Although the activity at issue was an individual's production of wheat for home consumption, the Court determined that it fell under Congress's Commerce power. The Court explained that it did not matter that Filburn's effect on the price of wheat was trivial.

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125. See ROTUNDA & NOWAK, supra note 124, at 422; see also *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 546 (holding that there is a "well-established distinction between direct and indirect effects").

126. See, e.g., *Carter*, 298 U.S. at 303–04 (invalidating act prohibiting unfair labor practices in coal industry because it regulated "mining" and "production," rather than "commerce"); *United States v. E.C. Knight Co.*, 156 U.S. 1, 13 (1895) (holding that Sherman Act did not reach a sugar refinery monopoly because Constitution did not permit Congress to regulate "manufacturing").

127. 301 U.S. 1 (1937).


130. *Id.* at 37.

131. *Id.*


133. *Id.* at 118–29.
because his contribution to the market "taken together with that of many others similarly situated, [was] far from trivial." 134

As a result, the Court vastly expanded Congress's Commerce Clause power during the period beginning in 1935 with *Jones & Laughlin* and ending in 1995 with *Lopez*. 135 The Court overwhelmingly deferred to Congress's judgment regarding which activities fell under its Commerce Clause power. In fact, in the fifty-three years following *Wickard*, every statute Congress enacted under that power passed judicial review. 136

**B. The Court's Current Interpretation of the Commerce Clause**

In 1995, the Supreme Court substantially narrowed its view of Congress's Commerce Clause power by holding in *United States v. Lopez* 137 that Congress could only reach economic activities that have a substantial effect on interstate commerce. 138 The defendant in *Lopez* was convicted for possessing a firearm in a school zone in violation of the Gun-Free School Zones Act of 1990 (GFSZA), 139 which made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." 140 The defendant argued that Congress lacked authority to pass the GFSZA and the Supreme Court agreed. 141

In *United States v. Morrison*, 142 the Court continued on to narrow Congress's Commerce Clause power. The Court held, by a five to four vote, that Congress exceeded its Commerce Clause authority by establishing a civil remedy under Section 13,981 143 of the Violence Against Women Act of 1994 (VAWA). 144 The act stated that "[a]ll persons within the United States shall have the right to be free from

134. *Id.* at 127–28 (describing the "aggregate" principle).
138. *Id.* at 559–68.
140. *Id.* § 922(q)(2)(A).
144. See *Morrison*, 529 U.S. at 627.
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crimes of violence motivated by gender."145 Subsection (c) stated that anyone who commits a crime of violence motivated by gender is liable to the injured party for damages, injunctive, and declaratory relief.146 The defendants successfully argued that Congress lacked the authority to pass this act.147

The Court in Lopez and Morrison established a new framework to evaluate the validity of statutes enacted under Congress's Commerce Clause power. First, the regulated activity must be economic in nature.148 Second, the Court set forth the following three elements to guide lower courts in determining whether the activity has substantial interstate effects: (1) whether Congress accumulated findings indicating that the regulated activity has interstate effects, (2) the strength of the nexus between the regulated activity and interstate commerce, and (3) whether the statute contains a jurisdictional element.149

1. Definition of "Economic Activity"

According to the Court in Lopez and Morrison, the central issue in evaluating the constitutionality of the GFSZA and VAWA was whether the regulated activity was economic in nature in that it must involve economic enterprise and commercial transactions.150 The Court in Lopez narrowed the substantial effects test established in Jones & Laughlin by requiring not only that the activity at issue substantially affect interstate commerce, but also that it be economic in nature.151 The Court in Morrison confirmed that the constitutionality of a statute enacted under the Commerce Clause depends on the economic nature of the activity being regulated.152 The Morrison Court stated that a proper interpretation

146. Id. § 13,981(c).
147. Morrison, 529 U.S. at 627.
149. See Morrison, 529 U.S. at 611–19; Lopez, 514 U.S. at 561–68.
150. See infra notes 151–77 and accompanying text.
151. See Lopez, 514 U.S. at 559–61.
152. Morrison, 529 U.S. at 610–11. Legal scholars and lower courts have debated about how to interpret the requirement that a federal regulation relate to an economic activity. Many have interpreted this requirement broadly. See, e.g., United States v. Gregg, 226 F.3d 253, 261–63 (3d Cir. 2000) (holding that, although the connection to economic or commercial activity plays a central role in whether a law is valid, economic activity can be understood in broad terms); Gibbs v. Babbitt, 214 F.3d 483, 491 (4th Cir. 2000) ("[E]conomic activity must be understood in broad terms. Indeed, a cramped view of commerce would cripple a foremost federal power and in so doing would
of *Lopez* demonstrates that the “noneconomic, criminal nature” of the act of carrying a gun in a school zone was critical to the Court’s decision rejecting the validity of the GFSZA.\(^{153}\) In fact, the *Lopez* Court distinguished past cases in which it had upheld congressional acts regulating economic activity under the Commerce Clause because the activity related to an economic endeavor or enterprise.\(^{154}\) In past Commerce Clause cases the regulated activity always arose out of, or was connected to, a commercial transaction.\(^{155}\)

The Court in *Lopez* referenced numerous cases to support its reasoning that regulated activities at issue in previous Commerce Clause cases always related to an economic endeavor and commercial transactions.\(^{156}\) For example, the Court cited *Hodel v. Virginia Surface Mining & Reclamation Ass’n*,\(^{157}\) in which the Court upheld, as a valid exercise of Congress’s Commerce Clause power, the Surface Mining Control and Reclamation Act, which regulated coal-mining operations involved in mining and selling coal interstate.\(^{158}\) In addition, the Court referred to *Heart of Atlanta Motel, Inc. v. United States*\(^{59}\) and *Katzenbach v. McClung*,\(^{60}\) which held that Title II of the Civil Rights Act of 1964 was constitutional under the Commerce Clause because it

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*\(^{153}\) Morrison, 529 U.S. at 610.*

*\(^{154}\) Lopez, 514 U.S. at 559–61. The Morrison Court also emphasized that the federal regulations the Court has sustained in past cases have involved economic endeavors. *Morrison*, 529 U.S. at 611.*

*\(^{155}\) See, e.g., Lopez, 514 U.S. at 561; Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 573 (1997) (holding that, although petitioner’s camp was a non-profit business, it engaged in interstate commerce by purchasing and providing goods and services out of state).*


*\(^{157}\) 452 U.S. 264 (1981).*

*\(^{158}\) *Id.* at 276–84.*

*\(^{159}\) 379 U.S. 241 (1964).*

*\(^{160}\) 379 U.S. 294 (1964).*
aimed to remove burdens on interstate commerce.\textsuperscript{161} The cases reasoned that discriminatory practices by hotels and restaurants burdened interstate commerce because they discouraged interstate travel.\textsuperscript{162} Therefore, hotels that catered to interstate guests, and restaurants that necessitated the interstate movement of the food products served to customers, were subject to federal regulation under the Commerce Clause.\textsuperscript{163}

In addition, the \textit{Lopez} Court cited \textit{Perez v. United States},\textsuperscript{164} which held that the Consumer Protection Act's prohibition of loan sharking was constitutional under Congress's Commerce Clause power because an individual's loan sharking activities substantially affect interstate commerce.\textsuperscript{165} The common tie among each of these cited cases is that all of the regulated activities relate to an economic enterprise involved in commercial transactions. Coal mining operations relate to the selling of coal; hotels and restaurants purchase supplies and sell food or accommodations; and loan sharking relates to illegal credit transactions.

Finally, the \textit{Lopez} Court found that, even in \textit{Wickard v. Filburn},\textsuperscript{166} the activity subject to regulation was economic in nature.\textsuperscript{167} The \textit{Lopez} Court stated that wheat production is an "essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."\textsuperscript{168} Because interstate commercial transactions, namely the buying and selling of wheat, depended upon wheat production, that production could be regulated under the Commerce Clause, whether or not the landowner planned to sell his wheat in interstate commerce.\textsuperscript{169} As a result, the \textit{Lopez} Court's recharacterization of federal Commerce Clause power makes a finding of economic activity crucial in determining the validity of a statute under the Commerce Clause.

Under this new emphasis on economic activity, the Court rejected the federal regulations at issue in \textit{Lopez} and \textit{Morrison}, holding that neither

\begin{itemize}
  \item \textsuperscript{161} See \textit{Katzenbach}, 379 U.S. at 301–05; \textit{Heart of Atlanta Motel}, 379 U.S. at 253–62.
  \item \textsuperscript{162} \textit{Katzenbach}, 379 U.S. at 300–01; \textit{Heart of Atlanta Motel}, 379 U.S. at 252–53. Discrimination by restaurants also burdens "the interstate flow of food and... the movement of products generally." \textit{Katzenbach}, 379 U.S. at 303.
  \item \textsuperscript{163} See \textit{Katzenbach}, 379 U.S. at 301–05; \textit{Heart of Atlanta Motel}, 379 U.S. at 253–62.
  \item \textsuperscript{164} 402 U.S. 146 (1971).
  \item \textsuperscript{165} \textit{Id.} at 156–57.
  \item \textsuperscript{166} 317 U.S. 111 (1942).
  \item \textsuperscript{168} \textit{Id.}
\end{itemize}
regulated economic activity. The Court held that both regulations therefore exceeded Congress’s Commerce Clause power. The GFSZA was a criminal statute that was unrelated, even in the broadest sense, to commerce or an economic enterprise. The Lopez Court found that the GFSZA could not be sustained under the line of cases upholding regulations that “arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially [affect] interstate commerce.” Similarly, in Morrison, the Court stated that gender-motivated crimes of violence are not economic activity “in any sense of the phrase”.

The Lopez Court did reaffirm the Wickard “aggregate” principle, but it held that the principle has been used only to aggregate activities that “arise out of or are connected with a commercial transaction.” The Court in Morrison clarified its stance on the aggregation principle, declining to adopt “a categorical rule against aggregating the effects of any noneconomic activity.” However, thus far in the history of Commerce Clause jurisprudence, the Court has only upheld regulations when the activity is economic in nature. Thus, in evaluating a new federal regulation, courts should consider whether the activity in question is economic in nature, in the sense that it involves an economic enterprise and commercial transactions, which—in the aggregate—affect interstate commerce.

2. Interstate Effect Analysis

Even if a court finds that an activity is economic in nature, the activity must still have substantial interstate effects before it can be federally regulated under the Commerce Clause. The Lopez Court set forth for

172. Id.
173. Id. The government argued, inter alia, that the GFSZA was related to interstate commerce because the presence of guns in school areas results in violent crime, which in turn negatively impacts the nation’s economy. Id. at 563–64.
175. Lopez, 514 U.S. at 561.
176. Morrison, 529 U.S. at 613.
177. Id. at 613, 617 (rejecting “the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce”).
178. Lopez, 514 U.S. at 559.
the first time three elements to assist courts in determining whether an activity has interstate effects: (1) whether legislative findings indicate that the activity has interstate effects, (2) the strength of the nexus between the activity and interstate commerce, and (3) whether the statute contains a jurisdictional element.  

a. The Presence of Congressional Findings

Congressional findings, while not dispositive, are helpful in enabling courts to evaluate Congress's judgment that the regulated activity substantially burdens interstate commerce. In Lopez, Congress did not support its assertion that possession of a gun in a school zone substantially affects interstate commerce with any legislative or congressional committee findings. In contrast, the Court in Morrison stated that Congress provided a significant amount of evidence regarding the effect of gender-motivated crimes on victims and their families. Although the Court did not discredit these findings, it stated that the presence of congressional findings alone is insufficient to uphold the constitutionality of the Commerce Clause regulation.

b. The Nexus Between the Activity and Interstate Commerce

The Court, in both Lopez and Morrison, examined the strength of the connection between the regulated activity and interstate commerce. In both cases, this link was too attenuated. For example, in Lopez the government argued that the possession of a gun in a school zone affects interstate commerce because such an activity may result in violent crime. Crime affects the national economy because its costs are spread among the population through the price of insurance, and people are less likely to travel to a high crime area. In addition, guns in school zones

179. Id. at 561–68.
182. Morrison, 529 U.S. at 614.
183. Id. at 614–15 (failing to invalidate Congress's findings, but stating that Congress's findings were "substantially weakened" because they relied on a method of reasoning the Court rejected); see also infra Part III.B.2.b (discussing Congress's method of reasoning).
185. Lopez, 514 U.S. at 563–64.
186. Id.
affect the educational process, which might lead to less productive citizens, thereby hurting the nation’s economy.\textsuperscript{187} In \textit{Morrison}, the government argued that gender motivated crimes affect interstate commerce by deterring potential victims from engaging in employment and traveling interstate.\textsuperscript{188} Furthermore, violence against women decreases national productivity, increases medical costs, and decreases supply and demand for interstate products.\textsuperscript{189} Despite these potential connections, the Court in both cases held that the regulated activity did not substantially affect interstate commerce.\textsuperscript{190}

The Court in both \textit{Lopez} and \textit{Morrison} emphasized that the government would have the Court follow the “but-for causal chain from the initial occurrence of violent crime to every attenuated effect upon interstate commerce.”\textsuperscript{191} The \textit{Lopez} Court feared that “piling inference upon inference”\textsuperscript{192} would lead to federal retention of a general police power, which is properly reserved to the States.\textsuperscript{193} In both \textit{Lopez} and \textit{Morrison}, the Court stated that accepting the government’s logic would mean that Congress could regulate not only all violent crimes, but also those activities that lead to violent crimes, regardless of their relationship to interstate commerce.\textsuperscript{194} The \textit{Lopez} Court further indicated that it would be hard to imagine any activity by an individual that would be beyond the scope of Congress’s Commerce power under this reasoning.\textsuperscript{195} In \textit{Lopez} and \textit{Morrison}, the Court was particularly concerned about the separation of powers implications resulting from the government’s arguments.\textsuperscript{196}

c. The Presence of a Jurisdictional Element in the Statute

The presence of a jurisdictional element in a statute provides support for the proposition that the regulated activity is not merely local in

\begin{footnotesize}
\begin{enumerate}
\item[187.] Id.
\item[188.] \textit{Morrison}, 529 U.S. at 615 (citing H.R. CONF. REP. NO. 103-711, at 385).
\item[189.] Id.
\item[190.] See id. at 614–19; \textit{Lopez}, 514 U.S. at 563–68.
\item[191.] See \textit{Morrison}, 529 U.S. at 612–13, 615–19; \textit{Lopez}, 514 U.S. at 563–68.
\item[192.] \textit{Lopez}, 514 U.S. at 567.
\item[193.] Id.
\item[194.] See \textit{Morrison}, 529 U.S. at 615–16; \textit{Lopez}, 514 U.S. at 564.
\item[195.] \textit{Lopez}, 514 U.S. at 564.
\item[196.] \textit{Morrison}, 529 U.S. at 615–19; \textit{Lopez}, 514 U.S. at 564–68.
\end{enumerate}
\end{footnotesize}
nature, but has some connection to interstate commerce. The *Lopez* Court stressed that the purpose of a jurisdictional element is to ensure through a "case-by-case inquiry" that the statute’s reach is limited to those activities that affect interstate commerce. The statute addressed in *United States v. Bass* provides an example of such a jurisdictional element. The *Bass* court addressed 18 U.S.C. App. § 1202(a), which states, in part, that any convicted felon "who receives, possesses, or transports in commerce or affecting commerce... any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both." The Court’s interpretation of the language "in commerce or affecting commerce" was critical to its determination that the statute passed constitutional muster. The offenses of receiving, possessing, and transporting must occur in commerce or affect commerce to implicate the statute, thereby creating a jurisdictional element. The government could meet its interstate commerce burden by demonstrating that the gun had previously traveled interstate, was moving interstate, was on an interstate facility at the time of the offense, or that possession of the gun affected commerce.

In contrast, neither of the acts at issue in *Lopez* and *Morrison* contained a jurisdictional element. The GFSZA did not limit the statute’s reach to a "discrete set of firearm possessions" that clearly would have impacted interstate commerce. The *Morrison* Court likewise found that the VAWA contained no jurisdictional element. The Court stated that Congress chose to extend the reach of the VAWA to regulate a body of violent crime occurring within the states.

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197. *Id.* at 561–62.
198. *Id.*
203. *See id.* at 347–51.
208. *Id.*
IV. CONGRESS EXCEEDED ITS COMMERCE CLAUSE POWER IN ENACTING THE RLUIPA

The RLUIPA represents an unconstitutional exercise of Congress's Commerce Clause power because land use regulation does not constitute an economic enterprise or a commercial transaction and does not substantially affect interstate commerce. Beginning with Lopez, the Court emphasized that the regulated activity must be economic in nature; that is, it must relate to an economic enterprise and commercial transactions, for Congress to exercise its Commerce power. Land use regulation does not constitute an economic enterprise or a commercial transaction. Although economics, in addition to public safety and aesthetic considerations, factor into local governments' land use decisions regulating religious use, this connection does not bring land use regulation within the realm of economic activity as defined by the Court.

Even if land use decisions are deemed to constitute economic activity, the RLUIPA is still unconstitutional under the Commerce Clause because Congress has not satisfied the elements the Court set forth to ensure that the regulated activity has substantial interstate effects on commerce. First, Congress accumulated little evidence to support its assertion that the economic impact of land use decisions affecting religion is substantial. Second, the nexus between land use regulation and interstate commerce is too tenuous because one has to make several inferences to conclude that a land use regulation has an impact on interstate commerce. Furthermore, the Court will not allow the federal government to infringe on an activity properly reserved by the state. Finally, although the RLUIPA contains a jurisdictional element, it is not effective because it does not allow for a case-by-case inquiry to ensure that the land use regulation has interstate effects.

209. See id. at 610–11; Lopez, 514 U.S. at 559–61.
210. See infra Part IV.A.
211. See infra Part IV.B.
212. See infra Part IV.B.1.
213. See infra Part IV.B.2.
214. See infra Part IV.B.3.
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A. The RLUIPA Does Not Regulate Economic Activity

Land use regulation is the activity a court must evaluate to determine whether the RLUIPA is valid under the Commerce Clause.\textsuperscript{215} Under \textit{Lopez}, a regulated activity must constitute economic activity by involving economic enterprise and commercial transactions.\textsuperscript{216} Land use regulation is more comparable to the non-economic activities at issue in \textit{Lopez} and \textit{Morrison} than it is to the \textit{Lopez} Court’s list of activities exemplifying economic activity.\textsuperscript{217} Although various economic considerations factor into land use regulation, this does not establish that land use regulation constitutes economic activity as defined by the Court.\textsuperscript{218}

Determining what activity a statute regulates is critical for evaluating the constitutionality of the statute under the Commerce Clause.\textsuperscript{219} Congress enacted the RLUIPA to regulate local governments’ land use decisions due to concerns that local governments were overly burdening religion.\textsuperscript{220} Therefore, to evaluate the constitutionality of the RLUIPA under the Commerce Clause, a court must determine whether land use regulation constitutes economic activity.

The \textit{Lopez} Court listed several past Commerce Clause cases to demonstrate that its definition of economic activity was quite narrow.\textsuperscript{221} The Court revealed that the activities of coal mining operations involved in the sale of coal, restaurants that purchase supplies and sell food, hotels that rent rooms, and loan sharks that engage in extortionate credit transactions all constitute economic activity.\textsuperscript{222} These specific references suggest that, to meet the definition of economic activity, a regulated activity must involve economic enterprise and commercial transactions.\textsuperscript{223}

\textsuperscript{217.} See id. at 559–61.
\textsuperscript{218.} See supra Parts I.A, B.2.
\textsuperscript{219.} See \textit{Lopez}, 514 U.S. at 559–61.
\textsuperscript{221.} See \textit{Lopez}, 514 U.S. at 559–61.
\textsuperscript{222.} See supra Part III.B.1.
\textsuperscript{223.} See \textit{Lopez}, 514 U.S. at 559–61.
In contrast, the regulated activities at issue in *Lopez* and *Morrison* did not constitute economic activity.\(^{224}\) Neither the act of carrying a gun in a school zone nor the act of committing a gender-motivated crime meets the narrow definition of economic activity set forth in *Lopez*.\(^{225}\) Although proponents of the GFSZA and the VAWA argued that the regulated activities impacted interstate commerce,\(^{226}\) the Court held that mere economic effects were insufficient to satisfy its definition of economic activity.\(^{227}\) Therefore, because the regulated activities were not economic in nature, neither congressional act was justified under the Commerce Clause.

As with the regulated activities in *Lopez* and *Morrison*, land use regulation fails to satisfy the Court’s narrow definition of economic activity. Land use regulation itself is not an economic endeavor and does not involve a transaction or the buying and selling of goods.\(^{228}\) Of course, land use regulation might encourage or prevent future economic transactions, such as the buying and selling of construction materials.\(^{229}\) Nonetheless, in *Lopez* and *Morrison*, the Court held that the economic nature of the activity is key, not the economic effects.\(^{230}\) Therefore, any future impact on a commercial transaction does not bring land use regulation within the Court’s narrow definition of economic activity.

Supporters of the RLUIPA may argue that land use determinations often involve economic considerations, thus making land use regulation an economic activity. For example, local governments often adopt land use regulations for the protection of aesthetics and public safety “with a view to conserving the value of buildings,”\(^{231}\) and one rationale for excluding religious uses from residential areas is the possible detrimental

\(^{224}\) United States v. Morrison, 529 U.S. 598, 613 (2000); *Lopez*, 514 U.S. at 561.

\(^{225}\) *Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 561.

\(^{226}\) *Morrison*, 529 U.S. at 615; *Lopez*, 514 U.S. at 563–64.

\(^{227}\) *Morrison*, 529 U.S. at 610–11; *Lopez*, 514 U.S. at 559–61.

\(^{228}\) See supra Part I.


\(^{230}\) See *Morrison*, 529 U.S. at 610–11; *Lopez*, 514 U.S. at 559–61. The Court has historically recognized that numerous trivial effects may substantially affect interstate commerce when considered in the aggregate. See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 127–28 (1942). Nonetheless, the aggregate principle is unrelated to the determination of whether land use regulation constitutes economic activity; the *Morrison* Court suggested that the Court has invoked the aggregation principle only in those cases in which the regulated activity is economic in nature. *Morrison*, 529 U.S. at 613.

\(^{231}\) SZEA, supra note 15, at Appendix A, 215.
effect on the property values in the community. The goal of preserving property values is an economic consideration. Further, in both City of Chicago Heights and Cornerstone Bible Church, courts upheld exclusion of religious uses from industrial zones to foster "economic stability and growth," to stimulate commercial development, and to dedicate an area for industry.

These economic considerations, however, merely influence land use regulation. Non-economic factors play an equally important role. The SZE A suggests that land use zoning emerged out of a concern for public safety and aesthetics. Courts also have recognized that promoting public health and safety and aesthetics are primary purposes of land use regulation, and local governments' justifications for excluding religious uses frequently are based on aesthetic and nuisance-type concerns. Although economic considerations may play a role in land use determinations, they are merely part of a host of other factors that influence land use regulation. Furthermore, the mere consideration of economics, by itself, does not convert land use regulation into economic activity. Even if local governments consider economics in making land use determinations, this factor alone does not justify Congress's regulation of such decisions based on the Commerce Clause.

Another connection between land use regulation and economics might occur if a land use regulation implicates the Takings Clause. A regulatory taking might implicate "economic activity" in two ways. First,

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232. See, e.g., Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303, 305 (6th Cir. 1983); West Hartford Methodist Church v. Zoning Bd. of Appeals, 121 A.2d 640, 642-43 (Conn. 1956); Milwaukie Co. of Jehovah's Witnesses v. Mullen, 330 P.2d 5, 17 (Or. 1958).


238. See supra Part III.B.1.

the court must determine when the government has taken private property for public use by asking whether the land use regulation deprives the landowner of all economically beneficial or productive use of the land. The government must pay landowners the value of their land when private property is taken for public use. These two economic implications of a taking, however, should be considered merely effects of land use regulation. The Court in Lopez and Morrison stated that the nature of the activity, not its effects, is key in determining whether land use regulation constitutes "economic activity." Furthermore, the takings analysis does not suggest that land use regulation itself involves an economic transaction. Therefore, a court is not likely to find that a takings claim transforms land use regulation into "economic activity."

Land use regulation does not fall within the Lopez Court's narrow definition of economic activity. Land use regulation more closely resembles the regulated activities in Lopez and Morrison. A mere connection to economics does not suggest that the activity is economic in nature. Instead, an activity that is economic in nature must involve economic enterprise and commercial transactions. Because land use regulation is not an economic enterprise and does not involve commercial transactions, it cannot be characterized as economic activity for Commerce Clause purposes.

B. The RLUIPA Does Not Regulate an Activity That Has Substantial Effects on Interstate Commerce

Even if courts were to determine that the RLUIPA regulates economic activity, the RLUIPA does not satisfy the elements courts must evaluate to ensure that the regulated activity "substantially affects interstate commerce." Thus, Congress lacked the Commerce Clause authority to enact the statute due to its tenuous effect on interstate commerce. Courts should hold that Congress has failed to ensure that the RLUIPA is limited to the regulation of interstate activity for the following reasons:

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240. Lucas, 505 U.S. at 1015.
241. U.S. CONST. amend. V.
243. Lopez, 514 U.S. at 559.
244. See infra Parts IV.B.1--B.3.
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(1) Congress failed to set forth findings indicating land use regulation has interstate effects;\(^{245}\) (2) the strength of the nexus between land use regulation and the economy is too tenuous;\(^{246}\) and, (3) the RLUIPA does not have an effective jurisdictional element.\(^{247}\)

1. Congressional Findings Do Not Support the Interstate Commerce Effects of the RLUIPA

Congress failed to set forth legislative findings regarding the effect land use regulations that burden religion have on interstate commerce. Although Congress passed the RLUIPA without committee action, it relied on the legislative history of the RLPA in enacting the RLUIPA.\(^{248}\) The RLPA's legislative history contains a vast amount of evidence explaining the detrimental impact land use determinations can have on religion.\(^{249}\) Little, if any, of this material, however, focuses on the potential economic impact land use determinations might have on the interstate economy.\(^{250}\)

In support of the RLUIPA, Senators Hatch and Kennedy stated that the economic impact of land use decisions affecting religion was substantial.\(^{251}\) The Senators, however, incorrectly reported that Marc D. Stern's testimony presented data to confirm such a statement.\(^{252}\) Stern emphasized the impact religious activity has on the economy.\(^{253}\) Stern's statistical information regarding the value of property controlled by religious institutions was unrelated to any possible impact land use decisions affecting religion have on interstate commerce.\(^{254}\) Although he indicated that religious institutions spent $8 billion in 1992 on capital

\(^{245}\) See infra Part IV.B.1.

\(^{246}\) See infra Part IV.B.2.

\(^{247}\) See infra Part IV.B.3.


\(^{250}\) See H.R. REP. No. 106-219, at 18–24 (1999); 146 CONG. REC. E1564–67 (statement of Rep. Hyde); 146 CONG. REC. S7774–75 (exhibit 1).

\(^{251}\) 146 CONG. REC. S7775 (exhibit 1).

\(^{252}\) See id.


improvements to facilities, his assertion that land use regulations may impact the interstate movement of supplies and services for the construction of facilities was unsupported.\textsuperscript{255} This lack of legislative findings regarding land use decisions affecting religious uses does not support Congress's assertion that it has the authority to enact the RLUIPA under its Commerce Clause power.

2. The Nexus Between Land Use Decisions and Interstate Commerce Is Too Tenuous

The link between land use regulation and its effect on interstate commerce is too attenuated to give Congress authority to regulate local land use decisions under the Commerce Clause. Congress's reasoning in support of the RLUIPA is similar to the "but-for causal chain" the Court rejected when evaluating the GFSZA\textsuperscript{256} and the VAWA.\textsuperscript{257} In Lopez, the Court also rejected the government's logic of "piling inference upon inference" to conclude that the regulated activity impacted interstate economy.\textsuperscript{258} The same piling of inferences is needed to connect land use regulation to the interstate economy.

Land use regulation admittedly is more closely connected to the interstate economy than possessing a gun in a school zone or committing a gender-motivated crime. Nonetheless, the connection is still not sufficient.\textsuperscript{259} In Lopez, the government argued that violent crime caused by the possession of a gun in a school zone substantially affects interstate commerce.\textsuperscript{260} For example, gun regulation might decrease travel to the high crime area.\textsuperscript{261} To reach this conclusion, one would have to infer that possessing the gun in a school zone would actually lead to a violent crime. Furthermore, one would have to assume that the crime would actually cause people not to travel to that area, and that this decrease in travel would affect interstate commerce. The link between the regulated activity and interstate commerce arguably was more direct in Morrison

\begin{itemize}
  \item \textsuperscript{255} See 1998 RLPA, \textit{supra} note 106 at 58.
  \item \textsuperscript{257} See United States v. Morrison, 529 U.S. 598, 615–16 (2000).
  \item \textsuperscript{258} \textit{Lopez}, 514 U.S. at 567.
  \item \textsuperscript{259} Compare \textit{supra}, Part I (describing land use regulation) with \textit{Morrison}, 529 U.S. at 615 and \textit{Lopez}, 514 U.S. at 563–64 (detailing the government's argument for how gender-motivated crimes and the possession of a gun in a school zone affect interstate commerce).
  \item \textsuperscript{260} \textit{Lopez}, 514 U.S. at 563–64.
  \item \textsuperscript{261} Id.
\end{itemize}
because the VAWA regulates the violent crime itself.\textsuperscript{262} Thus, the
significant inference one would have to make under \textit{Morrison} is that the
gender-motivated crime affects interstate commerce, perhaps by
deterring the victim from traveling interstate or from engaging in
employment.\textsuperscript{263}

Similar to the regulated activities in \textit{Lopez} and \textit{Morrison}, a land use
regulation restricting religious uses does not directly implicate interstate
commerce. To show that religious land use regulation substantially
impacts interstate commerce, one would have to infer that the regulation
would cause a religious institution to refrain from undertaking an action.
For example, in considering a land use ordinance restricting the ability of
a church to expand, a court would first have to infer that a church
intended to expand. The court would then have to make the additional
inference that the church's inability to expand would somehow affect
interstate commerce, perhaps by decreasing the demand for interstate
labor or interstate supplies.\textsuperscript{264} Thus, the number and type of inferences
one has to make to conclude that a religious land use regulation affects
interstate commerce is similar to the reasoning the U.S. Supreme Court
rejected in \textit{Lopez} and \textit{Morrison}.\textsuperscript{265} Congress asserted that land use
decisions prevented specific economic transactions such as the
construction of a facility or the sale, purchase, or rental of a building.\textsuperscript{266}
The prevention of an interstate economic transaction is a possible effect
of a land use regulation; however, a court would have to "pile inference
upon inference" to conclusively determine that land use regulation
substantially affects interstate commerce.

Accepting Congress's reasoning for enacting the RLUIPA under its
Commerce Clause authority would suggest that Congress could regulate
all local land use regulations. The Court in \textit{Morrison} stated that allowing
Congress to regulate gender-motivated crimes would allow Congress to

\begin{itemize}
\item \textsuperscript{262} Kropf, \textit{supra} note 152, at 402.
\item \textsuperscript{263} \textit{Morrison}, 529 U.S. at 615.
\item \textsuperscript{264} See \textit{supra} note 110 and accompanying text.
\item \textsuperscript{265} See \textit{supra} Part III.B.2.b. The connection between a land use regulation and interstate
commerce arguably may be more direct given alternative fact patterns. For example, a regulation
preventing a church expansion might more directly affect interstate commerce if the church could
prove with specific evidence that it intended to use a product that only was manufactured out of
state. However, the U.S. Supreme Court rejected even these more closely-related connections in
\textit{Morrison}, where the regulated activity was only two steps removed from interstate commerce. See
\textit{Morrison}, 529 U.S. at 615–19.
\item \textsuperscript{266} 146 CONG. REc. S7775 (daily ed. July 27, 2000) (exhibit 1).
\end{itemize}
regulate any type of violent crime because gender-motivated violence, "as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part." 267 The Court feared that allowing Congress to regulate all violent crime would result in the obliteration of "the Constitution's distinction between national and local authority." 268 Similarly, if the court affirmed Congress's authority under the Commerce Clause, a land use determination, regardless of whether it burdened religious uses, would fall within Congress's Commerce Clause authority because every land use decision would have some effect on interstate commerce.

Although every land use regulation may have a distant effect on interstate commerce, courts should be reluctant to approve legislation that would lead to unlimited congressional Commerce Clause power over a function that traditionally has been left to the states. 269 The Court in Lopez stated that the Commerce Clause is subject to outer limits and must not be extended so far that it destroys the distinction between what is local and what is national, thus creating a centralized government. 270 The Court rejected Congress's reasoning for nationalizing regulation of crimes motivated by gender because the reasoning could be "applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant." 271 Similarly, Congress's reasoning in support of the RLUIPA could be applied equally as well to all land use regulation, and the Court has held that land use regulation, like criminal law enforcement or education, is a function that historically has been performed by the states. 272 This concern for preserving state sovereignty as well as the attenuated connection between land use regulation and interstate commerce suggests that Congress does not have authority under the Commerce Clause to enact the RLUIPA.

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267. *Morrison*, 529 U.S. at 615.
268. *Id.*
269. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001); (stating that States have "traditional and primary power over land and water use"); *Hess v Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments.").
271. *Morrison*, 529 U.S. at 615–16.
272. *Solid Waste Agency of Northern Cook County*, 531 U.S. at 174; *Hess*, 513 U.S. at 44.
3. **The RLUIPA Does Not Contain an Effective Jurisdictional Element**

The jurisdictional element contained in the RLUIPA fails to accomplish its required purpose. As expressed in *Lopez*, the purpose of a jurisdictional element is to ensure through a case-by-case inquiry that only activities with interstate effects are regulated.\(^\text{273}\) The RLUIPA’s scope of application states that it only applies when a land use regulation affects interstate commerce.\(^\text{274}\) In the joint statement of Senators Hatch and Kennedy, the Senators stated that the jurisdictional element requires that each regulated burden on religious exercise affect interstate commerce.\(^\text{275}\)

This limitation in the RLUIPA should be compared with the acceptable jurisdictional element in *Bass*.\(^\text{276}\) In that case, the government had to prove that the firearm in question had previously traveled interstate, was moving interstate, was on an interstate facility at the time of the offense, or its possession affected commerce.\(^\text{277}\) Perhaps with the exception of the last, it is relatively easy for the government to make these factual determinations.

In contrast, the limiting language in the RLUIPA does not lend itself to a case-by-case inquiry. In each case in which the government alleges a violation of the RLUIPA, it has the duty to demonstrate what effect the land use regulation at issue has on interstate commerce.\(^\text{278}\) Unlike tracing the origin of a gun, it is much more difficult to demonstrate with specific, non-speculative data that each conflict between religion and a land use regulation has interstate commerce effects.\(^\text{279}\) For example, in a case in which a church is unable to construct a facility due to a land use regulation, the government may argue that the regulation results in a decrease in the demand for labor or supplies.\(^\text{280}\) To satisfy the jurisdictional element, the government would have to employ the reasoning the Court rejected in *Lopez* and *Morrison* of “piling inference upon inference” to reach the further conclusion that the church intended

\(^{273}\) *See supra* notes 198–206 and accompanying text.


\(^{277}\) *Id.*

\(^{278}\) *See supra* note 273 and accompanying text.

\(^{279}\) *See supra* Part IV.B.2.

\(^{280}\) *See supra* note 110 and accompanying text.
to use out of state labor or supplies originating from out of state. Thus, the purpose of the RLUIPA's jurisdictional element is compromised by the difficulty a local government would face in making this determination. Although Congress included a jurisdictional element in the RLUIPA, courts would find it unhelpful in ensuring that only activities that have interstate effects are regulated by the statute. Without a valid jurisdictional element, there is no added assurance that a statute is limited in scope.

V. CONCLUSION

Congress's third attempt at protecting religious liberty through the RLUIPA fails to adequately invoke the Commerce Clause power. This result might have been different had the U.S. Supreme Court adhered to its pre-Lopez approach to the Commerce Clause. However, the Court's current approach represents a return to the formulistic, restrictive interpretation of the Commerce Clause between 1888 and 1937. Thus, the RLUIPA is unconstitutional under the Court's current interpretation of the Commerce Clause.

The U.S. Supreme Court's relatively recent addition of the "economic activity" test substantially narrows Congress's regulatory powers under the Commerce Clause. Only an activity involving an economic enterprise and commercial transactions satisfies the Court's test. This reveals a critical defect of the RLUIPA: land use regulation does not constitute an economic enterprise or transaction as defined by the U.S. Supreme Court.

However, even if a court were to determine that land use regulation constitutes economic activity, Congress did not satisfy the elements the U.S. Supreme Court established to ensure that the statute regulates only those activities that affect interstate commerce. Most significantly, courts should be concerned that approving the RLUIPA would open the door for Congress to completely usurp local government authority over its land use. Therefore, Congress's latest attempt at protecting religious liberty will be frustrated by limitations on the Commerce Clause power imposed by the U.S. Supreme Court.

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281. See supra Part IV.B.2. It might be possible for a party to meet this burden under certain specific fact patterns. See supra note 266 and accompanying text.