NOTE

FINDING BENEVOLENT NEUTRALITY IN LAND USE: RLUIPA'S EQUAL TERMS PROVISION AND THE HUMAN FLOURISHING THEORY OF PROPERTY

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INTRODUCTION

Tree of Life Christians Schools ("the School") serves 583 students from eighteen different counties, 44% of whom come from minority populations. The School seeks to assist parents and the affiliated Church in educating and nurturing young lives in Christian faith, while also delivering fine education that has historically sent 99% of the School's graduates to college.

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The School has three campuses that are miles apart from one another: two campuses serve children from pre-K through fifth grade, and the other campus serves sixth grade through high school.

To maintain unity among students of different campuses, the School regularly holds evening events and field trips where all of Tree of Life students come together to share their learning experiences. But due to the geographical distance between campuses, some families have trouble sending children in the same household to different campuses. Two of the campuses use the main buildings of sponsoring churches, whose facilities are old with little space for outdoor or cultural activities. One of the campuses also disproportionately consists of students who come from families with higher income. The three campuses all lack long-term leases, putting the School at risk of closure as it operates three campuses as an at-will tenant.

The School saw an opportunity to surmount these hardships when a company abandoned its 254,000-square-foot building located in an elite commercial district. The School purchased the building, but the city disallowed the School's land use pursuant to an ordinance that designated the district exclusively for commercial use that would generate income tax revenue. The city allowed land use for a daycare center in the same district, however, because it could generate more tax revenue than the School.

These facts are taken from *Tree of Life Christian Schools v. City of Upper Arlington*.[1] The Sixth Circuit ultimately sided with Upper Arlington in holding that the City was permitted to disallow the School from its commercial district while allowing a daycare center, because the School was not "similarly situated" to the daycare center given the School's comparably smaller amount of potential revenue.[2] The holding was based on the court's interpretation of the Equal Terms provision of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"),[3] which has given rise to circuit splits as to how

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1 905 F.3d 357 (6th Cir. 2018). The recounted facts are from Brief for Amicus Curiae Parents of Students of Tree of Life Christian School in Support of Petitioner at 3–11, Tree of Life Christian Sch. v. City of Upper Arlington, 139 S. Ct. 2011 (2019) (No. 18-944). *See also* Ben Johnson, *Explainer: Tree of Life Christian Schools v. City of Upper Arlington*, ACTION INST. (MAY 17, 2019), https://blog.acton.org/archives/108770-explainer-tree-of-life-christian-schools-v-city-of-upper-arlington.html [https://perma.cc/RG6K-R3VL] (recounting the facts of the case).

2 *Tree of Life Christian Sch.*, 905 F.3d at 374–76.

3 Religious Land Use and Institutionalized Persons Act of 2000 § 2(b)(1), 42 U.S.C. § 2000cc(b)(1) (2018)).

courts should determine unequal treatment of religious land use.[4] The U.S. Supreme Court denied certiorari to hear the School's appeal,[5] leaving the circuit courts without a consensus on how to apply the Equal Terms provision.

The history of religious land use and discriminatory treatment dates back to around 350 B.C.E., as the Book of Ezra recounts how the Jewish people were able to reconstruct their Second Temple only after successfully arguing that preventing their reconstruction would constitute discrimination in the context of land use.[6] The issue continues to this day, evidenced by the fact that there were forty-two circuit court opinions and ninety-seven district court opinions addressing land use regulations that implicated RLUIPA from 2002 to 2018.[7] Religious organizations have received a total of twelve favorable rulings out of forty-seven justiciable pleadings based on the Equal Terms provision, amounting to a success rate of about 26%.[8] Resolving the circuit splits to establish a more uniform approach to the Equal Terms provision could afford religious organizations some predictability as they ponder the possibility of an expensive lawsuit.

This Note will examine the circuit courts' different approaches to interpreting the Equal Terms provision and suggest that the provision should be interpreted from the perspective of property law rather than the current judicial framework, which is inapt to resolve the inherent tension underlying RLUIPA and First Amendment jurisprudence. The Note will first identify this tension in Part I by surveying the history of RLUIPA in relation to the evolution of First Amendment jurisprudence. Part II will analyze the different approaches that circuit courts have taken to interpret RLUIPA's

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4 *See* Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 651 F.3d 1163, 1169 n.25 (9th Cir. 2011) (discussing the circuit splits surrounding the Equal Terms provision); *see also infra* sections II.1, II.2, II.3.

5 Tree of Life Christian Sch. v. City of Upper Arlington, 139 S. Ct. 2011, 2011–12 (2019).

6 *See* DANIEL P. DALTON, LITIGATING RELIGIOUS LAND USE CASES, xxiii–xxiv (2d ed. 2016) (introducing the story of the Second Temple as an example of religious land use discrimination that triggered the enactment of RLUIPA).

7 Lucien J. Dhooge, *A Case Law Survey of the Impact of RLUIPA on Land Use Regulation*, 102 MARQ. L. REV. 985, 991 (2019).

8 DALTON, *supra* note 6, at 283. Pointing to this rather low success rate, some argue that the Equal Terms provision is under-enforced. *See generally* Douglas Laycock & Luke W. Goodrich, *RLUIPA: Necessary, Modest, and Under-Enforced*, 39 FORDHAM URB. L.J. 1021, 1025, 1048–71 (2012) (arguing that RLUIPA has been under-enforced due to judicial reluctance to enforce it, and that there have been numerous cases where "churches should have easily won," but did not).

Equal Terms provision, concluding that existing judicial approaches and the commentaries thereof call for an alternative approach informed by principles of property law. Part III will introduce a property theory based on the concept of human flourishing, arguing that the theory can provide an effective interpretive framework that may resolve issues regarding religious land use such as the interpretation of RLUIPA's Equal Terms provision.

I
RLUIPA AND THE FIRST AMENDMENT CONUNDRUM

RLUIPA seeks to protect both religious land use and the religious exercise of institutionalized persons.[9] RLUIPA § 2000cc deals with protection of land use and contains two main provisions: the Substantial Burden provision and the Equal Terms provision.[10] The Substantial Burden provision focuses on a particular plaintiff, whereas the Equal Terms provision focuses on the treatment of one religious institution as compared to similar secular institutions.[11] The scope of this Note is limited to the Equal Terms provision, which provides that "[n]o 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."[12]

As stated in RLUIPA itself, the legislation was never meant to "affect, interpret, or in any way address" the First Amendment.[13] It is still necessary to understand the relationship between RLUIPA and the First Amendment, however, because RLUIPA was enacted specifically to address "frequently occurring burdens on religious liberty" such as land use regulation that may infringe upon "the core First Amendment right to

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9 146 CONG. REC. 16,698 (2000) (joint statement of Sen. Hatch and Sen. Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000).

10 *See* 42 U.S.C. §§ 2000cc(a), (b) (2018). The Equal Terms provision is actually part of the "Discrimination and Exclusion" clause of § 2000cc(b), which also states that the government cannot impose land use regulation that either discriminates against any assembly or institution on the basis of religion or unreasonably limits religious assemblies or institutions. § 2000cc(b). For purposes of this Note, the Equal Terms provision will be deemed to encompass these two provisions.

11 DALTON, *supra* note 6, at 71. Alleged violation of the Equal Terms provision based on the plain language of the ordinance is called a "facial challenge," whereas alleged violation based on the application of the ordinance is called an "as-applied challenge." *Id.* at 72.

12 42 U.S.C. § 2000cc(b)(1) (emphasis added).

13 42 U.S.C. § 2000cc-4.

assemble for religious purposes."[14] More importantly, examining RLUIPA within the historical development of First Amendment jurisprudence will reveal an inherent tension underlying RLUIPA's emphasis on "equal terms."

First Amendment jurisprudence prior to 1963 shows that the U.S. Supreme Court generally affirmed the government's broad authority to regulate religious behaviors such as religious land use.[15] This all changed, however, when the Supreme Court established the so-called *Sherbert-Yoder* test, which applied strict scrutiny to government conduct impacting religious beliefs to prevent governmental discrimination against religious behaviors.[16] In a way, the emergence of the *Sherbert-Yoder* test reflects a movement within First Amendment jurisprudence toward broadening religious liberty to circumvent potential discrimination.[17]

In *Employment Division of Oregon v. Smith*,[18] however, the U.S. Supreme Court cut back on the judicial protection of religious liberty on the grounds that anti-discriminatory aims of the *Sherbert-Yoder* test could function as special exemptions to religious entities.[19] In *Smith*, employees were fired for ingesting

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14 146 CONG. REC. 16,698 (2000) (joint statement of Sen. Hatch and Sen. Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000).

15 *See* Patricia E. Salkin & Amy Lavine, *The Genesis of RLUIPA and Federalism: Evaluating the Creation of a Federal Statutory Right and its Impact on Local Government*, 40 URB. LAW. 195, 198–99 (2008). *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 166–68 (1878) (holding that the Mormon practice of polygamy is a religious practice that the government may interfere with).

16 DALTON, *supra* note 6, at 2–3. In *Sherbert v. Verner*, the Supreme Court held that it was unconstitutional to deny unemployment benefits for someone who was terminated after refusing to work due to religious practice unless there is a strong state interest. 374 U.S. 398, 408–09 (1963). The Supreme Court solidified its position in *Wisconsin v. Yoder*, where it held that it was unconstitutional to compel school attendance in violation of one's religious beliefs. 406 U.S. 205, 214–15 (1972) ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."). The *Sherbert-Yoder* test stems from these two cases.

17 *See, e.g.*, Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 719 (1981) (applying the *Sherbert-Yoder* test to hold that the government's interests in denying unemployment benefits are not sufficiently compelling to justify the burden on appellant's religious liberty); *but see* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450 (1988) (explaining that whereas "indirect coercion or penalties on the free exercise of religion" require a compelling state interest for such a burden on religious liberty to be upheld, there is no such requirement for "incidental effects of governmental programs" that make it more difficult to practice certain religions without coercing individuals to act contrary to religious beliefs).

18 494 U.S. 872 (1990).

19 *See id.* at 886 (explaining that requiring compelling state interest in the sphere of religion may produce "a private right to ignore generally applicable laws").

drug during a religious ceremony, as such conduct was criminal under applicable state law.[20] In upholding the government's denial of unemployment benefits to such employees, the U.S. Supreme Court rejected the *Sherbert-Yoder* test and concluded that the government need not show compelling state interest when neutral and generally applicable laws are at issue.[21] This limitation on the *Sherbert-Yoder* test in *Smith* reflects a movement within First Amendment jurisprudence toward restricting religious liberty to circumvent potential exemption from generally applicable laws.[22]

In response to *Smith*, Congress enacted the Religious Freedom Restoration Act of 1993 ("RFRA") to restore the *Sherbert-Yoder* test and require compelling state interest in all cases where government action may restrict religious liberty.[23] However, the Supreme Court struck down RFRA in *City of Boerne v. Flores*, holding that RFRA exceeded Congress's enforcement authority under Section 5 of the Fourteenth Amendment.[24] RLUIPA was the fruit of Congress's continued efforts to overrule *Smith*, which it successfully accomplished by re-establishing the *Sherbert-Yoder* test's "substantial burden" and "compelling governmental interest" standards for regulations on religious land use.[25] In this sense, RLUIPA can be seen as Congress's attempt to re-broaden religious liberty that the *Smith* court sought to restrict.[26]

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20 *Id.* at 874.

21 *Id.* at 884–85.

22 *See* Salkin & Lavine, *supra* note 15, at 203 (explaining that many viewed *Smith* as doing "great damage to the constitutional protection of religion").

23 Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb). Congress explicitly stated that the purpose of RFRA is to restore the *Sherbert-Yoder* test. 42 U.S.C. § 2000bb(b).

24 521 U.S. 507, 536 (1997) (holding that RFRA "contradicts vital principles necessary to maintain separation of powers and the federal balance"). *See also* Salkin & Lavine, *supra* note 15, at 203–05 (explaining the constitutional deficiencies of RFRA).

25 *See* 146 CONG. REC. 16,698, 16,700 (2000) (joint statement of Sen. Hatch and Sen. Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000) (explaining how the Substantial Burden provision requires compelling interest, citing *Smith*); *id.* at 16,702 (explaining that *Smith* had largely eliminated strict scrutiny for free exercise cases, leading to legislative attempts to reverse *Smith*).

26 RLUIPA was a compromise between proponents of religious liberty and those who were concerned that overly protecting religious liberty may endanger other civil rights. *See* 146 CONG. REC. 16,698 (2000) (statement of Sen. Hatch) (admitting that he wanted a broader bill but had to agree on a more limited legislation); Salkin & Lavine, *supra* note 15, at 207–08 (explaining why the scope of RLUIPA is limited to land use and institutionalized persons).

This vacillation between broadening and restricting religious liberty underscores the fundamental tension underlying First Amendment jurisprudence. As the Eleventh Circuit noted:

> [The] argument implicates the intersection of both religious liberties principles found in the First Amendment—the right to free exercise of religion and the prohibition against establishment of religion. As courts strive for a "benevolent neutrality" toward religion that allows religious exercise to exist without either endorsement or interference, they do so with the recognition that the two Religion Clauses . . . "tend to clash with each other." . . . [C]ourts are sometimes forced to enter the debate about whether the Free Exercise Clause allows exemptions from burdensome laws . . . or whether the Establishment Clause *prohibits* such exemptions . . . .[27]

In a similar vein, one could question where exactly RLUIPA and its Equal Terms provision stand apropos First Amendment jurisprudence. In prohibiting the government from treating a religious assembly or institution on less than equal terms with secular assemblies or institutions, for example, is RLUIPA preventing discrimination by placing religious entities on equal footing with nonreligious entities? Or, is RLUIPA granting some sort of an exemption to religious entities with respect to land use regulation?[28] This conundrum reveals the inherent tension between anti-discriminatory equalization (i.e., anti-discriminatory vis-à-vis religious entities) and discriminatory exemption (discriminatory vis-à-vis secular entities), and it is this tension that should guide our inquiry as to what constitutes "equal terms" in RLUIPA's Equal Terms provision. This tension is also reflected in the rather chaotic circuit splits on how to

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27 Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1240 (11th Cir. 2004). The term "benevolent neutrality" was coined by Chief Justice Warren E. Burger in *Walz v. Tax Comm'n of N.Y.C.* where the Supreme Court upheld a property-tax exemption status for churches on the grounds that there was no nexus between the exemption and establishment of religion. 397 U.S. 664, 676–77 (1970) (identifying tax exemption for religious entities as an example of "benevolent neutrality toward churches and religious exercise" that government should provide "so long as none was favored over others and none suffered interference").

28 Legislative history does indicate that RLUIPA neither provides religious institutions with immunity from land use regulation nor relieves religious institutions from applying for various relief provisions in land use regulations that are not discriminatory. 146 CONG. REC. 16,698, 16,701 (2000) (additional discussion on the intended scope of the land use provision).

interpret and apply the Equal Terms provision, to which we turn next.[29]

II
DIFFERENT APPROACHES TO EQUAL TERMS: FINDING SECULAR COMPARATORS

Circuit courts have taken different approaches to the Equal Terms provision, with the disagreement focusing on what constitutes an "assembly" or "institution," whether a "similarly situated" comparator is necessary, and what level of scrutiny should be applied.[30] This Part examines some of the main approaches applied by different circuit courts and surveys existing commentaries that argue for one of these approaches. This will reveal an unresolved conundrum in the approaches taken by the circuit courts and commentaries alike, leading us to seek an alternative framework in which to read and apply the Equal Terms provision.

A. Eleventh Circuit's "Category" Approach

The Eleventh Circuit's approach to the Equal Terms provision appears in *Midrash Sephardi, Inc. v. Town of Surfside*,[31] a facial challenge case. Plaintiffs were two Jewish congregations seeking to build a synagogue within walking distance from their members' residence, because they were prohibited from using transportation on the Sabbath.[32] The Town of Surfside, however, had a zoning ordinance that divided the area into eight zoning districts, seven of which were business districts

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29 There has been a circuit split between the Eleventh Circuit and the Third Circuit, to which the Seventh Circuit has introduced a third approach. *See generally* Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 651 F.3d 1163, 1169 n.25 (9th Cir. 2011) (laying out the general positions of the Eleventh and Third Circuits); Matthias Kleinsasser, *RLUIPA's Equal Terms Provision and the Split between the Eleventh and Third Circuits*, 29 REV. LITIG. 163, 166–73 (2009) (outlining the circuit split between the Eleventh and Third Circuits in applying the Equal Terms provision of RLUIPA); Brooke N. Walker, *Unequal Application of RLUIPA's 'Equal Terms' Provision* 11–30 (Feb. 24, 2011) (unpublished manuscript), https://ssrn.com/abstract=1769084 [https://perma.cc/ZU78-N5E8] (outlining a three-way circuit split as to what constitutes an assembly or institution under the Equal Terms provision of RLUIPA). Some even argue that there is a "[s]ix-way circuit split" regarding the issue, with two other Circuits declining to adopt any of the six tests. *See, e.g.*, Brief of Amicus Curiae CatholicVote.org Education Fund in Support of Petitioner at 5–8, Tree of Life Christian Sch. v. City of Upper Arlington, 139 S. Ct. 2011 (2019) (No. 18-944) (describing the different approaches taken by circuit courts since 2004).

30 DALTON, *supra* note 6, at 72. This Note will not address the issue on the appropriate level of scrutiny.

31 366 F.3d 1214 (11th Cir. 2004).

32 *Id.* at 1220–21.

prohibiting "churches and synagogues."[33] The ordinance permitted churches and synagogues in the lone residential district on the condition that they successfully obtain a conditional land use permit.[34] The Town claimed that the ordinance was designed to "prevent uses and activities which might be noisy, offensive, obnoxious, or incongruous in behavior, tone or appearance" while also invigorating the business district and creating a strong tax base.[35] Plaintiffs contended that the Surfside Zoning Ordinance violated the Equal Terms provision.[36]

In applying the Equal Terms provision, the *Midrash* court first defined the terms "assembly" and "institution" by looking at the ordinary or natural meaning of those words.[37] The court then defined assembly as "a group gathered for a common purpose,"[38] while defining institution as "an established society or corporation."[39] Because churches and synagogues fall within the same "natural perimeter" as private clubs that were allowed in the business districts prohibiting churches and synagogues, the Eleventh Circuit found that the Surfside Zoning Ordinance violated the Equal Terms provision.[40]

The Eleventh Circuit took a similar approach in *Konikov v. Orange County*,[41] which included an as-applied challenge.[42] The case involved a rabbi who resided in a residential neighborhood, which was one of the several residential R-1A districts under the Orange County Code that required an application for special exception to use land for "religious organizations."[43] In examining whether this ordinance was applied in a way that violates the Equal Terms provision, the Eleventh Circuit focused on the fact that the Code deemed a group meeting three

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33 *Id.* at 1219.

34 *Id.*

35 *Id.* at 1220–21.

36 *See id.* at 1228–31.

37 *Id.* at 1230.

38 *Id.* at 1231.

39 *Id.* at 1230.

40 *Id.* at 1231. The "natural perimeter test" comes from Justice Harlan's concurring opinion in *Walz v. Tax Comm'n of N.Y.C.*, 397 U.S. 664, 696 (1969) ("[T]he critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter.").

41 410 F.3d 1317 (11th Cir. 2005).

42 *Id.* at 1327. The Eleventh Circuit requires plaintiffs to present a similarly situated secular comparator for as-applied claims. *See* Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cty., 450 F.3d 1295, 1311, 1313–14, (11th Cir. 2006) (ruling against the Plaintiff because of failure to present a valid comparator).

43 *Konikov*, 410 F.3d at 1320.

times a week as a "religious organization" while identifying another group that has comparable community impact as a "social organization."[44] Under the Code, then, a "cub scout troop meeting held two to three times a week" or "friends gathering to watch sports two to three times weekly" would not require a special exception, as long as religion is not involved in those gatherings.[45] The Eleventh Circuit held that this disparate impact under the Code violated the Equal Terms provision.[46]

The Eleventh Circuit's approach has been labeled as a "category" approach that compares religious assemblies or institutions to secular ones that are deemed to be similarly situated comparators.[47] The key aspect of this approach is that the definition of "assembly" or "institution" follows the plain and ordinary meaning of those words, favoring religious entities because all that is required is to identify *any* secular assembly or institution that is granted land use where a religious assembly or institution is excluded.[48]

B. Third Circuit's "Regulatory Purpose" Approach

Not persuaded by the reasoning of the Eleventh Circuit, the Third Circuit applied a different approach in *Lighthouse Institute for Evangelism, Inc., v. City of Long Branch*.[49] Here, Plaintiff was a Christian church that sought to "minister to the poor and disadvantaged in downtown Long Branch, New Jersey."[50] Plaintiff thus purchased property in the City's "Central Commercial District" to provide services like a soup kitchen and job skills training programs.[51] The City denied Plaintiff's application to operate as a church in the zone, however, because the City had an ordinance that permitted theaters and assembly halls in the downtown area but omitted churches from the list of permitted uses.[52] Furthermore, in the middle of a lawsuit brought by Plaintiff to challenge the ordinance, the City

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44 *Id.* at 1327–29.

45 *Id.* at 1328.

46 *Id.* at 1328–29.

47 *See* Kleinsasser, *supra* note 29, at 167 (explaining that the Eleventh Circuit's "category" approach that considers the category of "assemblies or institutions" as the natural perimeter).

48 *See id.* at 172–75 (introducing the Third Circuit's criticism that the Eleventh Circuit's category approach gives too much leeway to religious entities due to the broad definition of "assembly" or "institution").

49 510 F.3d 253, 267 (3d Cir. 2007) ("[W]e should decline this invitation to adopt the Eleventh Circuit's expansive reading of the statute.").

50 *Id.* at 256, 268.

51 *Id.* at 257.

52 *Id.*

adopted a redevelopment plan that only allowed commercial land uses such as restaurants, bars, theaters, cinemas, retail dance studios, culinary schools, art studios, and fashion design schools while prohibiting religious land uses as well as schools and government buildings.[53] The plan's purpose was to strengthen retail trade and City revenues and to encourage a culturally "vibrant" and "vital" downtown district with a well-developed retail sector.[54]

Unlike the Eleventh Circuit, the Third Circuit required a similarly situated comparator even for facial challenges.[55] The Third Circuit also added that the secular comparator must be similarly situated with respect to the purpose of the regulation in question.[56] The Third Circuit reasoned that the Eleventh Circuit's approach creates a standard with no boundaries by applying an overly expansive definition of "assembly" or "institution" without establishing an adequate similarly situated comparator.[57] In short, the Third Circuit's approach aimed to prevent giving religious institutions an affirmative right to ignore zoning ordinances.[58]

In applying a rule that a regulation violates the Equal Terms provision if it treats religious assemblies or institutions "less well than secular assemblies or institutions that are similarly situated as to the regulatory purpose,"[59] the *Lighthouse* court found that the City's original ordinance violated the Equal Terms provision, rejecting the argument that churches would cause greater harm to the regulatory purposes than an

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53 *Id.* at 258.

54 *Id.*

55 *See id.* at 264, 277 (vacating the District Court's entry of summary judgment for the City on petitioner's facial challenge to the Ordinance under the Equal Terms provision); *but see* Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 651 F.3d 1163, 1169 n.25 (9th Cir. 2011) (noting that the Sixth and Tenth Circuits have declined to decide on the issue of a similarly situated comparator to facial challenges).

56 The Third Circuit also adopted a strict liability standard as opposed to strict scrutiny because it interpreted RLUIPA to apply strict scrutiny only to the Substantial Burden provision. *See* Lighthouse Inst. for Evangelism, Inc., 510 F.3d at 268–69 (disagreeing with the Eleventh Circuit's application of strict scrutiny).

57 *See id.* The court argued that the Eleventh Circuit's approach would compel a municipality to permit a religious assembly with rituals involving sacrificial killings of animals to locate in a neighborhood so long as a ten-member book club, falling under the definition of "assembly," is allowed to locate in the same neighborhood. *Id.* at 268.

58 *See id.* at 269 n.14 (arguing that the expansive reading of RLUIPA would create a "substantively altered right").

59 *Id.* at 266.

assembly hall.[60] The redevelopment plan passed muster, however, because churches are not similarly situated to the other permitted assemblies with respect to the plan's economic development goals.[61]

In reaching its conclusion regarding the redevelopment plan, the court held that schools and religious land uses were similarly situated "as to the regulatory purpose," because there was a New Jersey statute limiting the availability of liquor licenses near schools and churches.[62] The court noted that the City would not be able to create a downtown area filled with restaurants, clubs, bars, and entertainment facilities without issuing liquor licenses in that area, which would be thwarted if schools and churches were permitted.[63] The redevelopment plan, therefore, rightfully prohibited two land uses that would thwart the regulatory purpose of the City's redevelopment plan.[64]

The Third Circuit's approach has been labeled as a "regulatory purpose" approach that first looks at the regulatory purpose of a land use regulation to identify a similarly situated comparator.[65] The approach only compares religious assemblies or institutions to secular assemblies or institutions that are similarly situated as to the regulatory purpose—like schools in the *Lighthouse* case—when applying the Equal Terms provision. By doing so, the Third Circuit restricts the Eleventh Circuit's approach that is more favorable to religious entities.

C. Seventh Circuit's "Accepted Zoning Criteria" Approach

The Seventh Circuit had initially adopted the Eleventh Circuit's approach but decided to adopt a modified version of the Third Circuit's approach in *River of Life Kingdom Ministries v. Village of Hazel Crest*.[66] Plaintiff was a church operating out of a rented space in a small warehouse.[67] The Church wanted to relocate to Hazel Crest in the southern suburbs of Chicago, but the building they chose was in an area designated by a zoning

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60 *Id.* at 272–73.
61 *See id.* at 270 (agreeing with the City's argument).
62 *See id.* at 266, 272.
63 *Id.* at 272.
64 *Id.* at 270–73.
65 *See* River of Life Kingdom Ministries v. Vill. of Hazel Crest, 611 F.3d 367, 376 (7th Cir. 2010) (en banc) (Williams, concurring) (referring to the Third Circuit's approach as the "regulatory purpose" test).
66 *Id.* at 367.
67 *Id.* at 368, 377.

ordinance as a commercial district.[68] The local zoning ordinance permitted a wider variety of commercial and retail uses such as recreational buildings and community centers, but it excluded new non-commercial uses from the district.[69] Churches were included in the list of excluded uses.[70] The town had suffered many years of economic decline, so the City had hoped to revitalize the area as a commercial center.[71] Plaintiff claimed that the zoning ordinance violated the Equal Terms provision.[72]

The Seventh Circuit viewed the Eleventh Circuit's approach as an oversimplification of the concept of assembly and agreed with the Third Circuit's rationale that a similarly situated comparator is necessary to limit the scope of the Equal Terms provision.[73] At the same time, however, the Seventh Circuit viewed the Third Circuit's approach as a "subjective and manipulable" test.[74] In Judge Posner's view, the Third Circuit's approach could allow zoning officials to disguise discrimination of religious institutions under a fictitious regulatory purpose, whereas the Eleventh Circuit's approach required the courts to compare land uses that could be incommensurable.[75] Judge Posner thus sought to supplant the subjective regulatory purpose test with a more objective "accepted zoning criteria" test.[76]

The accepted zoning criteria test is a particularized inquiry where a federal judge objectively determines what the regulatory zoning criteria is, instead of giving blind deference to the regulatory purposes put forth by zoning officials.[77] Judge Posner explained that accepted zoning criteria include traditional zoning considerations like health and safety, as well as factors

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68 *Id.* at 377.

69 *Id.*

70 *Id.* at 378.

71 *Id.* at 367–68, 377.

72 Plaintiff sued the City for facial violation of the Equal Terms provision after the City denied its application for special-use permit. *Id.* at 367, 378. The City then amended the ordinance to remove certain secular assemblies from the list of permitted and special uses to cure the facial violation. *Id.* at 368. Nevertheless, Plaintiff argued that the remaining permitted uses are "nonreligious assemblies" and that allowing those uses while excluding churches violated the Equal Terms provision. *See id.* at 378.

73 *See id.* at 369–71 (explaining why the Eleventh Circuit's approach would give religious land uses favored treatment that is inconsistent with the Establishment Clause).

74 *Id.* at 371.

75 *See* Tokufumi Noda, *The Role of Economics in the Discourse on RLUIPA and Nondiscrimination in Religious Land Use*, 53 B.C. L. REV. 1089, 1110 (2012).

76 River of Life Kingdom Ministries, 611 F.3d at 371.

77 *See id.*

such as traffic and tax revenue generation.[78] For example, a theater and a church would be similar as to "traffic," because both land uses tend toward concentrated comings and goings of persons, either at the end of a show or at the end of a religious service.[79]

Applying this new test, the Seventh Circuit held that the City did not violate the Equal Terms provision because its zoning ordinance specifically excluded other assemblies and institutions that are similar to churches as to tax generation and traffic potential.[80] The Seventh Circuit postulated that separate zoning areas, including residential and municipal, would "insure a better and more economical use of municipal services."[81] Therefore, the City was not unique to exclude churches and non-commercial assemblies from a certain zone. The Seventh Circuit ultimately held that treating religious and secular land uses equally from the standpoint of accepted zoning criteria such as a "commercial district" or "residential district" is sufficient to survive an Equal Terms provision claim.[82]

D. Other Approaches

The Ninth Circuit has interchangeably applied both the regulatory purpose and the accepted zoning criteria tests. In *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*,[83] a young religious congregation of around 250 members was searching for a permanent building in which to hold its services. The Church eventually purchased a former department store located in the Old Town District on Main Street.[84] But the City of Yuma had worked for years to revive its Old Town Main Street area into a tourist and entertainment district with a "mixture of commercial, cultural, governmental, and residential uses."[85] The zoning code for the Old Town District permitted a variety of uses, including membership organizations, but it specifically excluded religious organizations unless they obtained a conditional use permit.[86] The City Planning and Zoning Commission denied the Church a conditional use permit because of a state prohibition on liquor licenses for bars, night-

78 *Id.* at 371–73.
79 *Id.* at 373.
80 *Id.* at 373–74.
81 *Id.* at 372.
82 *Id.* at 373.
83 651 F.3d 1163, 1165 (9th Cir. 2011).
84 *Id.* at 1166.
85 *Id.* at 1165–66.
86 *Id.* at 1166.

clubs, and liquor stores within 300 feet of a church.[87] The Commission was concerned that the liquor license prohibition would depress potential tax revenue and negatively impact the unique neighborhood of Main Street, with the owners of neighboring properties objecting to granting a permit.[88]

The Ninth Circuit found that the town treated the Church on less than equal terms with other similarly situated uses within the same regulatory purpose.[89] Significantly, even though it was seemingly applying the Third Circuit's approach, the Ninth Circuit reached a different conclusion on similar facts. Here, as in the Third Circuit's *Lighthouse* case, there was also a ban on liquor licenses within a certain radius of a church that led the Third Circuit to side with the government.[90] The Ninth Circuit sided with the Church, however, holding that a religious institution cannot be treated less equally than a nonreligious institution if the two institutions cannot be distinguished on the basis of the accepted zoning criteria that define the zone.[91]

Meanwhile, some circuit courts have refused to adopt a particular approach. The Fifth Circuit, for example, seemingly applied a standard rather than adopting a particular test in determining whether a land use regulation is of less than equal terms.[92] The Second Circuit also refused to espouse a particu-

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87 *See id.*

88 *See id.* (explaining how owners of neighboring properties also objected to granting the permit because allowing a church would prevent issuance of liquor licenses, causing problems for a "24/7 downtown neighborhood" whose block serves as an entertainment district).

89 *Id.* at 1175.

90 *Compare id.* at 1174–75 (pointing out that the ordinance is too broad "to be explained away by the liquor license restriction" and that the ordinance permits land uses that would have the same practical effect as a church of "blighting a potential block of bars and nightclubs"), *with* Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 272 (3d Cir. 2007) (agreeing with the City that unavailability of liquor licenses due to permitting a church would have detrimental effects on plans for a vibrant entertainment district). The Ninth Circuit does emphasize that its holding in *Centro Familiar* is based on the fact that the ordinance excludes not only churches but also religious organizations that are not churches, giving less weight to the liquor licensing issue as did the Third Circuit in *Lighthouse*. Centro Familiar Cristiano Buenas Nuevas, 651 F.3d at 1173–74.

91 Centro Familiar Cristiano Buenas Nuevas, 651 F.3d at 1173.

92 Elijah Grp., Inc. v. City of Leon Valley, 643 F.3d 419, 423–24 (5th Cir. 2011) (holding that the ordinance treats the Church on terms that are less than equal to the terms on which it treats similarly situated nonreligious institutions, without specifying which circuit's test it is adopting). The Sixth Circuit views the Fifth Circuit's approach, which evaluates comparators by reference to "the ordinance itself and the criteria by which it treats institutions differently," as being closer to the Third Circuit's approach than to the Seventh and Ninth Circuits'

lar approach, seeking rather to treat all tests to be essentially identical and de-emphasize the "technical differences between religious and secular organization[s]."[93] In *Third Church of Christ, Scientist v. City of New York*, for example, the Second Circuit held that denying a land use permit to a church violated the Equal Terms provision because many hotels with catering operations were permitted in the same residential zone, and it did so without needing to analyze the "differences in the mechanism for selecting an appropriate secular comparator."[94]

The Sixth Circuit created the "legitimate zoning criteria" test in *Tree of Life Christian Schools v. City of Upper Arlington*, which is virtually the same in terms of substance as the Third, Seventh, and Ninth Circuits' approaches.[95] The U.S. Supreme Court has denied certiorari on the Sixth Circuit's decision,[96] leaving the issue open for further debate. The circuit splits thus remain in flux to this day.

E. The Right Approach?

Understandably, the current state of circuit splits regarding the Equal Terms provision has produced many articles seeking to argue for the "right" approach. Some prefer the Eleventh Circuit's approach, because they do not see any requirement in the text of the Equal Terms provision that a court should search for some comparator that is similarly situated with regard to some regulatory purpose or criteria.[97] Aside

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approaches. Tree of Life Christian Sch. v. City of Upper Arlington, 905 F.3d 357, 368 (6th Cir. 2018).

93 DALTON, *supra* note 6, at 79. The Fifth Circuit, however, considers the Second Circuit to have unintentionally created a fourth test. *See Elijah Grp., Inc.*, 643 F.3d at 423 (describing the Second Circuit's test as "somewhat combining the Third and Seventh Circuits' tests" in identifying a comparator that is similarly situated for all "functional intents and purposes" of the regulation).

94 626 F.3d 667, 670 (2d Cir. 2010).

95 905 F.3d 357, 369 (6th Cir. 2018). The decision succinctly sums up the different approaches, stating that the Eleventh Circuit requires a claimant to only show unequal treatment in comparison to a nonreligious entity in various ways whereas the Third, Fifth, Sixth, Seventh, and Ninth Circuits require the claimant to additionally prove that a nonreligious institution is similarly situated with regard to legitimate zoning criteria. *See id.* at 369–70.

96 Tree of Life Christian Sch. v. City of Upper Arlington, 139 S. Ct. 2011, 2011–12 (2019).

97 *See, e.g.*, Danielle Acker Susanj, *RLUIPA's Equal Terms Clause and the Circuit Split: It's All About the Money* 31–32 (January 31, 2012) (unpublished manuscript), https://ssrn.com/abstract=2209989 [https://perma.cc/7DNU-ZCEU] (pointing out that a RLUIPA violation does not require that a "similarly situated" comparator is identified under the Equal Terms provision); Walker, *supra* note 29, at 35 (explaining that nothing in the text of RLUIPA or its legislative history indicates that Congress intended to require plaintiffs to show a similarly situated comparator to prove an Equal Terms claim).

from the textualist rationale, proponents of the Eleventh Circuit's approach also contend that this approach allows both sides (i.e., religious institutions and municipalities) to prevail even when economic issues are at stake.[98] This argument is based on the criticism that the Third and Seventh Circuits' approaches can allow municipalities to invoke economic rationales to justify disallowing religious land uses.[99] Ultimately, then, these proponents argue for the broadest plain meaning of RLUIPA by interpreting it as providing a hard-and-fast rule that, wherever governments allow secular assemblies and institutions, they must also permit religious assemblies and institutions on no less than equal terms.[100]

Proponents of the Third Circuit's approach, on the other hand, argue that the regulatory purpose requirement serves a gatekeeping function against the Eleventh Circuit's potentially boundless interpretation in favor of free exercise.[101] These proponents admit that reading such an additional requirement into the text of RLUIPA could go against the principles of textual interpretation.[102] Nonetheless, they argue that there still needs to be a limit on the Eleventh Circuit's approach that could give too much leeway to religious institutions.[103] The key tenet of the Third Circuit's approach, then, is that the law cannot be said to be treating assemblies unequally when the assemblies themselves have widely disparate impacts on the regulation's purpose.[104] Proponents of the Ninth Circuit's approach follow a very similar, if not the same, rationale. In fact,

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98 Susanj, *supra* note 97, at 32.

99 *See id.* at 31–32 (noting that the Third and Seventh Circuits encourage city officials to invoke economic rationales, even if pretextual).

100 *See* Brian K. Mosley, Note, *Zoning Religion Out of the Public Square: Constitutional Avoidance and Conflicting Interpretations of RLUIPA's Equal Terms Provision*, 55 ARIZ. L. REV. 465, 497 (2013).

101 *See, e.g.*, Kleinsasser, *supra* note 29, at 174. (admitting that the Eleventh Circuit's approach "makes sense from the perspective of textual interpretation" while espousing for the Third Circuit's approach because the Eleventh Circuit's approach is "unworkable" in practice).

102 *See id.* The dissent in *Lighthouse* also criticized how the majority's extra-statutory embellishment was telling religious institutions "to take a back seat to [its] economic development goals" and furnishing "a ready tool" by which local governments could render the Equal Terms requirement "practically meaningless." Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 278, 293 (3d Cir. 2007).

103 *See* Kleinsasser, *supra* note 29, at 175 (arguing that the Third Circuit's test "serves a gatekeeping function by screening out claims involving secular and religious entities not susceptible to easy comparison").

104 *Id.*

some proponents even present a combination of the Third and Ninth Circuits' approaches.[105]

Criticism of the Eleventh Circuit's approach has been conveyed through the famous hypothetical about the 10-person book club and the 1,000-person church.[106] The argument is that, under the Eleventh Circuit's approach, a city must always allow a 1,000-person church in an area so long as the city also allows a 10-person book club to assemble.[107] This result is illogical, the argument goes, because a government may have a legitimate, non-discriminatory reason to prohibit assemblies based on factors such as size.[108] A 10-person book club and a 1,000-person church, for example, may have disparate impacts due to differences in size which may warrant different regulatory treatment.[109]

The regulatory purpose approach draws its own share of criticism for being overly subjective and leaving the door open for individualized assessment and discrimination.[110] This was specifically why Judge Posner introduced the accepted zoning criteria approach for the Seventh Circuit.[111] Accordingly, proponents of the Seventh Circuit's approach contend that establishing objective criteria would put all parties on notice and enable federal judges to easily apply the criteria to lawsuits.[112]

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105 Robert Banas, Note, *RLUIPA: How Equality and Fairness in Land Use Regulations Do Not Always Coexist*, 16 RUTGERS J. L. & RELIGION 360, 385 (2015). Banas proposes that courts first examine a land use regulation and determine its impact on the community. *Id.* Under the Ninth Circuit's approach, it will be necessary to establish what the "equal terms" are within the land use regulation to determine which parties will ultimately be impacted by the regulation. *Id.* Once the equal terms within the land use regulation are established, the Third Circuit's test will become applicable in determining its purpose and deciding whether religious and nonreligious institutions are treated unequally. *Id.*

106 Ryan M. Lore, Comment, *When Religion and Land Use Regulations Collide: Interpreting the Application of RLUIPA's Equal Terms Provision*, 46 U.C. DAVIS L. REV. 1339, 1358 (2013).

107 Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 268 (3d Cir. 2007).

108 Lore, *supra* note 106, at 1358–59.

109 *Id.* at 1159.

110 *See, e.g.*, Walker, *supra* note 29, at 31 (arguing that the Third Circuit's subjective test only incentivizes discrimination by allowing government to present self-serving testimony and pretextual regulatory purposes).

111 *See* River of Life Kingdom Ministries v. Vill. of Hazel Crest, 611 F.3d 367, 371 (7th Cir. 2010) (en banc) (explaining that "purpose" is subjective and manipulable, which is why the focus should be on accepted zoning "criteria" rather than regulatory "purpose").

112 *See* Andrew Cleves, Note, *Equal Terms: What Does It Mean and How Does It Work: Interpreting the Equal Terms Provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA)*, 80 U. CIN. L. REV. 209, 231 (2012) (claiming that the Seventh Circuit's test "protects against individualized assessment and subjective intent by providing objective standards").

However, Judge Posner himself spills a lot of ink defending against the charge that his new test may only be a semantic change.[113] Although Judge Posner insists that a regulatory purpose is subjective and prone to manipulation, whereas an accepted zoning criteria is an objective measure, he also acknowledges that his test is "less than airtight" and would not work well where the zoning choices are not based on a single conventional zoning criterion.[114]

Due to the similarity between the Third and Seventh Circuits' approaches, they draw the same kind of criticisms. One author observes that in cases requiring a similarly situated comparator with respect to either regulatory purpose or zoning criteria, the economic rationale ultimately has been the winning argument for the city, a concern Judge Sykes raised in her dissent in *River of Life Kingdom Ministries v. Village of Hazel Crest.*[115] This suggests that "economic rationales may be a pleading standard for cities, the trump card that surpasses RLUIPA's requirement not to treat religious institutions unequally."[116] The Third and Seventh Circuits' approaches would, in practice, incentivize city officials to invoke economic rationales to restrict religious land use.[117]

Ironically, some authors actually embrace the possibility that an approach would allow municipalities to define assembly in an economic context.[118] One author argues that defining assembly in an economic context would provide a clear definition to an otherwise ambiguous provision, offering a balanced approach to help diffuse the burdens on churches and municipalities.[119] The author even proposes that courts could apply this economic assembly definition in different ways, such as defining an assembly as "a group of people collected for a common purpose that generates a certain amount or percentage of tax revenue."[120]

The survey of the various efforts to find the preferred approach amidst the circuit splits leads to several important observations. The circuit courts, as well as their proponents and

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113 *See River of Life Kingdom Ministries*, 611 F.3d at 371–74.
114 *See id.* at 374.
115 *Id.* at 385–86; Susani, *supra* note 97, at 32.
116 Susanj, *supra* note 97, at 31.
117 *Id.* at 32.
118 *See* Cleves, *supra* note 112, at 226–27 (arguing that scholars and officials all consider economic growth to be a priority and that the Equal Terms provision lawsuits against municipalities show the importance of economics on local governments' decisions).
119 *Id.* at 226.
120 *Id.*

critics, all focus on trying to find the right interpretation of the Equal Terms provision without giving due consideration to the fact that RLUIPA was legislated amidst the historical tension between the "anti-discrimination" and "anti-exemption" principles of the First Amendment.[121] They do so by reading in the words "similarly situated" to a provision that omits such language, simply because the word "equal" seemingly invokes the jurisprudence on Equal Protection.[122] This renders the Equal Terms provision redundant, for Equal Protection and Establishment Clauses effectively provide for the same thing that the Equal Terms provision is supposedly attempting to accomplish.[123] This blind adoption of the Equal Protection jurisprudence seems to have the effect of "reductive equalization," whereby all that is required from the government is "equal treatment of similarly situated organizations."[124]

Moreover, while the circuit courts' attempts to find the correct interpretation of the Equal Terms provision are tied within the constitutional framework of Equal Protection, the commentators' attempts to choose the right approach among circuit courts seem to involve value-laden choices as to what kind of land use should be prioritized over another. For example, proponents of the Eleventh Circuit's approach contend that comparing religious and secular organizations within the same regulatory purpose or criteria would enable municipalities to utilize economic development as a valid cause to regulate religious land use.[125] Critics of the Eleventh Circuit's approach seem to agree, for they argue that municipalities should be able to regulate land use specifically to enable economic development.[126] The substance of the whole debate thus becomes a matter of value judgment, not legal analysis. The complex nature of the current circuit splits invites us to step back and ask:

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121 *See* discussion *supra* Part I.

122 In his dissent in *Tree of Life Christian Schools v. City of Upper Arlington*, Judge Amul Thapar notes that Congress knew about the "similarly situated" language from the Equal Protection context and specifically chose not to adopt the language into RLUIPA. 905 F.3d 357, 379 (6th Cir. 2018) (Thapar, J., dissenting).

123 Bram Alden, Note, *Reconsidering RLUIPA: Do Religious Land Use Protections Really Benefit Religious Land Users?*, 57 UCLA L. REV. 1779, 1806 (2010).

124 *Id.* at 1804.

125 *See, e.g.*, Susanj, *supra* note 97, at 31–32 (arguing that the Eleventh Circuit's test "strikes a reasonable balance" by allowing cities to justify zoning ordinances on economic grounds without overburdening non-commercial uses).

126 *See, e.g.*, Cleves, *supra* note 112, at 226–28 (describing the importance of cultivating economic growth on a local scale); Kleinsasser, *supra* note 29, at 164 (describing the impact of religious establishments on urban economic development projects).

why are the circuit courts and commentators treading in the sea of all these different approaches?

F. An Alternative Approach

To answer the question, one must first acknowledge the striking parallel between the circuit splits and the history of First Amendment jurisprudence itself. In a way, the Eleventh Circuit's approach embodies the *Sherbert-Yoder* test's movement toward broadening religious liberty, whereas the Third Circuit's approach resembles *Smith*'s movement toward restricting religious liberty. The Eleventh Circuit's approach thus risks over-protection, while the Third Circuit's approach risks under-protection in trying to prevent equalization from amounting to an exemption. The other circuits' approaches, led by the Seventh Circuit's approach, can be summarized as attempts to strike that "benevolent neutrality"[127] between the two extreme positions.

This brings us back to the crucial point raised by the First Amendment's tension: in prohibiting treatment of religious entities on less than equal terms with nonreligious entities, the Equal Terms provision is striving to achieve equal treatment of religious land use while avoiding special treatment, which has proven to be a near-impossible task in the history of First Amendment jurisprudence. Choosing one particular approach to the Equal Terms provision that either overly protects or insufficiently protects religious land use would address just one part of this dual task imposed by the peculiar place religion has in our Constitution: religion receives extra protection to prevent discrimination, but this cannot be so extra as to constitute an exemption.

Rather than trying to find a magical approach that would resolve this tension that courts have struggled to unravel for years, this Note shifts the focus of analysis to the fact that the Equal Terms provision specifically deals with religious *land use*, not religious liberty in the general sense. Why does religious land use need extra protection through legislation like RLUIPA, and when would such protection conflict with nonreligious land use? Instead of trying to interpret the Equal Terms provision to find the elusive "benevolent neutrality"[128] in the sphere of the First Amendment, this question steers us to con-

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127 *See* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1240 (11th Cir. 2004).

128 *Id.*

sider what such benevolent neutrality would look like in the context of land use.

This alternative approach to the Equal Terms provision enables us to turn to principles of property law rather than being caught up in a murky constitutional conundrum, as the issues related to religious land use deal with the core question of property law: the relationship between the state and individuals in land use. A framework grounded in property law can lead us to view both religious and nonreligious entities within the larger community that property law is concerned with, instead of simply comparing the religious to the nonreligious without giving due consideration to the values that each brings to society. Property law can provide an applicable framework grounded in value judgments to more adequately address issues related to religious land use, because "different values implicate different types of property so that it is reasonable to develop legal presumptions about outcomes based substantially on the type of property involved."[129]

III
AN ALTERNATIVE APPROACH TO EQUAL TERMS: PROMOTING HUMAN FLOURISHING

Indeed, the relationship between individuals and communities, especially the state, constitutes a "central preoccupation of property theory."[130] Viewed from this angle, one could interpret RLUIPA as a statute addressing how a government should interact with individuals whose personal religious values are tied to land use regulations that could impact their religion. In an attempt to understand RLUIPA's Equal Terms provision within property law, this Note turns to Gregory Alexander's human flourishing theory of property which starts from the proposition that the very purpose of property is to enable individuals to live a flourishing life.[131] If religion entails values that are essential to individuals' attainment of a flourishing life, as many believe it does, then the human flourishing theory of property might shed light on the relationship between such values and land use regulation.

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129 GREGORY S. ALEXANDER, PROPERTY AND HUMAN FLOURISHING, 222 (2018).

130 Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 THEORETICAL INQUIRIES L. 127, 127–28 (2009).

131 ALEXANDER, *supra* note 129, at xiv.

A. Human Flourishing

The term "flourishing" refers to Aristotle's concept of *eudaimonia*, which consists of the human person's exercising of moral and intellectual virtues as well as being a member of a community that aims to bring about the flourishing of its members.[132] In defining human flourishing for the purpose of presenting it as a basis of property theory, Alexander presents two key characteristics of human flourishing: that human flourishing is at once pluralistic and objective.[133]

Human flourishing is *pluralistic* in the sense that it rejects the existence of a single irreducible fundamental moral value to which all other moral values may be reduced, because the values constituting human flourishing are incommensurable and hence irreducible to a single value.[134] But human flourishing is also *objective*, meaning that there are certain things which can be intrinsically good, despite there being many different paths leading to a flourishing life.[135] Therefore, human flourishing cannot solely depend on individuals' subjective preferences; rather, human flourishing is an ontological state of living an intrinsically good life.[136]

Welfare, on the other hand, is value-monist and presupposes a desire-fulfillment theory.[137] Welfarism supposes that there is one and only good, which is presupposed to be the maximization of preference satisfaction to which all other val-

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132 Graham Oppy, *Philosophy in* OXFORD TEXTBOOK OF SPIRITUALITY IN HEALTHCARE 77 (Mark Cobb, Christina M. Puchalski, & Bruce Rumbold eds., 2012); Brian Duignan, *Eudaimonia*, Encyclopedia Britannica, https://www.britannica.com/topic/eudaimonia [https://perma.cc/L97A-XBX9] (last visited Jan 21, 2020).

133 ALEXANDER, *supra* note 129, at 5.

134 *Id.* Alexander uses the term "incommensurable" or "incommensurate" in the sense that one cannot say "x is better than y, x is less than y" about two values because there is no valuable respect that the two share in common. *Id.* at 5, 24. For example, Bach's musical genius and Mother Theresa's kindness are incommensurable because they are "valuable in fundamentally different respects." *Id.* at 24.

135 *Id.* at 5–6.

136 Gregory S. Alexander, *Property, Dignity, and Human Flourishing*, 104 CORNELL L. REV. 991, 992–93 (2019) [hereinafter *Dignity*]. Subjective preferences do play a role in human flourishing, but the human flourishing theory acknowledges that "there is a filter on what constitutes a flourishing life" because some subjective preferences (e.g., personal desire to devote one's life inflicting pain on innocent people) may not objectively constitute human flourishing. *Id.* at 993. Human flourishing has a subjective aspect because it is agent-relative, meaning human flourishing is "always the good for a particular person," but the objectivity of values prevents human flourishing from being defined solely based on subjective preferences. *See id.* at 993–94 (reconciling the agent-relative and objective aspects of human flourishing).

137 ALEXANDER, *supra* note 129, at xv, 10.

ues can be reduced.[138] Alexander's concept of human flourishing provides a novel foundation for property theory, specifically because of the two key characteristics of human flourishing that distinguish the concept from welfare which serves as a foundation for a utilitarian theory of property.[139] The term "human flourishing" as used in this paper refers to this specifically defined concept that is objectively value-pluralist, distinct from the concept of welfare.[140]

Admittedly, defining human flourishing by its key characteristics poses a challenge in measuring what exactly constitutes a flourishing life. Alexander adopts Amartya Sen's approach of measuring human flourishing by a person's "capabilities," to be distinguished from "functionings" which refers to what a person actually does with those capabilities.[141] Alexander presents life, freedom, practical reasoning, and sociability as the four essential capabilities.[142] Because these capabilities are essential to human flourishing, the capacity to develop such capabilities constitutes an objective good that society must promote as well as an entitlement that every member of society holds.[143]

The implications of a capabilities approach are significant, because it presupposes that a person's capabilities cannot be

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138 *Id.* at 10.

139 *Id.* at 3, 9.

140 Human flourishing is distinct from welfare in the sense that flourishing cannot be reduced to welfare, not that it is exclusive of welfare. Because human flourishing is value-pluralist, welfare can very well be one constituent of human flourishing. This value-pluralist concept of human flourishing is distinct from a value-monist concept of welfarism espoused by law-and-economics analysts, who tend to argue that maximizing satisfaction of one's personal preferences is the one and only good. *See id.* at 10–14 (explaining the differences between human flourishing and welfare).

141 *Dignity*, *supra* note 136, at 994, 995 n.13. Alexander's concept of human flourishing follows the "comprehensive liberalism of flourishing," which claims that "the good life is one in which an individual succeeds in developing and exercising her varied human capabilities." Gregory S. Alexander, *Can Human Flourishing Be Liberal?*, 32 CAN. J. L. & JURIS. 235, 236–37 (2019) [hereinafter *Liberal?*] (reviewing MENACHEM MAUTNER, HUMAN FLOURISHING, LIBERAL THEORY, AND THE ARTS (2018)). This is different from an "intellectualist-moralist" liberalism of flourishing, which claims that "the good life is one in which an individual succeeds in developing her intellectual and moral capabilities." *Id.*

142 Different authors have slightly different lists of what they believe are essential capabilities. *See, e.g.*, Alexander & Peñalver, *supra* note 130, at 137–38 (describing four capabilities they view as uncontroversial: (1) "life" is a good we take to include subsidiary goods, such as health and security; (2) "freedom" includes identity and self-knowledge; (3) "practical reason" is the capacity of deliberating well about what is good and advantageous for oneself; and (4) "sociability" is like "affiliation," a good that encompasses subsidiary goods such as social participation, self-respect, and friendship).

143 ALEXANDER, *supra* note 129, at 9.

developed without a community.[144] As Alexander explains, communities are "the mediating vehicles through which we come to acquire the resources we need to flourish and to become fully socialized into the exercise of our capabilities."[145] Hence, the cultivation of essential capabilities necessary to attain human flourishing depends upon social, cultural, and institutional matrices whose conditions may vary among societies that have different social norms.[146] Human flourishing thus presents an intrinsic link between individuals and communities, whereby communities empower its members to develop capabilities that are essential to flourish, enabling those members to in turn empower other members to also develop such capabilities.[147]

This marks a drastic departure from a utilitarian/economic or a classical liberal contractarian conception of community, according to which the individual exists ontologically prior to the community and communities are merely means for individuals to pursue their pre-existing preferences or goals that are independent of the community.[148] Under this conception of community, individuals and communities are tied by the pursuit of maximum welfare or contractual agreement.[149] Under the human flourishing theory, individuals and communities are bound by the individuals' obligation "to belong, to participate, and to contribute" and the communities' obligation to provide a context in which individuals can develop capabilities essential to human flourishing.[150] Simply put, individuals enter into community not because it is an instrument that helps them realize their individual preferences, but rather be-

144 *See id.* at 7 ("No one can develop these capabilities by himself. . . . [Capabilities] can meaningfully exist only within a matrix of social structures and practices.").

145 *Id.* at 8. Alexander continues: "[a]sked who we are, we inevitably talk about the communities where we were born and raised, our nation, our family, where we attended school, our friends, our religious communities and clubs. Indeed, individuals and communities interpenetrate one another so completely that they can never be fully separated." *Id.*

146 *Dignity*, *supra* note 136, at 996–97.

147 *Liberal?*, *supra* note 141, at 236 ("[I]t is the state's function to create the background conditions that allow individuals to develop and exercise their varied capabilities."). The state thus fosters "just relationships" with societies by shaping social norms, where "just social relations" means a society where individuals can interact with one another "in a manner consistent with norms of equality, dignity, respect, and justice as well as freedom and autonomy." ALEXANDER, *supra* note 129 at 8–9.

148 Alexander & Peñalver, *supra* note 130, at 134.

149 *See id.* at 130–32 (describing how the utilitarian question solely asks whether a community will enhance individuals' preference satisfaction).

150 *Id.* at 141, 144.

cause it is inherently human to live in communities.[151] This inherent interdependence is crucial to how human flourishing informs property theory about the relationship between individuals and communities in the context of owning and using property.

B. Human Flourishing and Property Theory

The value-pluralist and community-based qualities of human flourishing allow us to extend this concept of human flourishing into the realm of property law, especially as to how the state should regulate property in relation to the individuals who constitute the state itself.[152] As human flourishing necessarily imposes an obligation on communities to enable individuals to attain human flourishing by developing essential capabilities, the state, as a community itself, has an obligation to provide (or at least not take away) social matrices on which cultivation of human capabilities is made possible.[153]

This means that human flourishing necessarily implicates a perfectionist theory, under which the state is to create and foster conditions that empower citizens to achieve human perfection, which can be understood as being synonymous with human flourishing.[154] From the state's perspective, then, human flourishing has both an *empowering* function and a *limiting* function.[155] On the one hand, human flourishing empowers the state to compel certain use or sharing of property to fulfill individuals' and communities' obligation to foster capabilities essential to human flourishing.[156] On the other hand, human flourishing limits the state's powers so that the state

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151 *See* ALEXANDER, *supra* note 129, at 7 ("We are, in short, inevitably dependent upon communities, both chosen and unchosen, not only for our physical survival but also for our ability to function as free and rational agents.").

152 *See* Alexander & Peñalver, *supra* note 130, at 149 ("[The] dependence of human capabilities on community and on the material resources of the community create obligations . . . . [T]he state has a vital, although not unbounded, role to play alongside private communities in fostering the requisite human capabilities.").

153 *See* ALEXANDER, *supra* note 129, at 9 ("The cultivation of the capabilities necessary for flourishing depends upon social matrices . . . . A society that fosters those capabilities that are necessary for human flourishing is morally better than one that is either indifferent or (even worse) hostile to their manifestation.").

154 *Dignity*, *supra* note 136, at 996 n.17.

155 *See* ALEXANDER, *supra* note 129, at 55 (distinguishing obligations that restrict what we may do from obligations that require us to do certain things).

156 *Id.* For example, building material infrastructures like roads provides public benefits that are vital to empowering capabilities necessary for a flourishing life. *See id.* at 228. These projects may require individuals to sacrifice their personal homes if necessary, despite the many values tied to their property interest. *See id.*

may not impede its members' capacity to develop the essential capabilities.[157]

This dual nature of human flourishing is particularly important in relation to the state's power to regulate property—especially land—because using land for one particular use results in less land available for other uses.[158] Moreover, because human flourishing is value-pluralist, there cannot be one value that justifies a certain land use that makes less land available for the development of other values.[159] One value may empower the state to put land to use in a certain way, while another equally essential value limits the state from taking away land to be used in different ways.[160] The human flourishing theory encourages the state to allow religious land use to promote the flourishing of individuals whose essential capabilities largely depend on religious values, but also acknowledges that the state "simply [can]not operate if it were required to satisfy every citizen's religious needs and desires."[161]

Human flourishing thus cannot be deontologist, because it cannot impose duties or rules dictating actions under this empowered yet limited role of the state.[162] Alexander presents his human flourishing theory as being *consequentialist*, where human flourishing constitutes the very consequence and goal that property law strives to realize.[163] By empowering and limiting the state's powers over individuals, human flourishing can ultimately function as a moral foundation of property law

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157 For example, a nonessential expropriation of a personal home would seriously endanger human flourishing where the home is an individual's sole or main abode. *See id.* at 229 (examining the "special claim of homeowners" regarding their interest in personal security and privacy).

158 Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 832 (2009).

159 *See* ALEXANDER, supra note 129, at 5 (explaining that different values cannot be balanced one against the other, although rational choices can be made when they conflict with one another).

160 *See id.* at 226–28 (explaining how personal homes merit strong legal protection because of values like individual autonomy and personal security, although there are instances when sacrificing personal homes is necessary for the development of human capabilities that constitute a flourishing life).

161 Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 452 (1988).

162 ALEXANDER, *supra* note 129, at 11, 20 (explaining deontologists' emphasis on a single, objective moral value, although "[w]hen preferences conflict, no intrinsic attribute of preference can tell us which preference is the authoritative index of value").

163 *Id.* at 4. Alexander notes that human flourishing is usually tied to virtue ethics, an Aristotelian approach to normative ethics that is distinguished from deontology and consequentialism. *Id.* This means that Alexander's consequentialist property theory of human flourishing is not a virtue theory, although it is based on a concept central to a virtue theory. *See id.*

that guides the state in its regulation of property use that impacts human flourishing in a way that is "thoroughly suffused with moral content."[164] It is in this consequentialist sense that human flourishing relates to property law for the purposes of this Note.

Issues related to eminent domain serve as a good example of how human flourishing guides and informs property law as its moral foundation. In *Kelo v. City of New London*,[165] for example, the U.S. Supreme Court held that the economic benefits to a community constitute a legitimate basis to qualify the private redevelopment plans as permissible "pubic use" under the Takings Clause, implicating a utilitarian/economic view of community.[166] When community is viewed as existing to further human flourishing, however, the economic benefits mentioned in *Kelo* could be outweighed by other factors that constitute essential capabilities of human flourishing.[167] This, in turn, sheds light on the inherent limit on the government's power to regulate land use in a way that conflicts with such capabilities.

Reinterpreting *Kelo* through the lens of human flourishing, Alexander turns to how German courts apply the German Basic Law's social obligation provision in its property clause by utilizing a "scaling" function (*Abstufung der Sozialpflichtigkeit*).[168] This enables German courts to scale the extent to which the social obligation norm limits property according to the property's relation to the individual owner.[169] Hence, a property right that is more closely involved in providing personal liberty to the owner would be more difficult to restrict. Under this approach, German courts have afforded minimal protection for property interests whose function is primarily economic or private wealth-creating, because such interests do not immediately implicate the fundamental values of personal

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164 Peñalver, *supra* note 158, at 876.

165 545 U.S. 469 (2005).

166 *See generally* ALEXANDER, *supra* note 129, at 211–16 (explaining *Kelo*'s holding and providing a critical analysis as to how the Supreme Court relied on consequentialist reasoning, taking into account aggregate utility rather than all the relevant values at stake).

167 *See id.* at 226–29 (describing how the special function of a personal home may outweigh the need for a community's economic development).

168 *Id.* at 222.

169 *Id.* The German court has created a hierarchy of types of property interests depending upon the social functions they serve. The greater the degree of dependency, the greater the social function. *Id.* at 223.

autonomy and self-realization.[170] Had the Supreme Court applied this logic in *Kelo*, the importance of a personal home in developing the capabilities of personal security and privacy could have led to a different outcome.[171]

C. Human Flourishing and Religious Land Use

The aspects of human flourishing explored so far render it useful in providing guidance on religious land use. In a broad sense, there are two main ways in which religion can promote human flourishing.[172] At the individual level, religion may constitute a capability in and of itself to certain individuals who turn to religion to find ultimate meaning and thus attain a flourishing life.[173] At the communal level, religion can provide a community in which individuals can develop the essential capabilities to flourish.[174] In a way, then, religion can be an essential value itself as well as a locus in which individuals can find and develop values essential to flourishing. These twofold aspects justify the application of the human flourishing theory of property to religious land use.

(1) *Religion as capability*: To some individuals, religion itself can be an essential value that one needs to live a flourishing life.[175] One cannot identify religion as an essential value in the strictest sense, however, because the effects of religious practice on human flourishing can sometimes be secondary, if not incidental.[176] While it may be true that religion enables a

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170 *Id.* at 223. The scaling function would not dichotomously divide commercial and non-commercial interests. *Id.* Commercial interests like those of small, family-owned businesses involve more weighty fundamental values, so German courts would afford a relatively stronger protection. *Id.*

171 *Id.* at 229.

172 *See* Tyler J. VanderWeele, *Spiritual Well-Being and Human Flourishing: Conceptual, Causal, and Policy Relations* in RELIGION AND HUMAN FLOURISHING 44–45 (Adam B. Cohen ed. 2020) [hereinafter *Spiritual Well-Being*] (explaining how one's religion and participation in religious community both contribute to numerous aspects of human flourishing). VanderWeele generally understands the concept of "human flourishing" as comprising various domains such as happiness and life satisfaction, mental and physical health, meaning and purpose, character and virtue, and close social relationships. *Id.* at 44.

173 *See id.* at 45–46 (describing how religion itself can contribute to the attainment of human flourishing as one's religious tradition conceives of it, giving Christianity as an example where human flourishing entails communion with the divine or transcendent).

174 *See generally* Tyler J. VanderWeele, *Religious Communities and Human Flourishing*, 26 CURRENT DIRECTIONS IN PSYCHOL. SCI. 476 (2017) [hereinafter *Religious Communities*] (presenting empirical evidence showing beneficial effects of religious communities on various aspects of human flourishing).

175 *Spiritual Well-Being*, *supra* note 172, at 45–46.

176 *Id.* at 45.

person to develop capabilities that are essential to attain human flourishing, the degree to which religion plays such a role can be quite different, even for ones who share the same religion.[177] For individuals who adhere to different religions or do not have a religion at all, identifying a particular religion as being necessary for human flourishing could even sound problematic.[178] Things become most difficult where a religion draws widespread criticism for not complying with societal norms.[179]

In this vein, the value-pluralist yet objective aspect of human flourishing adequately suits the complexity of treating religion as an essential value. In the most general sense of the term, religion (or, "spirituality") can foster capabilities that are essential to flourishing.[180] A person espousing religion as a value need not reduce other people's cherished values, for human flourishing is value-pluralist.[181] Values that constitute human flourishing are incommensurate because they are each valuable in their own right without reducing other values and are relative to each person, meaning that individuals' values cannot be weighed against each other.[182] Also important is the fact that the agent-relativeness of human flourishing co-exists with an other-regarding feature, for acting in the interests of others also promotes capabilities that enable the individual to live a flourishing life.[183] This means that one must strive for harmony: a religion that disrupts harmony by disabling other religions or personal values from developing into capabilities does not pass the objective test of what is good in and of itself.

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177 *See id.* at 44–45 ("[P]articipation in religious community does not contribute positively to every individual . . . ."); *see also Religious Communities*, *supra* note 174, at 479 (noting how participation in religious community may have negative effects for some individuals).

178 *See Spiritual Well-Being*, *supra* note 172, at 48–49 (explaining how religious traditions may have different notions of "spiritual well-being," causing tensions that can present conflicts between religious practices and human flourishing).

179 *See, e.g.*, Cynthia Norman Williams, *America's Opposition to New Religious Movements: Limiting the Freedom of Religion*, 27 L. & PSYCHOL. REV. 171, 174–75 (2003) (discussing new religious movements that allow or even encourage sexual abuse and mass suicides).

180 *See* GRAHAM OPPY, REINVENTING PHILOSOPHY OF RELIGION: AN OPINIONATED INTRODUCTION 66 (2014) ("Religious worldviews always include accounts of what human flourishing consists in . . . [because they] always contain at least implicit accounts of the good life for human beings.").

181 *See* ALEXANDER, *supra* note 129, at 5 (explaining that human flourishing does not recognize a single irreducible fundamental moral value that is superior to all other moral values).

182 *Dignity*, *supra* note 136, at 992–93.

183 *Id.* at 994.

In sum, the value-pluralist aspect of human flourishing can justify promoting religion as a capability for some individuals, so long as their valued capability remains objective and other-regarding. The plurality of values provides a well-adapted means for "acknowledging and balancing an interest in the aggregate welfare or wealth of society with a concern for the full spectrum of the other human goods that land-use decisions implicate,"[184] such as the value of religion to many individuals.

(2) *Religion as source of capabilities*: Religion can also provide a community in which individuals can develop essential capabilities that are not directly tied to religious faith or practice.[185] Local institutions like churches, synagogues, mosques, and temples can serve as important sources for nurturing capabilities essential to human flourishing, such as sociability.[186] Aside from being a place of worship, religious institutions can also be a place for social and interpersonal interactions whereby individuals can develop socialization skills like "listening, respecting differences of opinion, expressing one's [own] opinion, learning and expressing sympathy and empathy with others."[187] The community-based aspect of human flourishing can thus justify promoting religion as a community where individuals can develop the capabilities essential to flourishing.

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184 Peñalver, *supra* note 158, at 867–68.

185 *See* ALEXANDER, *supra* note 129, at 87 (identifying churches, synagogues, and mosques as local institutions that are important sources of nurturing capabilities necessary for human flourishing); *see also Spiritual Well-Being*, *supra* note 172, at 46–47 (describing the subtle differences and the interrelatedness between "spiritual well-being" attained via religious practices and so-called "temporal flourishing").

186 ALEXANDER, *supra* note 129, at 87. This rebuts some of the arguments that authors make regarding religious communities. In arguing for a combination of the Third and Ninth Circuits' approaches, Banas compares a church to a homeless shelter. *See* Banas, *supra* note 105, at 385. Banas argues that, if a church were placed in a downtown area instead of a homeless shelter, there will be a significant increase in the amount of traffic, noise, and congestion that could thwart the goals of an ordinance seeking to create a commercial downtown area. *Id.* On the other hand, Banas argues, a homeless shelter serves the needs of the community and has little effect on such an ordinance. *Id.* By distinguishing homeless shelters and religious communities in this manner, Banas fails to understand that a religious community can develop capabilities that foster the very sensitivity that would instill in people's minds the desire to create and maintain a homeless shelter in the first place. *See Spiritual Well-Being*, *supra* note 172, at 47 (explaining how religious practices can inspire people to develop community and seek the good of other people).

187 ALEXANDER, *supra* note 129, at 87.

These two aspects of religion that correspond to the two features of human flourishing are significant in relation to land use. Individuals who treat religion as a capability need to continuously practice and experience their religion to foster such capability, which requires a tangible means to connect with the intangible.[188] Religious land use, in this sense, serves as an "interior ladder" through which religious or spiritual individuals constantly remain in touch with their meaning of life.[189] Religion also needs access to land use to establish a tangible community that can mediate essential capabilities to individuals such as sociability.[190] Because human beings are by nature interdependent, the cultivation of their capabilities needs to be maintained and strengthened via physical interactions that communities like religious institutions adequately provide.[191]

In addition, just as human flourishing theory's value-pluralism corresponds to religion's incommensurability as an essential value that does not reduce other values, the value-pluralist aspect also comports with the complexity intrinsic to land itself. In the intangible dimension, land derives its complexity from the intricacies of all the human interactions that takes place on physical land.[192] Because religious land use provides for a tangible locus in which religion can promote human flourishing, regulations on religious land use should be in line with the general principle that the state should use its

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188 *See* Peñalver, *supra* note 158, at 829 (explaining land's status "as an essential component in any human activity that requires physical space"); *see also Religious Communities*, *supra* note 174 at 478–79 (suggesting that the "bringing together of the religious and the social" via religious services has positive effects on health and well-being).

189 *See Spiritual Well-Being*, *supra* note 172, at 44–46 (explaining how participating in religious community may help attain meaning and purpose, which for some may be tied to the attainment of communion with the divine or transcendent as understood in one's religious tradition). The term "interior ladder" refers to a concept found in the Christian tradition of presenting the image of a ladder to symbolize an individual's spiritual progress toward attaining communion with the divine or transcendent through prayer and self-examination. *See, e.g.*, Cora E. Lutz, *Johannes Climacus'* Ladder of Divine Ascent, 47 YALE U. LIBR. GAZETTE 224, 224–25 (1973) (discussing the symbolism of a ladder in the history of Christian spirituality).

190 *See* ALEXANDER, *supra* note 129, at 87 (explaining how local institutions like religious communities can nurture essential capabilities through physical interactions that provide sociability experiences). There is also empirical data suggesting that attending religious services affects spiritual well-being more strongly than practicing religion in private. *Religious Communities*, supra note 174, at 478.

191 *See* ALEXANDER, *supra* note 129, at 7–9 (explaining the need for communities to develop capabilities essential to human flourishing).

192 Peñalver, *supra* note 158, at 829.

powers to promote values essential to human flourishing and limit its powers from inhibiting such values.

D. Human Flourishing and Equal Terms

This link between human flourishing and religious land use can inform how we interpret the Equal Terms provision. Applying the human flourishing theory of property, this Note proposes reading the provision as requiring that religious land use receive equal treatment in the sense that religion is given equal weight as a capability or source of capabilities for human flourishing. In other words, land use regulations should treat all capabilities equally and acknowledge that there is no one single value that can reduce other values as to claim priority in land use. As Eduardo Peñalver notes:

> [T]he cooperative pursuit of human flourishing must give way at crucial moments in order to create the space necessary for individuals to foster the goods of practical reason and autonomy. The key challenge is to strike the right balance between our obligations toward others and our inclination to favor our own interests and the interests of those close to us, an inclination that is healthy—and, indeed, necessary in its own way for flourishing—provided that it remains within the proper bounds.[193]

This perspective sheds new light on how we look at the Equal Terms provision. Instead of reading the "[n]o government shall impose or implement"[194] as being grounded solely on the First Amendment's protection of religious freedom, we can reinterpret this anti-discriminatory provision as pertaining to values that promote human flourishing. From this perspective, religious land use would receive special protection because religion can sometimes be overlooked as a capability relative to more tangible capabilities such as physical or economic capacity. The deeper rationale rooted in the human flourishing theory of property justifies special protection because religion itself can be a capability that some individuals rely on to live a flourishing life.

The state is thus empowered to facilitate religious practice where religion is essential for individuals. However, the state must also ensure that this empowerment does not offend others or reduce other aspects of human flourishing.[195] Hence,

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193 *Id.* at 870.

194 42 U.S.C. § 2000cc (b)(1).

195 *See* ALEXANDER, *supra* note 129, at 228–29 (discussing the need to weigh different aspects of human flourishing that are at stake when the state seeks

"less than equal terms"[196] can be read as treating all values equally in considering their irreducible contribution to human flourishing. This obliterates the need to find some kind of a secular comparator under the "similarly situated"[197] language found in Equal Terms cases. To those who highly value their religion or religious community, religious faith and practice constitute an essential value. In the meantime, homeowners and business owners have their own essential values tied to their property.[198] There is no right or superior among these values, for they are incommensurate for the purposes of promoting human flourishing. Requiring that churches show they are similarly situated to single family homes would be nonsense, because the focus is really on the equality of "terms" and not just equal "use or effects."[199]

By comparing religious land use to some kind of a comparator, courts are inevitably choosing one value as absolute, failing to recognize the value-pluralist aspect of human flourishing. In many Equal Terms cases, for example, the fact that religious land uses do not add to the city's revenue was a deicing factor.[200] But because intangible values like those attributed to religion and spirituality tend to be overlooked in the arena of land use,[201] the Equal Terms provision serves as a reminder that property law should consider all values that are tied to the flourishing of those who are in need of land.[202] Requiring a similarly situated comparator to adhere to Equal

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expropriation). This somewhat limited empowerment based on the human flourishing theory of property implicates that "treating all of the affected parties as equals requires that we give each of them their due in terms of evaluating their interests at stake." *Id.* at 225.

196 42 U.S.C. § 2000cc (b)(1).

197 *See* Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 264–68 (3d Cir. 2007) (explaining the court's holding that the Equal Terms provision requires the plaintiff to identify a nonreligious comparator that is "similarly situated" as to the objectives of the challenged land use regulation). *But see* Tree of Life Christian Sch. v. City of Upper Arlington, 905 F.3d 357, 379–80 (6th Cir. 2018) (Thapar, J., dissenting) (arguing that reading in the words "similarly situated" to a provision that omits the words goes against congressional intent).

198 *See* ALEXANDER, *supra* note 129, at 223 (describing the values implicated by homes and small, family-owned businesses).

199 Laycock & Goodrich, *supra* note 8, at 1063. Laycock also argues that the "similarly situated as to regulatory purpose" test is impossible to square with the text or policy of RLUIPA. *Id.* at 1061.

200 Susanj, *supra* note 97, at 1.

201 *See* Peñalver, *supra* note 158, at 861 ("[N]ormative economic property theory likely draws such wide support because the notion that effects on material well-being are relevant to legal-decision making is intuitively very appealing.").

202 This is because, for many landowners, "the way in which land facilitates the direct enjoyment of a variety of non-fungible, and often social, human goods overshadows the motivating force of its investment value." *Id.* at 832.

Protection jurisprudence, then, ends up promoting unequal treatment of values that are incommensurate and irreducible.

What does this all mean in terms of how we can apply the Equal Terms provision? The scaling function used by German courts can provide some guidance.[203] The guiding principle would be to require "a tighter nexus between the institution whose activity is under challenge and the goods necessary to a well-lived life" when municipalities attempt to regulate land use.[204] For example, courts would place a lot of weight on personal homes because home is a place where most people experience a sense of belonging, which grows stronger for most people the longer they remain in the same place.[205] Such sense of belonging, or even a sense of finding meaning in life, would justify a relatively higher protection.

The scaling function, of course, implicates some sort of a standard that could seem difficult to apply consistently.[206] Such a "lack of an algorithm for social decision making," however, can be a point of strength in religious land use context because it prevents "burying the tension among plural values inside homogenizing numerical measures of dubious validity" and instead "bring that tension to the foreground and invite reasoned deliberation about an appropriate response to it."[207] With that said, there is also value in providing a rule within a standard. Establishing human flourishing as the basis and goal of property law justifies a default rule that should generally allow religious land use, similar to what the Eleventh Circuit's approach does,[208] with exceptions to the rule where a religious land use does not promote individuals' flourishing or inhibits the development of other essential capabilities tied to conflicting land uses.

Therefore, a religious organization in need of religious land use for worship and community-building in a primarily business district cannot be denied land use if the rationale for denial is purely economic. The state may regulate such religious land use, however, if the religious organization attempts to

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203 *See generally* ALEXANDER, *supra* note 129, at 222–23 (describing the German court's application of the scaling function).

204 *Id.* at 211. The context in which the German courts apply the principle is when the government requires a property owner to sacrifice his or her entitlement. But the idea of government's powers over property being limited by values pertaining to human flourishing warrants the analogy.

205 *Id.* at 213–14.

206 *See id.* at 227–29 (applying the scaling function to resolve a conflict of property values).

207 Peñalver, *supra* note 158, at 876.

208 *See* discussion *supra* Part II (A).

use land in a residential district where capabilities of privacy and freedom could be inhibited (e.g., a large religious gathering in a quiet residential area). The state may also regulate religious land use in cases where the religious organization's beliefs or practices do not serve values that objectively promote human flourishing (e.g., a cult practicing incest or human sacrifice).[209] The value of auxiliary uses of land by religious organizations such as faith-based hospitals, nursing homes, and schools would be measured somewhat differently, as such land uses may promote values related not only to one's religion but also to capabilities like sociability.[210]

Then how would the Sixth Circuit's *Tree of Life* case look if the U.S. Supreme Court were to consider the human flourishing theory of property? In reaching its conclusion, the Sixth Circuit reviewed and compared expert reports on estimated revenues of the School and a daycare center to determine whether the daycare center amounts to a similarly situated comparator.[211] Applying the proposed rule based on human flourishing, the court instead would have assessed how much value the School would have on the community in terms of promoting the capabilities of the students, their families, and their local communities in attaining human flourishing. While it is true that the School's proposed use is not strictly tied to religious practice, triggering the issue of auxiliary uses, the School still has educational and social values that could contribute to human flourishing.[212] The court would then evaluate whether the School, in promoting these values, inhibits any

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209 *See Dignity*, *supra* note 136, at 1008–09 (explaining how a person cannot lead a flourishing life without respecting other people's dignity).

210 *See generally* Sara C. Galvan, *Beyond Worship: The Religious Land Use and Institutionalized Persons Act of 2000 and Religious Institutions' Auxiliary Uses*, 24 YALE L. & POL'Y REV. 207, 207–11 (2006). Galvan argues that auxiliary uses should not be included within scope of RLUIPA because doing so could violate the Establishment Clause. As another author points out, however, churches and religious institutions are changing and becoming more of a "social activity center" rather than just a house of worship. Banas, *supra* note 105, at 385. From the perspective of human flourishing, this social function of religious communities would be the very value that religion has in relation to human flourishing.

211 *See* Tree of Life Christian Sch. v. City of Upper Arlington, 905 F.3d 357, 373–76 (6th Cir. 2018) (examining expert testimonies on revenue-generating abilities of nonprofit daycares and the Plaintiff school to determine whether the two are similarly situated).

212 *See e.g.*, Brief for Amicus Curiae Parents of Students of Tree of Life Christian School in Support of Petitioner at 3–7, Tree of Life Christian Sch. v. City of Upper Arlington, 139 S. Ct. 2011 (2019) (No. 18-944) (explaining how parents choose Tree of Life Christian Schools to educate their children about "the deeper questions regarding the meaning and purpose of life" which are "worth far more than the simple dollar value the property might suggest").

other values that are also essential for human flourishing. In the *Tree of Life* case, the main justification put forth by Upper Arlington was its goal of maximizing tax revenue.[213] If this goal is essential to help the citizens of Upper Arlington to live a flourishing life, perhaps because most citizens are suffering from an economic depression, the Sixth Circuit's ruling could still hold. If such an economic goal is the sole value that is disallowing the School's land use, however, the human flourishing theory of property could very well justify a different outcome.

CONCLUSION

Admittedly, the solution presented in this Note is theoretical in nature and does not follow the principles of statutory interpretation in the strictest sense. If the U.S. Supreme Court were to inevitably choose from one of the approaches taken by the circuit courts, the human flourishing theory would most closely align with the Eleventh Circuit's category approach combined with a modified version of the Seventh Circuit's accepted zoning criteria approach serving as an exception to the rule. With that said, the goal of this Note was to introduce an alternative approach to interpreting RLUIPA's Equal Terms provision by taking a step back from the current judicial framework in which courts struggle to find the "right" approach to resolve an inevitable constitutional tension.

By attempting to address the complexities that religion and land use give rise to, this Note serves as a reminder that religious land use entails many irreducible values that are essential to human flourishing, which should be the very foundation and goal of the state's powers to regulate land use. At its very core, the Equal Terms provision of RLUIPA is not so much about comparing religious and nonreligious land use to determine whether the state has afforded them "equal" treatment.[214] Such an approach would be doing grave injustice to the very character of land and religion, for both implicate many values that are uniquely essential in their own way and are thus in-

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213 *Tree of Life*, 905 F.3d at 361; *see also* Brief of Defendant Appellee City of Upper Arlington at 36–39, Tree of Life Christian Sch. v. City of Upper Arlington, 905 F.3d 357 (6th Cir. 2018) (No. 17-4190) (arguing that maximizing tax revenue does not violate RLUIPA).

214 *See* Alden, *supra* note 123, at 1806–07 (suggesting that the Equal Terms provision can be superfluous because the Equal Protection Clause and the First Amendment already prohibit unequal treatment of religious and nonreligious land users).

commensurable.[215] The human flourishing theory of property can remedy this by inviting us to focus on the broader question: how society can best promote every member's human flourishing with the limited resource we have called land. Perhaps, interpreting the Equal Terms provision to promote human flourishing could lead us to find that benevolent neutrality in context of land use.

215 *See* Peñalver, *supra* note 158, at 868 (highlighting the "many subtle and incommensurable values" implicated by decisions related to land use).