

# EMPATHY AND PRAGMATISM IN THE CHOICE OF CONSTITUTIONAL NORMS FOR RELIGIOUS LAND USE DISPUTES

Elizabeth Reilly\*

## THESIS:

From the perspective of both religious entities and local governments, religious land use requests are best resolved quickly, locally and cooperatively. The traditional framework for addressing religious land use disputes, which the Religious Land Use and Institutionalized Persons Act (RLUIPA)<sup>1</sup> adopted, is ill-suited to those goals. Legally, disputes have long been framed as denials of the free exercise of religion – the broadest of all claims and the one requiring the most intrusive and subjective determinations about a particular religious group and its proposed use (what religion is, what a particular sect requires and how religion qua religion is affected by land use decisions).

I propose that the best method for analyzing land use decisions should be simple to apply, rely upon external and objective evidence to the greatest extent possible, create incentives for cooperation and resolution, reduce antagonism, and be deferential to both religious users and local government decisions. That can be better accomplished by flipping the traditional order of analysis by determining: first, if the land use decision violates Establishment clause norms; next, if it violates Equal Protection norms; and then, and only then, if the neutral decision nonetheless amounts to a denial of Free Exercise norms.

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\* Associate Dean and C. Blake McDowell Professor of Law, University of Akron School of Law. I would like to thank the Albany Government Law Review for sponsoring the outstanding symposium at which this paper was originally presented, as well as my colleagues at Akron who commented helpfully upon earlier drafts, especially Sarah Cravens, Brant Lee, Stewart Moritz and Tracy Thomas, and the participants in the work-in-progress presentation I gave at Northern Kentucky University Chase College of Law, especially John Bickers, Kenneth Katkin and Phillip Sparkes, for their incisive questions and comments.

<sup>1</sup> Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc-2000cc-5 (2000).

## EMPATHY:

My experience with religious land use issues began as a member of the Unitarian Universalist Church of Akron congregation. Our request to build an addition into the internal property and to increase parking in response to complaints of overflow parking, was denied after neighbors objected.<sup>2</sup> Some of the neighbors, and a council member, characterized our congregation as a cult in arguing against granting the permit.<sup>3</sup> The land use request was

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<sup>2</sup> The Unitarian Universalist Church of Akron is located on property immediately behind a commercial property on a major commercial thoroughfare in the metropolitan area of Akron, Ohio. The Church is in Fairlawn, immediately contiguous to Akron. The Church's eastern boundary is on a street that runs north/south. The major thoroughfare, State Route 18 (Market St.), is north of the church. On the northwest corner is the commercial building behind which the church is situated; its parking lot is between the commercial building and the church building, and the church parking lot is between both as well. In addition, a strip of trees over twenty feet high and twenty feet deep runs between the two properties on a residentially zoned but unusable strip of property. On the northeast corner is another commercial building. Immediately behind that building is a residence. There is then a residential street. The church's drive is several yards south of that residential street. Across from the church's property are two residences. The southern border of the church's property is a residence, approximately 100 feet away and slightly uphill from the building footprint of the church. The western border of the property is also about 300 feet away from the building footprint and is a wooded area with trees at least twenty feet high. Behind those trees are residences. The church is a single story edifice, set back from the street, uphill, about 250 feet, and buffered by trees and a Memorial Garden that incorporates trees.

At one time, the City of Fairlawn had a rezoning plan in which it proposed to rezone the church's residential-zoned property into multi-use property, but did not do so. During the dispute, the city claimed it did not carry through with the rezoning plan because the church did not request that rezoning when notified of the opportunity. The church's requested use was consistent with a multi-use zone. In the settlement, the city agreed to rezone consistent with that earlier comprehensive plan, and that further additions or modifications consistent with church or church-related uses would not be subject to requiring zoning approval in the future.

Originally, the church planned to enlarge its building in ways compatible with the internal architecture of the church, but that would build out toward the southern border and use about twice the number of square feet. Primarily, the church needed to improve, expand, and modernize its restroom facilities, kitchen, administrative office space, and construct a larger fellowship hall, as the congregation had outgrown the current facilities for after-service community meeting time. When an architect was consulted, the architect suggested scaling back the plans and relocating the expansion so that it grew from the northern and western sections of the church and did not extend beyond the current north building wing (except for an entry porch and stair) nor the current west building wing. Because of relocating the expansion within the general contours of the current building, a new kitchen was needed to accompany the community space. In other words, the plans were modified to complete the square of the then-current church building and to build towards the two buffered borders without changing setbacks and in ways not visible from the street. Some additional land was used to expand the parking on the north and west sides without changing setbacks as well. Because these plans minimized the impact on the neighborhood and aesthetics, and also expanded parking consistent with a previous neighborhood request, the church agreed to alter its vision in order to be a good neighbor. Those plans were submitted on January 31, 2000. Ultimately, the plans as submitted were approved in the settlement.

<sup>3</sup> Before presenting the plans and request to the zoning and building authorities, the church invited the neighbors in to see the current facilities, show them the inadequacies, and show them the new building plans. The chair of the building committee conducted a tour. On that tour was a neighbor who also served on the City Council. The chair recalls her tour as amicable, and that she exhibited both understanding of and sympathy toward the church needs to expand and appreciation for the minimal impact the plans had on the neighboring properties.

originally denied, but ultimately granted in settlement of a suit that relied upon RLUIPA.<sup>4</sup> This treatment sent the inescapable message that my religious beliefs and religious community were despised and disfavored. We simply wanted to work with the City of Fairlawn and its community and to receive fair treatment at their hands. In order to do so, we were required to engage in litigation – inimical to principles of wider community and justice to which we were devoted.<sup>5</sup> The entire scenario deeply distressed me and my religious community. This experience informs my approach to analyzing problems in religious land use requests.

However, as a scholar and citizen, I also empathize with local governments which face very difficult balancing decisions in what can often be a zero-sum situation with respect to land availability.<sup>6</sup> Governments face very real dilemmas: the diminishing availability of land, the need to enable zoning and planning and to protect neighborhoods, the impact of dedicating property likely to generate significant tax revenues to nontaxable uses, and the rippling effects of religious property on the permissible uses of neighboring properties.<sup>7</sup> I am distressed by a legal

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During the hearing on the zoning permit, this same neighbor spoke vociferously against the church, and disparaged the church and its beliefs and practices, particularly those representing earth-centered religious inspirations. The chair was devastated by this conduct, experiencing it as a betrayal because it was so unexpected.

<sup>4</sup> See also *Unitarian Universalist Church of Akron v. City of Fairlawn*, No. 5:00 CV 3021 (N.D. Ohio dismissed on stipulation May 3, 2004). For a description from the Becket Fund, which assisted in the litigation, see *The Becket Fund, Unitarian Universalist Church of Akron v. City of Fairlawn*,

<http://www.becketfund.org/index.php/case/77.html> (last visited Mar. 31, 2009).

<sup>5</sup> Daniel P. Dalton, Tomkiw Dalton, PLC, Comments at the Albany Government Law Review Symposium: God and the Land, Conflicts Over Land Use and Religious Freedom (Oct. 3, 2008), available at

<http://www.classcaster.org/resserver.php?blogId=250&resource=panel4.mp3>. Mr. Dalton noted a similar effect in his clients when he stated that churches can be reluctant to fight adverse land use determinations because “people don’t go to church to fight; they want peace.”

<sup>6</sup> Dwight Merriam, Robinson & Cole LLP, Comments at the Albany Government Law Review Symposium: God and the Land, Conflicts Over Land Use and Religious Freedom (Oct. 3, 2008), available at

<http://www.classcaster.org/resserver.php?blogId=250&resource=panel4.mp3>. Mr. Merriam noted a Connecticut town in which religious uses occupy 85% of the land.

<sup>7</sup> Compare *Digrugilliers v. Consol. City of Ind.*, 506 F.3d 612, 617-18 (7th Cir. 2007) (opining that limiting churches from commercial zones due to liquor and pornography restrictions could be problematic because they discriminate based upon special protections for religious uses), with *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 290-91 (3d Cir. 2007), cert. denied, 128 S.Ct. 2503 (2008) (finding a religious use not similarly situated to a secular assembly use because of differing restrictions with respect to selling alcohol near churches). The rippling effects on other desirable commercial uses, such as restaurants or shopping centers, applies especially in redevelopment plans in storefront and commercial zones, even if no current incompatible use has yet

regime that enables (or requires) religious entities to engage in conduct that would be tolerated from no other land user – self-righteous strong arm tactics, outsize requests and demands brooking no compromise – and to thereby generate overwhelming impacts on communities.<sup>8</sup>

Frankly, I was also discomfited by the use of something like RLUIPA as a “trump card” in the dispute. It felt too big and heavy, and I did not appreciate the feeling that it acted like a “bully” on our behalf. That is not who we wanted to be; yet it was our only tool to get the city to work with us. I am not in favor of bludgeons.<sup>9</sup>

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been located near the proposed religious user. *E.g.*, *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 756 (7th Cir. 2003) (noting that the city’s desire to preserve area as an entertainment zone made church use problematic).

<sup>8</sup> *E.g.*, *Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 982-85 (7th Cir. 2006) (explaining that when the church initially requested a 99,000-square-foot building, “the Village expressed concern about the size of the church complex,” and after negotiations with the Village, the church reduced the plan to a 56,200-square-foot building, but after intervening events resulted in the land being rezoned to permit up to only 55,000-square-foot buildings, the church reapplied for its 99,000-square-foot building, and sued when it was denied).

Also, Marci Hamilton notes how modern day churches are becoming “all-inclusive,” explaining that:

The traditional concept of a small church serving the immediately neighboring community undoubtedly had something to do with the idea that such use was an integral part of community life in “the best and most open localities.” However the establishment of a modern church, not dependent upon local residents as its communicants, and in some instances attracting people from far distances, the inevitable use of the automobile in connection therewith and the increased activities of the church for social and community functions having only a remote connection with its primary function, all present a different zoning picture.

Religious landowners regularly submit plans for multi-use buildings in the tens of thousands of square feet—and some hundreds of thousands—offering not just worship, but also religious education, elementary and high school education, banquet halls for religious celebrations, including weddings and bar and bat mitzvahs, coffee houses, motion picture theaters, fitness centers, all-night volleyball courts, child and senior day care centers, and social services, such as homeless shelters, soup kitchens, and drug and alcohol abuse treatment. Indeed, this trend has culminated in a move toward all-inclusive religious communities, from megachurches that are on the scale of a sizable shopping mall to planned communities that encompass not just a house of worship, but many social services and even private homes. This is a trend toward buildings that have greater negative secondary effects on neighbors, whether residential or commercial, and that raises issues properly and regularly considered by land use authorities in creating Master Plans or in the day-to-day determination of permit and variance requests.

Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311, 340 (2002) (quoting 1 RATHKOPF, LAW OF ZONING AND PLANNING 19-28 (3d ed. 1975) (other citations omitted)).

<sup>9</sup> A perceived legal bludgeon can turn opportunities to work together to resolve common interests into conflict-laden disputes because a local government believes that it is in a no-win situation and prefers to “blame” a court rather

An empathetic view of how we now engage in religious land use disputes emphasizes why any good legal regime would create incentives and rewards for working together to achieve reasonable compromises in an environment of mutual respect. The aching desire of my congregation to talk and work it out, met by hostility and stonewalling, remains with me as I analyze how to address religious land use issues. Empathy clarifies that it is in the best interests of any religious body to avoid antagonistic relations with its neighbors and the wider community and divisive litigation to accomplish religious purposes. When land use requests are treated initially as, or become, intransigent disputes, they divert a religious body's focus away from worship and community - the core of its existence.

Empathy also clarifies what sorts of conduct and relationships feed conflict and intransigence. When our request was administratively denied, we held a congregational meeting to determine whether or not to accept the total denial of any request, or to file suit. The denial was even harder to accept when we looked around us and saw numerous other churches in the municipality with higher traffic, larger facilities, and building expansions underway or recently completed. In that discussion, the arguments that prevailed in favor of filing suit despite a continuing wish to work with our neighbors were arguments about unfair treatment and needing to stand up against religious discrimination. To many, capitulating felt like denying the worth and value of our religious beliefs and failing to live up to our values of working for religious

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than take responsibility itself to establish land use principles and practices and accommodate competing land use desires among its citizens. Also, Wendie Kellington, in giving advice to those seeking land use approval, notes that:

RLUIPA is a big stick. It can make people mad to raise it if they perceive your client does not care about local land use considerations. Care about local land use rules and where possible prove how your religious claimant client complies with them.

. . . Where zoning rules do not allow your religious claimant client to gain land use approval, and you determine your client must ride the RLUIPA and First Amendment horse entirely to get to yes, prepare your client for a long and expensive litigation.

Wendie L. Kellington, *RLUIPA Practice Pointers - Representing The Religious Claimant*, Presentation at the A.L.I. – A.B.A. Course of Study: Land Use Planning (Aug. 17, 2007) in *LAND USE INSTITUTE: PLANNING, REGULATION, LITIGATION, EMINENT DOMAIN, AND COMPENSATION* 1141-49 (2007).

freedom and social justice. The morally right course of action was to act upon our beliefs and take the hard road to secure religious freedom for ourselves and the future.<sup>10</sup> Whether or not those perceptions of being discriminated against on the basis of our religious beliefs were accurate or not, they were overwhelmingly reinforced by the arguments neighbors and board of zoning appeals members made to block our request.<sup>11</sup>

Recent cases confirm that my experience is not unique.<sup>12</sup> Also, participants in the God and the Land symposium, representatives of both churches and governments, described experiences with the RLUIPA regime as ones in which positions of churches and governments harden quickly, and in which each party feels disadvantaged and subject to unfair demands.<sup>13</sup>

#### PRAGMATISM:

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<sup>10</sup> Unitarian Universalist principles include a commitment to a democratic process, as well as a free and responsible search for religious or spiritual truth. Unitarian Universalist Assoc. of Congregations, *Our Principles*, <http://www.uua.org/visitors/6798.shtml> (last visited Mar. 31, 2009). Acting against violations of rights is consistent with our commitment to social justice. Consistent with this interpretation of what is right, our congregation came out in force in 2008 to support a Hindu congregation in its administrative hearing seeking to build a temple. Rev. Mary Moore, Unitarian Universalist Church of Akron Reporter, *View From the 'Rim'*, <http://www.uuakron.org/reporter%20public/RepWebsiteFeb2008.pdf> (last visited Mar. 31, 2009).

<sup>11</sup> Merriam, *supra* note 6 (noting the problem caused at public hearings by the type of comments that “make religious institutions want and feel the need to sue.”).

<sup>12</sup> See generally Daniel Dalton, *The Lighthouse Story*, PLAN. & ENVT. L., Apr. 2007, at 3 (telling the harrowing experience of a church, represented by Mr. Dalton, which tried extremely hard to meet local requirements but could get the local zoning board to accept nothing, resulting in decimation of their congregation in size as well as morale); Graham S. Billingsley & Dwight H. Merriam, *Successful Planning and Regulation in the Shadow of RLUIPA*, PLAN. & ENVT. L., Apr. 2007, at 6 (chronicling a persistent and outsize demand by a religious institution incorporating many accessory uses made in contravention of a clear and consistently applied plan and the representation of the local government by Mr. Billingsley and Mr. Merriam in defending the RLUIPA challenge). See also *Guru Nanak Sikh Soc’y of Yuba City v. County of Sutter*, 456 F.3d 978, 982-84 (9th Cir. 2006) (noting that of the twenty-two types of zoned districts only six are available for church use and churches must acquire a conditional use permit for all six zones; a request to build a house of worship in a low density residential zone was denied by the Planning Board; the church suffered another denial of a permit request even after securing another property in an agricultural zone and agreeing to accept all the Planning Board’s conditions; the county would make no attempt to work with the church despite the church’s expressed willingness to comply with its conditions).

<sup>13</sup> For example, during the question and answer portion of Panel Two at the God and the Land symposium, an audience member who identified himself as a building inspector and a code enforcement official complained that accessory uses cause many of the problems, and when the need for a special use permit is raised as required by law, churches “want to sue” under RLUIPA. Rick Golden, an attorney and member of the audience, noted that in his experience RLUIPA has generated instant defensive and hardened positions, emboldening local governments as well as religious institutions to insist on litigation and not talking because they feel so aggrieved. See Shelley Ross Saxer, et al., *Panel Two: Legislative Intent and Statutory Interpretation Under RLUIPA at the Albany Government Law Review Symposium: God and the Land, Conflicts Over Land Use and Religious Freedom* (Oct. 2, 2008), available at <http://www.classcaster.org/resserver.php?blogId=250&resource=panel2.mp3>.

Good solutions avoid creating problems. They return the vast bulk of activity and decision making to parties who can respond to needs within workable guidelines that give each the necessary latitude to advance their interests. I seek a method of addressing land use issues that:

1. avoids disparaging religion and supports fair government planning and decision making;
2. encourages religious land users and government bodies to interact effectively, respectfully and cooperatively in seeking solutions to the needs of both;
3. is sensitive to the special case of religion while providing religious users and local governments with the means to craft decisions that protect freedom, equality and non-establishment without placing them in a false and unnecessary conflict with each other.

What becomes clear after examining the pre-Religious Freedom Restoration Act (RFRA)<sup>14</sup>/pre-RLUIPA religious land use dispute resolution regime<sup>15</sup> and the post-RLUIPA experience is that disputes tend to be handled in a legal environment that fosters disagreements, asks intractable and intrusive questions, makes decisions harder, and casts requests as disputes that may lead to or require litigation. One might wonder, post-RLUIPA, if this approach creates incentives to pursue litigation in order to answer the questions it generates.

Nonetheless, there is much to be said in favor of a statutory scheme addressing religious land use.<sup>16</sup> Statutes are able to set out standards of review, identify suitable evidence and allocate burdens of going forward and persuasion, and establish processes for dispute resolution suited to the context. Such clarity enables local actors to guide their behavior in formulating

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<sup>14</sup> Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-2000bb-4 (2000).

<sup>15</sup> 2 ROBERT M. ANDERSON, ANDERSON'S AMERICAN LAW OF ZONING § 12.21, at 562 (Kenneth H. Young 4th ed. 1996) (noting how churches were accepted as beneficial uses and were to some degree protected from the full impact of zoning restrictions).

<sup>16</sup> See Ashira Pelman Ostrow, *Judicial Review of Local Land Use Decisions: Lessons from RLUIPA*, 31 HARV. J.L. & PUB. POL'Y 717, 723-26 (2008) (arguing the value of extending RLUIPA-type protections to all land use disputes due to emphasis on planning and due process that is lacking in most local land use decision making).

requests and responses, understand the incentives for cooperation and resolution, and establish methods of dealing and preserving records that will facilitate handling future requests and resolving them expeditiously and with less rancor.

#### PROPOSAL:

Our current approach fails to achieve the goals articulated above. I argue that RLUIPA institutionalized/adopted a backwards approach to the sequence (and priorities) of constitutional and statutory principles to analyze the legitimacy of religious land use determinations. RLUIPA requires asking the biggest, most intrusive and hardest questions first. It focuses on that set of questions while keeping alive rather than eliminating the claims or perceptions of unfairness, allowing them to grow and fester. These are exactly the questions most likely to create and prolong disputes, lead to the need for a court arbiter, and create difficult, confusing, conflicting and controversial rules of decision and outcomes.

In addition, RLUIPA vastly expands the protected area for religious land use requests by defining virtually everything requested by a religious entity as being a religious exercise, even if it does not relate to a core belief. RLUIPA then mandates a standard of review for all decisions that sets extremely high, even insurmountable, barriers for local governmental decision making. These are exactly the kinds of effects that unbalance the parties, lead to reduced or nonexistent incentives to work together to negotiate solutions that serve the interests of both parties, and distort the ability to administer land use plans consistently for the future in ways that disserve both locales and religious entities.

This article proposes a legislative change to the RLUIPA sequence of priorities and analysis, including proposed legislated standards of review and burdens of going forward and persuasion. It also recognizes a need to narrow the definition of “religious exercise” in order to permit appropriate

comparisons among proposed religious uses and between religious and secular uses. Only Congress can change the religious exercise definition,<sup>17</sup> re-set the standards of review for the substantial burdens analysis particularly, and clarify the use and availability of disparate treatment as the method for evaluating discrimination claims. But even without the legislative amendments, courts and parties can adopt many of the suggested substantive and procedural changes, especially those about analytical sequence and those suggesting appropriate evidence for examining challenged decisions.

The need to resequence the analysis becomes clear after examining the current RLUIPA scheme. RLUIPA sets up a sequence of analysis and priorities that first asks the “Substantial Burdens” question as the “General Rule”: whether a widely-defined “religious exercise”<sup>18</sup> has been substantially burdened, and if so, whether the government nonetheless has a compelling interest for the regulation and has adopted the least restrictive alternative for advancing that interest (the § 2000cc(a) claim).<sup>19</sup> Next, RLUIPA moves to the “Equal Terms” question: whether the challenged regulation “treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution” (the § 2000cc(b)(1) claim).<sup>20</sup> Third in the RLUIPA sequence is the “Nondiscrimination” question: whether the government land use regulation “discriminates against any assembly or institution on the basis of religion or religious denomination” (the § 2000cc(b)(2) claim).<sup>21</sup> Finally, RLUIPA asks the “Exclusions and Limits” question: whether the government action “(A) totally excludes religious assemblies from a

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<sup>17</sup> The Supreme Court might conceivably find the breadth of the current §2000cc-5(7) definition of religious exercise to be an Establishment violation, if that breadth is analyzed as Professors Hamilton and Griffin suggested during the Symposium.

<sup>18</sup> 42 U.S.C. § 2000cc-5(7) (2000) (stating that “[t]he term ‘religious exercise’ includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief,” with the rule being that “[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose”).

<sup>19</sup> § 2000cc(a).

<sup>20</sup> § 2000cc(b)(1).

<sup>21</sup> § 2000cc(b)(2).

jurisdiction; or (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction” (the § 2000cc(b)(3) claim).<sup>22</sup>

Three constitutional norms undergird these challenges to local land use decisions: Free Exercise norms, Establishment norms, and Equal Protection norms. Loosely,

the §2000cc (a) claim is based on Free Exercise norms;

the §2000cc (b)(1) claim is based on Equal Protection (and Establishment) norms;

the §2000cc (b)(2) claim is based on Establishment norms;

the §2000cc (b)(3) claim is based on Free Exercise norms.

I propose that this sequence be reordered, so that the first question asked is the Nondiscrimination, or Establishment-norm question of §2000cc (b)(2); the second question is the Equal Terms or Equal-Protection-norm question of §2000cc (b)(1); and the third question is the Free-Exercise-norm series of questions, first on Exclusion and Limits as in §2000cc (b)(3) and only then the fraught Substantial Burdens question of §2000cc (a). An understanding of what those constitutionally-derived norms are, particularly within the context of land use decisions, will illuminate my argument and proposal for reversing the order of analysis used in religious land use disputes.

### *The Free Exercise Norm*

After *Village of Euclid v. Ambler Realty, Co.* established the power of local governments to zone,<sup>23</sup> and before *Sherbert v. Verner* imposed a strict scrutiny test for Free Exercise claims,<sup>24</sup>

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<sup>22</sup> § 2000cc(b)(3).

<sup>23</sup> See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394-96 (1926) (recognizing the validity of zoning regulations consistent with the reasonable exercise of the police power to protect public health, safety, morals and welfare).

the question of religious land use was resolved primarily by reference to the police powers of local government.<sup>25</sup> State constitutional guarantees of religious freedom could be used to limit governmental zoning decisions.<sup>26</sup> However, the primary check on local power appears to have been deference to religious institutions as fostering public morals and welfare.<sup>27</sup> As Anderson states in his treatise, this led to accommodating religious uses. Zoning regulations that excluded or impeded religious uses had difficulty being justified as related to the reasonable exercise of the police powers.<sup>28</sup> It appears that a non-deferential level of scrutiny of the reasonableness of the zoning regulation was used to accommodate the competing interests of local governments and neighborhoods with those of the religious bodies.<sup>29</sup>

*Sherbert* adopted a test for Free Exercise that required the government to show it had a compelling interest behind regulations that substantially burdened the exercise or practice of religion, and that the means adopted were narrowly tailored to that interest.<sup>30</sup> As applied to zoning regulations, the courts upheld some regulations under this test, while invalidating others.<sup>31</sup> Thus, it appears that the “strict in theory, fatal in practice” application of the strict scrutiny test did not extend into religious land use.<sup>32</sup>

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<sup>24</sup> See *Sherbert v. Verner*, 374 U.S. 398, 399, 406-10 (1963) (holding that Free Exercise required accommodation of a Seventh-Day Adventist’s unemployment compensation claim based on having been fired for refusing to work on her Sabbath).

<sup>25</sup> See 3 PATRICIA E. SALKIN, *AMERICAN LAW OF ZONING* § 28:1, at 28-3 (5th ed. 2008) (noting that before 1963, religious conduct could be regulated “through generally applicable laws to promote the public health, safety and general welfare.”).

<sup>26</sup> 2 ANDERSON, *supra* note 15, § 12.21, at 564 (citing *Cnty. Synagogue v. Bates*, 136 N.E.2d 488 (N.Y. 1956)).

<sup>27</sup> *Id.* at 563.

<sup>28</sup> *Id.*

<sup>29</sup> See generally *id.* §§ 12.01-12.53 (providing a thorough discussion of zoning regulations and their relationship to various types of land uses, including that of religious land use).

<sup>30</sup> See *Sherbert v. Verner*, 374 U.S. 398, 403-09 (1963).

<sup>31</sup> 2 ANDERSON, *supra* note 15, § 12.21A & n.90, at 566 (providing examples in which the court upheld and others in which the court invalidated zoning regulations challenged as unconstitutionally inhibiting Free Exercise).

<sup>32</sup> 3 SALKIN, *supra* note 24, § 28:2 n.9, at 28-6 (citing articles and several land use cases in explanation of the fact that the strict scrutiny test appears not to have been applied “with the same vigor” as such tests have been applied in other areas of constitutional law).

The Free Exercise norm is designed to protect people from government interference in their religious practices. *Sherbert* and *Wisconsin v. Yoder* protected individuals from laws that were not targeted at their specific religious practice yet significantly burdened those practices in coercive ways.<sup>33</sup> But a similar claim in *Employment Division v. Smith*<sup>34</sup> led the United States Supreme Court to change the Free Exercise analysis. *Smith* used a rational basis test for a neutral law of general applicability, even if it interfered with a religious practice.<sup>35</sup>

*Smith* ushered in an era in which religious practitioners sought to establish either the non-neutrality of the law in question, or that the legal regime involved provided for individualized determinations and exemptions yet refused to make them for religious adherents.

*Smith* also sparked passage of RFRA<sup>36</sup> and later RLUIPA<sup>37</sup> after RFRA was declared in *City of Boerne v. Flores* to be unconstitutional as applied to the states.<sup>38</sup> Both statutes seek to reinstate the strict scrutiny analysis of *Sherbert*, with RLUIPA specifically doing so for land use regulations.<sup>39</sup>

An early land use case interpreted *Smith* to require a “showing of discriminatory motive, coercion in religious practice or the Church’s inability to carry out its religious mission” if the land use regulation were enforced.<sup>40</sup> Thus, the Free Exercise clause protects against direct targeting to prevent or prohibit a religious practice, governmental coercion of a religious practice, or an inability to carry out the core religious mission that forms the basis for the

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<sup>33</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 220-21 (1972); *Sherbert*, 374 U.S. at 406.

<sup>34</sup> *Employment Div. v. Smith*, 494 U.S. 872 (1990).

<sup>35</sup> *See id.* at 879.

<sup>36</sup> 42 U.S.C. §§ 2000bb-2000bb-4 (2000).

<sup>37</sup> §§ 2000cc-2000cc-5.

<sup>38</sup> *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (holding RFRA unconstitutional because it exceeded Congress’s §5 power and “contradicts vital principles necessary to maintain separation of powers and the federal balance”).

<sup>39</sup> 42 U.S.C. §§ 2000bb(b), 2000cc(a)(1).

<sup>40</sup> *St. Bartholomew’s Church v. City of New York*, 914 F.2d 348, 354-55 (2d Cir. 1990) (holding that a historic landmark designation pursuant to historic preservation law was a neutral law of general applicability and its preventing replacement of a community center by an office tower did not violate the Free Exercise clause). *See* 3 SALKIN, *supra* note 24, § 28:2, at 28-8 (citing *St. Bartholomew’s Church*, 914 F.2d at 354-55).

religion. Free Exercise norms protect against burdening religious practices or compelling conduct in contravention to religious beliefs and practices. RLUIPA utilized Free Exercise norms in fashioning its “general rule” protecting against land use decisions that substantially burden anything ancillary to religion.

In essence, the starting point for analysis in religious land use disputes has consistently been under a wide umbrella of a Free Exercise claim, now embodied in the “general rule” claim under RLUIPA (designed to mimic Congress’s preferred approach to Free Exercise analysis in the land use context).<sup>41</sup> That is, whenever a religious body’s dispute with respect to limitations upon its use of land is involved, the first step for analysis is whether the regulation substantially burdens the exercise of religion. If so, RLUIPA requires the governmental body to establish a compelling interest in doing so and a narrowly tailored regulation that serves that interest. The First Amendment requires a similar test if the plaintiff can also establish either an additional fundamental right claim, a law targeted at a religion, or a governmental scheme in which individualized assessment occurs.<sup>42</sup> Otherwise, the First Amendment requires merely a rational basis for a governmental rule or decision that is both neutral and of general applicability.<sup>43</sup>

### *The Establishment Norm*

The Establishment Clause was designed to protect religious liberty and reciprocal government and religious independence from each other.<sup>44</sup> In the careering tests developed by

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<sup>41</sup> See § 2000cc(a)(1); 146 CONG. REC. E1563 (daily ed. Sept. 22, 2000) (statement of Rep. Canady).

<sup>42</sup> See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 538 (1993) (holding that three city ordinances prohibiting the killing of animals violated the Free Exercise clause by unconstitutionally targeting religious practice where their exceptions allowed animal slaughter in all instances except as sacrifice notwithstanding the city’s stated public health justification).

<sup>43</sup> *Employment Div. v. Smith*, 494 U.S. 872, 888 (1990).

<sup>44</sup> In the debates about the language of the amendment to guarantee religious liberty and the Establishment Clause specifically, there are repeated references to: 1) the need for religious liberty as a foundational principle, 2) the value of religious liberty encapsulated in a non-establishment principle to prevent the invidious harms rampant when

the Supreme Court, one mainstay is a principle of government neutrality<sup>45</sup> toward religion, acting neither to favor nor disfavor religion or a particular religious sect through its actions.<sup>46</sup> The nondiscrimination provision of RLUIPA has been recognized as drawing from Establishment Clause jurisprudence, not simply Free Exercise norms.<sup>47</sup>

The history of establishment in colonial America illustrates the important ties that land use decisions have both to what it means to establish a religion and to how land use favoring

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divisive religious sectarianism reigns, and 3) the harm present in government preference of a religion or intermeddling in religious affairs. THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, & ORIGINS 53-82 (Neil H. Cogan ed. 1997) (tracing the development of the Establishment and Free Exercise clauses through Congressional debates, state convention proposals, pamphlets, newspapers, and correspondence). Speakers spoke of one sect gaining preeminence and being able to compel others to conform, the government giving preference to one sect over another, intolerance resulting from establishment, and preventing persecution by placing all sects on the same level. *Id.*

<sup>45</sup> See *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 875-76 (2005); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 214-15 (1963) (acknowledging the words of Judge Alphonso Taft, in the unpublished decision of *Minor v. Board of Education of Cincinnati*, that “[t]he government is neutral, and, while protecting all, it prefers none, and it disparages none.”). In discussing the principle of neutrality and its importance, the Supreme Court itself has stated that:

[t]he prohibition on establishment covers a variety of issues . . . . In these varied settings, issues of interpreting inexact Establishment Clause language, like difficult interpretative issues generally, arise from the tension of competing values, each constitutionally respectable, but none open to realization to the logical limit.

. . . .

Given the variety of interpretative problems, the principle of neutrality has provided a good sense of direction: the government may not favor one religion over another, or religion over irreligion, religious choice being the prerogative of individuals under the Free Exercise Clause. The principle has been helpful simply because it responds to one of the major concerns that prompted adoption of the Religion Clauses. The Framers and the citizens of their time intended not only to protect the integrity of individual conscience in religious matters, but to guard against the civic divisiveness that follows when the government weighs in on one side of religious debate . . . .

*McCreary County*, 545 U.S. at 875-76 (citation omitted). The court has further said that the principle of neutrality:

stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits.

*Sch. Dist. of Abington Twp.*, 374 U.S. at 222.

<sup>46</sup> *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 214-15 (1963) (acknowledging the words of Judge Alphonso Taft, in the unpublished decision of *Minor v. Board of Education of Cincinnati*, that the ideal of religious freedom is one of “absolute equality before the law, of all religious opinions and sects . . . . The government is neutral, and, while protecting all, it prefers none, and it disparages none.”).

<sup>47</sup> *Freedom Baptist Church of Del. County v. Twp. of Middletown*, 204 F. Supp. 2d 857, 870 (E.D. Pa. 2002); see 3 SALKIN, *supra* note 24, § 28:7, at 28-47 (citing *Freedom Baptist*, 204 F. Supp. 2d at 870).

established religious sects threatens religious liberty.<sup>48</sup> Michael McConnell's thorough and detailed study of colonial establishment notes that land grants were a common method of supporting religious institutions and ministers (and schools) in the colonies.<sup>49</sup>

Many southern colonies mandated land set asides for Anglican church uses that included lands to generate income for the cleric and church.<sup>50</sup> Tussles ensued between religious and nonreligious uses and between competing religious uses.<sup>51</sup> For instance, in the former category are disputes related to the limitations on development imposed by large set asides of productive land.<sup>52</sup> The latter category encompasses issues accompanying the reluctance or refusal to devote more land to religious users when requests from other sects arose.<sup>53</sup>

In the New England colonies, township grids set aside three parcels of sixty-three to support religious uses<sup>54</sup> and the religion allowed to occupy them was often chosen by what church the majority attended.<sup>55</sup> A lack of availability of land to build a church for a different sect prevented a multiplicity of sects from flourishing.<sup>56</sup> Statutes requiring financial support for religion complemented this entrenchment of the first-established local church.<sup>57</sup>

Thus, the colonies made land available specifically only for church usage. The need to "share" the land and its support if other churches were built led the established and existing churches to resist the building of new denominations.<sup>58</sup> Disputes arose not from a failure to support religious land uses at all, but by supporting particular land uses only - an establishment

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<sup>48</sup> Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2115-30 (2003) (discussing the various establishments in the American colonies, specifically analyzing those in Virginia, New England, New York, the Carolinas, Georgia and Maryland).

<sup>49</sup> *Id.* at 2148-51.

<sup>50</sup> *Id.* at 2148-49.

<sup>51</sup> *Id.* at 2150-51.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 2150.

<sup>55</sup> *Id.* at 2150-51, 2156.

<sup>56</sup> *Id.* at 2153.

<sup>57</sup> *Id.* at 2151.

<sup>58</sup> *Id.*

issue growing out of the reality of establishment itself. The relationship between establishment and land uses impinged upon the freedom to exercise minority religions because of unavailability of land unless additional lands were set aside.<sup>59</sup>

In addition, especially with respect to land use and financial support, later laws during the period of increasing religious tolerance in the colonies might be facially welcoming to alternative religious sects, but used criteria of legitimacy that disfavored sects without buildings. For instance, Virginia passed laws that nominally rejected establishment and supported religious choice and liberty by permitting religions if they had permanent houses of worship staffed by permanent clergy. Baptists, who drew from lower socioeconomic classes and favored itinerant preachers while eschewing permanent edifices, were widely persecuted in accord with those laws.<sup>60</sup> Massachusetts supported establishment by taxes; even after this was loosened to give taxpayers some latitude to direct their support to their own religious entity (if it met the definition imposed by the state), it continued to cause controversy and religiously based persecution.<sup>61</sup> The more relaxed provisions resulted in complex schemes mandating financial support to some religious body, and permitting the citizen to choose which body to support under guidelines for qualifying to receive support.<sup>62</sup> The schemes often “neutrally” excluded contributions to disfavored sects such as Quakers by adopting guidelines requiring that sects eligible for tax contributions have clerics and/or houses of worship (both difficult to obtain in a zero-sum land availability environment).<sup>63</sup>

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<sup>59</sup> Note that the taxes used to pay minister salaries, although widespread, also led to a problem with computing taxes in Virginia which had difficulty setting a standard amount per tobacco pound when tobacco prices were rising sharply. This dispute seeded litigation that led to popular sentiment against grasping ministers and contributed to the rise of religious dissent – the ultimate nonestablishment force. *See id.* at 2154-55.

<sup>60</sup> *Id.* at 2165.

<sup>61</sup> *Id.* at 2158-59.

<sup>62</sup> *Id.* at 2153.

<sup>63</sup> *Id.* at 2148-49.

Thus, land usage rules supported established religions and impeded other sects. They did so by favoring or disfavoring particular sects in their access to land and the status of legitimacy accorded to them by their land ownership. The establishment, once in place, could remain self-generating by facially neutral laws that favored the advantages achieved by land ownership. It makes a good deal of sense to start analysis of land use decisions by invoking Establishment norms. As applied to religious land use requests, Establishment norms would focus on preventing favoring or disfavoring particular religious sects so that governments do not again support establishment, wittingly or unwittingly.<sup>64</sup>

Denominational discrimination arises if the government has permitted substantially similar land use to one religious body and then denied it to another. This is an establishment problem because it exposes government as having acted preferentially toward one religion – i.e., non-neutrally. If one church receives land use permission when others have not, the non-neutral treatment permits that sect to flourish while others wither. If one church is denied land use permission to do that which other churches have been authorized to do, the non-neutral treatment denies one sect the opportunity to thrive on the same terms that others have been granted. The land use context, being a zero-sum situation in so many ways, is an especially useful context within which to understand the staying power of the principle of neutrality in Establishment jurisprudence.<sup>65</sup>

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<sup>64</sup> *Id.* at 2148-49; *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 884 (2005) (O'Connor, J., concurring) ("It is true that the Framers lived at a time when our national religious diversity was neither as robust nor as well recognized as it is now. They may not have foreseen the variety of religions for which this Nation would eventually provide a home. . . . But they did know that line-drawing between religions is an enterprise that, once begun, has no logical stopping point.").

<sup>65</sup> *Id.* at 860. Chemerinsky has identified three basic doctrinal approaches to Establishment: 1) separation, the wall between church and state; 2) neutrality, evenhandedness between religion and secular values and entities and non-preference among different religious groups; and 3) accommodationist, support for religion allowable if no literal establishment of a government-favored church or coercion of religious participation. In all three, neutrality as between religions is an important feature. Erwin Chemerinsky, *Why Church and State Should Be Separate*, 49 WM. & MARY L. REV. 2193, 2196-98 (2008).

Establishment Clause jurisprudence also conceptually matches the situation of examining government actions toward an entity acting as a corporate body when making a land use request. Establishment norms are suited to examining the government action itself, rather than singularly focusing upon the impact upon the individual believer's ability to practice his or her own religious or non-religious beliefs. Religious liberty can be infringed by government action alone, whether or not any individual can claim compulsion against belief or inability to practice belief. Therefore, discrimination against one religious body is sufficient to raise Establishment problems, whether or not it substantially burdens religious practice. This focus on the government and its actions, rather than the individual and the impact upon religious exercise, helps define the difference in applying the norms behind the two religion clauses.

The fact that an Establishment problem can also constitute a Free Exercise encroachment is not surprising, as both clauses aim at securing religious liberty. But that fact does not negate the Establishment problem that underlies a government action, nor should it obscure it. The focus for determining Establishment violations and enforcing Establishment norms can remove some difficult questions from any analysis (substantial burdens on sincere religious exercises). It is also a mechanism for analyzing preferential or negative inconsistent treatment that doesn't strike at religious practice<sup>66</sup> but does cause invidious divisiveness between religions – a core evil the clause was designed to ameliorate. Establishment norms thus hold promise for recognizing harms and expediting and focusing analysis using questions that need not intrude into religious beliefs and practices.

Establishment and its consequences can and have significantly impeded religious liberty. That, however, does not keep the underlying problem of governmental favoring of one religion

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<sup>66</sup> Sch. Dist. of Abington Twp., v. Schempp, 374 U.S. 203, 225 n.9 (1963) (“[T]he requirements for standing to challenge state action under the Establishment Clause, unlike those relating to the Free Exercise Clause, do not include proof that particular religious freedoms are infringed.”).

over another from being an establishment problem, rather than having to be thought of as a Free Exercise problem. For instance, in *Abington School District v. Schempp*, Roger, Ellory and Donna Schempp, students at a high school in Abington, Pennsylvania, protested against mandatory school Bible reading by bringing in the Qu’ran to read during the set aside time.<sup>67</sup> They were suspended. The action obviously infringed their personal religious liberty and free exercise of their beliefs (they were Unitarians who believed in multiple sources of spiritual truth).<sup>68</sup> But the action was analyzed appropriately as creating more widespread, Establishment problems.<sup>69</sup> This example shows that interference with religious freedom is not always or only a Free Exercise problem. But we have jumped to Free Exercise analysis much too soon in many cases. By avoiding the Establishment Clause any time there is a religious liberty issue – something the Establishment Clause is of course designed to address as well – the Court marginalizes Establishment as a basis for protecting religion and eviscerates the clause and its analytical powers.<sup>70</sup> We should use it when it is the most apt and best tool – when there is a collective impact through which the government expresses support or hostility toward a particular religion qua religion.

Should we not use this positive aspect of the Establishment Clause, we will continue to consign it to being a negative constitutional principle only – and limit it and the perception of it in the populace. It will be used only as a clause trying or succeeding in inhibiting government choices that treat religion favorably, even if neutrally. It then looks like simply a codification of the detested “preference for secular dogma” that has afflicted its usage lately and made it

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<sup>67</sup> *Id.* at 206-07. *See also* *Schempp v. Sch. Dist. of Abington Twp.*, 177 F. Supp. 398, 400-01 (E.D. Pa. 1959) (providing another case in which a student brought in a copy of the Qu’ran to read during Bible reading session at a public school and was accommodated).

<sup>68</sup> *Sch. Dist. of Abington Twp.*, 374 U.S. at 205-06.

<sup>69</sup> *Id.* at 222.

<sup>70</sup> *E.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 521 (1993) (putting the Free Exercise clause at the forefront of their rationale).

something that religious people look at as an obstacle and an anti-religious influence.<sup>71</sup> Failing to use the clause to positive effect undermines the constitutional principle and its reciprocal desired positive impact on religious and political freedom. It foregoes the opportunity to educate the populace as to the religion-protecting parameters of the clause – why it is they should be glad as religious adherents that the government must maintain scrupulous neutrality between religions. A wider acceptance of Establishment as a core principle of liberty might enable us to navigate better and more successfully the current legal thicket, and public distrust, surrounding the Establishment Clause’s core principles of liberty. In practice, this change could support more and better balanced political liberty and religious liberty.

In land use, there are some collective Free Exercise issues caused by directed government conduct (e.g., exclusion of religious entities from a jurisdiction or preclusion of the ability to practice core worship rituals in the jurisdiction); often they follow upon Establishment problems. But that is not a reason to elide a direct examination of the government conduct itself and focus simply upon the effects on adherents’ religious practices. Especially when that conduct operates with respect to entities rather than individuals, it should first be looked at through an Establishment Clause lens, as it may indeed institute a preference or non-preference toward that religious group/entity. That could end our inquiry as to constitutionality, or eliminate one issue before narrowing the focus onto the next.

The Establishment norm is both necessary and useful as an analytical lens. It is self-sufficient, and can be used effectively to analyze a particular class of problems. Adherence to its principles can provide local governments with the ability to develop, explain and administer a

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<sup>71</sup> *Cf. Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 18 (1947) (holding that the First Amendment “requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.”).

desired land use plan and justify its responses to land use requests in ways that dispel claims of discrimination on the basis of religious sect. We should thus use it to focus land use actors, legislators and judges upon ways to prevent, or if necessary remedy, discrimination favoring or disfavoring particular sects whether or not core religious practice is substantially impeded.<sup>72</sup>

### *The Equal Protection Norm*

The Equal Protection Clause protects against government action that treats similarly situated parties differently. In land use, most Equal Protection claims are subject to a rational basis test: whether the government created a rational classification and if there is a reasonable basis for differential treatment of similarly situated property uses or owners.<sup>73</sup> In many contexts, the rational basis test is extremely deferential to governmental decisions. But in *City of Cleburne v. Cleburne Living Center*, the Supreme Court used a rational basis test in the land use context to review the city's denial of a special use permit to a group home for the developmentally disabled.<sup>74</sup> Because the city did not require special use permits for uses similar to group homes, the Court held there was no rational basis for treating this group home differently.<sup>75</sup> The Court applied a more searching scrutiny of the situation and the rationales offered by the city than is

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<sup>72</sup> The Establishment Clause does not require impeding beliefs. *See Engel v. Vitale*, 370 U.S. 421 (1962).

Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not. This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.

*Id.* at 430-31.

<sup>73</sup> 2 PATRICIA E. SALKIN, *AMERICAN LAW OF ZONING* § 15:4, at 15-24 to 15-26.

<sup>74</sup> *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 449 (1985).

<sup>75</sup> *Id.* at 450.

usual in rational basis review. It looked at neighbor negative attitudes and declared them impermissible bases for action and rejected government rationales it found unrelated to distinguishing this group home from other group residential-type uses.<sup>76</sup> Finding that the real reason for the distinction appeared to be “irrational prejudice,” the Court held the action violated Equal Protection.<sup>77</sup> Religious land use requests being treated differently from similar land use requests fall into a disfavored-use classification worthy of being scrutinized, without automatically deferring to either the local government or the religious user.

In land use, Equal Protection also protects against selectively enforcing or applying land use standards to a particular user or owner, in cases often referred to as “class of one” Equal Protection claims.<sup>78</sup> The class-of-one cases highlight the purpose of Equal Protection to secure every person from arbitrary and intentional discrimination. Eschewing a requirement of subjective ill will motivation, the Supreme Court recognizes these types of claims as potential cases of intentional differential treatment.<sup>79</sup> In *Willowbrook v. Olech*, the Court classified the local authority’s decision to require the permit seeker to do something additional to what was usually required for securing a favorable land use decision as being intentional differential treatment.<sup>80</sup> In such a case, Equal Protection prevents the government from singling out one user for disparate treatment without an articulable legitimate reason.<sup>81</sup> Improper considerations such as religion that account for the singling out or disparate treatment can ground these types of claims.<sup>82</sup>

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<sup>76</sup> *Id.* at 448.

<sup>77</sup> *Id.* at 450.

<sup>78</sup> 2 SALKIN, *supra* note 72, § 15:5, at 15-31.

<sup>79</sup> *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000), *aff’g*, *Olech v. Vill. of Willowbrook*, 160 F.3d 386 (7th Cir. 2000)

<sup>80</sup> *Id.*

<sup>81</sup> 2 SALKIN, *supra* note 72, § 15:5, at 15-35.

<sup>82</sup> *Id.* at 15-37.

Thus, the Equal Protection norm examines government conduct in land use to ensure reasonable regulations and application of them consistent with the rationales supporting those regulations. When the land use decision differentially impacts a use that generates negative attitudes, such as religious uses do in most of the zones in which they can locate (causing traffic in residential zones and limiting uses, development or tax revenues in commercial zones), the Equal Protection norm and test provide the tools for resolving the claims. That norm calls for careful examination of similar uses and discernable relationships between the decision and the rationales offered for it, and then a comparison between permitted uses and the denied use to determine whether they differ sufficiently to support the rationales in the latter but not the former situations. Therefore, using an Equal Protection norm focuses analysis upon the use requested by the religious body as compared with secular uses that are similar. It then examines whether or not the religious and secular uses receive the same treatment, and whether or not the rationales behind the differential treatment actually apply only to the use requested by the religious body, or also to the secular use. The focus is upon the government regulation, conduct or decision, compared with its regulation, conduct and decisions in similar situations, rather than upon the effect that conduct has upon the practice of religion.

Although the reasons are not clear, the Free Exercise claim became the primary vehicle through which religious bodies constitutionally challenged land use restrictions and decisions.<sup>83</sup>

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<sup>83</sup> 3 SALKIN, *supra* note 24, § 28:9, at 28-50 (“The establishment clause is not frequently at the heart of zoning disputes, but it occasionally becomes relevant when it appears that some advantage is being given to a particular religious group or to religious groups in general.”). Salkin has updated Anderson, but has not altered this conclusion from that reached by Anderson in the earlier treatise. 2 ANDERSON, *supra* note 15, § 12.21B, at 573. Both Salkin and Anderson implicitly acknowledge this lesser importance by treating Establishment after Free Exercise and by devoting significantly fewer pages to it (Anderson’s discussion of Free Exercise claims extends only eight pages (*Id.* § 12.21A, at 565-73) and his discussion of Establishment takes little more than a page (*Id.* § 12.21B, p. 573-74); Salkin’s discussion of Free Exercise extends ten pages (3 SALKIN, *supra* note 24, § 28:2, at 28-4 to 28-14), and is then followed by an extended, twenty-seven page discussion of RLUIPA § 2000cc(a) claims that are based on Free

Salkin notes that the Free Exercise and Establishment claims are not always entirely clear or separable,<sup>84</sup> but states that the Establishment Clause limits the government from acting affirmatively “to favor or disfavor particular religions, or religion in general”, whereas the Free Exercise Clause limits authority to act negatively by “threaten[ing] to burden an individual’s religious beliefs ... by preventing or penalizing those beliefs.”<sup>85</sup> I believe that two separate distinctions need to be made here. The first distinction is that the essence of Establishment violations is government conduct that is non-neutral between different religions,<sup>86</sup> whereas the essence of Free Exercise violations is the impact of government conduct interfering with specific religious practices of adherents.<sup>87</sup> The second distinction follows. Establishment violations are

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Exercise principles (*Id.* § 28:3, 28-14 to 28-37). In contrast, the section on Establishment runs only four pages (*Id.* § 28:9, 28-50 to 28-54), and the RLUIPA § 2000cc(b) claims discussion runs ten pages with an additional page devoted to § 2000cc(b)(3) claims (*Id.* § 28:7, 28-37 to 28-47). Of course, this simply mirrors what is happening in the case law and practice: Free Exercise claims are made more frequently, courts decide cases based on Free Exercise claims more often, and RLUIPA directed litigants to proceed with the “general rule” claim of § 2000cc(a) that is designed to encapsulate Congress’s preferred test for Free Exercise claims.

<sup>84</sup> 3 SALKIN, *supra* note 24, § 28:2, at 28-5.

<sup>85</sup> *Id.* § 28:2, at 28-4 to 28-5.

<sup>86</sup> Or between religion and non-religion. Note that the bulk of cases that use Establishment analysis involve claims made by opponents of religious uses. The essence of the claim is that religious uses are being granted more favorable terms than non-religious uses, and that such favoritism violates the Establishment Clause. *See id.* § 28:9, at 28-50 to 28-54 (citing *Ehlers-Renzi v. Connelly Sch. of the Holy Child, Inc.*, 224 F.3d 283, 284-85 (4th Cir. 2000) (finding no Establishment Clause violation to exempt parochial schools on land owned or leased by a religious organization to construct or expand without obtaining special exception required of other users); *Boyajian v. Gatzunis*, 212 F.3d 1, 2-3, 10 (1st Cir. 2000) (finding no Establishment Clause violation where a Massachusetts state law forbid exclusion of religious and educational uses from any zoning area, as supporting but not promoting religious exercise and preventing religious discrimination); *Cohen v. City of Des Plaines*, 8 F.3d 484, 486-87 (7th Cir. 1993) (finding no Establishment Clause violation where non-profit church-run day care centers were not required to obtain special use permit to operate in residential district); *Southside Fair Hous. Comm. v. City of New York*, 928 F.2d 1336, 1338 (2d Cir. 1991) (finding no Establishment Clause violation to sell property to Hasidic group synagogue and religious school).

<sup>87</sup> *E.g.*, *Sherbert v. Verner*, 374 U.S. 398, 399, 403 (1963) (individual denied unemployment compensation for refusing to work on Sabbath); *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972) (Amish family denied exemption from compulsory schooling law); *Employment Div. v. Smith*, 494 U.S. 872, 874 (1990) (individuals denied unemployment compensation after being fired due to drug use for peyote use during religious ceremony).

*See also* *Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App’x 729, 734-35 (6th Cir. 2007):

In the “Free Exercise” context, the Supreme Court has made clear that the “substantial burden” hurdle is high and that determining its existence is fact intensive. So, for example, while the Court has held that government action that forces an individual to “choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand” imposes a substantial burden on that individual’s free exercise of religion. *Sherbert*, 374 U.S. at 404. [fn. 4] The Court has also held that the government’s action in constructing a road and permitting timbering through a portion of a National Forest traditionally used by Native American

thus often, although not exclusively, operative upon a religion as a sect, rather than a specific individual adherent to that religion. Conversely, Free Exercise violations frequently operate directly upon or affect only individuals, rather than religious entities or a religion as a whole. The Equal Protection norm can help hold the balance between the religion clauses by noticing

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tribes for religious purposes did not impose a substantial burden because the government's action did not coerce individuals into "violating their religious beliefs; nor would . . . governmental action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988). Similarly, the Court has held that

[w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

*Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 717-18 (1981). But the Court found that a state law proscribing the Sunday retail sale of certain commodities did not impose a burden on the free exercise of religion by members of the Orthodox Jewish faith simply because it operated to make the practice of their religious beliefs more expensive. *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961).

[Fn. 4]According to *Living Water*, *Sherbert* "held that the relevant inquiry for substantial burden was whether the government action had a 'tendency to inhibit constitutionally protected activity.'" Appellee's Br. 29 (quoting *Sherbert*, 374 U.S. at 404 n. 6, 83 S.Ct. 1790.). But *Sherbert's* holding does not reflect, nor did the Court adopt, a "tendency to inhibit" test. Rather, the *Sherbert* Court focused on whether the state action in question forced the plaintiff to "choose between following the precepts of her religion and forfeiting benefits." *Sherbert*, 374 U.S. at 404, 83 S.Ct. 1790. See also *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. City of W. Linn*, 338 Or. 453, 111 P.3d 1123, 1129 n. 7 (2005) (addressing the same "tendency to inhibit test" that *Living Water* urges before us and finding that "the [U.S. Supreme] Court did not adopt a 'tendency to inhibit' test in *Sherbert* or use that test to decide *Sherbert* or any other case.").

In short, the Supreme Court generally has found that a government's action constituted a substantial burden on an individual's free exercise of religion when that action forced an individual to choose between "following the precepts of her religion and forfeiting benefits" or when the action in question placed "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Sherbert*, 374 U.S. at 404; *Thomas*, 450 U.S. at 717-18. It has, however, found no substantial burden when, although the action encumbered the practice of religion, it did not pressure the individual to violate his or her religious beliefs. See *Lyng*, 485 U.S. at 449; *Braunfeld*, 366 U.S. at 605-06; see also *Episcopal Student Found. v. City of Ann Arbor*, 341 F. Supp. 2d 691, 702 (E.D. Mich. 2004) ("[C]ourts have been far more reluctant to find a violation where compliance with the challenged regulation makes the practice of one's religion more difficult or expensive, but the regulation is not inherently inconsistent with the litigant's beliefs."). *Living Water*, 258 F. App'x at 734-735 and n.4. {{{Note to editors: This entire indented passage is a quote, with internal quotes as well, and the next to the last part is fn 4, which is placed in the court's text after the *Sherbert* cite, where I have replaced it so you can see}}}}}}

when religion is treated nonneutrally with respect to secular uses and limiting a religious body's ability to obtain favorable treatment when compared with similar secular uses.

### *Why the Norm and Sequence Matter*

A failure to examine the essence of land use decisions under all three constitutional norms can lead to truncating both equality and religious liberty. Overemphasizing and bulking up the Free Exercise norm, as with RLUIPA's §2000cc(a) test, can lead to favoring religion over nonreligion in comparable land use decisions, threatening Establishment principles. Conversely, overemphasizing the Free Exercise norm can result in underutilizing Establishment or Equal Protection norms. Often Free Exercise analysis can limit protections or require more difficult proofs<sup>88</sup> under the reigning *Smith* test (rational basis in a case in which there is a neutral law of general applicability involved).<sup>89</sup>

We now see litigation in Free Exercise mode that attempts to trigger more rigorous scrutiny (and hence more available relief) by focusing on finding both a substantial burden on religious exercise and a discriminatory aspect and effect upon religion within the governmental action.<sup>90</sup> By insisting upon the lens of Free Exercise analysis, laws that are not neutral and target religion generally or a religious sect particularly for less than equal treatment or for hostile

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<sup>88</sup> *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 222-23 (1963) (“The Free Exercise Clause, likewise considered many times here, withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion. The distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended.”).

<sup>89</sup> *Employment Div.*, 494 U.S. at 874-79 (explaining how the refusal to award compensation for violating a neutral law of general applicability did not violate the Free Exercise rights of employees denied unemployment compensation because they were fired for using controlled substances in religious ceremonies when off duty). *See also City of Boerne v. Flores*, 521 U.S. 507, 532-36 (1997) (finding RFRA an unconstitutional use of Congress's powers as applied to the states, in a case in which local authorities were applying a land-marking law to a church);

<sup>90</sup> *See, e.g., Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

treatment – bases that violate protections guaranteed by the Equal Protection Clause<sup>91</sup> or the Establishment Clause<sup>92</sup> – are subjected to appropriate scrutiny only if the claimant survives proving the additional hurdles imposed by Free Exercise analysis.

In this conflation of norms, the Equal Protection and Establishment Clauses and norms are apparently subsumed into the Free Exercise protections. Yet, as independent bases they are capable of doing the necessary work directly – and more efficiently. This approach is further problematic because it underdevelops the Establishment and Equal Protection norms at the same time that it overlooks and hence underdevelops an independent Free Exercise norm. It leads to a legal expectation/understanding that discrimination against a religious entity is problematic only if it also substantially interferes with a recognized right to practice a religion. It also collapses the concerns about discrimination against a religious sect (an institutional claim) with the concerns about the impact on individuals in the practice of their beliefs caused by regimes not operating directly upon religious institutions or entities.<sup>93</sup>

This collapsing of analysis leads to mushiness not only in our understanding of Free Exercise and Establishment problems, but also in our analysis of them. It becomes harder to discern the boundaries of the differing constitutional norms as applied to particular issues when a religious body is involved.<sup>94</sup> And it obscures a tightness and precision possible for analyzing

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<sup>91</sup> U.S. CONST. amend. XIV, § 1.

<sup>92</sup> U.S. CONST. amend. I.

<sup>93</sup> *Sherbert* is an example of the latter type of concern, whereas most land use regulations, including those treated in *Lukumi Babalu*, are instances of the former. *Sherbert*, 374 U.S. at 404; *Lukumi Babalu*, 508 U.S. at 542. For instance, distinguish between a government action that refuses to recognize a Saturday Sabbath no-work exemption in unemployment compensation (which works against an individual) from one that prohibits using any building in a residential or commercial zone for public assembly on Saturdays during the day (which works against a religious sect).

<sup>94</sup> This boundary discernment issue, of course, can never be eliminated. However, there is little reason to complicate it even further when some clear delineation in classes of actions and effects helps to predict which norm and standard is best used to address that class of problems efficiently. *Lukumi Babalu*, for instance, went through gyrations to mesh the sectarian-targeted and discriminatory actions with Free Exercise standards of substantial burdens, non-neutrality and lack of general applicability before being able to dispose of the rational basis standard of review and substitute a strict scrutiny standard. *Lukumi Babalu*, 508 U.S. at 572. This analysis could more easily

classes of governmental action which can result in the potential for both missing valid claims of religious institutions and undercutting legitimate governmental action.

In other words, failure to identify and focus on the essential norm creates disputes and disagreements,<sup>95</sup> prolongs those disputes,<sup>96</sup> and provides poor guidance and predictability in preventing or resolving those disputes.<sup>97</sup>

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have proceeded directly into whether or not the religious sect had been targeted for hostility or discriminated against compared to other sects (Establishment), or treated differently from nonreligious uses on the basis of religion (Equal Protection/fundamental rights) and applying the strict scrutiny at either point. It would have succeeded immediately at the hostility-to-specific-religion point. Instead, it appears that hostility and unequal treatment are simply both necessary components of Free Exercise analysis but have no independent or sufficient power of their own to protect the religious body from conduct such as that engaged in by Hialeah. What if, for instance, not all of the offending ordinances had been passed, but those that did effectively blocked the Santerians from locating and engaging in animal sacrifice? Are we to understand that the claim might not have been successful, because it could not overcome the hurdle of Free Exercise rational basis review?

<sup>95</sup>A simple use of empathy shows why. Religious bodies are driven to focus upon any use they desire to make of their property as a protected use and to examine minutely every impact of governmental land use regulations and decisions and escalate them into being substantially burdensome. This focus on entitlement and minutiae as important to them but unimportant to neighborhoods and governments results in a developing sense of unfair treatment on the basis of religion. That sense of unfairness causes a deep harm and incites strong reactions and beliefs that religious freedom itself demands sticking to one's position at all costs.

Governments are driven to believe that all of their planning and regulations can be upended by some religious body claiming a right to engage in land uses denied to others, whatever the impacts, and to focus also on every minute detail of the negative impacts of the proposed use and making it weighty. They feel unfairly treated by the law, which makes it exceptionally expensive and risky to refuse a proposal or try to compromise unsuccessfully, and which treats even the most secular of uses as religious exercise simply because a religious body wants to engage in it. They feel bullied and must take a stand against proposals on principle as well.

These predictable feelings, exacerbated by the focus that the law requires, and cutting deeply into an entity's perception of fairness and its own role and value, create disputes out of requests even between parties who are willing to work together. A simple look at the results of a search for religious land use cases brought in federal court before and after RLUIPA shows a "significant uptick." MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 107* (2005), *cited in* 3 SALKIN, *supra* note 24, § 28:3 at n.12.

<sup>96</sup>Kellington, *supra* note 9, at 1148 ("Where zoning rules do not allow your religious claimant client to gain land use approval, and you determine your client must ride the RLUIPA and First Amendment horse entirely to get to yes, prepare your client for a long and expensive litigation."). With RLUIPA looming in the background, both governments and religious bodies are in the evidence gathering and creation mode, rather than in the dispute resolution mode. Litigation is too easy for plaintiffs, who have a significant advantage under RLUIPA which includes attorney's fees for even partial success. Too much qualifies as a religious exercise. The question of what amounts to a substantial burden has proven to be difficult to determine both in terms of setting a standard for measuring it and in weighing the required detailed factual record to determine if the standard has been met. Similarly, presenting evidence and establishing what amounts to a compelling governmental interest in light of those particular burdens, and what qualifies as a least restrictive alternative, are unwieldy because of the accumulation of both large and small effects encouraged by the substantial burdens question. One court has noted that "the 'substantial burden' hurdle is high and . . . determining its existence is fact intensive." *Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App'x 729, 734 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 2903 (2008).

<sup>97</sup>When courts cannot determine how to interpret and apply the language of the statute, parties are surely unable to do so or to predict their accuracy in doing so. The substantial burdens litigation has proven how difficult it is to apply the standard; the Seventh Circuit experience by itself is a cautionary tale.

When Congress sought to correct the problem by placing the Free Exercise norm in hyper-drive in RLUIPA, religious entities received axes where scalpels would be a better tool for resolving land use questions, and local governments were left to seethe, capitulate, or compromise their planning and administrative functions. Both sides are driven to expensive dispute creation and resolution mechanisms, rather than having the tools to seek mutual understanding and beneficial resolutions.<sup>98</sup>

It is best to address and resolve disputes on the narrowest and least contestable grounds possible. Rather than starting with a broad Free Exercise analysis that encompasses multiple difficult issues for resolution, it would be better first to identify limited and more easily discerned violations. In fact, Congress appeared to wish to address the discrimination-type issues with RLUIPA to begin with, finding those to be the problems in need of remedying<sup>99</sup>

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If a firm understanding of the term “religious exercise” has eluded the courts, the disagreement over the meaning of that term pales in comparison to the controversy among the courts in defining “substantial burden.” . . . [T]he statute is silent with respect to exactly what constitutes a “substantial burden” on the exercise of religion.

3 SALKIN, *supra* note 24, §28:4, at 28-22 to 28-23. Even the religious exercise question has caused litigation as to its appropriate boundaries. *Id.* § 28:4, at 28-17 to 28-22. *See also supra* notes 6-24 and accompanying text. In addition, the § 2000cc(a) claim requires extremely fact-intensive questions to be answered, as well as subjective questions like whether or not the government action amounts to forcing an adherent to choose between religious precepts or forfeiting benefits (like *Sherbert*), and whether or not a professed religious exercise is “sincere.” *Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005) (examining RLUIPA’s constitutionality as applied to institutionalized persons, the Court stated that RLUIPA “does not preclude inquiry into the sincerity of a prisoner’s professed religiosity”); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 663 nn.8-9 (10th Cir. 2006) (noting that jury instructions properly incorporated a requirement that the church’s desire to operate a day care center had to be “[a] sincere exercise of religion” and defined a religious belief as “‘sincere’ if it is truly held and religious in nature”). The parties’ ability to agree upon the answers to these types of questions is low even in situations in which there is mutual trust and limited to no antagonism. Layered over the antagonistic relations fostered by the RLUIPA regime, predictability guiding objective resolution seems to vanish.

<sup>98</sup> Rick Golden, an attorney audience member at the God and the Land symposium, provided the author with a detailed history of one such dispute (on file with the author). *See also supra* notes 8-12 and accompanying text.

<sup>99</sup> Legislative history of testimony about discriminatory issues and findings of discrimination as support: S. Res. 2869, 106th Cong., 146 CONG. REC. S7774-801 (2000) (enacted) (remarks of Sen. Hatch) (evidence of violations “massive”); Rep. Charles T. Canady, *Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 131-53 (1998) (testimony of Professor Cole W. Durham, Jr., Brigham Young University Law School).

(leaving aside for now whether or not the fact-finding was sufficiently rigorous and broad to support their claims of widespread problems of discrimination and blockage of religious institutions in land use determinations by local governments).<sup>100</sup> To the extent that Congress's hearings and findings support constitutional violations justifying a statutory remedial scheme,<sup>101</sup> they most strongly justify doing so on bases that rest on discrimination – i.e., Establishment and Equal Protection norm claims.

Treating more limited claims first has three beneficial consequences. First, standards can be more readily developed and applied by the actors, rather than needing to be determined and applied in individual instances by courts. Second, the legal regime will start with the problems most in need of being avoided and corrected, signaling important value priorities. Third, the rigor of scrutiny can be successively lightened<sup>102</sup> and the latitude of governmental decision successively broadened as local land use authorities pass muster in being determined not to have violated core principles of religious fairness.

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Minority religions representing less than 9% of the population were involved in over 49% of the cases regarding the right to locate religious buildings at a particular site, and in over 33% of the cases seeking approval of accessory uses. . . .

While a study of this type can at best give a rough picture of what is happening, the conclusion seems inescapable that illicit motivation is [sic] affecting disputes in the land use area.

*Id.* at 136 (as cited by Hamilton, *supra* note 8, at 351, nn.133, 140); Rep. Charles T. Canady, *Religious Liberty Protection Act*, H.R. REP. NO. 219, 106-219, at 18-24 (1999) (as cited in U.S. DEP'T OF JUSTICE, REPORT ON ENFORCEMENT OF LAWS PROTECTING RELIGIOUS FREEDOM, at 4, 25 (2007) (noting that the findings explicitly spoke to widespread discrimination against minority religions and start-up churches, as well as findings that churches were treated worse than comparable secular uses). Both congressional findings speak to discrimination, not exercise.

<sup>100</sup> An article by Marci Hamilton exposed the shallowness and timing issues with respect to the support, lack of hearing counter-support and wholesale importation of testimony about one proposal into the RLUIPA report. However, that is not as relevant to this discussion because even taking the findings as adequate for purposes of making the findings and legislation constitutional, what those findings and supporting testimony support is addressing discrimination, not free-floating Free Exercise limitations. Hamilton, *supra* note 8, at 351-52.

<sup>101</sup> *City of Boerne* required Congress's section 5 power to be exercised in remedial, preventive legislation proportionate to findings of constitutional violation by those who would be subject to the legislation. *City of Boerne v. Flores*, 521 U.S. 507, 517 (1997). Hence, RLUIPA used legislative hearings and history that committee reports described as showing significant discrimination in land use decisions applied to religious bodies.

<sup>102</sup> Decreasing rigor in scrutiny would be consistent with Supreme Court constitutional precedents for the norms being applied. That would support the constitutionality of a statutory scheme to facilitate resolution of these types of disputes consistent with Congress's remedial and preventive section 5 powers.

## *Proposal*

I propose that we first recognize the appropriate essence of different types of land use dispute claims, and apply the correct constitutionally based analysis in ascending order of breadth and difficulty. Any claim should be funneled first through an Establishment norm analysis using a rigorous strict scrutiny standard;<sup>103</sup> if it passes, then through an Equal Protection norm analysis using an intermediate *Cleburne*-type of scrutiny;<sup>104</sup> and if it passes, through a Free Exercise norm analysis – first as to exclusion using an intermediate level of scrutiny,<sup>105</sup> and only thereafter on substantial burden, limited to core religious practice (worship and community), using the distinction between laws of general applicability (*Smith*-type review) and individually tailored laws (using *Sherbert*-type review assuming the tailoring did not run afoul of the earlier application of Establishment and Equal Protection norms).<sup>106</sup>

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<sup>103</sup> This appears to be what RLUIPA has mandated; some courts read the § 2000cc(b) claims as resulting in strict liability, while others use a strict scrutiny compelling interests test to avoid potential Establishment Clause problems. 3 SALKIN, *supra* note 24, § 28:7, at 28-38, citing *Christ Universal Mission Church v. City of Chi.*, 362 F.3d 423, 429 (7th Cir. 2004) (supporting strict liability in a § 2000cc(b) claim) and *Vineyard Christian Fellowship of Evanston, Inc. v. Evanston*, 250 F. Supp. 2d 961, 993 (N.D. Ill. 2003) (barring all restrictions would likely exceed constitutional mandates). *Cf.* *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (“A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases.”).

<sup>104</sup> *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (finding denial of permit for a home for developmentally disabled violated equal protection when similar uses were permitted as of right; using a scrutiny that went beyond accepting the city’s proffered rationales as a rational basis for differential treatment, especially because negative attitudes toward the proposed residents appeared to account for the difference).

<sup>105</sup> 3 SALKIN, *supra* note 24, § 28:7, at 28-47 (noting that exclusion claims are not proven even if areas with religious use as of right are totally built up, and that courts suggest exclusion may be permissible when narrowly tailored and supported by “sufficient justification,” citing *Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 988-89 (7th Cir. 2006), *cert. denied*, 128 S. Ct. 77 (2007)).

<sup>106</sup> Frederick Mark Gedickes commented that the 20th century saw “an eclipse of liberty by equality in the Supreme Court,” and noted that RLUIPA helps to remedy that eclipse. He also questioned whether or not discrimination on the basis of religious sect is really rooted in Establishment rather than Equal Protection or Free Exercise, and opined that it probably doesn’t matter what we call the norm as long as we approach the questions in the order I propose. Frederick Mark Gedicks, Guy Anderson Chair and Professor of Law, Brigham Young University Law School, Remarks at the Albany Law School Gov’t Law Review Symposium: God and the Land (Oct. 2, 2008), *available at* <http://podcasts.classcaster.org/blog/archives/2008/10/>. However, I believe that it enhances our understanding of liberty to note when unequal treatment threatens religious liberty (Establishment) and not simply equality and fundamental fairness. I also believe that it emphasizes the liberty aspects of Free Exercise to draw distinctions between religious discrimination and government action that excludes or prevents religious practice. Establishment can focus on institutional impact and equality rather than practice of individuals.

A clarity in the norm being applied would enable us to use more straightforward tests matched to upholding that norm as it is understood by the Supreme Court. The sequence of analysis and the tests used would normalize the landscape of religious land use disputes. It would address and protect the most invidious harms first. Governments would receive legal incentives to refrain from decisions that treat similar claims differently, particularly in the religious land use context when those differences raise questions of disfavoring particular sects or disfavoring religion in general. There would be clear guideposts to reward true planning and consistent decision making while encouraging parties to explore each other's concerns and needs and reach reasonable accommodations and compromises. Scrupulous consistency would protect local authorities unless used as a pretext to discriminate against the religious body. Rigorously requiring land use authorities to be "ruthlessly neutral"<sup>107</sup> should lead to nondiscrimination. Those making reasonable requests could expect to receive reasonable responses in light of reasonably proven governmental concerns at the local governing body level. Governments would retain safe harbor under § 2000cc-3(e), able to correct land use plans and ordinances that are exposed as discriminatory or unreasonably burdensome.<sup>108</sup> Once we dispose of differential impacts, few cases should remain; it should be, and most probably is, a rare case in which a

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<sup>107</sup> Marci A. Hamilton, Paul R. Verkuil Chair in Public Law, Cardozo School of Law, Edwin L. Crawford Memorial Lecture on Municipal Law at the Albany Law School Government Law Review Symposium: God and the Land (Oct. 3, 2008), *available at* <http://podcasts.classcaster.org/blog/archives/2008/10/>.

<sup>108</sup> RLUIPA allows governments to correct their substantially burdensome ordinances by stating:

A government may avoid the preemptive force of any provision of this chapter by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

42 U.S.C. § 2000cc-3(e) (2000); *e.g.*, *Christ Universal Mission Church v. City of Chi.*, 362 F.3d 423, 424 (7th Cir. 2004) (noting how the city's change of zoning ordinances removed a distinction between secular and religious uses); *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 762 (7th Cir. 2003) (quoting 42 U.S.C. § 2000cc-3(e) and recognizing the zoning change as preempting the application of RLUIPA to the ordinance).

government's land use decision is made to exclude a religious body or require it to choose between worshipping or engaging in sincerely religious activity and forfeiting a benefit.<sup>109</sup>

As the actual land use problem at the core of the dispute becomes more difficult and intransigent, with strong needs and interests of heavy emotional weight on all sides, the scales for decision making will become more equally balanced.<sup>110</sup> Thus, the parties will receive stronger messages about the wisdom of coming to terms between themselves, rather than having their positions hardened in contentious opposition at extreme ends of the spectrum. They will be more ready to do this because the legitimacy of both sets of interests will be understood better by both parties. Also, the (ir)religious overtones to the governmental action will dissipate, removing that burden from the government's ability to explain its position and that doubt from the religious body. The dispute will hopefully become one about land use issues, not religion, and the tools for resolving it can be drawn most heavily from land use law. We may recreate the regime described by Anderson, in his work *American Law of Zoning*, before Free Exercise

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<sup>109</sup> 2 ANDERSON, *supra* note 15, § 12.22, at 575-76 (noting how the deprivation of space essential to religious use or favoring one sect over another, as in excluding certain sects only, and excluding religious uses from all of a municipality or a substantial portion of it (e.g., 90%, or requiring 75% of area property owners to give written permission) is rare, but decisions make it clear that courts will disapprove of zoning out religious uses).

<sup>110</sup> Fred Mark Gedicks, in his comments at the symposium, insightfully analogized this descending order of rigor in scrutiny to the First Amendment Free Speech categories of viewpoint discrimination, virtually fatal in fact (analogized to my Establishment norm claim) and content regulation, highly problematic unless it is shown to be neutral, thus less rigorous than strict scrutiny in practice (analogized to my Equal Protection norm claim). See Frederick Mark Gedicks, Guy Anderson Chair and Professor of Law, Brigham Young University Law School, Comments at the Albany Government Law Review Symposium: God and the Land, Conflicts Over Land Use and Religious Freedom (Oct. 2, 2008), *available at* <http://www.classcaster.org/resserver.php?blogId=250&resource=panel3.mp3>. I suggest the third level might be time-place-manner regulation, which raises the similar question Professor Gedicks identified as the hardest and most interesting in religious land use: if government action is not discriminatory, why is it unconstitutional – what is left of liberty, and how should we protect it (the Free Exercise norm claim). Professor Gedicks suggests, perhaps in the latter case, that it should be a situation of “you take your chances.” *Id.* I see this position as tantamount to rational basis scrutiny, which leaves the parties to work out their own differences. However, Professor Gedicks also notes that discretionary situations might receive special consideration. *Id.* To me, this appears to be the increased scrutiny that *Smith* left open for laws not of general application. *Employment Div. v. Smith*, 494 U.S. 872, 884-85 (1990) (providing one Supreme Court analysis of government action burdening religious exercise).

analysis took hold and spawned RFRA and RLUIPA.<sup>111</sup> We could also avoid claims that the statute violates the Establishment Clause because it favors religious land uses.<sup>112</sup>

My proposed taxonomy is drawn from empathizing with the greatest (and potentially most frequent) harms done to religion by zoning authorities and the greatest legitimate needs and conflicts suffered by local governments attempting to administer a land use scheme. Those insights suggest that the worst offenses against religious uses are those of Establishment. These include government acting differently toward different religious sects with respect to land use requests, especially when similar negative externalities accompany the comparable uses. Second are offenses against Equal Protection values -- government treating religious uses less favorably than nonreligious uses of the same type and order, usually with some secular legitimate goal, such as tax basis, in mind. Offenses against Free Exercise are of a significant but lesser concern, usually arising because of significant governmental competing interests in limiting the land uses. These include the exclusion of opportunities to have a place for assembling for the worship and spiritual community that define religion at its core, limiting the ability of a religious assembly to exist or substantially burdening the ability to practice religion.

Pragmatism suggests addressing the problems in descending order of severity and ease in identifying if they exist. Simpler rules of evidence, appropriate standards of review, and shifting burdens of proof and persuasion can be crafted to identify and analyze issues of denominational

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<sup>111</sup> 2 ANDERSON, *supra* note 15, § 12.21, at 562-65. Angela Carmella also argued during the symposium that the pattern of RLUIPA cases is developing into recognizing the value of core religious uses that can be compatible with their proposed neighborhood. See Angela Carmella, Professor of Law, Seton Hall Law School, Comments at the Albany Government Law Review Symposium: God and the Land, Conflict Over Land Use and Religious Freedom (Oct. 2, 2008), available at <http://www.classcaster.org/resserver.php?blogId=250&resource=panel1.mp3>.

<sup>112</sup> See *Cutter v. Wilkinson*, 544 U.S. 709, 731-32 (2005) (rejecting a claim that RLUIPA facially violates the Establishment Clause with respect to the institutionalized persons portion). The Establishment claim in the land use context remains undecided by the Supreme Court. Lower courts have consistently rejected the claim, but academic commentators argue the point strongly, most particularly with respect to the “substantial burdens” § 2000cc(a) claim and the manner in which the statute broadens the definition of “religious exercise.” 42 U.S.C. § 2000cc(a) (2000); see also Hamilton, Crawford Memorial Lecture, *supra* note 106.

discrimination or failure to use equal terms when reviewing religious versus secular land use requests. Differential treatment of similar land use requests should be the easiest for a local government body to avoid, monitor, and correct in the normal conduct of land use decision making. It is also the easiest for the parties to collect evidence about, from the existing land use plan, zoning rules, and documented history of special permits or variance decisions. The very last issue available to be raised and decided would be land use requests granted to no other user *and* that exceed core religious existence. Core religious existence would be defined to require a place adequate for: 1) assembling for worship, 2) training congregants and children in the religious belief system, and 3) engaging in spiritual community surrounding worship activities and services. As the order of severity decreases, pragmatism counsels that the standard of review should also loosen.

The proposed analytical sequence would start with:

A general rule of nondiscrimination –

first, based on Establishment principles as nondiscrimination between religions (the § 2000cc(b)(2) claims) and

then on Equal Protection principles as nondiscrimination between religious and nonreligious uses (the § 2000cc(b)(1) claims).

Only after claims have been conceded or shown to be devoid of discriminatory motivation or impact would those based solely on Free Exercise principles be raised –

first § 2000cc (b)(3) exclusion claims and

then § 2000cc(a) substantial burden claims.<sup>113</sup>

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<sup>113</sup> The substantial burdens claim would be transformed into a *Smith* analysis, with a tightened definition of religious exercise. The more core the exercise, the heavier the burden to be justified by reasonableness of the government action. Substantial burden cases should thus be far fewer.

The standard of review would become successively less rigorous, and hence place the parties more equally in balance.

Denominational discrimination would be subject to exceptionally rigorous review, as applied in *Lukumi Babalu* and § 2000cc(b)(2).<sup>114</sup> Extremely compelling governmental land use interests, with narrowly tailored regulations that accord accommodations if possible to the religious sect and that are not tinged by hostility to the religion or its manner of exercise, could justify restrictions.

Failure to accord equal treatment to religious uses compared with secular uses would receive searching scrutiny, using the *Cleburne* framework.<sup>115</sup> The standard would protect and weigh the particularized needs of religious uses that impose real or perceived externalities, preventing them from being blocked by incantation (which can be exposed as a rationalization), especially when similar proven externalities have been accommodated. This would alter the § 2000cc(b)(1) standard to permit governmental interests to justify restrictions when they have been used consistently to restrict similar usage requests.

Exclusion would be analyzed as it appears to be currently: if only core religious uses are excluded from the jurisdiction, it would be an equal terms problem, to be analyzed with *Cleburne* scrutiny, with weight from Free Exercise principles and guarantees accorded to the religious user's interest.<sup>116</sup>

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<sup>114</sup> 42 U.S.C. § 2000cc(b)(2). *See also* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993) (noting that in order to restrict religious practice the law must be narrowly tailored to achieve a compelling governmental interest); 3 SALKIN, *supra* note 24, § 28:7, at 28-38 (noting that in some equal terms cases, the courts used the standard of review of strict liability, whereas in others, the courts adopted a strict scrutiny standard of review).

<sup>115</sup> *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 447-50 (1985) (expanding the inquiry beyond the explanation offered by the city).

<sup>116</sup> *See* 3 SALKIN, *supra* note 24, § 28:7 at 28-47 to 28-48 for an illuminating discussion of case law.

When core religious existence and practice is not at issue, *Smith*-based analysis should prove to be adequate and best.<sup>117</sup> Those disputes mirror the disputes between a land use authority and any other user, and should be resolved on those terms of decision making bearing a reasonable relationship to public health, safety, morals and welfare (thus counseling working together, as well as non-arbitrary decision making).<sup>118</sup>

The RLUIPA framework of protecting non-core usages motivated by religious exercise<sup>119</sup> even if no discrimination has occurred<sup>120</sup> will thus be carefully circumscribed so as not to exceed the boundaries of the Establishment Clause in preferring religious uses to non-religious uses of the same order.

In this proposal, as the governmental action passes muster at each stage, a stronger presumption of legitimacy attaches and a looser standard of review applies. In addition, I propose that a differing burden of production and persuasion should operate at each stage.

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<sup>117</sup> See *Employment Div. v. Smith*, 494 U.S. 872, 878-79 (1990) (providing that for substantial burdens on sincere, religiously motivated practices, the standard of review for governmental action that is both neutral and of general applicability is reasonable basis). In the land use context, this should revert to the general standard for weighing governmental decisions against proposed land uses: reasonable relationship to health, safety, morals or public welfare. In light of the positive contribution of houses of worship, inconvenience alone is unlikely to adequately support the reasonableness of restrictions or failures to make accommodations consistent with public welfare. Cf. 2 ANDERSON, *supra* note 15, § 12.21, at 562-63 (citing *Holy Spirit Assoc. for Unification of World Christianity v. Rosenfeld*, 458 N.Y.S.2d 920 (N.Y. App. Div. 2d Dep't 1983); *Diocese of Rochester v. Planning Bd. of Brighton*, 136 N.E.2d 827 (N.Y. 1956)).

<sup>118</sup> This result seems to match Leslie Griffin's proposal for a return to the principles that Philip Kurland argued as underlying both Religion Clauses and recognizing the role and latitude of government actors – "[not to use] religion as a standard for action or inaction." See Leslie Griffin, Larry and Joanne Doherty Chair in Legal Ethics, Comments at the Albany Government Law Review Symposium: God and the Land, Conflicts Over Land Use and Religious Freedom (Oct. 2, 2008), available at <http://www.classcaster.org/resserver.php?blogId=250&resource=panel3.mp3>. Sensitivity to religious uses as contributing to the common good, and refusing to accept incantatory negative externalities without evidence, can be built into the scheme, similar to what Angela Carmella suggested in her symposium presentation as the pattern of looking closely at the legitimacy of the government's assessment of the impacts of the proposed religious use. See Carmella, *supra* note 110.

<sup>119</sup> More specifically, the § 2000cc(a) claim using the § 2000cc-5(7) definition of religious exercise. 42 U.S.C. §§ 2000cc(a), 2000cc-5(7) (2000).

<sup>120</sup> For example, both spiritually and ancillary uses like homeless shelters, parochial day or boarding schools, day care centers and the like and, even more problematically, secular uses that benefit the religious body or are perceived to benefit from being attached to a religious body like apartment complexes, restaurants, retail centers and the like.

First, we start with the normal presumption that a land use determination is valid.<sup>121</sup> Every religious body would first be compelled to concede there is no denominational discrimination or to demonstrate that the challenged regulation or action treats the religious entity differently from other religious entities with respect to a substantially similar land use request. To avoid divisive litigation evidence and strategies, this type of claim would be supportable simply upon impact evidence. The government must then demonstrate why the different treatment is not preferential to one religion or hostile to the current claimant. The religious body has the initial burden of going forward to raise the question of differential impact among denominations by showing a similar request or use has been permitted to another religious body. If the religious body presents objective evidence of differential impact, the burden of proof and persuasion shifts to the government who must either show no differential impact or prove a compelling governmental interest, a neutral rationale and narrow tailoring to that interest and rationale.<sup>122</sup> The government could forestall this claim by providing documentation that demonstrates scrupulous neutrality between religions to the plaintiff at the time of its initial action upon, and denial of, the land use request.

If the government satisfies that burden or no differential impact is proven, the claimant may attempt to prove hostility toward the denomination. That is, government's choice to defend an impact claim would open the door for all evidence of discrimination or hostility to the religious sect. Evidence would include any arguments that the governmental body heard or permitted neighbors and others to make objecting to the proposed use about the religion, its

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<sup>121</sup> *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (recognizing the validity of zoning regulations consistent with the reasonable exercise of the police power to protect public health, safety, morals and welfare).

<sup>122</sup> In both instances, the evidence to support those proofs is most clearly in the control of the government, as it should have records of all the religious land use requests, the actions taken upon them, and the reasons in support of those actions. This justifies placing both the burdens of production and persuasion upon the government.

beliefs, etc. These arguments infect governmental process and understandably create a perception that the process was biased against the religious group.<sup>123</sup> Permitting these arguments to qualify as proof of governmental intent and shifting the burden to the government to disprove discriminatory intent provides necessary incentives to discourage and prevent such arguments during the land use permit process. Conversely, evidence that the government provided the claimant with supporting documentation showing that they similarly treated requests from other religious bodies would be admissible to disprove discriminatory intent. This rule would encourage early disclosure of examples dispelling the perception of discrimination and create additional incentives to both parties to work together during the administrative process. Because this is an Establishment-based claim, there is no requirement to demonstrate a burden on religious exercise.<sup>124</sup>

Second, if the plaintiff cannot plead or prevail on a denominational discrimination claim, the religious entity would need to make any available claim about unequal terms of treatment with other similar secular uses. Proof of a discriminatory impact on religious uses versus nonreligious similar uses would shift the burden of proof to the government to establish an actual and legitimate rationale for the different decision.<sup>125</sup> By requiring a real rationale, this analysis contextualizes all of the reasons offered and scrutinizes their internal consistency, rather than artificially isolating each routine rationale (traffic, congestion, noise, parking) and accepting it at

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<sup>123</sup> *E.g.*, *Hollywood Cmty. Synagogue v. City of Hollywood*, 430 F. Supp. 2d 1296, 1301-02 (S.D. Fla. 2006). *See also* Steven Rosenbaum, Attorney, U.S. Dep't of Justice, Albany Law School Government Law Review Symposium: God and the Land, Discussion Panel: Background on Religious Discrimination in Land Use (Oct. 2, 2008), available at <http://podcasts.classcaster.org/blog/archives/2008/10/> (discussing that in *Hollywood Community* no other religious use request had ever been denied, and religiously hostile comments were made in the debate during which negative externalities were also "ritualistically" used despite nearly identical secular uses of the same order having been permitted).

<sup>124</sup> Removing this aspect from the claim prevents a focus on scrutinizing religious beliefs and practices that are usually non-mainstream, and obviates the need to ask questions about sincerity (which non-believers have more difficulty crediting the more the practices deviate from mainstream accepted practices).

<sup>125</sup> Such a rationale was required in *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-40 (1985).

face value.<sup>126</sup> At this level of analysis, the religious nature of the use is less critical to the government's chosen course of action, and it is thus less harmful to the place of religion in the polity. Therefore, the presumption in favor of the government strengthens and the standard of review loosens.<sup>127</sup> Plaintiff may counter with evidence of hostility to religion,<sup>128</sup> again, either by government action or the reasons proffered or considered. This evidence would raise a rebuttable presumption of discrimination, with plaintiff still bearing the burden of persuasion if the government comes forward with rebutting evidence. Proof of discrimination would be sufficient to violate the statute even if the government also proves an actual and legitimate basis.<sup>129</sup> However, it is more difficult for plaintiff to prove discriminatory intent here than in the Establishment-type claim, consistent with equal protection jurisprudence as applied to other land users.

Third, if there is no failure to treat religion on equal terms, the only remaining bases for claims would be exclusion or unreasonable limitation, or a substantial burden upon religious exercise. In situations of total exclusion or unreasonable limitation of religious assemblies, institutions or structures within the jurisdiction, fact-specific limitations<sup>130</sup> might rise to a

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<sup>126</sup> Ritualistic incantations of negative externalities like traffic, parking and the like seem to pervade land use decisions. When those objections are raised late, without opportunity to respond, the courts have been able to see through them and require actual evidence. *See, e.g.*, *Westchester Day Sch. v. Vill. of Mamaronek*, 504 F.3d 338, 351-53 (2d Cir. 2007). As the Second Circuit did in *Westchester Day*, the proposed regime could discount arguments about increased traffic as a consequence of situating an Orthodox Jewish synagogue because the congregants must walk consistent with their religious beliefs and practice.

<sup>127</sup> This standard is especially helpful to governments dealing with commercial uses sought by a religious body, enabling it to treat commercialized usage requests for retail uses, apartment complexes, recreational facilities and similar ancillary uses in light of how those commercialized use requests from secular parties have been addressed. The mega-church problem thus becomes more capable of fair analysis and resolution.

<sup>128</sup> *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 521, 536 (1993). In *Lukumi Babalu*, the non-religious users posed the same governmental issues for types of use, ancillary impacts, etc., but were permitted to engage in those uses.

<sup>129</sup> This result, tantamount to raising the standard of review, is justified because the claim would then raise Establishment problems due to hostility toward religion rather than the Equal Protection problems of approving non-religious similar uses for less targeted rationales like tax status and compatibility with other uses.

<sup>130</sup> 3 SALKIN, *supra* note 24, § 28:7 at 28-47 to 28-48. Also, consider other possible situations like the refusal to allow the church to expand its worship facility to better accommodate its current congregational numbers on its current property despite not needing variances for setbacks, height restrictions, parking spaces and the like.

violation on terms similar to those we see being applied by courts at present under RLUIPA.<sup>131</sup> In this analysis, for core religious uses, the value of religious institutions to the public welfare would be given weight as in earlier zoning cases. Otherwise, it is and should be difficult to show a substantial burden unless the religious entity is significantly precluded from practicing its worship and religious community centered core activities by virtue of the impact of the land use regulation or decision.<sup>132</sup> In that situation, a rational-basis-with-teeth test should suffice. When ancillary uses by religious bodies are being considered, the government should be rationally making and applying neutral laws of general application. If not, the analysis in *Smith* suffices to protect the interests at stake.<sup>133</sup> Thus, at this level, the presumption in favor of governmental action operates, requiring plaintiffs to bear the burden of proof and persuasion to show that the government action is not reasonably related to a legitimate government land use interest in health, safety, morals or public welfare. The analysis would proceed as would any challenge to the validity of a government land use decision, using the same principles of review and scrutiny of non-arbitrariness. The government should be able to provide a neutral comprehensive plan that is consistently interpreted and applied. Neutral and pre-existing standards for religious uses, especially for common requests like those to locate or to expand worship facilities, will protect

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<sup>131</sup> Moving away from the unremitting focus on substantial burdens requiring compulsion to choose between religious practice and forfeiting a benefit might refresh a less distorted view of Free Exercise analysis as well. If the focus were first on excluding religious observers from the practice of their beliefs, as in § 2000cc(b)(3), then *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), and other sacred site litigation might well be decided differently – they would at least be analyzed differently. In the sacred site context, the requirement of choosing between practicing a religious belief or forfeiting a benefit is meaningless. Yet its absence can preclude a Free Exercise claim. A focus on what sincere beliefs require from adherents and whether or not the government is functionally preventing religious practice from occurring would correct this distortion, allowing us to distinguish a) condemning a sanctuary that can be moved from b) developing a site that singularly embodies religious significance.

<sup>132</sup> Dwight Merriam, et. al., Panel Four: Beginning to Answer RLUIPA's Unanswered Questions at the Albany Government Law Review Symposium: God and the Land, Conflicts Over Land Use and Religious Freedom (Oct. 3, 2008), available at <http://podcasts.classcaster.org/blog/archives/2008/10/>. Wide “exercise” claims spawn conflict over sincerity, which can ultimately jeopardize public acceptance of sincere religious practices, making it more cynical about the requests and the government more skeptical of sincere uses. As one panelist noted, “abuse makes all religions look bad.”

<sup>133</sup> *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990).

the government, providing an incentive to adopt and apply such standards. Plaintiff's ability to instead show a pattern of inconsistency and individualized assessment, by refusal to accept their request while granting similar requests, could prevail, according to the same terms that other challenges of arbitrary land use decision making have prevailed.

Some might find it counterintuitive to focus first upon discrimination and claim it will relieve the adversarial and emotional clashes that the RLUIPA scheme has spawned and supported. If a religious entity is looking for discrimination, how will that foster more productive interactions between it and the local government?

A significant source of tension between religious entities and local governments is the apparently context-less way in which religious bodies make their requests and local governments respond. From the perspective of the other side, neither party appears to have or use reference points that demonstrate their thoughtfulness and good will. From the perspective of religious entities, perceptions of discrimination occur and are fed by local government decision making that appears to be ad hoc, visceral and reactive. Decisions appear to be based on gut instinct rather than demonstrable consistency with articulated systematic planning, processes and previous decisions. Untethered religious body requests appear to local governments as growing from an entitlement mentality and non-responsiveness to community boundaries, rather than from religious needs. The requests and responses, thus untethered, appear to be arbitrary and ad hoc.

The proposal to re-sequence the analysis and to use objective data for comparative purposes will address this visceral negative reaction. First, the purpose of the sequencing is to eliminate decisions that appear to be or are made upon an ad hoc basis, as it is these decisions that can be perceived or actually be based upon preference for or non-preference against a

religious entity. Because the government will know to adopt a neutral plan of general applicability and apply it consistently, keeping records of the plan and the disposition of all requests, there will be understood parameters for reaching a decision and an objective database of a plan plus previous decisions against which to measure the locality's response. A religious entity making a request will have accessible records of previously permitted uses and changes to use in formulating the request. Initial disputes about consistency of treatment can be readily referred to the records and database, permitting both parties to determine if fair determinations are being made and to focus on identifying and meeting the needs within those established parameters. Thus, before requests turn into disputes, the parties will be able to monitor and avoid conduct that transgresses the boundaries of the pattern of conduct and the land use plan. Second, once the boundaries are known and adhered to, both parties are able to dispense with perceptions and actions that can be seen as discrimination. They will know the boundaries within which they can negotiate a response to the land use request that balances the interests of each party. In other words, the idea is to focus earlier behavior in the land use planning and application process on avoiding ad hoc potentially discriminatory actions, and thus to enable the parties to observe that the current behavior is consistent with previous practice and fairness, preventing disputes about discrimination from arising in the first place.

Denials of land use requests may always raise questions about the conscious or unconscious discrimination on the basis of religion, at least in the minds and hearts of the members of those religious entities. Those questions can lose their edge – and their ability to escalate what is at stake, and hence how deeply the dispute cuts – once questions about equal treatment between religious users and secular users, and between different religious sects, are removed. It thus behooves us to ask and answer those questions first. Governmental actors can

be trained to ask those questions first whenever dealing with a religious land use request, and to seek to avoid them by acting consistently with past practices and creating an objective record supporting the past and current practices. The assurance that the question has been asked and that the bases, which prove fairness and evenhandedness in application, have been shared removes the elephant in the room. The focus becomes talking about what matters - either dispelling the specter of differential treatment or working out accommodations for the competing interests at stake. Only after the question of differential treatment is dispelled would we need to ask about how sincerely religious is the proposed use, how much is exercise actually threatened, and other intrusive and subjective questions.

This proposed scheme also gives local governments the power to place themselves and their planning goals into a situation that is not lose-lose when confronting religious entity land use requests. First, pursuant to the proposal, governments must establish a real plan, with internal guidelines about uses, permits and the limits of special use requests within zones. Second, the government must rationalize those limits to articulated goals of the land use plan and of its flexibility for individual deviation. Third, the government must consider within the bounds of its plan and goals how to respond to individual requests and specifically where to consider placing religious entities in order to enable them to meet their goals within the limits of responses consistent with the overall plan. Fourth, the local government must scrupulously adhere to the plan, goals and flexibility boundaries (in both directions) and keep records of those decisions and the rationales behind them. Those plans, decisions and limits should be clearly communicated and readily accessible to all users and potential users. In other words, the local governments have the initial power to establish the goals and practices consistent with the land use plan. But they will maintain control only by adhering to the plan and articulating clearly the

consistency of the plan and the decisions made pursuant to it. The pattern of decisions made with respect to secular uses as well as to uses requested by other religious bodies will form the background against which the government's decision on a religious entity's request will be judged for consistency and neutrality.

Thus, local governments are empowered to set their own baselines. The focus on articulation, practice and written records will make the entire process more predictable for both the locality and the religious entity. The government, by its practices, will gain more control and be able to negotiate effectively within mutually understood boundaries. Religious entities, seeking to avoid conflict and expense, will be able to formulate their requests, purchase their properties and explain their needs in light of the known goals, boundaries and decisional factors that are guiding the local government process.

The proposal would enable the most problematic exercises of governmental power to be decided more quickly, focusing the parties on differential impact and privileging objective evidence that should be readily available from plans, records and documentation of similar requests and their disposition.<sup>134</sup> The parties themselves have incentives to share and evaluate these records and reach accommodations consistent with them during the administrative process. Once questions about differential treatment are removed, the remaining questions (and the standard of judicial review of actions) mimic those of any disputed land use determination, and will be resolved consistently with the developed body of land use law as to adequate evidence and balancing of interests in light of governmental power.

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<sup>134</sup> Dwight Merriam, FAICP, CRE, Robinson & Cole LLP, Panel Four at the Albany Government Law Review Symposium: God and the Land, Conflicts Over Land Use and Religious Freedom (Oct. 3, 2008), *available at* <http://podcasts.classcaster.org/blog/archives/2008/10/> (Merriam emphasized the need both for good, definitive, objective criteria for decision making, with measurable ways of assessing if those criteria have been met and for pre-stated rationales for the plans and decisions of the land use authority).

Channeling disputes in this sequence seems best suited to accommodating the interests of all parties. It protects religion and government from each other, enabling government to govern fairly and effectively while ensuring religious equality and liberty, and without entangling the government in religion. Land use authorities would first look at their proposed actions, to ensure consistent and uniform treatment of all religious sects, whatever their popularity or familiarity, then to consistency in applying land use regulations to the uses proposed rather than to the user. Finally, land use authorities would look to ensuring that fair provision for religious uses exists and that assessments of religious requests proceed by attempting to discern the competing interests involved and accommodating them consistent with a reasonable exercise of the land use power.

Ideally, this change would be enshrined in a legislative change that adopted the narrower definition of religious exercise, the re-sequencing of analysis, and the standards of review and evidentiary changes as suggested. However, short of Congressional action, local governments, religious entities – and if necessary the courts resolving their disputes – can adopt many of the substantive and procedural changes to making and deciding land use requests.

Local governments can adopt the strategy of building up objective data on previous use requests and actions, against which to measure any current request from a religious entity. Both parties can funnel their questions and procedures appropriately to illuminate and eliminate perceived and actual discrimination in the administration of land use policies as applied to individual requests. If necessary to seek court determinations, the parties can follow the proposed sequence and focus the dispute on the actual source of the problem.

Courts could also adopt the proposed sequencing of analysis. Pretrial, and if necessary trial, procedures could seek first to eliminate the issues of religious sect preference, then secular

versus religious use preference before considering substantial burdens analysis. This sequencing could also be used early in the pretrial process to identify the need to correct local decisions due to non-neutral application of local standards. This process would facilitate use of the safe harbor, as well as fostering mediated or negotiated resolutions.

This schema would also encourage governmental bodies and religious entities to work together to find appropriate resolutions of those competing needs, rather than place them at odds with each other, each wielding power to force its own desires. Working out differences, accommodating needs, addressing difficulties, and understanding how they affect actions will preserve the spiritual core of the religious body and its congregation best, and reduce neighborhood and government entity hostility or resentment, ultimately protecting religion further. I am struck that despite the outcome in *City of Boerne v. Flores*,<sup>135</sup> the church was able to reach a compromise that enabled it to expand its sanctuary and size while preserving historically significant architecture.<sup>136</sup> Yes, the specter of RLUIPA may have helped to offset the all or nothing feel of invalidating RFRA, but did RFRA and does RLUIPA embolden churches in classically nonproductive ways to try to win everything rather than to reach an accommodation of mutual interests? Yet, doesn't RLUIPA make local governments think twice, or at least settle, when competing constituencies argue against church land uses that are otherwise permitted?

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<sup>135</sup> *City of Boerne v. Flores*, 521 U.S. 507 (1997) (reversing a lower court decision in favor of the church by invalidating RFRA as applied to support the church's claim).

<sup>136</sup> See Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 162-63 ("For the parties, however, the case ended on a happier note. After the Supreme Court rendered its decision, the Archdiocese prepared to continue the case under other legal and constitutional theories. On August 12, 1997, the City Council unanimously adopted what it styled a 'settlement,' under which the Church may build a new 850-seat sanctuary behind, and partially hidden by, the original building, most of which will be repaired and preserved intact at Church expense. The plaintiffs thus accomplished their religious objective with minimal loss to public purposes, though at much greater cost to themselves--arguably the kind of reasonable accommodation that RFRA was designed to bring about." (citing Judge McConnell's own correspondence with Marci Hamilton, the attorney for the City of Boerne in the case, and Douglas Laycock, the attorney for the Church. E-mail from Marci Hamilton to Religion Law Discussion Group (August 13, 1997) (on file with the Harvard Law School Library); Telephone Interview with Douglas Laycock (September 16, 1997))).

We need a statute like that this article proposes so governments can say “my mother says no” when neighbors want to discriminate, or tax revenues take precedence over all else; but we also should rely on the standard set in *Smith*,<sup>137</sup> so governments can say no to subsidizing and absorbing huge land uses for tax-free uses, which are secular in every respect except that a religious entity wants to build or conduct them, and incidentally strengthen the infusion of religion or support the religious entity. The County of Boulder was right,<sup>138</sup> the County of Sutter was wrong.<sup>139</sup> Even when the courts get it right, at what expense – and couldn’t we have known that earlier?

#### CONCLUSION:

If the number of lawsuits is any indication of the level of disputes between religious entities and land use authorities, RLUIPA did not diminish the problems Congress purported to address. Indeed, it has resulted in increasing levels of disputes – if not in numbers, then certainly in intensity.<sup>140</sup> In this respect, RLUIPA has not resolved concerns about land use. Have local governments responded to RLUIPA by making it ever more difficult for churches to secure favorable routine zoning determinations? Or has RLUIPA escalated religious land use requests and then elevated them into disputes that rapidly become “federal cases,” increasing their intensity and severity – and perhaps their number? If so, the antagonistic relationships RLUIPA creates directly contravene its rationale and desired effect. More hopefully, might it be that

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<sup>137</sup> *Employment Div.*, 494 U.S. at 879.

<sup>138</sup> *Rocky Mountain Christian Church v. Bd. of County Comm’r of Boulder County, Colo.*, 481 F. Supp. 2d 1213 (D. Colo. 2007) (detailing a careful and comprehensive plan meticulously applied by the County to all requested uses, including that of Rocky Mountain Christian)

<sup>139</sup> *Guru Nanak Sikh Soc’y of Yuba City v. County of Sutter*, 456 F.3d 978, 982-84 (9th Cir. 2006) (detailing a recalcitrant County unwilling to permit the Sikh temple first in a residential zone, later in an agricultural zone, and refusing to work with the religious entity to find compromise plans that could meet the needs of both the religious entity and the county)..

<sup>140</sup> Daniel N. Lerman, *Taking the Temple: Eminent Domain and the Limits of RLUIPA*, 96 GEO. L.J. 2057, 2062 (2008).

government and church actions have not changed (or even changed somewhat to the better by ensuring that reasonable church requests are readily granted), and that RLUIPA simply brings existing disputes to light and assists churches in securing basic land use rights heretofore denied? Whatever its effect on pre-litigation behavior, RLUIPA has required courts and local governments to grapple with exceedingly difficult, divisive issues, such as questions of what constitutes a religious use, when there is a “substantial burden” on “religious exercise,” and when a governmental interest can outweigh that burden.

RLUIPA’s enshrining of Free Exercise concerns – and strict scrutiny of those concerns – as the general rule has generated broad and problematic claims to accommodation for religious land use, without getting to the heart of the most frequent harms done in the land use arena. The questions raised are so difficult that extended argument and litigation become likely, and court resolution necessary. It is better to provide the heightened level of protection and scrutiny to the most serious problems, those of religious equality. Evaluating the equality issues, first under Establishment norms that protect against differential decisions between one religious entity and another, and then under Equal Protection norms that guarantee access to land use equivalent to the access granted secular uses, enables us to apply more objective factors in predictable ways. The availability of objective evidence on these two claims – and institutionalizing a preference for relying upon it – also diminishes the antagonism between the parties that characterizes the post-RLUIPA regime.

It is not that RLUIPA has it all wrong, *per se*. Rather, RLUIPA has it upside down.