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The Forms and Limits of Religious Accommodation: The Case of RLUIPA

Ira C. Lupu & Robert W. Tuttle[1]

For the past twenty years, the Supreme Court's decision in *Employment Division v. Smith*[2] has been the *bete noir* of the religious liberty community in America. The widespread and conventional account of *Smith* is that, by precluding claims of mandatory religious exemption from formally neutral and generally applicable laws, the decision radically diminished religious freedom.[3] For example, prior to the decision in *Smith*, a religiously motivated person or a religious entity would have had a strong argument that a law outlawing all human consumption of alcohol was unconstitutional as applied to the use of wine in religious sacraments – in other words, that an exemption for sacramental use of wine was mandated by the Free Exercise Clause of the First Amendment.[4] After *Smith*, such an argument would be unavailable to anyone contesting the application of such a law, even in the obvious examples of using wine in Christian Communion, or in Jewish celebration of the Passover holiday.

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[1] The authors are both on the law faculty of The George Washington University. Ira C. Lupu is the F. Elwood & Eleanor Davis Professor of Law; Robert W. Tuttle is Professor of Law and the Berz Research Professor of Law and Religion. This essay is part of a larger book project, tentatively titled "Secular Government, Religious People." For the title of this essay, we acknowledge our debt to Lon Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353 (1978) (emphasizing the role of proofs, arguments, and rationality in the enterprise of adjudication).

[2] 494 U.S. 872 (1990).

[3] See, e.g., Douglas Laycock, The Remnants of Free Exercise, 1990 Sup. Ct. Rev. 1.

[4] The Volstead Act, implementing National Prohibition, exempted the use of wine for sacramental purposes. 41 Stat. 305 (1919), *repealed* 49 Stat. 872 (1935). This exemption was, in our terms, a constitutionally permissive rather than a constitutionally mandatory accommodation. Part II of this article discusses the appropriate parameters of permissive accommodations of religion.

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To many critics, *Smith* indefensibly rendered the Free Exercise Clause constitutionally redundant or superfluous. From their narrow angle of vision, the critics have a point. For over half a century, the Clause has overlapped with other, broader constitutional concerns of liberty and equality. For considerably fewer years, the Clause appeared to have a strong independent force, and *Smith* weakened that force. The weakening effect was far less than is typically asserted, because the Supreme Court had substantially undercut the independent force of the Clause in the decade leading up to *Smith*.[5] Nevertheless, *Smith* has had a very real effect on the law of free exercise, and on the general perception of that law among lawyers, judges, and concerned citizens.

So the critics are not entirely wrong, but they are myopic. Our view is historically longer, and considerably more panoramic in scope. The Free Exercise Clause has been deeply important in the development of constitutional rights to religious freedom. Moreover, it has quite frequently functioned in ways that pull along with it other, analogous secular rights. Because American law and culture have great respect for religious freedom, it has turned out to be one of the very best friends of freedom generally.

Through this wider lens, we analyze in Part I below the regime of religious liberty that has developed in the U.S. over the past century or so. That regime is robust indeed, and it

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[5] United States v. Lee, 455 U.S. 252 (1982); Bob Jones University v. United States, 461 U.S. 574 (1983); Alamo Foundation v. Secretary of Labor, 471 U.S. 290 (1985); Bowen v. Roy, 476 U.S. 693 (1986); Goldman v. Weinberger, 475 U.S. 503 (1986); O'Lone v. Estate of Shabazz,, 482 U.S. 342 (1987); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); Hernandez v. Comm'r, 490 U.S. 680 (1989); Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378 (1990). These decisions are sorted and canvassed in Ira C. Lupu, Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act, 56 Mont. L. Rev. 171, 177-185 (1995)

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protects strenuously – though not perfectly – the rights of the people to maintain their own choices of religious experience. That regime is limited, however, by restraints that flow from the government's secular character, and the disabilities that flow from that character.

At the periphery of that regime of religious liberty is the distinct problem of the creation of religious exemptions from otherwise general laws, such as a prohibition on drug or alcohol consumption. Focusing primarily on a case study of the Religious Land Use and Institutionalized Persons Act,[6] Part II of this paper analyzes the ways in which the legal system may properly respond to demands for such accommodations and exemptions. In that analysis, the government's obligatory secular character plays a central role in specifying the forms and limits of governmental actions designed to accommodate religious freedom.

I. **The Mandatory Regime of Religious Liberty**

For most Americans, the core of religious liberty is reflected in a set of key principles:

1. The right to worship as one chooses;
2. The right to prepare and disseminate writings that contain materials for religious contemplation and worship;
3. The right to assemble with others for purpose of worship;
4. The right to proselytize to others about one's religious convictions;
5. The right to be free of compulsion to worship in ways contrary to one's own beliefs;
6. The right of parents and guardians of children to direct and control the religious upbringing of children in their custody;
7. The right of religious sects and denominations to be treated equally with others under the law.

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[6] 42 U.S.C. § 2000cc et seq.

When we focus on the history and status of these core principles, three phenomena are striking. First, all of these rights are extremely well-protected in American constitutional law. Second, the development of these rights has unfolded through a conceptual strategy of protecting analogous secular concerns – freedom of speech, press, and association; parental rights; and the equality rights of unpopular social groups – along with their religious counterparts. Third, our constitutional history reveals that religiously motivated claims have frequently been at the cutting edge of constitutional freedoms, and have pulled analogous secular claims along in their wake, though secular conceptions of freedom have more recently been in the position of that leading edge.

Examples of all three phenomena, both hoary and recent, are plentiful:

1. The Supreme Court first protected the right to proselytize to strangers with respect to any form of social cause in *Lovell v. Griffin*,[7] *Cantwell v. Connecticut,*[8] and *Murdock v. Pennsylvania*,[9] all of which involved distribution of religious literature by members of the Jehovah's Witnesses. More recent decisions make explicit what was clear from the outset – that the right of proselytizing door-to-door or in the streets is not limited to efforts at religious

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[7] 303 U.S. 444 (1938) (invalidating requirement that any distributor of literature obtain a permit from city official with standardless discretion to grant or deny).

[8] 310 U.S. 296 (1940) (holding the Free Exercise Clause applicable to the states by incorporation into the 14th Amendment, and invalidating a conviction for common law breach of the peace by street proselytizer who played phonograph record attacking the Roman Catholic Church) .

[9] 319 U.S. 105 (1943) (invalidating fee for a license to distribute literature as a forbidden flat tax on the exercise of religion).

persuasion.[10]

2. In *Minersville School District v. Gobitis*,[11] the Supreme Court rejected a Free Exercise Clause claim to exempt religiously motivated children from an otherwise enforceable general duty to salute the American flag. Just three years later, in the midst of war, the Court in *West Virginia Board of Education v. Barnette*[12] upheld a general right to refuse to utter state-compelled speech. *Barnette* involved the identical religiously motivated refusal of school children to salute the American flag as had *Gobitis*, but the *Barnette* opinion rests on general, religion-neutral grounds.

3. In the famous footnote four to the Court's opinion in *United States v. Carolene Products Co.*,[13] the concern for religious minorities is the first listed example of the need for courts to protect "discrete and insular minorities" from unfriendly legislation directed against them as a result of prejudice.[14] Religious minorities are typically protected under the Religion

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[10] See, e.g., Hynes v. Mayor of Oradell, 425 U.S. 610 (1976) (political canvassing by candidate for office); Staub v. Baxley, 355 U.S. 313 (1958) (labor union canvassing).

[11] 310 U.S. 586 (1940).

[12] 319 U.S. 624 (1943). See also Wooley v. Maynard, 430 U.S. 705 (1977).

[13] 304 U.S. 144 (1938).

[14] "Nor need we inquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national… or racial minorities …: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." Id. at 152, note 4 (citations omitted). See also Steven D. Smith, Religious Freedom and Its Enemies, or Why the Smith Decision May Be A Greater Loss Now Than It Was Then, 32 Cardozo L. Rev. XXX (2011) at [text at note 65] (describing arguments that "religion is in fact the generative source of modern substantive commitments to human equality").

Clauses,[15] while racial and national minorities are typically protected under the Equal Protection Clause,[16] but the underlying theories of judicial intervention overlap considerably.

4. The germinal decisions protecting the right of parents to direct and control the flow of knowledge in their children's education explicitly involve religious entities. In *Meyer v. Nebraska* (1923),[17] the Court invalidated a Nebraska law outlawing instruction in modern foreign languages prior to the eighth grade; Meyer was a teacher of the German language in a Lutheran parochial school. In *Pierce v. Society of Sisters* (1925),[18] the Court struck down an Oregon compulsory education law which required minor children to attend public school; the plaintiffs were a private military academy, and the Society of Sisters of the Holy Names of Jesus and Mary, a religious order that operated a parochial school. Later decisions have recognized such parental rights in wholly secular settings.[19]

5. The potential pull-force of religious liberty on liberty more generally continues to the

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[15] See Larson v. Valente, 456 U.S. 228 (1982).

[16] Brown v. Board of Education, 347 U.S. 483 (1954) (invalidating de jure racial segregation in public schools); Hernandez v. Texas, 347 U.S. 475 (1954) (protecting Mexican-Americans against discrimination in jury selection).

[17] 262 U.S. 390 (1923).

[18] 268 U.S. 510 (1925).

[19] In Farrington v. Tokushige, 273 U.S. 284 (1927), the Court applied the parental rights doctrine to a Hawaiian Territorial law which outlawed "foreign language schools;" Hawaiians of Japanese, Chinese, and Korean descent operated such schools in order to teach their language and ancestral culture to their children. Wisconsin v. Yoder, 406 U.S. 205 (1972) extends this theme in an opinion that appears to rest on the free exercise clause alone, but *Smith* re-rationalized *Yoder* as a case involving hybrid rights of religious and parental freedom, 494 U.S. at 881, and more recent cases protect parental rights in a wholly secular context. See, e.g., Troxel v. Granville, 530 U.S. 57 (2000) (invalidating law that required custodial parents to permit child visitation by grandparents). [ADD CITES TO DWYER AND HILL IN THIS SYMPOSIUM]

present day. As of this writing, the Supreme Court has under advisement the case of *Snyder v. Phelps*,[20] in which the father of a soldier killed in Iraq successfully sued religiously-motivated protestors for intentional infliction of emotional distress, by way of anti-gay messages displayed near the soldier's funeral. The case will clarify the appropriate constitutional standard to be applied to speech on public issues – whether the speech is religiously motivated or otherwise – that inflicts emotional distress on a private figure.[21]

More recently, religious liberty has moved from the work-horse position to that of the beneficiary in cases where the affirmation of some rights leads to recognition of others. For example, the rich development of the law of access to public fora for speech has helped pull religious speech into various publicly-supported contexts from which it had been excluded.[22] And the growth of the right of association, embraced in cases like *Boy Scouts of America v. Dale*,[23] similarly has been fruitful for claims of religious association.[24]

As revealed by this account of reciprocal influences, religious liberty and other forms of

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[20] 580 F.3d 206 (4th Cir. 2010), cert granted, 130 S. Ct. 1737 (2010) (No. 09-751). The Supreme Court heard argument in the case on October 6, 2010.

[21] Hustler, Inc. v. Falwell, 485 U.S. 46 (1988) established the relevant standard in cases involving infliction of emotional distress on a public figure. In *Falwell*, the plaintiff was a well-known religious leader, and the defendant's speech did not appear to be religiously motivated.

[22] Widmar v. Vincent, 454 U.S. 263 (1981); Board of Educ. v. Mergens, 496 U.S. 226 (1990); Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993); Rosenberger v. Univ. of Virginia, 515 U.S. 819 (1995); Good News Club v. Milford Central School, 533 U.S. 98 (2001).

[23] 530 U.S. 640 (2000).

[24] *Dale* has buttressed claims by religious entities with respect to claims of exemption from employment laws. See Rweyemanu v. Cote, 520 F.3d 198, 205 (2d Cir. 2008); Univ. of Great Falls v. NLRB, 278 F.3d 1335, 1344 (DC Cir. 2002).

liberty have for nearly a century exerted a considerable influence, frequently salutary, on one another. The core principles of religious liberty have thus become protected by a broad variety of norms that connect religious freedom to expressive liberty, associational liberty, parental freedom, and constitutional norms of equality. When the Supreme Court in *Employment Division v. Smith* refers to a "hybrid situation" of rights,[25] the reference is precisely to this proud and exact jurisprudential tradition, rather than to some elusive and seemingly arbitrary new trigger for protecting religious freedom only when it is conjoined with some element (however flimsy) of other constitutionally protected concerns.[26]

The reasons why our constitutional tradition has developed in this way are deep and significant. The secular claims that are analogous to the protected religious claims – for example, the secular right to proselytize for political and social causes – have constitutional force equal to and independent from that presented by assertions of religious rights. To put the point from the other direction, the law has quite rightly developed in ways that refuse to privilege religious speakers, associations, parents, or conscientious objectors[27] over their non-religious counterparts.[28]

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[25] 494 U.S. 872, 882.

[26] For decisions (rendered soon after *Smith*) rejecting or ignoring the hybrid rights theory as a workable mechanism for protecting new free exercise claims, see Kissinger v. Bd. of Trustees, 5 F.3d 177, 180 (6th Cir. 1993); Brown v. Hot, Sexy, and Safer Productions, 68 F.3d 525, 539 (1st Cir, 1995).

[27] This phenomenon is especially visible in the context of statutory exemptions for conscientious objectors from military conscription. United States v. Seeger, 380 U.S. 613 (1965); United State v. Welsh, 308 U.S. 333 (1970).

[28] The earliest post-Smith account of this phenomenon is William P. Marshall, In Defense of Smith and Free Exercise Revisionism, 58 U. Chi. L. Rev. 308 (1991). This theme is

We want to focus on another, perhaps less obvious, but equally important set of reasons why religion-based rights tend quickly or immediately to become assimilated with their secular analogues. Although many of the doctrines that protect religious liberty first appeared in a setting where the claimants were religiously-motivated and raised religion-specific objections, the resulting legal norms do not require courts or other institutions to evaluate questions of religiosity. Such questions might include whether the claim truly has a religious character,[29] or whether the belief underlying the claim is held with religious sincerity.[30] Far more problematically, these questions might also include whether the claim has deep or shallow significance to individuals or a faith community – that is, whether the religious practice at issue is central or peripheral, obligatory or customary, subject to rewards or pains in the hereafter, and so on.

At the heart of our argument – both here and in the larger work of which this is a part – is the proposition that such evaluations of religious claims qua religious claims are beyond the competence of government. By this we do not mean that such evaluation is beyond the competence of human judgment; instead, we refer to the constitutional competence of a government limited to matters of temporal and secular concern. Any such appraisals are subject

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reinforced in Christian Legal Society v. Martinez, 561 U.S. XXX, 130 S. Ct. 2971(2010), in which the Court rejected a claim by a religious group of law students that its rights to freedom of association entitled it to ignore restrictions on exclusions from membership, applicable equally to all student groups at the law school. As the Court saw the problem, the claim in *Martinez* was one of religious privilege, not associational equality.

[29] See Africa v. Pennsylvania, 662 F.2d 1025 (3rd Cir. 1981) (holding that MOVE is not a religion, so its "Naturalist Minister" is not entitled to special diet in prison).

[30] U.S. v. Ballard, 322 U.S. 78 (1944).

to significant Establishment Clause restraints.[31]

This idea is far from new; indeed, it has been embedded in our law for many decades. In cases involving disputes over church property,[32] and in disputes over the employment status of clergy,[33] courts have long been explicit about the constitutional necessity of judicial abstention from questions that involve evaluations of religious commitments, obligations, and performances. This "hands-off" doctrine is sometimes attributed to the Free Exercise Clause,[34] and sometimes (as we prefer) to the Establishment Clause.[35] Without regard to that Clause-focused question, courts have repeatedly and consistently ruled that agents of the state lack

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[31] The prohibition on "excessive government entanglement with religion," Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970), does not really capture this concern because the adjective excessive suggests that the concern is one of degree. Id. The prohibition on state exercise of religious authority, however, is a matter of kind, not a matter of degree.

[32] See, e.g., Jones v. Wolf, 443 U.S. 595 (1979); Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969); Watson v. Jones,80 U.S. (13 Wall.) 679 (1871). See generally Kent Greenawalt, Hands Off! Civil Court Involvement in Conflicts Over Religious Property, 98 Colum. L. Rev. 1843 (1998).

[33] See, e.g., McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972). Almost every Circuit Court has followed *McClure*, and none have rejected its approach. See Ira C. Lupu & Robert W. Tuttle, Courts, Clergy, and Congregations: Disputes Between Religious Institutions and their Leaders, & Georgetown J. L & Pub. Pol. 119, 123-128 (2009).

[34] Kathleen Brady, Religious Organizations and Free Exercise: The Surprising Lessons of *Smith*, 2004 B.Y.U. L. Rev.1633.

[35] EEOC v. Catholic Univ. of America, 83 F.3d 455 (D.C. Cir. 1996); Pielach v. Massasoit Greyhound, Inc., 668 N.E.2d 1298, 1303 (Mass. 1996) (invalidating on Establishment Clause grounds a statute requiring employers to accommodate employee practices "of [a] creed or religion as required by that creed or religion"). See generally Ira C. Lupu & Robert W. Tuttle, Courts, Clergy, and Congregations: Disputes Between Religious Institutions and their Leaders, & Georgetown J. L & Pub. Pol. 119, 123-128 (2009). Professor Garnett attributes the doctrine to both Clauses. See Richard W. Garnett, Do Churches Matter? Toward an Institutional Understanding of the Religion Clauses, 53 Vill. L. Rev. 273 (2008).

authority to decide questions such as who is qualified for ministry, or which faction is more faithful to the original teachings of the church.

How do these two powerful and persistent themes – the tendency to generalize back and forth between religious liberty and its secular analogues, and the requirement of state abstention from deciding questions of religious significance – animate both the general enterprise of religious accommodation, and the particulars of the decision and reasoning in *Smith*? First, these themes remind us that claims to free exercise exemptions were, as a historical matter, at the periphery of religious liberty, perhaps because at the Founding the primary locus of concern was a form of Protestant religious liberty. In that religious tradition, beliefs and forms of worship were central; in those situations in which religious practices were of special importance, such as the observance of a Sunday Sabbath, the relevant customs tended to be widely shared and hence routinely protected in the law. In such a world, religious exemptions from general duties would rarely if ever seem necessary.[36]

In contemporary America, the combination of wide-ranging religious pluralism, extending far beyond Protestant Christianity, and the far-reaching expansion of government have created many more occasions for conflict between religious practice and government policy. Accordingly, the conventional boundaries of religious liberty claims have moved outward from

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[36] Saturday Sabbatarians occasionally presented such a problem, even at the time of the Framing. See Stansbury v. Marks, 2 Dall. 213 (Pa. 1793). And the question of Sunday mail delivery generated a significant conflict in the early American Republic. See the discussion of the "Sunday Mail Controversy" in Michael W. McConnell, John H. Garvey, and Thomas C. Berg, Religion and the Constitution (Aspen, 2d ed., 2006), at 70. For rather different views of the broader historical record with regard to accommodations, *compare* Philip Hamburger, A Constitutional Right of Religious Exemption -- An Historical Perspective, 60 Geo. Wash. L. Rev. 915 (1992) *with* Michael W. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1410 (1990).

the core of belief and worship to a periphery of uncommon religious practices,[37] and new assertions of conscientious objections in matters of sexuality and reproduction.[38] Of course, from the perspective of those who make practice-related claims, they may be anything but marginal or peripheral. Such claims (about appearance, diet, particular days for worship, use of mind-altering substances as a sacrament, refusal to provide particular medical services, etc.) may be quite central to the religious lives of those who assert them. The intensity of religious commitments to such beliefs and practices is precisely why the ruling in *Smith* has produced a firestorm over the past two decades.

The state's interest in regulating these matters, however, typically emerges from secular concerns that do not involve the government in exercising religious voice, judgment, authority,

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[37] For example, intensive security screening for passengers traveling by air has set off a whole new round of concern about interference with religious garb and intrusions on religious conceptions of privacy by the U.S. Transportation Security Agency . See Tara Bahrampour, TSA scanners, Pat-downs Particularly Vexing for Muslims, other Religious Groups, Washington Post, December 23, 2010, available at http://www.washingtonpost.com/wp-dyn/content/article/2010/12/22/AR2010122202919.html.

[38] In a variety of contexts, persons and organizations have sought rights to object on religious grounds to facilitating abortions, see, e.g., Illinois Health Care Right of Conscience Act, 745 Ill. Compiled Stats. 70/1 (1998) (protecting health care personnel and facilities from liabilities or other detriments based on their refusal to participate in delivering health care services for reasons of conscience); adoptions by same-sex couples, see Robin Fretwell Wilson, A Matter of Conviction: Moral Clashes over Same-Sex Adoption, 22 B.Y.U. J. Pub. L 475 (2008); same-sex weddings, see examples collected in Ira C. Lupu & Robert W. Tuttle, Same Sex Family Equality and Religious Freedom, 5 Nw. J. Law & Soc. Pol. 274, nn. 7-11 (2010); and fertility treatments for same-sex couples, see North Coast Women's Care Medical Group, Inc.v. Benitez, 44 Cal. 4th 1145, 189 P.2d 959 (Cal. 2008) (holding that religious freedom rights of doctors do not provide grounds for exemption from duty to treat for infertility a woman in a lesbian couple).

or character.[39] From the government's perspective, exemption claims are at the conceptual margin of intersection with government authority over the subject of religion. Moreover, the secular analogues of many such exemption claims – for example, those involving use of mind-altering substances, or modes of dress – do not involve constitutionally protected activity. As a result, the constitutional strategy of protecting both religion and its secular analogues by finding their common, constitutionally privileged elements is not available. In such cases, the demand for accommodation is frequently limited to religiously motivated practice alone.

What renders some practice-related demands for religious accommodations constitutionally insoluble are institutional arrangements that require the government to evaluate the religious significance and impact of government policy. Of course, religion is a category of activity identified by the Constitution itself, as well as a variety of statutory schemes,[40] so determinations by government agents of what constitutes religious activity are inevitable. The truly problematic judgments are thus not about whether activity is religious, or whether the activity has been burdened in some legal sense.[41] Rather, the questions that are jurisdictionally

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[39] In cases where the state's interest does involve religious judgment, the *Smith* rule does not apply, and the practices are protected against hostile state regulation. Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993).

[40] Section 501 (c)(3) of the Internal Revenue Code, for example, authorizes tax exempt status for entities organized for charitable, religious, educational, scientific, and literary purposes, among others. See Church of the Chosen People v. U.S., 548 F.Supp. 1247 (D. Minn. 1982) (upholding IRS decision that the church did not qualify as "religious" under § 501(c)(3) of the Internal Revenue Code).

[41] For analysis of what should count as a legally cognizable burden, see Ira C. Lupu, Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion, 102 Harv. L. Rev. 933 (1989) (identifying legal coercion, discrimination, loss of entitlements, and interference with legally protected interests as qualitative measures of what should qualify as a burden).

off-limits for the state are those involving the substantiality of the burden, or (to put it another way) the religious impact of being denied the freedom to engage in religiously-motivated behavior.

The hazards of such determinations are multi-fold, and were repeatedly exhibited in the Supreme Court's pre-*Smith* decisions. These dangers include favoritism and official approval for some faiths, and inevitable disapproval of others.[42] In *Wisconsin v. Yoder*,[43] for example, Chief Justice Burger's opinion commended at length the simple virtues of the way of life pursued by the Old Order Amish,[44] and the likely impact on those virtues if Amish children were obliged to remain in school until age 16.[45] In dissent, Justice Douglas wondered how other religious denominations, including his own, would fare under such a judicial appraisal of their record for virtue.[46] In the wake of *Yoder*, lower courts found themselves measuring education-related claims by families in other Christian denominations by standards that focused on the content of their religious beliefs, the role of those beliefs in their way of life, and the durability of the beliefs

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[42] See, e.g., Bob Jones University v. United States, 461 U.S. 574 (1983) (holding that IRS may treat some religious beliefs on race relations as contrary to public policy and therefore undeserving of tax-exempt status).

[43] 406 U.S. 205 (1972).

[44] Id. at 209-212; 216-217.

[45] Id. at 210-213; 218-219.

[46] Id. at 246 ("I am not at all sure how the Catholics, Episcopalians, the Baptists, Jehovah's Witnesses, the Unitarians, and my own Presbyterians would make out if subjected to such a test.")

and life patterns in the face of compulsory education laws.[47] A jurisprudence that propels judges into evaluation of such questions is a contra-constitutional excursion into appraising theological questions, as well as an exercise in amateur sociology.[48]

Moreover, such official determinations present an unusually high risk of arbitrariness with respect to decisions as to whether a particular religious practice is not only significant in itself, but important enough to deserve an offset against competing state interests.[49] In *Smith*, for example, the dissenting opinion focused – in part, in expressly theological terms – on the harm imposed on the Native American Church and its members by the state's ban on peyote.[50] Although Justice O'Connor agreed about this appraisal of religious harm, she concurred in the result because she believed that the state's anti-drug interests were sufficient to justify such damage to the Native American Church.[51]

The problem of state appraisal of harms to religious experience is aggravated still further

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[47] See, e.g., Johnson v. Charles City Community Board of Educ., 368 N.W. 2d 74, 83-84 (Iowa, 1985) (holding that fundamentalist Baptist parochial school is not entitled to a statutory or constitutional exemption from state accreditation standards because, inter alia, "exposure to the more general American culture [does not] pose such an immediate threat to plaintiffs' mode of living as is the case with the Amish.") Id. at 84.

[48] It is quite different for scholars to speculate on the relationship between the state's law and the survival of the cultural commitments of religious communities. See, e.g., Robert Cover, The Supreme Court, 1988 Term, Foreword: Nomos and Narrative, 97 Harv. L. Rev. 4 (1989).

[49] Native Americans are still waiting for any such judgments to run in their favor. See Emp. Div. v. Smith, 494 U.S. 872 (1990); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); Bowen v. Roy, 476 U.S. 693 (1986).

[50] 494 U.S. at 913-916 (Blackmun, J., joined by Brennan and Marshall, JJ., dissenting).

[51] Id. at 903-906 (O'Connor, J., concurring).

by the rule in *Thomas v. Review Board*[52] that individuals are free to assert the content and intensity of their own religious convictions, without regard for the views of others in their religious community.[53] The substantiality of a burden thus may depend on a judicial appraisal – psychological rather than sociological – of each litigant's subjective religious experience. An adjudicative process that includes such determinations breaches the divide that separates the secular state from the constitutionally separate functions of religious communities as interpreters of their own traditions.

The outcome in *Smith* is thus justifiable on the primary ground that government agents are constitutionally incompetent to decide such questions, because of the absence of constitutionally acceptable standards to do so.[54] And the Court's opinion in *Smith* rests explicitly on such grounds: "Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim."[55]

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[52] 450 U.S. 707 (1981).

[53] In keeping with Thomas, the Massachusetts Supreme Judicial Court in Pielach v. Massasoit Greyhound, Inc. 668 N.E.2d 1298 (MA 1996), invalidated a state statute which required employers to accommodate employee practices "of [a[creed or religion as required by that religion," because the statute set up conflicts, to be resolved by the courts, between individual adherents to a faith and "experts" or other official spokespersons for that faith tradition.

[54] The analogy between this theme and the doctrine of political questions, which precludes decision of certain constitutional issues because of "a lack of judicially discoverable and manageable standards for resolving" them, see Baker v. Carr, 369 U.S. 186, 217 (1962), should be quite evident. See also Joanne C. Brant, Taking the Supreme Court At Its Word: The Implications for RFRA and Separation of Powers, 56 Mont. L. Rev. 5 (1995).

[55] 494 U.S. at 886-887 (citing cases concerning unemployment compensation, church property, and criminal fraud), and 887, n. 4. See also Lyng v. Northwest Indian Cemetery

Nothing in the Supreme Court's decisional law since *Smith* has undermined the long-standing constraint on judicial evaluation of "the place of a particular belief in a religion." In *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*,[56] the Court upheld a free exercise claim against local ordinances that had singled out for prohibition the practice of ritual sacrifice of animals. The case did not require any evaluation of the religious significance of the practice; a determination that the Church and its followers had been the victims of targeted discrimination in the crafting of animal cruelty laws was sufficient for a unanimous Court to find a violation of the Free Exercise Clause.

Nor does the Court's decision in *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*[57] represent a step backward from *Smith*'s prohibition on evaluating the religious significance of a practice. The unanimous opinion in *O Centro* upheld a religious community's claim for an exemption, required by the Religious Freedom Restoration Act, from the Controlled Substance Act's prohibition on importation of hoasca tea, which the religious group used in its sacraments. As elaborated in Part II below, the most serious constitutional problem of RFRA is the requirement that government decision-makers determine what constitutes a "substantial burden" on religious freedom, but the government did not dispute that point in the *O Centro* litigation. Rather, the result in *O Centro* rested on the government's inability to demonstrate that

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Protective Ass'n, 485 U.S. 439, 457-58 (1988) (courts are not competent to decide which beliefs and practices are central or indispensable to a particular religious faith).

[56] 508 U.S. 520 (1993).

[57] 546 U.S. 418 (2006).

the exemption threatened its interests in public health or the interdiction of drug trafficking.[58] Moreover, the question of government competence to decide questions of religious significance did not arise in *Cutter v. Wilkinson*,[59] which upheld on their face the "institutionalized persons" provisions of the Religious Land Use and Institutionalized Persons Act, but did not purport to evaluate the burden on religious freedom with respect to any particular practice.

As we develop further in Part II, our argument about government competence to decide questions of religious significance is not an assertion of a special disability of the judicial branch. Unlike Justice Scalia in *Smith*,[60] we are not contending that this concern is about the separation of judicial from legislative or executive power. Rather, the relevant constitutional disability attaches to all branches and all levels of government. In this constitutional context, separation of powers means separating the functions of the secular state from those that are unique and distinctive to religious communities and their members.[61]

The implications of this position, rooted in the Establishment Clause, are sweeping, but they are hardly devastating to the cause of religious liberty. As analyzed above, courts can recognize mandatory aspects of religious freedom by finding common elements between

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[58] Id. at 430-437.

[59] 544 U.S. 709 (2005).

[60] 494 U.S. at 890 (suggesting that claimants seek legislative rather than judicial accommodations for religious practices).

[61] Without elaborating the point, the late John Hart Ely described the Establishment Clause in precisely these terms. John Hart Ely, Democracy and Distrust (Harvard Univ. Press, 1980), at 94 ("The First Amendment's religious clauses . . . make sure the church and the government [give] each other breathing space: the provision thus performs a structural or separation of powers function.")

religious liberty and its secular analogues. Doing so requires no judicial appraisal of issues of religious impact or weight. Similarly, the other branches of government can structure accommodations in ways that do not require discretionary appraisals of questions of religious significance. Many accommodations are free of such defects, but others are not. It is to the forms and limits of such permissive regimes of accommodation that we now turn.

II. Permissive Modes of Religious Accommodation – and their Limits

For virtually the entire history of modern Establishment Clause jurisprudence, the Supreme Court has recognized that government has the power to accommodate religion, subject to certain limits.[62] Those who defend programs challenged under the Establishment Clause have regularly claimed that the program represents accommodation, rather than unconstitutional support or promotion, of religion.[63] The easiest cases for the government to defend are those in which the challenged program offers the same protection to religion and its secular analogues.[64]

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[62] See, e.g., Zorach v Clauson, 343 U.S. 306, 313-14 (1952) (released time program is a permissible accommodation of religious needs). We have extended discussions of these limits in Ira C. Lupu and Robert W. Tuttle, Instruments of Accommodation: The Military Chaplaincy and the Establishment Clause, 110 W.Va. L. Rev. 87, 106-111 (2007); and Ira C. Lupu and Robert Tuttle, The Cross at College: Accommodation and Acknowledgment of Religion and Public Universities, 17 W&M Bill of Rts. J. 938, 966-980 (2008).

[63] Board of Ed. of Kiryas Joel v. Grumet, 512 U.S. 687, 732-33, 743-47 (1994) (Scalia, J., dissenting) (arguing that Court should have found that school district created for Orthodox Jewish community was a permissible accommodation of religious needs). *See also* School Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 294-305 (1963) (Brennan, J., concurring) (state-sponsored prayer in public school is not a permissible accommodation of schoolchildren's religious interest in prayer during the school day). *But see* id at 311-13 (Stewart, J., dissenting) (arguing that school-sponsored prayer is a permissible accommodation of religion).

[64] See, e.g., Walz v. Tax Comm'n, 397 U.S. 664 (1970) (rejecting Establishment Clause challenge to property tax exemption for religious organizations, because the exemptions were granted to a wide range of non-profit organizations, both secular and religious).

Accommodations that single out religion for special protection, however, are somewhat more vulnerable to challenge.[65]

The Court has generally applied three criteria to determine whether a program of that character is a permissible accommodation of religion. First, the accommodation must respond to a distinctive burden on religion.[66] Second, the accommodation must be available on a religion-neutral basis.[67] And third, the accommodation must not impose unreasonable burdens on third parties.[68]

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[65] See, e.g., Texas Monthly v. Bullock, 489 U.S. 1 (1989) (sales tax exemption limited to religious publications violates the Establishment Clause).

[66] Thus, in *Texas Monthly v. Bullock*, 489 U.S. 1 (1989), the Court rejected the state's claim that a tax exemption for religious publications was a reasonable accommodation. The Court reasoned that equal liability for taxes does not distinctively burden religion, so the benefit was an unconstitutional subsidy. Id. at 17-19. The "parsonage exemption" in the Internal Revenue Code § 107 suffers from the same defect, and faces a strong constitutional challenge in a case now pending in federal district court. See Freedom from Religion Foundation v. Geithner, 715 F. Supp. 2d 1051 (E.D. CA 2010).

[67] If an accommodation is not available to all similarly burdened religious groups or individuals, the accommodation may be treated as support for the uniquely protected faith group. Board of Ed. of Kiryas Joel v. Grumet, 512 U.S. 687, 702-05 (1994) (school district created for Orthodox Jewish community was unconstitutional because the accommodation was not generally available to all faith groups). *But see* id. at 745-47 (Scalia, J., dissenting) (arguing that the Court inappropriately assumed that the state would act unconstitutionally if faced with a similar religious community's request for such an accommodation).

[68] Estate of Thornton v. Caldor, 472 U.S. 703 (1985) (categorical duty of employers to accommodate employees' Sabbath observance violates the Establishment Clause because of the burden imposed on employers and fellow employees). *See* Cutter v. Wilkinson, 544 U.S. 709 (2005), which rejected a facial challenge to the constitutionality of RLUIPA, based on the assumption that courts applying RLUIPA will give due regard to concern for the safety of correctional officials and other inmates. Id. at 722-26. This third criteria reflects a concern about subordination of other private interests to the accommodated religious practice, and thus requires some measure of equal regard for religious and non-religious interests. *See also* TWA v. Hardison, 432 U.S. 63 (1977) (the duty of employers to accommodate religious needs of employees is limited to accommodations that impose no more than a de minimis burden on the

These three criteria, however, do not exhaust the Establishment Clause's restrictions on permissive accommodation, because they reflect only one category of the Clause's concern – government support or promotion of religion. As we explained above, the Establishment Clause also limits the state's assertion of religious authority. The state is not jurisdictionally competent to make religious decisions, such as the most faithful interpretation of religious texts, the fitness of a person for religious ministry, or the relative religious significance of particular beliefs or conduct.[69] Although the Court has articulated fairly stable criteria for deciding whether a permissive accommodation unconstitutionally promotes religion, it has not developed similar standards for assessing whether a permissive accommodation requires government officials to exercise religious authority. In what follows, we offer a tentative sketch of how such an inquiry might proceed, using the Religious Land Use and Institutionalized Persons Act (RLUIPA)[70] as a case study. After our discussion of RLUIPA, we conclude with more general observations about the forms and limits of permissive accommodation.

A. RLUIPA: Case Study in Permissive Accommodation

Following the Supreme Court's decision in *Employment Division v. Smith*,[71] a coalition of religious and civil rights organizations succeeded in urging passage of the Religious Freedom Restoration Act (RFRA),[72] which revived, in statutory form, the constitutional standard for

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employer).

[69] See text at *supra* notes XX-XX.

[70] 42 U.S.C. 2000cc et seq.

[71] 494 U.S. 872 (1990).

[72] 42 U.S.C. § 2000bb.

mandatory accommodations rejected by the Supreme Court in *Smith.* Under RFRA, which purports to restate the Court's pre-*Smith* standard for free exercise exemptions, if government "substantially burdens" a "sincerely-held" religious belief or practice, the burdened adherent is entitled to exemption from the state action at issue unless such action is the "least restrictive means" of achieving a "compelling government interest."[73] In *City of Boerne v. Flores*,[74] however, the Supreme Court held that RFRA was unconstitutional as applied to state and local governments, because it exceeded Congress's enforcement power under Section 5 of the Fourteenth Amendment.[75] After a failed attempt to enact a comprehensive religious accommodation statute (the Religious Liberty Protection Act[76]) that would remedy the defects identified in *Boerne*, Congress in 2000 passed RLUIPA.[77] The contexts of land use and corrections provided the jurisdictional bases that the Court had found lacking in RFRA,[78] and avoided conflicts (over sexual orientation and abortion) that had strained the RFRA coalition.[79]

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[73] Id.

[74] 521 U.S. 507 (1997).

[75] Id. at 532-34. Notwithstanding the Court's decision in *Boerne*, RFRA remains enforceable against the federal government. See, e.g., Gonzales v. O Centro Espirita, 546 U.S. 418 (2006).

[76] Religious Liberty Protection Act of 1998, 105th Congress, H.R. 4019 and S. 2148.

[77] 42 U.S.C. § 2000cc et. seq.

[78] RLUIPA, 42 U.S.C. §§ 2000cc(a)(2), 2000cc-1(b) (listing jurisdictional bases for statute).

[79] *See* C. Canady, New Legislation on Religious Liberty, 117 The Christian Century, No. 22, p. 786 (Aug. 2, 2000); 146 Cong. Rec. S7,778-79 (daily ed. July 27, 2000) (statement of Sen. Reid) (during the RLUIPA debate, discussing obstacles to enactment of RLPA). For a wider angle critique of generic religious liberty legislation, see Ira C. Lupu, The Case Against Codification of Religious Liberty Legislation, 21 Cardozo L. Rev. 565 (1999).

RLUIPA offers an especially illuminating subject for a case study on permissive accommodation, because the statute offers much more robust protection for religious exercise than the Constitution demands for those activities,[80] and does so through a variety of standards that present subtly different issues for evaluation in terms of their potential for requiring constitutionally impermissible religious judgments. The statute includes five distinct standards for judicial scrutiny of land use restrictions, and one for institutionalized persons. We first examine the four land use provisions that focus on discrimination against religious uses or exclusion of such uses,[81] then look at the "substantial burden" standard in the land use context,[82] and finally turn to RLUIPA's application of that standard to claims by institutionalized persons.[83]

Our analysis of RLUIPA in this Part explores only the question of whether the standards may require public officials to decide religious questions. Because it singles out religious activity for special protection, however, the statute is also susceptible to claims that it impermissibly benefits religion or unreasonably burdens third parties. In *Cutter*, the Supreme Court held that RLUIPA § 3 rests on a reasonable legislative judgment that the religious exercise

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[80] Even under pre-*Smith* Free Exercise jurisprudence, the incarcerated did not enjoy robust rights of religious accommodation. O'Lone v. Estate of Shabazz,, 482 U.S. 342 (1987). Religious institutions had only minimal success in claiming exemption from land use regulations before *Smith*, although courts purported to apply the *Sherbert-Yoder* standard. See, e.g., Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303 (6th Cir. 1983). See generally Robert W. Tuttle, How Firm a Foundation? Protecting Religious Land Uses After Boerne, 68 Geo. Wash. L. Rev. 861, 871-880 (2000) (discussing pre-Smith federal and state court decisions in land use disputes that involved religious institutions).

[81] 42 U.S.C. § 2000cc(b).

[82] 42 U.S.C. § 2000cc(a)(1).

[83] 42 U.S.C. § 2000cc-1(a).

of institutionalized persons has suffered distinctive burdens, such as discrimination and arbitrary limitation.[84] The Court has not yet considered a facial challenge to § 2, but we think it would similarly conclude that a legislative record of distinctive harms to religious land uses justify the grant of special protections for such uses.[85]

With respect to burdens on third parties, *Cutter* indicated that prison officials and courts, in applying the compelling interest test, should be especially sensitive to such burdens that an accommodation might impose. A similar approach by zoning authorities and courts is constitutionally appropriate in applying the land use provisions of RLUIPA. When officials deviate from otherwise applicable land use criteria in response to claims based on religious exercise, the normal concerns for the interests of abutters, neighbors, and others in the community affected by land use decisions take on constitutional dimensions.

1. RLUIPA Land Use - Discrimination and Exclusion

Section 2(b) of RLUIPA[86] addresses land use restrictions that discriminate against or exclude religious institutions. It provides:

> (1) Equal terms. No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.
> (2) Nondiscrimination. No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of

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[84] *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) ("RLUIPA's institutionalized persons provision ... alleviates exceptional government-created burdens on private religious exercise").

[85] Lower courts have uniformly rejected such challenges to the land use provisions. See, e.g., Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 355-56 (2nd Cir. 2007); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1235-37 (11th Cir. 2004); Guru Nanak Sikh Soc'y v. County of Sutter, 456 F.3d 978, 992-95 (9th Cir. 2006).

[86] 42 U.S.C. § 2000cc(b).

religion or religious denomination.
(3) Exclusions and limits. No government shall impose or implement a land use regulation that-
(A) totally excludes religious assemblies from a jurisdiction; or
(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

With the possible exception of section (3)(B), none of the "Discrimination and Exclusion" provisions of RLUIPA raise any likelihood of land-use officials or judges deciding religious questions. Paragraph (1), which requires no less than "equal terms" for religious entities as compared to their secular counterparts, has generated conflicting interpretations in the lower courts. Some courts have read into the provision an affirmative defense, which would permit the government to justify unequal treatment of a religious use if such treatment furthered a compelling interest.[87] Other courts have held that the treatment of a religious assembly or institution must be measured against that of a "similarly situated" non-religious assembly or institution, not simply *any* non-religious assembly or institution.[88] However these interpretive

[87] Compare Midrash Sephardi, Inc v. Town of Surfside, 366 F.3d 1214,1231-32 (11th Cir. 2004) (equal terms provision incorporates strict scrutiny standard, permitting affirmative defense) with Lighthouse Institute for Evangelism, Inc v. City of Long Branch, 510 F.3d 253, 268-69 (3rd Cir. 2007) (equal terms provision is a strict liability standard and does not permit affirmative defense).

[88] River of Life Kingdom Ministries v. Village of Hazel Crest, 611 F.3d 367, 368-73 (7th Cir. 2010) (equal terms provision requires finding that non-religious use is similarly situated to the proposed religious use with respect to "accepted zoning criteria"); Lighthouse Institute for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 266 (3d Cir. 2007) ("a regulation will violate the Equal Terms provision only if it treats religious assemblies or institutions less well than secular assemblies or institutions that are similarly situated as to the regulatory purpose"). The reference to "similarly situated" non-religious entities appears to reflect a judicial intuition that Paragraph 2(B)(1) is jurisdictionally founded on an enforcement of rights under the equal protection clause. But see Midrash Sephardi, Inc v. Town of Surfside, 366 F.3d 1214, 1230-31 (11th Cir. 2004) (rejecting claim that comparison should be limited to "similarly situated" non-religious uses).

issues are resolved, the equal terms provision poses no material risk that courts will be required to make religious decisions. To determine whether a religious assembly or institution has been treated equally, the zoning authority or court must evaluate the treatment of analogous non-religious uses (whether all assemblies or institutions, or only those that are similarly situated).[89] That evaluation will involve only secular questions of land use regulation, such as the need for conditional use permits, limits on the size or types of use, or parking requirements.[90] If the court permits an affirmative defense involving countervailing interests, that too will be assessed through the exclusively secular reasons that a jurisdiction might offer for unequal treatment of a religious use.[91]

Paragraph (2), which prohibits discrimination "on the basis of religion or religious denomination," tracks the requirements of the constitution, and therefore should be considered a constitutionally mandatory basis for relief, rather than a permissive accommodation.[92] If a

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[89] *See* Rocky Mountain Christian Church v. Bd. of County Comm'rs, 605 F.3d 1081, 1087-88 (10th Cir. 2010) (applying RLUIPA's equal terms provision).

[90] Id. (comparison of non-religious and religious use in terms of secular zoning criteria).

[91] *See* Midrash Sephardi, 366 F.3d at 1235 (assessing weight of city's interest in unequal treatment of religious use).

[92] By contrast, the equal terms provision seems to offer more expansive protection than the Free Exercise Clause, because the equal terms provision is triggered by comparably worse treatment than any relevant secular assembly or institution, even if religious uses are being treated just like most other secular assemblies or institutions. In *Smith*, the Court said that strict scrutiny would apply to religious burdens created by laws that are not "neutral" or "generally applicable" with respect to religion. 494 U.S. 872, 880-81 (1990). The equal terms provision extends that protection either (as some courts have held) by eliminating the government's affirmative defense to a prima facie claim of inequality, or by expanding the scope of impermissible unequal treatment beyond what the Constitution requires. See notes XXX-XXX, supra.

jurisdiction burdens or disfavors a religious use *because* the use is religious, or because the use is by a particular faith, such treatment would almost certainly violate the Free Exercise Clause.[93] Whether treated as a mandatory or permissive accommodation, the non-discrimination standard does not require courts to resolve religious questions. Instead, using the ordinary methods and principles of equal protection review, a court must ask whether the challenged burden was imposed impermissibly, because of the religious character of the proposed use, or for permissible secular reasons. The court has no need to consider anything other than the credibility and adequacy of the secular reasons offered to justify the burden.[94] Likewise, Paragraph (3)(A), which prohibits the total exclusion of religious assemblies from a particular land use jurisdiction, raises no concern about judicial competence to make religious decisions.[95] A court can decide whether a land use regime excludes all religious assemblies without resolving any religious issues.

Paragraph (3)(B), the final provision in this part of RLUIPA, protects religious land uses against "unreasonable" restrictions.[96] The indefinite character of this standard may raise distinct

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[93] Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) (city's prohibition of ritual sacrifice, while permitting other forms of slaughtering animals, was unconstitutional discrimination against religion).

[94] For a comparable exercise of judgment under the equal protection clause in the land use context, see City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) (invalidating denial of special use permit for a group home for mentally retarded persons, because the lack of credibility for the City's actions created an inference of impermissible animus toward mentally disabled persons).

[95] As we noted above, the provision may still be vulnerable to Establishment Clause challenge on other grounds, such as the burden an accommodation may impose on private third parties.

[96] RLUIPA, 42 U.S.C. 2000cc(b)(3)(B).

issues of government decision-making competence. In contrast to the first three standards of this Part, "reasonableness" is not conceptually restricted to secular considerations.[97] If reasonableness is determined by reference to the treatment of other religious or secular organizations, then application of the standard involves the same secular concerns as the equal treatment or non-discrimination provisions.[98] But if reasonableness is not wholly dependent on such comparison,[99] and requires an evaluation by land use authorities of the religious entity's reputation, virtue, or social utility , then application of the standard would be difficult to distinguish from a normative judgment about the value of the faith itself.[100] This is a judgment

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[97] *See, e.g.*, Vision Church, Un. Methodist v. Village of Long Grove, 468 F.3d 975, 990 (7th Cir. 2006) ("What is reasonable must be determined in light of all the facts, including the actual availability of land and the economics of religious organizations") (quoting 146 Cong. Rec. E1563 (daily ed. Sept. 22, 2000) (statement of Rep. Canady)). *See also* Rocky Mountain Christian Church v. Bd. of County Comm'rs, 605 F.3d 1081, 1089 (10th Cir. 2010)(Interpreting RLUIPA's "unreasonable limit" standard, approved the district court's jury instruction on that issue, which"... required RMCC to establish that the County's 'regulation, as applied or implemented, has the effect of depriving both [RMCC] and other religious institutions or assemblies of reasonable opportunities to practice their religion, including the use and construction of structures, within Boulder County'").

[98] See, e.g., Chabad of Nova v. City of Cooper City, 575 F. Supp. 2d 1280, 1289-91 (S.D. Fla. 2008) (applying "unreasonable limit" standard under RLUIPA).

[99] See, e.g., Rocky Mtn. Christian Church v. Bd. of County Comm'rs, 605 F.3d 1081, 1089-90 (10th Cir. 2010) (applying unreasonable limitations standard). This section of RLUIPA has generated very little decisional law, which suggests that lawyers and judges tend to see it as redundant of the other sections.

[100] The meaning of the reasonableness standard should be constrained by its sole jurisdictional basis, Section 5 of the Fourteenth Amendment. Seen in that light, the standard would need to be closely tethered to specific constitutional violations, such as complete arbitrariness in application of the relevant zoning criterion, or discrimination – such as that based on race, sex, ancestry, or religion – that would independently violate the Constitution. City of Boerne v. Flores, 521 U.S. 507, 519-20 (1997) (Congress has the power under Section 5 to remedy constitutional violations, but not to create new substantive rights).

that the Constitution puts off-limits to the state, but it also seems independently barred by the proscription in Paragraph 2 against discrimination on the basis of religion, so there seems little likelihood that courts will interpret Paragraph 3(B) to authorize such an inquiry. Accordingly, judicial application of the "Discrimination and Exclusion" provisions of RLUIPA has remained within a constitutionally safe ambit of decision.

2. RLUIPA Land Use - Substantial Burden

Section 2(a) of RLUIPA applies the *Sherbert-Yoder* standard of strict scrutiny to land use decisions involving religious entities. The section provides:[101]

> (1) General rule. No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution-
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> > (A) is in furtherance of a compelling governmental interest; and
> > (B) is the least restrictive means of furthering that compelling governmental interest.

As we discussed in the first part of this paper, the *Sherbert-Yoder* standard necessarily involves official judgments about religion.[102] Some of those judgments are ordinary secular determinations, albeit in a religious context, such as the claimant's sincerity.[103] But other

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[101] 42 USCS § 2000cc(a)(1).

[102] See text at supra notes XX-XX.

[103] We do not mean to suggest that inquiries into a claimant's sincerity are without their own complications. But those complications do not include substantive consideration of the beliefs held. See U.S. v. Seeger, 380 U.S. 163, 185 (1965) (discussing sincerity standard); Patrick v. Le Fevre, 745 F.2d 153, 157 (2nd Cir. 1984) (sincerity, but not substance of religious belief, is within competence of government). See generally, Kent Greenawalt, 1 Religion and the Constitution: Free Exercise and Fairness 109-23 (2006) (discussing sincerity standard in free exercise litigation).

judgments are not just *about* religion. They *are religious* judgments about the meaning or relative significance of beliefs or practices within a particular tradition – such as the duty to perform acts of charity,[104] or the need for particular architectural features in a house of worship.[105] Such religious judgments, we contend, fall outside the secular competence of government officials. RLUIPA's statutory language and the land use context reduce some of the risk that officials will routinely be asked to make religious judgments, but they do not eliminate that risk.

RLUIPA attempts to address this concern, and simultaneously maximize the protection afforded religious land uses, through an expansive definition of religious exercise. Most importantly, the statute provides that "[t]he term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[106] In addition, the statute defines religious exercise to include "the use, building, or conversion of real property for the purpose of religious exercise"[107] – and not merely religious activities that may occur on or within the real property. Nonetheless, the statutory definition of religious exercise does not solve the problem of religious judgments.

To begin with, a court still must determine whether a specific activity is religious or non-

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[104] See, e.g., Western Presbyterian Church v. Bd. of Zoning Adjustment, 862 F. Supp. 538, 544-46 (D.D.C. 1994) (religious obligation to feed the hungry).

[105] See, e.g., Martin v. Corp. of Presiding Bishop, 434 Mass. 141, 149-53 (2001) (discussing religious meaning of steeple – reversing judgment of trial court that steeple lacked such significance).

[106] RLUIPA, 42 U.S.C. § 2000cc-5(7)(A).

[107] RLUIPA, 42 U.S.C. § 2000cc-5(7)(B).

religious. Not all government efforts to define religion are constitutionally problematic because in many contexts the definition primarily focuses on the government's regulatory purposes. Ordinary zoning practice provides an especially clear example. In many jurisdictions, "religious uses" are defined in terms of the typical activities that occur in connection with a place of worship: regular assembly (often with people arriving in vehicles and accompanying concerns about traffic and parking), less-intense office use and meetings, and perhaps some residential or educational use as well.[108] But RLUIPA's definition of religion, following the *Sherbert-Yoder* standard and RFRA, primarily focuses on the individual believer's perspective about "religious exercise," not the government's functional definition.[109] That focus on the believer's perspective does not mean complete deference, especially in determining whether a particular system of belief is religious.[110] With respect to the practices of an institution that is undisputedly religious, however, a court is not likely to have a secular basis for disputing the organization's sincere claim that a particular activity has religious significance.[111] Thus, a court interpreting RLUIPA

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[108] See, e.g., City of Chicago Zoning Code, 17-17-0103-I, which provides this definition: "Religious Assembly. Religious services involving public assembly such as customarily occur in synagogues, temples, mosques and churches."

[109] As Professor Conkle argues in his contribution to this symposium, the *Sherbert-Yoder* line adopted a progressively more subjective understanding of religious activity protected by the Free Exercise Clause. [CITE]

[110] See, e.g., Africa v. Commonwealth, 662 F.2d 1025 (3rd Cir. 1025). See generally Kent Greenawalt, 1 Religion and the Constitution: Free Exercise and Fairness 124-56 (2006) (discussing the problems of defining religion for constitutional purposes).

[111] If, however, the religious entity's only activity is commercial – leasing the property to a non-religious user – a court should have no difficulty in concluding that organization has no claim under RLUIPA. See Scottish Rite Cathedral Ass'n v. City of Los Angeles, 156 Cal. App. 4th 108 (Cal. App. 2nd Dist. 2007).

should ordinarily accept the claimant's assertion – if sincere – that a particular activity is religious, whether that involves feeding the hungry or playing basketball.[112]

In a religious land use dispute, the problem of religious judgment remains even if the jurisdiction concedes the religious character of the activity at issue. Although the statute forecloses consideration of whether an activity is central or compulsory within a faith tradition, the statute requires an inquiry into whether the burden is "substantial."[113] To assess the substantiality of a claimed burden on religious exercise, the official needs to understand what unfettered exercise means, as well as the range of religiously acceptable alternatives to the burdened activity. The official also must measure the extent to which the challenged regulation impedes the disputed activity. Although these issues may be decided on exclusively secular grounds, nothing on the face of the statute limits adjudication to such considerations.

As a practical matter, zoning officials and courts are able to avoid religious judgments in many land use disputes. In a common type of those disputes, a religious entity holds property

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[112] See, e.g., World Outreach Conference Center v. City of Peoria, 591 F.3d 531, 535 (7th Cir. 2009) (operation of a community center and single-room occupancy residential facility is protected religious activity); Bikur Cholim, Inc., v. Village of Suffern, 664 F. Supp. 2d 267, 276 (S.D.N.Y. 2009) (operation of guest home is religious activity under RLUIPA). For one example of a court that appears to have had no hesitation about deciding which activities of a religious school should be considered religious, see Westchester Day School v. Village of Mamaroneck, 504 F.3d 338, 347-48 (2nd Cir. 2007) (approving the district court's room-by-room assessment of uses for proposed building, and indicating that certain uses – gymnasium, offices, residence – would not constitute religious activity). We think the court's assurance is based more on its agreement with the claimant's own classification of the intended uses than with an objective and controverted assessment of which uses are religious.

[113] See Employment Div. v. Smith, 494 U.S. at 886-888. In his opinion for the majority, Justice Scalia reasoned that questions of a belief's centrality and the substantiality of a burden are identical. We think the questions are distinguishable, but they are very closely related. In some circumstances the substantiality of a burden on religion may be resolved in secular terms, but the religious centrality of a belief cannot.

that is not approved for religious use, and claims that denial of permission is a substantial burden under RLUIPA §2(a).[114] To measure that burden, courts examine the relevant zoning map and real estate market to determine whether the claimant had other sites reasonably available and approved for its desired use.[115] In principle, that analysis is no different from the inquiry courts conduct to determine the permissibility of restrictions on siting of adult theaters.[116] Application of the test may involve controversial considerations, such as the relevance of the expense of property relative to the claimant's ability to pay, but the inquiry can be conducted without any religious judgments.

Such judgments cannot be so easily avoided, however, if a claimant asserts that a particular site, size, or accessory use is religiously significant. For example, when a religious community desires to open a school or social ministry in conjunction with its house of worship,

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[114] See, e.g., Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752 (7th Cir. 2003) (churches alleged that they were substantially burdened by Chicago zoning ordinance).

[115] Id. at 761-62 (determining that claimants had adequate opportunities to locate houses of worship in residential zones). In this type of dispute, courts will also assess the administrative process followed if the religious institution has been denied a special or conditional use permit, to see whether the conditions imposed are reasonable and what effort the religious institution has made to comply with reasonable conditions. As with the assessment of alternative sites, the assessment of conditions on use (such as alterations to the proposed size, parking, or landscaping) may be conducted in exclusively secular terms. See, e.g., Vision Church v. Village of Long Grove, 468 F.3d 975, 990-91, 998-99 (7th Cir. 2006); Sts. Constantine and Helen Greek Orthodox Church v. City of New Berlin, 396 F.3d 895, 899-900 (7th Cir. 2005).

[116] See City of Renton v. Playtime Theaters, 475 U.S. 41 (1985) (land use regulation must leave open reasonable alternative avenues for constitutionally protected speech); Topanga Press v. City of Los Angeles, 989 F.2d 1524 (9th Cir. 1993) (applying reasonable alternatives standard). See also Vision Church v. Village of Long Grove, 468 F.3d 975, 989 (7th Cir. 2006) (discussing constitutional review of adult uses in context of RLUIPA claim); Chabad of Nova v. City of Cooper City, 575 F. Supp.2d 1280, 1288-89 (S.D. Fla. 2008) (citing adult theater decisions in discussion of reasonable alternatives standard); Tuttle, *supra* note XX, at 895-903 (comparing zoning restrictions on religious and adult uses).

the community may assert not only the religious character of the proposed activity, but the religious importance of having the activity take place on the same site as its existing place of worship.[117] The same question arises when a claimant seeks to expand its existing use, and argues that a particular scale of activity – for example, a worship service for 500 rather than 200 – is religiously important.[118] In such cases, a court lacks secular criteria for determining whether the claimed religious exercise has been substantially burdened, because the court cannot measure the claimant's religious attachment to a particular place, or the extent to which that attachment (or other religious interests) would be burdened if the community needed to relocate.

One solution to this problem, of course, is for courts to accept the claimant's assertion that its religious exercise has been substantially harmed. The evidentiary burden of persuasion would then shift to the government to demonstrate its interest in imposing that harm – a secular inquiry that avoids any need to consider religious questions. Congress did not intend to provide, however, and courts have uniformly rejected, that degree of deference to religious land use claims.[119] Moreover, that deference would effectively immunize religious uses from many land

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[117] Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 654-55 (10th Cir. 2006) (church denied permission to operate daycare center on church property); Calvary Temple Assembly of God v. City of Marinette, 2008 U.S. Dist. LEXIS 55500, *28-*29 (W.D. Wisc. 2008) (church denied permission to open counseling center adjacent to church property); Timberline Baptist Church v. Washington County, 211 Ore. App. 437; 154 P.3d 759 (Or. App. 2007) (church denied permission to locate school on same lot as house of worship).

[118] Living Water Church of God v. Charter Twp. of Meridian, 258 Fed. Appx. 729, 736-37 (6th Cir. 2007) (church denied permission to locate or expand various ministries on same lot as house of worship).

[119] See, e.g., World Outreach Conference Center v. City of Peoria, 591 F.3d 531, 539 (7th Cir. 2009); Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 760-61 (7th Cir. 2003).

use regulations, application of which would frequently not survive review under RLUIPA's strict standards. As a number of courts have indicated, such regulatory immunity for religious uses would present quite different problems under the Establishment Clause than the problems we have focused on in this paper.[120] If the government accommodates religion in a manner that is not reasonably tailored to a distinctive burden on religion, the accommodation may be treated as impermissible government support.[121]

In the alternative, courts might avoid this problem by treating land, including the present site of a religious claimant, as relatively fungible, thus permitting the same type of inquiry used for disputes about the siting of a religious activity. If a claimant asserts the religious need to worship, educate, and provide social ministry at one site, the court might simply consider whether that conjunction or density of uses is available at other suitable locations within the relevant area.[122] The court can use ordinary secular standards of cost and ability to pay to examine the reasonable availability of those alternative sites. If no alternatives are available, however, the courts may be forced to make problematic religious judgments about the quality and degree of religious harm that the zoning authorities have inflicted.

3. RLUIPA - Institutionalized Persons

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[120] See, e.g., River of Life Kingdom Ministries v. Village of Hazel Crest, 611 F.3d 367, 370 (7th Cir. 2010) (discussing Establishment Clause concern and citing other courts that have addressed the same issue).

[121] Texas Monthly v. Bullock, 489 U.S. 1 (1989). See also Calvary Temple Assembly of God v. City of Marinette, 2008 U.S. Dist. LEXIS 55500, (W.D. Wisc. 2008) (acknowledging Establishment Clause concern, but finding it unnecessary to reach the issue).

[122] See, e.g., Timberline Baptist Church v. Washington County, 154 P.3d 759, 766-75 (Or. App. 2007) (discussing and applying standard for determining substantial burden, focusing on alternative locations at which all proposed uses may be conducted).

RLUIPA § 3 provides:[123]

> (a) General rule. No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 2 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997), even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person
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> (1) is in furtherance of a compelling governmental interest; and
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> (2) is the least restrictive means of furthering that compelling governmental interest.

This provision, too, applies the *Sherbert-Yoder* test – requiring accommodation of religious practice unless refusing accommodation is the least restrictive means to a compelling state interest – to claims by individuals residing in a wide variety of government institutions, from hospitals and nursing homes to all types of adult and juvenile correctional facilities.[124] Our comments focus on the correctional context, which accounts for virtually all of the many reported cases applying this provision.[125] The Supreme Court has twice heard disputes over this part of RLUIPA. In *Cutter v. Wilkinson*,[126] the Court rejected a state's claim that the statute, on its face, violated the Establishment Clause by promoting religion; and in *Sossamon v. Texas*,[127] now under advisement, the Court is considering whether claimants may seek money damages from the state for violations of the statute. The Supreme Court has not considered – and, as far as we have been

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[123] 42 U.S.C. § 2000cc-1.

[124] See the definition of "institution" in the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997.

[125] A recent LEXIS search for reported decisions applying RLUIPA § 3 produced over a thousand cases.

[126] 544 U.S. 709 (2005).

[127] 560 F.3d 316 (2009), cert. granted, 130 S. Ct. 3319 (2010).

able to determine, no court has squarely addressed – the problem we have identified in this paper. But RLUIPA § 3 presents that problem in its starkest form. In disputes arising under this provision, prison officials and courts routinely make religious judgments.

Consider just a few recent examples of litigation under RLUIPA § 3. In *Luke v. Williams*,[128] a court determined that a Wiccan prisoner's religious exercise was not substantially burdened by the state's restriction on his practice of faith outdoors, using a variety of religious artifacts. The court reached its decision, in part, because prison officials had consulted with an expert on Wiccan practice, who opined that practice of the faith did not require what the prisoner sought.[129] In *Sayed v. Proffitt*,[130] a court ruled that a Muslim prisoner's religious exercise was not substantially burdened by the state's refusal to allow him to perform "full ablution" (a shower) before weekly prayer service. The court agreed with prison officials, who in turn relied on an authority on Islam in concluding that partial ablution is an adequate substitute.[131] In *Vigil v. Jones*,[132] a prisoner claimed to believe in "Judeo-Christianity," and said that his religious exercise was substantially burdened by the prison's designation of him as a Protestant, which prohibited

[128] 2010 U.S. Dist. LEXIS 123752 (D. Or., Nov. 19, 2010).

[129] Id. at *8 ("Defendants also consulted with multiple Wiccan clergy members, one of whom stated that 'Wiccan ceremonies are very personal and can be purely meditative; no special property is needed for this.'")

[130] 2010 U.S. Dist. LEXIS 109221 (D. Col., Sept. 27, 2010).

[131] Id. at *17-*20 (including detailed description of religious authority's explanation of ablution requirement).

[132] 2010 U.S. Dist. LEXIS 95104 (D. Col., August 9, 2010).

him from taking part in Jewish worship services.[133] The court rejected his claim, and held that Protestant worship gave the claimant "a reasonable opportunity to participate in prison sponsored ceremonies that observe Judeo-Christian values."[134]

In each of these disputes, a government official concluded that the claimant's religious exercise was not substantially burdened, because the claimant had adequate alternative means of exercise. The decision about adequacy of alternatives in this context differs markedly from that decision in the land use context. In land use disputes, the reasonableness of alternatives can frequently be assessed in secular terms – the location, cost, and other particular characteristics of land. In prisons, however, the reasonableness is defined entirely in religious terms – what officials deem religiously sufficient for the claimant. Aside from the issue of whether such judgments are appropriate under the statute,[135] the judgments require officials to exercise religious authority. Nor can officials avoid the problem by deferring to the judgment of religious experts; that simply transfers the same concern to the state's judgment about who is qualified to speak as an expert on the claimant's faith.[136]

The ubiquity of this problem in prison disputes can be explained by the unique

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[133] Id. at *14-*21.

[134] Id. at *22.

[135] If the statute incorporates the Supreme Court's pre-*Smith* Free Exercise jurisprudence, the use of religious authority to deny a claim would be in tension with the Court's decision in Thomas v. Review Bd., 450 U.S. 707, 715 (1980) ("Intrafaith differences ... are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses").

[136] See, e.g., Wares v. Simmons, 524 F. Supp. 2d 1313, 1317-18 (D. Kan. 2007) (officials relied on rabbis' determination that certain religious books were not important for the claimant.)

institutional setting. As the Court noted in *Cutter*, "the government exerts a degree of control unparalleled in civilian society and severely disabling to private religious exercise."[137] Corrections officials may control the possession of sacred texts and objects,[138] assembly with other believers,[139] access to religious leaders and worship experiences,[140] as well as choices about grooming, attire, and diet.[141] For the incarcerated, these core elements of religious liberty depend on government permission. Exercise of the power to grant or withhold that permission may quite understandably lead deciding officials to a substantive assessment of the religious reasons for the request.

Moreover, the apparent frequency of official religious judgments may also arise from the government's role as provider of religious experience. Because of correctional authorities' control, prisoners depend on government to facilitate their religious exercise by providing chaplains, worship space and time, and other aspects of religious life.[142] Outside the context of

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[137] Cutter v. Wilkinson, 544 U.S. 709, 720-721 (2005).

[138] Mauwee v. Palmer, 2010 U.S. Dist. LEXIS 131704 (D. Nev., Nov. 29, 2010) (possession of eagle talon for religious ritual); LaPointe v. Walker, 2010 U.S. Dist. LEXIS 96776 (S.D. Ill., September 15, 2010) (rug for prayer).

[139] Ahmad v. Thomas, 2010 U.S. Dist. LEXIS 100866 (S.D. Tex., Sept. 23, 2010) (worship services).

[140] Young v. Erickson, 2010 U.S. Dist. LEXIS 134606 (E.D. Wis., December 20, 2010) (access to worship services and religious leader).

[141] Sylvian v. Florida Department of Corrections, 2010 U.S. Dist. LEXIS 115183 (N.D. Fla., Oct. 29, 2010) (grooming standards); Jones v. Hobbs, 2010 U.S. Dist. LEXIS 105799 (E.D. Ark., Oct. 1, 2010) (vegan meals required by religious beliefs); Reeder v. Hogan, 2010 U.S. Dist. LEXIS 105024 (N.D. N.Y., Sept. 29, 2010) (meals during Ramadan); Miller v. Wilkinson, 2010 U.S. Dist. LEXIS 103364 (S.D. Ohio, September 30, 2010) (grooming standards).

[142] Cutter, 544 U.S. at 720-21.

prisons – and that of similar institutions – the government's provision of religious experience would certainly violate the Establishment Clause.[143] Inside those institutions, and subject to certain limits, the ordinary provision of religious experience constitutes a permissible accommodation.[144] In the government's delivery of religious services, however, some consumers inevitably disagree with the quantity, quality, or timing of the services provided.[145] Indeed, many RLUIPA claims should be seen in just that light.[146] Resolution of such complaints – like the grant of permission to engage in religious exercise – inevitably leads to a substantive discussion of whether the provided services are inadequate.

We understand why those conversations about permission or provision lead to an assessment of religious reasons, especially when correctional facilities have easy access to experts in religious matters. But understanding does not entail justification. Prison chaplains

[143] Engel v. Vitale, 370 U.S. 421 (1962); Abington Sch. Dist. v. Schemmp, 374 U.S. 203 (1963) (public school-sponsored religious exercises violate the Establishment Clause).

[144] The government may facilitate individuals' access to religious experience, so long as that experience is voluntary, the accommodation is provided on a religion-neutral basis, and does not impose unreasonable burdens on third parties. Cutter, 544 U.S. at 720 (discussing requirements of government-imposed restriction on religion, neutral availability of the accommodation, and avoidance of third-party burdens). See generally, Lupu and Tuttle, Instruments of Accommodation, supra note XX, at 101-116 (discussing Establishment Clause standards for evaluation of religious accommodations).

[145] See, e.g., Oliverez v. Albitre, 2010 U.S. Dist. LEXIS 128243 (E.D. Cal., Dec. 6, 2010) (provision of oil for Wiccan ritual), Planker v. Ricci, 2010 U.S. Dist. LEXIS 116083 (November 1, 2010) (worship schedule for Odinist services); Soria v. Nevada Department of Corrections, 2010 U.S. Dist. LEXIS 116866 (D. Nev., Oct. 19, 2010) (outdoor space and materials to erect sukkah for Jewish ritual).

[146] See, e.g., Green v. Werholtz, 2010 U.S. Dist. LEXIS 102867 (D. Kan., September 28, 2010) (dispute over kosher meals); Muwwakkil v. Johnson, 2010 U.S. Dist. LEXIS 95143 (WD VA, Sept. 13, 2010) (adequacy of worship schedule, among other claims).

and other experts play vital roles in helping to identify and meet the religious needs of the incarcerated, and that includes helping prisoners to understand why they perceive the need for a particular accommodation. Experts may even have a role in helping prison officials to determine whether a particular claim reflects a sincerely-held religious belief. But their expertise in religion should not be the source of a legal determination that a claimant's religious burden is insubstantial. That religious judgment is outside the competence of state officials – including government chaplains.

This problem could be resolved by judicial creation of an exception from the ban on official religious judgments for such judgments in the unique setting of prisons. Such an exception would constitute an implicit balancing of Establishment Clause norms against general concerns for the scope of religious freedom. Establishment Clause standards, however, do not include balancing tests, and for good reason – government lacks religious competence, and its interest in prison administration cannot confer that competence. We much prefer the approach favored by the Supreme Court in *Cutter*, which is largely silent on the question of how to determine the substantiality of a burden, but offers a contextual interpretation of the compelling interest standard. Quoting from the legislative history of RLUIPA, the court said that lawmakers "anticipated that courts would apply the Act's standard with 'due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources.'"[147] Those are secular standards, and fall squarely within the competence of officials

[147] Cutter v. Wilkinson, 544 U.S. 709, 722-23 (2005) (quoting S. Rep. 103-111, p.10 (1993)).

and courts. Permitting prisoners the space to self-declare the substantiality of the burden they are experiencing on their religious exercise, and simultaneously giving prison officials wide authority to assert concerns of safety, security, and limited resources as reasons to refuse to make the requested accommodation, represents the constitutionally appropriate solution to the constitutional problems – impermissible religious judgments and unreasonable impact on third parties – presented by RLUIPA's institutionalized persons provision.

Conclusion

This paper suggests some rather precise criteria for the forms and limits of permissive religious accommodations. First, as is buttressed by the analogy to surviving forms of constitutionally mandatory accommodations, those structures that include both religion and its secular analogues tend to be on the constitutionally safest ground. By definition, such structures do not constitutionally privilege religion over all other forms of analogous activity. And, in practice, such structures typically do not require government decision-makers to decide questions about the weight or significance of particular religious beliefs and practices. The property tax exemption scheme upheld in *Walz*,[148] for example, treated property held by religious institutions in the same way that property held by secular charities was treated. Such a scheme entails no religious determinations by government agents, other than accepting as religious the characterization of the general purposes of an entity.

When accommodations are for religion alone, the constitutional questions frequently become more difficult. We have not dwelled in this paper on the question of when religion-

[148] Walz v. Tax Commission, 397 U.S. 664 (1970).

specificity is justified, but courts will and should ask the question.[149] Beyond the question of religion-specificity, there remains the problem of constitutionally impermissible religious questions. Some legislative accommodations are well-designed to exclude such questions. The exemption of religious organizations from Title VII's prohibition on religious discrimination in employment, for example, solves this problem by including all employees, and not – as Congress originally wrote the statute – by exempting only those employees involved in "religious activities."[150] More subtly, the post-*Goldman* statutory accommodation for the wearing of religious apparel in the military is on constitutionally safe ground, because the questions it delegates to administrators are whether the apparel is neat, conservative, and consistent with military functions,[151] rather than whether the wearing the apparel is religiously significant or trivial. As Part II of this paper reveals, RLUIPA's anti-discrimination and anti-exclusion provisions seems similarly well-designed; all can be applied with only secular considerations in mind.

The most questionable, religion-specific accommodations are those that require an

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[149] Compare Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (religion-specific sales tax exemption for books and magazines unconstitutional) with Corp. of Presiding Bishop v. Amos, 483 U.S. 327 (1987) (upholding exemption for religious entities from prohibition on religious discrimination in employment) and Cutter v. Wilkinson, 544 U.S. 709 (2005) (upholding on their face the institutionalized persons provisions of RLUIPA).

[150] 483 U.S. at 332, n.9.

[151] After the Supreme Court upheld, against free exercise challenge, a restriction on Air Force personnel wearing non-military headgear, Goldman v. Weinberger, 475 U.S. 503 (1986), Congress enacted a statutory accommodation, which permits members of the armed forces to wear religious apparel while in uniform unless the Secretary of Defense determines that "wearing of the item would interfere with performance of ... military duties; or ... is not neat and conservative." 10 U.S.C. § 774 (2010).

assessment of religious practice – its religious meaning and weight. In this regard, federal RFRA, state RFRA's (which typically have a "substantial burden" trigger), and the "substantial burden" provisions of both the land use and institutionalized persons sections of RLUIPA are all constitutionally quite troublesome. Under such schemes, inquiry into questions of religious character and sincerity of religious belief are permissible, but judgments about the significance of religious practice, or about the religious impact of prohibiting such practice, are beyond the authority of the state.

The Supreme Court has not yet been forced to face the questions raised by accommodation statutes that call for such determinations, and the lower courts have yet to perceive the difficulty. Eventually, some sharp government lawyer will frame this concern, and the character of these schemes will produce a long-overdue reckoning on the forms and limits of permissive accommodations of religion.