THE ESTABLISHMENT CLAUSE AND THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT OF 2000

*Shawn P. Bailey**

I. INTRODUCTION

"The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion."[1] The Supreme Court continued, "Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."[2] In these passages, the prohibition of "governmental interference with religion" refers to the autonomy of religious individuals and institutions that the First Amendment preserves. The restriction on "governmentally established religion" and "sponsorship" of religion refers to the neutrality toward religion that the Establishment Clause requires. The phrase "benevolent neutrality" refers to government accommodation of religion.

This "general principle deducible from the First Amendment" provides some important insight into the relationship between religious autonomy, neutrality toward religion, and accommodation of religion. First, it is clear that religious autonomy and neutrality toward religion can be consistent First Amendment objectives. Second, accommodation of religion can be consistent with both religious autonomy and neutrality toward religion.

The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)[3] is an example of the accommodation or "benevolent neutrality" permitted by the First Amendment. Rather than interfere with religious autonomy, RLUIPA ensures it by shielding religion from

---

* Trial Attorney, United States Department of Justice, Civil Division. J.D., J. Reuben Clark Law School (B.Y.U.), 2003; B.A., University of Utah, 2000. Thanks to Professors W. Cole Durham, Jr., Frederick M. Gedicks, and John E. Fee for their wise guidance—and thanks to my law school colleagues Melanie D. Reed and Anthony W. Merrill for their editing help and sound advice. I alone am accountable for any errors, and I do not speak on behalf of my employer, the Department of Justice, in this article.

1 Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970).

2 *Id.*

3 Religious Land and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, § 6, 114 Stat. 803 (codified as amended at 42 U.S.C. § 2000cc-4 (2000)). RLUIPA is commonly pronounced "ar-lu-pa."

government hostility where such hostility is particularly likely. Also, because it neither encourages nor discourages religion, RLUIPA is neutral toward religion. Elaborating on these claims, this article argues that RLUIPA is valid under the Establishment Clause.

Part II of this article introduces RLUIPA. Part III discusses Establishment Clause doctrine, focusing particularly on neutrality and accommodation. Part IV analyzes the argument that RLUIPA violates the Establishment Clause, focusing particularly on *Madison v. Riter*[4] and *Al Ghashiyah v. Department of Corrections*.[5] Part V responds to the argument that RLUIPA violates the Establishment Clause, analyzing RLUIPA under substantive neutrality, an important approach to the Establishment Clause neutrality rule. Part V also analyzes RLUIPA under the leading accommodation case (*Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*[6]), the narrowest likely reading of accommodation (*Texas Monthly, Inc. v. Bullock*[7]), and the leading Free Exercise case (*Employment Division v. Smith*[8]). Part VI concludes that RLUIPA is consistent with the Establishment Clause—and that the Establishment Clause should be construed in a way that maximizes both religious autonomy and neutrality toward religion.

II. RLUIPA: WHAT IT IS, WHERE IT CAME FROM

RLUIPA is the most significant religious liberty legislation enacted by Congress in recent years. RLUIPA provides for review under the *Sherbert v. Verner*[9] and *Wisconsin v. Yoder*[10] (*Sherbert-Yoder*) test when federal or state land use or institutionalized persons regulations[11] are alleged to burden religious exercise. Thus, RLUIPA's primary land use provision states:

> 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

---

4 Madison v. Riter, 240 F. Supp. 2d 566 (W.D. Va. 2003).

5 Al Ghashiyah v. Dep't of Corr., 250 F. Supp. 2d 1016 (E.D. Wis. 2003).

6 Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).

7 Tex. Monthly, Inc. v. Bullock, 489 U.S. 1 (1989).

8 Employment Div. v. Smith, 494 U.S. 872 (1990).

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

10 Wisconsin v. Yoder, 406 U.S. 205 (1972).

11 RLUIPA defines the phrase "institutionalized persons" by reference to 42 U.S.C. § 1997(1) (1994). According to § 1997(1), institutionalized persons include those detained in "jail, prison, or other correctional facilit[ies]," "pretrial detention facilit[ies]," and "persons who are mentally ill, disabled, or retarded, or chronically ill or handicapped" who reside in "any facility or institution . . . which is owned, operated, or managed by, or provides services on behalf of any State or political subdivision of a State." *Id.*

> government demonstrates that imposition of the burden on that person, assembly, or institution—
>
> (A) is in furtherance of a compelling governmental interest; and
>
> (B) is the least restrictive means of furthering that compelling governmental interest.[12]

This strict scrutiny test is significant because it creates a presumption of protection for religious exercise—it requires the government to demonstrate that extraordinary circumstances justify a failure to protect First Amendment interests. RLUIPA also contains provisions that restate well-established equal protection and anti-discrimination principles. RLUIPA provides that no government shall use land use regulations to treat religious institutions on less than equal terms, discriminate on the basis of religion, totally exclude religious institutions from a jurisdiction, or unreasonably limit religious institutions or structures in a jurisdiction.[13] RLUIPA's strict scrutiny test and anti-discrimination rules preserve the autonomy of religious individuals and institutions. RLUIPA allows religious institutions to construct mosques, temples, synagogues, and churches free from discrimination and burdensome regulations unless the regulations serve a compelling state interest through the least restrictive means.[14] It also shields the worship

---

[12] 42 U.S.C. § 2000cc(a)(1). Similarly, RLUIPA's primary institutionalized persons provision states:

> 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 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

Id. § 2000cc-1(a). The remainder of RLUIPA consists of general guidelines for judicial relief, rules of construction, a statement that RLUIPA does not affect the Establishment Clause, and definitions. *See* 42 U.S.C. §§ 2000cc-2 to -5.

[13] *Id.* § 2000cc(b). *See also* Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON. L. REV. 929, 981-83 (2001). Storzer and Picarello demonstrate that (1) RLUIPA's equal treatment provision codifies rules elaborated in First Amendment cases such as *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993), and *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990), and Equal Protection cases such as *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); (2) RLUIPA's discrimination provision codifies the rule in *City of Hialeah*, 508 U.S. at 532; (3) RLUIPA's complete exclusion rule tracks the Free Speech Clause total exclusion rule in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 67 (1981); and (4) RLUIPA's unreasonable limits rule codifies the requirement that legislation pass rational basis scrutiny under the Equal Protection and Due Process Clauses. *Id.*

[14] *See* 42 U.S.C. § 2000cc(a)-(b).

and religious observance of institutionalized persons from regulation that burdens religious exercise unless the same test is met.[15]

The *Sherbert-Yoder* test lies at the center of the struggle over religious liberty during the past few decades. The Supreme Court repudiated the *Sherbert-Yoder* test in *Employment Division v. Smith*.[16] According to *Smith*, the *Sherbert-Yoder* strict scrutiny analysis remains available in two situations: (1) when regulation involving individualized assessments burdens religious exercise; and (2) when "neutral, generally applicable law" burdens religious exercise in a way that involves "the Free Exercise Clause in conjunction with other constitutional protections."[17] In response to *Smith*, Congress enacted the Religious Freedom Restoration Act (RFRA),[18] which reinstated the *Sherbert-Yoder* test.[19] In *City of Boerne v. Flores*,[20] however, the Court ruled that RFRA was an unconstitutional legislative attempt to enforce the Fourteenth Amendment.[21] When the effort to revive RFRA fully in a way that complied with *City of Boerne* stalled, Congress enacted RLUIPA. This history suggests that RLUIPA is likely to be reviewed by the Supreme Court.

Congress enacted RLUIPA pursuant to the First and Fourteenth Amendments, the Commerce Clause, and the Spending Clause.[22] Thus,

---

15 *See id.* § 2000cc-2(b).

16 *Smith*, 494 U.S. 872 (1990). *Smith* ruled that "free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id.* at 879 (citation omitted).

17 *Id.* at 881-82, 884.

18 42 U.S.C. § 2000bb (1992).

19 *Id.* § 2000bb(a)-(b).

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

21 *Id. City of Boerne* distinguished the remedial power "to enforce the provisions of the Fourteenth Amendment," and the "power to decree the substance of the Fourteenth Amendment." *Id.* at 519. To qualify as an appropriate remedial measure under *City of Boerne*, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 520. To determine if Fourteenth Amendment enforcement legislation complies with this aspect of *City of Boerne*, the Court considers whether the record underlying the challenged legislation identified a pattern of probable constitutional violations. *Id.* at 530-31. For examples of such analysis, see *Nevada Department of Human Resources v. Hibbs*, 123 S. Ct. 1972, 1978-84 (2003) (considering congressional record regarding gender discrimination in employment); *Board of Trustees v. Garrett*, 531 U.S. 356, 369-70 (2000) (considering congressional record regarding discrimination against the disabled); *Kimel v. Florida Board of Regents*, 528 U.S. 62, 88-91 (2000) (considering congressional record regarding age discrimination in employment); and *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 640-46 (1999) (considering congressional record regarding patent infringement by states).

22 To claim the protection of RLUIPA in the land use context, a plaintiff must show that a substantial burden on religious exercise has been imposed in a way that triggers one of three jurisdictional bases: (1) the Spending power; (2) the Commerce power; or (3) actual

challenges to RLUIPA may emerge from any of the following categories of constitutional law: Fourteenth Amendment enforcement under *City of Boerne*,[23] Tenth Amendment, Commerce, Spending, and Separation of Powers.[24] Furthermore, RLUIPA may be challenged under the Establishment Clause. Until recently, Establishment Clause challenges to RLUIPA did not seem particularly serious. Professor Marci Hamilton, a notable opponent of federal religious liberty legislation, has argued that RLUIPA violates the Establishment Clause.[25] But no Supreme Court Justice other than Justice Stevens has indicated that he or she would accept this argument.[26] When a court in the Western District of Virginia ruled RLUIPA unconstitutional on Establishment Clause grounds in *Madison v. Riter*,[27] however, serious consideration of the issue became essential.

III. ESTABLISHMENT CLAUSE DOCTRINE

The Religion Clause of the First Amendment provides, "Congress shall make no law respecting an establishment of religion, or abridging the Free Exercise thereof."[28] The Religion Clause is a general rule with a general rationale: the preservation of religious liberty.[29] *Everson v. Board of Education*[30] contains an early attempt by the Court to give

---

or possible individualized assessments in the implementation of land use regulations. 42 U.S.C. § 2000cc(a)(2); *see also* Prater v. Burnside, 289 F.3d 417, 433 (6th Cir. 2002) ("[T]he Church may not rely upon RLUIPA unless it first demonstrates that the facts of the present case trigger one of the bases for jurisdiction provided in that statute.").

To claim the protection of RLUIPA's institutionalized persons provisions, a plaintiff must show that a substantial burden on religious exercise has been imposed in a way that triggers one of two jurisdictional bases: (1) the Spending power; or (2) the Commerce power. 42 U.S.C. § 2000cc-1(b).

[23] *See supra* note 21 (discussion of *City of Boerne*).

[24] *See generally* Storzer & Picarello, *supra* note 13 (analyzing possible constitutional challenges to RLUIPA).

[25] *See infra* Part IV.

[26] *See infra* Part IV.

[27] Madison v. Riter, 240 F. Supp. 2d 566, 582 (W.D. Va. 2003).

[28] U.S. CONST. amend. I.

[29] *See* Everson v. Bd. of Educ., 330 U.S. 1, 13 (1947) ("[T]he provisions of the First Amendment . . . had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty."). Professor Feldman's intellectual history of the Establishment Clause demonstrates that this observation in *Everson* was essentially correct. *See* Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 379-411 (2002) [hereinafter Feldman, *Origins*]. At least some of the current Supreme Court justices acknowledge that the Religion Clause has a single overarching purpose. In a dissenting opinion joined by Chief Justice Rehnquist and Justices White and Scalia, Justice Kennedy wrote: "The freedom to worship as one pleases without government interference or oppression is the great object of both the Establishment and the Free Exercise Clauses." County of Allegheny v. ACLU, 492 U.S. 573, 660 (1989) (Kennedy, J. dissenting).

[30] *Everson*, 330 U.S. 1.

specific content to the Religion Clause's disestablishment language. According to *Everson*:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.[31]

The *Everson* Court also equated disestablishment with "separation between Church and State."[32] The Supreme Court has rejected radical separationism, which aspires to prohibit all interaction between church and state.[33] Even so, later attempts to apply the Establishment Clause in individual cases has led to the proliferation of rules and tests that may be viewed as achieving varying degrees of separation between church and state.[34] While many of these rules and tests are not directly relevant to this article,[35] analysis of RLUIPA's validity under the Establishment

---

[31] *Id.* at 15-16.

[32] *Id.* at 16. Not part of the First Amendment text, the separation principle may be traced most notably to a sentence in a letter written by Thomas Jefferson: "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State." *Jefferson to the Danbury Baptist Association, January 1, 1802*, *in* RELIGIOUS FREEDOM: HISTORY, CASES, AND OTHER MATERIALS ON THE INTERACTION OF RELIGION AND GOVERNMENT, 205-06 (John T. Noonan & Edward M. Gaffney, Jr. eds., 2001).

[33] "Nor does the Constitution require complete separation of church and state. . . ." Lynch v. Donnelly, 465 U.S. 668, 673 (1984). "The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State." Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970) (quoting Zorach v. Clauson, 343 U.S. 306, 312 (1952)).

[34] As the Ninth Circuit's opinion in *Newdow v. U.S. Congress* demonstrates, any or all of the Court's Establishment Clause tests may apply in a given case. Newdow v. U.S. Cong., 292 F.3d 597 (9th Cir. 2002). On its way to ruling that the Pledge of Allegiance violates the Establishment Clause, the *Newdow* court applied the *Lemon*, formal neutrality, and anti-coercion tests. *Id.* at 605-12; *see* Lemon v. Kurtzman, 403 U.S. 602 (1972). The Supreme Court recently granted certiorari to determine whether the Ninth Circuit correctly decided the issues. Elk Grove Unified Sch. Dist. v. Newdow, No. 02-1624, 2003 U.S. LEXIS 7434 (Oct. 14, 2003).

[35] Establishment Clause rules that are not directly relevant to Establishment Clause challenges to RLUIPA include: (1) the anti-coercion rule, *see* Lee v. Wiseman, 505 U.S. 577, 587 (1992); County of Allegheny v. ACLU, 492 U.S. 573, 659 (1989) (Kennedy, J. dissenting); (2) the de facto establishment rule, *see* Tilton v. Richardson, 403 U.S. 672, 682-84 (1971); (3) the historical precedent rule, *see* Marsh v. Chambers, 463 U.S. 783, 791

Clause necessarily involves the neutrality and accommodation lines of Establishment Clause doctrine.

A. Neutrality

The Establishment Clause has been interpreted to require government neutrality toward religion. Exactly what neutrality means and how it should be achieved remains controversial. In *Lemon v. Kurtzman*,[36] the Supreme Court ruled that state action is consistent with the Establishment Clause if: (1) it is based on a "secular legislative purpose"; (2) its effect "neither advances nor inhibits religion"; and (3) it does not entail "excessive government entanglement with religion."[37] The second prong of the *Lemon* test is an important early Establishment Clause neutrality rule. Generally scorned,[38] the *Lemon* test has not been relied upon by a majority of the Court to invalidate any practice since 1985.[39] Still, the *Lemon* test has never been expressly overruled.

Concurring in *Lynch v. Donnelly*,[40] Justice O'Connor devised a test that slightly modifies *Lemon*'s neutrality prong: "The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval."[41] The Court eventually adopted Justice O'Connor's "Endorsement" test.[42]

The Establishment Clause neutrality principle underlying both the Endorsement test and the second prong of *Lemon* protect two distinct interests: neutrality in government expression regarding religion and

---

(1983); and (4) the non-delegation rule, *see* Larkin v. Grendel's Den, Inc., 459 U.S. 116, 123 (1982).

[36] *Lemon*, 403 U.S. 602.

[37] *Id.* at 612-14.

[38] In the words of Justice Scalia, the *Lemon* test is like a

> ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried. . . . It is there to scare us . . . when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely. . . . Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.

Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398-99 (1993) (Scalia, J., concurring) (citations omitted).

[39] *See* GEOFFREY R. STONE ET AL., THE FIRST AMENDMENT 525 (2d ed. 2003).

[40] Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

[41] *Id.* (O'Connor, J., concurring). In a series of concurring opinions, Justice O'Connor reiterated the Endorsement test. *See* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 346 (1987) (O'Connor, J., concurring); Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 711 (1985) (O'Connor, J., concurring); Wallace v. Jaffree, 472 U.S. 38, 67 (1985) (O'Connor, J., concurring).

[42] *See* County of Allegheny v. ACLU, 492 U.S. 573, 589-94 (1989).

equality in government treatment of religion. Neutrality in government expression regarding religion protects the subjective experience of group status in the political order. Thus, an imagined "good political society" in which "everyone feels equally like an insider" gives content to the Endorsement test's goal of political equality.[43] The Endorsement test seeks to preserve this imagined society by preventing the government from sending messages that certain members are insiders while others are outsiders.

Equality in government treatment of religion, on the other hand, functions like a specialized Equal Protection Clause, requiring similar treatment for similarly situated individuals or institutions.[44] Since both neutrality and equality are subject to the criticism that they are meaningless alone,[45] these ideas must be defined by baselines. Such baselines answer the question: neutral or equal compared to what? In other words, the baseline is a background assumption about what is normal. For example, while police and fire protection of religious structures are distinct benefits conferred on religion by the state, these benefits are probably well within the background assumption about what is normal.[46]

Formal neutrality is one way of determining whether state action complies with the neutrality principle. Professor Philip Kurland has provided the most famous statement of the formal neutrality approach:

> The [Free Exercise and Establishment] clauses should be read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden.[47]

The Supreme Court has applied formal neutrality most notably in Establishment Clause cases involving access to speech fora, government funding of social welfare programs, and government funding of education.[48]

---

[43] *See* Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673, 697 (2002).

[44] *See, e.g.*, City of New Orleans v. Dukes, 427 U.S. 297, 303-04 (1976).

[45] *See, e.g.*, Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

[46] As Professor Laycock has demonstrated, this point about the baseline stems from a larger policy of neutrality. *See* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1005 (1990) [hereinafter Laycock, *Neutrality*].

[47] Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 96 (1961); *see also* Laycock, *Neutrality*, *supra* note 46, at 999-1001.

[48] *See, e.g.*, Mitchell v. Helms, 530 U.S. 793 (2000) (education); Capitol Square Review & Advisory Bd. v. Pinnette, 515 U.S. 753 (1995) (access to speech fora); Bowen v. Kendrick, 487 U.S. 589 (1988) (social welfare programs); *see also* Frederick M. Gedicks, *Neutrality in Establishment Clause Interpretation: Its Past and Future*, *in* CHURCH-STATE

Substantive neutrality provides an alternative to formal neutrality. Under substantive neutrality, "the religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance."[49] Substantive neutrality analysis of a particular problem involves two questions: (1) does this accommodation of religion encourage religious exercise, and (2) would the absence of this accommodation discourage religious exercise.[50]

An historical example suggested by Professor Laycock demonstrates the difference between formal and substantive neutrality.[51] The use of sacramental wine was exempted from the prohibition of alcohol in the United States during the early twentieth century.[52] As an accommodation of religious exercise *not* extended to secular counterparts, this exemption probably violated formal neutrality.[53] This exemption, however, was consistent with substantive neutrality: it was unlikely that the mere possibility of obtaining a small amount of sacramental wine encouraged religious exercise that would not have occurred anyway. On the other hand, criminalizing the use of sacramental wine likely *would* have discouraged religious exercise to a significant degree.[54] Still, it should be noted that in some cases, substantive neutrality requires something like formally neutral treatment of religion.[55]

Requiring government to "be neutral so that religious belief and practice can be free,"[56] substantive neutrality seeks to maximize both neutrality toward religion and religious autonomy. Imposition of alternative burdens under a substantive neutrality regime demonstrates how substantive neutrality maximizes both religious autonomy and neutrality toward religion. The phrase "alternative burden" refers to a burden imposed to ensure that a benefit conferred to a religion does not encourage the practice of that religion. A prime example is the requirement that conscientious objectors to military combat provide some form of alternative military service.[57] The autonomy of the

---

RELATIONS IN CRISIS: DEBATING NEUTRALITY 191, 193-98 (Stephen V. Monsma ed., 2002) (discussing the aforementioned cases).

49 *See* Laycock, *Neutrality*, *supra* note 46, at 1001.

50 *See id.* at 1001-06.

51 *Id.* at 1003.

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.* at 1003-04 (discussing equal access cases, in which "substantive neutrality was best achieved by something close to formal neutrality—that student religious groups should be treated like any other student extracurricular group").

56 *Id.* at 1002.

57 *See id.* at 1017-18.

conscientious objector is preserved through the exemption from combat, while neutrality toward religion is preserved by requiring alternative service. Alternative burdens in the case of RLUIPA could be important. For example, prisons could ensure that special meals provided to religious inmates are just as bad (or good) as the standard prison diet.

In contrast, the religion-blindness required by formal neutrality is oblivious to religious autonomy—a shortcoming that can harm First Amendment interests in many cases. The argument that RLUIPA violates the Establishment Clause under formal neutrality,[58] which fails to consider religious autonomy in any way, exemplifies the harm formal neutrality inflicts on First Amendment interests. This failure of formal neutrality to take religious autonomy into account looks like the "callous indifference to religious groups" that the Court has ruled inconsistent with the First Amendment.[59]

B. Accommodation

As discussed, accommodation of religion is the "benevolent neutrality"[60] in government treatment of religion that the Establishment Clause permits. "Accommodation refers to government laws or policies that have the purpose and effect of removing a burden on, or facilitating the exercise of, a person's or an institution's religion."[61] "Until recently, the Free Exercise Clause was interpreted in a manner favorable to accommodation, while the Establishment Clause was interpreted to create obstacles to accommodation."[62] The accommodation doctrine, however, has seen a significant shift: "The Free Exercise Clause no longer [has been] interpreted to require accommodation in most instances, but the Establishment Clause no longer [has been] interpreted to interfere with them, in most instances."[63]

Following this shift, *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*,[64] stands as the leading accommodation case. The *Amos* Court reaffirmed that "the government may . . . accommodate religious practices and that it may do so without violating the Establishment Clause."[65] Similarly, the *Amos* Court ruled

---

58 *See infra* Part IV.

59 *See* Zorach v. Clauson, 343 U.S. 306, 314 (1952).

60 Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970).

61 Michael W. McConnell, *Accommodation of Religion: An Update and Response to Critics*, 60 GEO. WASH. L. REV. 685, 686 (1992).

62 *Id.* at 695.

63 *Id.* at 695-96.

64 Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).

65 *Id.* at 334 (quoting Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 135, 144-45 (1987)).

that "[t]here is ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.'"[66] The *Amos* Court upheld an exemption to Title VII of the Civil Rights Act of 1964 that allows religious employers to discriminate according to religion in hiring decisions related to positions in non-religious, non-profit entities.[67]

Within the framework of the *Lemon* test, the *Amos* Court demonstrated how the accommodation principle functions.[68] Under *Lemon*'s purpose prong, the *Amos* court ruled that "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions."[69] Under *Lemon*'s effect prong, the *Amos* Court ruled "a law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose."[70] Instead, *Amos* held that the Supreme Court

> has never indicated that statutes that give special consideration to religious groups are *per se* invalid. That would run contrary to the teaching of our cases that there is ample room for accommodation of religion under the Establishment Clause. Where, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exception come packaged with benefits to secular entities.[71]

With the words "*we see no reason to require that the exception come packaged with benefits to secular entities*,"[72] the *Amos* Court clearly stated that appropriate accommodation need not comply with formal neutrality. Finally, under *Lemon*'s excessive entanglement prong, the *Amos* Court ruled that the accommodation at issue "easily passe[d] muster" because limiting state interference in hiring decisions of religious institutions "effectuate[d] a more complete separation of [church and state]."[73]

While *Amos* stands as the leading accommodation case after the aforementioned shift, the Court had found a notable line of legislative accommodations *valid* under the Establishment Clause.[74] Cases in which the Court found such accommodations valid include: *Gillette v. United*

---

66 *Id.* (quoting Walz v. Tax Comm'n, 397 U.S. 663, 673 (1970)).

67 *Id.* at 329-30.

68 *Id.* at 335-39.

69 *Id.* at 335.

70 *Id.* at 337.

71 *Id.* at 338.

72 *Id.* (emphasis added).

73 *Id.* at 339.

74 *See supra* notes 62-63 and accompanying text (discussing the shift from judicial accommodation under the Free Exercise Clause to legislative accommodation permissible under the Establishment Clause).

States,[75] *Walz v. Tax Commission*,[76] *Board of Education v. Allen*,[77] and *Zorach v. Clauson*.[78]

Amos remains the leading accommodation case even though both *Texas Monthly v. Bullock*[79] and *Board of Education v. Grumet*[80] fell short of the *Amos* Court's robust accommodation theory. Both *Texas Monthly* and *Grumet* maintained that *Amos* is still good law.[81] Furthermore, claims that *Texas Monthly* and *Grumet* overruled *Amos sub-silentio* are weak at best. Because there was no majority in *Texas Monthly*, the status of Justice Brennan's plurality opinion remains suspect. And because *Grumet* addressed both anti-delegation and accommodation issues, *Grumet*'s effect on the accommodation doctrine also remains uncertain.

The *Texas Monthly* plurality opinion is significant because it represents the narrowest likely reading of the accommodation doctrine.[82] If RLUIPA is valid under this reading, it *must* be valid under a more robust approach to accommodation. Ruling that a state tax exemption for religious publications violated the Establishment Clause,[83] the *Texas Monthly* plurality used a three-part accommodation analysis.[84]

The *Texas Monthly* plurality's analysis first asks whether the accommodation in question flows to a broad group of beneficiaries, both secular and religious.[85] According to the plurality, a group of beneficiaries is sufficiently broad to survive Establishment Clause scrutiny if there is some correspondence between the breadth of that group and the scope of the secular purpose underlying the government action.[86] This, of course, is formal neutrality. As *Amos* stated[87] and the

---

[75] Gillette v. United States, 401 U.S. 437 (1971) (holding a conscientious objector exemption from military service did not violate the Establishment Clause).

[76] Walz v. Tax Comm'n, 397 U.S. 664 (1970) (holding a state tax exemption for religious property did not violate the Establishment Clause).

[77] Bd. of Educ. v. Grumet, 392 U.S. 236 (1968) (holding a statute requiring state to loan text books to parochial schools did not violate the Establishment Clause).

[78] Zorach v. Clauson, 343 U.S. 306 (1952) (holding a released time program for religious education conducted off school property did not violate the Establishment Clause).

[79] Tex. Monthly, Inc. v. Bullock, 489 U.S. 1 (1989).

[80] *Grumet*, 512 U.S. at 687.

[81] *See Tex. Monthly*, 489 U.S. at 18; *Grumet*, 512 U.S. at 705-08.

[82] *See* McConnell, *supra* note 61, at 698 ("Because Brennan tended to adopt a strict understanding of the Establishment Clause, it is safe to predict that the Court's position toward accommodation will not be more restrictive than this test.").

[83] *Tex. Monthly*, 489 U.S. at 5.

[84] *Id.* at 11-15; *see also* McConnell, *supra* note 61, at 698-708 (discussing *Tex. Monthly*'s three-part test).

[85] *Tex. Monthly*, 489 U.S. at 11-14; *see also* McConnell, *supra* note 61, at 698.

[86] *Tex. Monthly*, 489 U.S. at 15-16 ("How expansive the class of exempt organizations or activities must be to withstand constitutional assault depends upon the State's secular aim.").

Texas Monthly plurality affirmed,[88] however, the neutrality question is not dispositive of accommodation validity. Thus, if the accommodation in question does not comply with the neutrality rule, it may still be valid if it meets two requirements: (1) it does not "burden[] nonbeneficiaries markedly;" and (2) it "can[] reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion."[89]

Using this framework, the *Texas Monthly* plurality concluded that the tax exemption at issue fell short of formal neutrality because it was not afforded to a sufficiently broad group of beneficiaries.[90] The plurality relied on Justice Harlan's description of groups that may have rendered the group of beneficiaries sufficiently broad: "groups that pursue cultural, moral, or spiritual improvement in multifarious secular ways, including . . . groups whose avowed tenets may be antitheological, atheistic, or agnostic."[91] The *Texas Monthly* plurality also concluded that the tax exemption at issue burdened nonbeneficiaries "by increasing their tax bills by whatever amount is needed to offset the benefit bestowed on subscribers to religious publications."[92] Finally, the plurality concluded that the sales tax (which the exemption at issue lifted) did not constitute a significant imposition on religious exercise.[93] In other words, the plurality was unable to identify "a concrete need to accommodate religious activity."[94]

Dealing with the creation of a public school district according to religious criteria,[95] *Grumet* relied on the *Texas Monthly* plurality.[96] The Court in *Grumet* ruled that the school district at issue violated the Establishment Clause by expanding the rule prohibiting delegation of government power to religion[97] and by finding a formal neutrality problem.[98] According to the Court, the school district in question ran

---

87 Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 338 (1987) ("Where as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities.").

88 *Tex. Monthly*, 489 U.S. at 14-15.

89 *Id.* at 15.

90 *Id.* at 14.

91 *Id.* at 13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 697 (1970)).

92 *Id.* at 19 n.8.

93 *Id.* at 18-20.

94 *Id.* at 18.

95 Bd. of Educ. v. Grumet, 512 U.S. 687, 690-96 (1994).

96 *Id.* at 705-08.

97 *See id.* at 706 ("[A]n otherwise unconstitutional delegation of political power . . . [cannot] be saved as a religious accommodation."). Regarding the rule prohibiting delegation of government power to religious institutions, see *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123 (1982).

98 *Grumet*, 512 U.S. at 702-05.

afoul of formal neutrality because it provided a unique benefit to a particular religion and the possibility remained open that the "legislature itself may fail to exercise governmental authority in a religiously neutral way."[99]

IV. ESTABLISHMENT CLAUSE CHALLENGES TO RLUIPA

The argument that RLUIPA violates the Establishment Clause relies heavily on formal neutrality. Concurring in *City of Boerne v. Flores*,[100] Justice Stevens argued that RFRA[101] violated the Establishment Clause because "[w]hether the Church would actually prevail under the statute or not, the statute has provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment."[102] Addressing RLUIPA specifically, Professor Marci Hamilton has argued that RLUIPA violates the Establishment Clause because RLUIPA "is not tailored to alleviate specific burdens on specific religious practices, but rather hands religion a privilege in the land use arena that is unavailable to other individuals or entities."[103] Similarly, Professor Hamilton has argued that RLUIPA runs contrary to the Establishment Clause because its "breadth transforms it from an accommodation of religion into an unconstitutional benefit."[104] By claiming that government cannot confer a benefit on religious individuals or institutions without conferring the same benefit on non-religious individuals or institutions, Justice Stevens and Professor Hamilton are making a basic formal neutrality argument.[105]

---

[99] *Id.* at 703. It should be noted that the concurring and dissenting opinions in *Texas Monthly* and *Grumet* would have allowed broader accommodation. *See infra* notes 259-60 and accompanying discussion of Justice Scalia's *Tex. Monthly* dissent; *see also Grumet*, 512 U.S. at 26-29 (Blackmun, J., concurring); *id.* at 29-45 (Scalia, J., dissenting).

[100] City of Boerne v. Flores, 521 U.S. 507 (1997).

[101] *See supra* notes 16-21 and accompanying text.

[102] *City of Boerne*, 521 U.S. at 536-37 (Stevens, J., concurring).

[103] Letter from Marci Hamilton to the United States Senate (July 24, 2000), *at* http://web.archive.org/web/20020308141913/http://www.marcihamilton.com/rlpa/rluipa_letter.htm [hereinafter Hamilton, Letter]; *see also* Marci A. Hamilton, *The Religious Freedom Restoration Act Is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1 (1998) [hereinafter Hamilton, RFRA].

[104] *See* Hamilton, Letter, *supra* note 103.

[105] It should be noted that Justice Stevens has consistently ruled against religion. *See* Laycock, *Neutrality*, *supra* note 46, at 1010 (concluding that "hostility to religion" is the unifying principle underlying Justice Stevens's voting record in religion cases). Also, Professor Hamilton is a notable opponent to federal religious liberty legislation. *See City of Boerne*, 521 U.S. at 509 (listing Professor Hamilton as counsel of record for the defendant challenging the constitutionality of RFRA).

A. Madison v. Riter

In *Madison*, a judge in the Western District of Virginia adopted the Stevens-Hamilton formal neutrality approach to conclude that the institutionalized persons part of RLUIPA violates the Establishment Clause.[106] Ira W. Madison, a prison inmate who is Jewish,[107] initiated a RLUIPA claim after the Virginia Department of Corrections refused Madison's request for a kosher diet.[108] Of course, the emphasis the *Madison* court gave to Justice Stevens's *City of Boerne* concurrence in its preliminary discussion of RLUIPA[109] foreshadowed *Madison*'s ruling on RLUIPA.

Although *Madison* pays lip service to permissible legislative accommodation under the Establishment Clause,[110] *Madison* relies exclusively on formal neutrality to ensure compliance with Establishment Clause neutrality.[111] Applying the *Lemon* test, *Madison* concedes that the purpose of RLUIPA—to accommodate religious exercise—is a valid secular purpose under the Establishment Clause.[112] Applying the effect prong of *Lemon*, *Madison* concludes that RLUIPA violates the Establishment Clause by elevating religious rights above other fundamental rights and by elevating the status of religious inmates in prison society.[113]

To reach its first conclusion, *Madison* reasons that neutrality requires government to treat all fundamental freedoms the same.[114] Within this framework, *Madison* concludes that RLUIPA violates formal neutrality because it provides greater protection for the religious rights of inmates than *Turner v. Safley*[115] provides for inmates' fundamental rights in general.[116] *Madison* discusses at length the *Turner* standard (which provides for rational basis scrutiny of prison regulations that burden fundamental rights of inmates)[117]—and the higher level of protection afforded by RLUIPA.[118] The court then argues that the level of

---

106 Madison v. Riter, 240 F. Supp. 2d 566, 571-82 (W.D. Va. 2003).

107 "The Plaintiff claims to be a member of a particular sect of the Hebrew Israelite faith" in the words of Judge Turk. *Id.* at 568.

108 *Id.* Called the "Common Fare Diet" by the Virginia Department of Corrections, the kosher diet requested by Madison is apparently available to other Jewish inmates. *Id.*

109 *Id.* at 569.

110 *Id.* at 572.

111 *Id.* at 571-72.

112 *Id.* at 572 n.4.

113 *Id.* at 571-82.

114 *Id.* at 571-72.

115 Turner v. Safley, 482 U.S. 78 (1987).

116 *Madison*, 240 F. Supp. 2d at 572-75.

117 *Turner*, 482 U.S. at 89-91.

118 *Madison*, 240 F. Supp. 2d at 574-77.

protection of religious rights afforded by RLUIPA is constitutionally suspect because "there is no demonstrable evidence that religious constitutional rights are at any greater risk of depravation in the prison system than other fundamental rights."[119] *Madison* would have apparently required Congress to make findings regarding the status of all other fundamental rights in prisons prior to enacting RLUIPA.[120]

In conjunction with this discussion, *Madison* attempts to distinguish RLUIPA from the accommodation found valid in *Amos*. First, the court claims that *Amos* only permits accommodation that lifts a burden "that had been placed on [religious inmates] by an act of Congress specifically limiting free exercise rights."[121] *Madison* also attempts to distinguish RLUIPA from *Amos* by arguing that "RLUIPA requires the government itself, through the actions of prison administrators, to accommodate religious inmates."[122]

The *Madison* court also ruled that RLUIPA violates the Establishment Clause by endorsing religion over non-religion in prison society.[123] On the way to reaching this conclusion, *Madison* characterizes RLUIPA's strict scrutiny test as extremely powerful[124] and predicts that RLUIPA will lead to what the court apparently views as a parade of non-imaginary horribles.[125] Thus, *Madison* compares RLUIPA's strict scrutiny to the absolute exemption from Sabbath day work[126] struck down in *Estate of Thornton v. Caldor, Inc.*[127] Ultimately, the court concludes that the potential for "jealousy among fellow inmates" that would follow attempts to accommodate religious exercise in prison requires the conclusion that RLUIPA violates the Establishment Clause.[128]

---

[119] *Id.* at 575.

[120] *See id.*

[121] *Id.* at 576.

[122] *Id.* at 576 n.9.

[123] *Id.* at 578-81.

[124] *Id.* at 578-79.

[125] A judgment that accommodation of religion in prison is simply absurd seems to be implied in the following discussion of potential RLUIPA accommodations:

> Looking at the range of exceptions provided under the strict scrutiny test, it is not a logical stretch, in predicting the practical effects of RLUIPA, to imagine a prison in which religious prisoners are allowed to wear religious headgear and religious icons, have ungroomed hair and beards, receive extremist literature from outside the prison, refuse to submit to general medical tests and vaccinations, keep religious objects in their cells, and receive special diets.

Id. at 579-80.

[126] *Id.* at 579.

[127] Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 708-11 (1985).

[128] *Madison*, 240 F. Supp. 2d at 581-82.

B. Al Ghashiyah v. Department of Corrections

Following *Madison*, a judge in the Eastern District of Wisconsin adopted the Stevens-Hamilton approach in *Al Ghashiyah*[129] to conclude that the institutionalized persons part of RLUIPA violates the Establishment Clause. The RLUIPA claim initiated by Tayr Kilaab Al Ghashiyah alleged that the Wisconsin Department of Corrections refused to let Al Ghashiyah use his legal name,[130] failed to accommodate his religious dietary requirements, and denied him the use of religious items such as candles and oil.[131] Like *Madison*, the preliminary discussion of RLUIPA in *Al Ghashiyah* places particular emphasis on Justice Stevens's *City of Boerne* concurrence, even quoting it in its entirety.[132]

Also like *Madison*, *Al Ghashiyah's* initial discussion states that it intends to rely on formal neutrality alone for its standard of Establishment Clause validity.[133] Applying *Lemon*, *Al Ghashiyah* concludes that RLUIPA fails under both the effect and excessive entanglement prongs.[134] The *Al Ghashiyah* court also argued that RLUIPA lacks a proper secular purpose, essentially asserting that RLUIPA's effect is improper—and that, therefore, an improper purpose must have informed the enactment of RLUIPA.[135] After paying lip service to the potential for accommodation under the Establishment Clause, *Al Ghashiyah's* purpose analysis argues that RLUIPA is too broad to be a valid accommodation of religion.[136] *Al Ghashiyah's* purpose analysis asserts that *Amos* permits only religious accommodations enacted for the purpose of preventing Establishment Clause violations.[137] Notably, *Al Ghashiyah* relies on Professor Hamilton and Justice Brennan's concurrence in *Amos* to support this claim,[138] but no binding Supreme Court authority. Characterizing RLUIPA as extremely broad and comparing it to RFRA, *Al Ghashiyah* concludes that RLUIPA does not fit within its restrictive reading of *Amos*.[139] Despite this analysis, the

---

[129] Al Ghashiyah v. Dep't of Corr., 250 F. Supp. 2d 1016 (E.D. Wis. 2003).

[130] Now legally known by the aforementioned Muslim name, the plaintiff in *Al Ghashiyah* was formerly known as John Casteel. *Id.* at 1018.

[131] *Id.*

[132] *Id.* at 1019-20; *see also id.* at 1021 (claiming that "the Establishment Clause challenge is the most signficant of defendants' challenges to RLUIPA, particularly in light of Justice Stevens's concurrence in . . . *Boerne*").

[133] *Id.* at 1021-22.

[134] *Id.* at 1025-34.

[135] *Id.* at 1022-25.

[136] *Id.* at 1022-23.

[137] *Id.* at 1023-24.

[138] *See id.*

[139] *Id.* at 1024-25.

court concluded that it was unnecessary to determine whether RLUIPA has a valid secular purpose.[140]

Al Ghashiyah's conclusion that RLUIPA fails under *Lemon*'s effect prong stems from an analysis of RLUIPA under the test proposed by the *Texas Monthly* plurality.[141] Under *Texas Monthly*'s first prong, *Al Ghashiyah* concludes that RLUIPA falls short of formal neutrality.[142] This formal neutrality analysis follows closely—and quotes extensively from—*Madison*.[143] Under *Texas Monthly*'s second prong, *Al Ghashiyah* concludes that RLUIPA imposes burdens on those it does not accommodate by diverting prison resources, making non-accommodated inmates angry, and creating an incentive for non-accommodated inmates to become religious.[144] Under *Texas Monthly*'s third prong, the *Al Ghashiyah* court determined that RLUIPA does not lift a substantial burden from religion.[145] After complaining that the burden lifted by RLUIPA is not easy to define, *Al Ghashiyah* concludes without any analysis that RLUIPA does not address a significant threat to religious liberty.[146] At this point, the court inserts the argument (also made in *Madison*[147]) that application of RLUIPA's strict scrutiny test in the prison context will water down strict scrutiny in general.[148] Finally, *Al Ghashiyah* notes that inmates that suffer arbitrary or discriminatory deprivation of religious rights had a remedy prior to the enactment of RLUIPA.[149]

Al Ghashiyah's conclusion that RLUIPA results in excessive entanglement between government and religion stems from the conclusion that RLUIPA "forces the states to become involved with, knowledgeable about, and exceedingly sensitive to the varied religious practices of their inmates."[150] *Al Ghashiyah* also argues that by causing prison administrators to plan to avoid burdening religious exercise, RLUIPA results in excessive entanglement.[151]

---

[140] *Id.* at 1025.

[141] *Id.* at 1025-31. For discussion of the *Texas Monthly* plurality analysis, *see supra* Part III.B.

[142] *Al Ghashiyah*, 250 F. Supp. 2d at 1026-29.

[143] *Id.*

[144] *Id.* at 1029.

[145] *Id.* at 1029-31.

[146] *Id.* at 1029-30.

[147] Madison v. Riter, 240 F. Supp. 2d 566, 578 n.10. (W.D. Va. 2003).

[148] *Al Ghashiyah*, 250 F. Supp. 2d at 1030.

[149] *Id.* at 1031.

[150] *Id.*

[151] *Id.* at 1032.

V. WHY *MADISON* AND *AL GHASHIYAH* ARE WRONG

Madison and *Al Ghashiyah* are flawed in many ways. First, *Madison* and *Al Ghashiyah* conflict with a growing body of authority upholding the constitutionality of RLUIPA and RFRA under the Establishment Clause. The Ninth Circuit and at least eleven different federal trial courts have rejected Establishment Clause challenges to RLUIPA.[152] *Madison* and *Al Ghashiyah* aside, courts that have reviewed RLUIPA under the Establishment Clause have generally held that RLUIPA fits comfortably in the category of religious accommodation permitted by *Amos*.[153] Similarly, several federal circuits have rejected Establishment Clause challenges to RFRA,[154] on the basis that RFRA was a valid accommodation of religion under *Amos*.[155]

The *Madison* court presented almost no support for its claim that "the backdrop of authority is not as unanimous in support of RLUIPA as it might seem."[156] Grasping for some basis for its departure from authority, the court cited (1) a dissenting opinion that does not analyze RLUIPA or RFRA under the Establishment Clause;[157] (2) dicta in a footnote that the Florida RFRA "arguably runs afoul of the Establishment Clause" under Justice Stevens's *City of Boerne*

---

[152] *See* Mayweathers v. Newland, 314 F.3d 1062 (9th Cir. 2002), *cert. denied*, No. 02-1655, 2003 WL 21180348 (Oct. 6, 2003); Williams v. Bitner, 2003 WL 22272302 (M.D. Pa. 2003); Murphy v. Zoning Comm'n, 2003 WL 22299219 (D. Conn. 2003); Westchester Day Sch. v. Vill. of Mamoronek, 2003 WL 22110445 (S.D.N.Y. 2003); Johnson v. Martin, 223 F. Supp. 2d 820 (W.D. Mich. 2002); Charles v. Verhagen, 220 F. Supp. 2d 955 (W.D. Wis. 2002); Freedom Baptist Church v. Middletown, 204 F. Supp. 2d 857 (E.D. Pa. 2002); Gerhardt v. Lazaroff, 221 F. Supp. 2d 827 (S.D. Ohio 2002); Mayweathers v. Terhune, 2001 WL 804140 (E.D. Cal. 2001).

In addition, at least three federal district courts have rejected Establishment Clause challenges to RLUIPA in unpublished opinions. *See* Life Teen, Inc. v. County of Yavapai, No. Civ. 01-1490 (D. Ariz. 2003), *available at* http://www.rluipa.com/cases/LifeTeenAZ.html; Gordon v. Pepe, No. 00-10453-RWZ (D. Mass. 2003), *available at* http://www.rluipa.com/cases/Gordon.html; Miller v. Wilkinson, No. 02-3299 (6th Cir. 2002), *available at* http://www.rluipa.com/cases/Miller.html.

[153] *See Mayweathers*, 314 F.3d at 1068-69; *Williams*, 2003 WL 22272302, at *4-*5; *Murphy*, 2003 WL 22299219, at *27-*29; *Johnson*, 223 F. Supp. 2d, at 824-27; *Charles*, 220 F. Supp. 2d, at 968-69; *Freedom Baptist*, 204 F. Supp. 2d, at 865 n.9; *Gerhardt*, 221 F. Supp. 2d, at 846-48; *Mayweathers* 2001 WL 804140, at *6-*7.

[154] *See, e.g.*, Christians v. Crystal Evangelical Free Church (*In re* Young), 141 F.3d 854, 861-63 (8th Cir. 1998); Mockaitis v. Harcleroad, 104 F.3d 1522, 1530 (9th Cir. 1997); Flores v. City of Boerne, 73 F.3d 1352, 1364 (5th Cir. 1996); EEOC v. Catholic Univ., 83 F.3d 455, 470 (D.C. Cir. 1996); Sasnett v. Sullivan, 91 F.3d 1018, 1022 (7th Cir. 1996).

[155] *See Crystal Evangelical Free Church*, 141 F.3d at 861-63; *Flores*, 73 F.3d at 1364; *Catholic Univ.*, 83 F.3d at 470.

[156] Madison v. Riter, 240 F. Supp. 2d 566, 570 (W.D. Va. 2003).

[157] *Id.* (citing *Crystal Evangelical Free Church*, 141 F.3d 854 at 863-67 (Bogue, J., dissenting)).

concurrence[158] argument;[159] and (3) a conclusion—in another opinion that does not analyze RLUIPA or RFRA under the Establishment Clause—that *City of Boerne* rendered RFRA invalid as applied to the federal government.[160]

Not only does *Al Ghashiyah* conflict with rulings of several other courts, it also conflicts with Seventh Circuit authority. In *Sasnett v. Sullivan*,[161] the Seventh Circuit rejected an Establishment Clause challenge to RFRA by stating that it would "defer to the Fifth Circuit's analysis of why the Act also does not violate . . . the establishment clause of the First Amendment."[162] *Al Ghashiyah* offers two reasons for disregarding *Sasnett*: (1) *Sasnett* deferred to the judgment of another court rather than analyzing the Establishment Clause challenge to RFRA;[163] and (2) *Sasnett* was vacated when the Court issued *City of Boerne*.[164] First, *Sasnett*'s deference to the Fifth Circuit's *City of Boerne*

---

158 *See supra* notes 100-02 and accompanying text.

159 *Madison*, 240 F. Supp. 2d at 570 (citing Warner v. City of Boca Raton, 64 F. Supp. 2d 1272, 1287 n.11 (S.D. Fla. 1999)).

160 *Id.* (citing United States v. Sandia, 6 F. Supp. 2d 1278, 1280 (D.N.M. 1997)).

161 Sasnett v. Sullivan, 91 F.3d 1018 (7th Cir. 1996).

162 *Id.* at 1022 (citing Flores v. City of Boerne, 73 F.3d 1352, 1364 (5th Cir. 1996)). The Fifth Circuit rejected an Establishment Clause challenge to RFRA with these words:

> Nor does RFRA mandate religious accommodations that violate the Establishment Clause. To the contrary, the act provides that "nothing in this chapter shall be construed to affect, interpret, or in any way address [the Establishment Clause]." 42 U.S.C. § 2000bb-4. In short, RFRA by its own terms provides that the accommodations mandated by RFRA may reach up to the limit permitted by the Establishment Clause but no further.
>
> The City responds that, even so, RFRA on its face violates the Establishment Clause because it lacks a secular purpose and because it has the primary effect of advancing religion. *See Lemon v. Kurtzman*, 403 U.S. 602, 29 L. Ed. 745, 91 S. Ct. 2105 (1971). We disagree. Its remedial justifications belie the City's contention that Congress acted with a sectarian purpose. Relatedly, "it is a permissible legislative purpose to alleviate significant governmental interference" with the exercise of religion. *Amos*, 483 U.S. at 335.
>
> RFRA no more advances religion than any other legislatively mandated accommodation of the exercise of religion. In *Amos*, the Court rejected the argument that an accommodation violates the primary effects prong of the *Lemon* test simply by virtue of being an accommodation. "A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the government itself has advanced religion through its own activities and influence." *Id.* at 337. (emphasis in original). RFRA's lifting of "substantial burdens" on the exercise of religion does not amount to the Government coercing religious activity through "its own activities and influence."

Id. (alterations in original).

163 Al Ghashiyah v. Dep't of Corr., 250 F. Supp. 2d 1016, 1021 (E.D. Wis. 2003).

164 *Id.*

opinion—and the Fifth Circuit's brief Establishment Clause analysis in *City of Boerne*—is not surprising because the Establishment Clause challenge to RFRA probably did not seem particularly serious at the time. After all, prior to *City of Boerne*, no Supreme Court Justice had stated that the *Sherbert-Yoder* Free Exercise test violated the Establishment Clause. In *City of Boerne*, of course, only Justice Stevens adopted this argument. At any rate, correct, not lengthy, analysis is the key.[165] *Al Ghashiyah*'s other reason for disregarding *Sasnett* is weak for obvious reasons. *Sasnett* was vacated on grounds unrelated to the Establishment Clause. The Supreme Court's opinion in *City of Boerne* simply did not reverse *Sasnett*'s rejection of the Establishment Clause challenge to RFRA. Brushing *Sasnett* aside, the *Al Ghashiyah* Court relied heavily on notable opponents to religious liberty legislation.[166] In sum, both *Madison* and *Al Ghashiyah* stand on extremely shaky ground while a growing body of authority has consistently rejected Establishment Clause challenges to both RLUIPA and RFRA.

The Establishment Clause analysis in *Madison* and *Al Ghashiyah* also falls short. Some problems common to both opinions require only a brief response. For example, the attempt in both opinions to equate RLUIPA with the absolute exemption from Sabbath work[167] (which was struck down in *Caldor*[168]) does not fairly characterize RLUIPA.[169] This flaw is closely related to the "parade of imaginary horribles" argument that RLUIPA will essentially put religious inmates in charge of prisons in the United States. Both of these arguments fail to acknowledge that compelling state interests like health and safety will inevitably limit RLUIPA exemptions.

The central flaw in *Madison* and *Al Ghashiyah*, the unprecedented ruling that formal neutrality alone determines the validity of legislative accommodations of religion, requires additional discussion.

A. RLUIPA and Substantive Neutrality

Substantive neutrality, and not formal neutrality, should be applied to ensure that accommodations of religion comply with the

---

[165] The *Al Ghashiyah* court complained that the Fifth Circuit's rejection of the Establishment Clause challenge to RFRA was supported by "little analysis." *Id.*

[166] *See, e.g., id.* at 1019, 1028-31. At seven different times the case quotes or cites Christoper L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437 (1994).

[167] *Al Ghashiyah*, 250 F. Supp. 2d at 1028; Madison v. Riter, 240 F. Supp. 2d 566, 579 (W.D. Va. 2003).

[168] Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 708-11 (1985).

[169] The attempt to characterize RLUIPA's strict scrutiny test as an absolute right to exemption is particularly silly considering the limited success of religious claims under the *Sherbert-Yoder* test, limited success that *Al Ghashiyah* acknowledges. *See Al Ghashiyah*, 250 F. Supp. 2d at 1019 n.1.

Establishment Clause neutrality requirement. After discussing the limitations of formal neutrality, this section demonstrates that RLUIPA is consistent with substantive neutrality.

1. Formal Neutrality Is Fatally Flawed

Formal neutrality should not serve as the sole standard to ensure compliance with Establishment Clause neutrality for several reasons. First, formal neutrality is flawed because it tends to exalt neutrality, one First Amendment objective, at the expense of other First Amendment objectives. As the *Everson* Court said, the First Amendment's Religion Clause serves many purposes.[170] And as the *Walz* Court demonstrated, the accommodation issue can be framed in terms of the tension between two Religion Clause objectives: religious autonomy and neutrality toward religion.[171] In many instances, formal neutrality would ease this tension by eliminating religious autonomy. In contrast, substantive neutrality seeks to maximize both religious autonomy and neutrality toward religion.[172] Despite formal neutrality's limitation, this approach may be attractive to some because it looks like an easy standard to apply. Religious autonomy is much too valuable to trade for whatever ease or convenience formal neutrality may bring. Few if any of the freedoms guaranteed by the Bill of Rights are easy to secure. To state this first flaw differently, formal neutrality would boil the entire

---

[170] *See* Everson v. Bd. of Educ., 330 U.S. 1, 15-16 (1946).

> The "establishment of religion" clause of the First Amendment means at least this: Neither can a state nor the Federal Government set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.

Id.

[171] *See* Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970). The Court declared:

> The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts, there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

Id.

[172] *See supra* notes 56-57 and accompanying text.

Religion Clause down to a meaningless redundancy: a second Equal Protection Clause.

Formal neutrality is also flawed because it can impose excessive burdens on legislative bodies. Formal neutrality essentially requires Congress to solve either all problems or none of them. It is obviously more realistic for Congress to address one problem or issue at a time. This dilemma brings to mind *Madison's* claim that prior to enacting RLUIPA, Congress should have made findings regarding fundamental rights not within the scope of RLUIPA.[173] It goes without saying that such a requirement would be excessively burdensome. Similarly, formal neutrality forecloses the possibility of legislation tailored to solve specific problems. Wise parents know that formal neutrality in parenting would be irrational because each child has different abilities and a different personality. Even so, a child obsessed with fairness wants to be treated the same as other children, even though such treatment is much less valuable than the specially tailored care of wise parents. Like a wise parent in one sense (*not* a paternalistic sense; the metaphor is limited), government should prefer specially tailored legislation over equal mediocrity—or equal failure. In place of freedom to tailor legislation to particular circumstances, formal neutrality allows clumsy legislation that has the potential to offend almost everyone.[174]

Finally—and most fundamentally—formal neutrality fails to account for the text of the First Amendment itself, which singles out religion for special treatment.[175] If extended, the *Madison* court's argument would lead to the absurd conclusion that the Supreme Court's pre-*Smith* Free Exercise jurisprudence,[176] as well as current state law that provides for strict scrutiny of burdens on religious exercise,[177] violates the Establishment Clause.

Unlike formal neutrality, substantive neutrality maximizes both religious autonomy and neutrality toward religion.[178] As discussed, formal neutrality is "callous[ly] indifferent" to religious autonomy, while substantive neutrality views the preservation of religious autonomy as a primary objective.[179] Because it permits meaningful accommodation of religion, substantive neutrality is also consistent with the First

---

[173] Madison v. Riter, 240 F. Supp. 2d 566, 575 (W.D. Va. 2003).

[174] *See* Laycock, *Neutrality*, *supra* note 46, at 1000-01 (stating under formal neutrality government could both ban the Catholic Mass and fully fund religious education).

[175] *See* Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 29 (1989) (Scalia, J., dissenting).

[176] *See supra* notes 9-10, and accompanying text.

[177] *See generally* Alan E. Brownstein, *State RFRA Statutes and Freedom of Speech*, 32 U.C. DAVIS L. REV. 605 (1999).

[178] *See supra* notes 56-57 and accompanying text.

[179] *Id.*

Amendment, which singles out religion. Furthermore, substantive neutrality does not prevent legislative bodies from tailoring solutions to the particular circumstances of problems. For all these reasons, substantive neutrality should be the standard to ensure compliance with Establishment Clause neutrality.

2. RLUIPA Is Consistent with Substantive Neutrality

As discussed, substantive neutrality analysis of a particular problem involves two questions: (1) does this accommodation of religion encourage religious exercise, and (2) would the absence of this accommodation discourage religious exercise.[180]

RLUIPA is consistent with substantive neutrality because it does not encourage religious exercise. As the subsequent discussion demonstrates, RLUIPA lifts particularly heavy regulatory burdens from religious exercise. Due to this fact, it is extremely unlikely that people or institutions would engage in religious exercise solely to benefit from the protection of RLUIPA. To do so would be to take on a burden for the sole purpose of having the burden lifted. While RLUIPA could encourage religion in prison if inmates are allowed to abuse RLUIPA, prison officials should foreclose such possibility by imposing alternative burdens. To restate an example of an alternative burden, special religious meals should be just as bad (or good) as the standard prison diet.[181]

Regarding the second question, RLUIPA complies with substantive neutrality because the absence of RLUIPA would discourage religious exercise to a significant degree. Addressing how the absence of RLUIPA would discourage religious exercise, the following paragraphs address separately the land use and institutionalized persons contexts.

The absence of RLUIPA would discourage religious exercise related to land use. Due to the nature of land use regulation, RLUIPA's land use provisions lift a particularly heavy regulatory burden. Land use regulation is generally handled by bureaucrats who wield a significant degree of discretion. Also, land use decisions are generally made at the local level, which increases the potential for religious bigotry. Thus, while a "set of bigots can take over one agency or one local government[;] . . . they are quite unlikely to take over a state or the Congress."[182] The Court's analysis in *West Virginia Board of Education v. Barnette*[183] elaborates this point:

---

[180] *See* Laycock, *Neutrality*, *supra* note 46, at 1001-06.

[181] *See supra* note 57 and accompanying text.

[182] Douglas Laycock, *Religious Freedom and International Human Rights in the United States Today*, 12 EMORY INT'L L. REV. 951, 952 (1998).

[183] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

> [S]mall and local authority may feel less sense of responsibility to the Constitution, and agencies of publicity may be less vigilant in calling it to account. The action of Congress in making flag observance voluntary and respecting the conscience of the objector in a matter so vital as raising the Army contrasts sharply with these local regulations [making a flag salute in public schools mandatory] in matters relatively trivial to the welfare of the nation. There are village tyrants as well as village Hampdens, but none who acts under color of law is beyond reach of the Constitution.[184]

The discretion exercised by land use regulators amplifies the likelihood of discrimination or unduly burdensome regulation of religious land use. Prevention of this potential for abuse is the purpose underlying the individualized assessments exception to *Smith* that still triggers judicial review under the *Sherbert-Yoder* Free Exercise test.[185] While the localization and discretion associated with land use regulation establishes opportunity, prevailing rates of hostility toward religion demonstrate that the motive to discriminate against or unduly burden religious land use abounds.[186] Thus, in the context of religious land use regulation, the regulatory body holds all the cards.

This general point regarding the nature of land use regulation is supported by the record of probable constitutional violations in the religious land use context that justified the enactment of RLUIPA. The record Congress compiled to ensure that RLUIPA complies with *City of Boerne*[187] demonstrates the extent of the burden lifted by RLUIPA. Professor Laycock has provided a thorough summary of the congressional record related to RLUIPA's land use provisions;[188] this record includes statistical studies, expert testimony, and a large body of anecdotal evidence regarding the probable constitutional violations that justified the enactment of RLUIPA.[189]

One of the studies included in the congressional record underlying RLUIPA shows that small religions are the most likely targets of discriminatory land use regulation practices.[190] This study, which

---

[184] *Id.* at 637-38 (footnotes omitted).

[185] Employment Div. v. Smith, 494 U.S. 872, 884 (1990).

[186] Douglas Laycock, *Conceptual Gulfs in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 743, 773-74 (1990).

[187] *See supra* note 21 (discussion of *City of Boerne*).

[188] *See* Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 769-83 (1999).

[189] *See id.*

[190] *See* Von G. Keetch & Matthew K. Richards, *The Need for Legislation to Enshrine Free Exercise in the Land Use Context*, 32 U.C. DAVIS L. REV. 725 (1999). This article summarized the results of a study conducted by Professor W. Cole Durham and attorneys from the law firm Mayer, Brown & Platt in Chicago. Von G. Keetch, counsel for the Church of Jesus Christ of Latter-Day Saints, presented this survey to Congress in hearings held on May 12, 1999 and March 26, 1998. *See Religious Liberty Protection Act of 1999: Hearing on*

reviewed reported land-use cases, demonstrates that while small religious groups represent only 9% of the population, they were parties to almost 50% of the cases involving conflicts over the location of buildings for religious use.[191] In contrast, large religious groups (representing roughly 65% of the population) were parties to only 31% of the cases involving church location.[192] The rates of success of the small and large religious groups in these cases were similar.[193] Thus, these survey results do not merely indicate that small religious groups have a higher propensity to file frivolous lawsuits.

The attempt of the Orthodox Minyan of Elkins Park, Pennsylvania (Minyan) to obtain zoning approval for a new synagogue provides an example of the substantial burdens imposed on religion in the land use context.[194] Located in an area zoned for residential use, the new synagogue qualified for a religious use exception if it met off-street parking requirements and did not adversely affect traffic conditions.[195] Due to the nature of the Orthodox Jewish faith, most of the thirty-nine members of the Minyan walked to services.[196] At most, "five or six members would drive their automobiles to services on Friday evenings and then leave their cars at the synagogue over the Sabbath day."[197] The Cheltenham Township Zoning Hearing Board (Zoning Board), decided to "strictly construe" the parking requirement, ordering the Minyan to construct a parking lot with nineteen spaces.[198] The Minyan agreed to construct the full parking lot, and the Zoning Board acknowledged that doing so would satisfy the parking requirement.[199] Even so, the Zoning Board still denied the Minyan's petition for a special exception on the basis that the addition of nineteen parking spaces would adversely affect traffic conditions in the area.[200] RLUIPA's land use provisions were crafted to shield religion from the antagonism exemplified by the Zoning Board's apparent determination to prevent religious land use by any means necessary.

H.R. 1691 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 106th Cong. 26-27, 33-43 (1999) (statement of Von G. Keetch); *Protecting Religious Freedom After* Boerne v. Flores (Part III): *Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. 56-57, 60-72 (1998).

191 Keetch & Richards, *supra* note 190, at 739.

192 *Id.*

193 *Id.* at 741-42.

194 *See* Orthodox Minyan v. Cheltenham Township Zoning Hearing Bd., 552 A.2d 772 (Pa. Commw. Ct. 1989).

195 *Id.* at 773.

196 *Id.*

197 *Id.*

198 *Id.*

199 *Id.*

200 *Id.*

The nature of prison administration and the record underlying RLUIPA's institutionalized persons provisions also demonstrate that the absence of RLUIPA would discourage religious exercise to a significant degree. The localization of prison regulation and the broad discretion exercised by prison administrators are generally analogous to the localization and discretion associated with land use regulation.[201] Prevailing rates of anti-religious bigotry coupled with the nature of prison regulation impose a heavy burden on religious exercise. The record regarding religious exercise in prisons supports this claim. Charles Colson and Patrick Nolan of Prison Fellowship Ministries testified before Congress in broad terms regarding some prison wardens' general hostility toward religion and arbitrary treatment of religious exercise.[202] Isaac Jaroslawicz of the Aleph Institute testified regarding the typical plight of Jewish prisoners.[203] According to Jaroslawicz, Jewish prisoners have been routinely denied items central to Jewish rituals that are substantially similar to items generally allowed.[204] Even more troubling, Jaroslawicz related the story of a Jewish inmate who refused to withdraw a religious liberty lawsuit.[205] This inmate was transferred to a compound where Neo-Nazi skinheads were apprised of his imminent arrival; this inmate was beaten and killed fifteen minutes after his arrival in the new compound.[206] Furthermore, the Senate Judiciary Committee reviewed reported cases regarding probable and substantiated violations of the religious liberty rights of institutionalized persons.[207]

As the preceding discussion demonstrates, RLUIPA is consistent with substantive neutrality because the implementation of RLUIPA does not encourage religious exercise in any way, and because the absence of RLUIPA would discourage religious exercise to a significant degree.

---

[201] *See supra* notes 182-86 and accompanying text.

[202] *See Protecting Religious Freedom After* Boerne v. Flores: *Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. 3-9 (1997) (statement of Charles Colson); *Religious Liberty Protection Act of 1998: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. 165-69 (1998) (statement of Patrick Nolan).

[203] *Protecting Religious Freedom After* Boerne v. Flores (Part III): Hearing *Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. 37-45 (1998) (statement of Isaac Jaroslawicz).

[204] *Id.* at 41-43. For example, the Michigan Department of Corrections prohibited the lighting of Chanukah candles even though votive candles were still allowed. *Id.* at 41.

[205] *Id.* at 42.

[206] *Id.*

[207] *See* 146 CONG. REC. S7775 (daily ed. July 27, 2000) (joint statement of Sens. Hatch and Kennedy).

B. RLUIPA and Amos

Madison and *Al Ghashiyah* are also flawed because they failed to properly analyze RLUIPA under *Amos*. *Madison* and *Al Ghashiyah* aside, courts reviewing RLUIPA under the Establishment Clause have generally concluded that RLUIPA is a valid accommodation of religion under *Amos*.[208] The courts upholding RLUIPA under the Establishment Clause have generally ruled that the *Amos* Court's analysis of a religious exemption from Title VII can be applied equally well to RLUIPA.[209]

First, the intention to accommodate religion underlying RLUIPA is a legitimate government purpose.[210] Even *Madison* concedes this point.[211] *Al Ghashiyah*'s argument that RLUIPA was not enacted pursuant to a legitimate government purpose fails because it is based on an improperly narrow reading of *Amos*. The limit *Al Ghashiyah* would impose on the accommodation doctrine—that *Amos* only permits religious accommodations enacted for the purpose of preventing Establishment Clause violations[212]—is far from what the Court actually said in *Amos*. Explaining why one accommodation is valid, *Amos* reaffirms that the Establishment Clause permits some accommodation of religion.[213] The *Amos* analysis demonstrates how *Lemon* should be applied to test whether a particular accommodation complies with the Establishment Clause.[214] At any rate, *Al Ghashiyah*'s purpose analysis looks like an attempt to bootstrap an effect argument into a purpose problem. Contrary to *Al Ghashiyah*'s claims, the accommodation of religious exercise remains a legitimate government purpose.

Second, RLUIPA merely allows religion to advance religion. *Madison* and *Al Ghashiyah* attempt to distinguish RLUIPA from the

---

[208] *See* Mayweathers v. Newland, 314 F.3d 1062 (9th Cir. 2002), *cert. denied*, No. 02-1655, 2003 WL 21180348 (Oct. 6, 2003); Williams v. Bitner, 2003 WL 22272302 (M.D. Pa. 2003); Murphy v. Zoning Comm'n, 2003 WL 22299219 (D. Conn. 2003); Johnson v. Martin, 223 F. Supp. 2d 820 (W.D. Mich. 2002); Charles v. Verhagen, 220 F. Supp .2d 955 (W.D. Wis. 2002); Freedom Baptist Church v. Middletown, 204 F. Supp. 2d 857 (E.D. Pa. 2002); Gerhardt v. Lazaroff, 221 F. Supp. 2d 827 (S.D. Ohio 2002); Mayweathers v. Terhune, 2001 WL 804140 (E.D. Cal. 2001).

[209] *See* Mayweathers v. Newland, 314 F.3d 1062 (9th Cir. 2002), *cert. denied*, No. 02-1655, 2003 WL 21180348 (Oct. 6, 2003); Williams v. Bitner, 2003 WL 22272302 (M.D. Pa. 2003); Murphy v. Zoning Comm'n, 2003 WL 22299219 (D. Conn. 2003); Johnson v. Martin, 223 F. Supp. 2d 820 (W.D. Mich. 2002); Charles v. Verhagen, 220 F. Supp. 2d 955 (W.D. Wis. 2002); Freedom Baptist Church v. Middletown, 204 F. Supp. 2d 857 (E.D. Pa. 2002); Gerhardt v. Lazaroff, 221 F. Supp. 2d 827 (S.D. Ohio 2002); Mayweathers v. Terhune, 2001 WL 804140 (E.D. Cal. 2001).

[210] *See* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 335-36 (1987).

[211] Madison v. Riter, 240 F. Supp. 2d 566, 572 n.4. (W.D. Va. 2003).

[212] Al Ghashiyah v. Dep't of Corr., 250 F. Supp. 2d 1016, 1023-24 (E.D. Wis. 2003).

[213] *See Amos*, 483 U.S. at 334-35.

[214] *See id.* at 335-39.

religious exemption upheld in *Amos*, claiming that "RLUIPA requires the government itself, through the actions of prison administrators, to accommodate religious inmates."[215] This distinction is weak. To assert that prison administrators unconstitutionally act when providing religious accommodations like special meals only begs the accommodation question. No meaningful difference exists between government not interfering with religion in the context of hiring (*Amos*) and government not interfering with religion in the land use or prison context (RLUIPA). Therefore, *Amos* requires the conclusion that RLUIPA is valid under *Lemon*'s effect prong.

Finally, RLUIPA diminishes government entanglement with religion by limiting government interference with religious exercise in the land use and institutionalized persons contexts.[216] By clearly defining the standards of protection it affords to religious liberty,[217] RLUIPA minimizes the intrusion of land use regulators and prison administrators into religious matters. Perhaps *Al Ghashiyah*'s claim that excessive entanglement results when prison administrators become knowledgeable about and sensitive to inmates' religious practices[218] proves too much. Some contact or entanglement between the state and religion is inevitable. *Al Ghashiyah* apparently prefers the entanglement that requires state ignorance and insensitivity. RLUIPA, on the other hand, requires state actors to obtain a limited degree of knowledge and sensitivity toward religion—in the name of preventing the entanglement that results when government imposes burdens on religious exercise. Requiring such knowledge and sensitivity toward religious exercise does not result in excessive entanglement. Claiming otherwise is to argue that the Establishment Clause *does* require "callous indifference to religious groups."[219] Much to the contrary, RLUIPA merely requires respect for First Amendment interests in a few areas of particular concern. In so doing, RLUIPA "effectuates a more complete separation of [church and state] and avoids the kind of intrusive inquiry into religious belief"[220] prohibited by the Establishment Clause.

---

[215] *Al Ghashiyah*, 250 F. Supp. 2d at 1028; *Madison*, 240 F. Supp. 2d at 577 n.9.

[216] *See Amos*, 483 U.S. at 339.

[217] *See supra* Part II.

[218] *Al Ghashiyah*, 250 F. Supp. 2d at 1031.

[219] Zorach v. Clauson, 343 U.S. 306, 314 (1952). Or as Judge Enslen in the Western District of Michigan put it, "Government does not have to treat religion like an untouchable pariah in order to avoid state entanglement with religion." Johnson v. Martin, 223 F. Supp. 2d 820, 827 (W.D. Mich. 2002).

[220] *Amos*, 483 U.S. at 339.

Madison and *Al Ghashiyah*[221] also attempted to distinguish *Amos* by claiming that *Amos* only permits alleviation of burdens on religious exercise imposed "by an act of Congress specifically limiting free exercise rights."[222] This attempt at distinguishing *Amos* is similar to the claim that RLUIPA's breadth somehow renders it invalid under the Establishment Clause.[223] This distinction fails because *Amos* relied on both *Board of Education v. Allen*[224] and *Zorach v. Clausen*.[225] Neither *Allen* nor *Zorach* lifted burdens imposed "by an act of Congress specifically limiting free exercise rights."[226] Similarly, neither *Allen* (permitting the state to lend books to parochial schools under the Establishment Clause) nor *Zorach* (permitting released time for off-campus religious education under the Establishment Clause) were particularly narrow.

Despite *Al Ghashiyah's* claim to the contrary,[227] RLUIPA is nowhere near as broad as RFRA. This "breadth" claim seems to assert that accommodation of religion may offend the Establishment Clause to the extent that it actually accommodates religion. Quoting Professor Hamilton, *Al Ghashiyah* argues that RLUIPA is too broad to be a valid accommodation of religion because it will cause the government to consider religion—and seek to avoid imposing burdens on religion—in the legislative process.[228] (Of course, the same can be said about every area in which strict scrutiny is applied.) It should not shock or trouble anyone to imagine government officials legislating with the Constitution and other federal law in mind.

Assuming that the Establishment Clause permits meaningful accommodation of religion, breadth is a poor measure of accommodation validity because a so-called "broad" accommodation may be the only effective way to accommodate religion in certain circumstances. Such is the case with RLUIPA. As discussed, the localization and broad discretion inherent in land use and prison regulation coupled with prevailing rates of religious intolerance ensure that land use and prison regulation impose particularly heavy burdens on religion.[229] The record underlying RLUIPA, which demonstrates that RLUIPA was enacted in

---

[221] Madison v. Riter, 240 F. Supp. 2d 566, 576 (W.D. Va. 2003); *Al Ghashiyah*, 250 F. Supp. 2d at 1028.

[222] *Madison*, 240 F. Supp. 2d at 576; *see also Al Ghashiyah*, 250 F. Supp. 2d at 1028.

[223] *See supra* notes 103-04 and accompanying text.

[224] Bd. of Educ. v. Allen, 392 U.S. 236 (1968).

[225] Zorach v. Clauson, 343 U.S. 306 (1952).

[226] *Madison*, 240 F. Supp. 2d at 576; *see also Al Ghashiyah*, 250 F. Supp. 2d at 1028.

[227] *Al Ghashiyah*, 250 F. Supp. 2d at 1024.

[228] *Id.* (quoting Hamilton, RFRA, *supra* note 103, at 13-14).

[229] *See supra* Part V.A.2.

response to a record of probable constitutional violations,[230] illustrates the extent of this burden. Rather than render RLUIPA an invalid accommodation, RLUIPA's breadth merely ensures that it will actually lift a particularly heavy regulatory burden from religion.

Furthermore, rather than rendering it invalid, RLUIPA's breadth is conducive to religious autonomy. RLUIPA encourages religious autonomy because it treats all people and institutions alike; under RLUIPA both remain free to engage in religious exercise.[231] As discussed, accommodation can be viewed in terms of the tension between religious autonomy and neutrality toward religion.[232] As analysis of RLUIPA under both substantive neutrality and *Amos* demonstrates, RLUIPA is a valid accommodation of religion. It is consistent with both religious autonomy and neutrality toward religion.

C. RLUIPA and Texas Monthly

Unlike *Madison*, *Al Ghashiyah* analyzed RLUIPA under *Texas Monthly*,[233] the narrowest likely reading of the accommodation doctrine.[234] As discussed, the *Texas Monthly* plurality applied a three-prong analysis to determine if an accommodation was consistent with the Establishment Clause. The analysis first asks whether the accommodation in question flows to a broad group of beneficiaries, both secular and religious.[235] If so, the accommodation is valid. If the accommodation in question does not comply with formal neutrality, however, it is still valid if: (1) it does not "burden[] nonbeneficiaries markedly;" and (2) it "can[] reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion."[236]

1. Formal Neutrality

The first step of the *Texas Monthly* plurality's analysis asks a basic formal neutrality question—"whether the accommodation in question flows to a broad group of beneficiaries, secular and religious."[237] There is a solid argument that RLUIPA complies with this formal neutrality test. RLUIPA defines the group of beneficiaries whose "religious exercise" it protects as "person[s], including . . . religious assembl[ies] or

---

230 *Id.*

231 *See generally* Perry Dane, *The Varieties of Religious Autonomy*, *in* CHURCH AUTONOMY: A COMPARATIVE SURVEY 117 (Gerhard Robbers ed., 2001).

232 *See supra* notes 1-2 and accompanying text.

233 *See Al Ghashiyah*, 250 F. Supp. 2d at 1025-31.

234 *See supra* note 82 and accompanying text.

235 Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 11-14 (1989); *see also* McConnell, *supra* note 61, at 698.

236 *Tex. Monthly*, 489 U.S. at 15.

237 *Id.* at 11-14; *see also* McConnell, *supra* note 61, at 698.

institution[s]."[238] If interpreted broadly, these terms afford RLUIPA protection to the requisite broad group of beneficiaries, secular and religious.[239]

Such an approach is not foreign to government action that accommodates religion. In *United States v. Seeger*,[240] the Court construed the requirement that exemption from military service on the basis of conscientious objection required belief in a "Supreme Being."[241] The *Seeger* Court concluded that belief in a Supreme Being included "a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by God of those admittedly qualifying for the exemption."[242] The Court adopted this broad reading of the statute "to avoid[] imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others."[243] Similarly, Professor Laycock has argued that religious belief should be broadly construed in all constitutional contexts: "[A]ny belief about God, the supernatural, or the transcendent, is a religious belief. For constitutional purposes, the belief that there is no God, or no afterlife, is as much a religious belief as the belief that there is a God or afterlife."[244]

Construed broadly, RLUIPA protects both traditional religious institutions as well as "groups that pursue cultural, moral, or spiritual improvement in multifarious secular ways, including . . . groups whose avowed tenets may be antitheological, atheistic, or agnostic."[245] Both *Madison* and *Al Ghashiyah*, however, failed to consider whether RLUIPA can be construed to protect a group sufficiently broad to render it valid under a formal neutrality analysis. Even if it were to fall short of formal neutrality, RLUIPA fits comfortably in the narrow space left by *Texas Monthly* for non-formal neutral accommodations.

2. Regulatory Burden Lifted

RLUIPA "can[] reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion."[246] The preceding discussion of the nature of land use and prison regulation and the record regarding religious land use and religious exercise in prisons[247]

---

238 42 U.S.C. § 2000cc(a)(1) (2000).

239 *See Tex. Monthly*, 489 U.S. at 11-14; *see also* McConnell, *supra* note 61, at 698.

240 United States v. Seeger, 380 U.S. 163 (1965).

241 *Id.* at 165.

242 *Id.* at 176.

243 *Id.*

244 Laycock, *Neutrality*, *supra* note 46, at 1002.

245 Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 13 (1989) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 697 (1970)).

246 *Id.*

247 *See supra* Part V.A.2.

demonstrates that RLUIPA lifts a significant state-imposed deterrent to religious exercise. Thus, *Al Ghashiyah*'s conclusory statement that RLUIPA was not enacted in response to a threat to religious liberty[248] is without foundation.

3. Burden on Nonbeneficiaries

RLUIPA does not burden nonbeneficiaries markedly. As Professor McConnell has argued, deference to legislative judgments regarding the costs related to accommodation of religion is required, since "secular economic interests are not under-represented in the political process."[249] Common burdens that nonbeneficiaries may bear when RLUIPA is invoked in the land use context may relate to convenience, aesthetics, traffic safety, and tax revenue.

It seems safe to conclude that convenience and aesthetic concerns are generally far too inconsequential to qualify as significant burdens on nonbeneficiaries. It would be absurd to argue that because the signs, slogans, and street marching incident to political protest are inconsistent with convenience and aesthetics, that First Amendment speech rights should be suppressed. It would be equally absurd to argue that First Amendment religious rights should be suppressed for convenience and aesthetic reasons.

A significant deterioration in traffic safety may qualify as a significant burden on nonbeneficiaries. To invalidate an RLUIPA accommodation under the Establishment Clause, however, a claimant should have to prove that the religious land use at issue will result in such a significant deterioration. Presumably, most religious land uses will result in nothing more than a slight effect on traffic safety. Furthermore, the effect on traffic safety of a particular religious land use should be compared to potential alternative uses. It would be disingenuous to argue that a land use permit for an average religious structure should be denied on traffic safety grounds if the real property in question is a candidate for commercial use that is likely to generate as much or more traffic than an average religious use.

Arguably, RLUIPA has the potential of imposing a significant burden on nonbeneficiaries by limiting the ability of municipalities to favor land uses that generate tax revenue over religious land uses. The *Texas Monthly* plurality concluded that a tax exemption for religious publications imposed a burden on nonbeneficiaries "by increasing their tax bills by whatever amount is needed to offset the benefit bestowed on subscribers to religious publications."[250] The burden argument accepted

---

[248] *See* Al Ghashiyah v. Dep't of Corr., 250 F. Supp. 2d 1016, 1030 (E.D. Wis. 2003).

[249] McConnell, *supra* note 61, at 705.

[250] *Tex. Monthly*, 489 U.S. at 18 n.8.

by the plurality in *Texas Monthly* and the potential argument regarding RLUIPA are clearly distinct. The plurality addressed a direct attack on a tax exemption. The potential tax revenue argument regarding RLUIPA tries to bootstrap a complaint about formally neutral—and only tangentially related—tax exemptions into a claim that RLUIPA imposes a substantial burden on nonbeneficiaries. Of course, this potential tax revenue argument is a polite way of arguing that government maintains the power to discriminate on the basis of religion under cover of maximizing tax revenue.

Similarly, RLUIPA's institutionalized persons provisions do not substantially burden nonbeneficiaries. Standard accommodations of religion in the institutionalized persons context (permission to wear religious symbols, keep religious reading material, attend religious services, eat special religious meals) require only minor adjustments imposing virtually no costs on nonbeneficiaries. In many cases, these accommodations are analogous to items or activities (non-religious symbols, reading materials, meetings, and meals) that are generally permitted. Furthermore, it should be noted that compelling government interests such as safety and health will preclude RLUIPA claims that could impose any serious burdens on nonbeneficiaries in the institutionalized persons context.

To characterize potential jealousy or anger on the part of inmates who do not receive religious accommodations as a substantial burden[251] is particularly absurd. For obvious reasons, a purely subjective "jealousy" test should not be introduced into Establishment Clause doctrine. The claim that RLUIPA imposes a burden on non-accommodated inmates by encouraging them to become religious[252] also fails. The different treatment related to religious accommodation is not necessarily better treatment. Furthermore, the imposition of alternative burdens (ensuring special meals are just as bad or good as the common diet)[253] will ensure that non-accommodated inmates have no objective basis to be jealous of those who receive religious accommodations—and no artificial incentive to become religious.

As the preceding discussion demonstrates, RLUIPA fits comfortably in the narrow space left by *Texas Monthly* for non-formal neutral accommodations: RLUIPA lifts a heavy regulatory burden from religious exercise and it does not markedly burden nonbeneficiaries. Applying formal neutrality alone, *Madison* and *Al Ghashiyah* were much narrower than either *Amos* or the *Texas Monthly* plurality. In other

---

[251] *See Al Ghashiyah*, 250 F. Supp. 2d at 1029; Madison v. Riter, 240 F. Supp. 2d 566, 581 (W. D. Va. 2003).

[252] *See Al Ghashiyah*, 250 F. Supp. 2d at 1029.

[253] *See supra* note 57 and accompanying text.

words, *Madison* and *Al Ghashiyah* represent a radical attempt to restrict the category of religious accommodation permitted under the Establishment Clause.

D. RLUIPA and Smith

The ruling in *Madison* and *Al Ghashiyah* that RLUIPA violates the Establishment Clause is also flawed because it would render current First Amendment doctrine completely incoherent. *Employment Division v. Smith*, the current leading Free Exercise case, supports the validity of RLUIPA as an accommodation of religion.

Smith marked a significant shift from judicial accommodation to deference toward legislative accommodation.[254] In other words, *Smith* shifted the burden of protecting religious liberty from courts exercising judicial review under the Free Exercise Clause to legislatures enacting accommodations of religious exercise.[255] Justice Scalia, the author of *Smith*, elaborated on this approach to religious liberty in his concurrence in *City of Boerne*, in which he explained: "The issue presented by *Smith* is, quite simply, whether the people, through their elected representatives, or rather this Court, shall control the outcome of [individual Free Exercise cases]."[256] As Justice Scalia emphatically declared, "It shall be the people."[257]

Expressing approval of legislative accommodations that permit the religious use of peyote under state law, the *Smith* Court stated, "to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required."[258] The obvious inference from this statement is that *Smith* does not proscribe legislative accommodation of religion. Much to the contrary, the Justices that make up the core of the *Smith* majority have argued that the Court should have sustained significant legislative attempts to accommodate religion. Dissenting in *Texas Monthly*, Justice Scalia, joined by Chief Justice Rehnquist and Justice Kennedy, rejected the application of formal neutrality to accommodation issues.[259] Arguing

---

[254] *See supra* notes 62-64 and accompanying text.

[255] "*Smith* is a major step toward increased judicial deference to the political branches in the area of religion. The logical corollary to *Smith* on the establishment side is to increase the deference to the political branches." McConnell, *supra* note 61, at 732.

[256] City of Boerne v. Flores, 521 U.S. 507, 544 (1997) (Scalia, J., concurring).

[257] *Id.*

[258] Employment Div. v. Smith, 494 U.S. 872, 890 (1990).

[259] Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 29-30 (1989) (Scalia, J., dissenting). The dissent rejected:

> the bold but unsupportable assertion (given such realities as the text of the Declaration of Independence, the national Thanksgiving Day proclaimed by every President since Lincoln, the inscriptions on our coins, the words of the Pledge of Allegiance, the invocation with which sessions of our Court

that *Walz*, the seminal accommodation case related to taxes, was directly applicable, Justice Scalia demonstrated that the plurality in *Texas Monthly* fell far short of the "deeply embedded" tradition of "benevolent neutrality" in the United States.[260] In *Grumet*, Justice Scalia's dissenting opinion, which Chief Justice Rehnquist and Justice Thomas joined,[261] as well as Justice Kennedy's concurring opinion,[262] defended a similarly broad view of accommodation.

If *Smith*'s legislative deference theory is to maintain any sort of coherence, meaningful accommodation of religion must be allowed. If under *Smith* religious liberty must be relegated to majoritarian determination in legislatures,[263] then legislatures must be allowed to lift burdens from religion and not just impose them. In other words, the same deference to legislation that burdens religious exercise should be afforded to legislation that lifts burdens from religious exercise. If this is not the case—if there shall be no anti-majoritarian religious liberty safeguard enforced through judicial review *and* no accommodation of religion through the political process—then formal neutrality has swallowed the Religion Clause whole. To read *Smith* as a victory for formal neutrality rather than legislative deference is to boil the Religion Clause of the First Amendment down to nothing more than another Equal Protection Clause.

Because it maintains the possibility of meaningful legislative accommodation, substantive neutrality is more consistent than formal neutrality with *Smith*'s legislative accommodation theory. As discussed, substantive neutrality maximizes both religious autonomy and

---

are opened and, come to think of it, the discriminatory protection of freedom of religion in the Constitution) that government may not "convey a message of endorsement of religion."

Id.

260 *Id.* at 33-40.

261 Bd. of Educ. v. Grumet, 512 U.S. 687, 722-27 (1994) (Kennedy, J., concurring).

262 *Id.* at 732-52 (Scalia, J., dissenting).

263 *See* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Id.; see also ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1986) (approaching Supreme Court review as a means of protecting minority rights from majority encroachment); Michael W. McConnell, *Religious Freedom, Separation of Powers, and the Reversal of Roles*, 2001 B.Y.U. L. REV. 611, 612-13 (2001) (arguing that the Supreme Court's treatment of religious freedom does not conform to the anti-majoritarian theory of judicial review).

neutrality toward religion.[264] Similarly, it is notable that *Smith* left intact a significant line of cases that preserve religious autonomy under the Religion Clause of the First Amendment.[265] To require religious accommodations to comply with formal neutrality would eviscerate most of the legislative accommodation envisioned by *Smith*—and it would severely limit the religious autonomy that both *Smith* and substantive neutrality in general seek to preserve. As the Court observed in *Walz*, accommodation of religion, or "benevolent neutrality," can be consistent with both religious autonomy and neutrality toward religion.[266] Such is the case with RLUIPA.

As the preceding discussion has demonstrated, analysis under substantive neutrality, *Amos*, and *Texas Monthly* requires the conclusion that RLUIPA complies with the Establishment Clause neutrality principle. This conclusion is consistent with *Smith*'s legislative accommodation theory.

VI. CONCLUSION

In *Madison v. Riter* and *Al Ghashiyah v. Department of Corrections*, two federal district courts ruled that RLUIPA violates the Establishment Clause. In so ruling, these courts disregarded a substantial body of adverse authority. Most significantly, *Madison* and *Al Ghashiyah* ruled that formal neutrality alone determines the validity of legislative accommodations of religion. These rulings are flawed for several reasons. First, *Madison* and *Al Ghashiyah* were wrongly decided because formal neutrality is flawed. Substantive neutrality analysis, a superior alternative to formal neutrality, demonstrates that RLUIPA is consistent with the Establishment Clause. *Madison* and *Al Ghashiyah* are also flawed because they failed to properly apply *Amos*, the leading legislative accommodation case, and *Texas Monthly*, the narrowest likely reading of the accommodation doctrine. Finally, *Madison* and *Al Ghashiyah* are inconsistent with the legislative accommodation theory underlying *Employment Division v. Smith*, the leading Free Exercise case. In short, *Madison* and *Al Ghashiyah* were wrong and should be reversed.

Beyond the particular details of *Madison, Al Ghashiyah,* and RLUIPA, this article makes a point about the relationship between religious autonomy, neutrality toward religion, and accommodation of

---

[264] *See supra* Part V.A.

[265] *See generally* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1 (1998) (discussing church autonomy cases); Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981) (discussing church autonomy cases).

[266] Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970).

religion. The *Walz* Court observed that accommodation of religion can be consistent with both religious autonomy and neutrality toward religion.[267] Formal neutrality is a poor standard of Establishment Clause validity because it is "callous[ly] indifferent" to religious autonomy. *Amos* and even *Texas Monthly*, each of which leaves some religious autonomy intact, are superior forms of analysis to formal neutrality. In order to preserve the possibility of meaningful accommodation that maximizes both religious autonomy and neutrality toward religion, however, substantive neutrality should be the standard of accommodation validity.

[267] *Id.*