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A HIGHER AUTHORITY: HOW THE FEDERAL RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT AFFECTS STATE CONTROL OVER RELIGIOUS LAND USE CONFLICTS

Karen L. Antos*

Abstract: The Religious Land Use and Institutionalized Persons Act (RLUIPA) provides heightened protections for religious institutions that seek to build or expand their facilities in excess of local zoning regulations. Although RLUIPA claims on its face that it does not preempt state protections for religious land uses, more and more religious organizations have elected to bring suit under RLUIPA in addition to or in lieu of state laws. This Note focuses on Massachusetts and Washington as representative examples of states’ religious land use protections and examines the effect of RLUIPA on those protections. The Note suggest that RLUIPA may unintentionally preempt state laws, particularly where states have chosen not to act.

INTRODUCTION

Although conflicts between religious institutions and local land use regulations have existed for nearly as long as local governments have been implementing zoning regulations, the frequency of such conflicts has escalated in the past decade.¹ Previously, Congress had intervened to balance the competing concerns of religious groups and local governments through sweeping federal legislation.² However, Congress’s latest attempt, the Religious Land Use and Institutionalized Persons Act

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of 2000 (RLUIPA), is a narrowly tailored statute that only addresses religious protections in conflicts involving land use and prisoners’ rights.\(^3\) Despite its effort to allay conflicts between religious institutions and local governments, and notwithstanding its limited applications, RLUIPA often exacerbates conflicts between these groups.\(^4\) Conflicts arise because RLUIPA enables religious groups to receive approval for construction projects in situations where state law would have allowed local governments to prevent the construction.\(^5\)

Since its inception, several interest groups have funded litigation under RLUIPA to encourage religious institutions to fight adverse land use decisions.\(^6\) While not all challenges under RLUIPA have been successful, many religious facilities have been able to use RLUIPA, or even the mere threat of litigation under the Act, to persuade municipalities to grant special use permits that were originally denied.\(^7\) As a result of such litigation, religious institutions are able to engage in large-scale, multi-use construction to a much greater extent than nonreligious institutions would have been able to on the same parcels of land.\(^8\)


\(^5\) Id. at 98.

\(^6\) Id.; see RLUIPA.com, http://www.rluipa.com (last visited Apr. 27, 2008). This site, operated by the Becket Fund for Religious Liberty, provides updates on media coverage, published briefs, scholarships, and current and future cases involving RLUIPA. Id.

\(^7\) Hamilton, supra note 4, at 98–99; see RLUIPA.com, supra, note 6.

\(^8\) See Hamilton, supra note 4, at 82. Even without relying on RLUIPA, several churches were able to include bookstores, coffee houses, hotels, theaters, and even a McDonald’s within religious facilities. Id. at 80; see Scott Thumma, Exploring the Megachurch Phenomena: Their Characteristics and Cultural Context, Hartford Inst. for Religion Research (1996), http://hirr.hartsem.edu/bookshelf/thumma_article2.html. Using RLUIPA, religious institutions have successfully gained permission for a 5050-square-foot religious institution in a single-family residential district, appealed an adverse ruling that prevented the religious institution from building a 650-student Christian school located in a semi-rural area, and received $72,214.24 in attorney’s fees for the denial of a permit to operate a religiously affiliated bed and breakfast near a hospital. DiLaura v. Twp. of Ann Arbor, 471 F.3d 666, 668–69 (6th Cir. 2006); Hamilton, supra note 4, at 104; Pamela A. MacLean, Courts Struggle over Definition of ‘Undue Burden’ in Zoning Act, Nat’l L.J., Feb. 19, 2007, at 1, 1; see RLUIPA.com, supra, note 6 (listing many other conflicts resolved through the use of RLUIPA). Additionally, religious institutions have sought permission for construction of the following in residential neighborhoods: a hundred-child day care facility, a forty-person homeless shelter, and a religious institution that would increase traffic dramatically. Hamilton, supra note 4, at 99–101.
Without RLUIPA, these land use conflicts would be decided according to state laws.\(^9\) Several states have extended heightened protections to religious land uses similar to those available under RLUIPA.\(^10\) Other states simply have never considered whether to extend special protection to religious land uses.\(^11\) Finally, several states have declined to extend heightened protections to religious land uses after considering laws resembling RLUIPA.\(^12\) Claims under RLUIPA are available to religious groups in all states, even those states that intentionally did not pass laws offering heightened protections for religious uses.\(^13\)

This Note seeks to demonstrate that although RLUIPA states that it does not preempt state laws, the result of its implementation is essentially the same as if it had specifically preempted state control over religious land use laws in states without land use protections resembling RLUIPA. Part I of this Note examines the scope of local control over land use issues and the intersection of land use and religious issues. It then provides an overview of protections for religious land use issues that existed prior to 2000. Part II gives an overview of the creation and implementation of RLUIPA. Part III describes the various religious land use protections available at the state level, with a particular focus on Massachusetts and Washington. Part IV uses the cases from Part III to demonstrate how RLUIPA dramatically changes religious land use analysis, particularly in states without any religious land use protections in place. Finally, Part V concludes that, while RLUIPA creates nationwide consistency, it thrusts religious land use issues outside the traditional realm of state and local control.

I. LOCAL LAND-USE REGULATION

Compared to other areas of modern law, land-use regulation is unusual because control is exercised primarily at the local level.\(^14\) The creation and modification of zones, as well as exemptions or exceptions to a particular zone, have “always been treated as . . . local matter[s].”\(^15\) For land use controls to be enacted at the local level, the state government must delegate power to the local government because “local gov-

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\(^9\) See Hamilton, supra note 4, at 104.
\(^10\) Runyon et al., supra note 1.
\(^11\) See id.
\(^12\) Id.
\(^13\) See Hamilton, supra note 4, at 109.
ernments do not have inherent powers but are limited to those granted by a state constitution or legislature." Land use regulation is an aspect of the state’s police power—the ability of the state to protect public health, safety, morals, and general welfare. The state government, rather than investing the power in administrative agencies, grants decisionmaking power to local officials who make most land use decisions. A zoning regulation is an appropriate use of the police power when it reasonably and substantially relates to the “police power objectives of protecting public safety, health, morals and welfare.”

There are three circumstances in which a municipality can exercise its police power: (1) when an activity is expressly authorized through a delegation of power from the state; (2) when an activity is reasonably necessary to perform a delegated activity; (3) and when an activity is “essential to the declared objects and purposes” of the local government. Because “there is no inherent municipal power to zone,” a municipality must have directly or indirectly received a grant of power from the state before passing zoning ordinances or bylaws.

A. Limitations to Local Control of Land Use Regulations

The U.S. Supreme Court has recognized that local control of zoning provides a method for achieving “a satisfactory quality of life in both urban and rural communities.” By permitting a local government to exercise domain over its community, local control of land use regulations provides for the creation of “zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.” While the umbrella of land-use regulation applies to zoning and historic preservation laws, its scope is not

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16 Brian W. Blaesser et al., Land Use and the Constitution: Principles for Planning Practice 16 (1989) [hereinafter Blaesser et al., Land Use and the Constitution]. The concept that a local government must be delegated its powers by the state is known as Dillon’s Rule. Id.


18 Selm & Kushner, supra note 14, at 29.

19 See Runyon et al., supra note 1.

20 Burke, supra note 17, at 5.

21 Blaesser et al., Land Use and the Constitution, supra note 16, at 16; Burke, supra note 17, at 5, 7.


unlimited.\textsuperscript{24} For example, construction of roadways is not considered a form of land-use regulation and, thus, is not affected by statutes limiting local discretion in land-use regulation.\textsuperscript{25}

Moreover, while local governments have typically had great discretion in their land use decisions, local officials do not have unlimited authority to shape and apply zoning restrictions.\textsuperscript{26} Rather, zoning authority must be “exercised within constitutional limits.”\textsuperscript{27} A determination of whether an authority exceeded constitutional limits is based on a review of the nature of the right “assertedly threatened or violated,” not the power used by the government in threatening that right.\textsuperscript{28}

B. Land-Use Regulation and Religion

Most confrontations between land-use regulation and religion arise because of the different levels of government responsible for the creation and implementation of regulations.\textsuperscript{29} Specifically, state or local governments enact land use regulations and control land use through the police power, while federal law resolves conflicts involving burdens on religious freedoms.\textsuperscript{30} Laws designed to ensure fair treatment for religious institutions have proliferated as a form of “religious affirmative action.”\textsuperscript{31} In some cases, legislatures passed laws favoring religion specifically to address “an actual incident of discrimination.”\textsuperscript{32} In the land use context, these laws generally either reduce or streamline the requirements that a religious institution must follow when building or renovating religious facilities.\textsuperscript{33}

The conflict between land-use regulation and religion has led to several common clashes between religious institutions and local governments.\textsuperscript{34} Some disputes focus on historic preservation laws: where

\begin{itemize}
  \item \textsuperscript{24} See Brian W. Blaesser et al., Federal Land Use Law & Litigation 615 (2008) [hereinafter Blaesser et al., Federal Land Use].
  \item \textsuperscript{25} Prater v. City of Burnside, 289 F.3d 417, 422–34 (6th Cir. 2002); see Blaesser et al., Federal Land Use, supra note 24, at 619 & n.12.
  \item \textsuperscript{26} Wendie L. Kellington, Historical Evolution of the RLUIPA, in Proceedings of the Institute on Planning, Zoning and Eminent Domain 12-1, § 12.08, at 12-24 (Safia Ahmed ed., 2006).
  \item \textsuperscript{27} Schad, 452 U.S. at 68 (internal quotations omitted).
  \item \textsuperscript{28} Id.; Kellington, supra note 26, at 12-25.
  \item \textsuperscript{29} See Runyon et al., supra note 1.
  \item \textsuperscript{30} Id.
  \item \textsuperscript{32} Boyajian v. Gatzunis, 212 F.3d 1, 8 (1st Cir. 2000); see Kayden, supra note 31, at 4.
  \item \textsuperscript{33} Blaesser et al., Federal Land Use, supra note 24, at 708.
  \item \textsuperscript{34} See id.
\end{itemize}
a religious institution wants to renovate a building that, if used for a nonsectarian purpose, would be prohibited from undergoing renovation because of its location within an historic preservation zone.\textsuperscript{35} Other conflicts center on the application of basic zoning restrictions to the construction of new buildings, such as churches and peripheral facilities.\textsuperscript{36} Finally, many cases focus on whether to give religious exemptions from zoning laws to nonreligious facilities run by churches, such as office buildings and treatment centers.\textsuperscript{37}

Challenges that religious institutions bring to land use regulations are litigated under either the Establishment Clause or the Free Exercise Clause of the U.S. Constitution.\textsuperscript{38} The Establishment Clause and the Free Exercise Clause are frequently in tension and are the source of friction between freedom of religion and protection against governmental establishment of religion in the federal government.\textsuperscript{39} These two clauses, by nature of their disparate protections, require regulators to avoid both laws limiting the free exercise of religion and laws appearing to favor the establishment of religion.\textsuperscript{40}

\textsuperscript{35} E.g., Keeler v. Mayor of Cumberland, 940 F. Supp. 879, 880 (D. Md. 1996); First Covenant Church v. City of Seattle (\textit{First Covenant II}), 840 P.2d 174, 177 (Wash. 1992).

\textsuperscript{36} E.g., Castle Hills First Baptist Church v. City of Castle Hills, 2004 WL 546792, at *2 (W.D. Tex. 2004); Martin v. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, 747 N.E.2d 131, 133 (Mass. 2001).

\textsuperscript{37} See, e.g., N. Pac. Union Conf. Ass’n of Seventh Day Adventists v. Clark County, 74 P.3d 140, 142 (Wash. Ct. App. 2003); Blaesser et al., Federal Land Use, supra note 24, at 707–09.

\textsuperscript{38} Blaesser et al., Federal Land Use, supra note 24, at 593, 603; Robert A. Sedler, \textit{The First Amendment and Land Use: An Overview}, \textit{in Protecting Free Speech and Expression} 1, 10 (Daniel R. Mandelker & Rebecca L. Rubin eds., 2001). The Establishment Clause states, “Congress shall make no law respecting an establishment of religion.” U.S. Const. amend. I. The Supreme Court has interpreted this language to require a separation of church and state. Selmi & Kushner, supra note 14, at 350. The determination of whether a law violates the Establishment Clause is guided by the \textit{Lemon} test, which requires legislation to have a “secular legislative purpose,” to have a “principal or primary effect” that “neither advances nor inhibits religion,” and to avoid “excessive government entanglement with religion.” Id.; see Lemon v. Kurtzman, 403 U.S. 602, 612–15 (1971). The Establishment Clause only applies to land use cases when a “regulation has the effect of preferring religion over non-religion.” Sedler, supra, at 10. For the purposes of this Note, the primary importance of the Establishment Clause is that it is frequently in tension with the Free Exercise Clause.

\textsuperscript{39} Blaesser et al., Federal Land Use, supra note 24, at 603; see David L. Callies et al., \textit{Cases and Material on Land Use} 441 (4th ed. 2004). Although this tension exists, as of now, no court has found RLUIPA to violate the Establishment Clause. Blaesser et al., Federal Land Use, supra note 24, at 627–28.

\textsuperscript{40} Blaesser et al., Federal Land Use, supra note 24, at 593, 603; Callies et al., supra note 39, at 441.
The Free Exercise Clause, which provides that “Congress shall make no law . . . prohibiting the free exercise” of religion, limits a state’s control over matters of religious freedom.\(^{41}\) To violate the Free Exercise Clause, a government action must force the claimant to either disobey a belief of his religion or abstain from a requirement of his religion.\(^{42}\) Prior to 1990, courts held that the Free Exercise Clause required a review of infringements against religious practices using strict scrutiny.\(^{43}\) For a decision disfavoring religious practices to be upheld, the government was required to show that the chosen method of enforcement was “the least restrictive means of achieving some governmental interest.”\(^{44}\)

The application of strict scrutiny in cases involving the Free Exercise Clause ended with the Supreme Court’s decision in *Employment Division v. Smith*.\(^{45}\) There, two employees were denied unemployment benefits because of their use of peyote, an illegal drug, at a Native American Church ceremony.\(^{46}\) The Court found that the employees could legally be denied unemployment benefits because the Free Exercise Clause was not intended to protect illegal conduct undertaken within a religious ceremony.\(^{47}\) As long as a law prohibiting an activity did not specifically target religious activities for disparate treatment, the states were “free to regulate.”\(^{48}\) In *Smith*, the Court altered its standard of review for free exercise cases, requiring the government to show only a rational basis for passing a generally applicable law.\(^{49}\) As a result of the changes in Free Exercise Clause jurisprudence created by the Court’s decision in *Smith*, exceptions to neutral laws could only be granted by a full legislative process, rather than through the permitting process.\(^{50}\) The Court determined that this was the appro-
appropriate procedure, despite the increased burden on minority religious groups to seek popular support to gain protections.\textsuperscript{51}

Four years later, Congress reacted to the \textit{Smith} decision’s reduction of protections for the free exercise of religion by passing the Religious Freedom and Restoration Act (RFRA) of 1993.\textsuperscript{52} RFRA reinstated the strict scrutiny standard for review of free exercise challenges, and was generally viewed as a direct response to the Supreme Court’s decision in \textit{Smith}.\textsuperscript{53} However, RFRA existed for only four years before it was struck down by the Supreme Court in \textit{City of Boerne v. Flores}.\textsuperscript{54} In \textit{City of Boerne}, the Court found that RFRA exceeded the power granted to Congress under the Fourteenth Amendment.\textsuperscript{55} Specifically, the Court held that Congress overreached its powers when it applied RFRA to the states.\textsuperscript{56} By changing the standard associated with the Free Exercise Clause, Congress moved beyond enforcement and attempted to change the meaning of an amendment.\textsuperscript{57} In overturning RFRA, the Court returned to the free exercise analysis established in \textit{Smith}.\textsuperscript{58}
II. RLUIPA: STATUTORY HISTORY AND OVERVIEW

In 2000, Congress enacted RLUIPA, another regulation designed to protect the free exercise of religion, this time specifically in land-use regulation and the religious rights of prisoners. Like RFRA, RLUIPA statutorily reinstates strict scrutiny analysis for review of conflicts between land use regulations and religion. Unlike RFRA, however, RLUIPA is narrowly tailored, as it only addresses land use regulations and rights of the imprisoned, in an effort by Congress to avoid exceeding its powers.

RLUIPA prohibits the government from imposing or implementing a substantial burden on a religious exercise through a land use regulation. To defeat a challenge under RLUIPA, the government must show that it acted in furtherance of a compelling governmental interest and used the least restrictive means of furthering that interest. RLUIPA applies to any land use regulation where the "government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved." In effect, any discretionary permit, such as a variance or special permit, would fall within RLUIPA’s scope.

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61 146 Cong. Rec. S6678-02 (daily ed. July 13, 2000) (statement of Sen. Hatch). Unlike the narrowly tailored RLUIPA, RFRA applied to every type of regulation. Id. Although RLUIPA addresses both land use laws and conditions for institutionalized persons, this Note will only address the Act as applied to land-use regulation. Id. RLUIPA applies in three circumstances: (1) where a “state program receives Federal financial assistance”; (2) a substantial burden “imposed by a local law affects or would affect” interstate commerce; or (3) “the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations” where the government makes “individualized assessments of the proposed uses for the property involved.” 42 U.S.C. § 2000cc(a)(2)(A)–(C); see Int’l Church of the Foursquare Gospel v. City of San Leandro, No. C 07-3605 PJH, 2007 WL 2904046, at *10–11 (N.D. Cal. Oct. 2, 2007).
63 Id. § 2000cc(a)(1)(A)–(B).
64 Id. § 2000cc(a)(2)(C).
65 See id.; Blaesser et al., Federal Land Use, supra note 24, at 633–37. RLUIPA does not specifically define what type of burden on religious exercise would constitute a substantial burden. Daniel J. Curtin, Jr. & Cecily T. Talbert, Curtin’s California Land Use and Planning Law 55 (25th ed. 2005). In Civil Liberties for Urban Believers v. City of Chicago, the U.S. Court of Appeals for the Seventh Circuit imposed a more narrow definition of substantial burden. 342 F.3d 752, 761 (7th Cir. 2005). In order to constitute a substantial burden on religion, a land use regulation must make religious exercise “effectively impracticable.” Id. The U.S. Courts of Appeal for the Third, Fourth, and Ninth Circuits
Under RLUIPA, the burden of proof first rests on the religious institution to demonstrate that a substantial burden exists. Once the religious institution makes that showing, the burden shifts to the municipality to prove that the regulation falls under the compelling governmental interest exception. RLUIPA is not intended as preemptive law; it neither preempts state law nor repeals federal law, provided that such laws are at least as protective of religious exercise as RLUIPA.

Opponents of RLUIPA criticize the loss of local control over zoning resulting from what they view as federal preemption of local control and an “assault on . . . federalism.” Opponents argue that land-use regulation is a local issue and that federal religious protections from land use laws conflict with the Establishment Clause because religious uses are placed in a special class. Anti-RLUIPA sentiment can be summed up by a statement published by the National Association of Counties: “We fully support religious freedom, but this bill is not about addressing discrimination. It’s about taking control away from neighborhoods and giving it to Washington.” Critics also argue that Employment Division v. Smith was wrongly decided and that legislation is not the correct way to protect religious beliefs.

There have been numerous challenges to the constitutionality and application of RLUIPA since its passage. For example, in Civil Liberties for Urban Believers v. Urban Believers of Chicago, the U.S. Court of Appeals for the Seventh Circuit avoided an inquiry into the constitutionality of RLUIPA by finding that it did not apply to an association of religious groups challenging the Chicago Zoning Ordinance as a violation of

appear to have adopted this standard as well. MacLean, supra note 8, at 1. However, Supreme Court decisions also provide guidance in interpreting what would constitute a substantial burden on religion. Curtin & Talbert, supra, at 55; see Lyng v. Nw. Indian Cemetery Protective Ass’n, 485 U.S. 439, 449–50 (1988); Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707, 717–18 (1981); see also Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227–28 (11th Cir. 2004) (holding that a finding of a substantial burden under RLUIPA requires a zoning ordinance to do more than inconvenience the religious institution).

66 42 U.S.C. § 2000cc(a) (1).
67 Curtin & Talbert, supra note 65, at 55.
69 See Runyon et al., supra note 1.
70 Id.
71 Id.
72 Id.
73 See RLUIPA.com, supra, note 6; see also Sara Smolik, Note, The Utility and Efficacy of the RLUIPA: Was It a Waste?, 31 B.C. ENVTL. AFF. L. REV. 723, 730 (2004) (noting that courts often avoid inquiries into RLUIPA’s constitutionality).
RLUIPA. The Supreme Court has yet to hear a case on the constitutionality of the land use provisions of RLUIPA, and thus far, all lower courts have found it constitutional. In a recent case to consider RLUIPA’s constitutionality, the U.S. Court of Appeals for the Second Circuit held that RLUIPA was a valid exercise of Congress’s power under the Commerce Clause and violated neither the Tenth Amendment nor the Establishment Clause.

III. STATE RELIGIOUS LAW

In addition to federal religious exemptions, states employ various methods to ensure that the government does not violate the free exercise rights of religious facilities. Several states have promulgated legislation to provide additional protections to religious facilities from state laws, including those laws regulating land use. Massachusetts has expressly protected religious institutions since 1920. Several other states have interpreted their constitutions to provide additional protections for the free exercise of religion from land use laws, including Michigan, Minnesota, Ohio, Pennsylvania, Vermont, Washington, and Wisconsin.

After the Supreme Court declared RFRA unconstitutional in City of Boerne v. Flores, eleven states passed their own versions of RFRA to reinstate the strict scrutiny standard stated in the Act. These statutes,

74 Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 762 (7th Cir. 2003).
75 Kellington, supra note 26, at 12-38 to -39; see Smolik, supra note 73, at 730. See generally Caroline R. Adams, Note, The Constitutional Validity of the Religious Land Use and Institutionalized Persons Act of 2000: Will RLUIPA’s Strict Scrutiny Survive the Supreme Court’s Strict Scrutiny?, 70 Fordham L. Rev. 2361 (2002) (discussing the constitutional debate over RLUIPA); Ada-Marie Walsh, Note, Religious Land Use and Institutionalized Persons Act of 2000: Unconstitutional and Unnecessary, 10 WM. & MARY BILL RTS. J. 189 (2001) (suggesting RLUIPA is unconstitutional). For a brief period of time, one district court in California held that the land use provisions of RLUIPA were unconstitutional. See Elsinore Christian Ctr. v. City of Lake Elsinore, 291 F. Supp. 2d 1083, 1102 (C.D. Cal. 2003) (finding RLUIPA unconstitutional because it exceeded Congress’s powers under the Commerce Clause). However, the U.S. Court of Appeals for the Ninth Circuit rejected this argument in Guru Nanak Sikh Society of Yuba City v. County of Sutter. 456 F.3d 978, 981 (9th Cir. 2006).
76 Westchester Day School v. Vill. of Mamaroneck, 504 F.3d 338, 354–57 (2d Cir. 2007).
77 See Runyon et al., supra note 1.
78 Id.

however, are not uniform. For example, the Texas and Oklahoma RFRA
s address zoning in separate sections from other uses and, thus,
may provide that zoning is exempt from free exercise.\textsuperscript{82} Specifically, the
Texas RFRA states that local governments do not lose authority with
regard to “zoning, land use planning, traffic management, urban nuis-
ance or historic preservation.”\textsuperscript{83} This provision, as well as a similar law
in Oklahoma, was enacted to reduce the confusion of local land use
advocates and to avoid a loss of municipal control.\textsuperscript{84}

Several states have considered, but not passed, similar legislation,
while others have not introduced RFRA-like legislation at all.\textsuperscript{85} Prior to
RLUIPA, states without specific legislative protection for religious insti-
tutions generally relied on the potentially unclear combination of the
\textit{Smith} standard and state case law to determine whether free exercise of
religion was unduly burdened by land use laws.\textsuperscript{86} Proponents of state
RFRA have argued that many states have not sufficiently interpreted
their constitutions in terms of religious freedom protections.\textsuperscript{87}
Massachusetts and Washington offer instructive examples of how states
address free exercise challenges to land use without RLUIPA.

A. Religious Zoning Exemptions in Massachusetts

1. The Dover Amendment

Prior to the enactment of RFRA and RLUIPA, Massachusetts passed
its own version of legislation providing religious exemptions from land-

\textbackslash §§ 110.001–.012 (Vernon 2006); Daniel N. Price, \textit{Note, The Constitutional Standard for Zon-
(2002).}

\textsuperscript{83} See Runyon et al., \textit{supra} note 1. Legislatures in Arizona, California, Louisiana, Michi-
gan, Maryland, Missouri, New York, and Oregon introduced bills that would have imple-
mented additional state protections for religious free exercise. \textit{Id.} All bills were either
withdrawn or failed to pass. \textit{Id.}

\textsuperscript{84} See Douglas Laycock, \textit{State RFRA and Land Use Regulation}, 32 U.C. Davis L. Rev. 755,
763–69 (1999); Roman P. Storzer & Anthony P. Picarello, Jr., \textit{The Religious Land Use and
Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Prac-

\textsuperscript{85} Council on Religious Freedom, \textit{supra} note 80, at 3.
use regulation.\textsuperscript{88} Massachusetts General Law chapter 40A, section 3, commonly known as the Dover Amendment, enumerates these exemptions.\textsuperscript{89} The purpose of the Dover Amendment is to prevent discrimination by prohibiting municipalities from giving a nonreligious facility preference over a religious facility.\textsuperscript{90} The Dover Amendment states:

No zoning ordinance or by-law shall . . . prohibit, regulate or restrict the use of land or structures for religious purposes . . . provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements.\textsuperscript{91}

While the Dover Amendment provides leeway for protected uses, including religious uses, developers of such projects are still required to comply with basic zoning regulations unless a developer of a religious use project can demonstrate that it would be too burdensome for the religious institution to comply.\textsuperscript{92} A municipality may not provide a religious institution with blanket exemptions from zoning laws or prevent a religious institution from complying with all land use controls.\textsuperscript{93}

The burden of proof in a Dover Amendment challenge to a zoning restriction falls on the plaintiff, typically the religious institution.\textsuperscript{94} A plaintiff must prove that “compliance with the requirements would substantially diminish or detract from the usefulness of a proposed structure, or impair the character of the institution’s campus, without

\textsuperscript{89} Id.; see Bible Speaks v. Bd. of Appeals, 391 N.E.2d 279, 283 n.10 (Mass. App. Ct. 1979). Attorney General v. Inhabitants of Dover was the first case to test Massachusetts General Laws chapter 40A, section 3, the namesake of the Dover Amendment, where the Attorney General of Massachusetts challenged the town of Dover’s bylaw that permitted only non-sectarian educational uses in residential zones. 100 N.E.2d 1, 2 (Mass. 1951). The U.S. Court of Appeals for the First Circuit invalidated the portion of the Dover bylaw that conflicted with the statute, finding that the Dover Amendment was “intended as an expression of a general policy to take away from all municipalities all power to limit the use of land for church or other religious purposes or for religious, sectarian, or denominational educational purposes.” Id. at 3.
\textsuperscript{90} Bible Speaks, 391 N.E.2d at 283 n.10.
\textsuperscript{91} Mass. Gen. Laws ch. 40A, § 3.
\textsuperscript{92} 18A Douglas A. Randall & Douglas E. Franklin, Massachusetts Practice, Municipal Law and Practice § 17.6 (5th ed. 2006).
\textsuperscript{93} Campbell v. City Council, 616 N.E.2d 445, 449 (Mass. 1993).
\textsuperscript{94} See 28 Arthur L. Eno, Jr. & William V. Hovey, Massachusetts Practice, Real Estate Law § 23.32 & n.4 (4th ed. 2004).
appreciably advancing the municipality’s legitimate concerns.”95 In seeking a balance between municipal concerns and prevention of discrimination, courts have enforced restrictions consistent with “promoting public health or safety, preserving the character of [a] neighborhood, or . . . other purposes” served by local zoning.96

While legal analysis of the Dover Amendment’s protections is performed on a case-by-case basis, some factors exist to guide a court in its review.97 For example, a court must consider the religious institution’s overall use of the structure, not merely the function of each part of the structure, when conducting an analysis of whether that structure is protected by the Dover Amendment.98 This approach ensures that separate functions within a religious facility are protected, including kitchens, parking lots, and steeples.99 Another factor relevant to the inquiry is whether the regulation would impair the character of the use.100

Although judges are not permitted to determine whether a specific aspect of a structure serves a religious function, they may inquire whether the entire structure serves a religious purpose.101 For example, in Needham Pastoral Counseling Center, Inc. v. Board of Appeals, the Massachusetts Court of Appeals found that a counseling center run by the Congregational Church of Needham that was open to the general public did not serve a religious purpose, but instead resembled a mental health center.102 Because a determination of religious purpose depends on the use of the facility, not on the sponsoring organization, the Needham Pastoral Counseling Center did not qualify for zoning exemptions under the Dover Amendment.103 The Court of Appeals also provided some guidance regarding what could be considered a religious activity or purpose.104 It stated that religious activity is not merely prayer and worship, but rather some “system of belief, concerning

96 RANDALL & FRANKLIN, supra note 92, § 17.6.
97 See Trs. of Tufts Coll. v. City of Medford, 616 N.E.2d 433, 438 (Mass. 1993); RANDALL & FRANKLIN, supra note 92, § 17.6.
100 Trs. of Tufts Coll., 616 N.E.2d at 439; Trs. of Boston Coll., 793 N.E.2d at 396.
102 557 N.E.2d at 46.
103 Id. at 47.
104 See id. at 45, 47.
more than the earthly and temporal, to which the adherent is faith-
full.\footnote{Id.}

The Dover Amendment does not prevent a municipality from ex-
ercising discretion in the special permit process.\footnote{Trs. of Boston Coll. v. Bd. of Aldermen, 793 N.E.2d 387, 393 (Mass. App. Ct. 2003). Thus, a special permit allows the zoning board to attach conditions to a use that is built into a zone. Burke, supra note 17, at 143.} Reasonable zoning regulations may be applied to a religious or educational institution that seeks a special permit.\footnote{Trs. of Boston Coll., 793 N.E.2d at 393.} A municipality, however, is forbidden from discriminating against a special permit application under the “guise of regulating bulk and dimensional requirements.”\footnote{Bible Speaks v. Bd. of Appeals, 391 N.E.2d 279, 285 (Mass. 1979); Trs. of Boston Coll., 793 N.E.2d at 393.} One recent case decided under the Dover Amendment may have further extended the scope of religious protection in Massachusetts to rival protections granted under RLUIPA.\footnote{See Martin v. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, 747 N.E.2d 131, 134 (Mass. 2001); Edith Netter, The View from Belmont, Massachusetts, 53 Land Use L. & Zoning Dig., Sept. 2001, at 8, 9.}

2. Massachusetts’s Example: \textit{Martin v. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints}

The Massachusetts Supreme Judicial Court (SJC) directly ad-

dressed the application of the Dover Amendment to restrictions placed on a proposed religious construction project in \textit{Martin v. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints}.\footnote{747 N.E.2d at 133.} \textit{Martin} involved a challenge to a maximum height restriction for parcels zoned as single residence-A (SR-A) in Belmont, Massachusetts.\footnote{Id. at 133–34.} A religious structure is a use by right in SR-A, but the religious institution must still comply with numerous zoning restrictions.\footnote{Id.} The Church of Jesus Christ of Latter-Day Saints sought to develop a nine-acre wooded lot into a new temple.\footnote{Id. at 134.} The temple, as approved by the zoning board, was eighty-three feet high, including a ten-foot tall statue of the Angel Moroni.\footnote{Id. at 134.} As the court notes, the Angel Moroni is a central religious symbol for the church, similar in importance to the Christian cross. \textit{Id.} at 134 n.7. Further, the zoning
of comparable size permitted a building height of no more than sixty feet with steeples of no more than eleven feet, two inches.\textsuperscript{115}

The Church petitioned the Belmont zoning board for either a special permit to allow its steeple to exceed the maximum height requirement or for “a determination that application of the bylaw’s height restriction to the steeple would violate the Dover Amendment.”\textsuperscript{116} After several months of public hearings, the zoning board determined that the height restriction would violate the Dover Amendment as applied to the Church.\textsuperscript{117} It found that there was “no grave municipal concern” and that the Church should be accommodated under the circumstances.\textsuperscript{118} Once the board granted a special permit to the Church, plaintiffs, who owned properties abutting the proposed temple site, filed suit in Massachusetts Superior Court.\textsuperscript{119} The Superior Court judge ruled in favor of plaintiffs, finding that “neither the presence nor the height of the steeple represents a necessary element of the Mormon religion.”\textsuperscript{120}

The SJC granted certiorari and reversed the decision of the Superior Court.\textsuperscript{121} It found several reversible errors.\textsuperscript{122} First, the trial judge improperly focused on whether the steeple itself was a religious use; the SJC determined that the Dover Amendment applied to the use of the land as a whole or a structure thereon, rather than a portion thereof.\textsuperscript{123} The SJC noted that if it employed a narrow construction of the Dover Amendment and analyzed each part of a structure, elements such as church kitchens and parking lots would not be protected.\textsuperscript{124} Thus, the SJC held that although the trial court may have focused on the steeple because it was the only part of the temple that did not comply with zoning requirements, this narrow approach was an improper interpretation of the statute.\textsuperscript{125}

\textsuperscript{115} \textit{Id.} at 133–34.
\textsuperscript{116} \textit{Martin}, 747 N.E.2d at 134.
\textsuperscript{117} \textit{Id.}
\textsuperscript{118} \textit{Id.}
\textsuperscript{120} \textit{Martin}, 747 N.E.2d at 137 (internal quotations omitted).
\textsuperscript{121} \textit{Id.} at 133.
\textsuperscript{122} \textit{Id.} at 137–38.
\textsuperscript{123} \textit{Id.}
\textsuperscript{124} \textit{Id.} at 138.
\textsuperscript{125} \textit{Id.}
Moreover, the SJC found error with the trial judge’s determination that the proposed temple’s steeple did not serve a religious purpose.\textsuperscript{126} The court held that the trial judge correctly determined that a religious purpose is “something in aid of a system of faith and worship,” but that the inquiry into whether the steeple served a religious purpose was prohibited by the First Amendment.\textsuperscript{127} The SJC held that the trial judge should have taken the inquiry only as far as was necessary to determine that temples are “places where Mormons conduct their sacred ceremonies.”\textsuperscript{128} Further inquiry required the judge to determine the validity of tenets of the religion, and the First Amendment prohibited such an inquiry.\textsuperscript{129}

Additionally, the SJC found that the Superior Court erred in requiring that the church prove that the height restrictions placed on the temple by the bylaw were unreasonable.\textsuperscript{130} A requirement is unreasonable when it “detracts from the usefulness of a structure[,] impose[s] excessive costs[,] or . . . impair[s] the character of the proposed structure.”\textsuperscript{131} While the lower court determined that the church should not receive an exemption because it had not shown that the height restriction would prevent or diminish the temple’s usefulness, the SJC held that the judge should have considered whether the height restriction would reduce the character of the temple with respect to its exempted use as a religious facility.\textsuperscript{132}

In conducting its inquiry under the Dover Amendment, the SJC found that the lower court incorrectly dismissed aesthetic and architectural beauty as valid factors in making a determination about the inclusion of the steeple.\textsuperscript{133} The SJC determined that, rather than a steeple being a minor facet of a temple, “[A] steeple is the precise architectural feature that most often makes the public identify the building as a religious structure.”\textsuperscript{134} Moreover, the SJC decided that even if the steeple

\begin{footnotes}
\item[126] Martin, 747 N.E.2d at 138.
\item[127] Id.
\item[128] Id.
\item[129] Id.
\item[130] Id. at 138–39.
\item[131] Peter A. Spellios, Zoning: The Dover Amendment: Martin v. The Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, 87 Mass. L. Rev. 128, 129 (2003); see Martin, 747 N.E.2d at 139.
\item[132] Martin, 747 N.E.2d at 139.
\item[133] Id.
\item[134] Id. at 140.
\end{footnotes}
were not central to Mormon religious doctrine, this inquiry should not be a defining factor in a Dover Amendment case.\textsuperscript{135}

Under the language of the Dover Amendment, the inquiry into the reasonableness of the requirement is typically balanced against a legitimate municipal concern.\textsuperscript{136} In \textit{Martin}, however, the SJC and the Belmont Zoning Board balanced the reasonableness of the requirement against a critical or grave municipal concern.\textsuperscript{137} According to one critic of the SJC’s decision in \textit{Martin}, this higher standard is not found in the text of the law, but instead resembles RLUIPA’s requirement that the government show a compelling governmental interest.\textsuperscript{138}

\textbf{B. Religious Exemptions from Land Use Controls in Washington}

Unlike Massachusetts, Washington relies on a series of three cases to form the backbone of analysis for conflicts between land use regulations and religious freedom.\textsuperscript{139} These cases work in concert with the Washington State Constitution, which provides broader protections to land use regulations than the U.S. Constitution.\textsuperscript{140} Two of the three cases originated from a single lawsuit filed by the First Covenant Church, which sought to overturn a decision by the City of Seattle that designated the church as an historic landmark and prevented the church from making changes to the exterior of the structure.\textsuperscript{141}

In \textit{First Covenant Church of Seattle v. City of Seattle (First Covenant I)}, the Washington Supreme Court (WSC) held that the historic landmark designation burdened the free exercise of First Covenant Church.\textsuperscript{142} The Supreme Court, however, granted certiorari and vacated the deci-

\begin{itemize}
  \item \textsuperscript{135} \textit{Id.}
  \item \textsuperscript{136} \textit{Mass. Gen. Laws} ch. 40A, § 3 (2006); see \textit{Netter, supra note 109, at 9.}
  \item \textsuperscript{137} 747 N.E.2d at 134, 140; see \textit{Netter, supra note 109, at 9.}
  \item \textsuperscript{138} Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc(a)(1)(B) (2000); see \textit{Netter, supra note 109, at 9.}
  \item \textsuperscript{139} See \textit{generally} \textit{First United Methodist Church v. Hearing Exam’r, 916 P.2d 374 (Wash. 1996); First Covenant Church of Seattle v. City of Seattle (First Covenant II), 840 P.2d 174 (Wash. 1992); First Covenant Church of Seattle v. City of Seattle (First Covenant I), 787 P.2d 1352 (Wash. 1990), vacated, 499 U.S. 901 (1991) (together, providing the framework for Washington’s free exercise protections).}
  \item \textsuperscript{141} \textit{First Covenant II}, 840 P.2d at 177; \textit{First Covenant I}, 787 P.2d at 1353.
  \item \textsuperscript{142} 787 P.2d at 1353–54.
\end{itemize}
sion of the WSC following the change in free exercise jurisprudence in Employment Division v. Smith. In First Covenant Church of Seattle v. City of Seattle (First Covenant II), the WSC distinguished First Covenant II from Smith and relied on the state constitution to reinstate its holding in First Covenant I—that the historic landmark designation interfered with First Covenant Church’s right to free exercise of religion. In a third case, First United Methodist Church v. Hearing Examiner, the WSC held that the church’s lawsuit was ripe for review, even though First United Methodist Church filed when the city began the historic landmark designation process, rather than waiting for its conclusion.

In analyzing a religious land use case in Washington, the courts apply strict scrutiny to the actions of the municipality accused of burdening the religious institution. First, Washington courts must determine whether the “parties have a sincere religious belief.” This standard does not allow a judge free rein to determine whether a religious belief is reasonable. Instead, the religious institution “must prove only that their religious convictions are sincere and central to their beliefs.” Washington relied on Supreme Court precedent to establish this standard of review for a sincere religious belief.

The second test under the Washington analysis is “whether the challenged enactment or action constitutes a burden on the free exercise of religion.” Here, the courts rely on the analysis from the three cases, particularly First Covenant II. If a statute is found to have a coercive effect on the practice of a person’s religion, then it unduly

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144 First Covenant II, 840 P.2d at 177; see Smith, 494 U.S. at 872.
147 Id.
148 Id.
149 Backlund v. Bd. of Comm’rs of King County Hospital, 724 P.2d 981, 985 (Wash. 1986).
burdens that person’s free exercise of religion. A statute can be unduly burdensome even if it is facially neutral, so long as the petitioner can show that it is burdensome on his particular religious practice.

Finally, if a petitioner can show that the government action is unduly burdensome on his religious beliefs, then the government may offset the burden by showing a compelling state interest. In Munns v. Martin, the WSC acknowledged that there are numerous compelling governmental interests, some of which have not yet been tested by the courts. However, the court noted that compelling state interests are “based in necessities of national or community life such as clear threats to public health, peace, and welfare.” Even if the state shows that it has a compelling state interest, this third inquiry does not immediately end—the state must also demonstrate that it used the least restrictive possible means to achieve its purpose.

Most cases in Washington that have addressed the conflict between land use regulations and religious freedom have involved challenges to historic preservation laws. However, in a recent case concerning a church’s application for a special permit, the WSC held that the local government has some discretion when land use regulations encounter religion.

1. Washington’s Example: Open Door Baptist Church v. Clark County

The parcel of land at issue in Open Door Baptist Church v. Clark County was located in a rural estate (RE) zoning district. The conflict arose after Open Door Baptist Church failed to obtain a conditional use permit. Open Door received a notice of RE violation, which required the church to either “cease all business activities or apply for a

154 Munns, 930 P.2d at 321; First Covenant II, 840 P.2d at 187.
155 Munns, 930 P.2d at 321.
156 Id.
157 Id.; see First Covenant II, 840 P.2d at 187.
158 Munns, 930 P.2d at 321; First Covenant II, 840 P.2d at 187.
159 Carnell, supra note 140, at 705; see First United Methodist Church v. Hearing Exam’r, 916 P.2d 374, 378 (Wash. 1996); First Covenant II, 840 P.2d at 177; First Covenant Church of Seattle v. City of Seattle (First Covenant I), 787 P.2d 1352, 1353 (Wash. 1990), vacated, 499 U.S. 901 (1991).
160 Carnell, supra note 140, at 705; see Open Door Baptist Church v. Clark County, 995 P.2d 33, 41 (Wash. 2000).
161 995 P.2d at 35.
162 Id. at 34.
conditional use permit within ten days.” 163 Although a church originally occupied the parcel, the structure had been used as an art school for the twelve years prior to Open Door’s purchase of the land. 164 In a hearing where Open Door disputed the need for a conditional use permit, the hearing examiner found that the building’s right to be considered a nonconforming use without a conditional permit expired when it ceased to be used as a church during the twelve years prior to Open Door’s purchase. 165

Open Door appealed the decision of the hearing examiner to the Clark County Superior Court. 166 The Superior Court found that the permitting process improperly denied Open Door its rights because the hearing examiner did not observe the appropriate legal standards. 167 Clark County appealed the decision, and a panel of the Second Division of the Washington Court of Appeals reversed, finding that the requirement of obtaining a conditional use permit did not impose an unconstitutional burden on Open Door. 168 The Court of Appeals held that if Open Door were denied a conditional use permit, then it could again challenge the decision. 169 Open Door petitioned the WSC for review. 170 After granting review, the WSC affirmed the appellate court’s decision, finding that requiring the church to obtain a conditional use permit did not constitute a burden on Open Door’s freedom of religious exercise. 171

The WSC held that requiring a church to merely alert its neighbors of its intent to relocate into the neighborhood is the same standard that any construction project necessitating a special use permit must meet. 172 Because nonconforming uses are not permitted to convert into another type of nonconforming use, it was not unreasonable to require Open Door to obtain a conditional use permit. 173 The court reached this conclusion even though the Washington Constitution provides broader protection for free exercise than the U.S. Consti-

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163 Id. at 35.
164 Id. at 37.
165 Id. at 35.
166 Id.
167 Open Door Baptist Church, 995 P.2d at 35.
168 Id. at 36.
169 Id.
170 Id.
171 Id. at 48.
172 Id. at 37.
Applying the factors enumerated in *Munns*, the WSC found that there was no question as to whether Open Door had a “sincere religious belief.” The WSC did find, however, that Open Door’s petition failed under the second prong of *Munns* because there was not a burden on the free exercise of religion. Open Door’s suit was too prospective because the church had not even applied for a special permit before filing its claim; it had merely speculated that that the permit would not be granted.

To establish a successful claim, Open Door first would have needed to exhaust its administrative remedies by applying for an administrative permit. The church could continue its nonconforming use until the resolution of the permit process. Because the Court of Appeals found that the county must reduce or waive the permit fee if Open Door showed an inability to pay, the church’s burden was “a bit threadbare and based upon little more than the inconvenience of filling out paperwork.” Finally, the WSC found that even if Open Door suffered a burden on its free exercise of religion, a less restrictive alternative to requiring Open Door to file an application and follow the administrative process did not exist. By requiring religious institutions to follow the administrative process, the WSC sought to ensure that religious institutions did not end up “exempt from zoning . . . as a practical matter.” The WSC concluded by reiterating that a denial of Open Door’s conditional use permit application might enable the church to prevail on a future free exercise claim.

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174 *Open Door Baptist Church*, 995 P.2d at 38; *First Covenant Church of Seattle v. City of Seattle (First Covenant II)*, 840 P.2d 174, 189 (Wash. 1992).


176 *Open Door Baptist Church*, 995 P.2d at 42; *Munns*, 930 P.2d at 321.

177 *Open Door Baptist Church*, 995 P.2d at 42.

178 Id.


180 *Open Door Baptist Church*, 995 P.2d at 43.

181 Id. at 46.

182 Id.

183 Id. at 48.
IV. Is RLUIPA Necessary, or Can States Handle Religious Land-Use Jurisprudence on Their Own?

Since the enactment of RLUIPA in 2000, at least fifty separate cases have raised issues that concern its statutory provisions. This number is in addition to the many conflicts where the mere mention of RLUIPA was sufficient to encourage local governments to concede to religious facilities to avoid litigation. Critics of RLUIPA have argued that its passage has spurred churches to test their boundaries, creating unnecessary religious land use litigation. However, many of the vocal critics of RLUIPA represent interest groups affiliated with planning and local government. Although RLUIPA expressly states that it does not preempt state laws, its existence may result in religious land uses receiving different treatment from other land uses.

Interactions between RLUIPA and local religious land use regulations vary greatly between states that protect religious land uses through legislation or other protective measures and states that have not created protections for religious land use. In states that have protections for religious land uses, there are few differences, if any, in the analysis and outcome of religious land use issues. However, in states without additional protections for religious land uses, religious groups may reach more favorable results under RLUIPA than under state law analysis. In these states, not only is the analysis entirely different, but the outcomes under RLUIPA may be directly contrary to the outcome of litigation analyzed solely under state laws.

While RLUIPA provides states with broad federal protection of religious land use, it also removes states from the process of addressing religious land use issues by effectively preempting state law. Even though RLUIPA specifically states that it does not preempt other laws, religious institutions can choose to raise a claim under RLUIPA, rather than risk the uncertainty of their own states’ RFRA provisions or case law when

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184 See RLUIPA.com, supra note 6.
185 See Hamilton, supra note 4, at 98; RLUIPA.com, supra note 6.
186 See Hamilton, supra note 4, at 97–98; Runyon et al., supra note 1.
187 Seeid.
189 See Council on Religious Freedom, supra note 80, at 3.
190 See discussion infra Part IV.A.
191 See discussion infra Part IV.B.
192 See id.
193 See Runyon et al., supra note 1; see also Hamilton, supra note 4, at 78–110 (providing a harsh criticism of religious land use laws, including RFRA and RLUIPA).
dealing with religious land use conflicts. Moreover, this difference in state and federal protections is even greater in states that considered, but did not pass, their own RFRAs, thereby choosing not to extend heightened protection to religious land uses. Without RLUIPA, land use decisions in states that intentionally did pass state RFRAs would be guided by the rational basis review under the Employment Division v. Smith test instead of the strict scrutiny of RLUIPA. Unless a law was specifically targeted at discrimination against religion, a religious property would be guided by the same regulations as any secular property.

A. States That Have Protections for Religious Land Uses in Place

1. Comparing the Policies Behind RLUIPA, the Dover Amendment, and the Washington Analysis

Most states with statutory or case law protections of religious land use share the objective articulated in RLUIPA: to provide religious organizations with protection from discriminatory land-use regulation. For example, both RLUIPA and the Dover Amendment are intended to protect religious land uses from discrimination by local government or

194 Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-3(h) (2000); see Okla. Stat. tit. 51, §§ 251–258 (Supp. 2007); Tex. Civ. Prac. & Rem. Code Ann. § 110.010 (Vernon 2006); Price, supra note 82, at 366. Before RLUIPA’s passage, local governmental lobbyists attempted to include a provision in RLUIPA that required religious institutions to exhaust the local land use process before a RLUIPA suit ripened. Hamilton, supra note 4, at 104–05. This provision was not included in RLUIPA; thus, a religious institution invoking RLUIPA does not necessarily have to exhaust all local options to have a ripe suit under the Act. Id. at 105.


197 See Hamilton, supra note 4, at 95–96.

198 See Mass. Gen. Laws ch. 40A, § 3 (2006); 146 Cong. Rec. S7774-01 (daily ed. July 13, 2000) (statements of Sens. Hatch & Kennedy); see also Runyon et al., supra note 1 (providing examples of state protections). For the purposes of this Note, the protections of religious land use established in Massachusetts and Washington will serve as representative examples. Massachusetts will be representative of states with RFRA-like statutes, and Washington will be representative of states with case law protections in place.
zoning boards.\textsuperscript{199} RLUIPA was intended to protect against the “highly individualized and discretionary processes of land use regulation.”\textsuperscript{200} Similarly, the Dover Amendment strives to protect religion from discrimination by municipalities by limiting the ability of the local government to give preference to a secular use over a nonsecular use.\textsuperscript{201}

The protections created by case law in Washington serve a similar purpose.\textsuperscript{202} The Washington case law analysis seeks to prevent burdens on religious exercise by protecting religion from laws having a coercive effect on religious practice, including facially neutral laws.\textsuperscript{203} The WSC recognized that although freedom of religion is not an absolute right, its protections do have a preferred position.\textsuperscript{204} Although most Washington religious land use cases have dealt with repercussions from historic land use designations, such cases present a framework of protection similar to the framework found in RLUIPA and the Dover Amendment.\textsuperscript{205}

Like RLUIPA, the Dover Amendment strives to strike a balance between allowing religious uses and “honoring legitimate municipal concerns.”\textsuperscript{206} Courts that have applied the Dover Amendment have rec-

\textsuperscript{199} See Mass. Gen. Laws ch. 40A, § 3; 146 Cong. Rec. S7774-01 (daily ed. July 13, 2000) (statements of Sens. Hatch & Kennedy). Specifically, legislatures sought to ensure that churches were not excluded from locating in places where other large groups congregated for secular purposes. Id. One of the primary concerns in enacting RLUIPA was to ensure that local governments could not avoid prohibitions against exclusionary religious zoning by stating some illusory basis for the denial of a permit. Id. By subjecting actions of local government to strict scrutiny, RLUIPA not only ensures that there must be a compelling governmental interest, but that the interest could not be protected through a less restrictive means. 42 U.S.C. § 2000cc(a)(1)-(B); 146 Cong. Rec. S7774-01 (daily ed. July 13, 2000) (statements of Sens. Hatch & Kennedy). Further, state and local governments are not permitted to circumvent the intent of RLUIPA by defining the scope of terms within RLUIPA. Konikov v. Orange County, 410 F.3d 1317, 1324–25 (11th Cir. 2005) (per curiam); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1229–31 (11th Cir. 2004).


\textsuperscript{204} First Covenant Church of Seattle v. City of Seattle (First Covenant II), 840 P.2d 174, 187 (Wash. 1992); see First United Methodist Church v. Hearing Exam’r, 916 P.2d 374, 378 (Wash. 1996); First Covenant Church of Seattle v. City of Seattle (First Covenant I), 787 P.2d 1352, 1357 (Wash. 1990), vacated, 499 U.S. 901 (1991).

\textsuperscript{205} First Covenant I, 787 P.2d at 1356; see Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943).


\textsuperscript{207} Martin v. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, 747 N.E.2d 131, 137 (Mass. 2001); see Trs. of Tufts Coll. v. Medford, 616 N.E.2d 433,
ognized that local zoning regulations are designed to be uniformly enforceable; just as local governments should not uniformly discriminate against religious uses, they should not uniformly allow religious uses to be built without exercising discretion. Washington courts have also recognized the need to balance the concerns of religious institutions with those of the local government. In Open Door Baptist Church v. Clark County, the court determined that allowing the plaintiff to proceed without a conditional use permit would “add too much weight to one side of the scale.” Thus, although RLUIPA, the Dover Amendment, and the Washington cases express their protections for religious land uses in different ways, each strives to reduce discrimination against religious land uses by providing an additional measure of protection from the individualized and discretionary processes of local land-use regulation.

2. Would Martin v. Corporation of the Presiding Bishop of Jesus Christ of Latter-Day Saints Be Decided Differently Under RLUIPA?

Martin v. Corporation of the Presiding Bishop of Jesus Christ of Latter-Day Saints is particularly suitable to scrutiny under RLUIPA because of the manner in which the Massachusetts SJC chose to analyze the case. Although claims were brought under both RLUIPA and the Dover Amendment, the SJC declined to address the RLUIPA claim because it found that the decision was clear under the Dover Amendment. The SJC’s analysis in Martin was guided by the text of the Dover Amendment, which prohibits regulation or restriction of “the use of land or structures for religious purposes.” Within this prohibition, the Dover Amendment specifically notes that “reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area,
setbacks, open space, parking and building coverage requirements” are still applicable.214 In conducting its case-specific inquiry, the SJC determined that the steeple height was reasonable because: (1) the steeple was part of a larger structure that served a religious purpose; (2) the structure served a religious purpose as far as the court was permitted to determine; and (3) the zoning board found that controlling the steeple height of churches served no municipal concern.215

Had the SJC analyzed Martin under RLUIPA, the court would first have examined whether the land use regulation placed a substantial burden on religion.216 If the religious institution demonstrated that a substantial burden existed, then the SJC would have examined whether the local government could show that its regulation fulfilled a compelling governmental interest.217 Finally, if the government established a compelling governmental interest, then the court would have considered whether the method of furthering that interest was achieved by the least restrictive means.218

If the SJC had chosen to use RLUIPA to analyze Martin, only the first two steps of analysis under RLUIPA would have been necessary.219 The SJC likely would have determined that the restriction on steeple height placed a substantial burden on the institution’s religious practice.220 Further, unless a belief is “so bizarre, so clearly nonreligious in motivation,” courts employing RLUIPA analysis will generally defer to a religious institution’s determination of what constitutes a religious be-

214 Id.
217 Id. § 2000cc(a)(1)(A).
218 Id. § 2000cc(a)(1)(B).
219 See id. § 2000cc(a)(1); 747 N.E.2d at 140.
220 See 42 U.S.C. § 2000cc(a)(1); Martin, 747 N.E.2d at 138. This conclusion assumes that the court would have found that separating a building into its individual elements, each requiring a specific religious use, would not be a feasible analysis for courts to undertake. See id. It is possible, though unlikely, that because the SJC relied on state law to conclude that separating a building into each rudimentary element leads to impossible results, the court would reach a different answer under RLUIPA. See id. There is no evidence that any case decided under RLUIPA has broken a structure into individual elements and conducted its inquiries based on whether each individual element served a religious purpose; rather, the cases have looked at the structure as a whole. See Blaeser Et Al., Federal Land Use, supra note 24, at 621–79. However, if the SJC were to employ the “effectively impracticable” standard found in Civil Liberties for Urban Believers v. City of Chicago, but not adopted by the U.S. Court of Appeals for the First Circuit, then it is unlikely that the church could show a substantial burden. See 342 F.3d 752, 761 (7th Cir. 2003).
In *Martin*, the church emphasized that ascendancy toward heaven is a specific value of the Mormon religion. The court likely would have concluded that limiting the Mormon temple congregation’s ability to express its “inspirational value” would place a substantial burden on religious exercise.

Assuming that the SJC were to find that the limitation on the church’s steeple design placed a substantial burden on religion, it would then have analyzed whether there was a compelling governmental interest in regulating the height of the steeple. Here, the zoning board itself did not allege a municipal concern, nor did the SJC determine that there was evidence of one. Instead, the zoning board concluded that the steeple height exemption was reasonable “in light of the function of a steeple, and the importance of proportionality of steeple height to building height.” It is unlikely that the SJC would have drawn a different conclusion under RLUIPA, as the zoning board did not take issue with the proposed height of the steeple.

Because the zoning board did not allege a compelling governmental interest and the SJC would have been unlikely to find one under RLUIPA, it would not have been necessary for the court to determine if restrictions on steeple height were the least restrictive means of furthering a compelling governmental interest. Based on the similarities between the protections under the Dover Amendment and RLUIPA, as well as the nature of the SJC’s analysis in *Martin*, the SJC probably would have reached the same conclusion under RLUIPA: that the zoning board correctly granted the special permit allowing the taller steeple.

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222 747 N.E.2d at 137. The SJC determined that it was inappropriate for the trial judge to determine that ascendancy toward heaven was “not a matter of religious doctrine” and, thus, concluded that a steeple could in fact be an expression of a religious belief. Id.

223 See id.


225 *Martin*, 747 N.E.2d at 140.

226 Id.


3. Would Open Door Baptist Church v. Clark County Be Decided Differently Under RLUIPA?

Unlike in Martin, where the SJC applied a state statutory scheme similar to RLUIPA, in Washington, courts apply a three-part test developed by the WSC. When a religious land use case arises in Washington, the court first determines whether the religious institution has a sincere religious belief. Then, if the court concludes that the religious convictions at stake are "sincere and central to their beliefs," the court determines whether the land use regulation has a coercive effect that burdens the religious practices at issue. Finally, if the court finds that the regulation is unduly burdensome, the state or municipality may defeat the claim by showing a compelling state interest, and that the government is implementing this interest through the least restrictive means possible. Although the WSC relies on its own case law precedent to decide religious land use cases, the test resembles that of RLUIPA. The primary difference between RLUIPA and Washington’s test appears to be that the latter explicitly permits the judge some, albeit small, discretion in determining whether a religious belief is sincere.

The conflict in Open Door Baptist Church v. Clark County involved a church that failed to apply for a conditional use permit that would have allowed it to continue as a nonconforming use. The WSC, applying its three-part test, found that the mere requirement that Open Door file for a permit did not constitute a burden on religion. The WSC left open the possibility, however, that denial of a conditional use permit might constitute a burden on religion.

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230 See generally First United Methodist Church v. Hearing Exam’r, 916 P.2d 374 (Wash. 1996); First Covenant Church of Seattle v. City of Seattle (First Covenant II), 840 P.2d 174 (Wash. 1992); First Covenant Church of Seattle v. City of Seattle (First Covenant I), 787 P.2d 1352 (Wash. 1990), vacated, 499 U.S. 901 (1991) (providing the three-case basis for Washington’s free exercise jurisprudence).


233 Munns, 930 P.2d at 321.


236 Open Door Baptist Church v. Clark County, 995 P.2d 33, 35 (Wash. 2000).

237 Id. at 48.

238 Id. The WSC specifically noted that if the denial of a conditional use permit required the church to close, then the state must show a compelling state interest in denying the permit. Id. at 48 n.16. Open Door Baptist Church was decided less than three months
If a RLUIPA analysis had been applied to the facts in *Open Door Baptist Church*, the court first would have determined whether the restrictions placed a substantial burden on the religious exercise of Open Door.\(^{239}\) Here, the court would probably have found that there was no burden placed on Open Door’s religious exercise because Open Door sought to avoid “even *applying* for a permit that would allow an otherwise disallowed use.”\(^{240}\) Open Door raised two additional claims for a substantial burden on religion in the original case, both of which would also have failed under a RLUIPA analysis.\(^{241}\) First, Open Door claimed that a conditional use permit “would *probably* not be granted.”\(^{242}\) Because Open Door had not filed a permit application, the WSC, applying RLUIPA, likely would have reached the conclusion that it did using its three-part test; namely, that this claim was too prospective to analyze.\(^{243}\)

Finally, Open Door claimed that the cost of applying for a permit was a financial burden.\(^{244}\) This argument also would have failed under RLUIPA, as the Court of Appeals had ordered Clark County to reduce or eliminate the permitting fee if Open Door showed a financial burden.\(^{245}\) Under RLUIPA, municipalities have the option of avoiding the Act by “changing the policy or practice that results in a substantial burden on religious exercise” through various means.\(^{246}\) However, even if the court found a substantial financial or other burden on Open Door’s religious freedom, it probably would still have found that Clark County had a compelling governmental interest.\(^{247}\) The court in *Open Door Baptist Church* recognized that local governments have a compelling interest in upholding the residential character of a neighborhood.\(^{248}\) Further, the court found that it was reasonable to require the church to go through a public permitting process where neighbors

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\(^{239}\) See 42 U.S.C. § 2000cc(a)(1); 995 P.2d at 40.

\(^{240}\) *Open Door Baptist Church*, 995 P.2d at 40.

\(^{241}\) See 42 U.S.C. § 2000cc(a)(1); *Open Door Baptist Church*, 995 P.2d at 42.

\(^{242}\) *Open Door Baptist Church*, 995 P.2d at 42.


\(^{244}\) *Open Door Baptist Church*, 995 P.2d at 42.

\(^{245}\) Id. at 42–43.

\(^{246}\) 42 U.S.C. § 2000cc-3(e).

\(^{247}\) See 42 U.S.C. § 2000cc(a)(1)(A); *Open Door Baptist Church*, 995 P.2d at 47.

\(^{248}\) 995 P.2d at 47.
would have the opportunity to receive notification and to comment at a public hearing. 249

Finally, under the RLUIPA analysis, the court would have determined whether a less restrictive means existed for Clark County to protect its compelling governmental interest. 250 Had Open Door filed for a conditional use permit, Clark County would have allowed it to continue operating its nonconforming use throughout the conditional use permitting process. 251 Moreover, although there was a lengthy application process, this process was no more burdensome than it was for a secular organization. 252 Because local governments have an interest in being alerted when new nonconforming uses come into their jurisdiction, it is unlikely that a Washington court that was applying RLUIPA would have found that there was a less restrictive means available than the typical permit application process that still protected the governmental interest. 253

B. States That Rely on Federal Law in Deciding Religious Land Use Cases

States that do not codify or otherwise articulate the appropriate test for protection of the free exercise of religion in land use cases must rely on the federal statutory or case law to determine whether a land use regulation infringes on the free exercise of religion. 254 These states remain at the mercy of the federal statutory laws, so their religious land-use law standards have changed drastically since the Supreme Court decided Smith. 255

In the time between the demise of RFRA and the enactment of RLUIPA, courts relied on the analysis set forth in Smith to determine whether a law infringed upon freedom of religion. 256 The Court in Smith held that states are free to regulate laws that do not specifically

249 Id.
251 Open Door Baptist Church, 995 P.2d at 42.
252 Id. at 47.
253 See id.
254 See 42 U.S.C. § 2000cc-3(h). States in this position include: (1) states with yet-to-be interpreted RFRA provisions that specifically address religious land use; (2) states that considered but failed to pass state RFRA’s; and (3) states that have not considered RFRA or case law tests to address this issue. See Okla. Stat. tit. 51, §§ 251–258 (Supp. 2007); Tex. Civ. Prac. & Rem. Code Ann. § 110.010 (Vernon 2006); Hamilton, supra note 4, at 109; Runyon et al., supra note 1.
255 See discussion supra Part I.B, II (discussing changes in standards and jurisprudence).
256 Employment Div. v. Smith, 494 U.S. 872, 879 (1990); see Miller, supra note 50, § 2(a).
target religious activities for disparate treatment.\textsuperscript{257} The only means by which exceptions to neutral laws—including land use regulations—may be granted is through the full legislative process.\textsuperscript{258} No court has found that typical land use regulations target religious activities; therefore, the Smith standards drastically reduce the ability of religious institutions to fight what they perceive to be discriminatorily applied laws.\textsuperscript{259}

Instead, Smith limits the laws that religious institutions are able to challenge to those that facially target religious activities, an extremely difficult standard to meet.\textsuperscript{260} Few land use cases decided after Smith have been able to establish disparate treatment of religious uses to a degree sufficient for a court to find that the challenged law was not generally applicable.\textsuperscript{261} If a court were to find that a law targeted a religious practice under the Smith analysis, then that law would be required to protect compelling governmental interests through the least restrictive means feasible or it would be found unconstitutional.\textsuperscript{262}

At least one critic of the Smith analysis notes that what constitutes a generally applicable law actually seems to be a law that was “enacted without a constitutionally forbidden motive.”\textsuperscript{263} Simply put, laws that are not motivated by hostility to religion in general, or hostility to a particular faith, appear to be sufficiently neutral to withstand the Smith analysis.\textsuperscript{264} Laws upheld under Smith include those that “enact[] special rules for churches, deliberately exclude[] all new churches, pick[] and choose[] among religious practices or appl[y] through individualized assessments that select churches with gross disproportion.”\textsuperscript{265}

\begin{enumerate}
\item See 494 U.S. at 879.
\item Id. at 890; SELMI & KUSHNER, supra note 14, at 351.
\item See 494 U.S. at 890; BLAGESSER ET AL., FEDERAL LAND USE, supra note 24, at 607–08.
\item See Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 546 (1993); 494 U.S. at 888; BLAGESSER ET AL., FEDERAL LAND USE, supra note 24, at 607–08.
\item See Miller, supra note 50, §§ 2(a), 26(b). In fact, two of the three cases Miller mentions in the ALR annotation are First Covenant Church of Seattle v. City of Seattle (First Covenant II) and First United Methodist Church of Seattle v. Hearing Examiner, both of which comprise the basis for Washington’s religious land-use jurisprudence and were decided based on the greater protection of free exercise found in Washington’s State Constitution. See Munns v. Martin, 930 P.2d 318, 321 (Wash. 1997); First United Methodist Church v. Hearing Exam’r, 916 P.2d 374, 381 (Wash. 1996); First Covenant Church of Seattle v. City of Seattle (First Covenant II), 840 P.2d 174, 189 (Wash. 1992). But see Miller, supra note 50, § 26(b).
\item Church of the Lukumi Babalu Aye, 508 U.S. at 546.
\item Laycock, supra note 86, at 768.
\item Id.
\item Id. at 768–69; see Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 468 & n.2 (8th Cir. 1991); St. Bartholomew’s Church v. City of New York, 914 F.2d 348, 355 (2d Cir. 1990).
\end{enumerate}
The passage of RLUIPA—as well as RFRA—shifted the burden in religious land use cases to local governments. Rather than giving the religious institution the heavy burden of proving religious discrimination, the local government has the burden of defeating strict scrutiny by showing a compelling governmental interest. This test, regarded as the “most demanding test known to constitutional law,” requires the local government to show that any limitations placed on the practice of religion are as minimal as possible while still protecting a compelling governmental interest.

1. Illustrating the Difference: Martin Under the Smith Standard

As illustrated in the previous subsection, it is likely that the outcome in Martin would have remained the same if the Massachusetts SJC had elected to employ RLUIPA instead of the Dover Amendment in its analysis. However, the result of the case likely would have been quite different if the circumstances in Martin occurred in a state without its own protections and without RLUIPA. If neither RLUIPA nor the Dover Amendment provided greater protections than the Smith analysis, it is extremely likely that the steeple height would have remained capped at the limit found in the zoning ordinance, unless the church was able to push an exception through the legislative process.

Under the Smith analysis, the court would first have examined the law at issue in Martin. Although one court found that the targeted application of a local zoning law discriminated against a particular religious group, in general, zoning laws are considered to be laws of neutral application. Assuming that the SJC found the restrictions on

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268 See City of Boerne, 521 U.S. at 534.
269 See discussion supra Part IV.A.2.
271 494 U.S. at 890; Selmi & Kushner, supra note 14, at 351.
272 Smith, 494 U.S. at 879.
273 Cam v. Marion County, 987 F. Supp. 854, 859 (D. Or. 1997); see Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 763 (7th Cir. 2003). In Cam, the conflict arose over an offshoot of a local church that sought to create a worship space in a local farm building. 987 F. Supp. at 855. The court noted that a law that merely appeared to be facially neutral, but used to target religious groups, was not a facially neutral law similar to the controversy in Smith. Id. at 862; Miller, supra note 50, § 26(b). Because the court found that the decision of the hearing officer favored one religious sect over another, the denial of the permit did not apply a generally neutral law. Cam, 987 F. Supp. at 862.
building height to be generally applicable and facially neutral, the Martin case would likely have proceeded no further.\(^ {274} \) Because Smith held that states are free to regulate through generally applicable laws that do not target religious practices, the church in Martin would have been required to show that the building height restrictions were a pretext used by the government to prevent religious uses, or the court’s inquiry would have ended.\(^ {275} \)

2. Illustrating the Difference: Open Door Baptist Church Under the Smith Standard

Unlike Martin, the result of Open Door’s actual suit would remain the same if analyzed using Smith’s rational basis test.\(^ {276} \) The prospective nature of Open Door’s claim would make it difficult for the church to prevail under any test, as success on the merits would require a court to determine that any permitting or notification requirement whatsoever constitutes an excessive burden on religion.\(^ {277} \) While there is no difference in outcome on the actual merits of Open Door’s case under the Smith analysis, if Clark County were to deny Open Door the special permit, the Smith analysis would not provide the church with a remedy.\(^ {278} \)

Under both Washington case law and RLUIPA, a future suit based on the denial of a special permit probably would have succeeded.\(^ {279} \) Under the Smith analysis, however, Open Door’s success in challenging the denial of a special permit is improbable.\(^ {280} \) First, the court would have examined the law at issue—here, the requirements for a special permit.\(^ {281} \) As in the Smith analysis of Martin, the court would have determined that the laws concerning special permits were generally applicable and facially neutral.\(^ {282} \) A court using the Smith analysis would

\(^ {274} \) See 494 U.S. at 885.

\(^ {275} \) See Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531 (1993); Smith, 494 U.S. at 885. If the church was able to show that the regulations were a pretext to discriminate against religious practice, the same result would occur as when the Dover Amendment or RLUIPA were utilized. See Church of the Lukumi Babalu Aye, 508 U.S. at 546; see also discussion supra Part IV.A.2 (discussing the outcomes under RLUIPA and the Dover Amendment).

\(^ {276} \) See Smith, 494 U.S. at 879; Miller, supra note 50, § 2(b).

\(^ {277} \) See Open Door Baptist Church v. Clark County, 995 P.2d 33, 42 (Wash. 2000).

\(^ {278} \) See Smith, 494 U.S. at 879, 885; Open Door Baptist Church, 995 P.2d at 48.

\(^ {279} \) See Open Door Baptist Church, 995 P.2d at 48 n.16.

\(^ {280} \) See Smith, 494 U.S. at 890; Open Door Baptist Church, 995 P.2d at 48 n.16.

\(^ {281} \) See Smith, 494 U.S. at 879; Open Door Baptist Church, 995 P.2d at 36.

\(^ {282} \) See Smith, 494 U.S. at 885; Open Door Baptist Church, 995 P.2d at 36.
have ended its inquiry there. Thus, even though the resolution of the litigated issue in *Open Door Baptist Church* would remain the same, the results would be quite different if Open Door were denied a permit and filed a second suit as recommended by the WSC.

**Conclusion**

Control of land-use regulation by local government has been recognized as a means for a community to achieve “a satisfactory quality of life in both urban and rural communities,” while utilizing great discretion. Although the free exercise of religion remains a constitutionally protected right, the increase in megachurches, offering an entire range of activities, from worship to education and support groups, has arguably created more negatives for their neighbors. If land-use regulation is truly to be utilized to create “zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people,” then perhaps those people, through state and local government action, are best able to determine its implementation.

While the constitutionality of RLUIPA has not been tested, several scholars have questioned whether RLUIPA would pass muster if the Supreme Court chose to analyze its constitutionality. As long as RLUIPA remains in effect, it is clear that religious land use cases will be relatively consistent between states with and without their own protections in place. By allowing religious groups to avoid state limits on religious exemptions to land use, RLUIPA somewhat removes state and local governments from decisions on regulating religious land use conflicts. Particularly in states without their own protections, RLUIPA effectively preempts the states’ determination of the appropriate balance between land use regulations and religious institutions. In effect, RLUIPA exacerbates conflicts between local governments and religious groups by allowing religious groups to avoid state law when it conflicts with their goals.

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283 See Smith, 494 U.S. at 885.
284 See id. at 879, 885; *Open Door Baptist Church*, 995 P.2d at 48 & n.16.