GOD AND THE LAND: THOUGHTS ABOUT LAND USE CONTROLS AND RELIGIOUS FREEDOM IN THE AMERICAN LEGAL SYSTEM

Wendie L. Kellington[*]

[*] Wendie L. Kellington, Attorney at Law, P.C., Portland, Oregon and Michael E. Kellington, Kellington and Kellington, Medford, Oregon.

INTRODUCTION

A discussion about the interface of God and law in the United States legal system is meaningful if the political and legal system is considered. From America's rich political history emerges the First Amendment[1] to the United States Constitution and the overarching legal principles that separate church and state, while at the same time guaranteeing religious freedom. Nurturing these twin principles prevents the emergence of one faith, and the inevitable consequence of a hereditary and oppressive monarchy. Thomas Paine eloquently explained the evils of such a system:

> All hereditary government is in its nature tyranny. An heritable crown, or an heritable throne, or by what other fanciful name such things may be called, have no other significant explanation than that mankind are heritable property. To inherit a government, is to inherit the people, as if they were flocks and herds.[2]

In 235 years, however, the relationship between the First Amendment and those who govern and are governed has become ethereal: a background principle assumed to be important to academics but with little committed practical relevance to local decision making – having won the First Amendment justifies ignoring it. The complexity of American society, with its emphasis on local control and administrative decision making, has tested societal commitment to religious freedom. In particular, the tests are challenging in the arena of land use decision-making. In response, Congress enacted first the Religious Freedom Restoration Act (RFRA)[3] and then the Religious Land Use and Institutionalized Persons Act (RLUIPA).[4] RFRA and RLUIPA have placed religious freedom in a superior position to politically desirable societal restrictions, including popular local land-use controls. Predictably, the intersection of local land use planning and, in particular, RLUIPA, is a tense place, with vocal criticism of the wisdom of Congress' legislative

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[1] U.S. CONST. amend. I (the First Amendment to the United States Constitution provides in relevant part:
"Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof* . . . ") (emphasis added).

[2] THOMAS PAINE, THE RIGHTS OF MAN 114 (Courier Dover Pub. 1999) (1791).

[3] Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-2000bb-4 (2000).

[4] Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc-2000cc-5 (2000).

judgment.[5] But these legislative responses are consistent and necessary to protect secular democracy from well-meaning majoritarian values that otherwise are capable of stifling religious freedom. And stifling religious freedom, however incrementally, dooms America to the fates of those governments that do not separate church and state.

I. THE UNITED STATES OF AMERICA IS SPECIAL AS THE FIRST SECULAR DEMOCRACY

The United States of America is the first truly secular democracy in the recorded history of the planet. Other political models, like ancient Greece, may have been democracies, but they were not secular. Rather they relied on oracles and Gods to guide the leadership path. Greek citizens were inundated at every level of life by their religion—a chaotic and sometimes arbitrary pantheon which dictated everyone's actions.

Greeks viewed their world as "one great City of gods and men."[6] Cults honored a long list of gods, and cults honoring Zeus in Olympia, and Apollo at Delos were particularly popular.[7] All these cults and the consultations of various oracles to determine legislative and other decisions were still evident at the time of the arrival of Christianity.[8]

The republic of Rome similarly differs from the American model. The Imperators and Caesars were "divinely chosen," a concept that eventually evolved into hereditary rights in later political schemes.[9] In this regard, the split between Roma and Constantinople in 330 A.D. was almost entirely a religious affair:

> Constantine did plant the seed of one historic notion—that the Christian religion was compatible with politics. Christ himself had categorically rejected political involvement; and prior to Constantine, Christians had not sought to assume power as a means of furthering their cause. After Constantine, Christianity and high politics went hand in hand. This, in the eyes of the purists, was the moment of corruption.[10]

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[5] Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311, 332-33 (2003) (criticizing RFRA and RLUIPA for destroying the separation of powers in government).

[6] NORMAN DAVIES, EUROPE: A HISTORY 108 (1996).

[7] *Id.* at 110.

[8] *Id.*

[9] PETER HEATHER, THE FALL OF THE ROMAN EMPIRE: A NEW HISTORY OF ROME AND THE BARBARIANS 23 (2005).

[10] DAVIES, *supra* note 6, at 212.

During America's colonization, most European countries were entangled in events that fostered a sense of revolution against religious and other tyranny. The world of the mid-18th century was awash in war and revolution. What began in 1642 and ended with the execution of Charles I of England in 1649 (the first popular rebellion against a monarch) became an international trend of political and revolutionary actions directed against autocratic governments that drew their power from God.[11]

When Mozart wrote symphonies for Frederick the Great of Prussia, Spain was declining in power and influence, Poland was partitioned into non-existence from 1773 to 1795, and France went from a bloody war with England (ending in the Treaty of Paris in 1763) to an even bloodier revolution.[12] The state of affairs in Europe was different from America, in that alliances and mutual enmities kept balance in check. The monarchies kept power in traditional fashion:

> The international relations of the eighteenth century were concerned, above all, with the balance of power. All the general wars of the period were designed to maintain it . . . . Alliances could be rapidly permutated, and small professional armies could march swiftly into action to settle the disputes in tidy, set-piece battles.[13]

America was a different place populated by a different people. It was a large geographic region mostly unexplored by the civilization that ultimately governed it. It was populated by spirited people tired of religious oppression and willing to make a long and perilous journey for a different kind of life; willing to create a governmental template never before tried. The unique make-up of the American people owed itself to a largely intolerant Europe. Quakers fled persecution, Protestants fled Catholic countries; Calvinists and Lutherans, Jews and Presbyterians—most came to America seeking a place to worship without harassment or worse.[14] As explained in *Everson v. Board of Education of Ewing Tp.*[15]:

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[11] *See* Sean Kelsey, *The Death of Charles I*, 45 HIST. J. 727, 727 (2002); Alun A. Preece, Lecturer in Law, Univ. of Queensl., Paper Delivered at the Univ. of Canberra, Austl. Law Teachers Assoc. (ATLA) Annual Conf.: The Rise and Fall of Democratic Government? (July 4, 2000).

[12] DAVIES, *supra* note 6, at 659-61, 678-79.

[13] *Id.* at 661.

[14] *See generally* David B. Quinn, *The First Pilgrims*, 23 WM. & MARY Q. 360 (1966) (discussing the refuge religious groups sought from persecution in America); *America as a Religious Refuge: The Seventeenth Century,* in Library of Congress Exhibition, http://www.loc.gov/exhibits (last visited March 10, 2009).

[15] Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1 (1947).

> A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government-favored churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy. With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews. In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed. Among the offenses for which these punishments had been inflicted were such things as speaking disrespectfully of the views of ministers of government-established churches, non-attendance at those churches, expressions of non-belief in their doctrines, and failure to pay taxes and tithes to support them.[16]

Thus, roughly 75,000 settlers of English origin found themselves in:

> [A] vast area, diverse in its people, in its many forms of government, and in its resources, geographically as ill explored as it was constitutionally ill defined. It extended north to south, from the Hudson Bay Territory, Newfoundland, and Nova Scotia . . . and from Quebec . . . down to the Florida Keys. From east to west it stretched from the indented coastal plains and the tidal rivers of the Atlantic seaboard to the Mississippi.[17]

America was ripe for a new political model: a small population with huge tracts of land and untold resources, together with a diverse people escaping a common nemesis of religious dogma guiding political life and intolerance. Into this soil were thrown the seeds of secular democracy, sown by the efforts and ideas of brilliant thinkers like Thomas Paine, Thomas Jefferson, James Madison, and Benjamin Franklin.

It cannot be disputed that the separation of church and state was a fundamental rationale for the formation of the United States. Escaping the influence of the hereditary government of the monarchy, whose authority was bestowed by a particular

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[16] *Id.* at 8-9.

[17] ESMOND WRIGHT, FABRIC OF FREEDOM: 1763-1800 3-4 (David Donald ed., Hill & Wang, rev. ed., 1978) (1961).

God, was a primary moving force in the creation of the government for the new world. A secondary but equally important corollary and fundamental premise for the formation of the United States was that citizens be allowed freedom of religious exercise, without prohibition or compulsion by the state.[18]

A third indispensable corollary to these principles was the tolerance of a religious marketplace and of freedom within that marketplace. This freedom requires a multiplicity of religious faiths; no state sponsored faith or state restriction on the numbers or types of faiths that might exist. Disguised religious litmus tests of any stripe are as repugnant as overt ones. In *Lyng v. Northwest Indian Cemetery Protective Ass'n.*,[19] the Court cites Federalist No. 10, explaining that Federalist Paper 10 "suggest[ed] that the effects of religious factionalism are best restrained through competition among a multiplicity of religious sects." [20] Evidence of the efficacy of this principle is that in the United States, churches of all faiths have integrated within their communities. So long as this free integration can occur, then no one church can dominate any other and no church or faith can be prohibited. The proximity of houses of worship to believers provides Americans with realistic opportunities for religious interaction and instruction. The freedom to situate such houses of worship also provides insurance against the domination of any particular religious faith, including political control by a dominant sect.

New or expanded churches respond to new or expanded human needs for religious guidance. Thus, in the United States, it is fundamentally not the role of government to restrict opportunities the people want for religious guidance in the faith of their choice. Such restriction is a slippery slope for religious intolerance or dominance.

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[18] *See* THOMAS PAINE, *Common Sense*, *reprinted in* COLLECTED WRITINGS 43 (Eric Foner ed. 1976).

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

[20] *Id.*

> A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source. A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it; in the same proportion as such a malady is more likely to taint a particular county or district, than an entire State."

JAMES MADISON, FEDERALIST NO. 10 (Nov. 22, 1787).

II. RELIGIOUS TOLERANCE AND SEPARATION OF CHURCH AND STATE: CONCEPTS THAT EMERGED FROM THE CONTEMPLATIONS OF DEEP THINKERS

The ideas of religious tolerance and separation of church and state had their origins in the philosophies of the late 17th century. John Locke's "Natural Rights" included life, liberty, health and property.[21] Religious practice was defined as "property" in that one was free to choose one's own road to salvation. As early as 1659, Locke began advocating religious toleration—in the backdrop of Charles II repressing Quakers, Baptists, Unitarians and others.[22] While John Locke was a very religious Anglican, he understood the importance of religious toleration in political affairs largely because no one knew the "true" path. "[S]kepticism about the possibility of religious knowledge is central" to his argument.[23]

Later, the ideas of Jean-Jacques Rousseau introduced the concept of "Natural Man" whose highest form was seen in a "natural state." Rousseau's Social Contract of 1762 included the theory that humanity is good by nature. This, of course, conflicted with the Original Sin theory of the church, and Rousseau was persecuted for his (largely wrongly-understood) arguments.[24] While there is not much evidence that people like Thomas Jefferson subscribed to any of these ideas, Rousseau's treatise still represents the transition in thought, occurring in the mid-18th century, away from theism and autocracy.

The evolution of thoughts and events leading to the Declaration of Independence and a Constitution protecting religious freedoms can be seen early in America's history. The Mayflower Compact of 1620 showed the ability of an isolated people to draft their own laws and create their own government.[25] The Fundamental

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[21] JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 9 (C.B. Macpherson ed., Hackett Pub. Co. 1980) (1690).

[22] *Locke and Religious Toleration*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Fall 2008 ed.), *available at* http://plato.Stanford.edu/entries /locke/.

[23] William Uzgalis, *John Locke*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Fall 2008 ed.).

[24] *See generally* Jean-Jacques Rousseau, *The Social Contract, in* SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME, AND ROUSSEAU 169-70 (Ernest Barker ed., 1947) ("Man is born free."); *Romans* 15:12 ("Therefore, just as sin entered the world through one man, and death through sin, and in this way death came to all men, because all sinned."); *John* 8:34 ("Jesus replied, 'I tell you the truth, everyone who sins is a slave to sin.'")

[25] GEORGE BROWN TINDALL, AMERICA: A NARRATIVE HISTORY 59 (2d ed. 1988).

Constitutions of Carolina, a strange document drawn up by Lord Ashley Cooper and his secretary, none other than John Locke himself, guaranteed certain religious freedoms in Carolina by 1666.[26] The Fundamental Constitutions of Carolina (never ratified), while remarkable in their day because they allowed dissenters of the Church of England certain rights rather than pain of punishment and death, still established the Church of England as the official state church. Pennsylvania tolerated its Quakers,[27] and Rhode Island and South Carolina were noted for their degree of religious freedoms.[28] The natural culmination of these ideas was framed elegantly by Thomas Jefferson in his famous Virginia Statute for Religious Freedom.[29] Penned in 1777, it was not made into law until 1786, after bitter debate and revision.[30] The Virginia Statute was so important that Jefferson viewed it to be on a par with founding the University of Virginia and the Declaration of Independence; putting all three on his epitaph.[31] The Virginia Statute reads in part:

> [N]o man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested or burdened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge or affect their civil capacities.[32]

Thomas Jefferson, the final drafter of the Declaration of Independence, second Vice President of the United States (to President John Adams), and eventually the President of the United States, was surrounded by like-minded thinkers sharing among other things a vision of religious freedom and tolerance. Dr. Benjamin Franklin wrote of "[A] settled purpose of never being a Religious of any denomination whatsoever, but as a[n] . . . individual, purposing to employ myself in some . . . [better] station more usefully, I could wish fore freedom for my own and

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[26] *Id.* at 74-75.

[27] *See* Michael W. McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1425 (1990).

[28] *See id.* at 1424-25, 1428.

[29] Thomas Jefferson, *The Statute of Virginia for Religious Freedom*, *in* THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM: ITS EVOLUTION AND CONSEQUENCES IN AMERICAN HISTORY xvii-xviii (1988).

[30] VA. CODE ANN. § 57-1 (2007). *See* VIRGINIA STATUTE, *supra* note 30, at vii-viii; Todd D. Keator, *Tale of the Monkey Trials: Chapter Three*, 62 LA. L. REV. 673, 681 (2002).

[31] VIRGINIA STATUTE, *supra* note 30, at vii; WRIGHT, *supra* note 1718, at 152.

[32] § 57-1.

every other man's religious opinions."[33] The rascally Tom Paine mocked Edmund Burke's convictions about God and divine rights.[34] Jefferson himself was a devoutly religious man, even calling for a day of "fasting, humiliation and prayer" at the Declaration Convention.[35] Nonetheless, many years later, Jefferson's personal beliefs were expressed in a personal letter to Miles King: "Our particular principles of religion are a subject of accountability to our God alone. I inquire after no man's and trouble none with mine; nor is it given to us in this life to know whether yours or mine, our friend[']s or our foe[']s, are exactly the right."[36]The America that emerged in 1776 is the unique mixture of secular philosophy and religious toleration purposefully combined to create a workable government model that has been followed internationally. It is a model that led to religious freedom as an internationally recognized basic human right. In this regard, America's secular democracy has a well-known legacy. Shortly after the Philadelphia Convention, France fell into its own revolution on July 14, 1789. This revolution produced the Declaration of Rights of Man and of the Citizen, mirroring the language of the Declaration of Independence and the United States Constitution. [37] Winston Churchill and FDR set out the four basic freedoms in the Atlantic Charter, a joint statement issued August 14, 1941. Ironically, 165 years after a bitter war over the sovereignty of a nation and rights of its people, the English and the Americans declared that, together, they were fighting the Axis powers "to ensure life, liberty, independence and religious freedom and to preserve the rights of man and justice."[38]

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[33] Letter from John Calder to Benjamin Franklin (Mar. 13, 1783), *in* THE PAPERS OF BENJAMIN FRANKLIN, *available at* http://franklinpapers.org/franklin/framedNames.jsp.

[34] *See* JOHN KEANE, TOM PAINE: A POLITICAL LIFE 294-300 (1995) (discussing Paine's various responses to Burke's beliefs).

[35] *See* Thomas Jefferson, *The Autobiography of Thomas Jefferson, in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 8 (Adrienne Koch & William Peden eds., 1972); Letter from Thomas Jefferson and John Walker to the Inhabitants of the Parish of St. Anne (before July 23, 1774), *in* 1 THE PAPERS OF THOMAS JEFFERSON, at 116 (Julian P. Boyd ed., 1950).

[36] Letter from Thomas Jefferson to Miles King (Sept. 26, 1814) *in* 14 THE WRITINGS OF THOMAS JEFFERSON 198 (Andrew A. Lipscomb ed., 1903).

[37] THREE BEGINNINGS: REVOLUTION, RIGHTS, AND THE LIBERAL STATE 24, 44 (Stephen F. Englehart & John Allphin Moore, Jr. eds., 1994).

[38] MARTIN GILBERT, A HISTORY OF THE TWENTIETH CENTURY VOLUME TWO: 1933-1951 451 (1998) (stating that on January 1, 1942 "[t]he declaration was drafted in Washington by Roosevelt and Churchill together. Twenty-six countries . . . calling themselves the 'United Nations', signed it.").

III. PROTECTING RELIGIOUS FREEDOM IN THE CONTEXT OF LOCAL LAND USE DECISION-MAKING

In the context of the free exercise of religion, zoning restrictions have unique potential to stifle or install religion. Zoning authorities have great discretion to make the zoning decisions they want to make based on subjective and emotional responses to applications and to controversy concerning those applications. The United States Supreme Court has stated what should otherwise be obvious: that zoning has constitutional limits.

> The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities. *But the zoning power is not infinite and unchallengeable; it "must be exercised within constitutional limits*." Accordingly, it is subject to judicial review; and [as] is most often the case, the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed.[39]

The land use and zoning controls power that affects the religious faiths to which people belong is more likely to be exercised indirectly, and is therefore invidious. Indirect favoritism or extinguishment of particular faiths in a community or the unavailability of competing faiths in a community can follow an outgrowth of planning decisions regardless of whether they are aimed at manifesting such consequences. That it is difficult to prove discrimination in an individual case is not a new concept. It is easy to write land use decisional findings denying a church on some nonreligious basis. Consistent with principles favoring the protection of a secular democracy, RLUIPA requires such land use decision findings to be subjected to greater scrutiny than in traditional zoning cases where the "real" reason for denial of a religious land use can otherwise be masked.[40] In this regard,

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[39] Schad v. Borough of Ephraim, 452 U.S. 61, 68 (1981) (emphasis added) (citations omitted).

[40] An analogous principle has been noted in the unconstitutional takings context:

> In Justice Blackmun's view, even with respect to regulations that deprive an owner of all developmental or economically beneficial land uses, the test for required compensation is whether the legislature has recited a harm preventing justification for its action. Since such a justification can be formulated in practically every case, this *amounts to a test of whether the legislature has a stupid staff*. We think the Takings Clause requires courts to do more than insist upon artful

in *American Friends of the Society of St. Pius, Inc. v. Schwab*,[41] the New York court observed: "Human experience teaches us that public officials, when faced with pressure to bar church uses by those residing in a residential neighborhood, tend to avoid any appearance of an antireligious stance and temper their decision by carefully couching their grounds . . . [on some other basis]."[42]

The United States Supreme Court has recognized the serious constitutional problem with local regulators possessing discretion in matters affecting individual liberty in other contexts. For example, in *West Virginia Board of Education v. Barnette*,[43] the Court observed: "[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 into account."[44] Moreover, another court has explained one of the problems with local land use enforcement police engaging in proceedings aimed at prohibiting neighbors from worshipping together in their homes:

> The neutrality of the Cease and Desist Order is further suspect because Plaintiffs' First Amendment freedoms are curtailed to prevent isolated collateral harms not themselves prohibited by direct regulation. Defendants agree that there is no direct and express regulation limiting the number of visitors, with vehicles or not, that residents of single family homes may have. There is only the ZEO's and/or NMZC's interpretation of what uses are 'customary' in plaintiffs' neighborhood.[45]

Another recent example of this principle in practice is the case of *Cam v. Marion County*,[46] in which a federal district court dealt with the application of Oregon's "high value farmland" zoning rules prohibiting the establishment of new churches, but allowed existing churches to flourish. The court explained the prohibitive rule failed to pass the rational basis test in the First Amendment land use context. First, the court said that the local authorities tolerated the same structure on the "high value farmland" as a barn, but not as a church.[47] As a barn, square dancing and social

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harm preventing characterizations.

Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1025 n.12 (1992) (emphasis added) (citation omitted).

[41] Am. Friends of the Soc'y of St. Pius, Inc. v. Schwab, 417 N.Y.S.2d 991 (App. Div. 1979).

[42] *Id.* at 993.

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

[44] *Id.* at 637.

[45] Murphy v. Zoning Comm'n of the Town of New Milford, 289 F. Supp. 2d 87, 105 (D. Conn. 2003), *vacated*, 402 F.3d 342 (Conn. 2005).

[46] Cam v. Marion County, 987 F. Supp. 854, 860 (Or. 1997).

[47] *Id.* at 859.

gatherings were allowed.[48] But as soon as the county "discovered" people praying in the barn, the adherents were subject to code compliance action for violating zoning laws that forbade churches.[49] Second, "there is a strong inference" the instigator of the code compliance action was a rival church.[50] That rival church, while virtually across the street and on an identical type of land, was permitted by zoning authorities.[51] The court stated it was improper for the county to "lend its power to" one sect of religion over another and, while unintended, that was what the county had done.[52]

As *Cam* illustrates, the government's zoning power is uniquely powerful to favor one religious sect over another. Congress has heard a great deal of testimony regarding these kinds of adverse impacts that zoning can visit on religious free exercise. It became evident that local regulators more often than not feel little or no sense of responsibility to the Constitution. Local zoning hearing officers are heard saying they do not have to consider constitutional arguments as challenges to zoning decisions or recommendations. Accordingly, the RLUIPA was born and was co-sponsored by the unlikely duo of Senators Kennedy and Hatch as a means to enforce the important principles of the First Amendment and thereby protect secular democracy.[53]

IV. ABOUT RLUIPA

While much maligned precisely because of its efficacy to achieve its purposes, RLUIPA is a federal civil rights statute that protects the free exercise of religion.[54] RLUIPA expresses that it is to be interpreted broadly to protect religious freedom "to the maximum extent permitted by the terms of this chapter and the Constitution."[55] As a statutory right of action, Congress allocated the burdens of proof in RLUIPA.[56] While there are claims to the

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[48] *Id.* at 861.
[49] *Id.* at 855.
[50] *Id.* at 860.
[51] *Cam,* 987 F. Supp at 855.
[52] *Id.* at 859, 861-62 (citation omitted).
[53] 146 CONG. REC. S7,774-01 (daily ed. July 27, 2000) (statement of Sen. Orin Hatch).
[54] 42 U.S.C. § 2000cc-(a)(1) (2000).
[55] § 2000cc-3(g).
[56] § 2000cc-2(b).

contrary, this is not unusual. When Congress creates an affirmative defense rather than an element of a claim, it does the same thing. Professor Laycock explained the rationale for allocating the burdens in the context of RLUIPA, in his 1998 testimony to Congress:

> [RLUIPA] Section 3(a) provides that if a claimant demonstrates a prima facie violation of the Free Exercise Clause, the burden of persuasion then shifts to the government on all issues except burden on religious exercise. No element of the Court's definition of a free exercise violation is changed, but in cases where a court is unsure of the facts, the risk of nonpersuasion is placed on government instead of on the claim of religious liberty. This provision facilitates enforcement of the constitutional right as the Supreme Court has defined it. *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), of course reaffirms broad Congressional power to enforce constitutional rights as interpreted by the Supreme Court.
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> This provision applies to any means of proving a free exercise violation recognized under judicial interpretations. Thus, if the claimant shows a burden on religious exercise and prima facie evidence of an anti-religious motivation, government would bear the burden of persuasion on the question of motivation, on compelling interest, and on any other issue except burden on religious exercise. If the claimant shows a burden on religious exercise and prima facie evidence that the burdensome law is not generally applicable, government would bear the burden of persuasion on the question of general applicability, on compelling interest, and on any other issue except burden on religious exercise. If the claimant shows a burden on religion and prima facie evidence of a hybrid right, government would bear the burden of persuasion on the claim of hybrid right, including all issues except burden on religion. In general, where there is a burden on religious exercise and prima facie evidence of a constitutional violation, the risk of nonpersuasion is to be allocated in favor of protecting the constitutional right.
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> The protective parts of the *Smith* and *Lukumi* rules create many difficult issues of proof and comparison. Motive is notoriously difficult to litigate, and the court is often left uncertain. The general applicability requirement means that when government exempts or fails to regulate secular activities, it must have a compelling reason for regulating religious activities that are substantially the same or that cause the same harm. As these examples suggest, there can be endless arguments about whether the burdened religious activity and the less burdened secular activity are sufficiently alike, or cause sufficiently similar harms,

> to trigger this part of the rule. The scope of hybrid rights claims remains uncertain. Burden of persuasion matters only when the court is uncertain, but the structure of the Supreme Court's rules leave many occasions for uncertainty.[57]

Consistently, RLUIPA provides as follows regarding the allocations of the litigation burdens in the substantial burden/compelling interest part of the test:

> If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2000cc of this title, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.[58]

42 U.S.C. § 2000cc-3(g) of RLUIPA expressly states that it must thus be construed to broadly protect religious exercise.[59]

RLUIPA protects civil rights of the free exercise of religion in the context of land use regulation and land marking regulations[60] in two broadly different ways: first, protecting against substantial burdens and second, against discrimination within a community and exclusion from a community.[61] The term "substantial burden" is not defined in RLUIPA. The Joint Statement of RLUIPA's co-sponsors explains that RLUIPA's failure to define the term "substantial burden" is intentional in order for that term to have its First Amendment meaning:

> The Act does not include a definition of the term "substantial burden" because it is not the intent of this Act to create a new standard for the definition of "substantial burden" on religious exercise. Instead, that term as used in the Act should be interpreted by reference to Supreme Court jurisprudence. Nothing in this Act, including the requirement in Section 5(g) that its terms be broadly construed, is intended to change that principle. The term "substantial burden" as used in this Act is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial

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[57] *Religious Liberty: Hearing Before the S. Comm. on the Judiciary,* 106th Cong. 81-82 (2000) (statement of Douglas Laycock, Alice McKean Young Regents Chair in Law, University of Texas School of Law).

[58] § 2000cc-2(b).

[59] § 2000cc-3(g).

[60] A recent case holds that a local requirement to hook into a public sewer system is neither a land use nor a land marking regulation under RLUIPA and, therefore, a challenge to a requirement to hook into the public sewer system is not cognizable under RLUIPA. Second Baptist Church of Leechburg v. Gilpin Twp., No. 04-1434, 2004 U.S. App. LEXIS 26858, at *6 (3d Cir. Dec. 16, 2004).

[61] 42 U.S.C. §§ 2000cc (2000).

burden or religious exercise.[62]

Under RLUIPA's Section 2(a), where a substantial burden on the religious exercise is established, the restricting government is required to show that it has a compelling interest supported by the least restrictive means available to justify the substantial burden it imposes.[63] RLUIPA's substantial burden provision applies where the substantial burden is imposed: (1) in connection with a federally-funded activity; (2) where the burden affects interstate commerce; or (3) for the implementation or imposition of a land use regulation, where the burden is imposed in the context of a scheme whereby the state makes "individualized assessments" regarding the property involved.[64]

Second, under Section 2(b), government may not "impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution."[65] Further, government is forbidden from imposing or implementing "a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination."[66] Moreover, government is forbidden from imposing or implementing a land use regulation that either "totally excludes religious assemblies from a jurisdiction" or "unreasonably limits religious assemblies, institutions, or structures within a jurisdiction."[67]

These latter RLUIPA proscriptions in 42 U.S.C. § 2000cc(2)(b) do not require a showing of a substantial burden on the free exercise of religion. Rather, these proscriptions are expressed as elements that operate independently of RLUIPA's substantial burden elements in 42 U.S.C. § 2000cc(2)(a).[68] Similarly, the

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[62] 146 CONG. REC. S7776 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy).

[63] § 2000cc(a); § 2000cc-1(a).

[64] § 2000cc(a)(2); § 2000cc-1(b).

[65] § 2000cc(b)(1).

[66] § 2000cc(b)(2).

[67] 42 U.S.C.A. § 2000cc(b)(3)(A)-(B) (West 2003).

[68] The Joint Statement supporting RLUIPA contains several statements that support the reading of RLUIPA that the substantial burden prohibition and the exclusions and limits clauses operate independently of one another:

> [RLUIPA] applies the standard of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (1994): if government substantially burdens the exercise of religion, it must demonstrate that imposing that burden on the claimant serves a compelling interest by the least restrictive means. *In addition*, with respect to land use regulation, the bill specifically prohibits various forms of religious discrimination and exclusion.

146 CONG. REC. 7774 (2000) (emphasis added).

defense of showing a governmental compelling interest, furthered through the least restrictive means, is not stated as a defense to RLUIPA's discrimination and exclusion prohibitions of 42 U.S.C. § 2000cc(2)(b).

RLUIPA section 8(4)(A) expressly states RLUIPA applies to "a state, county, municipality, or other governmental entity created under the authority of a State; and any branch, department, agency, instrumentality, or official of an entity [previously] listed . . . ."[69] In this regard, a recent case holds that a county that makes a recommendation decision under an intergovernmental agreement with another jurisdiction shares RLUIPA liability with the body making the final decision that is based on the recommendation. In *Grace Church of The Roaring Fork Valley v. Board of County Commissioners of Pitkin*,[70] pursuant to an intergovernmental agreement, the church's

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The Joint Statement further provides: "The state may eliminate the discrimination *or* burden in any way it chooses, so long as the discrimination or substantial burden is actually eliminated." 146 Cong. Rec. 7776 (2000) (emphasis added).

The Joint Statement goes on to explain:

> The General Rules in 2(a)(1), requiring that substantial burdens on religious exercise be justified by a compelling interest, applies only to cases within the spending power or the commerce power, or to cases where government has authority to make individualized assessments of the proposed uses to which the property will be put. Where government makes such individualized assessments, permitting some uses and excluding others, it cannot exclude religious uses without compelling justification.
>
> Sections 2(b)(1) and (2) prohibit various forms of discrimination against or among religious land uses. These sections enforce the Free Exercise Clause rule against laws that burden religion and are not neutral and generally applicable.
>
> Section 2(b)(3), on exclusion or unreasonable limitation of religious uses, enforces the Free Speech Clause as interpreted in Schad v. Borough of Mount Ephraim, 425 U.S. 61 (1981), which held that a municipality cannot entirely exclude a category of first amendment activity. Moreover, the Court distinguished zoning laws that burden "a protected liberty" from those that burden only property rights; the former require far more constitutional justification. *Id.* at 68-69. Section 2(b)(3) enforces the right to assemble for worship or other religious exercise under the Free Exercise Clause, and the hybrid free speech and free exercise right to assemble for worship or other religious exercise under *Schad* and *Smith*.

146 CONG. REC. 7775-6 (2000) (citation omitted).

[69] 42 U.S.C.A. § 2000cc-5(4)(A)(i)-(ii) (West 2003).

[70] *See generally* Grace Church of The Roaring Fork Valley v. Bd. of County Comm'rs of Pitkin, No. 05-CV-01673-RPM, 2007 WL 1772114, (D. Colo. 2007) (order denying motions for summary judgment).

application was referred to the Basalt Planning and Zoning Commission, the recommending body that conducted a formal review (which included public hearings) before making a recommendation for denial.[71] In its denial, Pitkin County, the final decision-maker, referred to the Basalt recommendation along with some inconsistency found within the applicable Comprehensive Plan.[72] The court found that Pitkin County's action and the Town of Basalt's participation were not independent of each other during the consideration of the Special Use Permit Application.[73]

RLUIPA is a comprehensive civil rights statute that is well designed to protect religious land use decision making. In so doing, it fosters our form of government which places free exercise of religion and the separation of church and state at the forefront of governmental acts and omissions.

CONCLUSION

The United States of America has much to be proud of. Among its chief accomplishments is the creation of the globe's first secular democracy. Maintaining our first secular democracy will clearly be easier than the daunting task of winning it in the first place. But even in the maintenance, there will be some inconvenience. There will be cases where local land use controls must give way to allow the sitting of religious land uses including churches, and other types of houses of worship, where neighbors don't want them, and where land use rules can't be applied inflexibly. There will be frustrating cases that test the parameters of the local police power against applications for "extreme" religious land uses. But a secular democracy has to tolerate the inconvenience of grappling with the constitutional envelope, including its edges, as the price of maintaining a secular democracy.

America has grappled with other socially-seeming insurmountable challenges in other civil rights cases; including the contentious school desegregation cases. We are better for it. Similarly, land use controls that forbid religious land uses or where opponents claim the religious applicant does not meet

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[71] *Grace Church,* 2007 WL 1772114, at *1.
[72] *Id.*
[73] *Id.*

subjective "compatibility" special use standards, will not-so-simply give way to required land use permission for the religious land use. Decisions that deny religious land uses must be careful to not only articulate non-pretextual, strong, and neutral reasons for doing so, but to actually have such reasons. In the end, all are a small price to pay toward maintaining a multiplicity of faiths; the right of individuals to have religious faith or no religious faith and to avoid centralized religion dominating political institutions. If the historical and contextual reason this matters remains in focus, legislative bodies are in a position to exert leadership and explain to local objectors the relevance of the constitutional envelope to local religious land use and other decision-making.