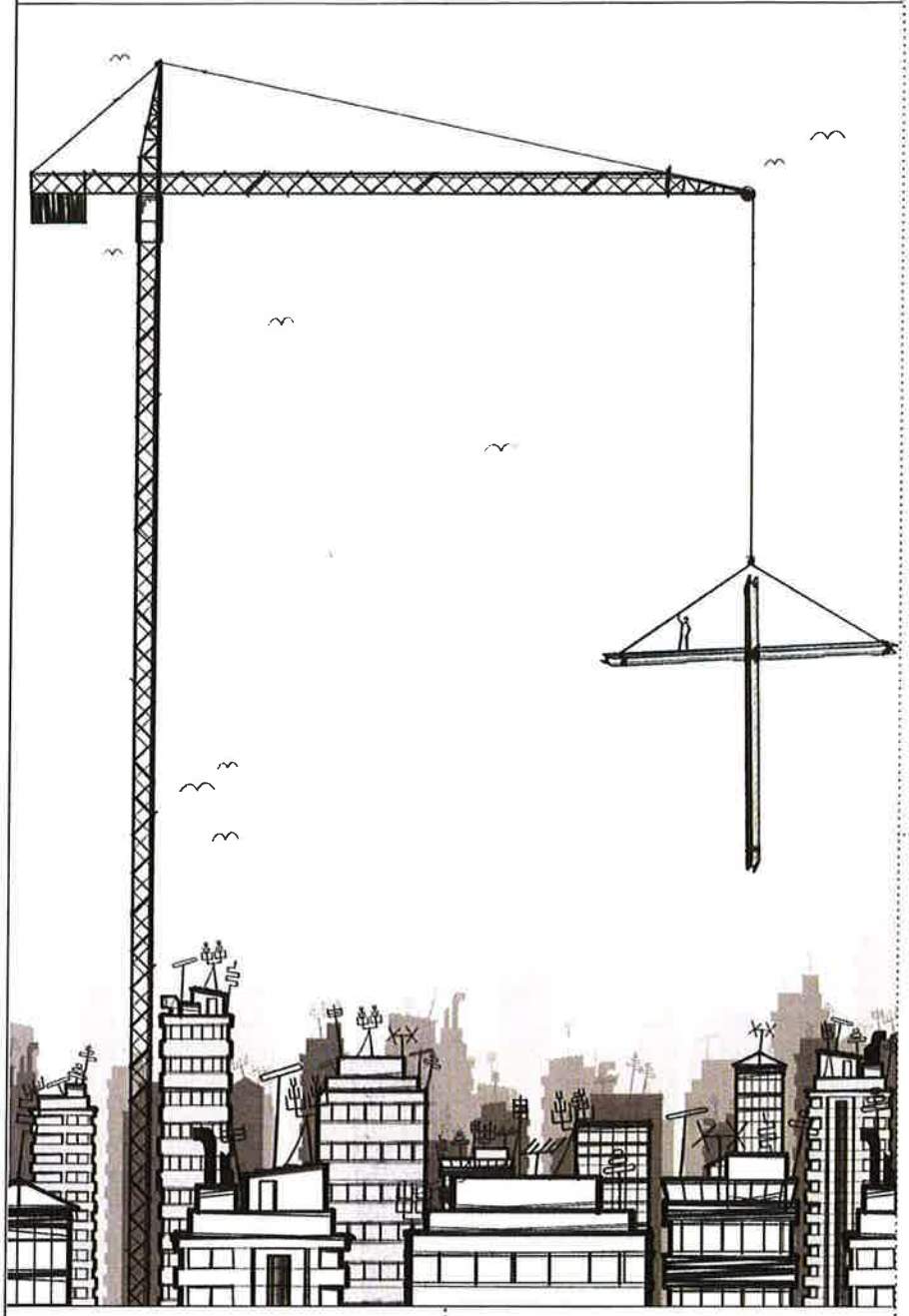
Religious Freedom and Land Use Regulation—It's Not All About RLUIPA

by Daniel D. Crean



The Merrimack New Hampshire, Congregation of Jehovah's Witnesses was denied a permit to build a "Kingdom Hall" in a residential zoning district. The zoning ordinance allowed churches as of right in the commercial district and two industrial districts, and permitted churches in residential districts by special exception when the following conditions were met:
(a) Site is appropriate for such use in terms of overall community development.
(b) Use as developed will not adversely affect the neighborhood and shall produce no diminution of real estate values in neighboring area.
(c) There will be no nuisance or serious hazard to vehicles or pedestrians.
(d) Adequate parking area is provided for motor vehicles on the premises.
(e) A buffer shall be erected and maintained to screen existing residential uses.
(f) Use as developed will be restricted for church purposes only. No commercial use of church is allowed.

The Congregation's petition for preliminary injunction was denied by a magistrate and, on appeal, with respect to the freedom of expression claim, the district court noted that other "[c]ourts have held that absent other expressive conduct, limitations on the geographical location of a religious institution do not implicate the right to free expression under the First Amendment." Acknowledging that there was some contrary authority, the district court, nonetheless, was persuaded that the location of the church in this case, absent other expressive issues, did not implicate the right to free expression. In the context of a facial challenge, the restriction imposed that requires a special exception for a church in a residential district does not burden free exercise.
—Merrimack Congregation of Jehovah's Witnesses v. Town of Merrimack, 2011 DNH 54, 2011 U.S. Dist. LEXIS 36090 (D. N.H. Mar. 31, 2011).

The First Amendment to the United States Constitution states, in part, that: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof ...".[1] Like other provisions of the First Amendment and Bill of Rights, these protections are applied against states (and political subdivisions) through the Fourteenth Amendment.[2] Judicial approaches to disputes involving religious institutions and exercise of religion have evolved during the last few decades, and remain important even in light of state and federal legislation[3] restricting local government land use authority in this arena.

Prior to the emergence of enumerated rights concerns in land use in the mid-twentieth century, religious uses and land use controls, if addressed at all, were litigated in state courts. Even in those cases, the primary analysis involved substantive due process, not

the First Amendment, and fell primarily into two "camps": (1) the exclusion of churches from residential zones was arbitrary and unreasonable and, therefore, failed substantive due process analysis, or (2) churches raised issues of substantive due process in the same manner as other litigants, and the exclusion of churches from some zoning districts was valid as long as there was no total exclusion of such uses from the entire municipality.[4]

In the mid-twentieth century, the U.S. Supreme Court and federal courts began to analyze issues raised under the free speech aspects of the First Amendment, such as protests and assemblies, adult entertainment, and commercial speech. As a natural step, courts recognized that First Amendment protections for religion might apply to land use regulation as well. The resulting clash between the protections afforded to religion by the Free Exercise Clause, and the limits on favorable treatment for religious uses imposed by the Establishment Clause, has been ongoing in terms of both legislative action and judicial review. The primary focus here is on the Free Exercise Clause protection for religion, and its language barring a law "prohibiting the free exercise thereof."

Free exercise jurisprudence applies strict scrutiny, requiring a compelling governmental interest to justify a regulation that significantly burdens religious practices: the regulation is invalid unless the government is addressing a compelling state interest and has chosen a narrowly-tailored method of regulation.[5] This so-called *Sherbert* test was significantly relaxed in a subsequent opinion regarding the applicability of general laws of neutral applicability[6] so as to require a balancing test. Even before that, however, the U.S. Court of Appeals for the Sixth Circuit, in *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, upheld an ordinance that prohibited the construction of churches in most of a city's residential zoning districts.[7] The court held the *Sherbert* test applied only if there was, in fact, a substantial burden on religious practices, and, because the ordinance did not prohibit the construction of any church, but only restricted the location options available to a congregation, the test was found to be inapplicable.[8]

Prior to the *Lakewood* decision, it does not appear that a federal circuit court had considered land use regulation of religious institutions directly from the viewpoint of the Free Exercise Clause. To the extent that the applicability of land use regulations to religious uses was disputed, the resolution involved a consideration of whether such uses were entitled to *preferential* treatment under a substantive due process analysis.[9]

As for state law cases, "early" state court treatment is exemplified by two New Hampshire opinions. In one, a school affiliated with a church was deemed to be an accessory use so as to negate the requirement to obtain a special exception or variance. Though neither the state nor the federal constitutions were cited in the court's decision, the court paid substantial deference to religion:

> [W]e first note that the parents and members of the congregation believe as a matter of religious conviction that their children should not be taught secular humanism in the public schools but receive a Christian education. As in [*Wisconsin v. Yoder*, 406 U.S. 205, 210-11 (1972)], "they object to (public) education generally, because the values (it) teaches are in marked variance with (their) values and ... way of life."... This concept is not new to Roman Catholics and other faiths who desire to run their own value-oriented schools.[10]

In the second case, the property owners' religious views were significant factors in the decision, finding that a municipal requirement to install a septic tank was improper.[11] The court held the use of a dry composting toilet, approved by the state, was the owners' choice "to live in accordance with their Quaker religion and the fundamental doctrine of simplicity in living,"[12] and applied substantive due process in concluding:

> The only conceivable purpose of requiring septic tanks is to protect the health of the community. When, however, an alternative means exists that does not impose a health hazard, the necessity for and reasonableness of the requirement disappears. Granted, the plaintiff's lifestyle is unusual and is different from that of most people. However, the liberty that we so proudly proclaim as the cornerstone of our society at least requires that government not interfere with our lives so long as we do no injury to others.[13]

Neither case expressly cited the religious exercise protections found in the First Amendment or the state constitution,[14] yet the decisions are clearly premised upon protecting the manner in which religion affects lifestyles, based on the religious principles of those who were subjected to the land use regulations.

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Framework for Analysis of Constitutional Issues

In much the same way that federal judicial review of land use regulation in general re-emerged in the mid-twentieth century,[15] issues under the free exercise prong also rose to prominence. The U.S. Supreme Court decided cases analyzing the Free Exercise Clause in other contexts,[16] and those decisions provide the framework for analyzing land use regulations. Unlike cases under the Establishment Clause of the First Amendment, which can be characterized as analyzing governmental action under a singular framework,[17] free exercise cases, particularly in the land use arena, are now examined using a balancing of interests. Though this is not as random as a case-by-case analysis might suggest, these balancing tests look to the values and principles protected, the governmental interests sought to be furthered, and the impact of land use controls on religious exercise.

Early cases analyzing police power enactments affecting religious exercise outside of the land use arena called into play a consideration of a direct versus indirect burden on religion,[18] and required a higher showing of a "substantial state interest" to justify the regulation.[19] The resulting conflict made the use of the balancing test a difficult exercise.

Initially, land use controls, like most other governmental controls affecting religious use and institutions, were reviewed under the strict scrutiny/compelling governmental interest test, applied when the regulation impinged on specifically-enumerated constitutional rights. One early exception was the Sixth Circuit's decision mentioned earlier, which restricted the application of the *Sherbert* test where a zoning ordinance restricted only location options, without a complete ban.

Another case upheld an enforcement action to prohibit a rabbi from conducting religious services in a converted garage adjacent to his house in a single-family-zoned district which prohibited churches, though they were permitted uses in all other districts.[20] The court applied a two-part analysis: (1) the ordinance had to regulate conduct rather than belief, and had to have a secular effect and purpose (noting that zoning laws generally met this test as they regulated conduct—land use—for the secular purposes of preventing incompatible land uses, controlling traffic and noise, and the like), and (2) there had to be an appropriate balance between the governmental interest being advanced and the burden placed on religious practices. Analyzing the governmental interest entailed inquiry into the impacts that would be caused by a religious exception to the regulation, and whether the least restrictive regulation possible had been chosen. Assessing the burden on religious practices required inquiry into the importance of the burdened practice and the degree of interference with it.

The resulting clash between the protections afforded to religion by the Free Exercise Clause, and the limits on favorable treatment for religious uses imposed by the Establishment Clause, has been ongoing in terms of both legislative action and judicial review.

In another case, where a secular purpose and intent were not so evident and there was considerable evidence of religious discrimination, a court invalidated the denial of approval to use an existing house, near a college campus in a residential zone, for a mosque.[21] An Islamic Center was proposed for a site, within walking distance of the campus, which provided all recommended off-street parking. The ordinance permitted religious uses by right only in outlying rural areas, and the nearest such zone was three miles from campus. Also, 26 various Christian churches were located in zoning districts closer to campus, where religious uses were permitted only as an "exception" approved by the city council: all nine requests for exceptions made by Christian churches after adoption of the zoning had been approved. The city council denied the exception on the basis of a neighbor's complaint about congestion, parking, and traffic problems. The court had little difficulty in concluding the denial substantially burdened religious practices (by allowing no sites for worship within walking distance of campus) and was not narrowly drawn in support of a substantial governmental interest.

In 1990, the U.S. Supreme Court eased the burden of justifying police power regulations by moving away from strict scrutiny when the regulation concerned was a "neutral law of general applicability."[22] The law at issue was an unemployment compensation statute which denied compensation to persons discharged for misconduct. Smith was fired from his position as a drug counselor for using peyote, a controlled substance under state law. Smith, a member of the Native American Church, claimed his use was a protected religious ritual. The prevailing opinion upheld the statute, finding the Constitution did not require government to demonstrate a compelling interest to validate a facially neutral law.[23] Conditioning compliance with the statute on a person's religious beliefs went too far in limiting the scope of a neutral law of general applicability, and striking the balance between protection for religious use and the public interest was a legislative task, not a judicial one.

Three years later, in a decision more directly involving land use, the U.S. Supreme Court invalidated an ordinance that banned slaughtering animals in religious rites.[24] The ordinance was found to differ from the law in *Smith* in that it focused directly on religious exercise; in addition, the restriction on killing only for such "rituals" lessened the claim that the City sought to further substantial interests associated with public health. Absent a neutral, generally

applicable basis for enacting the regulation, the Court's review reverted to strict scrutiny and the ordinance failed that test.

In reconciling these rulings, judicial scrutiny can be expected to focus on the true basis for the enactment. Controls seeking to target a religious practice will not survive even if disguised as general, neutral enactments. A primary lesson to be taken is that local governments must carefully craft ordinance language, and the legislative history should demonstrate a neutral focus, unrelated to any religious exercise.

Free Exercise and Land Use

The First Amendment's treatment of religion may be described as placing local government land-use controls between the proverbial rock and a hard place. On the one hand, treating a religious use or institution "just like" any other party to a land use issue may be seen as denying or substantially limiting the right of free exercise. However, the special treatment of religion, when viewed as government action that may have the purpose and effect of furthering religion, can lead to claims under the Establishment Clause. Thus, local governments must operate within a band between these two prongs of the First Amendment, and how narrow or wide that band may be varies based on current legislative and judicial views of the First Amendment. Other factors that influence an outcome include the character and purpose of the regulation, and the nature of the interference with religious exercise.

Though this article primarily addresses Free Exercise, a brief review of Establishment Clause issues adds to a more complete understanding of the law. A local government's ability to utilize land use controls to grant "special treatment" to religious uses has not been expressly decided by the U.S. Supreme Court,[25] although decisions regarding the exercise of other police powers provide guidance. A statute prohibiting a person from being required to work on a day he proclaimed to observe as a Sabbath was found to be invalid as having a primary purpose of advancing religion.[26] In another case, a statute exempting church-related organizations from prohibitions against religious discrimination in employment was upheld, in the case of an individual fired from a job in the organization's gymnasium because he was not a church member.[27]

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A primary concern of the Free Exercise Clause is whether governmental action must provide relief from an otherwise generally-applicable requirement. The clause can be viewed as aimed primarily at an individual's freedom to believe, which is deemed absolute, while a person's ability to act on such beliefs is not protected absolutely. Put another way:

> Questions of free exercise usually arise when a citizen's civic obligation to comply with a law conflicts with that citizen's religious beliefs or practices. If a law specifically singled out a specific religion or particular religious practice, under current Supreme Court rulings it would violate the First Amendment. Controversy arises when a law is generally applicable and religiously neutral but nevertheless has the "accidental" or "unintentional" effect of interfering with a particular religious practice or belief.[28]

Free exercise decisions from non-land-use case law may involve compulsory governmental actions that impinge on religious belief. The land use claim usually asserts that the governmental action interfered with action premised upon a religious belief. So characterized, a government does possess a reasonable sphere in which its actions may be upheld, with outer limits imposed on governmental action that would seek to forbid *all* religious activity.

The difficulty lies in determining *when* a governmental regulation takes the form of coercion to refrain from doing something in violation of religious principles. At one end of the decisional spectrum are cases, such as that in which the Supreme Court allowed the construction of a road and logging activity in areas held sacred by certain Indian tribes.[29] More or less reversing the inquiry, the Court stated the Free Exercise Clause addressed what the government may or may not do to an individual, not what an individual may exact from a government.[30] Incidental effects of governmental action that do not coerce individuals to act so as to violate their religious beliefs are not required to meet a compelling interest standard.

The more mundane aspects of land use controls, such as compliance with setbacks and basic building code requirements, do coerce behavior. Any free exercise challenge to such controls must arise from religious doctrine, and concern over religious use compliance with these controls must arise not just because the owner or user is a religious institution. In other words, protections under the Free Exercise Clause do not entitle a religious organization to special benefits under a land use ordinance.[31]

Another key issue in assessing land use controls under free exercise is the government's ability to define religion or religious use. A number of cases suggest that a government's inquiry into the "validity" of a religion may lead to potential First Amendment protection violations,[32] although it may be permissible for a government to verify the sincerity of one's religious belief.[33] Treading in these areas will be viewed strictly by a reviewing court, yet some of these older cases may not be applied as stringently when reviewing claims of exemption from otherwise generally applicable laws.[34]

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Conclusion

Coercive governmental action will face stringent scrutiny, increasing with the action's impact on the ability to exercise one's religious belief. A more usual concern, in the land use context, will address governmental regulation seeking to bar conduct (including religious activity) that is deemed harmful to legitimate societal issues. Such controls may be assessed by the application of a spectrum of concerns, including: the severity of the impact on religious belief and practice; the existence of realistic and practical alternate means of carrying on the religious belief or practice; and an examination of the nature and importance of the societal interest in upholding and applying the regulation in general, and as applied to the religious activity.

As a final note, it is important to realize that the state and federal legislatures, within their proper spheres of influence, may expand on religious protections, limiting local government land use control authority still further. Most notable at the present time are the federal RLUIPA, and similar state laws characterized by or using the title of Congress's initial failed attempt to limit local government land use controls related to religious use, the Religious Freedom Restoration Act of 1993.[35]

Notes

1. U.S. CONST. amend. I.
2. "...until the decision of *Cantwell v. Connecticut* (1940), opened the door to federal litigation against the states for religion-clause claims (by ruling that the 14th Amendment's protections against state action 'incorporates,' or absorbs, the free-exercise clause of the First Amendment), there was no cause of action against the state for laws that may have impinged on religious practices. In effect, the Supreme Court did not have opportunity to review this issue until the mid-20th century, when various free-exercise clause cases made their way through the state courts to the Supreme Court." C. Mullaley, RELIGIOUS LIBERTY IN PUBLIC LIFE, available on First Amendment Center website at www.firstamendmentcenter.org/free-exercise-clause.
3. *See, e.g.*, The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S. C. §2000cc-1, *et seq.* (West 2011).
4. *See* discussion at B. BLAESSER & A. WEINSTEIN, *FEDERAL LAND USE LAW & LITIGATION* (2009) (hereinafter *Blaesser, Federal Land Use Law*) at §7:28.
5. Sherbert v. Verner, 374 U.S. 398 (1963).
6. See the discussion of the *Smith* case, *infra*.
7. 699 F.2d 303 (6th Cir. 1983).
8. *Id.* at 307.
9. BLAESSER, FEDERAL LAND USE LAW, *supra* n. 4 at 596 (Chap. 7 synopsis).
10. City of Concord v. New Testament Baptist Church, 382 A.2d 377, 379 (N.H. 1978) (citations omitted).
11. Carey v. Town of Westmoreland, 415 A.2d 333 (N.H. 1980).
12. *Id.* at 376.
13. *Id.* (citing Brandeis' dissent in *Olmstead v. U.S.*, 277 U.S. 438 (1928)).
14. N.H. CONST., Pt. I, art. 5.

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27. Wideman v. Shallowford Comm. Hosp. Inc., 826 F.2d 1030, 1035-36 (11th Cir. 1987).
28. 367 F.3d 299 (5th Cir. 2004).
29. *Id.* at 307.
30. *Id.*
31. Badway v. City of Philadelphia, No. 10-2149, 2011 WL 666321 (3d Cir. Feb. 07, 2011), affirming No. CIV.A. 07-1333, 2010 WL 915002 (E.D. Pa. Mar. 15, 2010).
32. *Id.* at *1.
33. *Id.*
34. *Badway*, 2011 WL 666321 at *1.
35. The Circuits that have adopted the state-created danger exception include the Second, Third, Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuit. The First, Fourth, and Fifth Circuits have all discussed the state-created danger theory, but have never recognized it as a theory of recovery. The Eleventh Circuit appears to have repudiated the doctrine. For a discussion of the state-created danger exception in various circuits, *see generally*, Breen v. Texas A&M Univ., 485 F. 3d 325 (5th Cir. 2007), *rev'd*, 494 F.3d 516 (5th Cir. 2007).
36. *See, e.g.*, Penilla v. City of Huntington Park, 115 F.3d 707 (9th Cir. 1997) (finding that police cancelling a 9-1-1 call for medical assistance was an affirmative action that triggered the state-created danger exception).
37. 318 F.3d 473 (3d Cir. 2003).
38. *Id.* at 480.
39. 486 F.3d 217 (6th Cir. 2007).
40. *Id.* at 223.
41. *Id.*
42. 910 F.2d 1422 (7th Cir. 1990).
43. *Id.* at 1431.
44. *Id.*
45. Freeman v. Ferguson, 911 F.2d 52, 54-55 (8th Cir. 1990).
46. *See, e.g.*, Schieber v. City of Philadelphia, No. CIV. A. 98-5648, 1999 WL 482310 (E.D. Pa. July 09, 1999), and Sinthasomphone v. City of Milwaukee, 785 F. Supp. 1343 (E.D. Wis. 1992).
47. *See, e.g.*, Hale v. Bexar County, 342 Fed. Appx. 921 (5th Cir. 2009); Salas v. Carpenter, 980 F.2d 299 (5th Cir. 1992); Martin v. City of League City, 23 F.Supp. 2d 720 (S.D. Tex. 1998).
48. Kennedy v. City of Ridgefield, 439 F.3d 1055 (9th Cir. 2006).
49. *Id.* at 1065.
50. Kennedy v. City of Ridgefield, 440 F.3d 1091 (9th Cir. 2006).
51. *Id.* at 1092 (Tallman, J., dissenting). **M**

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15. After the initial rulings finding that zoning was a valid use of the police power in the 1920s and 1930s, federal courts generally absented themselves from the land use arena until cases arose under the First Amendment's free speech protections, including adult entertainment and commercial speech (e.g., signs) issues, and the continuing quest to determine the proper application of the Fifth Amendment's takings clause to land use regulation.
16. BLAESSER, FEDERAL LAND USE LAW, *supra* n. 4 at §7:3, and cases cited.
17. The so-called *Lemon* test, derived from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), though subject to continuing critical discussion and calls for alteration, remains the current statement of the law. It sets a three-part test by which governmental action (1) must have a secular purpose that neither advances nor inhibits religion; (2) must have a direct and immediate effect that neither advances nor inhibits religion; and (3) must avoid excessive entanglement with religion.
18. *See, e.g.*, Braunfeld v. Brown, 366 U.S. 599 (1961) (upholding Sunday closing laws against challenge by Orthodox Jewish merchants by finding a secular purpose in creating uniform day of rest, and that it imposed only indirect burdens).
19. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963) (invalidating a state denial of unemployment compensation to a person who refused to work on Saturdays due to religious beliefs. Justice Brennan created a three-part test analyzing (1) the burden imposed on religious exercise; (2) if such burden was substantial, the regulation had to be justified under a compelling interest standard; and (3) if such an interest existed, whether a less restrictive means could accomplish the result).
20. Grosz v. City of Miami Beach, 721 F.2d 729 (11th Cir. 1983).
21. Islamic Center of Mississippi, Inc. v. City of Starkville, 840 F.2d 293 (5th Cir. 1988).
22. Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990).
23. *Id.* at 878-79.
24. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).
25. BLAESSER, FEDERAL LAND USE LAW, *supra* n. 4 at § 7:6.
26. Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985).
27. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).
28. *Id.*
29. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).
30. *Id.* at 451.
31. *See, e.g.*, Prater v. City of Burnside, Ky., 289 F.3d 417 (6th Cir. 2002) (denying church's claim that its "spiritual duty" to construct a cemetery was violated when the city chose to develop a dedicated street instead of closing it and reverting the land to the church).
32. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963); Braunfeld v. Brown, 366 U.S. 599 (1961).
33. *See, e.g.*, U.S. v. Ballard, 322 U.S. 78 (1944).
34. Wisconsin v. Yoder, 406 U.S. 205 (1972) suggests that a determination of what is a "religious belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests." *Id.* at 215.
35. Pub. L. No. 103-141, 107 Stat. 1488 (Nov. 16, 1993), codified at 42 U.S.C. § 2000bb *et seq.* The Act was invalidated by the U.S. Supreme Court in *City of Boerne, Texas v. Flores*, 521 U.S. 507 (1997) on the basis that it exceeded Congress's enforcement powers under § 5 of Fourteenth Amendment. Several states have enacted their own versions – Rhode Island, Tennessee, Florida, Illinois, and Connecticut, to name a few. **M**

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