



“YIGBY” and the Constitution

Affordable Housing on Religious Property

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Roadmap

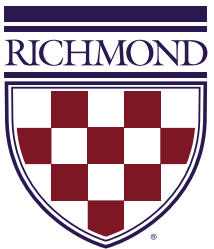
- **The Religion Clauses of the First Amendment**
- **Religious Exemptions from Generally Applicable Laws**
- **The Faith in Housing for the Commonwealth Act**
- **Religious Discrimination: The Federal Fair Housing Act**



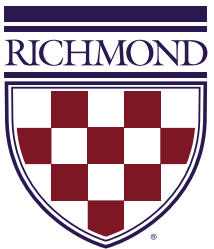
The Religion Clauses



“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”



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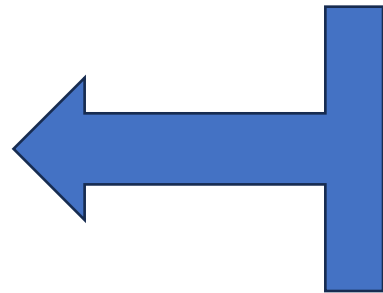
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Tension in the Religion Clauses

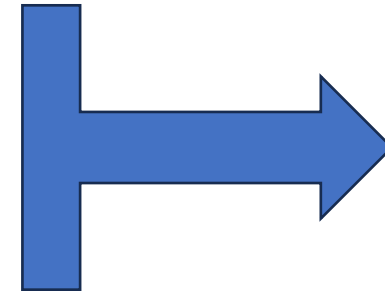
"Play in the Joints"

State **may not** give benefit



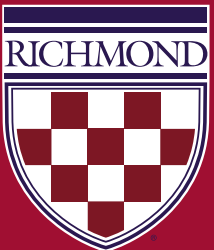
Establishment
Clause

State **may** give benefit



Free Exercise
Clause

State **must** give benefit





Religious Exemptions from Generally Applicable Laws

The Free Exercise Clause

The state **need not** give religious exemptions from neutral, generally applicable laws.

- *Employment Division v. Smith* (1990): Oregon **may** prohibit possession of peyote by adherents of a Native American religion who use the drug ceremonially
- *Church of the Lukumi v. City of Hialeah* (1992): City of Hialeah **may not** intentionally target adherents of Santería with a facially neutral ban on animal killings



The Establishment Clause

If the state **voluntarily** creates a religious exemption, courts ask four questions. Does the exemption . . .

1. Apply to religious organizations **only**?
2. Lift a **state-imposed burden** on free exercise?
3. Unduly burden **nonbeneficiaries**?
4. Support **proselytization** or **for-profit activity**?



The Establishment Clause

1. *Walz v. Tax Comm'n* (1970): New York City **may** exempt from property tax land used for a religious purpose, where it also exempts educational and charitable land
2. *Cutter v. Wilkinson* (2005): Congress **may** forbid prisons from imposing substantial burdens on inmates' religious exercise except under certain circumstances, as the burdens of incarceration are state-imposed



The Establishment Clause

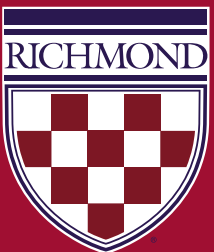
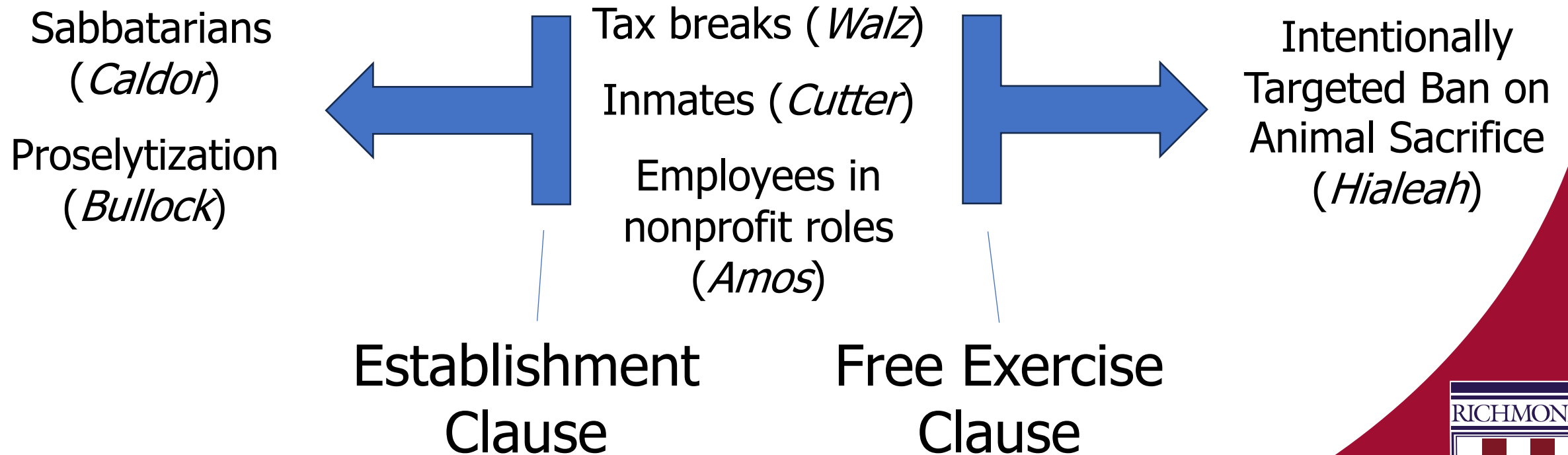
3. *Estate of Thornton v. Caldor, Inc.* (1985): Connecticut **may not** allow employees to take off any day they call the Sabbath, as the law unduly burdens employers.
4. (a) *Texas Monthly v. Bullock* (1989): Texas **may not** exempt from sales tax only literature that proselytizes.

(b) *LDS Church v. Amos* (1987): Congress **may** exempt from Title VII's ban on discrimination religious employees who perform nonprofit (but *not* for-profit) functions.



Exemptions from Neutral Laws

"Play in the Joints"





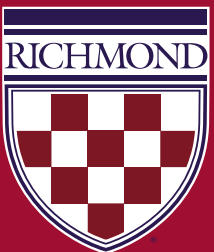
The Faith in Housing for the Commonwealth Act



Four Questions

Does the Faith in Housing Act . . .

1. Apply to religious organizations only? **Yes.**
2. Lift a state-imposed burden on free exercise? **Likely yes.**
3. Unduly burden nonbeneficiaries? **Likely no.**
4. Support proselytization or for-profit activity? **No.**



Four Questions

- 1. Religion Only? **Yes.**** The Faith in Housing Act applies only to religious organizations, unlike the tax exemption in *Walz*. But the same is true of Title VII's exemption for religious employers, which *Amos* upheld.
- 2. State-Imposed Burdens? **Likely yes.**** Religious groups likely view affordable housing as part of their faith mission. To avoid requiring courts to assess the veracity of that belief, the state may categorically exempt that activity from zoning (so long as it is not for profit).



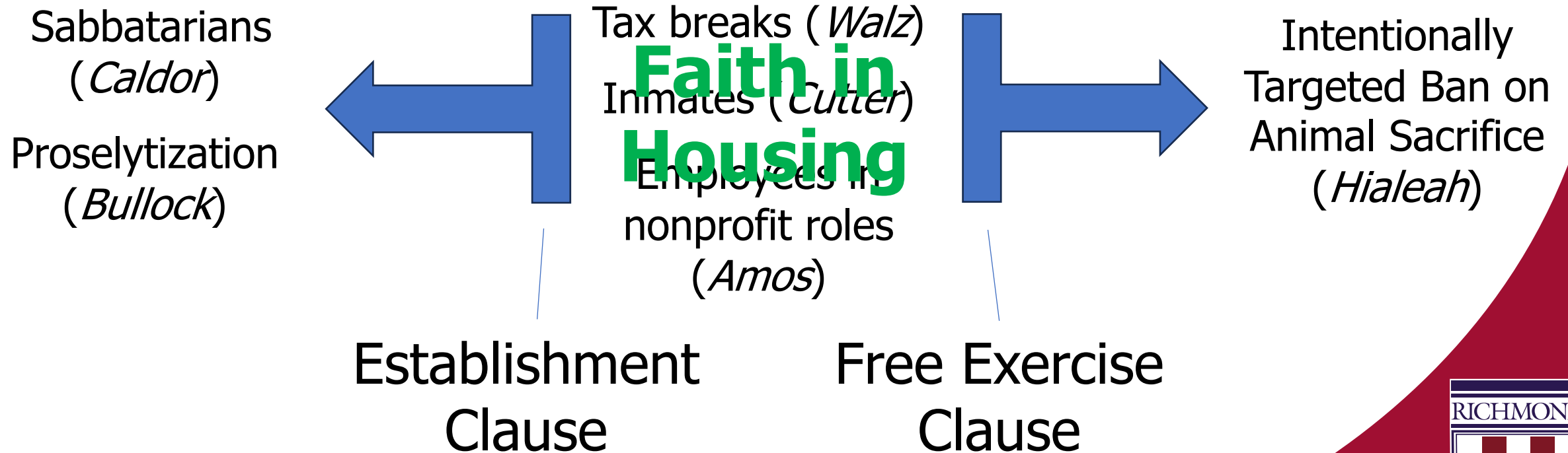
Four Questions

- 3. Unduly burdens on Others?** **Likely no.** Religious organizations that use the Faith in Housing Act may burden neighbors, but that burden is probably not alone sufficient to defeat the law, unlike the burden in *Caldor*.
- 4. Suspect Activities?** **No.** The Faith in Housing Act does not support proselytization (unlike the tax exemption in *Bullock*), and it appears to be limited to nonprofit activity (as at least three justices thought relevant in *Amos*).



Exemptions from Neutral Laws

"Play in the Joints"

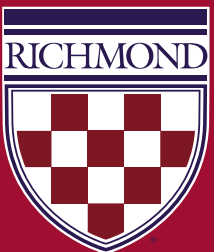


The Fair Housing Act



The Problem

- **The Federal Fair Housing Act makes it “unlawful” to “refuse to sell or rent . . . a dwelling to any person because of . . . religion.”**
- **But the Act also exempts a “religious organization” that owns or operates housing for “other than a commercial purpose.”**
- **So could a development built under Virginia’s Faith in Housing Act discriminate against tenants because of their religion?**



Conclusions

As written, the Faith in Housing Act likely falls in the “play in the joints” between the Religion Clauses.

But the Legislature could strengthen the bill by:

- 1. Extending it to secular nonprofit organizations**
- 2. Expressly prohibiting religious discrimination against tenants**

