B. CHURCH PROPERTY

One area of the law of church and state that has been abundantly litigated, on which the Supreme Court has spoken in at least eight important decisions, and which is paradigmatic for an understanding of church autonomy, is the law governing church ownership of property, or more specifically, the law that applies when there is a dispute within a religious body about who shall exercise control over that body's property. When one or the other party—or both—appeal to the civil courts to settle the dispute, how should the civil courts treat the issue? Some would say: the same as any other property dispute. In some instances, that is a sufficient answer. But sometimes the dispute turns on questions of religious doctrine or practice, each faction claiming that *it* is the true church because the other party has abandoned or betrayed the true faith on which the church was founded.

In England (which has an established church) civil courts devoted much time and effort to determining the merits of such claims, and developed a theory of *implied trust*: that the persons who contributed to the building of the church had intended it to stand for certain doctrines then in force and had thus impressed upon their donations an implied trust that they would continue to be used for that purpose. If, however, one faction in the church, even that nominally in control, had departed from the received doctrine thus to be perpetuated, that faction lost all claim to proprietorship of the property so dedicated, and the faction remaining true to the original faith was entitled to control that property. Many American courts, though not operating in the established-church milieu of England, continued to apply the implied-trust theory, with its departure-from-doctrine test, to disputes over church property. A different note was struck, however, by the U.S. Supreme Court in a case arising out of the tensions of the Civil War. That decision dominated American judicial policy on church property disputes within hierarchical churches for more than a century.

1. *Watson v. Jones* (1872)

The leading case in church property law arose within the Walnut Street Presbyterian Church of Louisville, Kentucky, where proslavery and antislavery factions struggled for control. The General Assembly of the Presbyterian Church in the U.S. ruled in favor of the antislavery faction. The opposing element appealed to the federal court in a diversity suit (since three of the petitioners lived across the Ohio River in Indiana) and urged it to apply the implied trust rule on the grounds that the national body had departed from the doctrines to which the local church property

had been devoted, and therefore the dissidents, who had remained true to those doctrines, were entitled to the property.

The Supreme Court declined to do so. It said that if there were an explicit trust dedicating the premises to a specific doctrine, the civil courts would enforce that trust in religious bodies as in any other voluntary associations, but it found no such explicit trust in this instance. The court distinguished between churches of congregational and those of hierarchical polity. In the absence of an explicit trust, it would not imply one, but in the case of a congregational body would respect the determination of a majority of the congregation. "The minority in choosing to separate themselves into a distinct body, and refusing to recognize the authority of the governing body, can claim no rights in the property from the fact that they had once been members of the Church or congregation."

In the case of a hierarchical church, however, the court adopted a rule of deference by the civil court to the determinations of a church court:

> Whenever the questions of discipline or of faith, or ecclesiastical rule, custom or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.

The court rejected the English precedent, distinguishing the American situation by saying:

> In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations and officers within the general association, is unquestioned.

This was a ringing early affirmation of the autonomy of religious bodies, which no court has since challenged. But the next sentences have elicited much criticism:[1]

> All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed.[2]

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1. See § 11 below.
2. *Watson v. Jones*, 13 Wallace 679 (1872).

This policy of judicial deference by the civil courts to ecclesiastical tribunals on matters internal to hierarchical religious bodies, including the control of church property, offered a simple rule that was welcomed by many courts. Since it was an expression of common law rather than constitutional law, the states were not obliged to adhere to it, and some of them did not. Over the years, however, it commended itself increasingly as resonating to constitutional norms, and was eventually "constitutionalized" by subsequent decisions of the Supreme Court.

2. *Gonzalez v. Archbishop* (1929)

Not until 1929 did the Supreme Court consider a case that built on the foundation of *Watson v. Jones*. It dealt not with church property as such but with the underlying issue, church *authority*. The plaintiff was a ten-year-old boy who complained that he had not been appointed by an archbishop of the Roman Catholic Church to a chaplaincy created by a bequest of one of his ancestors that had always been given to a member of his family. The bequest recognized the archbishop's right to ascertain the fitness of any applicant, and the archbishop had done so, relying on rules adopted long after the testator had died. The Supreme Court upheld the archbishop's decision, saying:

> In the absence of fraud, collusion or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, since the parties in interest made them so by contract or otherwise.[3]

The new dimension added by *Gonzalez* was the exception created in the first line quoted, implying that civil courts could scrutinize the determinations of ecclesiastical tribunals to determine whether "fraud, collusion or arbitrariness" had played a part.

3. *Kedroff v. St. Nicholas Cathedral* (1952)

The court next reviewed a church autonomy case in 1952, when *Kedroff v. St. Nicholas Cathedral* arose in New York. The dispute was over the Russian Orthodox cathedral in New York City, which was controlled by an archbishop appointed in 1933 by the patriarch of Moscow, head of the Russian Orthodox Church. A new archbishop was appointed by the American branch of the church, which viewed the Moscow leadership as subservient to Soviet domination. The New York state legislature amended its Religious Corporations Law to make clear that the American church controlled the property. The Supreme Court invalidated the amendment as intruding into the church's internal affairs.

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3. *Gonzalez v. Archbishop*, 280 U.S. 1 at 16-17 (1929).

> Legislative power to punish subversive action cannot be doubted. If such action should be actually attempted by a cleric, neither his robe nor his pulpit would be a defense. But in this case no problem of punishment for the violation of law arises. There is no charge of subversion or hostile action by any ecclesiastic. Here there is a transfer by statute of control over churches. This violates our rule of separation between church and state....
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> *Watson v. Jones*, although it contains a reference to the relations of church and state under our system of laws, was decided without depending upon prohibition of state interference with the free exercise of religion. It was decided in 1871, before judicial recognition of the coercive power of the Fourteenth Amendment to protect the limitations of the First Amendment against state action.... The opinion radiates, however, a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. Freedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as part of the free exercise of religion against state interference.[4]

Justice Felix Frankfurter spelled out the implications of the decision in a concurring opinion:

> What is at stake here is the power to exercise religious authority. That is the essence of this controversy. It is that even though the religious authority becomes manifest and is exerted through authority over the Cathedral as the outward symbol of a religious faith....
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> The long, unedifying history of the contest between the secular state and the church is replete with instances of attempts by civil government to exert pressure upon religious authority.... History also indicates that the vitality of great world religions survived such efforts. In any event, under our Constitution it is not open to the governments of this Union to reinforce the loyalty of their citizens by deciding who is the true exponent of their religion.[5]

4. *Kreshik v. St. Nicholas Cathedral* (1960)

A sequel to *Kedroff* arose in 1960 when New York's highest court on remand reasserted its earlier affirmation of the legislation and found in favor of the American branch of the Russian Orthodox Church. The U.S. Supreme Court reversed in a brief *per curiam*[6] decision, saying the matter had already been decided in *Kedroff* and

4. *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952).
5. Ibid., Frankfurter concurrence.
6. "By the court"; that is, unsigned by any particular justice as author.

implying that what the legislature could not do—alienate church property from the hierarchy controlling it—the state courts could not do either.[7]

5. *Presbyterian Church v. Hull Church* (1969)

In 1969 a curious judicial drama unfolded. Two local Presbyterian Churches in Savannah, Georgia, Mary Elizabeth Blue Hull Memorial Presbyterian Church and Eastern Heights Presbyterian Church, decided to pull out of the (Southern) Presbyterian Church in the U.S. because the national body, by ordaining women, supporting the National Council of Churches, opposing prayer and Bible-reading in the public schools and other nefarious acts, had departed from the doctrines to which the local church was dedicated. A jury, probably composed predominantly of Baptists, decided that the local church could indeed dissociate itself from the denomination and take the church property with it. The Georgia Supreme Court affirmed, and the U.S. Supreme Court granted *certiorari* and ruled on the case in an opinion by Justice William J. Brennan, the Supreme Court justice who perhaps has made the greatest contribution over the years to a rational and coherent interpretation of the religion clauses of the First Amendment.

> It is of course true that the state has a legitimate interest in resolving property disputes, and that a civil court is a proper forum for that resolution. Special problems arise, however, when these disputes implicate controversies over church doctrine and practice. The approach of this Court in such cases was originally developed in *Watson v. Jones*, a...diversity decision decided before the application of the First Amendment to the states but nonetheless informed by First Amendment considerations.... There, as here, the Court was asked to decree the termination of an implied trust because of departures from doctrine by the national organization. The *Watson* court refused, pointing out that it was wholly inconsistent with the American concept of the relationship between church and state to permit civil courts to determine ecclesiastical questions.... The logic of this language leaves the civil courts *no* role in determining ecclesiastical questions in the process of resolving property disputes.
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> Thus, the First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes. It is obvious, however, that not every civil court decision as to property claimed by a religious organization jeopardizes values protected by the First Amendment. Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property. And there are neutral principles of law, developed for use in all property disputes, which can be applied without "establishing" churches to which property is awarded. But First Amendment values are plainly jeopardized when

7. *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190 (1960).

> church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern. Because of these hazards, the First Amendment enjoins the employment of organs of government for essentially religious purposes, *Abington v. Schempp*; the amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine. Hence, States, religious organizations and individuals must structure relationships involving church property so as not to require civil courts to resolve ecclesiastical questions.
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> * * *
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> Since the Georgia courts on remand may undertake to determine whether petitioner is entitled to relief on its cross-claims, we find it appropriate to remark that the departure-from-doctrine element of Georgia's implied trust theory can play *no* role in any future judicial proceedings.[8]

On remand, the Georgia Supreme Court in essence seemed to say, "Well, if we can't use the implied trust theory, we'll just have to rely on `neutral principles of law.'" Scrutinizing the property deeds and the charter of the local churches and finding in them no explicit trust assigning beneficial ownership of the property to the denomination, the Georgia court again awarded the properties to the dissident local congregations.

Those watching this development from the national scene expected the Supreme Court once more to set the Georgia court straight in no uncertain terms and to restore the local property to the denomination, but no such thing happened. The U.S. Supreme Court declined to hear the case again![9]

6. *Eldership v. Sharpsburg Church* (1970)

On the same day that it declined to hear *Hull Church*, the Supreme Court issued a *per curiam* decision in a similar case, *Maryland and Virginia Eldership of the Churches of God v. Sharpsburg Church of God*, which involved a local church the majority of whose members had voted to withdraw from association with the Eldership (regional judicatory) and had taken the local church property with them. The Maryland Court of Appeals had allowed them to do so, finding no explicit statement in the constitution of the general church or the charter of the local congregation requiring that the local property remain in the control of the denomination. It emphasized the important insight that churches can be hierarchical

8. *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); emphasis in original.

9. 396 U.S. 1041 (1970).

in some respects without being so in all respects (that is, with regard to control of property), and outlined three ways in which a denomination can maintain control of local church property:

> 1. It may require reverter clauses[10] in the deeds to the property of the local churches;
> 2. It may provide in its constitution or by some other authoritative source for the reverting of the local church property to the hierarchical body upon withdrawal by the local congregation with an implied consent by the local church to this provision.
> 3. It may obtain from the [state legislature] an act providing for such a result.[11]

The U.S. Supreme Court dismissed the case for want of a substantial federal question and Justice Brennan added in a concurring opinion, joined by two other members of the court, that "neutral principles of law" provided *one* way of resolving church property disputes, but insisted that the deference rule of *Watson v. Jones* remained an alternative method of adjudication.[12] Over this precise point judicial controversy continued to skirmish.[13]

7. *Serbian Eastern Orthodox Diocese v. Milivojevich* (1976)

The next development was a decision bringing to an end a church dispute that had been in the courts for almost two decades and had bled a small denomination of hundreds of thousands of dollars fighting lawsuits in several states. The head of the American branch of the Serbian Eastern Orthodox Church, Bishop Dionisije Milivojevich, was removed and defrocked by the Holy Sobor of the bishops of that church at its headquarters in Yugoslavia. Bishop Dionisije, backed by many of the younger members of the church, fought back, claiming that his removal was a result of his outspoken opposition to the domination of the Yugoslavian hierarchy by the Communist government of Marshal Tito.

There were splits over this question in many Serbian Eastern Orthodox congregations. The Church of St. Sava in Cleveland was the arena for internecine squabbles, as the pro-Dionisije faction was locked out by the anti-Dionisije group, which then went to court to regain possession.[14] The main suit was by Dionisije himself, who brought an action in the state courts of Illinois, where the monastery which served as his headquarters was located, demanding reinstatement as bishop and

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10. A provision that, if the property ceases to be used in accordance with the governance of the general church, it will "revert" to the general church.

11. 249 Md. at 633, 241 A.2d. at 165.

12. *Maryland & Virginia Eldership v. Sharpsburg Church*, 396 U.S. 367 (1970).

13. See § 11 below.

14. See also *Serbian Orthodox Church Congregation of St. Demetrius of Akron v. Kelemen*, 393 U.S. 527 (1969).

restoration of a single American diocese (with himself again as head) in place of the three dioceses into which the Holy Sobor had divided the American church. He lost in the trial court, but the Illinois Supreme Court reversed on the ground that the acts of the Holy Sobor were arbitrary and not in conformity with the church's own procedures.

The U.S. Supreme Court granted *certiorari* and ruled in an opinion by Justice Brennan.

> The fallacy fatal to the judgment of the Illinois Supreme Court is that it rests upon an impermissible rejection of the decisions of the highest ecclesiastical tribunals of this hierarchical church upon the issues in dispute, and impermissibly substitutes its own inquiry into church polity and resolutions based thereon of those disputes....
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> Resolution of the religious disputes at issue here affects the control of church property.... Resolution of the religious dispute over Dionisije's defrockment...determines control of the property. Thus, this case essentially involves not a church property dispute but a religious dispute the resolution of which under our cases is for ecclesiastical and not civil tribunals.... This principle applies with equal force to church disputes over church polity and church administration.
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> The conclusion of the Illinois Supreme Court that the decisions of the Mother Church were "arbitrary" was grounded upon an inquiry that persuaded [that] court that the Mother Church had not followed its own laws and procedures in arriving at those decisions. We have concluded that whether or not there is room for "marginal civil court review" under the narrow rubrics of "fraud" or "collusion" when church tribunals act in bad faith for secular purposes, no "arbitrariness"[15] exception—in the sense of an inquiry whether the decisions of the highest ecclesiastical tribunal of a hierarchical church complied with church laws and regulations—is consistent with the constitutional mandate that civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom or law. For civil courts to analyze whether the ecclesiastical actions of a church judicatory are in that sense "arbitrary" must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly require the church adjudicatory to follow, or else into the substantive criteria by which they are supposedly to decide the ecclesiastical question. But this is exactly the inquiry that the First Amendment prohibits; recognition of such an exception would undermine the general rule that religious controversies are not the proper subject of civil court inquiry, and that a civil court must accept the ecclesiastical decisions of church tribunals as it finds them.
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> * * *

15. The quoted terms are from *Gonzalez v. Archbishop*, discussed at § B2 above.

> Indeed, it is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria. Constitutional concepts of due process, involving secular notions of "fundamental fairness" or impermissible objectives, are therefore hardly relevant to such matters of ecclesiastical cognizance.
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> In short, the First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters. When this choice is exercised and ecclesiastical tribunals *are* created to decide disputes over the government and direction of subordinate bodies, the Constitution requires that civil courts accept their decisions as binding upon them.[16]

Chief Justice Burger concurred in the judgment. Justice White wrote a brief concurrence reserving for the courts a role in determining threshold facts.

> Major predicates for the Court's opinion are that the Serbian Orthodox Church is a hierarchical church and the American and Canadian diocese, involved here, is part of that church. These basic issues are for the courts' ultimate decision, and the fact that church authorities may render their opinions on them does not foreclose the courts from coming to their independent judgment. I do not understand the Court's opinion to suggest otherwise and join the views expressed therein.[17]

Justice Rehnquist was not at all prepared to concede such judicial deference to ecclesiastical tribunals and said so in a lengthy dissent, which was joined by Justice Stevens. (Justices Powell, Marshall, Stewart and Blackmun constituted the "silent majority" on the Brennan opinion.)

> The Court's opinion, while long on the ecclesiastical history of the Serbian Orthodox Church, is somewhat short on the procedural history of this case. A casual reader of some of the passages in the Court's opinion could easily gain the impression that the State of Illinois had commenced a proceeding designed to brand Bishop Firmilian [Dionisije's successor] as a heretic, with appropriate pains and penalties. But the state trial judge... was not the Bishop of Beauvais, trying Joan of Arc for heresy; the jurisdiction of his court was invoked by [Firmilian himself], who sought an injunction establishing... control over the American-Canadian Diocese....
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> The jurisdiction of that court having been invoked for such a purpose by both contesting claimants to diocesan authority, it was entitled to ask if the real bishop of the... diocese would please stand up. The protracted

16. *Serbian Eastern Orthodox Diocese for the United States of American and Canada v. Milivojevich*, 423 U.S. 696 (1976).

17. Ibid., White concurrence.

proceedings in the Illinois courts were devoted to the ascertainment of who that individual was, a question which the Illinois courts sought to answer by application of the canon law of the church, just as they would have attempted to decide a similar dispute among the members of any other voluntary association. The Illinois courts did not in the remotest sense inject their doctrinal preference into the dispute.... Unless the First Amendment requires control of disputed church property to be awarded solely on the basis of ecclesiastical paper title, I can find no constitutional infirmity in the judgment of the Supreme Court of Illinois.

Unless civil courts are to be wholly divested of authority to resolve conflicting claims to real property owned by a hierarchical church, and such claims are to be resolved by brute force, civil courts must of necessity make some factual inquiry even under the rules the Court purports to apply in this case. We are told that "a civil court must accept the ecclesiastical decisions of church tribunals as it finds them." But even this rule requires that proof be made as to what those decisions are, and if proofs on that issue conflict the civil court will inevitably have to choose one over the other. In so choosing, if the choice is to be a rational one, reasons must be adduced as to why one proffered decision is to prevail over another. Such reasons will obviously be based on the canon law by which the disputants have agreed to bind themselves, but they must also represent a preference for one view of that law over another.

If civil courts, consistently with the First Amendment[,] may do that much, the question arises why they may not do what the Illinois courts did here... and conclude, on the basis of testimony from experts on the canon law at issue, that the decision of the religious tribunal involved was rendered in violation of its own stated rules of procedure.... If the civil courts are to be bound by any sheet of parchment bearing the ecclesiastical seal and purporting to be a decree of a church court, they can easily be converted into handmaids of arbitrary lawlessness.

The cases upon which the Court relies are not a uniform line of authorities leading inexorably to reversal of the Illinois judgment. On the contrary, they embody two distinct doctrines which have quite separate origins. The first is a common-law doctrine regarding the appropriate roles for civil courts called upon to adjudicate church property disputes—a doctrine... which has never had any application to our review of a state-court decision. The other is derived from the First Amendment to the Federal Constitution, and is of course applicable to this case; it, however, lends no more support to the Court's decision than does the common-law doctrine.

The first decision of this Court regarding the role of civil courts in adjudicating church property disputes was *Watson v. Jones*. There the Court canvassed the American authorities and concluded that where people had chosen to organize themselves into voluntary religious associations, and had agreed to be bound by the decisions of the hierarchy created to govern such associations, the civil courts could not be availed of to hear appeals from otherwise final decisions of such hierarchical

authorities. The bases from which this principle was derived clearly had no constitutional dimension; there was not the slightest suggestion that the First Amendment or any other provision of the Constitution was relevant to the decision of that case....

* * *

Watson, *Bouldin*[18] and *Gonzalez* have no direct relevance to the question before us today: whether the First Amendment, as made applicable to the States by the Fourteenth, prohibits Illinois from permitting its civil courts to settle religious property disputes in the manner presented to us on this record.... [T]he only cases which are relevant to that question—*Kedroff*, *Kreshik*, *Blue Hull*, and *Md. & Va. Churches*[19]—require that this question be answered in the negative. The rule of those cases, one which seems fairly implicit in the history of our First Amendment, is that the government may not displace the free religious choices of its citizens by placing its weight behind a particular religious belief, tenet, or sect....

There is nothing in this record to indicate that the Illinois courts have been instruments of any such impermissible intrusion by the State on one side or the other of a religious dispute.... Instead, that opinion appears to be precisely what it purports to be: an application of neutral principles of law consistent with the decisions of this Court. Indeed, petitioners make absolutely no claim to the contrary. They agree that the Illinois courts *should* have decided the issues which *they* presented; but they contend that in doing so those courts should have deferred entirely to the representations of the announced representatives of the Mother Church. Such blind deference, however, is counselled neither by logic nor by the First Amendment. To make available the coercive powers of civil courts to rubber-stamp ecclesiastical decisions of hierarchical religious associations, when such deference is not accorded similar acts of secular voluntary associations, would, in avoiding the Free Exercise problems petitioners envision, itself create far more serious problems under the Establishment Clause.

* * *

In conclusion, while there may be a number of good arguments that civil courts of a State should, as a matter of the wisest use of their authority, avoid adjudicating religious disputes to the maximum extent possible, they obviously cannot avoid all such adjudications. And while common-law principles like those discussed in *Watson*, *Bouldin*, and *Gonzalez* may offer some sound principles for those occasions when such adjudications are required, they are certainly not rules to which state courts are required to adhere by virtue of the Fourteenth Amendment. The principles which that Amendment, through its incorporation of the First, *does* enjoin upon the state courts—that they remain neutral on matters of

18. *Bouldin v. Alexander*, 15 Wall. 131 (1872), discussed at § C3 below.

19. 393 U.S. 440 (1969) and 396 U.S. 367 (1970), summarized by Justice Rehnquist in the elided material and discussed at §§ B5 and 6 above.

> religious doctrine—have not been transgressed by the Supreme Court of Illinois.[20]

Justice Rehnquist's eloquent dissent was perhaps a bit more indulgent of the Illinois court's discretion than it deserved. To an objective observer it might have appeared that that court *was* "putting its thumb on the scale" in favor of Dionisije at several points in the record, such as when it accepted the interpretation of the church's canon law offered by one "expert" on Dionisije's side in preference to the interpretation of *five* "experts" on the other. At any rate, Rehnquist failed to persuade seven members of the court to his point of view, and at least five of them adhered to the Brennan view that *Watson*, *Gonzalez*, *Kedroff*, *Blue Hull* and *Sharpsburg*—whatever their source—augured against a court's second-guessing an ecclesiastical tribunal in the manner of the Illinois Supreme Court.

In any event, Bishop Dionisije at last was ousted, the three bishops appointed in his place could finally preside in peace over their dioceses, and the church could begin to recover from its more than decade-long convulsion.

8. *Jones v. Wolf* (1979)

The Supreme Court seemed in *Serbian Diocese* to have settled firmly on a rule of strict deference to hierarchical tribunals—even to the extent of closing the exception for "arbitrariness"—that appeared to leave little room for "neutral principles of law," but in 1979 the court issued another church property decision that muddied the waters again. Once more the question was posed by a Presbyterian Church in Georgia and that litigious fellow, Jones. The Vineville Presbyterian Church of Macon, Georgia, was split over issues pertaining to the denomination's policies, and by a vote of 165 to 94 resolved to sever its ties with the Presbyterian Church in the U.S.—which is any group of church members' right—and to take the local church property with them—which isn't necessarily. The Augusta-Macon Presbytery appointed an administrative commission, which ruled that the minority was the true congregation, and members of that minority went to court to reclaim possession of the church property.

The trial court followed the "neutral principles" approach that had been adopted by the Georgia Supreme Court on the remand of *Hull Church*. It examined the pertinent deeds, charters, state laws and church constitutions, but found in them nothing to support an express or implied trust in the Vineville Presbyterian Church property in favor of any body other than the trustees of the local church. Therefore it refused to recognize in the denomination any authority to declare the minority faction the true congregation for purposes of controlling the property. The Georgia Supreme Court affirmed, saying, "More than a mere connectional relationship between the

20. *Serbian Orthodox Diocese, supra*, Rehnquist dissent, emphasis in original.

local and general churches must exist to give rise to property rights in the general church."[21]

The U.S. Supreme Court granted *certiorari* and issued an opinion written by Justice Blackmun.

> Georgia's approach to church property litigation has evolved in response to *Presbyterian Church v. Hull Church*.... On remand, the Georgia Supreme Court concluded that, without the departure-from-doctrine element, the implied trust theory would have to be abandoned in its entirety.... In its place, the court adopted what is now known as the "neutral principles of law" method for resolving church property disputes....
>
> The neutral principles analysis was further refined by the Georgia Supreme Court in *Carnes v. Smith*.[22] The case concerned a property dispute between The United Methodist Church and a local congregation that had withdrawn from that church. As in *Presbyterian Church II*, the court found no basis for a trust in favor of the general church in the deeds, the corporate charter, or the state statutes dealing with implied trusts. The court observed, however, that the constitution of the United Methodist Church, its Book of Discipline, contained an express trust provision in favor of the general church. On this basis, the church property was awarded to the denominational church.
>
> In the present case, the Georgia courts sought to apply the neutral principles analysis.... And here... in contrast to *Carnes*, the provisions of the constitution of the general church, The Book of Church Order, concerning the ownership and control of church property failed to reveal any language of trust in favor of the general church. The courts accordingly held that legal title to the property of the Vineville Church was vested in the local congregation. Without further analysis or elaboration, they further decreed that the local congregation was represented by the majority faction, respondents herein.
>
> The only question presented by this case is which faction of the formerly united Vineville congregation is entitled to possess and enjoy the property.... There can be little doubt about the general authority of civil courts to resolve this question. The State has an obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively.
>
> It is also clear, however, that "the First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes." Most importantly, the First Amendment prohibits civil courts from resolving church property disputes on the basis of religious

21. *Jones v. Wolf*, 241 Ga. 208 (1979).
22. 222 S.E.2d 322 (1976).

> doctrine and practice.[23] As a corollary of this commandment, the Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization.[24] Subject to these limitations, however, the First Amendment does not dictate that a State must follow a particular method of resolving church property disputes. Indeed, "a state may adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith."[25]
>
> At least in general outline, we think the "neutral principles of law" approach is consistent with the foregoing constitutional principles....
>
> The principal advantages of [that] approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity. The method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice. Furthermore, the neutral principles analysis shares the peculiar genius of private-law systems in general—flexibility in ordering private rights and obligations to reflect the intentions of the parties. Through appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to religious property in the event of a particular contingency, or what religious body will determine the ownership in the event of a schism or doctrinal controversy. In this manner, a religious organization can ensure that a dispute over the ownership of church property will be resolved in accord with the desires of the members.
>
> This is not to say that the application of the neutral principles approach is wholly free of difficulty.... [In cases where] the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body. *Serbian Orthodox Diocese*. We therefore hold that a State is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute.[26]

The court attempted to rebut the reproaches of the dissent, as expressed by Justice Powell, joined by the Chief Justice and Justices Stewart and White, for abandoning the rule of deference. The dissent stated:

> This case presents again a dispute among church members over the control of a local church's property. Although the Court appears to accept established principles that I have thought would resolve this case, it

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23. Citing *Serbian Orthodox Diocese v. Milivojevich, Md. & Va. Churches v. Sharpsburg Church, and Presbyterian Church I, supra.*

24. Citing *Serbian Orthodox Diocese, Watson v. Jones, supra.*

25. Citing *Md. & Va. Churches, supra*, Brennan, J., concurring, emphasis in original.

26. *Jones v. Wolf*, 443 U.S. 595 (1979).

superimposes on these principles a new structure of rules that will make the decision of these cases by civil courts more difficult. The new analysis also is more likely to invite intrusion into church polity forbidden by the First Amendment.

The Court begins by stating that "[t]his case involves a dispute over the ownership of church property," suggesting that the concern is with legal or equitable ownership in the real property sense. But the ownership of the property of the Vineville Church is not at issue. The deeds place title in the Vineville Presbyterian Church, or in trustees of that church, and none of the parties has questioned the validity of those deeds. The question actually presented is which of the factions within the local congregation has the right to control the actions of the titleholder, and thereby to control the use of the property, as the Court later acknowledges.

Since 1872 disputes over the control of church property usually have been resolved under principles established by *Watson v. Jones*. Under the new and complex, two-stage analysis approved today, a court instead first must apply newly defined "neutral principles of law" to determine whether property titled to the local church is held in trust for the general church organization with which the local church is affiliated. If it is, then the court will grant control of the property to the councils of the general church. If not, then control by the local congregation will be recognized. In the latter situation, if there is a schism in the local congregation, as in this case, the second stage of the new analysis becomes applicable....

As this new approach inevitably will increase the involvement of civil courts in church controversies, and as it departs from long-established precedents, I dissent.

The first stage in the "neutral principles of law" approach operates as a restrictive rule of evidence.... [C]ivil courts using this analysis may consider the form of religious government adopted by the church members for the resolution of intrachurch disputes *only* if that policy has been stated, in express relation to church property, in the language of trust and property law.

One effect of the Court's evidentiary rule is to deny to the courts relevant evidence as to the religious polity—that is, the form of governance—adopted by the church members. The constitutional documents of churches tend to be drawn in terms of religious precepts. Attempting to read them "in purely secular terms" is more likely to promote confusion than understanding. Moreover, whenever religious polity has not been expressed in specific statements referring to the property of a church, there will be no evidence of that polity cognizable under the neutral-principles rule. Lacking such evidence presumably a court will impose some rule of church government derived from state law. In the present case, for example, the general and unqualified authority of the Presbytery over the actions of the Vineville Church had not been expressed in secular terms of control of its property. As a consequence, the Georgia courts could find no acceptable evidence of this authoritative

relationship, and they imposed instead a congregational form of government determined from state law.

This limiting of the evidence relative to religious government cannot be justified on the ground that it "free[s] civil courts completely from entanglement in questions of religious doctrine, polity, and practice." For unless the body identified as authoritative under state law resolves the underlying dispute in accord with the decision of the church's own authority, the state court effectively will have reversed the decisions of doctrine and practice made in accordance with church law. The schism in the Vineville Church, for example, resulted from disagreements among the church members over questions of doctrine and practice. Under the Book of Church Order, these questions were resolved authoritatively by the higher church courts, which then gave control of the local church to the faction loyal to that resolution. The Georgia courts, as a matter of state law, granted control to the schismatic faction, and thereby effectively reversed the doctrinal decision of the church courts. This indirect interference by the civil courts with the resolution of religious disputes within the church is no less proscribed by the First Amendment than is the direct decision of questions of doctrine and practice.

When civil courts step in to resolve intrachurch disputes over control of church property, they will either support or overturn the authoritative resolution of the dispute within the church itself. The new analysis, under the attractive banner of "neutral principles," actually invites the civil courts to do the latter. The proper rule of decision, that I thought had been settled until today, requires a court to give effect in all cases to the decisions of the church government agreed upon by the members before the dispute arose.[27]

The majority replied to this criticism as follows:

The dissent would require the States to abandon the neutral principles method, and instead would insist as a matter of constitutional law that whenever a dispute arises over the ownership of church property, civil courts must defer to the "authoritative resolution of the dispute within the church itself." It would require, first, that civil courts review ecclesiastical doctrine and polity to determine where the church has "placed ultimate authority over the use of the church property." After answering this question, the courts would be required to "determine whether the dispute has been resolved within that structure of government and, if so, what decision has been made." They would then be required to enforce that decision. We cannot agree, however, that the First Amendment requires the State to adopt a rule of compulsory deference to religious authority in resolving church property disputes, even where no issue of doctrinal controversy is involved.

The dissent suggests that a rule of compulsory deference would somehow involve less entanglement of civil courts in matters of religious

27. Ibid., Powell dissent, emphasis in original.

> doctrine, practice and administration. Under its approach, however, civil courts would always be required to examine the polity and administration of a church to determine which unit of government has ultimate control over church property. In some case, this task would not prove to be difficult. But in others, the locus of control would be ambiguous, and "A careful examination of the constitutions of the general and local church, as well as other relevant documents, [would] be necessary to ascertain the form of governance adopted by the members of the religious association." In such cases, the suggested rule would appear to require "a searching and therefore impermissible inquiry into church polity" *Serbian Orthodox Diocese*. The neutral principles approach, in contrast, obviates entirely the need for an analysis or examination of ecclesiastical polity or doctrine in settling church property disputes.
>
> The dissent also argues that a rule of compulsory deference is necessary in order to protect the free exercise rights "of those who have formed the association and submitted themselves to its authority." This argument assumes that the neutral principles method would somehow frustrate the free exercise rights of the members of a religious association. Nothing could be further from the truth. The neutral principles approach cannot be said to "inhibit" the free exercise of religion, any more than do other neutral provisions of state law governing the manner in which churches own property, hire employees, or purchase goods. Under the neutral principles approach, the outcome of a church property dispute is not foreordained. At any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church. The burden involved in taking such steps will be minimal. And the civil courts will be bound to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form.[28]

The majority concluded that the Supreme Court of Georgia would need to decide whether the majority (dissident) faction or the minority faction represented the Vineville congregation. It observed that Georgia law provided that "church property be held according to the terms of church government" and that a local church affiliated with a hierarchical religious association "is part of the whole body of the general church and is subject to the higher authority of the organization and its law and regulations."[29] One would think that principle would have settled both the instant case and the earlier *Blue Hull Church* case without further ado. But the majority of the Supreme Court remanded the case to the Georgia court to determine whether a

28. *Jones v. Wolf, supra.*

29. Quoting *Carnes v. Smith*, 222 S.E.2d 322 (1976), involving split in a Methodist church, in which the Georgia Supreme Court awarded the property to the denomination.

principle of majority rule applied to the Vineville Presbyterian Church and thus to decide between the dissident and "loyal" (to the denomination) factions. That disposition is reminiscent of Justice Abe Fortas' incredulous query at oral argument in *Hull Church*: "You mean you want *us* to determine which is the true Presbyterian Church?" The Supreme Court of Georgia, however, nothing loath, on remand unanimously decided to accept the invitation of the U.S. Supreme Court and announced—to no one's great surprise— that it did indeed follow a majoritarian rule (contrary to what seemed to be the clear direction of its statutes that "church property be held according to the terms of the church government"). The rule could be rebutted by a contrary indication in corporate charters, relevant deeds and organizational constitutions, but the state court professed to find no such indications in this instance, so it duly awarded the property of the Vineville Presbyterian Church to the majority (dissident) faction[30]—in essence permitting a schismatic group to steal the local church property right out from under the general church, thus "congregationalizing" the Presbyterian Church in this instance, exactly as it had done in the case of the two Savannah churches.[31]

The "neutral principles of law" approach thus appeared to invite dissatisfied congregations in hierarchical churches to depart the denomination and take the church property with them. Indeed, a news item in an Indiana newspaper shortly after the *Jones v. Wolf* decision quoted a leader of a schismatic movement in the Episcopal Church urging Episcopalian dissidents to follow the example of the Vineville Presbyterian Church. And when a United Presbyterian Church in Washington tried to break away from the denomination, who should enter a friend-of-the-court brief urging the court to let it do so—under "neutral principles of law"—but Mary Elizabeth Blue Hull Memorial Presbyterian Church! Fortunately for the denomination, the Washington court declined to follow *Jones v. Wolf* and adhered instead to the principles of *Watson v. Jones* in deferring to the ruling of the ecclesiastical tribunal that the dissident local church had no right to the property.[32]

9. Commentary on the Decisions

The principle of deference by civil courts to the decisions of church tribunals in hierarchical churches with respect to schisms resulting in disputes over local church property has elicited a number of criticisms. That principle and its critique pose very clearly a paradigm of the impact of the law—and of conflicting theories of the law—upon the needs and interests of religious bodies and upon their freedom to define their own nature, structure and mode of operation.

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30. 244 Ga. 388 (1979).

31. *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, discussed at § B5 above.

32. *Presbytery of Seattle v. Rohrbaugh*, 485 P.2d 615 (1971).

a. Zollman's *American Church Law* (1917). One of the sharpest critics was Carl Zollman, Professor of Law at Marquette University.[33] In an otherwise staid and circumspect volume, Chapter 9, devoted to "Church Decisions," seemed almost shrill in its denunciation of "the leading case"—*Watson v. Jones* (1871):

> It is to be regretted that such an important and far-reaching decision was rendered by the United States Supreme Court.... It is respectfully submitted that the Supreme Court by this decision has impeded the progress of religious liberty instead of furthering it.... [A] refusal by the courts in a proper case to construe the constitution, canons or rules of the church and revise its trials and the proceedings of its governing bodies, instead of preserving religious liberty, destroys it.... If a person who connects himself with a religious association is to be placed completely at its mercy irrespective of the agreement which he has made with it, the conception of religious liberty as applied to such a case becomes a farce, a delusion, and a snare.... To maintain religious liberty, the courts must uphold not only the legal rights of religious organizations, but also the legal rights of all their members.... [T]he doctrine of *Watson v. Jones* leaves the minority in voluntary associations subject to the unlimited and despotic power of the majority.[34]

Zollman was not the only commentator to be solicitous for the rights of the downtrodden lay dissidents within a congregation.

b. Adams and Hanlon, "*Jones v. Wolf*." Arlin M. Adams, a judge of the Third Circuit Court of Appeals in Philadelphia at the time, and William R. Hanlon, his law clerk, wrote a very illuminating commentary on church property disputes shortly after the Supreme Court decided *Jones v. Wolf*.[35] It is illuminating because of its careful tracing of the legal issues involved and because of its total misunderstanding of the way hierarchical churches evolve and operate. For that reason it is especially valuable as a paradigm of how even the most conscientious and perspicacious of legal writers can fail to grasp or respect the needs and interests of religious bodies and their members.

Adams and Hanlon assumed, as did Zollman, that the best category for understanding and resolving disputes over church property is the law of *contract*. The civil court can and should ascertain what "contract" has been entered into by the disputing parties prior to their dispute and effectuate—as best it can—the resolution that represents the original intention of the contracting parties. As in any contract disputes, there may be (1) difficulties in determining the terms of the original

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33. His classic *American Civil Church Law* was published in 1917 as volume 77 of the Columbia University "Studies in History, Economics and Public Law," republished in an updated version as *American Church Law* in 1933 by the School of Law of Catholic University.

34. Zollman, C., *American Church Law* (St. Paul: West Pub. Co, 1933), pp. 285, 287, 288, 298.

35. Adams, A.M., and Hanlon, W.R., "*Jones v. Wolf*: Church Autonomy and the Religion Clauses of the First Amendment," 128 *Univ. of Penn. L. Rev.* (June, 1980) 1291-1339.

contract, (2) difficulties in applying them to the factual situation, and (3) difficulties in ascertaining what the factual situation *is* over which the dispute has arisen, but courts are not unaccustomed to dealing with such questions and (supposedly) can do so in church property disputes, so long as questions of ecclesiastical doctrine or practice are not involved.

Adams and Hanlon contended that civil courts should *always* rely on "neutral principles of law" to decide such disputes, since that is the method whereby the court ascertains the terms of the original contract and enforces it. The other alternative contemplated by *Jones v. Wolf*—the *Watson v. Jones* method of deference to the determination of the hierarchical authority—is improper, in their view, because it entails the acceptance of the "fiction of an implied consent by associated churches to the authority of the general church."

Adams and Hanlon arrived at the important insight that a given church need not be either congregational *or* hierarchical, but may be hierarchical in some respects and congregational in others, as noted above.[36] But how it got that way is another matter. Adams and Hanlon envisioned a single scenario for the formation of the contract that would determine how the property of the religious body should be controlled:

> [N]o constitutional considerations bar civil courts from determining for themselves whether the local church, *upon its affiliation with a hierarchical organization*, meant to confer on the latter body the authority claimed....
> [W]hether a particular question is a matter of internal church affairs, which may not be intruded upon by a civil court, depends entirely on whether the parties consented either expressly or by implication, to have the issue resolved within the structure of church government....
> A local church may, of course, *affiliate with a hierarchically structured religious society* on terms that would effectively place the property of the local church under the control and disposition of the hierarchical body....
> But when a local church challenges the hierarchical organization's authority to dispose of *its* [the local church's] property, no Supreme Court decision mandates that a civil court must defer automatically to an ecclesiastical tribunal's ruling on that question.
> The Court's endorsement of judicial inquiry into the intentions of the parties... presumes that more than *mere association between the parties* is necessary to accord one party rights over the other's property.[37]

The authors interpreted the deference rule of *Watson v. Jones* to be supportive of "the principles of freedom of association," which they characterize as somehow "embedded in the religion clauses"—which may be true:

> The [*Watson*] court... attempted to promote the policies embedded in the religion clauses by strictly protecting the principles of freedom of

36. See *Md. & Va. Eldership* at § B6 above.
37. Adams and Hanlon, *supra*, p. 1331, emphasis added.

> association. Such freedom not only permits but requires that parties be free to determine the limits and purposes of their relationship.

Freedom of association is certainly important, and it is certainly an integral part of the First Amendment, including the free exercise of religion, but it is by no means the sole or central element in religious freedom. One can readily agree with the authors' contention that in religion, as in other relationships protected by the First Amendment, the "parties be free to determine the limits and purposes of their relationship," but *who are the parties*, and how do they enter into that determination? The authors' next sentence recurred to the same locally focused scenario as before, raising doubts about their knowledge of when and how such a relationship is usually contracted:

> Under this approach, whatever authority a hierarchical organization may have over *associated local churches* is derived solely from the local churches' consent.[38]

This scenario assumes that the local body preexisted the hierarchical organization rather than the other way around. That was indeed the case apparently with the two local churches in Savannah, Georgia, which (successfully) sought their release from the Presbyterian Church in the U.S., namely, Mary Elizabeth Blue Hull Memorial Presbyterian Church and Eastern Heights Presbyterian Church, but factually and historically such a situation is by no means the norm.[39]

Adams and Hanlon attempted a comparison with other voluntary organizations:

> ... the rule of compulsory deference to hierarchical tribunals, in conjunction with implied consent to hierarchical control of property, denies to local churches the same protection of law afforded to other voluntary associations.

This remarkable statement imputed to nonreligious organizations the same localized scenario that the authors had projected upon local churches. But are all such groups necessarily, presumptively or preeminently local? Can local lodges of the Masons or local branches of the National Association for the Advancement of Colored People or state affiliates of the American Civil Liberties Union or union "locals" or other local embodiments of regional or national organizations disaffiliate from the larger body *and take the local property with them*? As in the case of churches, that question should and does turn on the empirical factor of the terms of their relationship, but there is no justification for assuming in advance that that relationship is necessarily one of a voluntary contract entered into by two equal and

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38. Ibid., p. 1337, emphasis added.

39. It was also apparently the case with the American branch of the Serbian Eastern Orthodox diocese in *Milivojevich*, which had its own independent existence and constitution before affiliating with the Yugoslavian body.

independent contracting parties; instead, one may be the "child" or creation of the other, a possibility to be explored below.

Adams and Hanlon saw potential deterrences to freedom of association in the *Watson* rule:

> Tying control of a local church to a hierarchical organization, regardless of *whether the local church in fact has relinquished control*, effectively limits the *ability of local church congregations to establish the terms of their association with more general church organizations*. Moreover, *local churches desirous of associating with a hierarchical organization for purposes of religious worship* may be *inhibited from such association by a well-grounded fear* of losing *their* property.[40]

"Worship," of course, is probably the most localized activity in which a congregation engages. It doesn't need to associate with a hierarchical body to do that. The reasons a local congregation may associate with a larger body—on the occasions when that is what actually happens—are of a different nature: to gain a more accessible source of trained clergy, to show solidarity with a broader movement or a historical ethos or a theological tradition.

> The assumption that a local church has consented, at least in the absence of an express provision to the contrary, to *another* religious group's authority over *its* property imposes additional legal requirements on local churches that may constrain their right to associate with *other* religious groups. In this manner, adherence by state courts to the implied-consent theory may constitute a violation of the free exercise clause.[41]

The authors were assuming essentially a "Baptist" scenario, in which preexisting local congregations pick and choose which national body they will favor with their affiliation, and from time to time disaffiliate with one and form affiliation with another, or indeed with two or more at the same time! But to do otherwise, said the authors, is a form of judicial bias or favoritism:

> ...[B]y encouraging and supporting a hierarchical form of church polity over other alternative forms, adoption of *Watson*'s fiction of implied consent would appear to constitute a judicial establishment of religion. No less than tangible state financial assistance, judicial support of one institutional form of church polity over another is prohibited by the first amendment.

But is it any less preferential—and therefore equally a forbidden "establishment of religion"—for the judiciary to presuppose a *congregational* norm or model rather than a *hierarchical* one? Adams and Hanlon apparently considered their

40. Adams and Hanlon, *supra*, p. 1337, emphasis added.

41. Ibid., emphasis added.

congregational model to be somehow "neutral," objective and free of judicial prejudice or presuppositions:

> Unlike the implied-consent approach, "neutral principles of law" embody no preference among... various organizational possibilities, nor do they impose on any church particular legal requirements that might inhibit the formation of religious associations. And, because neutral principles are not result-oriented, the outcome of a church property dispute is not fore-ordained.

The result, they say, is not "fore-ordained"—*except* that the local party to the dispute shall be *assumed* to be congregationally autonomous *unless* proven *otherwise*! The burden of proof is upon the broader body to demonstrate that it is the beneficiary of an explicit cession by the local congregation of authority to control the local property, rather than the other way around. How that principle comports with a truly neutral recognition by the civil courts of the autonomy of religious bodies to define their own locus of authority and decision-making will be considered in the next section below.[42]

c. Tribe, *American Constitutional Law*. The assertion that the only rights recognized by the Constitution are those of the individual members seems to contradict the concern with which this section on the autonomy of religious bodies began—"the integrity of religious associations viewed as organized units"—a consideration that, Prof. Tribe reported, "the Supreme Court has recognized for nearly a quarter-century." Yet Prof. Tribe himself, a few pages beyond the material quoted earlier,[43] seemed to echo some of the apprehensions of the critics discussed above:

> To make ecclesiastical decisions wholly unassailable in civil courts could deprive members of churches of one of the fundamental legal protections enjoyed by members of other voluntary associations.... So long as the disputed issue is one that can tolerably be subjected to [the risks of arbitrariness by church leaders], as seems the case with matters of internal church organization, the dangers of governmental domination or at least favoritism are likely to outweigh the gains from public intervention to rescue even the most deserving dissidents. But once the stakes intersect the civil realm and implicate significant secular interests in property or personal liberty, governmental intervention in cases of evident overreaching becomes the only alternative to an otherwise unacceptable choice between perpetuating internal domination and inviting resolution by open force. In such cases, the best that constitutional doctrine can achieve is to constrain the grounds on which courts act, instructing them

42. See § 10 infra; another commentator on this subject who took a somewhat similar approach was Ellman, Ira Mark, "Driven from the Tribunal: Judicial Resolution of Internal Church Disputes," 69 *California L. Rev.*, 1378-1444 (1981).

43. See in introductory material to AUTONOMY OF RELIGIOUS BODIES, above, at n. 3.

> above all to avoid modes of decision that involve resolving by law issues of religious faith or doctrine.[44]

10. A Critique of The Critics

The "strict deference" rule of *Watson v. Jones*, *Kedroff*, *Hull Church* and *Serbian Diocese* represented a major advance over the English idea of an *implied trust* that civil courts could discern and apply to determine control of church property, since it freed American courts from trying to "second guess" ecclesiastical tribunals in interpreting their own doctrine and law. The implied trust theory imputed retrospectively to bygone generations of church members what their intentions may (or may not) have been in supporting their church in an earlier era. It assumed that they in effect intended to impress a trust upon their gifts for preservation in perpetuity of the church's doctrines and practices then in force. That assumption may be false and is certainly gratuitous, for the earlier generations may have intended to express loyalty to their church without expecting to bind the future to the forms with which they were familiar. Most likely they never thought about the future implications of their gifts and works at all, and to that degree the implied trust theory is a patent fiction. It served to bring the occasional intrachurch dispute within the ambit of *trust law*, and thereby to risk subjecting it to the fault of trust law, which is to place all assets held in trust under the dead hand of past purposes. From that dead hand the "strict deference" rule delivered the hierarchical churches to which it may have been applied.

But the critics reviewed above contended that an uncritical acceptance by civil courts of the determinations of ecclesiastical tribunals placed the interests of church members—and indeed their religious liberty—at the mercy of church hierarchs. For the fiction of *implied trust*, they would say, the strict deference rule substituted the fiction of *implied consent*—that in joining a church the members have consented in advance to all decisions that the leaders of the church may make, regardless of the circumstances or the merits of any future dispute. That fiction was especially apparent, the critics explained, in the instance of disputes between individual congregations and denominational authorities, when the latter assumed control over local church property that may not have been granted to them by the former.

a. Which "Neutral Principles"? Trust, Contract or Some Other? The only just way to deal with these intrachurch disputes, said the critics, was to treat them under the rubric of *contract law*: determine what were the terms of the agreement entered into by the two parties prior to the dispute and simply apply those terms to the dispute. If they did indeed agree to be bound by the decision of a hierarchical tribunal with respect to control of local church property, then enforce that agreement.

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44. Tribe, *American Constitutional Law*, 1st ed. (Mineola, N.Y.: Fndn. Press, 1978), § 14-13, p. 882. (This material was slightly altered in the 2d edition.)

If they didn't agree to that, then there would be no basis for assuming that the hierarchical body had any claim to control the local property. Such a principle sounds fair and reasonable, at least at first glance.

The problem is that for the principle of *implied consent* there has been substituted an *implied contract*—or rather, an implied *non*contract—which may be no less fictional. Of course, if there is an *explicit* trust (as *Watson v. Jones* stated), it will be honored. If there is an *explicit* contract (as even the Georgia court found in *Carnes v. Smith*, the Methodist property case), it will be honored. It is only in the *absence* of an explicit trust or contract that the courts may feel called upon to *imply* something in the relationship between the parties that will help to resolve the dispute. It is in the process of *implication* in *ambiguous* cases that difficulties arise, and to that category alone the following analysis is directed.

The "neutral principles of law" approach would try to keep to a minimum the scope of judicial supposition by restricting the admissible evidence to words in black and white on objective instruments of property conveyance, thus attempting to confine a dispute over the extent and effect of *religious authority* within the safe bounds of ordinary *property law*. And in the instances where "neutral principles of law" produce the same result as would deference to the ecclesiastical hierarchy or enforcement of a preexisting agreement that does not explicitly refer to control of property, no problem arises. Where the result is the *opposite*, however, as Justice Powell pointed out in dissent in *Jones v. Wolf*, the courts have reversed the outcome that would seem to have been intended by the parties' own (prior) understanding of religious authority in their community of faith.

Adams and Hanlon would permit the courts to assume that in the absence of explicit evidence to the contrary, the (implied) contract between the local congregation and the general church—however explicitly it may place control in the general church in other matters—leaves control of local *property* in local hands. Thus to separate out control of property from the principle of religious authority respected by the parties that would otherwise apply is far from "neutral": it *assumes* a "congregational" locus of authority in that one area, whatever may be the church's own choice of polity in all (other?) respects.

The "congregational" model assumed to be normative by Adams and Hanlon, in which preexisting autonomous local congregations enter into a "contract" of association with broader religious organizations, either granting to the larger body or retaining for themselves control over local church property, would seem to a practitioner or historian of American religion to be highly untypical. It has occasionally occurred, as in *Hull Church* and *Serbian Diocese*, and perhaps their elevation to cases of national awareness may have seriously skewed the sample and distorted the courts' understanding of the situation.

b. How Connectional Churches Really Start. But historically the empirical facts are generally quite different from that model. Normally a religion begins as a religious movement, inspired by a charismatic leader (like John Wesley), who attracts

a small band of followers, drawn by the leader's authoritative teaching, vision and standards. Others are attracted to the movement by its distinctive qualities, its drive, its high demand upon its members, its stringent requirements of belief and conduct, and it proliferates through space and perdures through time. Efforts may be made to "spread the word" and to gain converts, and problems of "quality control" are resolved by varying degrees of strictness in supervision of the several dispersed nuclei of converts. New believers are grouped into geographically contiguous clusters, meeting in members' homes until they can hire a hall or build one.

Often the movement will help them get a meetinghouse started, sometimes advancing them the money or underwriting a mortgage for them as John Wesley did in Bristol[45] (and elsewhere). It is quite common lately for hundreds of Jehovah's Witnesses to come from miles around to put up a new Kingdom Hall for the local flock *in one weekend*! (Whose "property" is that?) Many denominations have "church extension" departments whose task is to start and develop new congregations, including arranging for a missionary minister to be assigned at the denomination's expense until they get started, and granting or loaning them money to build a church.

To be sure, sometimes a group of devoutly inclined people will get together in an unchurched community and say, "We need a church here," and only later ask themselves, "What *kind* of church should it be: Methodist, Presbyterian, Baptist?" But that is the exception rather than the rule. Even when a church may be founded by lay initiative, the founding family or families would tend to envision a church of their own previous persuasion (however nominal) and seek the help of that denomination in acquiring a minister to help get a church started. (If they didn't have an earlier religious affiliation, they usually weren't the ones to think of organizing a church.) The most common pattern in the United States was for a Methodist "circuit rider"[46] to come to town and gather a few favorably inclined families and get them to start a *Methodist* church—not a no-name or generic church looking for a congenial affiliation. Of course, other denominations had—and have—their counterpart missionary enterprises, and the churches they found are outposts of the sponsoring denomination. The historical (and continuing) American experience can be summarized as follows:

(1) Most local congregations related to hierarchical denominations are the "offspring," branches, agencies or outposts of those denominations, not the other way around;

(2) Local congregations created by local initiative and not wishing to be obligated to larger religious bodies usually do not link up with *hierarchical* denominations, but with *congregational* ones—or, more commonly, they don't link up with *any* broader body;

45. See "Whitefield's Principle" in introduction to AUTONOMY OF RELIGIOUS BODIES.

46. Or a comparable itinerant missionary of another denomination.

(3) Local congregations of hierarchical denominations are *not* usually separate and independent contracting parties with respect to determining terms of control over church property: they are in effect the current tenants of a local enterprise brought into being by the denomination;

(4) Members joining hierarchical denominations necessarily are members in a local congregation of the denomination, but their membership is in the denomination rather than in the congregation, and they enter into that membership on terms set by the denomination, including accepting the denomination's mode of control of property;

(5) In the absence of explicit trust or contractual agreements to the contrary, it should be *assumed* that members and local congregations accept, recognize and respect the ecclesiastical authority of the denomination of which they are a part and product, and that an integral and natural part of that ecclesiastical authority is control over the temporalities that make up the fabric of the church in that place. To suppose otherwise is to project upon the local church a curious schizophrenia in which the "spirit" of the church is subject to a different authority than the "body"—a supposition that the civil court should not entertain without the clearest explicit evidence that it is indeed the preexisting intention of the parties.

Even to refer to the local church as a separate contracting "party" is to misconstrue the true state of affairs in most instances. Can the local Ford plant in Mahwah, N.J., suddenly announce its independence from the Ford Motor Co.? The employees may indeed enter into labor contracts with the management setting forth the terms of their employment, just as church members may enter into church membership on the (semi)contractual terms set forth in training for church membership and the vows taken upon entrance.

But the branch plant cannot as a whole suddenly depart from the control and administration of the corporation that owns it, taking the factory and inventory with it. The very idea is ludicrous, but not more so than the idea of a local parish of the Methodist, Episcopal, Presbyterian or Roman Catholic Church declaring its independence of the denomination that predated, spawned, cultivated, provisioned, staffed and maintained it. To be sure, churches are not business corporations, but for that very reason they should have *more* freedom, not less, to organize themselves as they desire.

In the normal situation, where the local congregation is the *creature* of the larger body, the law of *contract* is totally inappropriate. The local group is no more an independent contracting party than is the local office of IBM in relation to the parent corporation. The relationship should be treated more correctly under the law of *agency*, where one entity is the agent of the other, subject to the latter's dominion and control in all matters. There may indeed be contracts between the corporation and the individuals who make up the local agency as to the terms of their employment, but the local agency as an organization does not contract with the parent body. The individual church members are free to leave the church at any time, or even all together, but they are not free to take with them the property that is the larger

church's embodiment in the locality, any more than the IBM employees can hoist the flag of independence over the local IBM facilities.

The ultimate reason for deference to the decisions of a hierarchical tribunal is not to indulge the pretensions of ecclesiastical prelates or prebendaries but to recognize that the religious body—general as well as local—is part of an overarching entity that is often broader than any one nation and longer than the recollection of persons now alive. It is the embodiment of a Gospel, a Truth, that is not in its central elements subject to vote by local majorities. A local group of dissidents in a Roman Catholic parish cannot on the impulse of a few days—or decades—vote itself out from under the guidance and control of the Vicar of Christ in Rome—and remain a Roman Catholic Church with any claim to the property of that church, regardless of whether their parents paid for its building. It goes without saying that other religious traditions have their counterparts in venerable teachings that determine their character and continuity, and the leadership of those bodies is likewise responsible to safeguard that character and continuity from local and evanescent distortion or perturbation. They may themselves over the centuries have "departed" from what some think the true doctrine is or should be, and dissidents may seek to call them back to the True Faith by remonstrance or revolt—which is exactly what happened in the Presbyterian cases cited above—and judging which is really the True Faith is exactly what civil courts are not empowered to do under the First Amendment. Their responsibility is primarily not to enforce some implied trust or contract but to respect the locus of decision-making responsibility the religious body itself has created and recognized over the centuries to maintain its character and continuity.

If the incumbents in that role have gone astray, the remedy for those who differ with them is not to try to wrest from them control of the local branch office but to go forth and start a new company of the True Faith according to their own lights—as many a dissident group has done, to the enrichment of the varieties of religious experience in the world and the revitalization of the religious enterprise as a whole.

Of course, an obvious solution to church property disputes would be for churches to express in unambiguous terms their intentions for the control of property and the resolution of internal altercations. Problems of interpretation by civil courts will be reduced, the Supreme Court has suggested, "as recognition is given to the obligation of states, religious organizations, and individuals [to] structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions."[47] This counsel was followed—belatedly—by the United Presbyterian Church in the U.S.A. after *Jones v. Wolf* in hastily amending its constitution to make clear that the general church retained control of local church property in the event of a congregation's departure from the denomination.

Churches do not always follow this laudable course because it is not the primary preoccupation of religious bodies coming into being to anticipate the possibility of

47. *Jones v. Wolf* at 604 quoting *Hull Church* at 449.

their eventual dissolution, to foresee all possible hazards of schism and apostasy, and to prepare appropriate legal safeguards against them, any more than the fond parents of a newborn baby rush out to get a burial insurance policy for it before it has even begun to crawl. Focusing on the dangers of defection or demise would seem to a beginning church—or even one in middle life—to be a defensive or defeatist apprehension, if not a self-fulfilling prophecy, and therefore many churches are loath to engage in such "negative thinking," prudent though it might be.

To some degree, the church-property problem may be one of the artifacts of history. When the established churches in the colonies were gradually disestablished, the old "territorial parishes" ceased to be public corporations,[48] and new forms of holding church property had to be found. Since the problem arose with respect to already-existing local congregations, especially in New England, where each community had its religious structure as part of the municipal structure, both highly independent of other towns and in most respects of colony or commonwealth as well, the solutions tended to be predicated along local and independent lines. As a rule, a few (male) members of the local church would be asked to hold title to the local church property as trustees.

The Roman Catholic Church soon found this arrangement unsatisfactory and fought for nearly a century to eliminate lay trusteeship, experiencing such setbacks as a law passed by the Pennsylvania legislature in 1855 requiring lay trusteeship.[49] (It was overturned in 1937.)[50]

During the trusteeship struggle, the Catholic Church was often confronted by various ethnic groups setting up their own "Catholic" church—a contradiction in terms from the viewpoint of the hierarchy—choosing their "own" priests, and defying the orders of the bishop. In order to effectuate the *spiritual* leadership of the Church—as it had come to be understood in the course of a dozen centuries throughout many lands—that leadership arranged wherever possible to vest title to all property in the "ordinary" of the diocese (the bishop or archbishop appointed by the Pope to oversee the diocese or archdiocese) as a "corporation sole," or in him and a few other high-ranking clergy such as the chancellor of the diocese, so that continuity of the corporation would be preserved on the death of the ordinary. Thus did the Roman Catholic Church pursue something like Whitefield's Principle[51] in order not to be turned out of the rooms they had built if they preached not as the lay trustees liked.

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48. See Zollman, *supra* at n. 34, pp. 103-107.

49. Sydney Ahlstrom, *A Religious History of the American People* (New Haven: Yale University Press, 1978), p. 567; see also pp. 531-3, 536-8. See discussion immediately below.

50. *Canovaro v. Brothers of the Order of Hermits of St. Augustine*, 326 Pa. 76, 191 A. 140 (1937).

51. See Autonomy, § 1 above.

c. The *Krauczunas* Litigation Over Lay Trusteeship. In Pennsylvania, the struggle was particularly difficult. Statutes were adopted there that required control of church property to be vested in the lay members of the various congregations:

> Whensoever any property... shall hereafter be... conveyed to any ecclesiastical corporation, bishop, ecclesiastic or other person, for the use of any church, congregation or religious society... the same shall not be otherwise taken and held, or inure, than subject to the control and disposition of the lay members of such church, congregation or religious society....[52]

In 1896 a congregation transferred title to the church property to the bishop of the diocese in trust for the use of the congregation, but in 1908 ten lay members sued the bishop to regain title to the property. (They were trustees designated by resolution passed by a majority of the congregation to take this action.) The bishop resisted on the ground that canon law required that title be held in his name, and the trial court agreed but was reversed by the Supreme Court of Pennsylvania, which insisted that "ecclesiastical rules and regulations" must yield to the civil law when the two conflicted.[53]

Subsequently the congregation divided into two opposing factions, one supporting the bishop and seeking to return title to the property to him, the other insisting that no such reconveyance should be made. Again they went to court; again the trial court decided for the probishop side; again the Supreme Court of Pennsylvania reversed with dicta showing a total lack of understanding of Whitefield's Principle:

> It is difficult to conceive of anyone bearing any relation whatever to a religious body quite so incapable of intermeddling with the affairs of the congregation as a trustee who simply holds the legal title to the church property. Such a one is trustee for no other purpose, and has nothing whatever, by reason of the fact that he holds the legal title, to do with any of the affairs of the congregation, or with the property itself, no matter whether he be prelate or layman.[54]

The trial court, on the third attempt, found that the congregation had voted to reconvey title to the bishop. (Meanwhile the bishop had excommunicated the opposing faction and placed the church under interdict until the property was reconveyed to him.) The Supreme Court reversed again, insisting that even the majority of the congregation could not place canon law above civil law.[55]

At that juncture, the antibishop faction began to bring in nonCatholic ministers to hold services in the still-interdicted church. The probishop group sued to end this

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52. 2 Pa. Digest of Laws 1860 (12th ed. 1895), as amended, Pa. Stat. Ann. Tit. 10 Section 81 (1965).

53. *Krauczunas v. Hoban*, 221 Pa. 213, 70 A. 740 (1908).

54. *Mazaika v. Krauczunas*, 229 Pa. 47, 77 A. 1102 (1910).

55. *Mazaika v. Krauczunas*, 233 Pa. 138, 81 A. 938 (1911).

practice; the trial court upheld their position; and again the Supreme Court reversed, holding that the bishop had been disregarding civil law by closing the church and was thus not entitled to relief.[56]

Thereupon the bishop capitulated, lifted the interdict, unexcommunicated the rival faction and appointed a new priest to the parish, who was then locked out by the opposition group. They declared that the interdict had abrogated all ties between the congregation and the bishop, and they were now free to use the property as they wished. The probishop group sued to prevent use of the property by nonCatholics; the trial court again ruled in its favor; and this time the Supreme Court affirmed! It held that the property had been dedicated to the Catholic Church and was not to be diverted from that use.[57]

As Paul Kauper commented on this six-year siege of litigation, "Thus, the final result was that, while the *laity* controlled temporal affairs, it could do so only as a *Catholic* laity."[58] Yet it was not permitted by the *state* to be *fully* a "Catholic laity" to the extent of adhering to the Catholic Church's self-definition of its own polity and ecclesiastical leadership. This was another instance of the state effectually "congregationalizing" a quintessentially hierarchical church despite the church's struggle to retain its chosen form.

Other ecclesiastical polities in the United States have pursued other modes of property ownership, most of them based on (local) membership corporations. But in all churches, especially those of hierarchical structure, the same concern exists: to prevent the frustration of the church's spiritual leadership by persons not selected for their spiritual authority. Every local pastor knows that it is very helpful to the congregation to have a Board of Trustees—composed of men (and nowadays of women, too) who know how to keep the property fixed up (in ways most pastors do not know as well), but a few pastors have discovered to their woe how frustrating it can be to have a recalcitrant Board of Trustees that wants to limit the use that can be made of the church property for what the pastor may deem religious purposes.

To prevent this type of violation of Whitefield's Principle, the United Methodist Church, for instance, has included in its *Book of Discipline* (church law) the following proviso:

> Subject to the direction of the Charge Conference...,[59] the Board of Trustees... shall have the supervision, oversight, and care of all real property owned by the local church and of all property and equipment

56. *Mazaika v. Krauczunas*, 240 Pa 248, 87 A. 686 (1913).

57. *Novicky v. Krauczunas*, 245 Pa. 86, 91 A. 657 (1914).

58. Kauper, Paul G., and Ellis, Stephen C., "Religious Corporations and the Law," 71 *Michigan Law Review* 1499 (Aug. 1973), p. 1526, from which this account is derived.

59. A body made up of the lay leadership of the congregation, that is, chairpersons of its various boards, committees, and organizations, its lay officers, and the clergy, both the pastor and any retired clergy in the parish, plus an indeterminate number of "at large" members of the congregation; it is not composed of the entire congregation, however.

> acquired directly by the local church or by any society, board, class, commission or similar organization connected therewith..., *provided*...— that the Board of Trustees shall not prevent or interfere with the pastor in the use of any of the said property for religious services or other proper meetings or purposes recognized by the law, usages, and customs of The United Methodist Church, or permit the use of said property for religious or other meetings without the consent of the pastor....[60]

Most other denominations have comparable provisions in their basic law—and if they do not, they should have, to protect the exercise of spiritual authority, however they may define it.

Many of these devices are somewhat makeshift splices on a structure handed down in *civil* law from early and imperfect efforts to shape a suitable mode of holding church property in this country. Most Protestant churches of hierarchical polity have been trying to live with that basic localized artifact with varying degrees of success. But these accidents of history should not remain a dead hand upon the present, burdening those churches that wish to effectuate a regional, national or world locus of spiritual leadership rather than a congregational one.

And civil courts should not assume because of these accidents of history that local, congregational polity is the norm and that all other kinds of polity therefore must bear the burden of proof to show that some explicit "trust" exists to justify beneficial ownership of property at some higher level. In a presbyterial system, for example, the prime (though not ultimate) locus of spiritual authority is in the presbytery (a council of lay and clerical elders representing a cluster of congregations), so the burden of proof should be on any congregation to show cause why it should *not* be subject to the presbytery in the use of its property *as in all other matters*. In an episcopal system, on the other hand, the locus of spiritual authority is in the bishop or the episcopal area or see, and the burden of proof should be upon lower levels to show cause why they should *not* be subject to the bishop in the use of church property *as in all other matters*.

Truly *neutral* principles of law would not be biased for or against *any* particular level of decision-making in churches with respect to control of property any more than on other matters. True religious liberty should include freedom for persons to choose to form themselves into religious bodies of whatever size, scope, form or duration they deem most suitable to their religious needs and ministries and to maintain that pattern over the generations, so long as they present a responsible face to the rest of the world, meet their obligations, answer their mail and mow their lawns.

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60. *The Book of Discipline* (Nashville: The Methodist Publishing House, 1984), p. 640, ¶ 2532.

11. Further Developments

Since *Jones v. Wolf*, state courts have been deciding how they will handle church property disputes, i.e., whether to follow the neutral principles approach or not. In 1983 the Court of Appeals of Maryland (which had opted for neutral principles in *Eldership v. Sharpsburg Church*)[61] upheld the claim of the United Presbyterian Church in the U.S.A. to the property of a local church, Babcock Memorial Presbyterian Church in Baltimore, which had sought to convey it as a gift to a dissident, independent Presbyterian church of fourteen members in Dundalk, Maryland. The court found in the bylaws of Babcock a recognition that the church is "under the care of and subject to the jurisdiction of the Presbytery of Baltimore" and therefore could not alienate the property without the Presbytery's consent.[62] Because of the facts of the case, this outcome was consonant with both the neutral principles and strict deference approaches.

The Supreme Court of Iowa later in 1983 similarly found that under both approaches a local church could not break away under the fact-situation in its case.

> We find that the First United Presbyterian Church of Kamrar belonged to a hierarchical church. Under the compulsory deference approach, the presbytery's decision of the property dispute is therefore conclusive.
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> * * *
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> In a hierarchical church, property disputes are resolved by ecclesiastical judicatories.... [The members'] right to leave the church does not include a right to take church property with them.
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> * * *
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> When its provisions are construed together, the Book of Order gives [the United Presbyterian Church] exclusive ultimate control of the uses and disposition of local church property.... This is a condition of the organization of local churches.

The denomination had adopted an amendment to its constitution in 1981 to make explicit its control of local church property. The Kamrar church contended that that proved there had been no such relationship at the time it broke away prior to 1981. The court disagreed, basing its conclusion on neutral principles of law.

> Nor does the 1981 action of the General Assembly in adopting [the] amendment change our view. The record shows the 1981 amendment was adopted because of uncertainty concerning the effect of *Jones v. Wolf* on the theory of implied trust. It does not affect our determination based on neutral principles that an implied trust exists as a result of UPCUSA's polity giving it determinative authority over the property of its subordinate churches.[63]

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61. See § B6 above.
62. *Babcock Memorial Presbyterian Church v. Presbytery of Baltimore*, 464 A.2d 1008 (1983).
63. *Doris Fonken v. Community Church of Kamrar*, 339 N.W.2d 810 (1983).

New York's highest court, dealing with the same polity of the same denomination, reached the opposite result in *First Presbyterian Church of Schenectady*:

> [E]ven though members of a local group belong to a hierarchical church, they may withdraw from the church and claim title to real and personal property, provided that they have not previously ceded the property to the denominational church.... The fact that the Presbytery is part of a hierarchical body which may have determined the property dispute adversely to plaintiffs does not bind this court if it proves possible to decide the controversy through application of "neutral principles of law."
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> In *Jones* [*v. Wolf*] the Supreme Court held that a state court is entitled to adopt a "neutral principles of law" analysis as a means of resolving church property disputes, but it is not required to do so. Judicial deference to a hierarchical organization's internal authority remains an acceptable alternative mode of decision. We choose to recognize the neutral principles of law analysis and we apply it here. We do so in the belief that when properly applied it avoids drawing civil courts into religious controversies by focusing on evidence from which the court may discern the objective intention of the parties and it also permits the state to protect its legitimate interest in securing titles to property.... It is completely secular in operation, it is flexible enough to accommodate all forms of religious organizations and it relies upon well-established principles of law familiar to judges and lawyers. It also provides predictability so that religious organizations may order their affairs to account for its application. Moreover, we agree with those who have observed that the doctrine is preferable to deference because it does not prefer one group of disputants to another. The deference approach assumes that the local church has relinquished control to the hierarchical body in all cases, thereby frustrating the actual intent of the local church in some cases. Such a practice, it is said, discourages local churches from associating with a hierarchical church for purposes of religious worship out of fear of losing their property and the indirect result of discouraging such an association may constitute a violation of the free exercise clause. Additionally, by supporting the hierarchical polity over other forms and permitting local churches to lose control over their property, the deference rule may indeed constitute a judicial establishment of religion (see Adams & Hanlon, *Jones v. Wolf*: Church Autonomy and the Religion Clauses of the First Amendment, 128 U. of Pa. L. Rev. 1291, 1337).
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> * * *
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> First Church acquired the property on its own without any funding assistance from the denominational church and there is no evidence that it intended to hold the property in trust [for the denomination]. The evidence is just the other way. First Church took no action from which an intent to create a trust may be implied and it had no notice or knowledge

> that the Presbytery or UPCUSA claimed that an implied trust existed prior to this dispute.[64]

The court had examined the denomination's Book of Order (as it existed at the time of the schism, prior to the 1981 amendment referred to in the Iowa case, *supra*), and professed to find no binding obligation of local churches to hold property in trust for the denomination. Two provisions had been cited, one that any property of a church being dissolved must be held for the presbytery, but the court thought that inapposite "because plaintiff church is not undergoing dissolution or extinction," and another authorizing the presbytery to replace the "session" of the local church if the session is "unable or unwilling to manage wisely the affairs of its church."

> These provisions... are located outside the property section of the Book of Order. They deal with church government and relate only indirectly to the control of property. They set forth the mechanism of church government in the event of a church dispute and any inquiry into their meaning by a court is constitutionally foreclosed because it would require the court to choose between the insurgent session and the commission or "replacement session."

This judicial obtuseness to the obvious intention of the entire denomination—including the First Church of Schenectady, prior to its disaffection—that the presbytery should supervise the local church in *all* respects not explicitly reserved to local discretion was exceeded only by the court's disingenuousness in embracing the neutral principles approach on the ground that it "provides predictability" and "does not prefer one group of disputants over another." The court adopted the (erroneous) Adams-Hanlon scenario of independent congregations opting to affiliate or disaffiliate at will "for purposes of religious worship" while wanting to keep their property unencumbered. This mythical scenario—adopted here by the highest court of a major state *with explicit credit to Adams and Hanlon*—will do much mischief before it is corrected.

In 1984 the Supreme Court of Missouri sitting *en banc*, reached a similar conclusion in *Elijah Lovejoy Presbytery v. Jaeggi*. It reversed a lower court that had found in favor of the presbytery and awarded the property to the dissident local congregation.

> This Court now adopts the "neutral principles of law" approach as the exclusive method for resolution of church property disputes. To the extent that *Hayes* [a 1914 Missouri church property case following the deference rule] is inconsistent with this holding, it should no longer be followed....
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> In its brief Memorial [Presbyterian Church] takes the position that UPCUSA "is not a hierarchical denomination, in which power flows from

64. *First Presbyterian Church of Schenectady v. United Presbyterian Church in the U.S.A.*, 62 N.Y.2d 110 (1984) (emphasis added).

> the top down, but is rather a connectional or representative denomination in which power flows from the bottom up, through an ascending scale of judicatories....” Some of the cases discussed below hold, as did the trial court, that UPCUSA is hierarchical. Since the neutral principles approach “accommodate[s] all forms of religious organization and polity,” this Court need not concern itself with any issue with regard to UPCUSA's form of organization.[65]

The South Dakota courts also decided for the local church and against the denomination in *Foss v. Dykstra*[66] on the basis of neutral principles of law, making the results of that approach anything but predictable (Maryland, Washington and Iowa versus New York, Missouri and South Dakota), and justifying the congregationalizing of Presbyterian churches in the latter instances by use of a supposedly “neutral” theory that in actuality tilts against hierarchy.

a. *Russian Orthodox Church Outside Russia v. Church of the Holy Resurrection* (1995). A glaring example of the ability of state courts to disregard the self-chosen polity of hierarchical churches cropped up in the Commonwealth of Massachusetts. In 1952, Holy Resurrection parish was established in Worcester County under the “Normal Parish By-Laws and the Regulations of the Russian Orthodox Church Outside Russia” then in effect in the denomination, which clearly set forth the prescribed chain of authority within the church, from the Synod of Bishops down to each local parish. The by-laws adopted by the parish provided that “the sale of church real estate, its alienation, exchange or cession..., shall be effected subject to the authorization of the Bishops' Synod,” and upon the closing of the parish, its “entire personal and real estate [property]... shall be turned over to the direct management and disposition of the diocesan authorities as per the direction of the Ruling Bishop.”[67] There could be no clearer statement that the property of the parish was subject to hierarchical control.

In 1987, the parish decided to emancipate itself from the Russian Orthodox Church Outside Russia and to go its own way independently. At an extraordinary meeting of the parish on January 4 called by the rector, Father Victor Melehov, contrary to explicit orders of Metropolitan Vitaly, Father Melehov's superior and Primate of the church, delivered by wire the day before, the by-laws were amended by (barely) two-thirds' vote of those attending to remove all reference to the denomination. Two representatives of the bishop sent to warn parishioners that the meeting was canonically irregular were ejected by the police at the behest of Father Melehov. The Primate and Bishops' Synod of the Russian Orthodox Church Outside Russia then brought action in the Superior Court for Worcester County to recover ownership of the parish property thus alienated from its control.

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65. *Lovejoy Presbytery v. Jaeggi*, 682 S.W.2d 465 (1984).
66. 341 N.W.2d 220 (S.D., 1983).
67. Normal Parish By-Laws, ¶¶ 47, 56.

Following a two-day bench trial, the Superior Court, James P. Donohue, J., ruled in favor of the dissident parish, holding that it was sole owner of all its assets. This remarkable result was arrived at by (mis)applying the rule of an earlier Massachusetts case in which the facts were quite different, *Antioch Temple v. Parekh*,[68] for the recognition that some church polities may be hierarchical with respect to matters of doctrine and/or liturgy but at the same time congregational with respect to control of temporalities such as property—a perceptive distinction that has been noted above. In that case, however, the general church had freely chosen to structure itself as both a hierarchical and congregational polity, whereas the Russian Church Outside Russia had not. Indeed, the latter had clearly expressed its self-definition to be hierarchical with regard to control of property in its organizing documents, and so was not properly subject to the rule of *Antioch Temple*. Nevertheless, it was pressed into the procrustean bed of *Antioch* by the civil court and informed that it was congregational with respect to parish property because Antioch Temple was! The trial court arrived at this curious conclusion on the basis of wide-ranging parol evidence offered by the defendant parish that was cited by the appellate court decision discussed below.

The denomination appealed the case to the Appeals Court of Massachusetts, where opinion was rendered by Justice Raya S. Dreben for a panel consisting also of Justices Rudolph Kass and Elizabeth Porada. That decision conceded considerable weight to the plaintiff's case.

> The Church maintains that its "Regulations" and the parish by-laws give the Church the right to control parish and Church property.
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> When looked at alone, apart from the testimony at trial, the Church documents provide considerable force to the Church's position. Thus, among the matters coming within the jurisdiction of the Synod, according to the Regulations of the Church, are "[m]atters concerning church property in dioceses [and] parishes...." Another Regulation states that the
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> > "diocesan bishop, having the overall care of his diocese and its prosperity... [among other matters] administers and disposes of diocesan and monastic property and supervises all other church property in the diocese, in accordance with the 41st Apostolic canon: `We command that the Bishop have authority over the property of the church'...."
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> The parish by-laws also lend support to the Church's contention that the Church had control over the parish's property [quoting excerpts recited above].

That should have settled the matter. What persuaded the appellate court and the trial court otherwise?

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68. 422 N.E.2d 1337 (1981).

In assessing the judge's findings, the documents are but part of the evidence. When the testimony at trial is considered, the judge's findings that the parish is congregational in terms of the ownership and management of its property and is not subject to the Church in such matters is not clearly erroneous. The parish, as the judge found, was always a separate legal entity and not a subdivision of any other entity. It had paid for the real estate and its other property with its own funds and always held title in its own name. The property was never "diocesan, monastic or Church property."

The prerevolutionary manner of ownership of property by parishes of the Russian Orthodox Church, as well as the pattern of ownership of property of parishes affiliated with the Church after its founding in 1921, also provide support for the judge's finding. The testimony as to the history of the Russian Orthodox Church before the 1918 Revolution explained that the apostolic canons, of which the 41st is a part, were adopted in the third and fourth centuries, and that in the Russian Orthodox Church, the patterns of ownership of property varied over time and reflected local conditions. While the only person who could appoint a priest was the bishop, property and indeed churches belonged to various groups, including tradesmen, nobles, and the Tsars. The bishops owned their own cathedrals and some private property and often created their own small churches. An expert in Russian theological studies at the College of the Holy Cross described the pattern as "something not unlike the crazy quilt of ownership" in the Roman Catholic Church prior to the establishment of the rigid canons of church ownership whereby the Catholic bishops took title. There was both a hierarchical system of jurisdiction and a vastly different, "almost more like a congregational notion of ownership of property side by side."

After the Russian Revolution, the Russian Orthodox Church Outside Russia was established in Constantinople in 1921. The headquarters later moved to Serbia and, after the second world war, to New York City.... There has been much voluntary movement of parishes in and out of the Church, as well as in and out of the other orthodox umbrella organizations.

At the time the parish left the Church in 1987, about twenty other parishes also left.... Although... other of the twenty parishes that left the Church had the "normal" Church by-laws, yet the Worcester parish and a parish in Ipswich were the only ones whose property was demanded by the Church.

On the basis of the foregoing evidence, particularly of the considerable movement in and out of the Church by individual parishes who took with them their own property without claim by the Church, the judge's finding

> that the parish was congregational as far as control and use of its property was concerned was not clearly erroneous.[69]

The Supreme Judicial Court of Massachusetts agreed to review the case and concluded: "The judge's exercise of jurisdiction over the property dispute was proper under either the traditional approach or the neutral principles approach. The plaintiff's attempt to recast the case as one involving questions of polity fails. Thus, for the reasons stated in the opinion of the Appeals Court, we affirm the judgment of the Superior Court."[70]

b. *Russian Orthodox Church Outside Russia*: Petition to the Supreme Court. This outcome was distressing, not only to the denomination involved, but to other denominations of hierarchical polity and to specialists in church-state law. It represented yet another instance of civil courts congregationalizing hierachical churches despite the clearest evidence to the contrary in the church's own formative documents. An excellent petition for *certiorari* was addressed to the Supreme Court of the United States on behalf of the Russian Orthodox Church Outside Russia (ROCOR) by Dean Edward M. Gaffney of the Valparaiso University School of Law, one of the outstanding scholars in the church-state field. It is excerpted extensively here because it ably sums up the concern about the damage done to religious liberty by the "neutral principles of law" idea adopted in *Jones v. Wolf* that is the burden of this entire section, and it invited the Supreme Court to use this case to rectify or clarify that idea.

> The characterization of an Orthodox Church as a combination of episcopal and congregational polities is, at the very least, a delicate blend of fact and law that merited closer scrutiny of the record than the appellate courts below gave it. For example, had they undertaken the independent review of the entire record that is called for under *Bose*,[71] the appellate courts below would have discovered ample evidence to explain why the petitioner Church pursued the respondents more aggressively than some of the other parishes that left the Church in this time period. The record discloses that the respondents were bound to the Church under by-laws that were much more explicit than those governing some of the other parishes. It was for this reason that the Church—upon the advice of counsel—responded more vigorously to the respondents' defection from the Church than it did with other parishes.[72]

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69. *Russian Orthodox Church Outside of Russia v. Russian Orthodox Church of the Holy Resurrection*, 617 N.E.2d 1031 (Mass. App. 1993).

70. *Russian Orthodox Church*, etc., 636 N.E.2d 211 (Mass. 1994).

71. *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984).

72. In a footnote, Dean Gaffney added: "Another very practical reason suggests itself for the apparent `inconsistency' of practice in pursuing some, but not all, of the parishes that wished to disaffiliate from the Church. This Church is a small religious body in this country.... Its scarce resources, all of which are derived from the voluntary contributions of its members, are dedicated to the religious life of the Church. The biblical command to feed the hungry (Isaiah 58:7; Matt. 25:35)

Thus the "factual" determination that ROCOR is a blend of hierarchical and congregational polities turns out to mask the very question presented for review, whether the Religion Clause of the First Amendment prohibits courts handling property disputes within a religious organization from transforming the polity of a hierarchical church into a hybrid form of hierarchical-congregational governance that is inconsistent with the deeply held religious convictions of the church reflected clearly in the governing documents of the church.

* * *

All the precedents of the Court involving Eastern Orthodox Churches assume correctly that the polity of these religious organizations is hierarchical....[73]

State courts are now in deep disarray over the resolution of intra-church property disputes. Some courts have followed this Court's unambiguous teaching in *Watson v. Jones*[74] that deference to the binding decisions of hierarchical churches is required by the First Amendment.[75]

Other courts, including the Supreme Judicial Court of Massachusetts in this case, have gone so far as to impose their own view of congregational organizational structure upon manifestly hierarchical communities such as the Presbyterians and the Episcopalians. In this case, the principal error of the lower courts was to rely upon an earlier decision involving a church that, unlike ROCOR, had freely chosen to structure itself both as a hierarchical church and as a congregational church.[76]...

The ruling in this case and others that we discuss below... constitute a serious constitutional violation that does grave injustice to hierarchically governed religious communities....

[T]he Protestant Episcopal Church [PECUSA]... can no longer rely on a uniform approach among the States to an appreciation that it is an *episcopal*, not a congregational church. For example, in *Bjorkman v. Protestant Episcopal Church*,[77] the Supreme Court of Kentucky affirmed a judgment in favor of a local parish seeking to split off from the [denomination]... despite clear evidence in the record that: (1) the canon law of the church prohibits the encumbrance or alienation of any consecrated church or chapel without the consent of the bishop of the diocese, and (2) the 1899 articles of incorporation "plainly show a

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should not be construed by the Court or any other court to refer primarily to lawyers." It would also be pertinent to note that if a motorcycle patrolman cannot pursue and arrest *all* speeding motorists, the law setting speed limits is not thought to be vitiated by failure of enforcement.

73. Citing *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952) and *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976), discussed at §§ 3 and 7 above, respectively.

74. 80 U.S. 679 (1871), discussed at § 1 above.

75. Citing *Fonken v. Community Church*, 339 N.W.2d 810 (Iowa 1983), *supra*; *Original Glorious Church of God in Christ of the Apostolic Faith v. Myers*, 367 S.E.2d 30 (W.Va. 1988); *Protestant Episcopal Church v. Graves*, 417 A.2d 19, *cert.* denied, 449 U.S. 1131 (1981).

76. *Antioch Temple v. Parekh, supra.*

77. 759 S.W.2d 583 (Ky. 1988).

corporate purpose to be affiliated with, and to be subject to, the canons of the Diocese of Lexington."...

Reflecting an apparent bias in favor of congregationalism, the Kentucky Supreme Court suggested that the local parish "acquired the property with no assistance from PECUSA; that the property was managed and maintained exclusively by [the local parish]" and then added the remarkable conclusion that "PECUSA's relationship with [the local parish] was exclusively ecclesiastical and [the local parish] was at all times in control of its temporal affairs." This conclusion overlooked evidence in the record of that case that the local parish "enjoyed the benefits of membership in PECUSA for many long years—its members were confirmed by the Bishop of Lexington, its clergy participated in a PECUSA pension plan, PECUSA insured the church, and the church regularly asked for and received help and advice from the Bishop of Lexington."[78] The bifurcation of the relationship between PECUSA and one of its parishes into matters temporal and matters spiritual resonates better in the English House of Lords,[79] and completely misunderstands Episcopal ecclesiology....

With cases such as *Bjorkman* on the books, it is small comfort to PECUSA that other courts are directly in conflict with the Kentucky court (and with the Massachusetts Supreme Judicial Court in this case), on the issue of whether Episcopalians (and the Russian Orthodox in this case) are governed by *episkopoi*— bishops.[80]... In the current state of affairs, PECUSA cannot now trust that a uniform national rule will acknowledge that Episcopalians are episcopally governed.[81]...

It must be candidly stated that the principal reason for the confusion in the state courts... arises from the tension within this Court's jurisprudence. For over a century—from *Watson v. Jones* to *Serbian Eastern Orthodox Diocese*—the teaching of this Court was clear and easy to follow [reviewing cases]....

What flowed from these cases was a clear rule that offered the lower courts practical guidance. First the courts should decide whether the church is congregational or hierarchical. Once a determination had been made that a church is hierarchical, the court should defer to the decisions of the highest ruling body of the church.

In 1979, however, the Court suggested that although state courts were *allowed* to defer to the decisions of national church adjudicatories in the

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78. *Bjorkman, supra*, Stephens, C.J., dissenting.

79. Composed of Lords Temporal and Lords Spiritual.

80. Footnote 15: "The state of the law is now in such disarray that the same court is not consistent on how to view a hierarchical church. Contrast *Bjorkman*... (Episcopalians are not entitled to deference as a hierarchical church) with *Cumberland Presbytery v. Branstetter*, 824 S.W.2d 417 (Ky. 1992) (Presbyterians are entitled to deference as a hierarchical church)."

81. Citing some cases recognizing denominational control of parish property: *Protestant Episcopal Church v. Graves, supra*; *Bishop of Colorado v. Mote*, 716 P.2d 85 (Colo. 1986); *Rector, Wardens & Vestrymen v. Episcopal Church*, 620 A.2d 1280 (Conn. 1983); *Tea v. Protestant Episcopal Church*, 610 P.2d 182 (Nev. 1980), some under "neutral principles of law."

> case of hierarchical churches, they were no longer *required* to follow the standard of deference to the self-understanding of these religious communities. In *Jones v. Wolf*, the Court announced that state courts could resort to "neutral principles of law" to resolve intra-church disputes....
>
> After a decade and a half of the application of the new standard..., it has become apparent that state courts have frequently distorted the self-understanding of religious communities involved in property disputes. These distortions, moreover, only run in one direction. When courts are left free to ignore the clear teaching of *Watson* and its progeny, Baptists remain Baptists. For the purpose of determining property ownership, if not literally for *all* practical purposes, however, Presbyterians and Episcopalians can be suddenly transformed into quasi-Baptists by judicial fiat. Thus the "neutral principles of law" approach has provided only an illusion of neutrality. The actual effect of the operation of this standard has been a tilt or a preference, however subtle, in favor of one particular form of church government, congregationalism or local control....
>
> * * *
>
> The integrity of a church's beliefs should not be made to turn on an inspection of deeds that may have been prepared hastily decades ago by a real estate practitioner who had little or no concern for delicate First Amendment values. [Footnote:..."In this case, the Appeals Court relied upon such factors as the involvement of the Tsars or Russian nobles in the possession of chapels and other religious property in pre-revolutionary Russia. This `fact' is a red herring. It is as illuminating to this case as the arrangements in Elizabethan England.... The reason why these historical arrangements in Europe are utterly irrelevant to the disposition of property claims of the Orthodox, Roman Catholics, and Episcopalians in this country is that we rejected the concept of an established national church at the dawn of the Republic."]
>
> ...The time has come for the Court to give greater guidance and clarity to the lower courts on this matter than was provided in the open-ended approach adopted in *Jones v. Wolf*.[82]

This petition was supported by a brief *amicus curiae* entered on behalf of James Andrews, Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.), Orthodox Church in America, National Council of Churches of Christ in the U.S.A., Greek Orthodox Archdiocese of North and South America, Antiochian Orthodox Christian Archdiocese of North America, General Conference of Seventh-day Adventists, and the Christian Legal Society. It opened with the following statement:

> The Presbyterian Church (U.S.A.), the Protestant Episcopal Church... and other churches have been losing parishes to breakaway congregations

82. *Primate and Bishops' Synod of the Russian Orthodox Church Outside Russia v. Russian Orthodox Church of the Holy Resurrection*, Petition for Writ of Certiorari (Nov. 1994), *passim*.

> because of the refusal by lower courts to enforce the denomination's right to retain local church property....
>
> Repeatedly, lower courts have construed clear and express provisions in church law prohibiting alienation of church property without the consent of hierarchical authorities as being mere moral and spiritual guidance without legal force or effect on temporal control of property. The instant case is just such an example of judicial disregard of explicit church law and provides the [Supreme] Court an opportunity to clarify and correct the lower courts' (mis)understanding of the right of hierarchical churches to control their subordinate entities in property as in all other matters....
>
> The *amici* are thus in a position to suggest to this Court a significant point that appears to have escaped the attention of the Massachusetts courts: theological convictions have a direct bearing on the structures and forms of ecclesiastical governance. Notwithstanding the important differences among the *amici*—indeed precisely because of these significant theological differences—all of the *amici* have a strong interest in keeping the government out of affairs that are beyond its jurisdiction and literally none of its business.[83]

Unfortunately, the Supreme Court did not seize this opportunity to correct the chaos in church-state law complained of. On January 17, 1995, the Supreme Court entered the following order in the above-captioned case: "The motion by James Andrews, et al. for leave to file a brief as amicus curiae is granted. The petition for a writ of certiorari is denied."[84]

2. Landmarking of Church Buildings

A recent development in the world of real estate law has posed a unique threat to the autonomy of religious bodies: the designation of church buildings as "landmarks" because of their architectural and historic character. At first glance this may seem a culturally constructive measure to prevent the tasteless remodelling or outright demolition of important and beloved edifices, and many a congregation has been flattered to be so designated—until such time as they might want to sell or modify or renovate an outworn structure. Then they may discover that their hands are tied; they cannot move without the consent of the civic agency that supervises landmarks. Some may discover sooner that they must maintain the facade in its landmarked condition at their own expense or suffer criminal penalties, whether they have any money left for religion or not! Such at least is claimed to be the effect of the landmark preservation statute in New York, and other states and cities are adopting similar laws.

a. *Lutheran Church v. New York City* (1974). The New York law was tested as applied to a church body in *Lutheran Church in America v. City of New York*. That

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83. *Primate & Bishops*, etc., Brief *Amici Curiae* of James Andrews, etc., pp. 1-3 *passim*.

84. 115 S.Ct. 924 (1995).

denomination had acquired in 1942 the mansion built in 1853 by J.P.Morgan in midtown Manhattan, and used it as its national headquarters. In 1958 it added additional office space at the back. In 1965 the New York City Landmarks Preservation Commission proposed to designate the mansion as a landmark, and the church opposed that action, but without success. When the building was "landmarked" over its protests, the church went to court to get that action reversed. The state's highest court, the Court of Appeals, ruled on the matter in 1974.

> Government interference with an owner's use of private property under the police power runs the gamut from outright condemnation for which compensation is expressly provided to the regulation of the general use of land remaining in private ownership so that the use might harmonize with other uses in the vicinity. No compensation is awarded in the latter situation since there is no taking. Also, of course, where property is being put to a noxious use such use can be enjoined under the common-law doctrine of nuisance.... Such government interference... is based on one of two concepts—either the government is acting in its enterprise capacity, where it takes unto itself private resources in use for the common good, or in its arbitral capacity, where it intervenes to straighten out situations in which the citizenry is in conflict over land use or where one person's use of his land is injurious to others.... Where government acts in its enterprise capacity, as where it takes land to widen a road, there is a compensable taking. Where government acts in its arbitral capacity, as where it legislates zoning or provides the machinery to enjoin noxious use, there is simply noncompensable regulation.
>
> What do we have in the case before us where title remains in private hands and where the government regulation which severely restricts the use to which the property may be put is neither in pursuance of a general zoning plan, nor invoked to curtail noxious use?
>
> A zoning ordinance in order to be validly applied cannot, for one thing, serve to prohibit use to which the property is devoted at the time of the enactment of the ordinance.... Here, plaintiff has submitted ample proof not seriously contested, that the use to which the property has been put for over 20 years would have to cease because of the inability under the designation to replace the building. Also, and of chief importance, zoning is void if confiscatory....
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> * * *
>
> In the instant case it could... be well argued that the [landmarks] commission has added the Morgan house to the resources of the city by the designation..., and that while such designations might not wreak confiscatory results in all situations (as where business might well be promoted by the designation), it does have that effect here where plaintiff is deprived of the reasonable use of its land.
>
> * * *

> [In the case of *Sailors' Snug Harbor*[85]] the Appellate Division ruled that where designation would prevent or seriously interfere with the carrying out of the charitable purpose it would be invalid. That is a simple enough concept and ought to apply here....
>
> What has occurred here..., where the commission is attempting to force plaintiff to retain its property as is, without any sort of relief or adequate compensation, is nothing short of a naked taking.... [T]he commission, without any move toward invoking the power of eminent domain, is attempting to add this property to the public use by purely and simply invading the owner's right to own and manage. Legitimate zoning stops far short of this because it does not appropriate for public use....
>
> It is uncontested that the existing building is totally inadequate for plaintiff's legitimate needs and must be replaced if plaintiff is to be able freely and economically to use the premises.... The power given the municipality to force termination of plaintiff's free use of the premises short of condemnation (which would provide compensation for plaintiff's complete loss) directly violates plaintiff's rights under the Fifth and Fourteenth Amendments.... [T]he landmark designation as here applied is declared to be confiscatory.[86]

So the landmark designation was removed from the former J.P. Morgan mansion, notwithstanding which the Lutheran Church in America continued to use it without further significant alteration from 1974 until it moved its headquarters to Chicago in 1988.

b. ***Penn Central v. New York City*** (1978). The U.S. Supreme Court has ruled only once on the New York landmarking statute, and that case did not involve a religious organization. It did involve the same legal question as *Lutheran Church in America* (which had not reached the church's First Amendment claims), namely, the Fifth Amendment's provision "nor shall private property be taken for public use, without just compensation." The Penn Central Transportation Co. sought to build on top of its Grand Central Terminal in Manhattan but was prevented from doing so because of the landmark designation of that structure. Penn Central went to court claiming that it had been the victim of an unconstitutional "taking" without just compensation: its utilization of the air rights above its building had been "taken" by the City. The Supreme Court held that landmarking did not constitute a "taking" in the sense of the Fifth Amendment because the "transferable development rights" could be utilized by adjacent buildings that Penn Central also owned, so that—even though it couldn't build on top of Grand Central Station—it could use the air rights to add on to buildings it owned next door.[87] Thus the holding in *Penn Central* would seem to be limited by its facts to the transfer of development rights to nearby property owned by the same landholder. But the New York Court of Appeals, in a subsequent

85. *Sailors' Snug Harbor v. Platt*, 29 A.2d 276 (1968).

86. *Lutheran Church in America v. City of New York*, 35 N.Y. 2d 121 (1974).

87. *Penn Central v. N.Y.C.*, 438 U.S. 104 (1978).

decision, viewed the teaching of *Penn Central* to be that a "taking" had not occurred if the property owner was able to carry on its current activities in the existing (landmarked) structure.[88]

c. *Ethical Culture Society v. Spatt* (1980). One other case involving a religious body was adjudicated by the New York Court of Appeals prior to 1985. It involved the Ethical Culture Society, which sought to have the landmark designation removed from its Meeting House in Manhattan in order to replace it with an income-generating apartment tower. The court decided against this plea.

> Although the Society does argue that the physical structure of the Meeting House is ill-adapted to its present needs, by no means are we assured that the only feasible solution to this problem would entail the demolition of the now protected building facade. Instead, petitioner's arguments seem to emphasize aggrievement with respect to the prohibition against high-rise development. There is no genuine complaint that eleemosynary activities within the landmark are wrongfully disrupted, but rather the complaint is instead that the landmark stands as an effective bar against putting the property to its most lucrative use. But there simply is no constitutional requirement that a landowner always be allowed his property's most beneficial use.
>
> * * *
>
> The Society also contends that the existence of the designation interferes with the free exercise of its religious activities; however, rather than argue its desire to modify the structure to accommodate these religious activities, the Society has suggested that it is improper to restrict its ability to develop the property to permit rental to nonreligious tenants.... Although the Society is concededly entitled to First Amendment protection as a religious organization, this does not entitle it to immunity from reasonable government regulation when it acts in purely secular matters.[89]

d. *The Church of St. Paul and St. Andrew* (1986). A somewhat different—and more clear-cut—challenge was expressed by the United Methodist Church of St. Paul and St. Andrew in upper Manhattan. The church's structure was rapidly deteriorating and posed safety hazards both inside and out. In the 1960s the small but active congregation had raised $100,000 for a major renovation of the building's facade, but within a few years its exterior was again crumbling away under the impact of automobile exhaust fumes on its terra cotta limestone blocks. The cost of stabilizing the structure and making it serviceable and energy-efficient would run into millions of dollars, which the congregation had no way of raising. So the church developed a plan to replace its building with a high-rise apartment house that would include several floors for church use.

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88. See *St. Bartholomew's Episcopal Church* at § e below.

89. *Matter of the Society for Ethical Culture v. Spatt*, 51 N.Y.2d 449 (1980).

The emergence of that plan stimulated a sudden solicitude on the part of the church's neighbors for the preservation of the church's hitherto uncelebrated architecture, perhaps motivated by apprehension of having a new, tall building shut off their view of the Hudson River. The local Community Board, an obscure element in New York City's government infrastructure, conceived the plan of having the church edifice designated as a landmark, and so recommended to the Landmarks Preservation Commission—without notifying the church until it was nearly a *fait accompli*. The Commission held hearings on the proposal, at which the church vehemently objected to being landmarked, notwithstanding which it was designated a landmark on November 24, 1981, confirmed by the New York City Board of Estimate (composed of the mayor, borough presidents, etc.) in March of 1982. Five days later the church filed suit to have the landmark designation vacated, relying upon the First Amendment.

The City of New York responded that the church had not exhausted its administrative remedies because it had not submitted itself to the Landmarks Law's "hardship proceeding" provided for the relief of landmarked structures whose owners faced economic difficulties in maintaining them. The trial court observed that exhaustion of administrative remedies is not a valid defense under Section 1983 and suggested that "lack of ripeness" was a better basis for a motion for summary judgment. The City quickly substituted "lack of ripeness," and the court dismissed the case solely on that basis, in effect throwing the church back on the tender mercies of the "thief who took the property in the first place," as the church viewed it.[90]

The hardship procedure would require the church to sit down with the Landmarks Commission and discuss its religious purposes and priorities and then demonstrate that the landmarked building was not suitable for them. The Landmarks Commission might respond that the building would be adequate if the church revised its program to eliminate its feeding of 250 needy people at lunchtime or cut back on its senior citizens' center (one of the city's largest). The point is that a church should never have to submit its *religious* program to a civic agency for approval, let alone jeopardize that program in order to maintain the masonry in the condition the civic agency requires. The New York Court of Appeals—New York's highest court—agreed to hear the case but confined itself to the "preliminary legal question: whether the claim that the Landmarks Law is unconstitutional... is ripe for judicial determination."

> [T]he controversy cannot be ripe if the claimed harm may be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party.... Neither the finality requirement nor the requirement that the issue be "purely legal" is met. Finality is lacking because the effect on plaintiff of being subjected to the Landmarks Law—the basis of its claim—is incomplete and undetermined. The effect cannot

90. Quotation from George Morris Gurley, chairman of the church's board of trustees.

> be measured until plaintiff has sought and the [Landmarks] Commission has granted or denied a certificate of appropriateness... or other approval of its rebuilding program....
>
> Likewise, it is clear that the requirement that the issue presented be "purely legal" is not satisfied.... The ultimate resolution of this constitutional issue—i.e., whether the Landmarks Law, as applied, prevents or seriously interferes with plaintiff's ability to carry out its charitable purpose (*Matter of Society for Ethical Culture v. Spatt*)[91]—will require a careful examination of facts not yet developed pertaining to plaintiff's financial situation and to whatever action the Commission takes with respect to plaintiff's rebuilding program.... How much, if any of plaintiff's rebuilding program will be thwarted and whether and to what extent it will suffer resultant constitutional harm cannot be known until the Commission acts on plaintiff's request for approval of its plans. The plans, which it refuses to submit to the Commission for approval, include renovation of the interior and exterior of the church and would, if approved, result in compliance with the very statutory requirements plaintiff contends the Commission's designation causes it to violate.
>
> Finally, plaintiff's declaratory judgment action cannot be ripe to the extent it is based on plaintiff's claim of constitutional injury from being theoretically subject to criminal sanctions for noncompliance with the Landmarks Law's repair and maintenance requirements.... Plaintiff does not allege that these requirements have been enforced, and nothing in the record suggests that imposition of criminal sanctions has been threatened or even intimated....
>
> The question remains whether our decision on the ripeness issue should be different because plaintiff is a church and bases its constitutional claim in part on prospective interference with its right to free exercise of religion. We think not....
>
> The ultimate effect, if any, on plaintiff's religious activities will not be direct, but purely consequential and, moreover, contingent on future developments. In any event, the merits of the constitutional claim are not before us.... What plaintiff must prove to establish its constitutional claim as a charity under the established standard [of *Spatt*] is neither dependent upon nor peculiar to its religious character. Plaintiff's claim—founded on an alleged interference with its building program and its inability to afford the repair requirements of the Landmarks Law—takes on incidental First Amendment overtones only because it is a church. That fact is simply not germane to the ripeness issue here.[92]

This opinion, written by Judge Hancock and joined by Chief Judge Sol Wachtler and Judges Kaye and Titone, might leave the reader duly befogged by the procedural dust thrown up in great amount were it not for a vigorous dissent addressing the merits indited by Judge Meyer and joined by Judges Simons and Alexander.

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91. 415 N.E.2d 922, (1980), *supra*.

92. *Church of St. Paul and St. Andrew v. Barwick*, 496 N.E.2d 183 (N.Y. 1986).

As the church contends, the basic issue confronting the court is which is to be preferred—religious freedom or the exercise of the police power in furtherance of architectural and cultural interests. First Amendment rights clearly are not absolute, but just as clearly, "freedom of religion [is] in a preferred position."[93] As between the free exercise of religion and the aesthetic and community values involved in landmark preservation, the latter is "outweighed by the constitutional prohibition against the abridgement of the free exercise of religion and by the public benefit and welfare which is itself an attribute of religious welfare in a community."[94] Yet by construing the certificate of appropriateness procedure... more broadly than has the Commission itself, and ignoring the Commission's arrogating to itself, as part of the hardship procedure..., of the "judicial rule"[95]... the majority gives the Commission greater power than accorded it by statute or prior judicial decision and in so doing subordinates religious freedom to a secular purpose of lesser importance....

The church's affidavits... noted that although the sanctuary was designed to seat 1,400 worshippers and during the first half of the century had been filled to capacity, its membership in 1981 was approximately 250, of whom only 100 were regular Sunday worshippers. As a result, the congregation is dwarfed by the large sanctuary, which frequently cannot be used because of the prohibitive cost of heating the space.

In relation to the physical and financial condition of the church, the affidavit presented the following data: The heating bill, which was $11,400 in 1974, had advanced in 1979 to $22,500 and in 1982 totaled $34,000. Heating expense plus $9,000 for insurance and $3,000 for emergency repairs in 1982 consumed 70% of all pledges, donations and loans by members of the congregation for that year. Physically, the condition of the building is deteriorating.... The balcony of the sanctuary has been closed because [it is] too dangerous for use. The plumbing facilities are "decrepit," lighting is poor[,] and there are no elevators for handicapped individuals. As for the exterior, extensive repairs to the roof and masonry are required. Falling stones and masonry fragments are a danger to pedestrians. In addition, leaks in the roof drainage system have rotted large sections of the wall. In 1980, it was estimated that exterior repairs in the amount of $250,000 were required. When this action was commenced in 1982, that estimate had risen to $350,000. Other than the buildings and land and a small endowment of $35,000, there are few assets. The church operates with annual pledge income and donations from its membership..., which totaled approximately $60,000 in 1982 and barely met the most necessary of salary and maintenance expenses.

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93. *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943), discussed at IIA2i.

94. *Matter of Westchester Reform Temple v. Brown*, 22 N.Y.2d 488, 293 N.Y.S.2d 297, 239 N.E.2d 891 (1968).

95. Citing *Matter of Society for Ethical Culture v. Spatt*, *supra*; *Lutheran Church v. City of New York*, 316 N.E.2d 305 (1974), discussed at § a above.

> When... the use [of a landmarked structure] is for a charitable or religious purpose, the standard [of constitutionality] is that the designation "not physically or financially prevent, or seriously interfere with the carrying out of" that purpose.[96] This results from the "special status of religious institutions under the First Amendment"[97] "which severely curtails the permissible extent of governmental regulation in the name of the police powers."[98]
>
> When the latter standard applies and the existing building of the religious institution is totally inadequate for its legitimate needs if it is to be able freely and economically to use its premises, landmark designation which by proscribing alteration or demolition invades the owner's rights to own and manage its property is unconstitutional as applied and the municipality must, then, be prepared to "provide agreeable alternatives or condemn the premises."[99]
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> * * *
>
> With respect to the statutory framework, the majority takes the church to task for "its aversion to ceding any control of the building program to the Commission." But, as the church contends, the basic issue here is which is to be preferred—religious freedom or architectural and cultural interests. The Commission has no statutory authority to deal with the hardship issue with respect to religious and charitable organizations, that issue being for the courts. To give it the leverage to deal with appropriateness as something more than architectural appropriateness, as the majority opinion does, after the designation is an accomplished fact and the religious organization incurs maintenance obligations under threat of criminal sanctions and without regard to the organization's financial situation, is in effect to permit hardship, not a function of the Commission with respect to a church, to be negotiated under the guise of appropriateness and is wholly inconsistent with the church's First Amendment rights.
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> * * *
>
> The affront to plaintiff's religious freedom is that in order to achieve the financial basis necessary for it to carry out its religious and charitable work it must submit not just to the preservation of the [two] exterior walls that have been landmarked but also to the Commission's intermeddling in its over-all rebuilding plan or establish to the satisfaction of the Commission, in the guise of the Commission's providing it with a reasonable alternative, that its financial situation is such that it should be permitted to partially demolish and rebuild the existing structure.

The majority had disregarded the church's concern about possible criminal penalties for failure to maintain the landmarked premises by saying that it hadn't been

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96. *Spatt*, *supra.*

97. *Jewish Reconstructionist Synagogue v. Roslyn Harbor*, 342 N.E.2d 534, 537 (N.Y. 1975).

98. *Westchester Reform Temple*, *supra.*

99. *Lutheran Church v. New York*, *supra.*

prosecuted yet. Judge Meyer refuted that treatment by noting that the Supreme Court of the United States had held to the contrary on several occasions, including one in the church-state area.

> [A] teacher obligated by Arkansas statute not to teach the theory of evolution was held entitled to a declaration that the statute was in violation of the First Amendment because she faced the dilemma of teaching the statutorily condemned material or subjecting himself [*sic*] to dismissal and criminal prosecution.[100] And Davis tells us... that "[t]he general principle of ripeness law now is that a statute, regulation or policy statement is ripe for challenge when an affected person has to choose between disadvantageous compliance and risking sanctions."[101]
>
> * * *
>
> But aside from the maintenance and repair requirements, the church faces the very real possibility that its program for obtaining the means necessary to carry on its religious and charitable work will be thwarted by its financial position and the time and effort to litigate through all the procedural steps to which the majority and the Commission would subject it. Thus will the very problem which created the need for rebuilding to preserve its religious and charitable status be subordinated to cultural and aesthetic considerations not of equal importance constitutionally.[102]

Thus, by a single vote on the seven-person court, was the struggling Church of St. Paul and St. Andrew thrown on the tender mercies of the New York City Landmarks Commission.

It is interesting to note that the church building at issue was characterized by the Court of Appeals' majority as "of unquestioned architectural significance" and was described by the Commission as a specimen of "scientific eclecticism" in architecture—a quality the author did not notice when attending this church while a graduate student at Columbia University. Indeed, its "special character" was so distinguished that the architect who designed it, R.H. Robertson, did not want it included in his roster of achievements![103]

e. *St. Bartholomew's Episcopal Church* (1990). A somewhat more visible and less sympathetic subject was the Episcopal Church of St. Bartholomew on Park Avenue next to the Waldorf-Astoria Hotel. It tried three times to get approval from the Landmarks Preservation Commission for the demolition of its Community House (not the church itself) and the construction in its place of a high-rise structure, most of which would be leased for commercial use. Each proposal was rejected, and the church finally went to court seeking to have the Landmarks Law declared

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100. *Epperson v. Arkansas*, 393 U.S. 97 (1968), discussed at IIIC3b(2).

101. Davis, *Administrative Law*, vol. 4, § 25.13, p. 393, (2d ed.).

102. *Church of St. Paul & St. Andrew, supra*, Meyer dissent.

103. See L'Heureux, N.J., Jr., "Ministry v. Mortar: A Landmark Conflict," in Kelley, D.M., ed., *Government Intervention in Religious Affairs, II* (New York: Pilgrim Press, 1986), pp. 164 ff.

unconstitutional as applied to the church and the designation of the church and its properties vacated.

Although a large, prestigious Byzantine church with an $11,000,000 endowment does not evoke the same solicitude as the struggling church of St. Paul and St. Andrew, the issues were very much the same, except that St. Bart's, as it is familiarly known, did not object to the landmark designation as such and did try to go through the "hardship proceeding" provided by the Commission, but without success. So it took the matter to court. The federal district court held that the church had not shown that designation of its auxiliary building as a landmark had prevented the church from carrying out its religious and charitable mission.[104] The church appealed this decision, and in due time the decision of the Second Circuit Court of Appeals was announced per Judge Ralph Winter. (In the meantime, the Supreme Court recast the law of the Free Exercise Clause via *Oregon v. Smith*.)[105]

> The Church argues that the Landmarks Law substantially burdens religion in violation of the First Amendment as applied to the states through the Fourteenth Amendment. In particular, the Church contends that by denying its application to erect a commercial office tower on its property, the City of New York and its Landmarks Commission... have impaired the Church's ability to carry on and expand the ministerial and charitable activities that are central to its religious mission. It argues that the Community House is no longer a sufficient facility for its activities, and that the Church's financial base has eroded. The construction of an office tower similar to those that now surround St. Bartholomew's in midtown Manhattan, the Church asserts, is a means to provide a better space for some of the Church's programs and income to support and expand its various ministerial and community activities.... [W]e believe the Church's claims are precluded by Supreme Court precedent.
>
> As the Court recently stated in *Employment Division v. Smith* (1990),... "[T]he right of free exercise of religion does not relieve an individual of the obligation to comply with a `valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[106] The critical distinction is thus between a neutral, generally applicable law that happens to bear on religiously motivated action, and a regulation that restricts certain conduct because it is religiously oriented.
>
> The Landmarks Law is a facially neutral regulation of general applicability.... It is true that the Landmarks Law affects many religious buildings. The Church thus asserts that of the six hundred landmarked

104. *The Rector, Wardens, and Members of the Vestry of St. Bartholomew's Church v. City of New York*, 728 F.Supp. 958 (S.D.N.Y. 1989).

105. 494 U.S. 872 (1990), discussed at IVD2e; Congress in 1993 reinstated the previous definition of Free Exercise in the Religious Freedom Restoration Act, 12 USC 2000bb.

106. *Employment Division v. Smith*, *supra*, quoting *U.S. v. Lee*, 455 U.S. 252, 263, n. 3, (Stevens, J., concurring).

sites, over fifteen percent are religious properties and over five percent are Episcopal churches. Nevertheless, we do not understand those facts to demonstrate a lack of neutrality or general applicability. Because of the importance of religion, and of particular churches, in our social and cultural history, and because many churches are designed to be architecturally attractive, many religious structures are likely to fall within the neutral criteria—having "special character or special historical or aesthetic interest or value"—set forth by the Landmarks Law.[107] This, however, is not evidence of an intent to discriminate against, or impinge on, religious belief in the designation of landmark sites.

The Church's brief cites commentators, including a former chair of the Commission, who are highly critical of the Landmarks Law on grounds that it accords great discretion to the Commission and that persons who have interests other than the preservation of historic sites or aesthetic structures may influence the Commission decisions.[108] Nevertheless, absent proof of the discriminatory exercise of discretion, there is no constitutional relevance to these observations.

* * *

It is obvious that the Landmarks Law has drastically restricted the Church's ability to raise revenues to carry out its various charitable and ministerial programs. In this particular case, the revenues involved are very large because the Community House is on land that would be extremely valuable if put to commercial uses. Nevertheless, we understand Supreme Court decisions to indicate that neutral regulations that diminish the income of a religious organization do not implicate the free exercise clause.[109] The central question in identifying an unconstitutional burden is whether the claimant has been denied the ability to practice his religion or coerced in the nature of those practices. In *Lyng v. Northwest Cemetery Protective Ass'n*.[110] the Court explained,

> It is true that... indirect coercion or penalties on the free exercise of religion, not just outright prohibition, are subject to scrutiny under the First Amendment.... This does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions. The crucial word in the constitutional text is "prohibit"...

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107. N.Y.C. Admin. Code § 25-302(n) (1986).

108. At this point Judge Winter inserted a footnote that suggests more truth than poetry:

> 3. The Landmarks Law made a cameo appearance in a recent best-selling novel as a vehicle for political retaliation against a clerical official seeking to develop Church property. *See* T. Wolfe, *Bonfire of the Vanities* 569 (1987) ("Mort? You know that church, St. Timothy's? ...Right... LANDMARK THE SON OF A BITCH!"). [capitals in original]

109. Citing *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378 (1990), discussed at VC6b(5), and *Hernandez v. Commissioner*, 490 U.S. 680 (1989), discussed at VC6c(13).

110. 485 U.S. 439 (1988), discussed at IVE1i.

> We agree with the district court that no First Amendment violation has occurred absent a showing of discriminatory motive, coercion in religious practice or the Church's inability to carry out its religious mission in its existing facilities....
>
> * * *
>
> We conclude that the Landmarks Law does not affect an unconstitutional taking because the Church can continue its existing charitable and religious activities in its current facilities. Although the regulation may "freeze" the Church's property in its existing use and prevent the Church from expanding or altering its activities, *Penn Central* explicitly permits this.... In both cases, the deprivation of commercial value is palpable, but as we understand *Penn Central*, it does not constitute a taking so long as continued use for present activities is viable.[111]

The spectacle of the Landmarks Commission, the district court and the appellate court rummaging through the church's assets, income, program and space requirements to determine whether—in their secular judgment—the church could "afford" to live within the limits set by the landmarking law would seem to represent the epitome of "excessive entanglement" between church and state that the Supreme Court had said would violate the Establishment Clause,[112] but the Second Circuit (in a footnote) thought otherwise:

> 4. The Church also argues that the Landmarks Law involves an excessive degree of entanglement between church and state in violation of the establishment clause. The district court dismissed this argument as irrelevant in the present context, reasoning that the entanglement doctrine applies only to instances of government funding of religious organizations. However, in *Jimmy Swaggart Ministries* the Supreme Court considered an entanglement claim in the context of government taxation of the sale of religious materials by a religious organization. The Court found no constitutional violation, as the regulation imposed only routine administrative and recordkeeping obligations, involved no continuing surveillance of the organization, and did not inquire into the religious doctrine or motives of the organization. These same factors are of course largely true of the Landmarks Law. The only scrutiny of the Church occurred in the proceedings for a certificate of appropriateness, and the matters scrutinized were exclusively financial and architectural. This degree of interaction does not rise to the level of unconstitutional entanglement.

This was one of the clearer examples of the notion that governmental control of a church's temporalities does not impair its freedom to follow its spiritual vision. A church's financial and architectural embodiment are inextricably intertwined with its

111 . *St. Bartholomew's Church v. New York City*, 914 F. 2d 348 (CA2 1990).

112 . *Lemon v. Kurtzman*, 403 U.S. 602 (1971), *et. seq.*

theological convictions, aspirations and attainments.[113] Disembodied "beliefs," "doctrines" and "motives" are not the heart and soul of religion, and leaving them untouched while binding the body, its earthly housing and financial sinews, is as generous as telling a shackled prisoner that he has nothing to complain of because his imagination can still roam free. Tying down a church's life to its present being is to "freeze" (the court's own term) its future to its past, which in other realms of human experience is not called liberty. As the Supreme Court observed in limiting the role of civil courts in settling intrachurch disputes over property, "the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern."[114] Fortunately, the cramped and cramping interpretation of the Second Circuit, like that of the New York Court of Appeals in *Church of St. Paul and St. Andrew*, *supra*, was not the last word. The highest courts of two other states took a different approach to the landmarking question.[115]

f. Trying to Change the Law. Because of the experience of St. Paul and St. Andrew, St. Bart's, and other churches in New York City and elsewhere in the state, the New York State Interfaith Commission on Landmarking of Religious Property was formed, composed of bishops and comparable judicatory leaders of many faith-groups, to obtain a change in the Landmarks Law of that state that would exempt churches and synagogues from being landmarked without their consent. A bill was introduced in the state legislature to accomplish that objective, and hearings were held, marked by a heavy turnout of militant preservationists, including Jacqueline Kennedy Onassis, with more than a hundred witnesses opposing the legislation and only a few dozen (representing far more people) favoring it. Mayor Koch assured the citizens of New York City on television, "We won't let them demolish your landmarks." "*Your* landmarks" evidently referred to the *public*, which had not paid a cent for the building of those churches and would not be paying a cent to maintain them.[116] The bill did not pass.

The lesson of New York's treatment of the landmarking of churches would seem to be that henceforth religious bodies contemplating the construction of a new house of worship, if they wish to avoid the stultifying embrace of the architectural preservationists, should adopt the policy THINK UGLY in order to create a structure that no one would want to preserve. This approach has evidently commended itself in some quarters, producing "megachurches" that have the added

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113 . See Carmella, Angela C., "Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review" in 36 *Villanova L. Rev.* 402, esp. 449ff. (1991).

114 . *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969), discussed at § 5 above.

115 . See §§ g and h below.

116 . An excellent treatment of this entire subject may be found in L'Heureux, "Ministry v. Mortar: A Landmark Conflict," *supra*.

advantage—when no longer needed for their original purpose—of being readily salable for use as a discount mart or merchandise emporium.

g. *Society of Jesus v. Boston Landmarks Commission* (1989). New York City was not the only venue in which landmarking problems afflicted religious bodies; Chicago, Los Angeles and other cities saw similar encounters. But one of the most egregious impositions occurred in Boston, where the local Landmarks Commission undertook to instruct the Jesuits on how they should arrange and maintain the *interior* of the Church of the Immaculate Conception. Because of the relocation of Boston College, Boston College High School and much of the Roman Catholic population of the South End of the city, the usage of the church declined, and the Jesuits made plans to convert the "upper church" into offices, residences and counseling facilities and to use the "lower church" for worship. When they began to make alterations in the upper church toward this end, opposition arose. The Boston Landmarks Commission was approached to prevent remodeling of the interior, and in October 1986 the Commission approved temporary landmark status for the church, thus bringing the renovation to a halt.

The Jesuits modified their plans to include an arrangement under which part of the upper church would continue to be used for services, but the Commission meanwhile designated most of the upper church as a historic landmark. The Jesuits filed suit challenging that designation, but submitted to the Landmarks Commission an application to make certain changes in the interior of the upper church, among them the removal of the main altar and the installation of a table-altar in the center of the sanctuary in accordance with the liturgical reforms of Vatican Council II. The application was denied, and the Jesuits filed another action challenging the denial. (A second application with less sweeping alterations was subsequently approved.)

The several suits were consolidated and decided October 11, 1989, by Judge Elbert Tuttle of Superior Court of the Commonwealth of Massachusetts, who saw them as presenting a single issue: "Is the Boston Landmark Statute constitutional as it has been applied to the Church of the Immaculate Conception?" Since the facts were not in dispute, he decided, as a matter of law, whether the application of the Landmark Statute interfered with the Jesuits' free exercise of religion.

> It has long been recognized that the first amendment to the United States Constitution protects from government interference the way a church manages its affairs....[117]
>
> Part of this constitutionally protected sphere of church autonomy includes the buildings used for worship. As the New York Court of Appeals observed, "[R]eligious structures enjoy a constitutionally

117. Citing *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979), discussed at § D3a below; *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 107 (1952), discussed at § B3 above.

protected status which severely curtails the permissible extent of governmental regulation in the name of the police powers."[118]

Without a doubt, the interior design of the Church of the Immaculate Conception is securely within the protection afforded by the free exercise clause. If anything, the inside arrangement of a house of worship is more closely bound up with the practice of religion than any other element of the physical structure....

The Jesuits contend that the mere designation of their church as a landmark has constrained the free exercise of religion. This is a difficult contention to evaluate, since it turns on an abstract concept; it was apparently rejected by the New York Court of Appeals in [*Church of St. Paul and St. Andrew v.*] *Barwick*.[119] However, the undisputed facts before this court reveal that the Landmark Statute has had much more of an impact on the Jesuits than mere designation....

The main altar in the upper church provides one illustration of the inhibiting effect of the Landmark Statute. The Jesuits had installed a new central altar that was closer to the seating for the congregation. They felt that the larger main altar distracted attention from the new central altar. After the first application for design changes was denied, the Jesuits were under the impression that the Commission would not allow them to remove the main altar. They thus reluctantly agreed to an alternative of screening it off.

The Commission insists that it never expressly refused permission to remove the main altar, and that in fact it would have allowed the removal had the Jesuits renewed the proposal in their second application. This contention is somewhat misleading, since the Commission was apparently going to require that the main altar be "reconstituted" in some form after it was removed. In any event, the mere fact that the Jesuits honestly *perceived* a restriction on this liturgically significant interior structure tends to show the impact of the Landmark Statute on their religious practices.

The problem with the main altar is but one example among many of the inhibiting effect the Landmark Statute has had on the Jesuits ever since the 1986 designation. Indeed, the lengthy and costly application and hearing processes have been significant burdens in [and] of themselves, quite apart from the substantive restrictions they generate. It is not unfair to say that the life of the Church of the Immaculate Conception has been dominated by the operation of the Landmark Statute for the past three years....

The state interest served by the Landmark Statute is historical preservation, certainly a worthy goal. As applied to private buildings generally, the law is certainly appropriate. As applied to the Church of the Immaculate Conception, however, the interest in historical preservation is not strong enough to justify the significant restraints on the practice of religion that have been imposed by the Landmark Statute....

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118. *Westchester Reform Temple v. Brown*, 22 N.Y.2d 488, 293 N.Y.S.2d 297, 239 N.E.2d 891 (1968).

119. 67 N.Y.2d 510 (1986), discussed at § d above.

> It should be added that the Landmark Statute is not the only way for the state to realize its goal of historical preservation. If the public truly wants to preserve its religious heritage, it seems only just that the public should pay the costs involved. Rather than charging the Jesuits with the burden of maintaining a church that they feel they cannot afford, the Commonwealth might consider assuming that burden by buying what is undeniably an architectural treasure. The eminent domain powers could be invoked if necessary. Surely such a policy would be appropriate, if the public interest in historical preservation is as strong as the Commission suggests.
>
> Whatever methods the Commonwealth ultimately adopts to preserve its significant churches, it must adhere to the mandates of the United States Constitution. As applied to the Church of the Immaculate Conception, the Landmark Statute impermissibly burdens the free exercise of religion protected by the first amendment. Because the constraints on the Jesuits' administration of their church can be traced to the initial designation in May of 1986, that designation must be removed.[120]

In this decision Judge Tuttle succinctly stated what had long needed to be said about the operation of landmark preservation statutes with respect to churches: the public interest in historical preservation does not rise to the "compelling" level necessary to overcome the claims of free exercise of religion. And even if it did, there is a less intrusive way to serve that interest—namely, by purchase or exercise of the power of eminent domain, whereby the *public* pays for the preservation of landmarks rather than requiring the adherents of a religious property owner to do so.

Judge Tuttle was firm but forebearing in his exposition of the law; a less judicious person might have remarked with incredulity the prospect of a governmental agency undertaking to tell a Roman Catholic religious order how to arrange the interior of its house of worship. The main altar in a church is the center of worship, the focus of devotion, the most holy element in the holiest precinct of the sanctuary. Its shape and arrangement and location is a matter solely and indisputably of sacerdotal concern and ecclesiastical jurisdiction.

The decision to relocate the altars of Roman Catholic churches from the east wall of the sanctuary, where the priest faced it during Mass, with his back to the congregation, to the center of the sanctuary, where the priest faced the people, was an important change in the self-understanding of the roles of priest and people in relation to the sacrificial sacrament enacted in the Mass, a change determined at the highest level of the church, Vatican Council II. The idea that the decision about the proper relationship of the people at worship toward their God should be countermanded by a band of civic bureaucrats and architects in the name of the

120. *Society of Jesus v. Boston Landmark Commission*, slip op. (1989), aff'd 409 Mass. 38, 564 N.E.2d 571 (1990).

esthetics of architecture—and at the instance of mere bystanders who had no role in the church—is simply outrageous![121]

The idea that the state should assume the cost of preserving important architectural specimens by use of eminent domain seems logical, but it may concede too much. A trenchant comment on this argument, as well as on landmarking in general, was contained in correspondence to this author from Douglas Laycock, Professor of Law at the University of Texas:

> Eminent domain is not the solution to the landmarking problem. It is true that if the government wants the church building it should pay, but it may not be able to take the church building even if it does pay. I have no doubt that government may take a church building that stands in the way of a road, and probably it can take a church building if it needs the land for most other governmental purposes. The church is entitled to compensation like everyone else, and I think free exercise requires some deference in the exercise of eminent domain—at least a showing that other land would not serve the government's purpose equally well....
>
> But the landmarking cases are different, and they would remain different even if the government used eminent domain and paid fair value. In the landmarking cases, the government does not want the land. It doesn't even want the building for conversion to some secular use. Rather, government wants the sacred architecture itself. It does not want the real estate, but the religious creation. The church has created such buildings to the glory of God, or the inspiration of souls, and the state has no cognizable interest in that creation. The free exercise clause does not prevent the state from building a freeway over the most direct route, even if a church is in the way. But it should prevent the state from taking a church as a pretty bauble that it wants for its own.[122]

h. ***First Covenant Church v. City of Seattle*** **(1992).** Another straw in the wind was lofted on the West Coast by the Supreme Court of the state of Washington in a landmarking case that had been up to the Supreme Court of the United States and back. In 1980 the Landmarks Preservation Board of the city of Seattle nominated the house of worship of First Covenant Church as a city landmark. Over the objections of the church, the board proceeded to designate it as a landmark in 1981 and established controls to preserve the exterior of the church. After futile efforts to negotiate agreement on those regulations, the city and the church went before a hearing examiner, at which time the church again objected to the landmark designation. The hearing examiner recommended that the city council approve the regulations, which it did in 1985, adopting an ordinance requiring the church to get approval from the Landmarks Preservation Board for any alterations in the church's exterior. The

121 . A similar dispute over the location of altars is discussed at § 13 below.

122 . Personal correspondence from Douglas Laycock, writing from Hawaii to the author, August 7, 1986, used with permission.

ordinance contained a curious exception, notable in what it gave with one hand and took away with the other:

> [N]othing herein shall prevent any alteration of the exterior when such alterations are necessitated by changes in liturgy, it being understood that the owner is the exclusive authority on liturgy and is the decisive party in determining what architectural changes are appropriate to the liturgy. When alterations necessitated by changes in liturgy are proposed, the owner shall advise the Landmarks Preservation Board in writing of the nature of the proposed alterations and the Board shall issue a Certificate of Approval. Prior to the issuance of any Certificate, however, the Board and owner shall jointly explore such possible alternative design solutions as may be appropriate or necessary to preserve the designated features of the landmark.[123]

Early in 1986 the church took the matter to court, maintaining that the religious freedom provisions of the state constitution protected active churches from the application of the Landmarks Preservation Ordinance. The trial court dismissed the church's claims, but the Supreme Court of Washington reversed.[124] The city appealed to the Supreme Court of the United States, which vacated the judgment and remanded the case "for further consideration in the light of *Employment Division, Department of Human Resources of Oregon v. Smith*."[125] Upon remand, the church's position was supported by a brief *amicus curiae* entered by the Christian Legal Society, joined by the National Council of Churches and other national and state religious bodies,[126] while the city's position was endorsed by *amici* the Municipal Art Society of New York and the National Trust for Historic Preservation in the United States.

The *Smith* decision of 1990 made a monumental change in the scope and force of the Free Exercise Clause of the federal First Amendment, which for twenty-seven years had been "settled law"—that government must justify any burden on the sincere practice of religion by a "compelling state interest" that could be served in no less burdensome way.[127] The Supreme Court announced in *Smith* that government need no longer justify a burden on the practice of religion incidental to a neutral law

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123 . Seattle Ordinance 112425, September 17, 1985, quoted in *First Covenant Church v. Seattle*, 787 P.2d 1352 (1990).

124 . 787 P.2d 1352 (1990).

125 . 111 S.Ct. 1097 (1991).

126 . Namely, Church Council of Greater Seattle, Corporation of the Catholic Archbishop of Seattle, Washington State Catholic Conference, Diocese of Olympia, North Pacific Conference of Covenant Churches, Evangelical Covenant Church, James E. Andrews a Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.), Baptist Joint Committee on Public Affairs, Evangelical Lutheran Church in America, General Conference of Seventh-day Adventists, Council on Religious Freedom, Americans United for Separation of Church and State, National Association of Evangelicals, National Council of the Churches of Christ in the U.S.A.

127 . This test dated from *Sherbert v. Verner*, 374 U.S. 398 (1963), discussed at IVA7c.

of general application,[128] thus abandoning the strict scrutiny normally applied to alleged infringement of rights protected by the First Amendment in favor of the minimal level of scrutiny applied to interests not protected by the Bill of Rights. The Supreme Court apparently thought that the Seattle ordinance was such a neutral law of general application that should not be deflected by a claim of free exercise of religion, and so returned the issue to the state court for a redetermination to that effect.

The key question was whether the state court would see the issue in that light and reverse its earlier conclusion. The churches' *amicus* brief urged the state supreme court to reaffirm its original view, but to predicate it upon the *state* constitution, so that the U.S. Supreme Court would not again be able to gainsay it. Several state courts had already followed that course in *Smith*-based remands,[129] and state constitutions came to be seen by many as a fall-back defense against regressive decisions by the Supreme Court of the United States.

The Washington Supreme Court first reviewed the holdings of the *Smith* decision and then tested the *First Covenant* facts against them. (1) Was the Seattle ordinance a "neutral law of general application"? Chief Justice Dore, writing for the majority, concluded:

> [The] designation ordinance... is not neutral. It alludes to religious facilities in the two references to "liturgy"....
>
> The landmark ordinances must also be "generally applicable" laws. Justice Scalia [in *Smith*] contrasted "generally applicable" tax laws with statutes that contain "a system of individualized exceptions," that "create[] a mechanism for individualized governmental assessment" of the conduct governed. The landmark ordinances at issue here are unlike a general tax law because they invite individualized assessment of the subject property and the owner's use of such property, and contain mechanisms for individualized exceptions. The City's Landmarks Preservation Ordinance is not generally applicable.
>
> The City and the National Trust for Historic Preservation insist that *Rector, Wardens & Members of Vestry of St. Bartholomew's Church v. New York*[130] compels a different result....
>
> *St. Bartholomew's* is distinguishable from this case. St Bartholomew's accepted designation as a landmark, without objection. First Covenant has objected continuously to designation. St. Bartholomew's sought an exception for an adjunct building, not for its church building. First Covenant seeks an exception for its church building. St. Bartholomew's sought an exception to use its property for commercial purposes. First Covenant seeks an exemption so that it may continue to use its church for

128. *Oregon v. Smith*, 494 U.S. 872 (1990), discussed at IVD2e. Congress reinstated the strict-scrutiny test by the Religious Freedom Restoration Act, 12 USC § 2000bb, adopted in 1993.

129. E.g., *Minnesota v. Hershberger*, 462 N.W.2d 393 (Minn. 1990).

130. 914 F.2d 348 (CA2 1990), cert. denied, 111 S.Ct. 1103 (1991), discussed at § e above.

> exclusively religious purposes. St. Bartholomew's did not allege that designation reduced its principal asset, only that it impeded its ability to generate additional revenue to expand its programs. Uncontroverted evidence supports First Covenant's claim that designation reduces the value of its principal asset by almost one-half. Finally, the parties in *St. Bartholomew's* did not challenge the effect of the religious exemption on the New York law's constitutionality, and the religious exemption in the New York law is not "liturgy" based, as is Seattle's. *St. Bartholomew's* is factually distinguishable and does not control this case.

The second question confronted by the court was (2) Is the Seattle case a "hybrid situation" in which free exercise of religion is combined with another right protected by the Constitution?

> The rule in *Smith* also does not apply because First Covenant's claim presents a "hybrid situation." The case upon which the Supreme Court relied when it formulated the "hybrid claim" exception, as well as other authority, support the view that a "hybrid" case is one in which a single claim encompasses several protected interests. The church's claim is "hybrid" because designation not only violates First Covenant's right to freely exercise religion, it infringes on First Covenant's rights to free speech.
>
> "Speech" includes nonverbal conduct if the conduct is "sufficiently imbued with elements of communication." Whether conduct constitutes speech depends on the nature of the activity, combined with the factual context and environment in which the activity is undertaken. There must be "[an] intent to convey a particularized message" and a great "likelihood... that the message would be understood by those who view it." [citations omitted]
>
> First Covenant claims, and no one disputes, that its church building itself "is an expression of Christian belief and message" and that conveying religious beliefs is part of the building's function. First Covenant reasons that when the State controls the architectural "proclamation" of religious belief inherent in its church's exterior it effectively burdens religious speech. We agree with First Covenant's reasoning. The relationship between theological doctrine and architectural design is well documented.[131] The exterior and the interior of the structure are inextricably related. When, as in this case, both are "freighted with religious meaning" that would be understood by those who view it, then the regulation of the church's exterior impermissibly infringes on the religious organization's right to free exercise and free speech....

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131 . Citing Pak, "Free Exercise, Free Expression, and Landmark Preservation," 91 *Colum. L. Rev.* 1813, 1840-43 (1991); Carmella, "Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review," *supra*, 401, 490-98; Crewdson, "Ministry and Mortar: Historic Preservation and the First Amendment After *Barwick*," 33 *J. Urb. & Contemp. L.* 137, 157-8 (1988).

In summary,... First Covenant's case is distinguished from *Smith* because *Smith* is a police power case and this case is not.... The *Sherbert* Court's "compelling interest" test, therefore, applies to the justiciable controversy before us.

Applying the *Sherbert* "compelling interest" test, we address the church's contention that subjecting it to the controls of the Landmark Preservation Ordinance burdens its right to freely exercise religion....

The City's ordinances, as this court held earlier, impermissibly burden First Covenant's right to free exercise in two ways. The ordinances burden free exercise "administartively" because they require that First Covenant seek the approval of a government body before it alter[s] the exterior of its house of worship, whether or not the alteration is for a religious reason. Further, they burden First Covenant financially, because they reduce the value of the Church's property by almost half.

The City alleges that financial burdens do not violate the First Amendment, under *Jimmy Swaggart Ministries v. Board of Equalization*.[132] The City is mistaken. *Swaggart* does not control this case. *Swaggart* held that imposition of California's sales and use tax on the in-state sales of Jimmy Swaggart Ministries did not violate the free exercise clause because the sales tax was not a "precondition to the exercise of evangelistic activity" and was more "akin to a generally applicable income or property tax." The Court warned, however, "a more onerous tax rate, even if generally applicable" might violate the constitution if it too seriously impeded religious activity....

Designation of First Covenant's church so grossly diminishes the value of the Church's principal asset that it impermissibly burdens First Covenant's right to free exercise of religion.

The City urges that the "liturgy exemption" alleviates any burden on the exercise of religion. We do not believe that the exemption cures either the "administrative" or the financial infringements of First Covenant's right to free exercise.

First, the plain and ordinary meaning of the term "liturgy," which we employ absent a statutory definition of that term, does not provide a workable standard that protects the constitutional rights of the church. "Liturgy" is a "rite or series of rites, observances, or procedures prescribed for public worship in the Christian church in accordance with authorized or standard form." *Webster's Third New International Dictionary* (1971). "Liturgy" essentially refers to prescribed conduct that occurs within the structure. The liturgy-focused exemption in this case is constitutionally infirm because it allows the City to control any nonliturgical elements of religious conduct that require architectural change. Carmella, at 475, 507-08. Further, as we previously observed:

> Would a wider door to permit access by handicapped parishioners comprise a liturgical change? Although... widening the door does not relate directly to the rites or procedures of worship in the church, it

132. 493 U.S. 378 (1990), discussed at VC6b(5).

> does facilitate the ability of disabled persons to participate in religious services and activities. The anomalies created by the liturgy exception are cumbersome and would result in... delays in carrying out routine church work.

Secondly, adopting the City's interpretation of the phrase "necessitated by changes in the liturgy" as meaning "for religious purposes" does not resolve the ambiguity. The City still has the right to determine what is or is not for a religious purpose and it acknowledged at argument that it reserved the right to determine if the `religious purpose' claim was bona fide.... Further, the City's suggestion [at oral argument] that if it did not believe First Covenant's interpretation of liturgy was bona fide it would bring the Church and the religious question before the courts fosters exactly the kind of religious entanglement the constitution seeks to avoid. The governmental oversight of church action that the City reserves to itself, under the liturgy exception, impermissibly burdens free exercise.

[The ordinance] also requires that First Covenant seek the City's approval before it alters its church, even for presumptively valid "liturgical" purposes. The exemption states that if the Church proposes an alteration "necessitated by changes in liturgy," "the Board and owner shall jointly explore such possible alternative design solutions as may be appropriate or necessary to preserve the designated features of the landmark." The requirement that the Church negotiate with the City constitutes unjustified governmental interference in religious matters and infringes First Covenant's right to free exercise.

Finally, the liturgy exemption does not mitigate the financial burden that designation imposes on First Covenant. Regardless of how the exemption is construed, the Church suffers the same dramatic depreciation in the value of its property and its principal asset. In sum, the liturgy exemption does not cure the infringement of free exercise by the Landmarks Preservation Ordinance.

If government action burdens the exercise of religion, but the State demonstrates that it has a compelling interest in enforcing its enactment, that interest will justify the infringement of First Amendment rights. The State, through its police power, may regulate the use of land. Landmark preservation laws enacted pursuant to legislative authority regulate land use by conserving structures with historic or esthetic significance that enhance the quality of life for all citizens. Preservation ordinances further cultural and esthetic interests, but they do not protect public health or safety. [citations omitted] *We hold that the City's interest in preservation of esthetic and historic structures is not compelling and it does not justify the infringement of First Covenant's right to freely exercise religion. The possible loss of significant architectural elements is a price we must accept to guarantee the paramount right of religious freedom.* [emphasis added]

Upon further consideration, in light of *Smith*, we conclude that applying the City's preservation ordinances to First Covenant's church violates the church's right to freely exercise religion under the First Amendment.

Thus the Washington Supreme Court, after duly regarding *Smith*, reasserted its original conclusion that the Seattle ordinance was unconstitutional on the basis of the federal First Amendment. But it did not rest with that.

> Although we might distinguish this case from *Smith* and base our decision solely on federal grounds, we decline to do so. Like the *Hershberger* court,[133] we eschew the "uncertainty" of *Smith* and rest our decision also on independent grounds under the Washington constitution.
>
> Washington, like all the states, may provide greater protection for individual rights, based on its "`sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution'"[134]....
>
> The language of our state constitution is significantly different and stronger than the federal constitution. The First Amendment limits government action that "prohibits" free exercise. Our state provision "absolutely" protects freedom of worship and bars conduct that merely "disturbs" another on the basis of religion. Any action that is not licentious or inconsistent with the "peace and safety" of the state is "guaranteed" protection....
>
> The [U.S. Supreme Court] majority's analysis in *Smith* departs from a long history of established law and adopts a test that places free exercise in a subordinate, instead of preferred, position. Further, one of the cases upon which the *Smith* court principally relies, *Minersville Sch. Dist. v. Gobitis*, was overruled. *See West Va. State Bd. of Educ. v. Barnette*[135].... Finally, the majority in *Smith* accepts the fact that its rule places minority religions at a disadvantage. Our court, conversely, has rejected the idea that a political majority may control a minority's right of free exercise through the political process[136]....
>
> A facially neutral, even-handedly enforced statute that does not directly burden free exercise may, nonetheless, violate [our constitution] if it indirectly burdens the exercise of religion....
>
> Seattle's ordinances, as discussed fully in our First Amendment analysis, impose unconstitutional administrative and financial burdens on First Covenant's free exercise of religion. The "liturgy exception" in the designation ordinance does not alleviate the harm.... [T]he exemption standard is vague, the exemption still requires that the Church seek secular approval before making religiously motivated changes to its facade, and the exemption does not alleviate the adverse financial impact of designation on First Covenant....
>
> Finally, a compelling state interest does not justify the impermissible burden. Application of the Landmarks Preservation Ordinance is not

133 . Referring to *Minnesota v. Hershberger*, 462 N.W.2d 393 (Minn. 1990), *supra*.

134 . *State v. Gunwall*, 720 P.2d 808 (1986).

135 . 319 U.S. 624 (1943), discussed at IVA6b.

136 . Citing *Bolling v. Superior Court*, 133 P.2d 803 (1943).

> necessary to prevent a grave danger to the public health, peace or welfare. Interests, such as preservation of significant structures, are not "of sufficient magnitude to outweigh" the free exercise of religion.[137]
>
> We conclude that imposing the City's Landmark Preservation Ordinance on First Covenant's church violates First Covenant's right to free exercise of religion under article 1, section 11 of our state constitution.... We have fully considered the Supreme Court's holding in *Employment Division v. Smith* and we conclude that *Smith* does not compel a different result.[138]

Chief Justice Dore's opinion was joined by four other members of the court. As is often the case, several judges did not share these sentiments but resonated more with the views of the City of Seattle and the preservationists. Justice Dolliver wrote a dissent, in which he was joined by Justices Smith and Brachtenbach, that relied heavily on the *Smith* rule and the *St. Bartholomew's* opinion from the Second Circuit.

> The majority... asserts the implementing ordinance's two references to "liturgy," which provides an *exemption* for religiously motivated exterior changes, transforms the otherwise neutral ordinance into a non-neutral one. The irony, even the perversity, of this position is apparent.... [T]he Landmarks Preservation Ordinance makes no reference to religious facilities. Only the implementing ordinance, which must necessarily focus on the designated church site, is deemed not neutral because of its exception for liturgically required exterior changes. Yet, the majority uses this exemption as the reason the landmark ordinances fail the neutrality test! Incredible. This is bootstrapping of the most egregious nature....
>
> The majority's attempt to distinguish *St. Bartholomew's* on the facts is unconvincing. Free exercise, if applicable at all in the landmark preservation arena, should not depend on when a church objects to a regulation, whether the affected building is an adjunct or a main church building, or whether the claimed financial restrictions are characterized as a reduction in market value or revenue generation. These matters are simply irrelevant under the *Smith* analysis. Moreover, the landmark law in *St. Bartholomew's* did not have an exception for alterations required by liturgy, which is present here....
>
> Nor does this case present the hybrid situation provided for in *Smith*. Even assuming secular design regulation of the exterior of a church violates free speech, which I am far from convinced it does, the landmark ordinances cannot restrict the church's expression of religious belief because the City has agreed that exterior changes required by liturgy are removed from the landmark regulations.
>
> The church has also failed to show how the Seattle ordinances burden their free exercise, either administratively or financially. The

137 . Citing *Bolling*, *supra,* at 385, *Sumner*, *supra,* at 9.

138 . *First Covenant Church v. City of Seattle*, 787 P.2d 1352 (Wash., 1992), majority opinion by Dore, C.J.

> administrative burden the majority asserts impermissively burdens free exercise boils down to the City's ability to "bring the Church and the religious question [whether the exterior change has a bona fide liturgical base] before the courts"....
>
> Once the true nature of the majority's purported "administrative" is properly understood, it is apparent that it is not the type of burden which is protected [against?] by the First Amendment. Although, clearly, courts will not presume "to question the *centrality* of particular beliefs or practices to a faith" (italics mine; *Smith*, quoting *Hernandez v. Commissioner*)[139], no court has stretched the free exercise clause to the point where establishing the *fact of religious motivation* for conduct, or, in this case, a liturgical base for an exterior change, is considered, by itself, a religious hardship. Those wishing to shield their conduct under the First Amendment from otherwise valid governmental regulation must first show that they merit its broad protections. To hold otherwise, as does the majority, would indeed "permit every citizen to become a law unto himself." (*Smith*, quoting *Reynolds v. United States*).[140]
>
> The church has also failed to show an unconstitutional financial burden. First, the alleged reduction in market value caused by the designation is a disputed fact in this case. The reduction is based on one appraisal, which is disputed by the City, and which was never the subject of fact finding by the trial court. Even if the reduction is taken as fact, the church has not shown the alleged reduction prohibits or interferes with religious practice. The central question in identifying an unconstitutional burden is whether
>
> > the claimant has been denied the ability to practice his religion or coerced in the nature of those practices.[141]
>
> * * *
>
> The protections afforded by the federal and state religion clauses are not properly invoked when a claimant has not been denied the ability to practice his religion or coerced in the nature of those practices. To hold the religion clauses applicable in this context denigrates their true meaning and unjustifiably limits the City's efforts to preserve the cultural assets of the City in the interests of the general welfare.[142]

In the difference between Chief Justice Dorr's opinion (for the majority) and Justice Dolliver's (in dissent) can be seen a striking contrast in perception of the same fact situation (the same, that is, except for a disagreement about the extent of financial loss, though Justice Dolliver did not claim that there was no loss; he just thought it was less of a loss than the majority did, which said it was "uncontroverted"). To Justice Dolliver the important thing seemed to be that the church was still standing and the congregation could still worship in it, so what actual harm had they suffered?

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139 . 490 U.S. 680, 699 (1989), discussed at VC6c(13).

140 . 98 U.S. 145 (1878), discussed at IVA2a.

141 . *St. Bartholomew's*, 914 F.2d at 355.

142 . *First Covenant Church v. City of Seattle*, *supra,* Dolliver, J., dissenting.

He read the "liturgy" exception as removing all religious alterations from the scope of the landmark restrictions, while the majority noted that "liturgy" does not embrace all religious considerations, and even if it did, the church still had to sit down with the Landmarks agency and haggle over "such possible alternative design solutions as may be appropriate and *necessary* to preserve the designated features of the landmark." The emphasis added here to the word "necessary" highlights the implication that the church still might have to accept the landmark agency's verdict as to what alternatives would be "necessary" to obtain the Certificate of Approval that was supposed to be issued as a matter of the owner's right.

Chief Justice Dore thought the city's readiness to take the church to court to determine the bona fides of its "liturgy" alterations "fosters exactly the kind of religious entanglement the constitution seeks to avoid." Justice Dolliver thought that asking a court to determine whether there is really "a liturgical base for an exterior change" should prove no "religious hardship."

In essence, Chief Justice Dore and the majority appeared to find the basic defect of the landmarks scheme to be that a civic agency would be empowered to supervise the religious operations of a church, while Justice Dolliver saw nothing wrong with the civic authority telling the congregation how to run their church (with respect to maintaining the landmarked facade and financing that maintenance). Here was the sharp contrast in judicial outlook on the proper respective roles of religious organizations and government toward each other that is reflected even on the Supreme Court of the United States and in the American society as a whole.

For one school of thought the area of church autonomy with respect to internal "religious" affairs is quite broad and impermeable to the state—virtually an island of extraterritoriality within the civil domain. For the other school of thought, the area of autonomy is quite limited and permeable to civil authority, consisting of "belief" in "doctrines and tenets" and practices *compelled* by such belief. Any actions not compelled by belief, any organizational embodiment of the religious community, and any "temporalities" utilized by it are seen by this school as the proper and legitimate concern of civil authority and subject to largely unlimited oversight and regulation "in the [infinitely elastic] interests of the general welfare."

i. *First United Methodist Church v. Seattle* (1996). No sooner had the dust settled on *First Covenant* than another case that had been sidelined in the courts pending the outcome of that litigation came to the foreground. The First United Methodist Church of Seattle had been nominated for landmark designation and had vigorously opposed that honor. The trial court enjoined the city from proceeding with the landmarking process. The city appealed, and the Court of Appeals held that the city could designate the church as a landmark as long as it refrained from imposing any controls upon the church "until the structure ceases to be used for primarily religious purposes." The church appealed to the Supreme Court of Washington, which held, per Chief Justice Durham, that the church was entitled to relief because

the nomination prohibited it from making any alterations until the city council had acted on the nomination.

The church, whose membership had dropped by half due to the commercialization of the central city area, argued that its building was unsafe without extensive alterations, which they could not afford. They wished to sell the property and build elsewhere to carry on their religious mission and ministry, but no one would want to buy the property with the landmarks nomination hanging over it. The Supreme Court faulted the Court of Appeals for failing to apply the strict scrutiny standard adopted in *First Covenent, supra*, which it reaffirmed, adding that the phrase "primarily religious purpose" was ambiguous, and could lead to further litigation, delay and expense for the church. But the main point was that the city had in effect sequestered the church.

> If United Methodist decides to sell its property in order to respond to the needs of its congregation, it has a right to do so without landmark restrictions creating administrative or financial burdens. The free exercise clause prevents government from engaging in landmark preservation when it has a coercive effect on religion. This protection deos not cease if United Methodist sells its property.... We reverse the Court of Appeals and hold landmark designation of United Methodist unconstitutional.[143]

Justice Dolliver again dissented (joined by two other members of the court) on the same grounds as in *First Covenant* but also because the church had not yet been actually designated a landmark and therefore had not been hurt, nor had it proposed any actual plans for alteration or disposition of the property to the city for case-by-case consideration designed to "protect the needs of the individual landmark." The reader may consult experience and previous cases discussed above to evaluate the sort of "protection" afforded churches by this civic process.

Whether the law will follow the course of *St Bartholomew's* and *Barwick*, *supra,* or of *Society of Jesus*, *First Covenant* and *First Methodist, supra*, remains to be seen.

j. Condemnation: *Pillar of Fire v. Denver* (1973). Sometimes churches may want to *resist* condemnation when the object is the destruction of the structure rather than its preservation. That was the case in Denver in the early 1970s when the Urban Renewal Authority wanted to demolish Memorial Hall, the first permanent church building of the Pillar of Fire Church, to make way for a large office building as part of its plan for renovating the center city. The church objected and took the matter to court.

The Pillar of Fire broke off from Methodism in 1901 under the leadership of evangelist Alma White, who then took the title of "Bishop." At first the church held meetings in revival tents, but in 1903-4 built Memorial Hall, which at the time of suit

143. *First United Methodist Church of Seattle v. Hearing Exam'r*, 916 P.2d 374, 381 (Wash. 1996).

was still used for church purposes, though not for regular Sunday services. The Pillar of Fire Church contended that the old brick building was revered for its historical and symbolic significance in the birth of the Pillar of Fire movement.

The case was decided by the Colorado Supreme Court sitting *en banc* in an opinion written by Justice Erickson, starting from federal and state cases upholding the constitutionality of urban renewal laws.[144] Then it reviewed the Supreme Court's free exercise cases up through *Wisconsin v. Yoder* (1972),[145] and concluded:

> [W]e must balance the interests involved in the controversy before us and recognize that the state must show a substantial interest without a reasonable alternative means of accomplishment if the state is to be constitutionally allowed to take the birthplace of the Pillar of Fire Church, which is alleged to be *sui generis*....
>
> The Pillar of Fire is not an organization of hundreds of thousands and is not able to muster widespread political support. This church, then, must turn to the courts as the guardians of the rights guaranteed by the First Amendment.... Not only is the building in question being used for religious purposes, but the building and the site are alleged to have unique religious significance for the Pillar of Fire. The loss to the Pillar of Fire would allegedly go far beyond the incidental burden of having to move to a new location which would occur if any church building were condemned....
>
> The First Amendment protects freedom of religion which has its roots in the hearts and souls of the congregation, not in inanimate bricks and mortar. Yet, religious faith and tradition can invest certain structures and land sites with significance which deserves First Amendment protection. We recognize that church property is private property which can be taken for paramount public use..., just as religious conduct is subject to appropriate regulations for the public good....
>
> When regulating religious conduct, however, the state may be challenged to justify its infringement of the totally free exercise of religion.... We hold that under these circumstances, the state may be challenged to justify a use of its power of eminent domain.... The [church] is entitled to its day in court to determine which of the rights should prevail....
>
> The cause is remanded for proceedings consistent with this opinion.[146]

In this instance it was the church rather than the state that showed preservationist concern. Unfortunately for that concern, the church did not fare as well when after remand it returned to the Supreme Court of Colorado. Certain facts emerged on remand that changed the complexion of the case.

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144 . *Berman v. Parker*, 348 U.S. 26 (1954) and *Rabinoff v. District Court*, 360 P.2d 114 (1961).

145 . 406 U.S. 205 (1972), discussed at IIIB2.

146 . *Pillar of Fire*, *supra*.

> The trial court found that the church property was not *sui generis* and that the contemplated condemnation of the property would not interfere with the free exercise and enjoyment of religious worship by the Pillar of Fire Church.... The church building is neither the birthplace nor the mother church of the Pillar of Fire denomination. Although this edifice served as the denomination headquarters for a few years, the headquarters were moved to Zarephath, New Jersey in 1908 and have remained there since that time. A sale of the building was actually attempted at one time during its history, but no willing buyers were found. Presently, the building is used only for occasional and limited worship activity by parishioners [fn: once a month on Tuesday mornings; once a year in some years for a "Jubilee Service;" occasionally radio broadcasts originate there via telephone hookup to the church's transmitter in Westminster NJ]. Since the 1930's, the denomination's principle [*sic*] place of worship in Denver has been the Alma Temple, which is located not far from the State Capitol Building. For the last thirty years, the building... has been used chiefly as a commercial rooming house. The rooms, according to the testimony, are rented to single men at the rate of $35 to $45 per month....
>
> Balanced against Pillar of Fire's contention is the interest of DURA [Denver Urban Renewal Authority] in the subject property.... [T]he success of the Skyline Urban Renewal Project depended in part upon the acquisition of all of the private property in the core of the downtown project area. If scattered buildings were left on blocks in the core of the project, the desired redevelopment would be prevented. All private property in the core area has been acquired and demolished... except for the Pillar of Fire Church. Full-block development, a key feature of the renewal project, would not be possible if the Pillar of Fire Church were to remain as it is in the center of this particular block.... Alternate means of accomplishing DURA's goals, involving open space, parking, and separation of pedestrian and motor traffic, could not be achieved if the building remains in place.... Accordingly, we affirm the trial court's conclusion that DURA is entitled to condemn the property.[147]

This was an instance in which the church seems to have somewhat overclaimed its case, but the urban redevelopers may have done the same. If an active, attractive and historic church edifice were the contested subject, the governmental claims should have been subjected to the same sharper scrutiny as the church's. While some may be drawn to the pristine prospect of a sterile sweep of greensward in the center of the city, with grade separations for vehicular and pedestrian traffic, others may not find that the ideal setting for urban life. Indeed it may result in the *absence* of urban life, which may be indeed an improvement, but is probably not the mandate of "urban renewal." An equally persuasive case could be made for preserving some of the amenities of ordinary urban existence, such as churches, stores, theaters, and so on,

147 . *Denver Urban Renewal Authority v. Pillar of Fire,* 552 P.2d 23 (1976).

where people can actually live and work and socialize rather than simply gaze upon from afar or from passing vehicles. The choice between these two alternative scenes is one that the municipal authority can make as a "rational" means of carrying out its assigned task, but that choice need not be accorded the weight of a *compelling* state interest sufficient to overbear all other values, particularly those protected by the Bill of Rights. This decision should not be viewed as having accorded such high priority to the powers of eminent domain that they cannot be subject to constitutional balancing in a properly presented free-exercise claim.

k. *Flores v. Boerne* (1996). Coming under the heading of "landmarking" of church property, but scarcely reaching that subject, was an important decision of the Fifth Circuit Court of Appeals dealing with a threshold issue—the constitutionality of the 1993 Religious Freedom Restoration Act (RFRA).[148]

The landmarking dispute arose after P.F. Flores, Roman Catholic Archbishop of San Antonio, in 1991 authorized the parish of St. Peter in the city of Boerne, Texas, to replace their 1923 structure with a larger church building. Some months later, the City Council adopted a preservation plan that included at least part of the existing St. Peter's Church within a Historic District, thus restricting the ability of the parish to rebuild. In 1993 the parish applied for a building permit, contending that the Historic District encompassed only the facade of the church and the proposed expansion would leave that part untouched. The city responded that the entire church building was covered by the Historic District designation, and the supposition by the parish that only the facade was designated was due to a mere "clerical error" or an "inaccuracy" on the part of the city architect that did not negate the underlying intent of the City Council,[149] so the permit was denied.

The archbishop filed suit in federal district court, seeking a judicial declaration that the ordinance purporting to landmark the church was unconstitutional and contrary to the newly enacted Religious Freedom Restoration Act. The city contended that the Religious Freedom Restoration Act was itself unconstitutional because in it Congress had tried to overturn the Supreme Court's decision limiting the scope of the Free Exercise Clause of the First Amendment, *Oregon v. Smith*.[150] The district court, Lucius D. Bunton III, Senior Judge, agreed with the city that RFRA was unconstitutional and certified the case for interlocutory appeal on that issue. The United States joined the case as Intervenor-Plaintiff-Appellant in defense of the constitutionality of a federal statute. Decision was announced January 23, 1996, by Judge Patrick E. Higginbotham, for himself and Judges Emilio M. Garza and Fortunato Benavides.

The decision turned on issues not central to the law of church and state but regarding the power of Congress in relation to the role of the courts. Nevertheless, it

148 . 42 U.S.C. § 2000bb *et seq.*, discussed at IVD2e(7).

149 . *Flores v. Boerne*, Response to Motion for Partial Summary Judgment of Plaintiff, p. 6.

150 . 494 U.S. 872 (1990), discussed at IVD2e.

is of interest here because the discussion circled around whether Congress could enact a higher degree of protection for rights guaranteed in the Bill of Rights than the Supreme Court has recognized—in this instance, the free exercise of religion. Numerous commentators and several federal courts had addressed this subject (the constitutionality of RFRA),[151] but *Flores* was the first definitive opinion (and a unanimous one) by a Circuit Court of Appeals.

In 1990 the Supreme Court had held—contrary to "settled law" since 1963—that the Free Exercise Clause did not protect religious practice from burdens imposed by facially neutral, generally applicable laws. Governments were no longer required to prove a "compelling state interest" to justify such burden, thus cutting back on the "strict scrutiny" standard applicable to important rights guaranteed by the Constitution to the level of protection already afforded by the Equal Protection Clause. In RFRA, Congress undertook to restore the strict-scrutiny standard the Court had declined to enforce. The district court had held that RFRA was facially invalid because it infringed on the authority of the judiciary "to say what the law is."[152] The circuit court disagreed.

> That the Executive and Legislative branches also have both the right and duty to interpret the constitution casts no shadows upon Justice Marshall's claim of ultimate authority to decide. The judicial trump card can be played only in a case or controversy. The power to decide the law is an incident of judicial power to decide cases. There is no more. A power of review not rooted in a case or controversy would impermissibly draw to Article III [the Judiciary] the interpretive role of the Executive and Legislative branches of government. So it is that the familiar recitation that Congressional legislation comes to us with a presumption of constitutionality is a steely realism and not merely a protocol of manners or an empty formalism.[153]

The district court had also concluded that Congress had not invoked the power now claimed under Section 5 of the Fourteenth Amendment "to provide statutory protection for a constitutional value when the Supreme Court has been unwilling to assert its authority."[154] The circuit court again disagreed and documented the discussion of this issue in House and Senate hearings on RFRA, concluding, "There is no question that Congress drew on its power under Section 5 in enacting RFRA. The district court's doubt that it did is without basis. The issue is whether the authority was there."

The city contended that RFRA was unconstitutional for several reasons: that Section 5 of the Fourteenth Amendment did not provide authority to enact it; that

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151 . See note 160 below.

152 . *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), Marshall, C.J.

153 . *Flores v. City of Boerne*, 73 F.3d 1352, 1358 (5th Cir. 1996), *rev'd*, 521 U.S. 507 (1997).

154 . Ibid.

RFRA violated the separation of powers by sending back to the courts the task of accommodating general laws and religious practices after the court had denied the judiciary's competence to do so; that RFRA violated the Establishment Clause and the Tenth Amendment. The court rejected each contention in turn.

Section 5 reads as follows: "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." The Supreme Court (since 1879) has interpreted that power broadly. The circuit court noted that in *Katzenbach v. Morgan* (1966) the Supreme Court had upheld Congress' effort to set higher standards for citizens' right to vote than the court itself had found in the Constitution. The court had set three conditions for testing Congress' powers under Section 5. The first, as applied to the instant case, was whether RFRA was an enactment to enforce the provisions of the Fourteenth Amendment. The circuit court noted that the Free Exercise Clause was incorporated in the Due Process Clause of that amendment,[155] and any argument that such should not be the case was "addressed to the wrong court" (i.e., only the Supreme Court could change that 56-year-old rubric).

> We think it beyond peradventure that Congress enacted RFRA to enforce the religious liberty protected from State infringement by the Due Process Clause.... RFRA's legislative history leaves little room for doubt that Congress intended "to enforce the right guaranteed by the free exercise clause of the first amendment."... Indeed, the Senate Judiciary Committee found the need for legislation to restore the pre-Smith compelling interest test in order "to assure that all Americans are free to follow their faiths free from governmental interference."

The second element of the *Morgan* test was whether RFRA was "plainly adapted to that end." Congress is not empowered to invent new legislation "out of whole cloth," said the circuit court. Its power under Section 5 is "remedial." It may "find and redress nascent or disguised violations of the Amendment." The court noted that the United States (as intervenor) had pointed to three ways in which RFRA remedied shortcomings of *Smith*.

> [It] is an effective means of prohibiting the unconstitutional targeting of religion through facially neutral laws.... Smith's requirement that individuals show that a law is not facially neutral or generally applicable has not been an effective means of rooting out laws hostile to a religion in particular or to religion in general. RFRA responds by requiring all laws that substantially burden the exercise of religion to pass the compelling interest test, a test well-suited to separating well-intentioned statutes from invidious ones.... These considerations, analogous to those underlying the Voting Rights Amendments of 1982 convince us that RFRA serves the

155 . In *Cantwell v. Connecticut*, 310 U.S. 296 (1940), discussed at IIA2c.

remedial goal of identifying budding or disguised constitutional violations that would otherwise survive judicial scrutiny under Smith.

In a similar vein, the United States argues that even if the Constitution only prohibits governmental action taken with the *intent* of interfering with religious exercise, Congress may go further, as it did with RFRA, and prohibit conduct that has the *effect* of burdening the exercise of religion [emphasis added].... In cases involving racial discrimination, the Court has held that Congress may prohibit laws with a racially discriminatory effect, as it did in the Voting Rights Act of 1965, as an appropriate method of promoting the Amendment's purpose, even if the Constitution only prohibits laws with a racially discriminatory intent. Similarly, Congress could reasonably conclude that prohibiting laws that have the effect of substantially burdening religion promotes the free exercise of religion....

A robust application of the compelling interest test may be uneven in exempting religious practices from statutes of general applicability and push courts into either an uncomfortable judging of the credibility of claims that practices are religious exercises or leaving each person a non-regulatable island unto themselves, arguably concerns behind the pre-Smith timidity of its use. The concerns are large, and for some scholars, they are a compelling argument against RFRA.[156] But this begs the question of congressional power. That some generally applicable laws must yield their unwitting grasp of religious practices is the price Congress has chosen to pay to achieve its desired level of accommodation. "It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations.... It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did."[157]

Finally, the United States claims that RFRA serves to protect religious minorities, thereby promoting the goals of both the Due Process Clause and the Equal Protection Clause [of the Fourteenth Amendment]. According to this view of RFRA, adherents of minority religions are disproportionately affected by facially neutral laws. Congress heard testimony regarding the effects of Smith on members of the Hmong, Jewish, Mormon, and Amish faiths. Congress could reasonably conclude that more exacting scrutiny of facially neutral legislation that burdens a religious practice is needed to protect adherents of minority religions.

Relatedly, Congress could reasonably conclude that seeking religious exemptions in a piecemeal fashion through the political process, particularly at the state or local governmental level, would place minority religions at a disadvantage. Smith acknowledged that leaving accommodation to the political processes risked discriminatory treatment

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156. Citing Eisgruber, Christopher L., & Lawrence G. Sager, "Why the Religious Freedom Restoration Act Is Unconstitutional," 69 *N.Y.U.L.Rev.* 437, 452 (1994). Another law review article has since appeared along the same lines: Gressman, E. and Carmella, A., "The RFRA Revision of the Free Exercise Clause," 57 *Ohio State L.J.* 65 (1996).

157. *Flores v. Boerne, supra*, quoting *Katzenbach v. Morgan*, 384 U.S. 641, 653 (1966).

but viewed it as an "unavoidable consequence of democratic government." Congress considered the effect the Smith decision would have on minority religions seeking accommodation through the political process and concluded that "State and local legislative bodies cannot be relied upon to craft exceptions from laws of general application to protect the ability of the religious minorities to practice their faiths."

The third inquiry under Morgan is whether RFRA is consistent "with the letter and the spirit of the constitution." This inquiry requires us to determine whether RFRA violates any other provision of the Constitution. Congress' power to remedy constitutional wrongs is a one-way street. Congress may not violate other constitutional provisions while enforcing those of the Fourteenth Amendment. The City claims that RFRA violates three Constitutional provisions: 1) the separation of powers; 2) the Establishment Clause; and 3) the Tenth Amendment.... We will address each separately.

The district court agreed with the City that RFRA violated the separation of powers by displacing the authority of the judiciary..., according to the City, by reversing Smith and restoring the pre-Smith judicial standard for evaluating free exercise claims. In effect, Congress has created a new constitutional right and achieved a "substantive expansion of First Amendment doctrine." In short, the City describes RFRA as nothing less than a constitutional coup d'etat.... The United States responds that RFRA "is simply a statute that provides legislative protection for a constitutional right over and above that provided by the Constitution."

The response that Congress has created a statutory right is facile and ultimately incomplete. RFRA creates a statutory right[,] to be sure. The origins and framing of that right, however, are drawn from judicial decisions construing the Constitution. We will not pretend that RFRA is anything but a direct response to the Supreme Court's decision in Smith. Indeed, Congress' announced purpose was "to `turn the clock back' to the day before Smith was decided" (statement of Rep. Hyde).... This is a statutory rule, but it is a rule mandating a process rejected by the Court in Smith.

RFRA is also, in a sense, an assignment by Congress of a higher value to free-exercise-secured freedoms than the value assigned by the courts—that is, strict scrutiny versus a form of intermediate scrutiny. This view includes an image of congressional second-guessing of the courts. But that sense is false. Congress by RFRA is demanding ad hoc review of laws of general applicability that substantially burden the free exercise of religion. This is functionally a regulation of nascent violations of the Free Exercise Clause, at least so long as the statutory trigger of substantial effect is given full force.... RFRA demands that the Court engage in an exercise that the Court has eschewed. Nonetheless, whether the courts must obey RFRA's command to do so turns only on the independent issue of the power of Congress under section 5.

As we have otherwise explained, this is indistinguishable in any relevant way from the congressional command to examine election practices adversely impacting the voting strength of protected minorities, even though there was no purpose to discriminate, and, hence, no violation of the Equal Protection Clause. Dispensing with the constitutionally rooted requirement that discrimination be purposeful is an extraordinary exercise of power.... This is not to suggest that RFRA's dispensing with purpose is of a lesser magnitude. We doubt that it is. Rather, the point is that despite its large role, dispensing with purpose remains nonetheless an exercise of Congress' remedial power, the power to reach conduct that only threatens the free exercise of religion.

Undeniably, RFRA's origins and codification of terms drawn directly from constitutional decisions make it unusual and are characteristic of what is termed a "foundational statute." The critical question is whether they make RFRA unconstitutional. We think not.

The City's argument rests on the mistaken assumption that Smith describes not only how little the Government must accommodate religion but also how much it may accommodate it. Stated another way, the City must contend that Smith held not only that facially neutral laws having the incidental effect of burdening religion do not violate the Free Exercise Clause but also that exemptions to such laws do violate either that clause or the Establishment Clause. Only if the latter proposition is true does RFRA usurp the judiciary's duty to interpret the Constitution.... Prior to Smith, the Court recognized that legislatures were free to enact religious exemptions more expansive and accommodating than that required by the Free Exercise Clause.... Smith, however, did not change this rule. To the contrary, the Court contemplated "leaving accommodation to the political process."... Since Smith, the Court has reaffirmed that religious accommodations are constitutional....

The City's separation of powers argument challenges this well-established rule. Every legislatively mandated accommodation of religion reflects a legislature's judgment regarding the free exercise of religion. RFRA does not usurp the judiciary's authority to say what the law is any more than did the Voting Rights Act of 1964 when it prohibited literacy tests after [the Supreme Court] had upheld their constitutionality. Nor does RFRA usurp the judiciary's interpretive powers any more than did the American Indian Religious Freedom Act Amendments of 1994, which overturns the particular result of Smith by preventing States from prohibiting Native Americans from using peyote as part of their religious practices.

That RFRA speaks in broad generalities where other legislatively mandated religious exemptions... address specific conduct is of no moment. Within the area of permissible legislative accommodations of religion, Congress may paint with a broad or narrow brush. In either situation, Congress has "disagreed" with the judiciary regarding the scope of religious freedom and the Free Exercise Clause. In neither situation has

> Congress arrogated to itself the unrestricted power to define the Constitution....
>
> We conclude that RFRA does not violate the separation of powers....
>
> Nor does RFRA mandate religious accommodations that violate the Establishment Clause. To the contrary, the act provides that "nothing in this chapter shall be construed to affect, interpret, or in any way address [the Establishment Clause]." In short, RFRA by its own terms provides that the accommodations mandated by RFRA may reach up to the limit permitted by the Establishment Clause but no further.
>
> The City responds that, even so, RFRA on its face violates the Establishment Clause because it lacks a secular purpose and because it has the primary effect of advancing religion. We disagree. Its remedial justifications belie the City's contention that Congress acted with a sectarian purpose. Relatedly, "it is a permissible legislative purpose to alleviate significant governmental interference" with the exercise of religion.[158]
>
> Finally, the City urges that RFRA violates the Tenth Amendment because the act limits the power of the States to legislate "in the traditional areas of state sovereignty and prominence."... On its face, RFRA does not intrude upon state sovereignty any more than the myriad other federal statutes that preempt state regulation.[159]

The case was remanded to the district court to wrestle with the landmarking of St. Peter's Church under the strictures of the Religious Freedom Restoration Act.

13. Rights of Ownership: *Struemph v. McAuliff* (1983)

The right to use property already owned as the landholder pleases, though subject to various limitations (discussed under landmarking, zoning, and nuisance)[160] is an important attribute of property ownership. How that principle applies to religious usage was the subject of a Missouri case, a kind of echo of the *Krauczunas* struggle.[161] Six parishioners of Holy Family Parish in Freeburg, Missouri, sued their bishop, the Most Reverend Michael McAuliffe, ordinary of the Roman Catholic Diocese of Jefferson City. As a result of the teaching of Vatican Council II, many Roman Catholic churches revised the arrangement of their sanctuaries so that the priest faced the congregation over a centrally located "altar of sacrifice." The hierarchy recommended that side altars and other appurtenances be removed so that attention would focus on the central altar of sacrifice.[162] When this came to be done

158 . Citing *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 335 (1987)

159 . *Flores v. City of Boerne*, 73 F.3d 1352, 1364 (5th Cir. 1996), *rev'd*, 521 U.S. 507 (1997).

160 . Discussed at § 12 above, § 14 below and at IIA3, respectively.

161 . See text at § B10c above.

162 . See *Society of Jesus v. Boston Landmarks Commission* at § B12g above for another dispute over this ecclesiastical policy.

at the "Cathedral of the Ozarks" (as Holy Family was sometimes known), resistance developed among some of the parishioners, particularly those whose forebears had given or constructed the side altars. They blocked the workmen who were assigned to make the alterations, and the pastor and workmen withdrew rather than force the issue. The objectors then sought an injunction to prevent any future removals or rearrangements of the existing furnishings. The trial court, purporting to use "neutral principles of law," gave decision for the parishioners against the bishop, enjoining him from moving the altars.

The bishop appealed to the next higher court, the Missouri Court of Appeals for the Eastern District, Division Five, where decision was rendered September 6, 1983, by Special Judge Almon H. Maus.

> The plaintiffs contend the existence and location of the altars is a property right. The defendant asserts the altars are an essential part of worship and the controversy is purely ecclesiastical. Without actually deciding the same to be true, the court will consider the case as if it involves a property right.
>
> * * *
>
> The guidelines for the determination of such property rights were developed in Missouri at an early date based upon... *Watson v. Jones*....[163]
>
> > One joining an organized society such as a church having a representative form of government under the supervisions [*sic*] and control of judicatories known as church courts agrees by the act of membership to abide by the rules, orders and judgments of such courts properly made, and consents that whatever rights and privileges he may possess as a member shall be controlled by such rules, orders, and judgments....
> >
> > In view of the relation above defined which the individual bears to the church, it follows that the powers granted to the General Assembly and presbyteries [of a Presbyterian church], when exercised by them, are binding upon all the members, regardless of whether the action meets with their approval or not. The alternative of those who disapprove is simply withdrawal from the organization, for the fact of membership implies an agreement to abide by the actions of the governing body.[164]
>
> In *Klix v. Polish Roman Catholic St. Stanislaus Parish*,[165] the [Missouri] court clearly held that in the Roman Catholic Church control is vested in the hierarchy....
>
> * * *
>
> [T]he trial court [in this case]...declared "[a]s a means of adjudicating a church property dispute, a state court is constitutionally mandated to adopt a `neutral principles of law' analysis...." This was error. In that decision [*Jones v. Wolf*] the United States Supreme Court did not decide that the right to control the use of property titled in a Bishop of the Roman

163 . 80 U.S. (13 Wall.) 679 (1872), discussed at § B1 above.

164 . *Hayes v. Manning*, 172 S.W. 897, 902-903 (*en banc*, 1914).

165 . 118 S.W. 1171 (1909).

> Catholic Church must be determined upon the neutral principles therein referred to.... A state may yet observe the rule of deference applicable to a hierarchical church as enunciated in *Watson v. Jones*.... There is a distinction between establishing a religion and taking cognizance of the fundamental discipline of a church as established by its founders....
>
> The rule of deference to the decisions of the ecclesiastical authorities of a hierarchical church is well established in Missouri. The evidence in this case "proves there is a graded hierarchy in the Catholic Church, extending from the priests of parishes through bishops and archbishops to the Roman see; and, as said, the higher clericals, and not the congregation, hold title to and manage temporalities." *Klix... supra*. The observations of this court [in *Klix*] in 1909 are equally valid today.
>
> > Many religious sects, and among them the Roman Catholic, are of world-wide extent and vast membership, with congregations, parishes and established hierarchies and councils in every land. For ages they have observed a uniform polity, not only in spiritual matters, but in the transaction of secular business and the management of their properties.... The record indicates that in the Roman Catholic communion, the titles to church possessions are vested in the bishops and archbishops, who manage them, either directly or through the parish priests, and without participation by the congregation.... [T]he right of every religious sect to preserve the peculiar economy it prefers, and perhaps has obeyed immemorially, touches closely, if it is not part of it, that religious freedom which American Constitutions guarantee.
>
> The rule of deference is peculiarly applicable to and is indeed a part of the structure of the Roman Catholic Church. The plaintiffs have not demonstrated any reason it cannot or should not continue to be so applied. The rule of deference to the decisions of the clerical authorities of the Roman Catholic Church is yet the law in this state.[166]

Neither Vatican Council II nor *Jones v. Wolf* could reopen the lay trusteeship struggle, which the hierarchy had won in Missouri and most other states.[167] And that is as it should be. Vatican Council II did not change the hierarchical structure of the Roman Catholic Church, and "neutral principles of law" should not be utilized to change by judicial fiat the "peculiar economy" that a church has chosen for itself. If and when a church restructures itself, then the courts can and should recognize the change, but not until then. It is startling to encounter lay members of the Roman Catholic Church who do not seem to be aware of the role of the ordinary of the diocese (bishop or archbishop) in owning and controlling the property of the church, including every parish, but the courts should be able to recognize that role, as in this

166. *Struemph v. McAuliffe*, 661 S.W.2d 559 (1983).

167. Pennsylvania was an exception from 1855 until 1937, when the lay-trusteeship statute was overturned in *Canovaro v. Brothers of the Order of Hermits of St. Augustine*, 326 Pa. 76, 191 A. 140 (1937). See discussion of *Krauczunas* litigation at § B10c above.

instance,[168] and the same should hold true for other hierarchical polities to the degree applicable.

14. Zoning of Church Property

The "rights of ownership" are not absolute in the law of the United States, but are subject to various regulations and controls, as was seen in the section on landmarking.[169] One category of such regulation is *zoning*, by which municipalities restrict the types of land-use that can be undertaken in various areas under their jurisdiction. This type of regulation rankles many property owners, particularly religious bodies, who are especially likely to believe that zoning restrictions impinge on their rights. The courts are frequently asked to rule on the propriety of many a zoning restriction or denial of application for a variance to accommodate a proposed religious use.

This encounter can take several postures. Sometimes the local zoning authority denies an application for a proposed use, and the applicants take the matter to court.[170] Sometimes the local zoning authority grants the application, and the neighbors take the matter to court.[171] Sometimes the religious group proceeds with its plans without securing the requisite permit or variance, and the local zoning authority takes the matter to court.[172]

Reasons for disallowing zoning applications, special use permits and variances for religious uses include considerations of parking availability, increased traffic congestion, noise pollution, environmental impairments, sewerage overload, inadequate lot-size or set-back provisions, aesthetic incongruity, adverse effect on property values and loss of property-tax revenues. Sometimes these contentions may also mask an animus against the particular religious group involved, evidenced by a history of accommodation of all other religious applicants.[173] Courts give different degrees of deference to these various considerations, with relatively little weight accorded aesthetic considerations (beauty being largely in the eye of the beholder), the supposed effect on property values (which is usually anecdotal or conjectural at best) or the loss of taxable property to an exempt use, and none to the

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168. See also *Parent v. Roman Catholic Bishop of Portland*, 436 A.2d 888 (Me., 1981) to the same effect.

169. See § 12 *supra*.

170. E.g., *Englewood v. Apostolic Christian Church*, 362 P.2d 172 (1961); *Lakewood, Ohio, Congregation of Jehovah's Witnesses v. City of Lakewood*, 699 F.2d 303 (1983), discussed at § a below; *Messiah Baptist Church v. County of Jefferson*, 859 F.2d 820 (1988), discussed at § d below,.

171. E.g., *Lucas Valley Homeowners Assn. v. County of Marin and Chabad of North Bay*, 284 Cal. Rptr. 427 (1991).

172. E.g. *City of Sumner v. First Baptist Church*, 639 P.2d 1358 (1982); *Grosz v. City of Miami Beach*, 721 F.2d 729 (1983).

173. See, e.g., *Islamic Center of Mississippi v. City of Starkville*, 840 F.2d 293 (CA5 1988).

aversion to disfavored religions (which in any event would be unconstitutional as a basis for state action).

Many of the hundreds of zoning cases in the literature are so heavily dependent upon the provisions of the particular local ordinance and the particular fact situation that they are of limited applicability beyond their borders, and it is difficult to generalize about them. Nevertheless, occasionally contentions about constitutional protection of the free exercise of religion do rise above the particularities and are important to survey here. The treatment they receive tends to fall into two classes: the "majority" rule, sometimes called the "New York" rule; and the "minority" rule, sometimes called the "California" rule, after their respective progenitors. The former rule assumes that religious bodies enjoy a preferential position with respect to their right to locate where they wish. This view has been stated as follows:

> With respect to zoning restrictions, New York adheres to the majority view that religious institutions are beneficial to the public welfare by their very nature. Consequently, a proposed religious use should be accommodated, even when it would be inconvenient for the community. A religious use may not be prohibited merely because of potential traffic congestion, an adverse effect upon property values, the loss of potential tax revenues, or failure to demonstrate that a more suitable location could not be found.... A distinction must be drawn between danger to the public and mere public inconvenience. Every effort must be made to accommodate the religious use subject to conditions reasonably related to land use.[174]

The California rule reflects no such preferential status for religious institutions but insists that they are to be treated the same as all other applicants. That rule was enunciated in a 1949 case, *Corporation of Presiding Bishop v. City of Porterville*, as follows:

> It is a matter of common knowledge that people in considerable numbers assemble in churches and that parking and traffic problems exist where crowds gather. This would be true particularly in areas limited to single family dwellings. There necessarily is an appreciable amount of noise connected with the conduct of church and youth activities. These and many other factors may well enter into the determination of the legislative body in drawing the lines between districts, a determination primarily the province of the city [and not of the courts]. A single family residence may be much more desirable when not... adjacent to a public building such as a church. The municipal legislative body may require that church buildings be erected to conform to health and safety regulations as provided in its building code[,] and we see no reason to hold that churches may be erected in a single family residential area when a duplex, triplex, or other multiple dwelling can lawfully be excluded therefrom. A provision in the

174. *Holy Spirit Association for Unification of Christianity v. Rosenfeld*, 458 N.Y.S.2d 920 (1983).

> ordinance for a single family residential area affords an opportunity and inducement for the acquisition and occupation of private homes where the owners thereof may live in comparative peace, comfort and quiet. Such a zoning regulation bears a substantial relation to the public health, safety, morals and general welfare because it tends to promote and perpetuate the American home and protect its civic and social value.[175]

A few decades ago, the law on matters of zoning tended to favor the right of churches to locate in residential areas over the objections of neighbors or the adverse holdings of zoning boards. That may not be as true in the 1990s as it was in the 1960s. Though the picture is mixed now, as it was then, the preponderance seems to have shifted to one less favorable to the claims of churches and other religious entities, at least according to one observer.

> The initial impact of zoning laws on churches appears to have been minimal [until the 1950s].... Zoning laws were certainly less restrictive than they are today. In most places vacant land was not scarce, and churches were almost universally held in high esteem as institutions of social utility in bringing enlightenment to the masses (if they were not revered as...houses of God), so that there was a natural bias in favor of allowing churches to be built.
>
> This state of affairs began to change rapidly in the years after World War II. The growth of residential suburbs caused an explosion of activity in church-building. But the increased use of zoning to preserve the residential character of suburban neighborhoods (so that they would not replicate the urban areas people thought they had left behind) increasingly brought churches and zoning authorities into conflict....
>
> If the conflict heightened in the 1950s, it has reached the stage of open conflict today. Today, the majority "New York rule" has eroded substantially even in New York.... As a practitioner in this area, I have little doubt that it is becoming more difficult for churches to relocate in newly developed areas or for churches not already functioning in built-up areas to lay down roots. Zoning authorities are reviewing church applications more carefully than they did a decade ago and are imposing stricter limits on church uses. The upshot is not merely more litigation or greater expense for churches; there is, in addition, a distinct, although perhaps unintended, bias in favor of preserving the religious status quo. That fact has obvious constitutional implications; it also has implications for religion itself.
>
> Religious change and renewal has been the hallmark of American religion. Upstart theologians, would-be prophets and dissenters have formed movements that have been free to establish new churches and challenge the teachings, status and complacency of more settled and financially more powerful institutions. Free markets, with low entry costs, have been good for American religion as well as for the American

175 . 203 P.2d 823, 825 (1949).

> economy. Free religious competition has been good as well for the nation, which is not stuck in a religious rut as are other societies with far less religious volatility.
>
> The vitality of American religion is due in large part to the ferment caused by vigorous competition. It is still true that religious groups need no government official's permission to challenge existing faiths or religious configurations, nor need they pay a licensing tax for the privilege of disseminating religious views. But it is not true that entry remains cheap. Chief among these new, but significant, entry costs are those imposed by zoning laws.[176]

In the tension between the majority and minority rules we see another instance of the disagreement between those who think that the Religion Clauses of the First Amendment require only "formal" neutrality (treating religious claimants like all other claimants—the "minority" rule) and those who think that those clauses command "substantive" neutrality (they single "religion" out by name for accommodations peculiar to its unique needs and nature—the "majority" rule).[177] The shift in the center of gravity from the majority rule of substantive neutrality to the minority rule of formal neutrality is reflected in other areas of the law and is typified by the conclusions on this subject arrived at by the five federal appellate courts that have dealt with it to date.

a. *Lakewood Jehovah's Witnesses v. City of Lakewood* (1983). The first of these was the United States Court of Appeals for the Sixth Circuit, which observed that "[a]lthough many state courts have addressed this issue, no other federal circuit court has resolved the question," so it proceded to do so, remarking in a footnote:

> 2. California and Florida state courts have upheld municipal zoning ordinances which exclude churches from residential districts. However, many other states confronting similar ordinances have held them unconstitutional. Courts striking down such ordinances have reasoned that the presence of churches in residential areas is beneficial to the public morals and welfare. Any exclusion of churches from neighborhoods is "arbitrary and unreasonable," hence unconstitutional.[178] This reasoning is problematical because an ordinance permitting churches but excluding secular interests also protected by the First Amendment runs afoul of the Establishment Clause.... On the other hand, not all political and social

176. Stern, Marc, "God's Shrinking Little Acre: Zoning and Religious Institutions," paper presented at Bicentennial Conference on the Religion Clauses, Philadelphia, May 31, 1991; used with permission.

177. See Laycock, D., "Formal, Substantive, and Disaggregated Neutrality Toward Religion," 39 *DePaul L. Rev.* 993 (1990).

178. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)—the Supreme Court's leading case on municipal zoning, upholding a comprehensive zoning plan that excluded commercial activities from residential districts on the grounds that such a plan was a legitimate exercise of the police power if its rules were not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare;" it did not involve religion.

> organizations have been traditionally viewed as beneficial to public welfare and morals. Therefore, the original rationale for permitting churches in residential areas fails.[179]

With this obscurely oracular deliverance as its beacon, the court moved on to the particulars.

The congregation of Jehovah's Witnesses had worshipped at a storefront in the center of town since 1944 and desired to relocate to a less congested area more conducive to worship and adequate for a larger Kingdom Hall. They purchased a half-acre lot in a section zoned for residential use. Their application to build a church on the lot was denied because of the residential zoning, which applied to 90% of the village's area. Thus the congregation was holding a lot that could not be used for the purpose for which it was purchased. The congregation took the issue to court, claiming that the ordinance violated its freedom of religion because it prohibited it from building a Kingdom Hall on its lot.

> First, the nature of the religious observance at stake must be evaluated. And second, the nature of the burden placed on the religious observance must be identified.
>
> The Congregation's "religious observance" is the construction of a church building in a residential district.... [This] activity has no religious or ritualistic significance for the Jehovah's Witnesses. There is no evidence that the construction of a Kingdom Hall is a ritual, a "fundamental tenet," or a "cardinal principle" of its faith. At most the Congregation can claim that its freedom to worship is tangentially related to worshipping in its own structure. However, building and owning a church is a desirable accessory of worship, not a fundamental tenet of the Congregation's religious beliefs. The zoning ordinance does not prevent the Congregation from practicing its faith through worship whether the worship be in homes, schools, other churches, or meeting halls throughout the city. The ordinance prohibits the purely secular act of building anything other than a home in a residential district.
>
> The burdens imposed on the Congregation by the ordinance are an indirect financial burden and a subjective aesthetic burden. The Congregation may build a church in Lakewood only in commercial or multi-family residential district. Land in these districts is more expensive and, the Congregation claims, less conducive to worship than the area where the lot is located. However, this is not a case where the Congregation must choose between exercising its religious beliefs and forfeiting government benefits or incurring criminal penalties. No pressure is placed on the Congregation to abandon its beliefs and observances. While it is true that the Congregation would face penalties if it began building on the proposed site, the penalties would not have the

179. *Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood*, 699 F.2d 303 (1983), citations omitted except for previous note.

> purpose or effect of dissuading the Congregation from practicing its faith. In short, the burdens of the ordinance are the increased cost of purchasing land and the violation of the Congregation's aesthetic senses, if the Congregation chooses to build a new church in Lakewood....
>
> Although the Congregation may construct a new church in only ten percent of the City, the record does not indicate that the Congregation may not purchase an existing church or worship in any building in the remaining ninety percent of the City.... The lots available to the Congregation may not meet its budget or satisfy its tastes[,] but the First Amendment does not require the City to make all land or even the cheapest or most beautiful land available to churches.... [W]e hold that the Congregation's freedom of religion, as protected by the Free Exercise Clause, has not been infringed.

The court's logic in rejecting the majority rule deserves some attention, since it seems to have set the course for the outcome (and perhaps for the views of other circuit courts as well, as will be seen below). The court reasoned that "an ordinance permitting churches but excluding secular interests also protected by the First Amendment runs afoul of the Establishment Clause." That is a debatable proposition. The Supreme Court has indeed suggested that New York State's constitution barely escaped violating the Establishment Clause in exempting churches from property taxation only because it also exempted educational and charitable uses.[180]

More recently, however, the Supreme Court upheld the congressional exemption of churches from the Civil Rights Act's prohibition of discrimination on the basis of religion in employment. In other words, Congress expressly provided that religious organizations could hire their own members in preference to others—even for nonreligious jobs. That provision was challenged as a violation of the Establishment Clause in a case involving the Mormon church's insistence that Mormons have a "temple recommend" (a clearance from their bishop that they were in good standing) in order to be employed in certain jobs the church considered faith-linked.

The court said that Congress had not offended the Establishment Clause in so legislating because it merely relieved religious preference from restrictions placed on it by government. Justice White stated for the court:

> A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden "effects"... it must be fair to say that the *government itself* has advanced religion through its own activities and influence.[181]

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180. *Walz v. Tax Commission*, 397 U.S. 644 (1970), discussed at VC6b(3).

181. *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 337 (1987) (emphasis in original), discussed at § D4b below.

It could be argued that accommodating the Jehovah's Witnesses' building of a Kingdom Hall in a residential zone would not be the government's advancing religion but merely removing burdens imposed on religious practice by the state.

Even more recently, however, the Supreme Court ruled that a Texas law exempting religious publications alone from sales tax violated the Establishment Clause because it did not also exempt nonreligious publications to at least as broad an extent as the property tax exemption upheld in *Walz*.[182] That would suggest that special exceptions to zoning codes would have to be available to some nonreligious applicants as well (to the extent they were nonprofit, educational or charitable).

Furthermore, the Circuit Court's observation that "not all political and social organizations have been traditionally viewed as beneficial to public welfare and morals" seems a *non sequitur*. If such organizations are held to be protected by the First Amendment, they are by definition "beneficial to public welfare and morals." Or rather, if they are so nefarious, pernicious, or self-serving as to be outside the First Amendment's protections, they are not members of a class in parity with churches as entitled to accommodation. Even if they are protected by the First Amendment, they may not be eligible for the same *sort* of accommodation as churches. Though both are protected by the First Amendment, political organizations, for instance, are treated differently from churches in the Internal Revenue Code.

The Circuit Court, finally, seemed to think that the case might be different if the Jehovah's Witnesses were obliged by a "ritual" or "fundamental tenet" of their faith to build a Kingdom Hall in a residential area. Since that was only an esthetic preference, however, it did not rise, in the view of the court, to the level deserving accommodation. That was a particularly wooden notion of religion. As Douglas Laycock observed about a different case:

> This position implies a wholly negative view of religion. It views God as a great schoolmarm in the sky, who lays down certain binding rules, and it assumes that the exercise of religion consists only of obeying the rules. It is as though all religious experience were reduced to the book of Leviticus. It is the view of religion held by many secularized adults, who left the church in their youth after hearing too much preaching about sin and failing to experience any benefits.
>
> In this view of religion as obeying the rules, all the affirmative, communal, and spiritual aspects of religion are assumed away—placed outside the protection of the Free Exercise Clause. Practices that merely grow out of religious experience, or out of the traditions and interactions

182 . *Texas Monthly v. Bullock*, 489 U.S. 1 (1989), discussed at VC6b(4).

> of a religious community, are constitutionally unprotected unless they are mandated by binding doctrine.[183]

The Sixth Circuit Court of Appeals thus set the style for the federal courts by an overexpansive view of the scope of the Establishment Clause and an impoverished understanding of the scope of the practice of religion protected by the Free Exercise Clause.

b. *Grosz v. Miami Beach* (1983). The second circuit court to confront a zoning restriction affecting religion was the Eleventh. The decision was written by a senior circuit judge of the Fifth Circuit, Irving L. Goldberg, sitting by designation.

> This case calls for the accommodation of two important values, both embodied in the spirit and the letter of the Constitution: free exercise of religion and the effective use by a state of its police powers. That accommodation consists of a balancing process, leading to a scheme of compromise between the two values that best accords with constitutional mandates.

Naftali Grosz and his wife had purchased a home in a single-family residential zone of Miami Beach. Several years after they moved in they obtained a permit to remodel a large garage on the premises for use as a "playroom." They were apprised by the City at that time that the structure could not be used as a place of religious assembly. Nevertheless, the interior was fitted for group religious services, with benches to seat over thirty people, Torahs, Arks, a Menorah, an eternal light, prayer books, prayer shawls, etc., so that it took on the character of a small synagogue or *shul*, and soon religious services were held there daily. Naftali Grosz was a rabbi, who in fulfillment of a requirement of his religious faith conducted religious services twice daily for at least ten adult males—a *minyan*—in whatever home he might occupy. He was aged and somewhat infirm at the time, but not immobile. Usually his congregation consisted of ten to twenty males, but sometimes as many as fifty people attended, some of whom were neither family, friends or neighbors, but none were turned away. Religious services lasted a half-hour in the morning and a half-hour in the afternoon, but on Saturdays and religious holidays the service might take two or three hours. Daily services caused no substantial disturbance, but the larger services disturbed neighbors because of chanting and singing, people asking directions to the "Grosz *shul*" and sundry comings and goings. These led to complaints to the City, which sent a "notice of [zoning] violation" that could result in a misdemeanor charge. The City would not prosecute anyone for praying in their home with ten friends, even on a regular basis, it explained, but could not countenance the operation of a house of worship out of zone.

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183 . Laycock, D., "Summary and Synthesis: The Crisis in Religious Liberty," 60 *Geo. Wash. L. Rev.* 852, 847 (Mar. 1992).

The Groszes took the matter to court, claiming that their freedom of religion had been impaired. The trial court agreed, finding that enforcement of zoning laws did not rise to the level of a "compelling state interest" sufficient to justify interference with the plaintiffs' practice of their religion. On appeal, the Circuit Court of Appeals undertook a lengthy "Expedition into Free Exercise Doctrine" (as it was then) and gleaned from it the tests it thought should apply.

> We know now at least the broad contours of the path we must follow in making an accommodation between the City's interest in zoning enforcement and [the Groszes'] free exercise interest. We must first apply the conduct/belief and secular effect and purpose tests. Should the government action pass these tests we then must balance the cost to the government of altering its activity to allow the religious practice to continue unimpeded against the cost to the religious interest imposed by the government action.
>
> *A. Thresholds*
>
> In this case, the thresholds pass quickly beneath our feet. The City's zoning law affects prayer and religious services, and so involves conduct. Therefore, balancing not absolutism is appropriate. That the law has both secular purpose and effect is non-controversial. No one contends that zoning laws are based upon disagreement with religious tenets or are aimed at impeding religion.
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> * * *
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> *B. The Burden on Government*
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> * * *
>
> Gatherings for organized religious services produce, as do other substantial gatherings of people, crowds, noise and disturbance.... Given this total inconsistency between the accomplishment of the City's policy objectives and the continuance of [the Groszes'] conduct, the government action in this case easily passes the least restrictive means test.
>
> Doctrine also requires that we consider the impact of a religion based exemption to zoning enforcement. In that regard we find that granting an exception would defeat City zoning policy in all neighborhoods where that exception was asserted. Maintenance of the residential quality of a neighborhood requires zoning law enforcement whenever that quality is threatened. Moreover, no principled way exists to limit an exception's cost just to the harm it would create in this case. Crowds of 500 would be as permissible as crowds of 50. Problems of administering the exception such as distinguishing valid religious claims from feigned ones, therefore, need not even be considered. A religion based exception would clearly and substantially impair the City's policy objectives. Together, the important objectives underlying zoning and the degree of infringement of those objectives caused by allowing the religious conduct to continue place a heavy weight on the government's side of the balancing scale.
>
> *C. The Burden on Religion*
>
> In calculating the the burden on religion, we first determine whether the conduct interfered with constitutes religious practice. The religion of...

Naftali Grosz requires him to conduct religious services twice daily in the company of at least ten adult males. Solicitation of neighborhood residents to attend and the participation of congregations larger than ten, the conduct on which the City based its notice of violation, are not integral to [his] faith.... We assume... that the nonessential practices further the religious conduct. We must also assume, then, that [Groszes] suffer some degree of burden on their free exercise rights.

Turning to the significance of that burden, we note that Miami Beach does not prohibit religious conduct per se. Rather, the City prohibits acts in furtherance of this conduct in certain geographic areas.... The City's zoning regulations permit organized, publicly attended religious activities in all zoning districts except the... single family districts. The zones that allow religious institutions to operate constitute one half of the City's territory. [Groszes'] home lies within four blocks of such a district. [They] do not confront the limited choice of ceasing their conduct or incurring criminal liability. Alternatively, they may conduct the required services in suitably zoned areas, either by securing another site away from their current house or by making their home elsewhere in the City.... In comparison to the religious infringements analyzed in previous free exercise cases the burden here stands toward the lower end of the spectrum.[184]

D. The Final Balance....

Fortunately, the instant case arises in a factual context in which substantial, relevant case precedent exists to guide our balancing. This case is not the first to involve balancing government's interest in restricting the location of religious conduct[185].... Admittedly, restriction of religious conduct on public streets and in airports is less burdensome than restriction of such conduct on an individual's property. The *Prince* and *Krishna* cases, however, establish the principle that government can exercise its police powers to limit the place and manner of religious conduct, despite a significant burden on free exercise.

* * *

We glean a final bit of support for our holding from a Supreme Court dismissal for want of a substantial federal question in *Corporation of the Presiding Bishop v. Porterville*.[186] The state court had held that churches may be excluded from residential areas consistent with the free exercise clause. Justice Vinson, writing in a later case..., explained the Supreme Court's dismissal of the California case.

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184. Citing *Prince v. Massachusetts*, 321 U.S. 158 (1944) (criminal liability for child labor infraction); *Gillette v. United States*, 401 U.S. 437 (1971) (criminal liability for refusing to serve in the armed forces in Vietnam); *Braunfeld v. Brown*, 366 U.S. 599 (1961) (loss of livelihood because of requirement of law to close place of business on Sunday as well as on the owner's Sabbath); *Sherbert v. Verner*, 374 U.S. 398 (1963) (loss of unemployment compensation for refusal to work on Sabbath).

185. Citing *Prince v. Massachusetts, supra*, and *International Society for Krishna Consciousness v. Eaves*, 601 F.2d 809 (CA5, 1979) (upholding airport restrictions on distribution of literature and solicitation of funds).

186. 338 U.S. 805 (1949)—one of the early "minority" or "California" rule cases.

> When the effect of a statute or ordinance upon the exercise of First Amendment freedoms is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the nation is an absurdity. We recently dismissed for want of substantiality an appeal in which a church group contended that its First Amendment rights were violated by a municipal zoning ordinance preventing the building of churches in certain residential areas.[187]
>
> Our journey at an end, we now examine the scale and determine how the two conflicting constitutional values, free exercise rights and the state police power, are to be accommodated.... The *Prince* and *Krishna* analysis regarding time, manner, and place restrictions on religion supports the view that the relative weights of the burdens favor the government. The Supreme Court's pronouncement in *Douds* argues even more strongly for this conclusion.
>
> The judges who have precedentially performed balancings on the free exercise trapeze have encountered great difficulty with the weights and measures involved. Balancings must avoid constitutionalizing secularity or sectarianizing the Constitution. In this area, where religious guarantees of the Constitution compete with the rights of government to perform its function in the modern era, certitude is difficult to attain. All should understand that we have not written today for every situation in which these issues might arise—only that we have done our best as amateur performers in solving this very, very delicate problem. We who perform on this flying trapeze may not always be daring and young, but we must avoid that slip that could take us into the doctrinal confusion below.
>
> We find that the burden upon government to allow [Grosz's] conduct outweighs the burden upon [his] free exercise interest.[188]

A question that arises in this instance—and that will recur later—is whether it is "principled" to allow 50 people to use a religious facility but not 500. Discourse about inability to find a "principled" solution is often a warning flag presaging bad things to come. It frequently is used to suggest that no exceptions can be made for cases that *are* exceptional under the terms of the Constitution. As Professor Michael McConnell's research has demonstrated, the customary way of handling religious objections to laws of general application (such as military service) was simply to *exempt* objectors without worrying about hosts of hypothetical claimants for exemption.[189]

There are more or less arbitrary lines drawn in the law all the time. That is one of the key functions of the judiciary: making distinctions. Whether they are "principled" distinctions seems to rest with whether one likes the result or not. Justice White's

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187. *American Communications Ass'n v. Douds*, 339 U.S. 382, 397 (1950).

188. *Grosz v. City of Miami Beach*, 721 F.2d 729 (1983).

189. McConnell, M., "The Origins and Historical Understanding of Free Exercise of Religion," 103 *Harvard L. Rev.* 1410 (May, 1990).

distinction—between government's getting out of the way of churches so that they can advance religion and government's advancing religion itself—might seem imprecise and perhaps "unprincipled" to critics on the court and elsewhere. Justice O'Connor concurred in the judgment in *Amos*, but thought Justice White's rationale too sweeping.[190]

After the acrobatic imagery of the not-so-young and not-so-daring judges collectively balancing on the not-so-tightwire of the First Amendment, one wonders what the "doctrinal confusion below" into which they must not "slip" might be compared to that which they created while still maintaining their precarious balance above. While deprecating the somewhat disingenuous efforts of the Groszes to evade the zoning requirements, one may not necessarily share the court's conclusion that the burden on their religious practice was outweighed by the city's interest in preserving its residential zones completely free of any occasional religious thronging in a few locations. Whether there is a "principled" way to deal with such exceptions will be seen in the similar "house-church" case of *Lucas Valley Homeowners* below.[191]

c. *Islamic Center v. Starkville* (1988). The Fifth Circuit Court of Appeals encountered a zoning case arising from the hometown of Mississippi State University, where a group of Muslim students and faculty sought a location they could use as a religious center and place of worship. After a long search and lengthy negotiations with city officials about a succession of sites that were unacceptable for various reasons, the Muslim group settled on a house near the campus that the code enforcement officer said should be suitable. The Muslims prepared a plan for the site that would include eighteen parking spaces as required by the city. The Planning Commission recommended approval of the plan. Places of religious assembly were permitted in residential sections of Starkville only as an exception to the zoning code, and exceptions had to be approved by the Board of Aldermen. The Board met to consider the request for an exception for the Islamic Center. When a resident representing property owners in the area spoke in opposition, the Board voted unanimously to deny the exception, giving no reasons for its decision. The city did not communicate further with the Center, but its fire and electrical inspectors approved the building's conformity with their requirements for a place of worship. The Muslim group made the proposed alterations in the building and began to use it as both a student residence and a place of worship.

Eleven months later the City ordered the Islamic Center to stop holding worship services on its premises because of complaints by the neighbors. The Center took the matter to court. The trial court ruled against them on the ground that, although Muslims are required by their faith to pray five times a day, they are not obliged to

190 . See *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 347 (1987), discussed at § D4b below.

191 . See § f below.

do so collectively, so the denial of an exception for a place of worship interfered only with a religious preference rather than an obligation. The Islamic Center appealed to the Fifth Circuit, which reviewed the record and noted some significant factors.

1. Most of the Muslim students did not have cars and could not travel far to worship.

2. The nearest districts in which churches were permitted by right were three miles or more from the campus.

3. None of the twenty-five churches located in the city were in those permitted zones; they were all in residential zones where a special exception approved by the Board of Aldermen was required.

4. Sixteen of the churches were already located in those zones when the ordinance went into effect, but nine others had since been granted exceptions to locate there. When asked if the Board had ever refused such a request except to the Islamic Center, the city answered in the negative.

5. Next door to the Islamic Center was a large mansion called "Maranatha House"—a residence and worship center for a Pentecostal Christian group. The city treated its use as if it were "grandfathered in" as a nonconforming use preexisting the ordinance, but a neighbor testified that it was a fraternity house at the time the ordinance went into effect. Regular worship services held there attracted more than twice as many participants as the most heavily attended services at the Islamic Center. Maranatha House had only eight off-street parking places, compared to eighteen at the Islamic Center for its much smaller group. Many who came to services at Maranatha House parked on the streets and sometimes blocked the Islamic Center driveway. Services at the latter location were inobtrusive, while those at the former often created noise because of the crowd, numbering around a hundred, the playing of tambourines and other instruments, and the use of amplifiers and loudspeakers during the preaching and singing.

The Circuit Court decided that the trial court had reached the wrong conclusion.

> Regulatory statutes or ordinances that affect religious activities are constitutional so long as they impose no undue burden on the ability of the church or its members to carry out the observances of their faith. The district court's opinion and the City's brief both suggest that application of the zoning ordinance to the Islamic Center places no burden on it or its members because they can establish a mosque within walking distance of the campus outside the city limits or buy cars and ride to more distant places within the City. The suggestion is reminiscent of Anatole France's comment on the majestic equality of the law that forbids all men, the rich as well as the poor, to sleep under bridges, to beg in the streets, and to steal bread. Laws that make churches, synagogues, and mosques accessible only to those affluent enough to travel by private automobile obviously burden the exercise of religion by the poor, a class that includes many students. And a city may not escape the constitutional protection afforded against its actions by protesting that those who seek an activity it

forbids may find it elsewhere. By making a mosque relatively inaccessible within the city limits to Muslims who lack automobile transportation, the City burdens their exercise of religion....

As the Supreme Court observed in *Schad v. Borough of Mt. Ephraim*, "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.'"[192]

* * *

The assembly of a community of believers is an integral part of most religious faiths, certainly of the Muslim. The assembly of those bound by common beliefs and observances not only serves to create a sense of community among the members through the shared expression of their beliefs, it also communicates to outsiders the church's identity as a group devoted to a common ideal. By group worship, each worshipper communicates to outsiders the identity of the group and his own identity as a member of it, a form of self-expression. Ritual preserves, evidences, and perpetuates faith. If government exercises its power to affect group worship, it must demonstrate at least that the burden imposed serves an important government purpose and also that this purpose could not be accompanied [accomplished?] by a means less burdensome to the exercise of religion.

As the Supreme Court observed in *Schad*, the availability of other sites outside city limits does not permit a city to forbid the exercise of a constitutionally protected right within its limits. "[One] is not to have the exercise of his liberty of expression [and, we add, his freedom of religion] in appropriate places abridged on the plea that it may be exercised in some other place."[193]

* * *

Many state courts have therefore held that a zoning ordinance that prohibits the construction of church buildings or the use of all existing buildings for public worship in virtually all residential districts violates the free exercise clause....[194] The question before us is more limited: whether the City's refusal to grant an exception to permit the use of the [Islamic Center's] property for religious worship is supported by important government needs and, if so, whether the City has enforced its secular interests uniformly in dealing with other religions.

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192. *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 68 (1981)—not a religion case—(quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 519 (1977) Stevens, J., concurring in judgment.

193. 452 U.S. at 76-77, quoting *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939)—a Jehovah's Witnesses case decided under the free-speech clause, discussed at IIA4b(2).

194. Citing Reynolds, "Zoning the Church: The Police Power Versus the First Amendment," 64 *B.U.L.Rev.* 767 (1985) (citing cases); Comment, "Zoning Ordinances Affecting Churches: A Proposal for Expanded Free Exercise Protection," 132 *U.Pa.L.Rev.* 1131 (1984).

The court reflected on the disposition of zoning cases by two other federal circuit courts, *Lakewood Jehovah's Witnesses v. Lakewood* and *Grosz v. Miami Beach*[195] and quoted a commentator who summed them up as follows:

> [T]he recent federal appellate court decisions clearly stand for the proposition that zoning ordinances which serve a legitimate public purpose by excluding from certain residential areas church buildings or regular worship services in homes do not violate the First Amendment where such ordinances place *only* an "incidental economic burden" on religious freedom *and* where alternative channels and opportunities are left open for religious conduct.[196]

The court distinguished the case before it from its predecessors in the other circuits.

> The burden placed on relatively impecunious Muslim students by the Starkville ordinance is more than incidental, and the ordinance leaves no practical alternatives for establishing a mosque in the city limits....
>
> The City's approval of applications for zoning exceptions by other churches suggests that it did not treat all applicants alike. This undermines the City's contention that the Board denied a zoning exception to the Muslims solely for the purposes of traffic control and public safety.
>
> The City has never enforced its ordinance against Maranatha House, with a membership twice as large as the Islamic Center, even though its services are audible from the street, it has only half as many parking spaces as the Islamic Center, and it is located on the same allegedly congested street next door to the Islamic Center. The City has not apparently interfered with parking of cars on the street by those attending Maranatha House, although it argues that on-street parking is not permitted on [that] street.
>
> While lines must be drawn at some point, and, when traffic is congested, a few more cars may aggravate a bad situation, just as a final straw may break a camel's back, the City has advanced no rational basis other than neighborhood opposition to show why the exception granted all other religious centers was denied the Islamic Center. As the Supreme Court observed in *City of Cleburne v. Cleburne Living Center*,[197] an equal protection case, neighbors' negative attitudes or fears, unsubstantiated by factors properly cognizable in a zoning proceeding, are not a permissible basis for treating a home for the mentally retarded differently from other group or multi-unit housing institutions. There is even less justification for differentiating between familiar and unfamiliar religions. "Private biases may be outside the reach of the law, but the law cannot, directly or

195 . Discussed in sections immediately above.

196 . Ziegler, "Local Land Control of Religious Uses and Symbols," 1985 *Zoning and Planning Law Handbook* 331, 344 (emphasis added by Fifth Circuit).

197 . 473 U.S. 432,447-49 (1985).

> indirectly, give them effect."[198]... The record makes clear that the City did not act in a religiously neutral manner when it denied an exception for the Islamic Center.... This court declares the ordinance unconstitutional as applied to the Islamic Center and enjoins the City of Starkville from enforcing [it] against the use of the property [at issue] for public worship.[199]

This decision was certainly more perceptive of the human realities of religious activities than the two earlier circuit court decisions. The "majestic equality of the law" at least took some cognizance of the needs of impecunious students as part of the judicial equation and rebuked the Aldermen of Starkville for showing blatant favoritism toward more familiar religions. The role of neighborhood opposition to a proposed land use was deprecated as not appropriately cognizable by the court—a view rejected by another circuit court two years later.[200]

d. ***Messiah Baptist Church v. County of Jefferson, Colorado*** **(1988).** The Tenth Circuit Court of Appeals dealt with a church zoning case in the same year, though less sympathetically. It is reported here mainly for the sake of the dissent by Judge Monroe G. McKay, which ably stated the argument for a higher regard for the accommodation of religious needs and interests in the hierarchy of values sought to be served by a zoning regime.

Messiah Baptist Church bought about eighty acres of vacant land in an area of Jefferson County, Colorado, zoned for agricultural use only, with schools, churches and other places of assembly banned, even as special uses. Two years later, the county amended the zoning regulations to allow church use by special permit, and the church applied for such a permit to build a 12,000-square-foot structure to be used for worship services, offices, classrooms, and a gymnasium, plus parking area for 150 vehicles and an amphitheater where devotees could park and participate in services without leaving their cars, using individual amplifiers as in a drive-in theater. A hearing was held by the county planning commission, which denied the permit for a number of reasons, including access problems, erosion hazards, and inadequate fire protection. The church took the matter to federal district court, but lost on the county's motion for summary judgment. The church appealed to the Tenth Circuit Court of Appeals, which handled the First Amendment claim in a singularly wooden way.

> The first question to be addressed is whether the [agricultural] zoning regulations regulate religious beliefs. If they regulate religious beliefs, as opposed to religious conduct, then the regulations are unconstitutional.... Courts consistently distinguish religious beliefs from religious

198 . *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

199 . *Islamic Center v. Starkville*, 840 F.2d 293 (CA5 1988).

200 . See *Christian Gospel Church v. San Francisco* at § e below.

conduct.[201]... As to what constitutes regulation of beliefs, the Supreme Court recently... reiterated the concept that the free exercise clause prohibits the government from *coercing* the individual to violate his beliefs.... The [zoning] regulations do not in any way regulate the religious beliefs of the Church.

Do the regulations impermissibly regulate religious conduct? Generally speaking, the government may regulate religious conduct.... However, conduct flowing from religious beliefs merits protection when shown to be integrally related to underlying religious beliefs.... The Church argues that constructing its house of worship is intimately bound to its religious tenets. As an abstract argument, this proposition is true. The evidence in the record, however, fails to establish any basis for this contention. The Church makes a vague reference to a preference for a pastoral setting, but such is of no consequence to this analysis. What is important is that the record contains no evidence that building a church on the particular site is intimately related to the religious tenets of the church. At most, the record discloses the Church's preference is to construct its house of worship upon its land. We agree with the observation of the Sixth Circuit... that "building and owning a church is a desirable accessory of worship, not a fundamental tenet of the Congregation's religious beliefs."[202] In short, under the facts of this case, the [zoning] regulations do not regulate any religious conduct of the church or its members.

We must also consider whether the zoning regulations place *any burden* on the free exercise of [the Church's] religion. "If the purpose or effect of the law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect."[203] In our case, the record reveals that neither the purpose nor the effect of the zoning regulations is to impede observance or discriminate between religions. Regulation of the location of church construction is not an impediment to religious observance in the sense of a prohibition. Arguably, the zoning regulations affect secular activity and make the practice of religion more expensive, and therefore impose an indirect burden on the exercise of religion. Even assuming that the effect of the regulations is to add expense to the practice of religion, this indirect burden does not invalidate the zoning regulations if the state cannot accomplish its purpose by means which do not impose such a burden.... [T]he financial consequences to the church do not rise to infringement of religious freedom. As the court stated in *Lakewood*, "the First Amendment

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201 . Citing *Cantwell v. Connecticut*, 310 U.S. 296,303 (1940), for the hackneyed point that the First Amendment embraces two concepts—freedom to believe and freedom to act—the first being absolute, but the second subject to government regulation. Perhaps sensing some archaism in this venerable dichotomy, the court also quoted *Grosz v. Miami Beach*, *supra*, "The belief/conduct distinction has survived."

202 . *Lakewood Jehovah's Witnesses v. Lakewood, supra.*

203 . *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961).

> does not require the City to make all land or even the cheapest or most beautiful land available to churches." We agree....
>
> We hold that the [regulations in question] do not violate the Church's First Amendment rights.... [T]here is no infringement of the Church's religious freedom. A church has no constitutional right to be free of reasonable zoning regulations nor does a church have a constitutional right to build its house of worship where it pleases.[204]

A significant dissent was written by Circuit Judge McKay that will stand here for the articulate antithesis of the views of the majority of this court and of the *Lakewood* and *Grosz* courts. Unlike them, it showed some understanding of the religious enterprise and its needs and did not treat them with the superficiality of the "belief/action" dichotomy.

> Places of worship have in almost all religions been as integral to their religion as have Sunday school, preaching, hymn singing, prayer, and other forms of worship which we have traditionally recognized as the "exercise" of religion. Churches are the situs for the most sacred, traditional exercises of religion: baptisms, confirmations, marriages, funerals, sacramental services, ordinations, and rites of passage of all kinds.
>
> In the free exercise context, churches serve much the same function as public forums do in the free speech context. Since time immemorial, citizens have gathered in public forums for speech and assembly purposes under the highest level of constitutional protection. The right to assemble or speak in a public forum cannot be absolutely prohibited, and may only be infringed by narrowly-drawn time, place, and manner restrictions. Similarly, the place of worship is central to the first amendment concept of free exercise as essentially the only place of religious "assembly" and the central place for the expression of religious "speech." Thus, when government agencies seek to encumber the use of buildings for religious worship, they are, in fact, impinging on speech, assembly, and religious exercise through the use of zoning ordinances....
>
> What is at stake is the power of the County, through zoning ordinances, to prohibit legitimate and protected first amendment uses at particular locations. Recently, in a similar case, the Fifth Circuit refused to apply that kind of distinction where a Muslim church sought to use an existing building as its place of worship.[205] Indeed, if first amendment free exercise rights are not triggered by the impingement on places of worship, the right of free exercise of religion is for practical purposes subject to broad infringement in all of its aspects except perhaps belief....
>
> Property is not an unlimited commodity. Congregations pay an onerous price in time, money, and convenience when forced to select worship sites at a considerable distance from their homes. *See, Islamic Center, supra*.

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204 . *Messiah Baptist Church v. County of Jefferson, Colorado*, 859 F.2d 820 (CA10 1988).

205 . *Islamic Center v. Starkville, supra.*

Although other sites may be available, the first amendment demands that we know where, how many, how suitable, how convenient, and at what cost before we properly can judge the burden on exercise as compared to the burden on the state's legitimate interests.

In cases involving the free exercise clause of the first amendment, courts typically have engaged in the characterization game by declaring which activities are "secular," "fundamental," or "integral." Thus, it is not surprising that at least one other circuit, in a case with facts and issues very similar to the one before us, has characterized this type of dispute as one concerning the mere construction of a building and thus a secular activity. *See Lakewood, supra.* In *Lakewood*, as a result of the zoning ordinance, the congregation was prevented from building a church on its own property. The Sixth Circuit did not justify or explain its characterization, but rather declared that the restrictive zoning ordinance did not force the congregation to abandon its beliefs through financial coercion or criminal penalty and did not tax the exercise of religion. No consideration was given to the magnitude of the financial or convenience burden which an alternate site location might impose. It is not self-evident that an attempt to acquire and use an alternative site is always a trivial burden. Nor is it self-evident that a congregation's attendance pattern can be easily accommodated to an alternate site without substantial individual and collective burden.

Here the majority opinion does not adopt quite such an extreme view but nonetheless targets the activity as implicating only minor or insignificant free exercise interests. Naturally, if we characterize the restricted activity as secular, there is no point to this litigation or to a discussion of the restrictions, since the minimum threshold of a rational basis, required in zoning cases not implicating the first amendment, can be satisfied so simply as to not admit of argument.[206] A colorable claim of infringement upon first amendment liberty demands more.... The facts of this case easily present such a colorable claim.

To claim that this case is only concerned with the construction of a building is to miss the point. Surely no one would contend that it would be constitutional to zone an entire state or for that matter the whole country so as to prohibit churches. Even the justices who would broadly uphold zoning of some first amendment activities would not have endorsed such a sweeping view. Congregants would be free to hold whatever religious beliefs they chose, but none would have a house of worship in which to come together. Such a situation would undoubtedly infringe upon "free exercise."

* * *

The rational basis standard... trivializes the burdening role which zoning can and does play in the exercise of religious expression. On the other hand, the complexity of meeting the legitimate public concerns [implicated in zoning land use] suggest that applying the most rigid compelling state

206. *See Village of Euclid v. Ambler Realty Co., [supra]* (1926).

> interest test would be improvident when there is available a set of well-developed standards cautiously worked out for balancing these unavoidable and constantly recurring conflicts between the two constitutionally acknowledged interests....
>
> Through a solid body of precedent, the Supreme Court has developed a standard for reviewing government regulations which infringe on first amendment interests. In those cases the Supreme Court has applied a time, place, and manner test to speech and assembly cases. In my view, cases involving the effect of zoning on religious "exercise" are properly subject to the same analysis. It is not apparent to me how place-of-worship cases can be analytically distinguished from other speech and assembly cases involving time, place, and manner restrictions....
>
> If it is conceded, as I believe it must be, that using buildings as places of worship is not a mere fringe or tangential part of religious exercise but rather central to the congregational worship experience, then it seems much easier to select and apply appropriate standards to the case which is before us....
>
> * * *
>
> Under the appropriate test, the zoning authorities would have the burden of demonstrating that the access and erosion problems cannot be otherwise solved. The County would have to demonstrate that the Church represented a greater erosion hazard than agriculture or, particularly, feed yards in the same zone. But even if the [County] makes this showing, [its] burden would also require a showing that the erosion hazards could not be ameliorated in the site plan sufficient to satisfy the minimum standards required for other activities permitted as a matter of right in the same zone. The same analysis is true of fire protection. A requirement in the use permit that an automatic sprinkler system be installed comes to mind.
>
> * * *
>
> If the correct standard is applied to this case, I conclude that the original ordinance that excluded all church uses from the zone, and the amended 1978 version that permitted churches, subject to essentially standardless permit requirements, were in fact invalid on their face.... I would remand the case to the trial court with the guidance herein given....[207]

Cogent as Judge McKay's dissent seems, it did not persuade Judge Wade Brorby, who wrote the majority opinion, or Judge Deanell Tacha, the third member of the panel. Neither did it appear to sway the next circuit court considering a zoning case involving a church, the last and latest in this series. It was ironic but understandable that Judge McKay had to turn to the law of speech and assembly to try to make his point about the scope of the constitutional protection of the free exercise of religion. Many judges now sitting, like many attorneys appearing before them (some of whom in turn may become judges), have little feel for the law of church and state. They may read up on the words, but they don't know the music. In matters of religion, they

207 . *Messiah Baptist Church, supra,* McKay, J., dissenting.

seem tone-deaf, as a professor of law at Yale, Stephen L. Carter, pointed out in his fine book, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion*.[208] Douglas Laycock made a similar point:

> Recently I had lunch with the dean of a major law school—a church affiliated law school, although I should say it is a highly acculturated one. He said that nothing in the recent religion cases affected the core of religious exercise, and he was unmoved by examples. He doubted that Native American peyote use was really worship; he doubted that a ban on communion wine would affect core Catholic worship. Finally I said to him, "You can talk in those terms and think in those ways only because you have never spent much time talking with people who are seriously religious." He thought about it a minute and said, "I've never known anybody who was seriously religious." From that sort of ignorance, we get fundamental misperceptions of what is at stake.[209]

The task of litigants in this area—and it is often an uphill one—is to try to help lawyers and judges to understand *what is going on* in the religious behavior at issue by relating it to other, more conventional usages or—as did Judge McKay—by analogizing to the speech and assembly guarantees of the First Amendment.

e. *Christian Gospel Church v. San Francisco* (1990). The Christian Gospel Church applied for a conditional use authorization to establish a church in a single-family residence in a part of San Francisco zoned for single-family residences. It stated that the congregation would include not more than fifty people. The application was opposed by a neighborhood association that entered a petition signed by 190 residents of the applicants' vicinity. The petition stated, among other things, that "There are too many churches in our residential neighborhood. There are vacancies [in nearby commercial areas] that would be better suited for this church...." Traffic, noise and insufficient parking space were also cited. The City Planning Commission denied the application, reasoning that the church could create noise, traffic and parking problems and that it would adversely affect the character of the neighborhood. The church took the matter to federal district court, which granted summary judgment in favor of the city. The Ninth Circuit Court of Appeals took note of what the other four circuits had done in such cases[210] but followed an approach already crafted in its own purview.

> The question of whether a zoning provision violates the free exercise clause is one of first impression for this circuit. We have articulated a general standard for evaluating the impact of a government provision on the exercise of religion[,] and we find that this test is appropriate for

208. (New York: Basic Books, 1993).

209. Laycock, "Summary and Synthesis," *supra*, 842.

210. See *Lakewood Jehovah's Witnesses v. Lakewood, Grosz v. Miami Beach, Islamic Center v. Starkville,* and *Messiah Baptist Church v. Jefferson County, supra*.

analyzing a challenge to zoning laws. This test involves examining the following three factors: (1) the magnitude of the statute's impact upon the exercise of the religious belief; (2) the existence of a compelling state interest justifying the imposed burden upon the exercise of the religious belief; and (3) the extent to which recognition of an exemption would impede the objectives sought to be advanced by the state.[211]

The impact on religion. The Church listed three reasons why it was burdened by the denial of a conditional use permit. All three of these reasons center around the importance of "home worship." First, the Church emphasized the importance of home worship in protecting minority religions from persecution. Second, the Church's expert witness stated that "[t]he fundamental belief in house church is that Jesus is soon coming again and nonresidential structures for worship are unnecessary and contrary to the belief." Third,... churches have a strong interest in a quiet environment and "have a valid interest in being insulated from certain kinds of commercial establishments."[212]

It is uncontroverted that the Church had, until applying for this permit, worshiped in the banquet room of a hotel. It is difficult for us to find a significant burden on religious practice if the Church had not previously been practicing home worship. The burden on religious practice is not great when the government action, in this case the denial of a use permit, does not restrict current religious practice but rather prevents a change in religious practice.

Most significantly, the Church has made no showing of why it is important for the Church to worship in this particular home. The government action in this case did not prevent all home worship. Rather, it involved the denial of a permit to worship in this specific home. The burdens imposed by this action are therefore of convenience and expense, requiring [the Church] to find another home or another forum for worship. We find that the burden on religious practice in this zoning scheme is minimal.

Government interest. A zoning system "protects the zones' inhabitants from problems of traffic, noise and litter, avoids spot zoning, and preserves a coherent land use zoning plan."[213] These concerns are particularly strong in this case since the Church is applying for nonresidential use in a residential neighborhood. San Francisco has a strong interest in the maintenance of the integrity of its zoning scheme and the protection of its residential neighborhoods.... [T]he use of that dwelling for worship services would bring traffic and noise problems to an otherwise quiet residential neighborhood.

Balancing the interests. The third prong of the free exercise test involves analyzing the extent to which recognition of an exemption from the government action would impede the objectives sought by the state. We

211 . *Callahan v. Woods*, 736 F.2d 1269, 1273 (1984), discussed at IVA9d.

212 . *Larkin v. Grendel's Den*, 459 U.S. 116, 121 (1982), discussed at VB4.

213 . *Grosz, supra.*

> have found that the burden on religious practice is minimal. The government's interests in not allowing an exception to the zoning provision are, in contrast, strong. We find that the burden on religious practice in this case does not warrant an exemption from the zoning scheme and affirm the finding of the district court....
>
> * * *
>
> The Church argues that the true reason for permit denial was neighborhood opposition.... Contrary to the arguments of the Church, neighborhood opposition to the granting of a conditional use permit is not unlawful and should be considered by the Planning Commission.... The views of the residents of the area surrounding the property are important for the Commission to consider in evaluating the impact of a permit on the neighborhood....
>
> [The Church] also claims that the provision requiring use permits for churches (and other forms of public assembly) but not other nonresidential uses, such as parks and child care facilities, violates equal protection. In order to prevail, the Church must make a showing that a class that is similarly situated has been treated disparately.... The Church was treated no differently than a school or community center would have been. We do not see any reason why churches alone should be treated differently than other types of assembly.
>
> We find that there is a rational basis for a law requiring all places of public assembly to obtain a conditional use permit before establishment in certain neighborhoods. These activities bring undesired noise and traffic problems to a neighborhood. There is no equal protection violation in such a zoning requirement.
>
> * * *
>
> The Church claims that the private [defendants] conspired to violate the Church's civil rights by circulating a petition, testifying before the Planning Commission and writing letters to the editor.... [T]he Neighborhood Association in this case was fully protected by the first amendment [right to petition the government for redress of grievances] when it campaigned against the granting of the permit.... [They] were doing what citizens should be encouraged to do, taking an active role in the decisions of government. Their involvement was certainly not actionable. We find that there was no conspiracy to deprive the Church of its civil rights.[214]

In this latest in the series of five holdings by federal circuits, we see the culmination of the trend in zoning law involving churches from "substantive neutrality" to "formal neutrality." The Ninth Circuit summarized the standard of formal neutrality in its inimitable conclusion: "The Church was treated no differently than a school or community center would have been. We do not see any reason why churches alone should be treated differently than other types of assembly."

214 . *Christian Gospel Church v. City and County of San Francisco*, 896 F.2d 1221 (CA9 1990).

Apparently the Ninth Circuit panel did not recognize that the first sixteen words of the First Amendment—"Congress shall make no law respecting an establishment of *religion*, or prohibiting the free exercise *thereof*"—by singling out a specific type of activity—religion—for explicit protection, might provide a reason "why churches alone should be treated differently." That does not mean that their interests should always prevail, but it suggests that "equal" treatment does not solve the problem. Religious bodies are identified by the religion clauses as entities that have their own unique needs and interests that are not the same as "other types of assembly," and that appropriate action toward them by government will sometimes seem to advantage them (as by protections of church autonomy considered in this volume) and will sometimes seem to disadvantage them (as in the denial of public funds for their operation.)[215]

The outstanding work on "substantive neutrality" is that of Professor Douglas Laycock, who has written:

> My basic formulation of substantive neutrality is this: the religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance.... I mean that religion is to be left as wholly to private choice as anything can be. It should proceed as unaffected by government as possible. Government should not interfere with our beliefs about religion either by coercion or persuasion. Religion may flourish or wither; it may change or stay the same. What happens to religion is up to the people acting severally and voluntarily; it is not up to the people acting collectively through government....
>
> Government routinely encourages and discourages all sorts of private behavior. Under substantive neutrality, these encouragements and discouragements are not to be applied to religion. Thus, a standard of minimizing both encouragement and discouragement will often require that religion be singled out for special treatment....
>
> We must keep in mind what neutrality is supposed to accomplish. Our goal is not to leave religion in a Hobbesean state of nature, nor to leave it regulated exactly to the extent that commercial businesses are regulated, with no extra burdens and no exemptions. Our goal is to maximize the religious liberty of both believers and nonbelievers.[216]

What would be the course of substantive neutrality with respect to zoning religious uses? It should be one of minimizing governmental encouragement or discouragement of religious behavior. Whatever that means, it is not what the Ninth Circuit did in this instance. Though it claimed to be using a neutral analysis that had been formulated in an excellent decision in that circuit—*Callahan v. Woods*[217]—its

215. Discussed at IIID.

216. Laycock, "Formal... Neutrality Toward Religion," *supra*, 993, 1001-1006 *passim*.

217. 736 F.2d 1269 (CA9 1984), discussed at IVA9d.

use of the formula was anything but neutral. To begin with, the formula focuses on "belief" rather than on "religion," which consists of much more than beliefs.

Religion consists of rites, myths, traditions, communities, interactions, shared attitudes and aspirations, of which "beliefs" are often the conceptual effluvia that describe, explain and perpetuate the communal experiences. The focus on "beliefs" is an intellectualized, creed-oriented European/Christian/Protestant idea of religion, and the belief/action dichotomy initiated by the nineteenth-century decision, *Reynolds v. U.S.*, has created a simplistic supposition about religion that has lingered too long in American law. It has led to absurdities like the Tenth Circuit's looking for a tenet in the creed of the Messiah Baptist Church requiring it to locate in Jefferson County farmland. Such a search, of course, dooms in advance the church's case to failure.

The Ninth Circuit contented itself with noting that the Christian Gospel Church had not previously been meeting in a house-church and therefore couldn't be too serious about it. That approach would keep religious groups frozen forever in their present form because they are not expected to change. What's good enough for them now ought to be good enough for them always. The Supreme Court rejected that notion in *Hobbie v. Unemployment Appeals Commission of Florida*, a case involving a plaintiff who was denied unemployment compensation because she would not work on her Sabbath, Saturday, but who had become a Sabbatarian after her employment. The state viewed her as the "agent of change" who had taken up a religion that interfered with her job. The court held that "[t]he First Amendment protects the free exercise rights of employees who adopt religious beliefs or convert from one faith to another after they are hired."[218]

In other words, religious behavior is free to change and cannot be straitjacketed by governmental expectations that it will always remain the same. Arguably it was because of the church's dissatisfaction with meeting in a hotel ballroom that they sought another setting and asked themselves what would be the proper place to worship in view of their conviction that Christ would soon be coming again, and fancy basilicas would not be needed by the faithful. That is as "religious," and probably more so, than continuing to meet in the hotel ballroom, but it won them no merit in the eyes of the court.

The Ninth Circuit panel reasoned further that even if the church believed it should meet in a single-family residence, it had not shown why it had to be *this* residence. Although the opinion does not reveal the status of the property, it is conceivable that the church wanted to worship in the residence in question because it *owned* it and not some other, but to the court, that was a matter of minor inconvenience. They could just "find another home or another forum for worship." Those who have had to buy and sell property know that that can be more than a minor inconvenience, not to mention a cause of serious expense.

218 . 480 U.S. 136 (1987), discussed at IVA7i.

A small congregation, struggling to meet the payments on a mortgage on their house-church, is told they cannot worship in it but must find another. The payments go on while they look for another in their price range. Where do they worship in the meantime? Back to the hotel ballroom, where they have to pay rent on top of their mortgage? And if they find an alternative residence, there will be the additional expense of two closings, with a time span between them that can run for months, when they could be paying for two mortgages during the overlap. Then they can start the conditional use permit process all over again, with possible frustration at the end once more. (But why can't they get that settled before they buy? Because many zoning authorities will not consider "hypothetical" applications from other than actual owners.)

On top of this protracted ordeal can accrue the vicissitudes that befall human enterprises. Some members of the congregation may become disenchanted with having to go back to the hotel. Others may grow weary of the increased expense and endless uncertainty. There may be fallings-away and internal schisms. It is not an easy thing to hold a small congregation together and keep it moving forward, let alone to undertake a major financial commitment. What must it have cost them in money, time and frustration to fight the City and County of San Francisco and the Neighborhood Association for nearly three years, through two federal courts, and then in the end to lose and have to start all over again? If that is not "discouragement by government," what is? That does not mean that the church ought to have its way without having to encounter any obstacles, but it does suggest that the court was being a bit cavalier to find that "the burden on religious practice in this zoning scheme is minimal"! Compared to what—the "Mormon wars"[219] or the Waco tragedy?[220]

But a different tone emerged when the court moved on to step No. 2: the government's interest was described, quoting *Grosz*, as protecting the zone's inhabitants from problems of traffic, noise and litter, avoiding spot zoning, and preserving a coherent land use zoning plan. All this was no doubt true, but it did not determine the importance of those activities on the constitutional scale. It simply described what the zoning regime was designed to do, with a rather circular twist at the end—a zoning system preserves a zoning system. Yet the court treated this recital as supplying the answer to its quest and announced as though self-evident and sufficient that "San Francisco has a strong interest in the maintenance of the integrity of its zoning scheme and the protection of its residential neighborhoods."

Moreover, "These concerns are particularly strong in this case since the Church is applying for nonresidential use in a residential neighborhood." In another part of the opinion (not quoted above), the court had noted that the city had granted twenty-five church permits in the four years preceding, but only three of them in residential areas. (It did not reveal how many—if any—had been denied.) So although the city's

219 . See discussion of the opposition by the federal government to the Mormon Church at IVA2.

220 . See discussion at § J below.

concern might be "particularly strong," it had not precluded three such arrangements just in the past few years. The instant application, then, was not totally unheard of, nor would granting it have been wholly unprecedented. The City's interest might be characterized (crudely) as 3/25ths or 12 percent, but that is not zero.

In the third step, the court purported to balance the two interests, but it simply restated the assertions it had already announced: "We have found that the burden on religious practice is minimal. The government's interests in not allowing an exception to the zoning provision are, in contrast, strong. We find that the burden on religious practice in this case does not warrant an exemption...." Both previous steps were little more than conclusory *ipse dixits*, and the third step added a final one. The court could as well have announced at the outset that the church was not entitled to second-guess the city and would have saved a lot of time and paper. Its performance was almost farcical compared to what Judge McKay (in dissent) in *Messiah Baptist* thought necessary for judicial weighing of competing constitutional values:

> Property is not an unlimited commodity. Congregations pay an onerous price in time, money, and convenience when forced to select worship sites at a considerable distance from their homes. Although other sites may be available [and we do not know that from the record in the San Francisco case], the first amendment demands that we know where, how many, how suitable, how convenient, and at what cost before we properly can judge the burden on exercise as compared to the burden on the state's legitimate interests.[221]

Needless to say, the appellate court would not engage in fact-finding, but it could remand the case to the district court to develop an adequate record for weighing competing constitutional causes, and then—if the case came up on appeal again—it would be in a position to do a more conscientious job of balancing.

Better yet, the court could vacate the city's denial of the application and direct it to explore whether conditions could be agreed on in the conditional use permit that would enable the church to utilize its property under reasonable time, place and manner restrictions that would minimize the noise, parking and traffic congestion, etc. If such conditions could not be worked out, then resort could always be had again to the courts.

Such a course was required by an appellate court in New York, quoting the lines appearing at the beginning of this section on zoning, "Every effort must be made to accommodate the religious use subject to conditions reasonably related to land use."[222]

> The record discloses that... the Town Board voted to deny the permit, without making any attempt to accommodate the proposed religious use.

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221 . *Messiah Baptist Church, supra.*

222 . *Holy Spirit Association v. Rosenfeld, supra.*

> This was improper and constituted an abuse of the Town Board's discretion, in that the Board ignored its affirmative duty to suggest measures to accommodate the proposed religious use.... [W]e observe that the accommodation of the religious use and maintenance of the public's safety, health and welfare could have been achieved by limiting the number of persons who could attend services or meetings at any given time, and by posting "no parking" signs along the street to prevent hazardous road conditions and by limiting the hours during which meetings... could be held, in conformity with the petitioner's religious practices.... [T]he Town Board is directed to issue the permit upon such reasonable conditions as will allow the petitioner to establish its house of worship, while mitigating any detrimental effects on the health, safety and welfare of the surrounding community.[223]

Such a course would mean substituting for the "formal neutrality" of the federal circuits and the California state courts the "substantive neutrality" of the New York and similar state courts—a course proposed by Judge McKay of the Tenth Circuit. Such a switch in doctrine would be unusual, but has occasionally occurred. Perhaps the Supreme Court might lead the way if at some time in the future it again becomes dominated by justices who are concerned to implement the rights guaranteed by the Bill of Rights. After all, "Our goal is not to leave religion... regulated exactly to the extent that commercial businesses are regulated, with no extra burdens and no exemptions. Our goal is to maximize the religious liberty of both believers and nonbelievers."[224]

f. *Lucas Valley Homeowners v. Marin County* (1991). With reference to the suggestion above that conditions could be agreed on in the conditional use permit that would minimize the impact of a religious use on the community, a case from northern California illustrates the adoption of that expedient, which has become "all the rage" in the realm of zoning religious uses.[225] A small Orthodox Jewish congregation, Chabad of North Bay, contracted to purchase a single-family residence in San Rafael in "bucolic" Lucas Valley[226] and sought a conditional use permit to convert the residence into a synagogue. A neighborhood civic organization, Lucas Valley Homeowners Association, opposed the permit and submitted petitions with 632 signatures of community residents expressing objections. Eventually the Board of Supervisors of Marin County approved the permit. The Homeowners applied to the Superior Court of Marin County, which granted a writ of mandate overturning the Board's action. Chabad of North Bay, as real party in interest, appealed the writ to

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223 . *Harrison Orthodox Minyan v. Town Board of Harrison*, 552 N.Y.S.2d 434 (1990).

224 . Laycock, "Formal... Neutrality Toward Religion," *supra*.

225 . Characterization by Marc Stern in letter to the author, Feb. 2, 1994.

226 . Characterization by their attorney, Sanford Jay Rosen, a longtime acquaintance of the author, who employed him in the late 1970s to handle appeals for the Sioux medicine man, Leonard Crow Dog, from federal convictions for his part in the American Indian Movement's occupation of Wounded Knee.

the Court of Appeal, which reversed the Superior Court and upheld the permit issued by the Board. It did so on the strength of the conditions imposed on the use of the property by the Board in granting the permit.

Use of the property was limited to daily and holiday prayer services (times and expected attendances specified); three holiday festivals (maximum attendance of fifty); adult classes (four days a week, maximum attendance of five) and lectures (three times per year, maximum attendance fifty); children's educational programs, Monday through Friday, for eighteen children, plus Hebrew school on Sundays for ten children; office staffed by four; ritual bath by appointment (three men per day, one woman per week); eleven life cycle and special events per year (maximum attendance fifty); and five "Friday Night Live" services for up to fifty persons.[227] The initial mechanism of enforcement was a log to be kept by Chabad listing all participants at every activity and their point of origin.

The Board exempted the premises from the local parking standards (based on square footage of the building) that required twenty-one off-street parking spaces, on the rationale that there were sixty-four on-street parking spaces not in front of private residences in the vicinity available on a first-come, first-served basis, and that the religious beliefs of the congregation prohibited their traveling by vehicle on the Sabbath or religious holidays. Thus, the synagogue would be primarily serving the needs of eighteen families living within walking distance, who would not need parking spaces. Chabad agreed that on the twenty-nine events during the year that might attract participants from farther away, it would take responsibility to assure that they did not park in front of neighboring homes. Noise was to be similarly restricted. No more than six outdoor or quasi-outdoor events would be held during the year; there would be no amplified music or live bands outdoors; outdoor activity was limited to the hours between 10:00 AM and 8:30 PM, except on Friday evening, when the closing hour was 9:00 PM. No more than six children were to be permitted outside at any one time during child-specific events.

Although Chabad had originally planned to expand its activities at the site, it announced that it would operate at its present level. It sought only to convert the second floor into a social hall, which the Board rejected, subject to reapplication after the first annual review. In order to qualify for the permit, "Chabad submitted, and agreed to, a project with a static congregation."[228] The permit had to be renewed each year for the ensuing three years, when any failure to conform to the stipulated mitigations could be cause for denial. The appellate court unanimously concluded:

> This case has occasioned intense emotion and advocacy on all sides. We have emphasized that the focus must be the use, as approved, and not the feared or anticipated abuse. There is ample leeway within the permit review mechanisms to correct or obliterate any substantial abuse. Should

227 . *Lucas Valley Homeowners v. Marin County*, 284 Cal.Rptr. 427, 431 (1991).

228 . *Lucas Valley Homeowners, supra.*

> the permit function as crafted, the tensions in this case, which on some level mirror the tension inherent in the religion clauses of our state and federal Constitutions, should abate.

While the Board of Supervisors was deliberating on the permit, one of the three who voted to grant it "expressed concern that certain *conditions* would inhibit Chabad members' free exercise of religion." Another was troubled by the "draconian conditions" attached to the permit, but voted to approve it.[229] They were right to have misgivings on this count. The conditions do constrict the operation of the religious group, in effect freezing it in its present size and form. The congregation accepted those conditions in order to obtain the permit, presumably in good faith (as the appellate court rightly assumed). But five or ten years later, after the permit had been three times renewed and became permanent, would things still look the same?

Perhaps a new rabbi might arrive who "knew not Joseph,"[230] and new expectations and aspirations might emerge in the congregation not envisioned (or allowed) in the conditional use permit. What would happen then? Would small deviations from the strict conditions be attempted, to be followed by larger ones? Would the rancor of the neighbors be aroused again? Even with the best will on all sides (which is a lot to hope), it would be inherently an unstable situation. Human groups—especially religious groups—in their development over time are anything but "static." They may shrink or they may grow, but they seldom for long remain the same, and it is an unreasonable expectation that they should do so. To attempt to encapsulate, to encyst, a religious group's natural development by legal strictures on its use of its land is surely to impair its free exercise of religion, as the uneasy supervisor rightly suspected.

It is possible that the supervisors did not intend to bind the congregation to a static state forever, but simply wanted to insure for a trial period of three years its stability in the community and its acquaintance with the legitimate expectations of its neighbors. That may not necessarily make for peace, but at least it might "give peace a chance." Not only rabbis—and congregants—but neighbors come and go, and the composition of the parties might well shift over the years, perhaps for the better with respect to their relationships, as they learned to take each other more for granted.

Whatever restrictions the conditional use permit imposed, they were voluntarily accepted by the congregation. So any claims of impairment of their free exercise rights were freely waived—if by "freely" one includes the leverage of loss of use of one's property for the purposes for which it was obtained. But should the congregation have entered into such an arrangement that purported to bind its successors in perpetuity to the conditions agreed upon for the use of their property? Should any congregation purport to do so?

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229 . Ibid. at 437; emphasis in original.

230 . Exodus 1:8 (AV).

If conditional use permits are coming into more common usage as a means of making peace—or at least truce—between the conflicting interests of a religious group seeking to settle in a residential community and those of the people already resident there, then both sides should realize what they are getting into. The religious group is likely to have more vitality and longevity than the local taxpayers' association and so to be likely to bestir itself in new directions and to grow in new ways. On the other hand, it is not entitled simply to abrogate the understandings entered into as a condition of its entrance. Sometimes new "contracts" can be negotiated between changed parties, or those most immediately affected can be bought out to develop a "buffer" zone. If irreconcilable incompatibilities should emerge, the congregation may ultimately be obliged to relocate—as others have before them (a hurdle that is difficult, but not impossible to surmount)—"leaving [their] outgrown shell by life's unresting sea."

g. *Western Presbyterian Church v. Board of Zoning Adjustment* (1994). A number of struggles have been waged over efforts by churches to give aid and succor to the needy, especially the homeless in large cities. In one such encounter, a Presbyterian Church in Washington, D.C., was balked by the zoning authorities in its efforts to feed the hungry. This case was unusual in that it involved a new church structure being erected by the International Monetary Fund at 2401 Virginia Avenue, N.W., in exchange for the church's old premises at 1906 H Street, N.W. The church obtained a building permit for a new church, but made no specific reference to the operation of a feeding project at the site.

Even before the congregation moved to the new location, the Foggy Bottom Association and the Advisory Neighborhood Commission complained to the zoning administrator about the church's plans to provide food for the needy at the new church building. The zoning administrator notified the church that such a use was not permitted in the zone where the new building was located. This ruling was predicated upon the administrator's conclusion that the feeding program was not an "accessory use... customarily incidental to the uses otherwise authorized." After pursuing its administrative appeals in vain and seeing the date for its scheduled move approaching, the church took the issue to the federal district court for emergency relief, based on its free exercise rights under the First Amendment. The federal district court was receptive to its claims.

> Although their goals may be laudatory [laudable?], zoning ordinances may not infringe upon constitutionally protected rights.... The issue before the Court is whether the District of Columbia's zoning regulations... preclude the Church from feeding the city's homeless[,] which the Church contends is a valid exercise of its First Amendment rights and rights guaranteed to the Church under the [Religious Freedom Restoration Act].
>
> * * *

The [Church] maintain[s] that ministering to the needy is a religious function rooted in the Bible, the constitution of the Presbyterian Church (USA), and the Church's bylaws.[231]...

It must be noted that the concept of acts of charity as an essential part of religious worship is a central tenet of all major religions.[232]...

The plaintiffs have made a more than adequate showing that their feeding program... is motivated by sincere religious belief. Indeed, the defendants have not challenged the plaintiffs on this point. Accordingly, the Court finds the Church's feeding program to be religious conduct falling within the protections of the First Amendment and the RFRA.

* * *

If a law or governmental action is found to substantially burden the free exercise of religion, the government must demonstrate that it has a compelling governmental interest in such a burden *and* that the interest could not be protected by a less restrictive means....

At no point have the defendants challenged the plaintiffs' right to locate the Church at 2401 Virginia Avenue.... Once the zoning authorities of a city permit the construction of a church in a particular locality, the city must refrain, absent extraordinary circumstances, from in any way regulating what religious functions the church may conduct. *Zoning boards have no role to play in telling a religious organization how it may practice its religion. A city cannot use its zoning laws to regulate the way a particular religion offers its prayers or the way a religion celebrates its holidays* [emphasis added]....

Unquestionably, the Church's feeding program in every respect is religious activity and a form of worship. It also happens to provide, at no cost to the city, a sorely needed social service. The secular benefits inure to the needy persons who partake of the free breakfasts; the members of the Church benefit spiritually by providing the service.

It is clear that the adverse decisions of the zoning [authorities] were in response to complaints brought by neighborhood organizations. The reasons given by those groups were that the homeless attracted to the neighborhood by the feeding program would contribute to crime in the neighborhood. It is contended that this would result in a decline in property values.

The Court is not insenstitive to the community's concerns. This is an outstanding neighborhood, only a short distance from the Kennedy Center and the upscale Watergate housing complex. The citizens who reside in this area are proud of their neighborhood and are entitled to be secure in their homes and workplaces. They are entitled to walk the streets without being harassed by panhandlers or assaulted in any way.

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231. The court quoted passages cited from the church's bylaws and the Bible (Matt. 25:35, 40-43, 46; Ezek. 18:5-9; James 2:14-17).

232. Citing teachings of Islam, Hinduism and Judaism from Krim, K., *Dictionary of Living Religions*, pp. 347, 316, 387-8 (1981).

> The Church recognizes its responsibility to the community and has represented that it will take all reasonable steps to assure the program will not result in harm to its congregation and neighbors.... [I]f.. the feeding program becomes a nuisance, upon a proper showing this Court will appropriately modify its final order....
> [T]he Court takes judicial notice that within three blocks of the Church's premises is a popularly priced restaurant. The Court knows of no attempt by the zoning authorities to dictate which persons may or may not be served at that facility. It seems rather incongruous that no objection could be raised if a needy person can buy his or her food, but it becomes inappropriate if that needy individual can obtain food at no cost from a benevolent source. The Court wonders what position authorities would take if instead of providing the meal on its premises, the Church provided the needy with funds and sent them to the nearby restaurant to be fed.
>
> It is difficult to imagine a more worthwhile program. The federal government and the District of Columbia have been unable to deal with the problem of the homeless, but here, a private religious congregation is spending its own funds to help alleviate a serious social problem. It is paradoxical that local authorities would attempt to impede such a worthwhile effort....
>
> The [Church has] demonstrated that the [City's] actions substantially burden their right to free exercise of religion in violation of the First Amendment and the Religious Freedom Restoration Act of 1993. Accordingly, the [Church is] entitled to prevail....[233]

This was a judicial opinion more in the vein that one might wish the law to take. The court's reproach to the city for standing in the way of good-hearted people who were trying as a matter of religious service to do what the city under its civic duty was lamentably failing to do was a note much needing to be heard in zoning disputes.

Even when churches are not engaged in material services to the community, they are potentially a source of community stability and betterment. Their primary service to any community is not charity but *religion*; that is, they help some people (their adherents) to make sense of their lives and to find meaning in their situations. The worth of religion is not dependent upon utilitarian by-products, and it should not be judged on them. By its *religious* ministrations it is performing a function essential to the survival of society, which no other type of entity can perform, and thus *is entitled to be let alone by society* in pursuance of that function. Governments and courts are not equipped to determine whether that function is being performed effectively at a given time by a given religious organization, since only the adherents thereof are in a position to judge whether their religious needs are being met (and even

233. *W. Presbyterian Church v. Bd. of Zoning Adjustment*, 862 F. Supp. 538 (D.D.C. 1994) (Sporkin, J.).

they may not be fully able to discern that in the short range).[234] So it behooves government to accommodate religious undertakings wherever possible, so long as they are sincere, do not actually impair public health and safety or violate the rights of others.

234 . For further exposition of this argument, see VF5 or Kelley, D.M., *Why Conservative Churches Are Growing* (New York: Harper & Row, 1972, 1977; Mercer Univ. Press, 1984), chs. 3, 4.