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ZONING AND THE LOCATION OF RELIGIOUS ESTABLISHMENTS

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I. INTRODUCTION

Zoning regulation has begun to run into challenges on a number of grounds. Of increasing significance are challenges based on the free speech and free exercise clauses of the first amendment.[1] Although both sets of rights are of substantial importance, it is interesting to note that the Supreme Court has spoken at great length on the subject of zoning and free speech[2] as have the lower federal courts.[3] In recent years, however, the Court has consistently declined to hear zoning cases involving the free exercise clause.[4]

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[1] *See* Pearlman, *Zoning and the First Amendment*, 16 URB. LAW. 217 (1984) (discussion of issues relating to free speech and land use).

[2] *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981); Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976).

[3] *See* Avalon Cinema Corp. v. Thompson, 667 F.2d 659 (8th Cir. 1981); John Donnelly & Sons v. Campbell, 639 F.2d 6 (1st Cir. 1980), *aff'd*, 453 U.S. 916 (1981); Entertainment Concepts, Inc. v. Maciejewski, 631 F.2d 497 (7th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981); Alexander v. City of Minneapolis, 531 F. Supp. 1162 (D. Minn. 1982); Basiardanes v. City of Galveston, 514 F. Supp. 975 (S.D. Tex. 1981), *aff'd in part and rev'd in part*, 682 F.2d 1203 (5th Cir. 1982); Purple Onion, Inc. v. Jackson, 511 F. Supp. 1207 (N.D. Ga. 1981).

[4] *See* Grosz v. City of Miami Beach, 721 F.2d 729 (11th Cir. 1983), *cert. denied*, 469 U.S. 827 (1984); Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303 (6th Cir.), *cert. denied*, 464 U.S. 815 (1983); Marsland v. International Soc'y for Krishna Consciousness, 66 Haw. 119, 657 P.2d 1035, *appeal dismissed*, 464 U.S. 805 (1983); Lubavitch Chabad House of Ill., Inc. v. City of Evanston, 112 Ill. App. 3d 223, 445 N.E.2d 343 (1982), *cert. denied*, 464 U.S. 992 (1983); Medford Assembly of God v. City of

The refusal to hear cases in this area presents a number of problems. Unlike the area of free speech where there is substantial, although sometimes confusing, federal precedent to provide guidance, the domain of the free exercise clause involves mostly state court decisions. These state court decisions, based largely on interpretations of the police power rather than the free exercise clause, reflect the law as it has developed in particular jurisdictions. This means that the power of a local jurisdiction to control land use where religious institutions are concerned may differ significantly from state to state, even though free exercise of religion is a federal constitutional right which was deemed applicable to the states through the fourteenth amendment as long ago as 1940 in *Cantwell v. Connecticut*.[5] Indeed, certain positions have become specifically identifiable with certain states: there is a New York position, a California position, and so forth.

This situation might be understandable if there were relatively few zoning cases. On the contrary, the use of constitutional arguments to raise challenges to zoning ordinances has increased. The number of freedom of religion cases has also increased; thus it seems almost shocking that in 1983 a federal court, deciding a free exercise question involving the exclusion of all church buildings from residential areas of a city, could state that "no other federal circuit court has resolved the question."[6]

Undoubtedly, there are reasons for the current state of affairs and such reasons will be discussed in this article. First, this article will examine the free exercise clause in the light of its underlying values. Next, the various positions taken by state and federal courts in relation to zoning regulation and the free exercise clause will be examined. Finally, some suggestions regarding a way out of the doctrinal thicket that envelopes the area at the moment will be offered.

II. THE FREE EXERCISE CLAUSE

The first amendment to the United States Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[7] As the Supreme Court has noted, "[t]he language of the Religion Clauses of the First Amendment is at best opaque, particularly when compared with other portions of the Amendment."[8] Nonetheless, there has been sufficient law produced under the cases to warrant some generalizations. Unfortunately, very little of this

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Medford, 72 Or. App. 333, 695 P.2d 1379, *cert. denied*, 474 U.S. 1020 (1985).

[5] 310 U.S. 296, 303 (1940).

[6] *See Lakewood*, 699 F.2d at 304.

[7] U.S. CONST. amend. I.

[8] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

law pertains to the land use context, and land use law has sufficiently distinct characteristics such that it is difficult to apply to it a general branch of law.[9]

An analysis of the free exercise clause[10] begins with the notion that the clause prevents governmental regulation of religious beliefs.[11] Therefore, the government cannot compel affirmation of belief[12] or discriminate against individuals who hold abhorrent views.[13] In addition, it cannot use the taxing power to inhibit dissemination of religious views.[14]

If a state government regulation interferes with the free exercise of religion, this regulation can be upheld only upon a showing that it is justified by a compelling state interest.[15] This means that only "those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[16] Moreover, a regulation which is neutral on its face may be applied in a manner which is unduly burdensome to the free exercise of religion and, thus, may run afoul of the clause.[17] Reasonable state regulation of religion, however, is allowed if it is based on purely secular considerations and not on religious belief.[18] Finally, the free exercise clause cannot be used to dictate how government procedures will be conducted.[19] In short, the courts are to chart a course that preserves religious freedom and yet avoids a semblance of established religion.[20]

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[9] *See generally* Pearlman, *supra* note 1, *passim* (discussion of the free speech aspects of the first amendment); Pearlman, *Section 1983 and the Liability of Local Officials for Land Use Decisions*, 23 URB. L. ANN. 57, 88-101 (1982) (federal approach to local zoning actions).

[10] In general, the establishment clause will not be involved in land use cases. A discussion of the relationship between the free exercise and establishment clauses is found in Reynolds, *Zoning the Church: The Police Power Versus the First Amendment*, 64 B.U.L. REV. 767, 797-805 (1985).

[11] *See* Sherbert v. Verner, 374 U.S. 398 (1963); Cantwell v. Connecticut, 310 U.S. 296 (1940).

[12] *See Sherbert*, 374 U.S. at 402; Torcaso v. Watkins, 367 U.S. 488, 495 (1961); Braunfeld v. Brown, 366 U.S. 599, 603 (1961).

[13] *See* Fowler v. Rhode Island, 345 U.S. 67, 70 (1953).

[14] *See* Follett v. Town of McCormick, 321 U.S. 573, 578 (1944); Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943).

[15] United States v. Lee, 455 U.S. 252, 257-58 (1982); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 718 (1981); Wisconsin v. Yoder, 406 U.S. 205, 214 (1972).

[16] *Yoder*, 406 U.S. at 215.

[17] *See id.* at 220. *Cf.* Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970) (must look to both purpose and effect).

[18] *See Yoder*, 406 U.S. at 219-20.

[19] *See* Bowen v. Roy, 476 U.S. 693 (1986) (government can require persons applying for Aid to Families with Dependent Children to furnish social security numbers in spite of belief that assigning a child a number will affect the child's spirit).

[20] *See Yoder*, 406 U.S. at 221 (citing Walz v. Tax Comm'n, 397 U.S. 664, 672 (1970)).

III. THE STATE CASES

As noted above, the vast majority of cases relating to zoning regulation and the free exercise clause are state cases. There are two principal lines of decision which have become notable: the New York and the California cases. They represent extremes. Other states tend to fall into one of the two camps; relatively few of those other states present a clear and independent rationale for their decisions.

A. The New York Position

The most restrictive position, as well as the majority position, taken by the states is that of New York. This position gives considerable deference to religious uses and is reflected in a long line of cases beginning in 1956 with *Community Synagogue v. Bates*.[21] In *Community Synagogue*, a synagogue applied for a change of use permit, which would allow the transformation of a one-family dwelling in a residential district into a church use, and requested a number of variances as well. The use was to be solely for public worship and other "strictly religious uses"[22] including a religious school and men's and women's social clubs.

After finding evidence indicating that the building would not meet fire laws, the town board denied the application and the decision was upheld by the appellate division.[23] The board made a number of findings concerning the proposed use, including the fact that the use would serve other than religious purposes and that the use was out of character with the district and, thus, would not promote the general welfare.

The court of appeals rejected both of these contentions and concluded that religious uses include social groups and more than pure activities of worship. As to the findings respecting the character of the area, the court of appeals stated that no factual foundation for such findings was discovered in the record. The court also held that the board could not require the synagogue to submit plans for a zoning change which showed that the facility would comply with the building code's requirements for fire safety.

If the court had merely stopped at this point, *Community Synagogue* would be of relatively little importance; the court could have simply concluded that the board misinterpreted its own ordinance or placed unreasonable restrictions on the applicant—restrictions that might have been unreasonable for a non-religious application as well. The court, however, went on to equate its decision with the essence of religious freedom: "The men and women who left Scrooby for Leyden and eventually came to

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[21] 1 N.Y.2d 445, 136 N.E.2d 488, 154 N.Y.S.2d 15 (1956).
[22] *Id.* at 448, 136 N.E.2d at 490, 154 N.Y.S.2d at 17.
[23] *Id.* at 450, 136 N.E.2d at 491, 154 N.Y.S.2d at 19.

Plymouth in order to worship God where they wished and in their own way must have thought they had terminated the interference of public authorities with free and unhandicapped exercise of religion."[24]

The court rejected the argument that the village had the right to refuse a religious use at a "precise spot." This, the court concluded, would give the village the right to determine exactly where a religious establishment could be located and such action by the village would interfere with the free exercise clause of the New York Constitution. This conclusion represents a jump across a vast gap in logic since no such issue was really presented in the case, but it was not until later cases that the court would articulate its reasoning more firmly.

In a similar case decided the same day, *Diocese of Rochester v. Planning Board*,[25] the New York court further confused the issues. In this case, the court did not base its decision on the free exercise clause but, presumptively, reached its decision by using traditional police power standards.[26] Under an ordinance allowing certain uses including fire stations, municipal buildings, police stations, park buildings, and educational or religious buildings if approved by the planning board, the Town of Brighton denied a permit for the construction of a church. The board concluded that, since the area in question was almost totally developed with residential property, a church would change the character of the area; good planning required that churches be built in future subdivisions which could be properly designed to accommodate such churches.

The court concluded that wholly excluding a church from a residential area bore no reasonable relationship to the police power. From the board's reluctance to allow a church in this built-up area, the court inferred that the board was acting on the principle that churches could only be constructed in sparsely populated areas. In addition, the court felt that, in light of the purposes of a church, the fact that there would be "pecuniary loss to a few persons"[27] should not bar church uses; the loss of tax revenue, since under New York tax law churches were exempt from property taxation, was irrelevant; and increased noise and traffic congestion was an insufficient reason for denying a permit to a church. The

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[24] *Id.* at 458, 136 N.E.2d at 496, 154 N.Y.S.2d at 26.

[25] 1 N.Y.2d 508, 136 N.E.2d 827, 154 N.Y.S.2d 849 (1956).

[26] *Id.* at 526, 136 N.E.2d at 837, 154 N.Y.S.2d at 863. For procedural reasons, the court did not reach the constitutionality of the ordinance and decided the case on traditional police power grounds. *Id.* The lower courts found that constitutional issues could not be raised since the case was an attack on the discretion of the town planning board and that this attack assumes the constitutionality of the ordinance. *Id.* at 519, 136 N.E.2d at 832, 154 N.Y.S.2d at 856. The court of appeals, in addition, decided not to consider whether the standards under which the board decided the case were unconstitutionally vague.

[27] *Id.* at 524, 136 N.E.2d at 835, 154 N.Y.S.2d at 861.

court, noting that the "church is the teacher and guardian of morals,"[28] clearly gave a substantial weight to the church's role in society.

Community Synagogue and *Diocese of Rochester*, viewed together, reveal the position of the New York courts toward land use restrictions on religious establishments. In at least one subsequent case, however, a New York court recognized that communities do have valid police power concerns in connection with religious establishments, which concerns must be balanced with religious expectations under the free exercise clause. The fact that this balance is not exactly an even one was clarified by the New York Court of Appeals in *Westchester Reform Temple v. Brown*.[29] There the court stated that land use considerations are "simply . . . 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 worship in a community."[30] This language reinforces the notion that New York courts consider churches so vital to the public interest that, despite efforts to exercise authority under the police power, communities are virtually compelled to allow churches in residential districts. This is certainly an extraordinary notion, especially since other critical uses, such as hospitals and schools, do not necessarily have a similar status. Moreover, it is submitted that it is one thing for the court to apply the free exercise clause but quite another to apparently usurp a community's ability to determine what constitutes public health, safety, morals, and welfare.

There is still room under *Westchester Reform* for a community to place restrictions on religious establishments by exercising police power authority but, where there is an irreconcilable conflict, regulation must yield to religion. The extent to which this doctrine can be carried is unclear since there must certainly be circumstances (for example, if very serious traffic hazards could occur) where the court would agree that the police power must prevail. A case of this type, however, remains to be heard by the New York Court of Appeals. One cannot be sanguine about this situation because in *Jewish Reconstructionist Synagogue, Inc. v. Incorporated Village of Roslyn Harbor*,[31] the New York Court of Appeals held that a town may not deny a variance with respect to setback lines to a religious establishment in a residential area before the town has made

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[28] *Id.* at 526, 136 N.E.2d at 837, 154 N.Y.S.2d at 862 (citing State *ex rel.* Synod of Ohio v. Joseph, 139 Ohio St. 229, 39 N.E.2d 515 (1942)). It should be noted that while *Synod* seems to support the New York case, there was evidence in that case that the area was not built up and that the church in question had made substantial efforts to deal with traffic, noise, and congestion. *Synod*, 139 Ohio St. at 247-49, 39 N.E.2d at 523.

[29] 22 N.Y.2d 488, 239 N.E.2d 891, 293 N.Y.S.2d 297 (1968).

[30] *Id.* at 496, 239 N.E.2d at 896, 293 N.Y.S.2d at 304.

[31] 38 N.Y.2d 283, 342 N.E.2d 534, 379 N.Y.S.2d 747 (1975), *cert. denied*, 426 U.S. 950 (1976).

serious attempts to mitigate impacts. It is especially relevant that the court held in favor of the synagogue even though only four percent of its members lived in the town. The court so held despite the fact that the zoning board had not been given the authority to vary setback requirements and had found that, even if it had the power, it would have denied the variance because of the impacts created by the synagogue on traffic and the lack of sufficient water pressure in nearby fire hydrants.

The court touched all bases in its decision. First, the court concluded that the ordinance required the board to turn down a variance request by a religious institution if any detrimental effect were possible. In addition, the court engaged in a tortured example of logic. The synagogue would sit twenty-nine feet from its property line if the variance was granted, instead of 100 feet if it were not. According to the court, the ordinance required homes to be twenty-five feet away from the property line. Therefore, the minimum requirement for separation between a church and a home would normally be 125 feet. Since, if the variance was granted, the nearest house would be 106 feet away, the court concluded that there would be "a mere 19-foot discrepancy between reality and the village's own statutory ideal."[32]

Impacts between a church and a property, however, are not confined to impacts between the church and the house alone. It seems logical for a community to conclude that adverse effects could arise from church buildings less than 100 feet from a property line, regardless of the distance of the church from any house. By turning the separation from property line requirement into one based on distance from living quarters, the court, attempting to justify its approach, misses the point.

Dissenting views were also expressed and sounded the call that "the time has come . . . to breathe vitality into the so far lifeless" doctrine that churches can be subject to appropriate restrictions.[33] The dissenting judges urged that New York should adopt the view that religious institutions may be subject to reasonable regulation, especially in a case where there is no total exclusion from a residential district. They accepted the notion that churches occupy a special position but pointed out that, in many cases in the past, issues have been examined from the standpoint of religious users rather than uses. Religious and non-religious uses should be examined in the same manner; many religious uses are no different from similar uses by non-religious bodies.

The force of the court of appeals' decisions has been such that the

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[32] *Id.* at 290, 342 N.E.2d at 540, 379 N.Y.S.2d at 755.

[33] *Id.* at 292, 342 N.E.2d at 541, 379 N.Y.S.2d at 757 (Jones, J., dissenting). The doctrine of appropriate restrictions refers to language of Judge Froessel in Diocese of Rochester v. Planning Board, 1 N.Y.2d 508, 526, 136 N.E.2d 827, 836-37, 154 N.Y.S.2d 849, 862-63 (1956).

lower courts have continued to follow the higher court,[34] with only a rare case resulting in a decision which is unfavorable to a church. In *Holy Spirit Association for the Unification of World Christianity v. Rosenfeld*,[35] a lower court denied a request by a church to establish a training and recruitment center in a town. Although stressing the community's duty to try to minimize adverse impacts on the town and simultaneoulsy make every effort to accommodate a religious use (even where an unpopular church provokes hostile reaction from the community),[36] the court found that a religious institution's right to special treatment in zoning will not survive misrepresentation, fraud or deceit. In this case, the church made a number of misrepresentations. It promised that it would not conduct workshops while its permit application was pending but, in fact, conducted ten to twelve such events. The church also agreed that no more than three people unrelated by blood or marriage would reside in the church while the application was pending. Nonetheless, evidence revealed ten beds in the church, and the church admitted that six people were residing on the property.

Under the circumstances, the court found that the zoning board could properly conclude that the church would not comply with whatever conditions might be imposed on its use of the property.[37] The court did not offer any guidance as to how the church might rectify this situation or the extent to which perceived intent may be a factor for a zoning board to consider. Presumably, only misrepresentation, fraud or deceit would be sufficient grounds and this would still be consistent with the New York zoning decisions.

In essence, in spite of some arguments for change, the New York Court of Appeals allows little or no zoning regulation of churches.

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[34] *See* Islamic Soc'y of Westchester & Rockland, Inc. v. Foley, 96 App. Div. 2d 536, 464 N.Y.S.2d 844 (2d Dep't 1983); American Friends of the Soc'y of St. Pius, Inc. v. Schwab, 68 App. Div. 2d 646, 417 N.Y.S.2d 991 (2d Dep't 1979); Covenant Community Church, Inc. v. Town of Gates Zoning Bd. of Appeals, 111 Misc. 2d 537, 444 N.Y.S.2d 415 (Sup. Ct. Monroe County 1981). However, some New York courts have allowed reasonable regulation of churches. *See* Seaford Jewish Center, Inc. v. Board of Zoning Appeals, 48 App. Div. 2d 686, 368 N.Y.S.2d 40 (2d Dep't 1975); Congregation Gates of Prayer v. Board of Appeals, 48 App. Div. 2d 679, 368 N.Y.S.2d 232 (2d Dep't 1975); Rhema Christian Fellowship v. Common Council, 114 Misc. 2d 710, 452 N.Y.S.2d 292 (Sup. Ct. Erie County 1982).

[35] 91 App. Div. 2d 190, 458 N.Y.S.2d 920 (2d Dep't 1983).

[36] *See id.* at 199, 458 N.Y.S.2d at 927.

[37] *Id.* at 201, 458 N.Y.S.2d at 928. The court, citing Bell v. Waterfront Commission of New York Harbor, 20 N.Y.2d 54, 228 N.E.2d 758, 281 N.Y.S.2d 753 (1967), and Ostroff v. Sacks, 64 App. Div. 2d 708, 407 N.Y.S.2d 546 (2d Dep't 1978), also concluded that revocation of the permit was justified based upon deceit. *Id.*

B. The California Position

In California, unlike New York, the state courts give substantial weight to local legislative judgments and do not single out religious institutions for special treatment. As long ago as 1949, in *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville*,[38] a California court held that churches could be excluded from single-family districts provided that the legislative body of a community made a valid judgement that churches in such districts would create problems related to traffic, parking, and noise. The court stated that "[t]hese 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."[39] The underlying rationale was simply that a comprehensive zoning district with single-family homes only is a valid residential district.[40] According to the court, regulating religious institutions through a zoning ordinance is no different than regulating these institutions by requiring them to conform to a local building code. In response to the argument that such regulation is an unwarranted restriction on religious worship, the court maintained that the denial of a permit is not a prohibition against religious worship and the record contained no evidence that the church building could not be erected in an appropriate district. The burden, as in most zoning cases, was on the plaintiff to show that the ordinance was unreasonable and this plaintiff, the church, failed to make such a showing.

One major issue, which was not decided in the case, was whether excluding church buildings from virtually all residential areas of the city would be unconstitutional. The court declined to decide this issue on procedural grounds. The *Porterville* case was ultimately appealed to the United States Supreme Court, where it was dismissed for lack of a substantial federal question.[41] Since *Porterville*, the California courts have continued to support the position that municipalities have the right to exclude churches from residential zones.[42] Moreover, the relevant cases have clarified the extent to which the California courts are prepared to

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[38] 90 Cal. App. 2d 656, 203 P.2d 823, *appeal dismissed*, 338 U.S. 805 (1949).

[39] *Id.* at 659, 203 P.2d at 825.

[40] *Id.* (citing Miller v. Board of Pub. Works, 195 Cal. 477, 234 P. 381 (1925)).

[41] *Porterville*, 338 U.S. 805 (1949). *See also* American Communications Ass'n v. Douds, 339 U.S. 382, 397 (1950) (citing *Porterville* to show that a "rigid test requiring a showing of imminent danger to the security of the Nation is an absurdity.").

[42] Garden Grove Congregation of Jehovah's Witnesses v. City of Garden Grove, 176 Cal. App. 2d 136, 1 Cal. Rptr. 65 (1959); Minney v. City of Azusa, 164 Cal. App. 2d 12, 330 P.2d 255 (1958); City of Chico v. First Ave. Baptist Church, 108 Cal. App. 2d 297, 238 P.2d 587 (1951).

go. In *Minney v. City of Azusa*,[43] the court, citing *Porterville*, held that a church was not entitled to a use variance in a single-family zone.[44] The court concluded that there is significant constitutional support for treating religious groups similarly to other land users.[45] The court stated that the majority position of disallowing restriction of churches is an extreme viewpoint which ignores the basis of modern day zoning and permits church groups to act in a manner which may not be in the best interests of the community.

The *Minney* court held that churches could be excluded from single-family districts even where other, non-single family uses were allowed. In this case, agricultural and horticultural uses, libraries, museums, parks, playgrounds, and public schools were permitted. There must, however, be a rational basis for the classification. Furthermore, when attacking a refusal to grant a variance, a church is in no better position than any other potential user with respect to typical variance standards and the burden of proving an abuse of discretion.[46] Under *Porterville*, California courts have also held that churches are entitled to no better treatment when applying for special use permits.[47]

The California court decisions contrast sharply with the New York reasoning. In *Holy Spirit*[48] the New York court upheld a town's refusal to allow communal living because of misrepresentation. However, the New York decisions make clear that in this jurisdiction the types of activities which a community can prohibit are those which pose a substantial threat to public safety or order. Therefore, religious groups which practice polygamy or snake handling, use peyote, or refuse compulsory secondary ed-

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[43] 164 Cal. App. 2d 12, 330 P.2d 255 (1958).

[44] *See id.* at 21-24, 330 P.2d at 259-61. The court also cited West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642 (1943) (religious organizations do not enjoy unlimited freedom); Cox v. New Hampshire, 312 U.S. 569, 574 (1941) (regulations to impose order are lawful); and Cantwell v. Connecticut, 310 U.S. 296, 304 (1940) (community may regulate time, place, and manner of religious expression and may safeguard good order of community).

[45] *Minney*, 164 Cal. App. 2d at 24-26, 330 P.2d at 260-61. *See also* State *ex rel.* Wenatchee Congregation of Jehovah's Witnesses v. City of Wenatchee, 50 Wash. 2d 378, 381, 312 P.2d 195, 197 (1957).

[46] *Minney*, 164 Cal. App. 2d at 24, 330 P.2d at 261.

[47] *See* Garden Grove Congregation of Jehovah's Witnesses v. City of Garden Grove, 176 Cal. App. 2d 136, 1 Cal. Rptr. 65 (1959); City of Chico v. First Ave. Baptist Church, 108 Cal. App. 2d 297, 238 P.2d 587 (1951). But where local ordinances so permit, subject to certain restrictions, a church may have a right to a special use permit. *See* Redwood City Co. of Jehovah's Witnesses, Inc. v. City of Menlo Park, 167 Cal. App. 2d 686, 335 P.2d 195 (1959). For a discussion of conditional use permits, see 2 A. RATHKOPF & D. RATHKOPF, THE LAW OF PLANNING AND ZONING § 20.01 (4th ed. Supp. 1987), which indicates that, while conditional use regulation is a widely accepted position, the practice can vary depending on whether the state is a majority or minority jurisdiction.

[48] 91 App. Div. 2d 190, 458 N.Y.S.2d 920 (2d Dep't 1983).

ucation may be subject to justifiable constitutional regulation.[49] Otherwise, even where there is evidence that a particular religious regimen may not be beneficial to religious members and may even harm some people, the *Holy Spirit* decision would prohibit harmful uses only where the health or life of an "average" participant may be endangered.[50]

The California cases, while presenting a strong position in favor of restriction of religious uses, do not totally ignore the special role of churches. In *Garden Grove Congregation of Jehovah's Witnesses v. City of Garden Grove*,[51] a California court explicitly recognized that religious values may be of a special nature. The court accepted the church's argument that religious establishments are favored by law and not considered objectionable. The court stated that it "is entirely in accord with those principles."[52] The court, however, emphasized that the appropriate place to consider those principles and weigh them along with other factors is at the planning commission level (the case involved a special use permit). In essence, the special status of churches cannot be totally ignored, but must be examined in the light of compatibility with the city's overall land use scheme. As long as the local body has considered this, a California court will likely uphold a reasonable decision.

C. *Other Jurisdictions*

The California and New York cases represent the two major lines of decision.[53] Other state courts have issued decisions that appear to sketch out a middle ground, but they are not definitive in this area and are few in number.[54] One commentator has noted that many of these cases can be

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[49] *See id.* at 198, 458 N.Y.S.2d at 926.

[50] *Id.* at 199, 458 N.Y.S.2d at 926. The court, discussing a training regimen, stated that in isolated instances participants may have psychotic episodes or become suicidal. The "evidence did not establish, however, that the average participant is in imminent danger of losing his, or her, life or health. The participants in the retreat workshops of the Unification Church are adults, with the constitutional right to choose their own life-styles." *Id.*

[51] 176 Cal. App. 2d 136, 1 Cal. Rptr. 65 (1959).

[52] *Id.* at 143, 1 Cal. Rptr. at 69.

[53] There are a few courts which accept the California position; allowing the exclusion of churches from residential districts, especially where the community provides an alternate location. *See* Town v. State *ex rel.* Reno, 377 So. 2d 648 (Fla. 1979), *cert. denied*, 449 U.S. 803 (1980); Medford Assembly of God v. City of Medford, 72 Or. App. 333, 695 P.2d 1379, *cert. denied*, 474 U.S. 1020 (1985).

[54] *See* Seward Chapel, Inc. v. City of Seward, 655 P.2d 1293 (Alaska 1982); Abram v. City of Fayetteville, 281 Ark. 63, 661 S.W.2d 371 (1983); East Side Baptist Church of Denver, Inc. v. Klein, 175 Colo. 168, 487 P.2d 549 (1971); St. John's Roman Catholic Church Corp. v. Town of Darien, 149 Conn. 712, 184 A.2d 42 (1962); West Hartford Methodist Church v. Zoning Bd. of Appeals, 143 Conn. 263, 121 A.2d 640 (1956); Hull v. Miami Shores Village, 435 So. 2d 868 (Fla. Dist. Ct. App. 1983); Northeast Neighborhood Ass'n v. City of Salem, 59 Or. App. 499, 651 P.2d 193 (1982); Antrim Faith Baptist Church v. Commonwealth, 75

analyzed as based on other grounds related to the specific facts of the cases for procedural as well as substantive reasons.[55] Nonetheless, this same commentator suggests that the preferred status of religion in American life plays a major role in these cases.[56]

The cases are sometimes based on the weighing of land use policy objectives against religious objectives. For example, in *West Hartford Methodist Church v. Zoning Board of Appeals*,[57] a Connecticut court concluded that a zoning board could deny a special use permit where evidence indicated that allowing a church at a proposed location would subject homes to substantial additional traffic, lack of privacy, and losses in property values.[58] Other courts have held that furthering land use objectives may be a reason for denying a church use in at least certain portions of a city;[59] that a community may refuse to allow a church to use a property where a major part of the use was for administrative purposes;[60] and that a community may refuse to allow a church to operate in violation of fire safety requirements.[61] These cases represent a small movement toward a balancing position.[62] Despite this movement, there is no clear trend at the state level.

Pa. Commw. 61, 460 A.2d 1228 (1983); City of Sherman v. Simms, 143 Tex. 115, 183 S.W.2d 415 (1944); State *ex rel.* Lake Drive Baptist Church v. Village of Bayside Bd. of Trustees, 12 Wis. 2d 585, 108 N.W.2d 288 (1961).

[55] *See* Reynolds, *supra* note 10, at 776-77.

[56] *Id.*

[57] 143 Conn. 263, 121 A.2d 640 (1956).

[58] *Id.* at 268-69, 121 A.2d at 642. *Cf.* St. John's Roman Catholic Church Corp. v. Town of Darien, 149 Conn. 712, 724-26, 184 A.2d 42, 47-49 (1962) (zoning ordinance which requires special permit for construction of parochial school does not deprive applicant of property without due process).

[59] *See* Seward Chapel, Inc. v. City of Seward, 655 P.2d 1293 (Alaska 1982).

[60] Hull v. Miami Shores Village, 435 So. 2d 868 (Fla. Dist. Ct. App. 1983).

[61] Antrim Faith Baptist Church v. Commonwealth, 75 Pa. Commw. 61, 460 A.2d 1228 (1983). However, in City of Sumner v. First Baptist Church, 97 Wash. 2d 1, 639 P.2d 1358 (1982), the Supreme Court of Washington held that, if a religious institution is involved, there must be an attempt to show that the standards of a fire and safety code are, in fact, necessary. *Id.* at 8, 639 P.2d at 1362-63.

[62] It remains uncertain whether the movement toward a balancing position will grow. In New Jersey, a lower court decision reflecting acceptance of the balancing position was recently overturned by the New Jersey Supreme Court. *See* State v. Cameron, 184 N.J. Super. 66, 445 A.2d 75 (Law Div. 1982), *aff'd*, 189 N.J. Super. 404, 460 A.2d 191 (App. Div. 1983), *rev'd*, 100 N.J. 586, 498 A.2d 1217 (1985). In this case the court objected to zoning ordinances that exclude churches from residential districts. The court based its decision on the New Jersey and United States Constitutions. *Cameron* was followed by another New Jersey lower court decision that overturned an ordinace prohibiting religious services in private homes on the grounds that such ordinance violated the New Jersey Constitution's free exercise of religion clause. *See* Farhi v. Commissioners of Borough of Deal, 204 N.J. Super. 575, 499 A.2d 559 (Law Div. 1985).

IV. THE FEDERAL CASES

A. *General Issues*

Although there are relatively few federal cases on the topic, the trend in federal courts has been adherence to the basic notion of a balancing test. The balancing test evolved from a series of Supreme Court decisions dating back to *Cantwell v. Connecticut*.[63] In *Cantwell*, the Supreme Court reversed the convictions of three Jehovah's Witnesses for breach of peace and solicitation without a license on the grounds that the government's action went beyond the least intrusive means. Subsequently, in *Braunfeld v. Brown*,[64] the Supreme Court considered a Pennsylvania law prohibiting the Sunday retail sale of certain goods and rejected the challenge of an Orthodox Jewish merchant. The merchant contended that he would suffer economic loss because he was unable to work on Saturday (Orthodox Jews are not permitted by their religious precepts to work on Saturdays) and would thus be forced to choose between his religion and serious economic disadvantage. Upon determining that the government can regulate conduct which is "found to be in violation of important social duties or subversive of good order, even when the actions are demanded by one's religion,"[65] the Court concluded that the law required some sacrifice on the part of the merchant but did not force a clear-cut choice between religion and financial gain. The Court held that where a state enacts a law with a secular purpose (in this case, to provide a day of rest for all businesses), the law is valid despite any indirect burden on religious observance unless the state can achieve its purposes by means imposing a lesser burden.[66]

The rather loose requirements of *Braunfeld* were tightened in *Sherbert v. Verner*.[67] There the Court considered a South Carolina law which required claimants for unemployment compensation to be available for work. If such claimants failed without good cause to accept suitable work, they would be ineligible for benefits. The plaintiff was a member of the Seventh-Day Adventist Church and refused to work on Saturday. The Court enunciated the compelling state interest test for cases of this nature; the state law was valid if it did not infringe upon the free exercise of religion or, if it did infringe, was justified by a compelling state interest.[68]

Upon finding that the plaintiff's ineligibility for benefits was solely the result of a religious practice, the Court concluded that the South Car-

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[63] 310 U.S. 296 (1940).
[64] 366 U.S. 599 (1961).
[65] *Id.* at 603-04.
[66] *Id.* at 607 (citing Cantwell v. Connecticut, 310 U.S. 296, 304-05 (1940)).
[67] 374 U.S. 398 (1963).
[68] *Id.* at 403.

olina law represented a burden, even though the impact on religion was only an indirect result of the state law. Using the balancing test, the Court further found a strong state interest in providing a day of rest from work and that allowing days of rest other than Sunday could result in administrative problems of great magnitude. The Court clearly did not overrule *Braunfeld.* Instead, the *Sherbert* decision reflects change with respect to the Court's adoption of the compelling state interest test in cases where there is a burden on the free exercise of religion. This decision is not without its problems and has been a source of doctrinal confusion.[69]

Sherbert was followed by *Wisconsin v. Yoder,*[70] wherein the Court considered the claim of an Amish church that a Wisconsin compulsory school attendance law violated free exercise rights. The Court stated that the law could stand if it did not abridge the free exercise of religion by its requirements or if the state's interest in education was of sufficient magnitude to override the protected interest. The Court concluded that the traditional Amish way of life was not merely one of personal preference but was deeply grounded in religious conviction. Amish religious laws not only affected belief but also were pervasive throughout the entire Amish way of life. The Court found that compulsory school attendance would create a real threat of undermining the Amish community, forcing the Amish to abandon belief or migrate to another state with no such legal requirement.

Regarding the state's claim that compulsory education was of great importance, the Court determined that the additional education required by the state[71] (beyond the eighth grade) was of lesser magnitude. The justification proffered for the requirement was the necessity of preparing children for the modern world, but the Amish were preparing their children for a different way of life. In *Yoder,* therefore, the Court set forth the foundation of free exercise analysis. The free exercise clause means that government cannot force an individual to choose between basic reli-

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[69] There is substantial commentary on this subject. *See* Pepper, *The Conundrum of the Free Exercise Clause—Some Reflections on Recent Cases,* 9 N. KY. L. REV. 265 (1982); Pepper, *Reynolds, Yoder and Beyond: Alternatives for the Free Exercise Clause,* 1981 UTAH L. REV. 309; Note, United States v. Lee: *Limitations on the Free Exercise of Religion,* 28 LOY. L. REV. 1216 (1982); Note, *Constitutional Law and The Religion Clauses—A Free Reign to Free Exercise?,* 11 STETSON L. REV. 386 (1982); Note, *Zoning Ordinances Affecting Churches: A Proposal for Expanded Free Exercise Protection,* 132 U. PA. L. REV. 1131 (1984); Note, *Constitutional Review of Building Codes and Zoning Ordinances Applied to Parochial Schools:* City of Sumner v. First Baptist Church, 7 U. PUGET SOUND L. REV. 607 (1984) [hereinafter Note, *Constitutional Review*].

[70] 406 U.S. 205 (1972).

[71] The Amish did not object to school at an elementary level, but felt that further school was a threat. *Id.* at 212.

gious beliefs and living in society unless there is a compelling reason for requiring this choice. The Court did not deal with the aspect of *Sherbert* relating to direct or indirect effect on religion, which aspect would be dealt with in later cases.

The presumptive validity that the Court had laid down in *Braunfeld* was thus undercut. It was further undercut in *Thomas v. Review Board of Indiana Employment Security Division*[72] where the Court struck down a state's denial of unemployment compensation benefits to an employee who, based upon his religious beliefs, quit his job because it related to the production of weapons. The Court, on the basis of *Sherbert v. Verner* and *Wisconsin v. Yoder*, held that religious beliefs need not be consistent or logical to qualify for first amendment protection and that the employee's free exercise rights had been violated. Moreover, one can define the extent to which his religious beliefs have been affected; the plaintiff was permitted to assert that producing the raw material for tanks did not violate his religious beliefs whereas actually producing turrets for tanks did. In addition, the plaintiff was protected even if other practitioners of his religion did not agree with him on this point.

In *Thomas*, the Court again concluded that a person may not be compelled to choose between the exercise of a first amendment right and participation in a public program. Of greater significance was the fact that the Court further weakened the direct-indirect effect distinction of *Braunfeld* (although, once again, without specifically overruling it). The ultimate issue was one of coercive effect. If the effect is substantial, a violation may exist regardless of whether the effect is direct or indirect. Rejecting the state's arguments that a decision favorable to the plaintiff could result in widespread unemployment or significant probing by employers into the religious beliefs of job applicants, the Court failed to discern a compelling governmental interest. Both arguments were rejected on grounds of insufficient evidence.

Another important recent case was *United States v. Lee*.[73] An Amish farmer failed to withhold social security taxes from his employees because payment of the taxes and receipt of the benefits would violate the Amish faith. While the social security system provided exemptions for self-employed persons on religious grounds, it did not do so where a commercial enterprise with employees was involved. Although the Court followed precedent by determining whether a burden on religion could result from compulsory participation, it proceeded to find a compelling governmental interest in assuring, because of its national scope, the proper administration of the social security system. The Court concluded that payment of

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[72] 450 U.S. 707 (1981).
[73] 455 U.S. 252 (1982).

social security taxes was a part of the overall tax system and that allowing people to withhold taxes for specific reasons, would undermine a sound tax system. The accommodation granted by Congress allowing exemptions for self-employed Amish but not others—was deemed a reasonable and an appropriate balance of the conflicting interests.

Justice Stevens filed a concurring opinion. While agreeing with the Court's decision, he argued that the Court has generally not used the balancing test it so often enunciates. Stevens argued that the real basis for this decision and all others like it (except *Yoder*) was that, where there is a valid and neutral law of general applicability (for example, a law not directly related to religious practice), then a complainant has a very high standard to meet. Stevens supported this position based upon the necessity of keeping government away from evaluating different religious claims. *Sherbert* and *Thomas*, he felt, were correctly decided under this standard because they involved laws arguably intended to provide benefits but which forced employees to forego benefits because of their religious beliefs.

Bowen v. Roy,[74] decided in 1986, is an important case which raises a number of questions. A native American family refused to provide a social security number for their daughter when applying for Aid to Families with Dependent Children on grounds that assigning such a number would hurt their daughter's "spirit." Distinguishing *Yoder*, *Sherbert*, and *Thomas*, the Court held, that where the government enforces a facially neutral, uniformly applicable requirement for a welfare program reaching "many millions of people,"[75] then the compelling state interest test need not be used. The effect of this conclusion is unclear, however, since two Justices found that the case was moot, and four Justices indicated that *Sherbert* and *Thomas* were controlling.[76] These five felt that the government had failed to show an administrative burden outweighing the burden on the applicants. Presumably, the law of *Sherbert* and *Thomas* continues to hold, but at least some of the Court's members are prepared to acknowledge the relevance of administrative burdens when dealing with programs involving many people and statutes which are facially neutral. Since local land use regulations usually do not involve millions of people, it is not likely that the case will affect the law in this area as applied by

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[74] 476 U.S. 693 (1986).

[75] *Id.* at 707.

[76] *Id.* at 720-23 (Stevens, J., concurring in part and concurring in result) (case is moot); *id.* at 714-16 (Blackmun, J., concurring in part) (case may be moot); *id.* at 727-28 (O'Connor, J., concurring in part and dissenting in part) (should apply Free Exercise Clause precedents); *id.* at 733 (White, J., dissenting) (as *Thomas* and *Sherbert* control this case, "I cannot join the Court's opinion and judgment").

the federal courts.[77]

B. Federal Cases in a Land Use Context

In accordance with the Supreme Court cases discussed above, lower federal courts have begun to develop an appropriate analysis for cases dealing with religion and land use. The most highly developed analysis was performed by the Eleventh Circuit in *Grosz v. City of Miami Beach, Florida*.[78] *Grosz* involved residents of Miami Beach who made structural changes to an accessory structure to their single-family home which was located in a single-family, residential district.[79] No external modifications were made but the building was stocked with provisions for religious services, including benches for more than thirty people, torahs,[80] arks,[81] prayer books, and other religious items. The majority of people who attended the services were family members, friends, or neighbors. The owner of the building was an Orthodox Jewish rabbi who was somewhat infirm but not immobile. As part of his religious tradition, he was required to conduct services twice daily for at least ten adult males. The court found that while daily services created no neighborhood problems, well-attended services disturbed neighbors as a result of the number of people asking for directions and worshipers chanting during services. The court noted that the Miami Beach ordinance permitted religious institutions in many other residential zones[82] and that the ordinance had been enforced in an even-handed manner.

The court outlined two threshold tests: Does the action regulate religious belief (which is never allowed) or does it regulate religious conduct (which may be allowed)? In addition, does the law have a secular purpose and effect (which is permitted) or a sectarian purpose and effect (which is not)? The law must not be aimed at impeding religion nor can it have the essential effect of a negative influence on religious activity or religious belief. Any non-secular effects must be only incidental to the secular ef-

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[77] A recent case involving the denial of benefits was Hobbie v. Unemployment Appeals Commission of Florida, 480 U.S. ___, 107 S. Ct. 1046 (1987). In *Hobbie*, the Court held that Florida could not deny unemployment benefits to a Seventh-Day Adventist who was discharged for refusing, based upon religious reasons, to work on Friday evenings and Saturdays. The Court relied upon both *Sherbert* and *Thomas*. A notable distinction is that the plaintiff in *Hobbie* had converted after she started working at the place from which she was ultimately dismissed. The Court found that the timing of conversion was not relevant.

[78] 721 F.2d 729 (11th Cir. 1983), *cert. denied*, 469 U.S. 827 (1984).

[79] *Id.* at 731.

[80] The Torah consists of the first five books of the Old Testament and, in scroll form, is used in Jewish religious services.

[81] The structure in the service in which the Torahs are kept.

[82] *Grosz*, 721 F.2d at 732. However, the court did not indicate how many of these other zones are zoned for single-family residences only.

fect.[83] If an ordinance passes these two threshold tests, a court may proceed to the balancing test enunciated by the Supreme Court in the decisions discussed above.

The balancing test used by the court weighed the cost to the government of altering its activity against the cost to the religious practice of being imposed upon by the government activity.[84] The court felt that such test would mark the path of least constitutional impairment. In performing its analysis, the court examined the balancing process in terms of two notions; the burden on government as opposed to the burden on religion.

With respect to the burden on government, underlying policy requires an examination of whether the regulation meets the "least restrictive means test." If the government can achieve its aims with a lesser burden on religion, the regulation must fail. Another aspect of the inquiry involves the impact of a religion-based exception on governmental policy objectives. The court noted that the Supreme Court cases are ambiguous and left open the question of the extent to which administrative costs can be considered in such situations. It does, however, appear that where system-wide considerations of significant moment are implicated as in *Lee* (in which there would be a serious burden on the social security system), the administrative aspects become more important. Nonetheless, as the Eleventh Circuit concluded, there remain some significant questions regarding this matter.

In terms of burden on religion, there is a hierarchy, to some extent, of burdens. For example, an ordinance which places criminal sanctions on a religious practice creates the heaviest burden.[85] This is very clear in its effect. However, below this impact are lesser infringements on religion. These, the court noted, are less clear in their effects. The Eleventh Circuit determined that no Supreme Court decision subsequent to *Sherbert* has used the direct-indirect effect test.[86] However, where the action concentrates directly on conduct, then the courts will perceive a serious imposition.

Finally, the court required the weighing of competing interests. Courts should render a decision against the government where the government can easily achieve its policy interests without an undue burden on religion. If the burden on religion is zero, then there should be a decision in favor of the government. Where, however, the action passes the threshold tests of conduct focus and secular purpose and effect, the bur-

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[83] *Id.* at 733-34 (citing Braunfeld v. Brown, 366 U.S. at 607).

[84] *Id.* at 734.

[85] *See* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972); Cantwell v. Connecticut, 310 U.S. 296, 307-08 (1940).

[86] *Cf.* Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707 (1981).

den on government and the burden on religion are balanced by requiring the government to demonstrate a compelling state interest. The Eleventh Circuit emphasized that, where "avoiding the burden on government rises to the very upper ranges of government interest, a free exercise challenge will fail."[87]

In *Grosz*, the court then began with the threshold tests and maintained that the law affected conduct—prayer and religious service—as opposed to belief that the purposes of the ordinance were non-sectarian. Therefore, the court concluded that the balancing test was in order. In weighing the burden on government, the court stated that the religious services produced noise and crowds and that neighbors had complained about the services. Consequently, it determined that the religious conduct was clearly inconsistent with the governmental action under the police power, which action easily passed the least restrictive means test. The court also determined that granting an exemption for religion would defeat the city zoning policy in all areas of the city in which a religious exemption was granted, thus there was much weight on the government's side of the equation.

The court proceeded to discuss the effect on religion. Since the rabbi needed ten adult men twice a day for services, he would solicit in the neighborhood to find such a group. The court stated that the soliciting was objectionable and "non-essential" but, nonetheless, aided the religious conduct.[88] Consequently, there was some degree of burden on first amendment rights. The court, however, maintained that this burden fell on the lower end of the spectrum. Services could be conducted in other parts of the city and the penalties for noncompliance with the law did not rise to the level of criminal liability, loss of livelihood, or the denial of a basic, income-sustaining public welfare benefit.[89]

The court then went on to determine a final balance. Citing *Prince v. Massachusetts*[90] and *International Society for Krishna Consciousness v. Eaves*[91] for the proposition that government can place reasonable restrictions on the time, place, and manner of conduct, the court held that this ordinance could stand. The court also relied upon *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*,[92] in which the Sixth Circuit held that a city's interest in creating residential districts

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[87] *Grosz*, 721 F.2d at 737.

[88] This conduct was, in fact, the basis for the city's notice of violation.

[89] The court cited Prince v. Massachusetts, 321 U.S. 158 (1944) (criminal liability); Gillette v. United States, 401 U.S. 437 (1971) (same); Braunfeld v. Brown, 366 U.S. 599 (1961) (loss of livelihood); and Sherbert v. Verner, 374 U.S. 398 (1963) (loss of employment compensation).

[90] 321 U.S. 158, 169 (1944).

[91] 601 F.2d 809 (5th Cir. 1979).

[92] 699 F.2d 303 (6th Cir.), *cert. denied*, 464 U.S. 815 (1983).

outweighed a congregation's religious interests. The *Grosz* court found that *Lakewood* was especially appropriate because it was even a closer case; religious services could be held on only ten percent of the land in Lakewood as opposed to almost half in the Miami case.

Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood[93] was indeed a closer case. It involved a church, which was operating out of a storefront and looking for a more suitable home, in a Cleveland suburb with a population of 62,000. The church took out an option to purchase land which fronted on a six lane east-west thoroughfare and a north-south secondary route. Despite the highway location, the surrounding neighborhood consisted of large one and two-family homes. The church was initially denied an exception to the residential zoning on the grounds of noise and traffic hazards. After a comprehensive rezoning of the city, the zoning ordinance still left the property in a single-family district which did not permit churches and the church was again refused a building permit.

The *Lakewood* court performed an analysis which was simpler than the one performed by the *Grosz* court. Upon examining the nature of the religious observance and the burden placed on that observance, the court held that owning a building was a desirable aspect of operating a church but was not a necessary religious tenet. The court concluded that the burdens imposed were of an indirect, financial and aesthetic nature and that the congregation was not forced to choose between abandoning its beliefs or preserving the zoning code. The court also found that, even though only ten percent of the land in Lakewood was suitable for a new church, if the church wished to build in a residential area it could purchase other churches or build in the part of the city which permitted such churches.

The *Lakewood* court held that the first amendment does not compel a city to make the cheapest or most beautiful land available for churches. The conclusion of the case was that, while the effect of the ordinance was to make the practice of religion more expensive, this was not a sufficient reason to overturn the ordinance because it did not force the congregation to abandon religious beliefs through financial or criminal penalties. Moreover, no tax was placed on the exercise of religion. Therefore, the court held that there was no infringement of religious freedom and the case must be decided by reference to ordinary due process analysis. In performing this analysis, the court relied heavily on the *Euclid v. Ambler Realty Co.*[94] and *Village of Belle Terre v. Boraas*[95] for the proposition that cities have substantial power to determine their residential environments.

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[93] *Id.*

[94] 272 U.S. 365 (1926).

[95] 416 U.S. 1 (1974).

The *Grosz* and *Lakewood* decisions have been very influential and other federal courts have begun to follow their approach, although not always with the same results. In *Congregation Beth Yitzchok of Rockland, Inc. v. Town of Ramapo*,[96] a court followed *Grosz* in balancing the burden on the community against the burden on religious interests. The court argued that where the issue is regulation of an activity deemed secular (a religious nursery school), the burden on religious interests is light and a wide range of restrictions can be justified. This is especially true where, as in this case, fire and safety regulations are involved. On the other side, in *Jehovah's Witnesses Assembly Halls of New Jersey, Inc. v. City of Jersey City*,[97] a court held that where religious worship resembled a commercial usage (for example, use of a theater for religious assemblies that could parallel commercial theater use in terms of impacts), a city could not prohibit the usage. This does not necessarily reflect disagreement with the *Lakewood* analysis but perhaps evinces a conclusion here that, under these facts the burden on religion is unjustified.

V. CUTTING THROUGH THE THICKET

It is suggested that nothing short of a definitive Supreme Court decision will give a firm direction to judges deciding free exercise cases involving the zoning process. The purpose of this section is to provide some guidance as to how specific aspects of zoning relate to the Supreme Court decisions involving the free exercise clause. First, it is essential to begin by analyzing what is clear in this area. If anything is clear, it is that the Supreme Court decisions emphasize that governments run into trouble when they enact legislation forcing individuals to choose between their religious practices and their observance of the law. Second, zoning regulates activities in space. It is thus different from the typical free exercise problem with which the courts are confronted. Third, the compelling state interest test will be used in the event of a burden on religion which is substantial enough to implicate the free exercise clause. If the clause is not implicated, then the traditional rational basis test will be used. In the zoning field, the Court has been reluctant to find that ordinances violate fundamental rights which would require use of the compelling state interest test.[98] As a practical matter, the test used will determine the outcome. Since land use considerations are likely to be important in a community's decision-making process, but rarely involve questions of a compelling state interest, the crucial issue in zoning cases is likely to turn on the

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[96] 593 F. Supp. 655 (S.D.N.Y. 1984).

[97] 597 F. Supp. 972 (D.N.J. 1984).

[98] *See* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). *Cf.* Pearlman, *The Closing Door: The Supreme Court and Residential Segregation*, 44 J. AM. INST. PLANNERS 160 (1978).

extent to which a zoning ordinance impinges on the religious practices of individuals or congregations. An essential fact about zoning is that it deals with relationships in spatial dimensions. Zoning laws are peculiar in that they are not really laws of general applicability but are, rather, linked to individual properties.[99] It is this feature which makes much of zoning law difficult to deal with in the same manner as other laws.

Considering the test set forth in *Grosz*, it is necessary to analyze how it relates to zoning in a broad sense. As to the threshold tests—whether the law regulates religious beliefs as opposed to conduct and whether it has a sectarian purpose and effect—it is generally the case that zoning laws will pose no problems. Zoning regulates uses of space, and what goes on in those uses is of little concern to government unless there are external impacts, which impacts zoning laws attempt to control.[100] Similarly, the nature of zoning as a comprehensive, rational measure of land use means that zoning laws are unlikely to have a sectarian purpose. This is not to say that they cannot, but the situation is unlikely.

Regarding the burdens imposed on religion by zoning ordinances, it is important to recognize that there are very few burdens of a direct nature. This is because religious practices rarely have a spatial nature. Indeed, this appears to be extremely rare. One significant example is Orthodox Judaism, which places restrictions on travel by Orthodox Jews on the Sabbath. One must walk to services.[101] In essence, where zoning makes the action of practicing a religion more expensive or more difficult, but does not force a participant to choose, there is no direct burden and the compelling state interest test need not be invoked.[102]

The sparse federal case law on the subject tends to confirm the state court pattern of generally finding unconstitutional those ordinances which totally exclude religious uses from a city. Consequently, it would be

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[99] For a discussion of the peculiar nature of zoning law, see Pearlman, *supra* note 9.

[100] *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1970).

[101] The issue of religious Jews and their ability to attend religious services came up in Congregation Dovid Ben Nuchim v. City of Oak Park, 40 Mich. App. 698, 199 N.W.2d 557 (1972). In this case, religious Jews, unable to ride to services, wished to build a synagogue in a residential area. The Michigan court, relying on Mooney v. Village of Orchard Lake, 333 Mich. 389, 53 N.W.2d 308 (1952), which accorded favored status to religion and prohibited the restriction of religious uses from an entire community, granted a decision in favor of the religious members. Presumably, for Orthodox Jews, the inability to ride to services operates as a prohibition.

[102] For example, in Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, discussed *supra* text and accompanying notes 92-93, the court found that where a zoning ordinance made it more difficult for a church to build and own a new building, there was no direct interference because a fundamental tenet of the church's religious beliefs was not involved. The church could meet in other places throughout the city but not in the residential zone in question.

difficult for a community to show that it requires such a regulation and, moreover, that its need for such a regulation is outweighed by the burden placed on religious observers.[103] Nonetheless, it is possible to imagine such a situation, perhaps in a very small community in a more or less continuously populated megalopolis, where special problems of traffic and land use exist and where there is very close access to religious institutions nearby. In this situation, it is reasonable to consider driving time or distance rather than political boundaries as the important factor. Regardless, it appears unlikely that the courts will generally countenance total prohibition.[104]

Total exclusion is relatively unlikely in any event, and would probably be considered a violation of the free exercise clause.[105] What is much more common is the exclusion of churches from residential areas. Again, in many instances, it is unlikely that churches would be excluded from all residential areas. The constitutionality of such an ordinance would be dubious. What serious burdens could churches in high density, residential areas pose that are of significantly greater impact than the high density, residential areas themselves? Other nonresidential uses are frequently allowed in high density neighborhoods and churches would not seem to be very different. Most problems caused by churches could be handled in some manner other than exclusion, thus raising the least intrusive means issue.[106]

The most common problem is the exclusion of churches from some part of a community. Most frequently this takes the form of exclusion from low density, residential districts. As discussed above, most state courts have prohibited this exercise of the zoning power.[107] The typical justification for not allowing exclusion in this instance is that the existence of churches in residential neighborhoods is beneficial to the community and actively promotes the police power. Therefore, exclusion through zoning becomes arbitrary, since zoning fails to promote this beneficial influence. This type of reasoning in connection with other zoning issues is relatively rare. Generally, zoning is used to prevent unwanted

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[103] *See* Grosz v. City of Miami Beach, 721 F.2d 729, 740 (11th Cir. 1983), *cert. denied*, 469 U.S. 827 (1984); Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303, 307 (6th Cir.), *cert. denied*, 464 U.S. 815 (1983).

[104] This accords with decisions involving the free speech aspects of the first amendment. *See* Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981).

[105] *Cf.* Mooney v. Village of Orchard Lake, 333 Mich. 389, 53 N.W.2d 308 (1952).

[106] There are other reasons given for overturning ordinances that are not discussed in this article, but may be relevant. In this context, courts do not look favorably on situations where certain types of intense uses are allowed but churches are excluded. *See* Ellsworth v. Gercke, 62 Ariz. 198, 156 P.2d 242 (1945). *See also* 2 A. RATHKOPF & D. RATHKOPF, *supra* note 47, § 20.01 & n.7.

[107] *See supra* text accompanying notes 27-28.

situations.[108] On occasion, it *may* be used to promote "positive" goals.[109]

It is rare, however, for courts to hold that zoning *must* permit an activity because it is a positive benefit to the community, since it is usually up to the community to make its determination as to what it considers beneficial. One exception is *Southern Burlington County NAACP v. Township of Mt. Laurel*,[110] in which the New Jersey Supreme Court held that providing for low- and moderate-income housing was a required purpose of zoning under the New Jersey Constitution. *Mt. Laurel* represents at least one major example of a court imposing specific requirements on zoning ordinances by determining that certain values are, in effect, mandatory.[111]

Mandatory requirements are not only rare in the context of zoning but they can also represent an usurpation of legislative power. Essentially, unless there is some constitutional requirement clearly expressed, an argument that freedom to locate churches in residential areas is important enough to make location restricitions arbitrary can result, in effect, in substitution of the judgment of the court for that of the community. The issue should not be what is necessary but rather what can a community reasonably find and do through its legislative power. At the same time, it is necessary to recognize that religion is an issue which must be handled with more than usual care.[112]

In the area of religion, if the decision is based on state constitutional requirements, then federal court interpretation may be of lesser impor-

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[108] Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). The constitutional justification for zoning is the prevention of nuisances, with allowance for a reasonable margin of error as to what constitutes a nuisance. *Id.* at 388.

[109] *See* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). In *Belle Terre*, the court allowed zoning to be used to promote desired lifestyles—single-family quiet residential living. *Id.* at 9.

[110] 67 N.J. 151, 336 A.2d 713, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975); *cf.* Southern Burlington County NAACP v. Township of Mt. Laurel, 92 N.J. 158, 456 A.2d 390 (1983) (discussing specific action mandated by *Mt. Laurel*).

[111] *Mt. Laurel* is not the only instance, although it is perhaps the most significant. *See also* Bristow v. City of Woodhaven, 35 Mich. App. 205, 192 N.W.2d 322 (1971). In *Bristow*, where the court held that mobile home parks were to be given preferred status because they protected the public interest. The Michigan Supreme Court has also held that mobile homes cannot be excluded from residential districts. *See* Robinson Twp. v. Knoll, 410 Mich. 293, 302 N.W.2d 146 (1981).

[112] One argument that can also be made is that in the *Mt. Laurel* case, the mandatory requirements are directly related to purposes which are central to zoning: where people live and how communities can deal with growth. In the case of religion, however, religious purposes are being held of such importance because of factors central to other questions (for example, our country's traditional respect for the importance of free religious expression). This comparison does not make religious expression any less important, but does suggest that there may be closer connections between the need for mandatory requirements where the requirement deals with issues touching on the centrality of the zoning process itself.

tance since state constitutions may be found to set higher standards on this subject than the federal constitution. Where a state court has simply found that churches in residential neighborhoods promote the police power, the federal cases may be of greater value since the Supreme Court, by dismissing the *Porterville* case for want of a substantial federal question,[113] clearly demonstrated that it does not feel that the presence of religious institutions in a residential neighborhood is compelled. Furthermore, in a subsequent case, *American Communications Association v. Douds*,[114] the Supreme Court stated that it dismissed the *Porterville* case because there was a relatively small interest to be protected under the free exercise clause by preventing the building of churches in residential areas.

VI. EMERGING TRENDS

Recently, a number of states have begun to apply a balancing test to this issue. Some recent cases suggest that at least some state courts may well be liberalizing their thinking; deciding zoning cases not with a fixed standard but rather with the flexibility and sensitivity which zoning demands. This is not, however, universally true. The newer cases recognize that religious uses are better suited to certain areas than to others. For example, in *Seward Chapel, Inc. v. City of Seward*,[115] the Alaska Supreme Court, recognizing that total exclusion of church uses would be unconstitutional, found that churches, like other intensive uses, are not entitled to be free from reasonable time, place, and manner restrictions. This case involved a church school and the court stated that it was perfectly proper to locate the school where its "impact on surrounding parcels is lessened."[116] The court concluded that as long as an ordinance provides adequate areas for zoning for religious purposes, exclusion from specific parcels of land is legitimate where such exclusion furthers a legitimate land use objective.

This concept of adequate zoned space for church uses raises some questions with respect to what is adequate and how adequacy is to be determined.[117] Does the city have to meet every demand for church usage or is there some point at which it can say that no more land suitable for churches is available? Presumably, the *Seward* court would hold that reasonable land use justifications would suffice. Absent that sort of situation,

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[113] Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville, 90 Cal. App. 2d 656, 203 P.2d 823, *appeal dismissed*, 338 U.S. 805 (1949).

[114] 339 U.S. 382, 397-98 (1950).

[115] 655 P.2d 1293 (Alaska 1982).

[116] *Id.* at 1301.

[117] For a discussion of adequate availability in another context, see Pearlman, *supra* note 1, at 272-74.

the court would likely examine the facts of each case and weigh the balances. The bottom line for the *Seward* court was the doctrine expressed in the Supreme Court cases examined herein; the free exercise clause comes into play when a state forces individuals to choose between complying with a law and complying with the dictates of their religion.[118]

One area in which the regulation of religious action has occurred involves uses not devoted directly to prayer. Most frequently, this type of regulation involves the operation of a church as a religious school or the use of a church for some form of communal living. These situations often involve the free exercise clause because churches claim that such uses are an integral part of their operations or, indeed, of their beliefs. However, because these uses are frequently further from the direct idea of religious expression, courts are more likely to uphold reasonable regulation. This is in the context, of course, of Supreme Court decisions allowing persons with religious beliefs to define what constitutes their religion.[119] Nonetheless, when such beliefs are expressed as action, the courts are more willing to subject such activities to time, place, and manner regulations.

Perhaps the case which has best raised such issues, albeit in a nonzoning case, was *International Society for Krishna Consciousness v. Eaves*.[120] There, the Fifth Circuit upheld, in pertinent part, an Atlanta ordinance which regulated the solicitation of funds in airports. The ordinance required that donations to organizations only take place at designated solicitation booths in the airport. To the religious group involved, accepting money was as much a religious act as proselytizing or praying. The group urged that regulation of solicitation was thus regulation on the basis of content and, consequently, unconstitutional. The court rejected this argument and concluded that, while soliciting of money may be a genuine religious act, it was still conduct which could be regulated. The regulation did not deal with any religious aspects of the activity but merely with the "mechanical, non-communicative aspects of transferring money."[121] It was not aimed at religious activity and served important governmental interests in relieving airport congestion. Therefore, the court held that the regulation was a valid time, place, and manner restriction.

Similarly, in zoning cases, issues of this type are subject to the same

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[118] *Seward*, 655 P.2d at 1301. However, not all state courts treat accompanying educational uses as casually. *See* City of Sumner v. First Baptist Church, 97 Wash. 2d 1, 639 P.2d 1358 (1982) (involving an injunction to close down an existing church school in a church).

[119] *See* United States v. Lee, 455 U.S. 252, 257 (1982); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 714 (1981).

[120] 601 F.2d 809 (5th Cir. 1979).

[121] *Id.* at 828.

type of analysis. In *Abram v. City of Fayetteville*,[122] the Arkansas Supreme Court upheld the denial of a conditional use permit for operation of a parochial school in a church that had previously received a conditional use permit to operate in a single-family zoning district. The church argued that the school was an integral part of the function of a church. The court noted that operation of a full-time, parochial school was a much more intense use than a church and that different requirements could be applied to it.[123] The court relied on the repeated Supreme Court dismissals for want of substantial federal question of cases allowing reasonable time, place, and manner regulation[124] and found that an ordinance allowing parochial schools as conditional uses enables a community to balance substantial community concerns against religious needs. The court noted that an ordinance which totally excludes parochial schools might be a different case but that a community could locate these uses where their impacts on other land would be minimized.

Other courts have reached similar conclusions. In *Antrim Faith Baptist Church v. Commonwealth*,[125] a Pennsylvania Court held that, although a parochial school was an integral part of a church ministry, it could still be subject to fire safety installation requirements when a variance is granted to enable the school to operate. In *Hull v. Miami Shores Village*,[126] a Florida court held that a law allowing churches in single-family districts did not permit a church to use eighty percent of a building to administer services to the entire archdiocese of 135 parishes. Although this case was basically a "primary use" case (what was the primary use of the structure?) rather than a first amendment decision, the implication of the decision is that a local government has the right to regulate church uses. It is noteworthy that the court stated that it was regularly called upon to consider the applicability of zoning ordinances to religious groups.[127]

It may also be that if there are strong overriding considerations, courts will look to the purposes of regulation. In *Southern New England*

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[122] 281 Ark. 63, 661 S.W.2d 371 (1983).

[123] *Id.* at 65, 661 S.W.2d at 372. The school operated from 8:30 a.m. to 3:15 p.m. each weekday. It was, therefore, not simply a school for teaching religious doctrine to members. The court did not consider this but, if it did, would perhaps have reached a different conclusion, and reasonably so, since the religious school use is much less likely to have significant impacts compared with those of a full-fledged parochial school.

[124] *See* Damascus Community Church v. Clackamas County, 45 Or. App. 1065, 610 P.2d 273 (1980), *appeal dismissed*, 450 U.S. 902 (1981); *cf.* American Communications Ass'n v. Douds, 339 U.S. 382, 397-98 (1950) (relatively small interest to be protected by preventing the building of churches in residential areas).

[125] 75 Pa. Commw. 61, 460 A.2d 1228 (1983).

[126] 435 So. 2d 868 (Fla. Dist. Ct. App. 1983).

[127] *Id.* at 869, n.1.

Conference Association of Seventh-Day Adventists v. Town of Burlington,[128] the court upheld a town bylaw that zoned as wetlands the property on which a church sought to place a building. The church argued that a state law prohibiting the restriction of the use of land for religious purposes (except for reasonable area regulations) exempted the property from the wetlands designation in a zoning ordinance.[129] The court held that a general purpose of the state wetlands laws was to protect wetland areas and, therefore, more stringent local regulation through a zoning ordinance was permitted.

Not all of the cases, however, point to a conclusive trend. A special case in point is the New Jersey decision in *State v. Cameron*.[130] In *Cameron*, the lower court appeared to follow the federal case pattern.[131] Holding that a zoning ordinance may prohibit a preacher from conducting services in his home, the court stated that values relating to quietness and seclusion, as well as to the maintenance of property values, are sufficient to balance the ledger. This decision was reversed by the New Jersey Supreme Court. The reversal resulted in more questions than answers and, through the concurring and dissenting opinions, raised some important issues.[132] The majority held that, where an ordinance excludes "churches and similar places of worship" from a residential use district, it cannot be used to prohibit a minister from temporarily using his home for a one-hour religious service each week for approximately twenty-five people. The court maintained that where religious activity is involved, potential vagueness has to be interpreted against the community and that failure to otherwise define "church" made it unclear as to whether the ordinance applied to this type of use. The majority further maintained that "church" implies a certain type of structure which is architecturally designed for certain religious functions and, unless otherwise defined in an ordinance, it is unclear whether it could apply to the minister or his house.

The majority acknowledged, however, that cities can regulate other kinds of uses in private homes and can exercise the police power to deal with problems of traffic, noise, and similar features. Presumably, if the ordinance were "sufficiently directed against the tangible detrimental effects of particular conduct,"[133] a community could exclude churches from

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[128] 21 Mass. App. Ct. 701, 490 N.E.2d 451 (1981).

[129] *Id.* at 705, 490 N.E.2d at 454. The Church did agree the town could regulate it under general wetlands law forever.

[130] 100 N.J. 586, 498 A.2d 1217 (1985).

[131] *See* 184 N.J. Super. 66, 445 A.2d 75 (Law. Div. 1982), *aff'd*, 189 N.J. Super. 404, 460 A.2d 191 (App. Div. 1983), *rev'd*, 100 N.J. 586, 498 A.2d 1217 (1985).

[132] 100 N.J. 586, 498 A.2d 1217 (1985).

[133] *Id.* at 601, 498 A.2d at 1225.

at least some residential zones. A concurring opinion by Justice Clifford argued that the court should not have reached a decision based upon the vagueness question but, instead, should have held that the community did not have the power to regulate religious activities in private homes and that the power to affect religious activities in residential districts has clear limits.[134]

Justice Garibaldi dissented, arguing that the definition of "church" involved a use and not a type of structure and that regular use of a house as a site for religious services constituted a church. She concluded that the regulation did not deprive the minister of any constitutional rights, citing the Sixth Circuit's *Lakewood* decision[135] as "strikingly similar" to the case at bar.[136] Justice Garibaldi proceeded to argue that it is necessary to look on zoning as part of a whole planning scheme and to not simply consider zoning issues on a case-by-case basis. Because the majority did not reach the substantive issues, it is unclear what the law is in New Jersey today. Although the majority's reliance on vagueness perhaps indicates a desire to avoid the major issue, at least certain language in the majority decision gives credence to some zoning power to regulate religious uses. The *Cameron* case thus suggests that there may be a middle ground in New Jersey state court decisions.[137]

There are some very hard line views being expressed. In *City of Sumner v. First Baptist Church of Sumner*,[138] the Supreme Court of Washington, in what strikes this author as an extreme decision,[139] held that, where a church fails to comply with a building and zoning code in the operation of a school facility, the community nonetheless has to adopt a

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[134] *Id.* at 606, 498 A.2d at 1227 (Clifford, J., concurring). Justice Clifford cited two New York cases to support this position: Diocese of Rochester v. Planning Board of Town of Brighton, 1 N.Y.2d 508, 136 N.E.2d 827, 154 N.Y.S.2d 849 (1956); and Westchester Reform Temple v. Brown, 22 N.Y.2d 488, 239 N.E.2d 891, 293 N.Y.S.2d 297 (1968).

[135] *Cameron*, 100 N.J. at 614-15, 498 A.2d at 1231-32 (Garibaldi, J., dissenting); *see* Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303 (6th Cir.), *cert. denied*, 464 U.S. 815 (1983).

[136] *Cameron*, 100 N.J. at 614, 498 A.2d at 1231.

[137] However, lower courts have taken a rather hard line. Thus, in St. John's Evangelical Lutheran Church v. City of Hoboken, 195 N.J. Super. 414, 479 A.2d 935 (1983), the court held that a church operation of a shelter for the homeless was a religious use and harm to the community if the shelter were closed far outweighed inconvenience to the community if it remained open. *Id.* at 421-22, 479 A.2d at 939. The court, thus, appears to be engaging in policy making since it concludes that the government needs assistance in dealing with the problem of the homeless. An even harder line decision was issued in Farhi v. Commissioners of Borough of Deal, 204 N.J. Super. 575, 499 A.2d 559 (Law Div. 1985), in which the court held that religious worship in the home could not be regulated in any way absent an overriding governmental interest. *Id.* at 584-85, 499 A.2d at 564.

[138] 97 Wash. 2d 1, 639 P.2d 1358 (1982).

[139] It has struck at least one other commentator in the same way. *See* Note, *Constitutional Review*, *supra* note 69.

flexible attitude toward that use. What makes this case a real test is that school safety standards were at issue. The basement of the church met standards for churches but failed to meet school safety standards. The court held that no attempt had been made to show that the safety standards were necessary in the particular circumstances involved and that applying the standards would force the school to shut down. In order to satisfy the first amendment, the court had to weigh the city's concerns against the impact on the church and the court determined that there was insufficient evidence on this point. Therefore, the case was remanded to obtain this evidence and to determine other issues as well.

The decision produced a flurry of concurring and dissenting opinions. Three judges (one concurring and two dissenting) made a number of important points. Judge Williams, concurring with the remand, expressed the view that, while balancing of positions has to take place, it was not for the court to disregard the city's conclusion that the safety of the children was at stake. Reasonable fire regulations, he argued, were minimal intrusions. Judge Dolliver, dissenting, (joined by Judge Rosellini) argued that, unlike the Supreme Court cases of *Yoder* and *Thomas*, which were cited by the majority, this case did not force an unalterable choice between religious belief and observance of the law since the church could choose to comply with the code.[140]

The case is troubling because it shows the extreme to which a court's deference to religious views can go. Although fire regulations may be of more immediate concern than zoning regulations, the same principles ought to apply. It should also be noted that the school failed to comply with the city's zoning code as well. As long as the effect of the regulation is indirect, not aimed at religious groups, and does not force a choice between religion and city ordinances, the courts should defer to reasonable time, place, and manner regulations. Moreover, the case is of special concern because the majority used the major Supreme Court decisions to support its conclusion even though the Supreme Court cases deal much more closely with real choices between conformity to an ordinance and religious belief. The *Sumner* court does not, unlike other state courts, rely on the police power argument or a state constitution but, instead, relies on the United States Supreme Court decisions.

Finally, an Indiana court has recently reiterated the Indiana position which does not favor restrictions on churches. While holding that churches can be subject to reasonable restrictions, in *Milharcic v. Metro-*

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[140] *Sumner*, 97 Wash. 2d at 20-21, 639 P.2d at 1369 (Dolliver, J., dissenting). There was some dispute about the church's financial ability to comply but, although the church raised this issue, apparently no evidence was presented to support this contention. *Id.* at 20, 639 P.2d at 1369.

politan Board of Zoning Appeals of Marion County (Division II)[141] an Indiana court held that a church could not be excluded from a residential zone and that a use variance request by a church could not be denied. If some state courts will not take the *Porterville* hint, then the Supreme Court needs to clarify the matter as soon as a suitable case is presented. Otherwise, communities in many states will be left with an uncertain view of their powers in this area.

VII. CONCLUSION

After examining the various cases, the question remains whether the new trend toward balancing religious uses and community interest ought to be encouraged. In light of the Supreme Court's strong statements about the valuable public purposes served by zoning and examination of the very real impacts on churches, the trend would appear to make sense. Except for the relatively few instances of total prohibition, most zoning laws do no totally eliminate religious uses throughout the community. They are not aimed at content, nor do they regulate belief. They also do not, as far as location is concerned, directly require anyone to act in a manner inconsistent with religious beliefs (except possibly for Orthodox Jews), although restrictions on living arrangements within churches have produced a number of situations which must be analyzed with extra sensitivity. The zoning laws do not condition benefits upon performance of actions contrary to religious beliefs. Indeed, in large measure, they do not force individuals to choose between religious practice and beliefs or obedience to zoning law. Moreover, they tend to place only minimal burdens on religious uses.

If there is a problem with certain of the courts' analyses of this situation, it seems to this author that much of the analysis ignores the real difference between zoning legislation and other types of legislation. As noted above, the Supreme Court has given strong support to the public purposes chosen by local legislative bodies. Tests that require local governments to justify their actions as based upon significant purpose miss the point that their actions in passing a genuinely comprehensive zoning ordinance are already likely to have strong policy concerns at their base. Thus, while religious uses are perhaps entitled to special sensitivity in the analysis, any analysis that fails to recognize that the zoning ordinance is a reflection of policy choices (not just what is necessary) that are of importance to the community will fail to do justice to the issues at hand. The federal courts have recognized this point and are beginning to work out a framework of analysis that recognizes the reality of the zoning situation. It is not yet clearly definitive and will not be until the Supreme Court

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[141] 489 N.E.2d 634 (Ind. Ct. App. 1986).

considers the questions that the lower courts are raising. However, the framework provides a better recognition of the real balancing involved in issues that are fundamental to both planning and religion.