

Case Comments

Justice Douglas' Sanctuary: May Churches* Be Excluded From Suburban Residential Areas?

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one. . . . [The police power] is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.¹

I. INTRODUCTION

Justice Douglas' statement in *Village of Belle Terre v. Boraas*² has been invoked frequently since 1974 to support the legitimacy of single-family residential districts in municipalities. Heartened by this unambiguous statement by the United States Supreme Court, municipalities have exercised their police power to prohibit certain property uses and users in order to preserve the quality of their residential neighborhoods.³ Even before the *Belle Terre* decision, Lakewood, Ohio, an older, suburban community in the metropolitan Cleveland area, used zoning to protect the quality of its residential districts.⁴ In 1973 Lakewood enacted a new zoning code, which prohibited the construction of churches in one- or two-family residential districts or in multiple family, low density districts.⁵ In *Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood*,⁶ a case of first impression in the federal courts, the Sixth Circuit upheld the validity of the 1973 zoning ordinance, concluding that it was not a violation of either the free exercise clause of the first amendment⁷ or the due process clause of the fourteenth amendment.⁸

The *Lakewood* case grew out of events commencing in 1972⁹ when members of the Lakewood, Ohio Congregation of the Jehovah's Witnesses¹⁰ sought to relocate

* Throughout this article the term "churches" includes any structure used by a religious organization primarily for worship.

1. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

2. 416 U.S. 1 (1974).

3. Although municipalities may prohibit uses directly, they also indirectly may exclude uses by height, bulk, and area requirements. 2 R. ANDERSON, *AMERICAN LAW OF ZONING* §§ 9.50-.67 (2d ed. 1976). Users may be indirectly excluded by minimum lot area or floor area, density restrictions, and the prohibition of certain types of dwellings (e.g., mobile homes, rowhouses and multiple family houses). *Id.* §§ 8.04-.11.

4. *Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood*, 699 F.2d 303, 304 (6th Cir.), *cert. denied*, 104 S. Ct. 72 (1983).

5. *Id.* at 305 (referring to LAKEWOOD, OHIO ORDINANCE § 55-78 (July 2, 1973)).

6. 699 F.2d 303, 304 (6th Cir.), *cert. denied*, 104 S. Ct. 72 (1983). The *Lakewood* decision has prompted considerable discussion. *See generally*, Note, *Land Use Regulation and the Free Exercise Clause*, 84 COLUM. L. REV. 1562 (1984); Comment, *Zoning Ordinances Affecting Churches: A Proposal for Expanded Free Exercise Protection*, 132 U. PA. L. REV. 1131 (1984).

7. U.S. CONST. amend. I.

8. U.S. CONST. amend. XIV, § 1.

9. *Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood*, 699 F.2d 303 (6th Cir.), *cert. denied*, 104 S. Ct. 72 (1983).

10. Hereinafter referred to as the "Congregation."

because their existing facilities were inadequate. The Congregation found a suitable location in Lakewood on the corner of Clifton Boulevard, a six-lane thoroughfare, and West Clifton Avenue, a secondary artery.¹¹ The half-acre lot was located in an area zoned for single-family dwellings,¹² subject to a special-use permit¹³ for churches.¹⁴ The city zoning board of appeals denied the Congregation's request for a special-use permit, citing potentially increased traffic hazards and noise levels, potentially decreased property values, and "various other problems."¹⁵ The Congregation unsuccessfully appealed the denial of the special-use permit to the Cuyahoga County Court of Common Pleas.¹⁶ Soon thereafter, Lakewood enacted the 1973 zoning ordinance, which explicitly prohibited the construction of a church building on the lot that the Congregation had procured.¹⁷ In fact, the ordinance prohibited new churches in ninety percent of the suburban city, while in nine of the remaining ten percent,¹⁸ a special-use permit was required for the construction of a church.¹⁹ Since Lakewood was suburban and had little undeveloped land, the Congregation had to compete with businesses for the few open parcels of land in the remaining ten percent. The competition resulted in a premium on commercial land, which proved to be prohibitive for the Congregation.²⁰

Unable to locate other affordable and suitable sites, the Congregation again sought a building permit for the acquired lot.²¹ The permit again was denied, this time based on the newly enacted zoning ordinance. The Congregation then filed suit in federal district court, under Section 1983 of the Civil Rights Act²² arguing that the

11. *Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood*, 699 F.2d 303, 304 (6th Cir.), *cert. denied*, 104 S. Ct. 72 (1983).

12. *Id.* at 305.

13. Special-uses are permitted subject to certain conditions specified in the zoning regulations. If the appropriate administrative agency determines that the conditions have been met, a use will be permitted. 3 R. ANDERSON, *supra* note 3, at § 19.01.

14. Brief for Appellant at 10, *Lakewood, Ohio Congregation of Jehovah's Witnesses* 699 F.2d 303, (6th Cir.), *cert. denied*, 104 S. Ct. 72 (1983).

15. *Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood*, 699 F.2d 303, 305 (6th Cir.), *cert. denied*, 104 S. Ct. 72 (1983).

16. The Congregation actually filed two state claims. The first suit alleged the special-use permit was improperly denied. The second suit, filed in 1975, concerned the validity of LAKEWOOD, OHIO ORDINANCE § 55-78 (July 2, 1973) under both the state and federal constitutions. The Congregation lost in Cuyahoga County Common Pleas Court, *Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood*, 9 Ohio Op. 3d 314 (C.P. 1978), and appealed to the Eighth District Court of Appeals of Ohio. The appellate court affirmed the lower court's decision but remanded the case to determine the constitutionality of the ordinance as applied. The common pleas court had not made a determination on this issue when the Congregation filed the federal suit. *Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood*, 699 F.2d 303, 305 (6th Cir.), *cert. denied*, 104 S. Ct. 72 (1983).

17. *Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood*, 699 F.2d 303, 305 (6th Cir.), *cert. denied*, 104 S. Ct. 72 (1983).

18. *Id.* at 307.

19. Brief for Appellant at 13, *Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood*, 699 F.2d 303 (6th Cir.), *cert. denied*, 104 S. Ct. 72 (1983).

20. *Id.* at 31.

21. *Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood*, 699 F.2d 303, 305 (6th Cir.), *cert. denied*, 104 S. Ct. 72 (1983).

22. Section 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper

Lakewood zoning ordinance violated the Congregation members' first, fifth, and fourteenth amendment rights.²³ When the district court held the zoning ordinance was valid, the Congregation appealed the first amendment claim to the Sixth Circuit.²⁴

Applying the *Wisconsin v. Yoder* test,²⁵ the Sixth Circuit rejected the first amendment argument. The court concluded that the first element of the test, whether the religious activity is a fundamental tenet of one's religion,²⁶ was not satisfied, because building a church has no religious significance.²⁷ Furthermore, the second element, whether the state unduly burdens the religious practice,²⁸ was not satisfied since the burden on the Congregation was minimal; the Congregation still could worship in homes, churches, schools, or meeting halls in residential districts.²⁹ Moreover, the court stated that financial inability to purchase land in a permitted zone was only an indirect economic burden, which does not require a court remedy. Since the court found the Congregation failed to satisfy the first two elements of *Yoder*,³⁰ the burden did not shift to the city to show a compelling state interest, the third element of the *Yoder* test.³¹ The Sixth Circuit also discussed whether the Congregation was denied due process under the fourteenth amendment. The court concluded that the Congregation was not denied due process since Lakewood had a rational basis³² for prohibiting churches in residential districts under *Village of Euclid v. Ambler Realty Co.*³³ and *Belle Terre*. The Congregation's petition for a writ of certiorari to the United States Supreme Court was denied.³⁴

The circumstances of the *Lakewood* case are fairly typical of situations across the United States. Suburban communities are becoming increasingly aggressive in the use of their most powerful discretionary tool, zoning.³⁵ Restrictive residential zoning has a direct impact on excluded property uses since these uses are restricted to other portions of the city or excluded totally. For religious minorities, the prohibition of

proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1976). The Supreme Court has interpreted § 1983 to include a municipal corporation as a "person." *Owen v. City of Independence*, 445 U.S. 622, *reh'g denied*, 446 U.S. 993 (1980).

23. *Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood*, 699 F.2d 303, 304 (6th Cir.), *cert. denied*, 104 S. Ct. 72 (1983).

24. The Congregation did not appeal the other two constitutional claims. *Id.*

25. 406 U.S. 205 (1972); *see infra* text accompanying notes 136-38.

26. *Id.* at 216.

27. *Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood*, 699 F.2d 303, 307 (6th Cir.), *cert. denied*, 104 S. Ct. 72 (1983).

28. *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972).

29. *Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood*, 699 F.2d 303, 307 (6th Cir.), *cert. denied*, 104 S. Ct. 72 (1983).

30. *Id.* at 308.

31. *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972).

32. The rational basis test when applied to zoning ordinances, means that an appellate court will not second guess the municipality's legislative body concerning the wisdom or rationality of the zoning ordinance, if the ordinance has a "substantial relation to the public health, safety, morals or general welfare." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

33. 272 U.S. 365 (1926).

34. *Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood*, 699 F.2d 303 (6th Cir.), *cert. denied*, 104 S. Ct. 72 (1983).

35. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981) ("The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities.").

new churches in residential districts presents a dilemma, since these minorities often have neither the political power to change the ordinance nor the economic resources to purchase suitable property in a permitted district. A church, then, is straightjacketed; it is unable to grow and worship with its new adherents. It may be forced to go outside of the community, subjected to other communities' zoning restrictions, and removed from the congregation and community it was established to serve. The *Lakewood* case provides an excellent basis for a reexamination whether, given the increasing judicial deference to zoning decisions, a municipality validly can exclude churches from residential areas. This Comment will demonstrate that the free exercise clause is a valid basis upon which to declare unconstitutional the prohibition of the construction of churches in residential areas in situations such as those in *Lakewood*. Furthermore, this Comment will demonstrate that the establishment clause would not be violated by permitting churches in residential districts.

II. THE HISTORY OF ZONING AND ITS EFFECT ON RELIGIOUS USES

A. Historical Basis for Zoning

Zoning is a fairly recent concept. During the nineteenth century, restrictive covenants³⁶ and the doctrine of nuisance³⁷ were widely used to resolve conflicts between differing uses of land.³⁸ These approaches generally were dependent upon enforcement by adjoining landowners and consequently were a piecemeal approach to remedying harms.³⁹ Zoning, the regulation of private uses of land by a municipality through its police power, provided not only governmental enforcement of restricted uses but also a comprehensive approach to problems that could not be solved individually.⁴⁰ In 1926, in *Village of Euclid v. Ambler Realty Co.*,⁴¹ the United States Supreme Court first determined the validity of zoning. The Court concluded that a municipality has the power to regulate land use to promote the public health, safety, morals, and general welfare.⁴² Although municipalities legally could restrict land use, any provision that is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare," is unconstitutional.⁴³ Two years later the Court reiterated this standard in *Nectow v. City of Cambridge*.⁴⁴ After *Nectow*, the Court declined to hear zoning cases for almost forty years, preferring to let state courts consider these cases of local concern. Although state courts have honored the standard set forth in *Euclid* and *Nectow*, those courts have interpreted the standard differently and have created a continuum of

36. A restrictive covenant is a provision in a deed which limits certain uses or prohibits them altogether. 1 R. ANDERSON, *supra* note 3, § 3.04.

37. Nuisance is a wrongful act that interferes with or destroys another's use or enjoyment of his or her land. *Id.* § 3.03.

38. 82 AM. JUR. 2D, *Zoning and Planning* § 1 (1976).

39. *Id.*

40. *Id.*

41. 272 U.S. 365 (1926).

42. *Id.* at 395.

43. *Id.*

44. 277 U.S. 183 (1928).

review, ranging from substantial deference⁴⁵ to close scrutiny of legislative decisions.⁴⁶

In the last ten years, the Supreme Court has returned to reviewing zoning laws.⁴⁷ The Court, still clinging to the standard articulated in *Euclid* and *Nectow*, has shown almost complete deference to legislative determinations on social and economic regulation including zoning.⁴⁸ The Court, however, has begun to consider the limitations of zoning, especially when it conflicts with fundamental rights.⁴⁹ Still, prior to *Lakewood*, there were no reported federal decisions concerning the conflict between zoning and the religion clauses. This left the issue to the state courts.⁵⁰

B. The Use of Zoning to Exclude Churches in Residential Areas

Even before the courts became deferential to zoning decisions, communities excluded certain uses from residential areas. The most common exclusions were commercial and industrial uses⁵¹ and apartment buildings.⁵² Justice Sutherland wrote in *Village of Euclid v. Ambler Realty Co.* that apartment buildings have the characteristics of a nuisance and, therefore, could be excluded from single-family residential districts.⁵³ Other property uses, such as churches, schools, libraries, and other public buildings, were not as clearly objectionable, but the *Euclid* Court failed to rule on them: "Specifically, there is nothing in the record to suggest that any damage results from the presence in the ordinance of those restrictions relating to churches, schools, libraries and other public and semi-public buildings."⁵⁴

Many municipalities, however, have found that churches and their parishioners produce undesirable effects and, therefore, use zoning to control religious uses of

45. See, e.g., *Lockard v. City of Los Angeles*, 33 Cal. 2d 453, 461, 202 P.2d 38, 42, cert. denied, 337 U.S. 939 (1949) (holding that zoning decisions will not be invalidated unless the regulations have no reasonable relation to the public welfare).

46. See, e.g., *La Salle Nat'l. Bank v. City of Chicago*, 5 Ill. 2d 344, 354, 125 N.E.2d 609, 614 (1955) (holding that zoning decisions will not be invalidated unless the regulations have no real and substantial relation to the public welfare).

47. See *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) (invalidating a zoning ordinance that prohibited live nude dancing in the community); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (holding that a zoning ordinance that prohibited a grandmother from living with her grandson defined family too narrowly in violation of the due process clause); *Young v. American Mini Theatres*, 427 U.S. 50 (1976) (upholding a zoning ordinance that dispersed adult theatres throughout the community); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (upholding a zoning ordinance that prohibited more than two unrelated or unmarried persons from living in the same dwelling).

48. See *City of New Orleans v. Duke*, 427 U.S. 297, 303 (1976) ("When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations."); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974) ("We deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be 'reasonable, not arbitrary'. . . ."). But see *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) ("There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments . . .").

49. *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) ("When a city undertakes such intrusive regulation of the family, neither *Belle Terre* nor *Euclid* governs; The usual judicial deference to the legislature is inappropriate.").

50. See, e.g., *Galfas v. City of Atlanta*, 193 F.2d 931 (5th Cir. 1952). In *Galfas* the court applied the abstention doctrine. This doctrine gives a federal court discretionary authority to relinquish jurisdiction when the matter concerns an issue that the state court would be better suited to handle. *Railroad Comm'n. of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

51. 2 R. ANDERSON, *supra* note 3, §§ 9.25-.26.

52. *Id.* § 9.35.

53. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

54. *Id.* at 385.

land.⁵⁵ The most significant problem created by churches is traffic hazards.⁵⁶ When groups congregate, traffic and traffic hazards necessarily result. This is a particular concern in residential areas, where roads are narrower than in other areas of the municipality and cannot handle a sudden influx of automobiles before or after religious services.⁵⁷ The hazards are compounded when the worshippers park along narrow residential streets. Communities also are concerned because the safety of children is threatened when traffic increases. A second problem is the noise created by a church and its parishioners.⁵⁸ Noise can come not only from inside the church (especially during the summer) but also from outside the church during outdoor activities of the congregation and during the time before and after worship services.⁵⁹ A third, but more questionable concern is economics. Churches are exempt from property taxes and thus decrease tax revenues for municipalities.⁶⁰ Moreover, the mere presence of a church may decrease the value of surrounding land.⁶¹ Finally, municipalities may wish to discourage undesirable religious sects from worshipping in the community although this concern is never explicitly stated.⁶² While this goal is not a legitimate objective of zoning,⁶³ municipalities legitimately are able to regulate religious uses to remedy the first three problems, under such a broad standard of regulating "health, safety, morals, and general welfare," that they are able to remedy the last concern as well.⁶⁴

1. *Judicial Rejection of the Use of Zoning to Exclude Churches*

Even though many of the municipalities' concerns are legitimate, most state courts have rejected municipalities' attempts to exclude churches from residential districts,⁶⁵ and commentators have supported this result.⁶⁶ The state courts could have upheld the municipalities' actions under the *Euclid* test by finding a relationship

55. See generally *Young v. American Mini Theatres*, 427 U.S. 50 (1976) (the Court held that a city council may use zoning to regulate adult theatres in order to reduce the ill effects caused by those establishments).

56. J. CURRY, PUBLIC REGULATION OF THE RELIGIOUS USE OF LAND 118-34 (1964); 3 N. WILLIAMS, JR., AMERICAN LAND PLANNING § 77.12 (1975).

57. 2 R. ANDERSON, *supra* note 3, § 12.22.

58. J. CURRY, *supra* note 56, at 106-10.

59. *Id.* at 106.

60. *Id.* at 89-94.

61. *Id.* at 95-104.

62. *Id.* at 186-208. It is noteworthy that most of the cases litigated concern Moslems, Jews, Jehovah's Witnesses, and Christian fundamentalist groups, since these religious minorities have been subject to religious discrimination in the past. D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 133 (1971). For a recent example of neighbors' attempt at removing an undesirable religious sect, see *Baptist Neighbors Oppose Texas Buddhist Temple*, N.Y. Times, Feb. 3, 1984, at A8, col. 2.

63. See generally *Buchanan v. Warley*, 245 U.S. 60 (1917) (holding that a city ordinance that had the practical effect of fostering racial discrimination was invalid).

64. 2 R. ANDERSON, *supra* note 3, § 8.19.

65. See, e.g., *Board of Zoning Appeals v. Decatur, Ind. Co. of Jehovah's Witnesses*, 233 Ind. 83, 117 N.E.2d 115 (1954); *Mooney v. Village of Orchard Lake*, 333 Mich. 389, 53 N.W.2d 308 (1952); *Diocese of Rochester v. Planning Bd. of Brighton*, 1 N.Y.2d 508, 136 N.E.2d 827, 154 N.Y.S.2d 849 (1956); *Ohio ex rel. Synod of Ohio of United Lutheran Church in Am. v. Joseph*, 139 Ohio St. 229, 39 N.E.2d 515 (1942); *City of Sherman v. Simms*, 143 Tex. 115, 183 S.W.2d 415 (1944). Massachusetts has legislatively prohibited municipalities from regulating or restricting the use of land for religious purposes. MASS. ANN. LAWS ch. 40A § 3 (Michie/Law. Co-op. 1983).

66. Note, *Churches and Zoning*, 70 HARV. L. REV. 1428 (1957); Note, *Zoning Out Religious Institutions*, 32 NOTRE DAME LAW. 627 (1957); Note, *Zoning Laws and the Church*, 27 ST. JOHN'S L. REV. 93 (1952).

between the traffic and noise created by churches and the public "health, safety, . . . and general welfare."⁶⁷ Instead, these courts used a modified form of the *Euclid* test⁶⁸ and possibly considered unvoiced religious discrimination underlying the facts⁶⁹ to reject municipalities' attempts to exclude churches.

The courts have modified the *Euclid* test in two ways. First, the courts have held that a church has a special status that must prevail when a zoning ordinance conflicts with a church's desire to locate within the community.⁷⁰ Second, since churches promote morals and general welfare, the courts have found that using the police power to exclude churches would be arbitrary and unreasonable.⁷¹

In *Jewish Reconstructionist Synagogue v. Village of Roslyn Harbor*,⁷² for example, the New York Court of Appeals stated that "the peculiarly pre-eminent status of religious institutions under the first amendment provision for free exercise of religion remains an important factor entering into the balance that also weighs the needs or desires of the community."⁷³ In an earlier opinion, the same court said that "when the church enters the picture, different considerations apply."⁷⁴ Although the *Roslyn Harbor* court found the preeminence of religious institutions was derived from the first amendment, the court failed to provide any justification for its conclusion. Other courts have also found in the constitutional right to worship and to assemble for worship the justification for invalidating zoning ordinances.⁷⁵ However, these courts also never explained how those rights are infringed when a congregation is prohibited from building a church.

This lack of analysis probably is due to the state courts' inability to find any

67. See *supra* text accompanying notes 41-43.

68. One court has stressed the necessity of modifying the *Euclid* test:

Human experience teaches us that public officials, when faced with pressure to bar church uses by those residing in a residential neighborhood, tend to avoid any appearance of an antireligious stance and temper their decision by carefully couching their grounds for refusal to permit such use in terms of traffic dangers, fire hazards and noise and disturbance. . . . Under such circumstances it is necessary to most carefully scrutinize the reasons advanced for a denial to insure that they are real and not merely pretexts used to preclude the exercise of constitutionally protected privileges.

American Friends of Soc'y of St. Pius v. Schwab, 68 A.D.2d 646, 417 N.Y.S. N.Y.S.2d 991 (1979).

69. J. CURRY, *supra* note 56, at 186. Curry isolates seven elements that he believes are indicative of religious prejudice:

- A. A sharp difference in the treatment of two denominations under comparable circumstances.
- B. Procedural harassment of an applicant.
- C. Sudden changes in requirements, imposed when a particular church application is about to be filed or just after it is filed.
- D. Harsh language or other indication of a hostile attitude.
- E. Absence of a rational basis for a decision against the church.
- F. Truculence on the part of the church-applicant that would try the patience of angels.
- G. Adverse action against a church or racial group which is notoriously the victim of widespread intolerance.

Id. at 187.

70. See, e.g., *Jewish Reconstructionist Synagogue v. Village of Roslyn Harbor*, 38 N.Y.2d 283, 342 N.E.2d 534, 379 N.Y.S.2d 747 (1975), *cert. denied*, 426 U.S. 950 (1976).

71. See, e.g., *Ohio ex rel. Synod of Ohio of United Lutheran Church in Am. v. Joseph*, 139 Ohio St. 229, 39 N.E.2d 515 (1942).

72. 38 N.Y.2d 283, 342 N.E.2d 534, 379 N.Y.S.2d 747 (1975), *cert. denied*, 426 U.S. 950 (1976).

73. *Id.* at 288, 342 N.E.2d at 538, 379 N.Y.S.2d at 753.

74. *Diocese of Rochester v. Planning Bd. of Brighton*, 1 N.Y.2d 508, 523, 136 N.E.2d 827, 834, 154 N.Y.S.2d 849, 859 (1956).

75. See, e.g., *Board of Zoning Appeals v. Decatur, Ind. Co. of Jehovah's Witnesses*, 233 Ind. 83, 94, 117 N.E.2d 115, 128 (1954).

basis for the Supreme Court's limited interpretation of the free exercise clause.⁷⁶ Until the 1963 *Sherbert v. Verner* decision,⁷⁷ religious activity was not considered within the purview of the free exercise clause. Even after *Sherbert* building a church arguably could not be considered a religious activity.⁷⁸ Furthermore, the courts feared that a preference for religious uses might require similar preferences for other forms of public assembly.⁷⁹

The difficulty in finding justification for the protection of religious uses of land in the constitutional guarantee of religious freedom, and the desire to protect the rights of churchgoers caused some courts to determine that a zoning ordinance prohibiting churches was contrary to the goals that a state's police power was intended to promote.⁸⁰ Churches, several courts declared, actually promote morals and general welfare. Churches not only provide stability by teaching moral values⁸¹ but also provide community services and a place for social groups to meet.⁸²

After considering the benefits that churches provide to a community, these courts concluded that any detriments were insignificant. Most courts have determined that although traffic hazards posed the greatest threat, the threats were minimal since churches created the most traffic in nonpeak hours.⁸³ In determining the gravity of the hazard, the courts have looked at the number of worshippers,⁸⁴ the width of the street,⁸⁵ and the availability of on-site parking.⁸⁶ One court even concluded that people entering the street upon leaving a church rarely cause accidents.⁸⁷ In addition, courts have stated that noise created by churches is "insufficient grounds upon which to deny a permit to a church."⁸⁸ The Ohio Supreme Court, for instance, claimed that

76. See *infra* text accompanying notes 108–123.

77. 374 U.S. 398 (1963).

78. *Miami Beach United Lutheran Church of the Epiphany v. City of Miami Beach*, 82 So. 2d 880 (Fla. 1955).

79. J. CURRY, *supra* note 56, at 210.

80. *Id.*

81. *Mooney v. Village of Orchard Lake*, 333 Mich. 389, 394, 53 N.W.2d 308, 310 (1952) (citing the Northwest Ordinance of 1787); *Ohio ex rel. Synod of Ohio of United Lutheran Church in Am. v. Joseph*, 139 Ohio St. 229, 248–49, 39 N.E.2d 515, 524 (1942) ("The Church in our American society has traditionally occupied the role of both teacher and guardian of morals.").

82. *Ohio ex rel. Synod of Ohio of United Lutheran Church in Am. v. Joseph*, 139 Ohio St. 229, 249, 39 N.E.2d 515, 524 (1942) ("Fully to accomplish its . . . social function, the church should be integrated into the home life of the community which it serves.").

83. *Board of Zoning Appeals v. Decatur, Ind. Co. of Jehovah's Witnesses*, 233 Ind. 83, 93, 117 N.E.2d 115, 120 (1954) ("The services . . . are held . . . at times when traffic is at its lowest ebb."); *Ohio ex rel. Synod of Ohio of United Lutheran Church in Am. v. Joseph*, 139 Ohio St. 229, 248, 39 N.E.2d 515, 524 (1942) ("Any perceptible increase in traffic . . . would occur . . . [at] a time when ordinary traffic would be greatly diminished . . .").

84. *Galfas v. Ailor*, 81 Ga. App. 13, 57 S.E.2d 834, 835, *transf.*, 206 Ga. 76, 55 S.E.2d 582 (1950) (175 members); *Ohio ex rel. Synod of Ohio of United Lutheran Church in Am. v. Joseph*, 139 Ohio St. 229, 39 N.E.2d 515 (1942) (250 members).

85. *Ohio ex rel. Synod of Ohio of United Lutheran Church in Am. v. Joseph*, 139 Ohio St. 229, 248, 39 N.E.2d 515, 524 (1942) (one of the streets was "as wide as any in the city"); *Washington ex rel. Wenatchee Congregation of Jehovah's Witnesses v. City of Wenatchee*, 50 Wash. 2d 378, 312 P.2d 195 (1957) (50–60 feet); *West Virginia ex rel. Howell v. Meader*, 109 W. Va. 368, 154 S.E. 876 (1930) (35 feet).

86. *Ohio ex rel. Synod of Ohio of United Lutheran Church in Am. v. Joseph*, 139 Ohio St. 229, 39 N.E.2d 515 (1942) (area sufficient to accommodate 60 automobiles).

87. *Board of Zoning Appeals v. Decatur, Ind. Co. of Jehovah's Witnesses*, 233 Ind. 83, 92, 117 N.E.2d 115, 120 (1954).

88. *Diocese of Rochester v. Planning Bd. of Brighton*, 1 N.Y.2d 508, 525, 136 N.E.2d 827, 836, 154 N.Y.S.2d 849, 861 (1956); *accord Ohio ex rel. of Synod of Ohio of United Lutheran Church in Am. v. Joseph*, 139 Ohio St. 229, 247, 39 N.E.2d 515, 523 (1942); *Congregation Comm., N. Fort Worth Congregation, Jehovah's Witnesses v. City Council of Haltom City*, 287 S.W.2d 700 (Tex. Civ. App. 1956).

churchgoers rarely enter the church in a boisterous mood.⁸⁹ Finally, state courts have held that a decrease in property values is not a harm that justifies excluding churches,⁹⁰ especially since any harm is either speculative or negligible.⁹¹ Thus, the state courts have balanced the churches' potential harms to the community against the benefits of churches, and have concluded that zoning ordinances excluding churches are arbitrary and unreasonable, since the ordinances are not substantially related to the public health, safety, morals, or general welfare.⁹²

2. Judicial Acceptance of Exclusion of Religious Uses of Land from Residential Districts

While in a majority of states, churches could not be excluded from residential districts, courts in four states, California,⁹³ Connecticut,⁹⁴ Florida,⁹⁵ and Oregon,⁹⁶ have held that churches may be excluded from residential districts through zoning. In *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville*,⁹⁷ for example, a California court decided that zoning does not constitute an unwarranted restriction of worship, and therefore, like any other landowner, the plaintiff-church was subject to land use restrictions.⁹⁸ In *Milwaukie Company of Jehovah's Witnesses v. Mullen*⁹⁹ the Oregon Supreme Court explicitly stated its rationale for holding that churches legally could be excluded from residential districts. The court said that although freedom of religion cannot be suppressed, one's religious practice is subject to valid governmental regulations.¹⁰⁰ Conse-

89. *Ohio ex rel. Synod of Ohio of United Lutheran Church in Am. v. Joseph*, 139 Ohio St. 229, 247, 39 N.E.2d 515, 523 (1942).

90. *Englewood v. Apostolic Christian Church*, 146 Colo. 374, 384, 362 P.2d 172, 177 (1961) (McWilliams, J., specially concurring) ("The possible depressive effect on property values . . . is not in itself sufficient ground. . . ."); *Columbus Park Congregation v. Board of Appeals*, 25 Ill. 2d 65, 73, 182 N.E.2d 722, 726 (1962) (permitted uses in the district are just as harmful to property value as the establishment of a church); *Board of Zoning Appeals v. Schultz*, 241 Ind. 339, 348, 172 N.E.2d 39, 43 (1961); *Diocese of Rochester v. Planning Bd. of Brighton*, 1 N.Y.2d 508, 524, 136 N.E.2d 827, 835, 154 N.Y.S.2d 849, 861 (1956) ("[A] mere pecuniary loss to a few persons should not bar" the erection of a church.); *Congregation Comm., N. Fort Worth Congregation, Jehovah's Witnesses v. City Council of Haltom City*, 287 S.W.2d 700, 705 (Tex. Civ. App. 1956) ("The evidence falls far short of showing material injury to neighboring residential property.").

91. *See, e.g., Congregation Comm., N. Fort Worth Congregation, Jehovah's Witnesses v. City Council of Haltom City*, 287 S.W.2d 700, 705 (Tex. Civ. App. 1956).

92. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

93. *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 denied*, 338 U.S. 805 (1949), *reh'g denied*, 338 U.S. 939 (1950).

94. *West Hartford Methodist Church v. Zoning Bd. of Appeals of West Hartford*, 143 Conn. 263, 121 A.2d 640 (1956).

95. *Miami Beach United Lutheran Church of the Epiphany v. City of Miami Beach*, 82 So. 2d 880 (Fla. 1955). *Contra State ex rel. Tampa, Florida Co. of Jehovah's Witnesses, N. Unit v. City of Tampa*, 48 So. 2d 78 (Fla. 1950).

96. *Milwaukie Co. of Jehovah's Witnesses v. Mullen*, 214 Or. 281, 330 P.2d 5 (1958), *cert. denied and appeal dismissed*, 359 U.S. 436 (1959).

97. 90 Cal. App. 2d 656, 203 P.2d 823, *appeal denied*, 338 U.S. 805 (1949), *reh'g denied*, 338 U.S. 939 (1950). The *Porterville* decision was acknowledged by the Supreme Court in *American Communications Ass'n v. Douds*: "We recently dismissed for want of substantiality an appeal in which a church group contended that its First Amendment rights were violated by a municipal zoning ordinance preventing the building of churches in certain residential areas." 339 U.S. 382, 397-98 (1950).

98. *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville*, 90 Cal. App. 2d 656, 660, 203 P.2d 823, 825, *appeal denied*, 338 U.S. 805 (1949), *reh'g denied*, 338 U.S. 939 (1950).

99. 214 Or. 281, 330 P.2d 5 (1958), *cert. denied and appeal dismissed*, 359 U.S. 436 (1959).

100. *Id.* at 319, 330 P.2d at 23.

quently, the *Mullen* court strictly applied the *Euclid* standard of review to the contested zoning ordinance and upheld the ordinance because the reduction of traffic hazards and noise were valid zoning goals.¹⁰¹

The idea that zoning legitimately can be used to exclude churches is still a minority view, but this view is becoming increasingly accepted, as a result of growing judicial deference to zoning ordinances. In 1982, for example, the Alaska Supreme Court upheld a zoning ordinance that prohibited the establishment of a parochial school in a residential district.¹⁰² In an even more intrusive ruling, the New Jersey Superior Court held that a municipality validly could prohibit a congregation from worshipping in the minister's home.¹⁰³ In *Lakewood*, the Jehovah's Witnesses were unsuccessful in their state claim for a special-use permit¹⁰⁴ even though the Ohio Supreme Court already had held that excluding churches from residential areas was arbitrary and unreasonable.¹⁰⁵ The Ohio Court of Appeals concluded that "while the law of Ohio provides that churches may be erected in single family districts, this does not mean that churches have an absolute right to erect their buildings on any lot in a single family district. The city may require reasonable restrictions."¹⁰⁶ The appellate court, therefore, affirmed the denial of the special-use permit.¹⁰⁷

The foregoing decisions indicate that state courts are becoming increasingly reluctant to review legislative decisions that prohibit religious uses in residential districts. Consequently, religious minorities' interest in worshipping in the community in which their members live may not receive adequate judicial protection.

III. PROTECTION OF THE LOCATION OF CHURCHES UNDER THE FIRST AMENDMENT

A. *The Free Exercise Clause and Religious Activity*

In 1791, the free exercise clause of the first amendment¹⁰⁸ was added to the United States Constitution to protect the rights of religious minorities.¹⁰⁹ Although the free exercise clause was added to the Constitution early in United States history, the scope of the clause's protection has been unclear. Not only does no legislative

101. *Id.* at 313, 330 P.2d at 20.

102. *Seward Chapel, Inc. v. City of Seward*, 655 P.2d 1293 (Alaska 1982).

103. *New Jersey 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); *see also Grosz v. City of Miami Beach*, 721 F.2d 729 (11th Cir. 1983); Comment, *Zoning Ordinances, Private Religious Conduct, and the Free Exercise of Religion*, 76 Nw. U.L. Rev. 786, 786-812 (1981).

104. *See supra* note 16.

105. *Ohio ex rel. Synod of Ohio of United Lutheran Church in Am. v. Joseph*, 139 Ohio St. 229, 39 N.E.2d 515 (1942).

106. *Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood*, No. 32386, slip op. at 4 (Ohio Ct. App. Mar. 21, 1974).

107. *Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood*, 699 F.2d 303, 305 (6th Cir.), *cert. denied*, 104 S. Ct. 72 (1983).

108. U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise of [religion] . . .").

109. The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

history exist to elucidate the framers' intent, but the Supreme Court did not first construe the clause until 1879, eighty-eight years after its ratification. In *Reynolds v. United States*¹¹⁰ the Supreme Court declared that the federal government could outlaw the Mormons' practice of polygamy. The Court held that although the government could not regulate religious beliefs, regulation of religious actions was within the government's scope of power.¹¹¹ This action/belief dichotomy continued in later Supreme Court cases in which the Court held that the government could prohibit children from soliciting religious tracts¹¹² and that the government could require children to be inoculated in violation of a religious doctrine.¹¹³ In *Cantwell v. Connecticut*¹¹⁴ the Court also made the free exercise clause applicable to the states. The Court noted that a statute that regulated the dissemination of religious ideas would be ruled invalid if it were not narrowly drawn to limit the discretion of the public official.¹¹⁵

Although the Court continued to follow the action/belief dichotomy, decisions concerning constitutional rights of religion were often decided on alternative grounds,¹¹⁶ demonstrating the Court's reluctance to expand the meaning of the free exercise clause. For example, the Court upheld the right of parents to send their children to private and parochial schools as long as those schools satisfied the basic educational requirements.¹¹⁷ The Court based its decision, however, on the liberty of parents to direct the upbringing of their children, which was protected by the fourteenth amendment.¹¹⁸ In *West Virginia Board of Education v. Barnette*,¹¹⁹ the Court declared that children of the Jehovah's Witnesses could not be compelled to recite the Pledge of Allegiance to the United States flag. Although it was against the Jehovah's Witnesses' fundamental tenets to honor graven images like the flag, the Court appeared to decide this case on free speech grounds.¹²⁰

The Supreme Court did not decide a case concerning religious activity solely on free exercise grounds until 1961 when in *Braunfeld v. Brown*¹²¹ the Court held that a law requiring businesses to close on Sundays did not violate the free exercise clause. Braunfeld asserted that the Sunday closing law forced him to choose between practicing his religion, which required that he close his store on Saturday, and remaining open on Saturday to compensate for the loss of income from closing on Sunday and to

110. 98 U.S. 145 (1879).

111. *Id.* at 166.

112. *Prince v. Massachusetts*, 321 U.S. 158 (1944).

113. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

114. 310 U.S. 296 (1940).

115. *Id.* at 307.

116. *See, e.g., West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (compulsory salute to the American flag violates the freedom of religion and of speech); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (a municipal ordinance requiring a tax be paid by solicitors of religious literature violates the freedom of religion, speech, and press); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (dissemination of religious ideas is protected by the first amendment); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (prohibition of parochial schools within the state was a violation of due process).

117. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

118. *Id.* at 534.

119. 319 U.S. 624 (1943).

120. *Id.* at 642.

121. 366 U.S. 599 (1961).

retain his capital investment.¹²² Chief Justice Warren, writing for the majority, stated that the Pennsylvania statute that prohibited businesses from remaining open on Sunday did not require Orthodox Jews to forsake their religious beliefs; the statute merely created an indirect burden that makes the practice of their religion more expensive. The Court held that the statute did not discriminate invidiously among religions and that the statute promoted a valid state interest—a uniform day of rest. Therefore, the Court held that the statute did not violate the free exercise clause.¹²³

Two years later, in *Sherbert v. Verner*,¹²⁴ the Court expanded the protection of religious activity. The Court rejected the action/belief distinction¹²⁵ and stated that religious freedom is violated when a substantial burden is placed on the religious practice¹²⁶ without a compelling state interest.¹²⁷ *Sherbert* dealt with a South Carolina law that denied unemployment compensation to individuals who had refused to accept work.¹²⁸ The plaintiff, Sherbert, had refused to accept any work that required her to work on Saturday, her religion's day of rest.¹²⁹ Justice Brennan, writing for the majority, stated that the South Carolina law forced Sherbert to choose between her religious beliefs and accepting unemployment benefits, and, therefore, imposed a substantial burden on her religious beliefs.¹³⁰ Furthermore, the state had asserted no compelling interest in requiring everyone to accept work on Saturdays. The Court held that the state's interest could be met while allowing religious exemptions.¹³¹ Justice Brennan distinguished *Braunfeld*, asserting that the state's interest in *Braunfeld* in a uniform day of rest was compelling, while the state's interest in *Sherbert*, uniform application of unemployment compensation laws, was not. Justice Brennan concluded that providing a religious exemption in *Braunfeld* would "present an administrative problem of such magnitude, or . . . afford the exempted class so great a competitive advantage, that such a requirement would have rendered the entire statutory scheme unworkable."¹³² On the other hand, Justice Brennan found no such problem in *Sherbert*; an exception to the statute would not render the goal of uniform application of the unemployment compensation laws totally unworkable.¹³³

The free exercise clause was delineated further by Chief Justice Burger in *Wisconsin v. Yoder*¹³⁴ and in *Thomas v. Review Board of Indiana Employment Security Division*.¹³⁵ In *Yoder*, the Court held that a state could not compel Amish students to attend high school, since the state law conflicted with the Amish religious practices. In reaching that conclusion, Chief Justice Burger, writing for the majority,

122. *Id.* at 601.

123. *Id.* at 609.

124. 374 U.S. 398 (1963).

125. The Eleventh Circuit appears to have resurrected the action/belief dichotomy. See *Grosz v. City of Miami Beach*, 721 F.2d 729, 733 n.5 (11th Cir. 1983).

126. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

127. *Id.*

128. *Id.* at 401.

129. *Id.*

130. *Id.* at 404.

131. *Id.* at 407.

132. *Id.* at 408-09.

133. *Id.*

134. 406 U.S. 205 (1972).

135. 450 U.S. 707 (1981).

enunciated a three-part test: (1) whether the activity in question is rooted in genuine religious belief;¹³⁶ (2) whether the free exercise of that religion is unduly burdened by governmental action;¹³⁷ and (3) whether the state's interests are of "the highest order," outweighing the petitioner's burden.¹³⁸

In *Thomas* the Court further broadened the application of the free exercise clause. *Thomas* argued that he was denied unemployment compensation because of his religious beliefs. *Thomas* had been denied unemployment benefits because he had refused to work on a production line making parts for armaments, even though as a member of the Jehovah's Witnesses, he was not obligated to refuse to make armaments.¹³⁹ Although the Court in *Yoder* required the religious activity to be a fundamental tenet of one's religion, the *Thomas* Court, in an opinion by Chief Justice Burger, stated that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."¹⁴⁰ Thus, something less than an established church doctrine will be considered a religious belief sufficient to satisfy the first element of the *Yoder* test, as long as the belief is genuinely held by the individual. The *Thomas* Court reiterated the compelling state interest or interest of the highest order standard found in *Sherbert* and *Yoder* and concluded that the state had not met its burden.¹⁴¹

The *Thomas* decision is the most recent of several decisions broadening the scope of the free exercise clause. These cases evidence the Court's attempt to scrutinize closely governmental actions that subtly discriminate against religious minorities. The Supreme Court's expansion of the free exercise clause to protect religious minorities sharply contrasts with federal and state court decisions¹⁴² that have upheld zoning ordinances that effectively exclude religious minorities from certain communities.

B. Application of the *Yoder* Test to Lakewood Situations

1. *Worship as Religious Activity Rooted in Genuine Religious Belief*

The *Yoder* test arguably can be applied in the zoning context to protect the right of a religious group to construct a place of worship in the group's chosen location. While the Sixth Circuit in *Lakewood* denied protection under *Yoder*, concluding that (1) a church building had no ritualistic significance,¹⁴³ (2) the burdens on the group's religious practice were only aesthetic and economic,¹⁴⁴ and (3) zoning for safety

136. *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972).

137. *Id.* at 218.

138. *Id.* at 215.

139. *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 709-11 (1981).

140. *Id.* at 714.

141. *Id.* at 719.

142. Besides the Sixth Circuit, one other circuit, the Eleventh, has upheld a zoning ordinance that prohibits churches or synagogues in residential districts. *Grosz v. City of Miami Beach*, 721 F.2d 729, 738 (11th Cir. 1983). For state court decisions, see text accompanying notes 92-95.

143. *Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood*, 699 F.2d 303, 307 (6th Cir.), *cert. denied*, 104 S. Ct. 72 (1983).

144. *Id.*

reasons was a valid use of the police power,¹⁴⁵ the Sixth Circuit's analysis is in many ways unsatisfactory. Although a church building merely may be the structure in which the congregation worships, the regulation of land use for church building does affect where a congregation can worship, and depending on the extent of the regulation, whether the congregation can worship at all.¹⁴⁶ The right to worship is protected under the free exercise clause of the first amendment.¹⁴⁷ Thus, although a church building itself may not have the ritualistic significance necessary to satisfy the "fundamental tenet of one's religion"¹⁴⁸ element of the *Yoder* test, the denial of the right to construct a church as a means to effect the right to worship, may in effect deny a congregation the right to worship. Since worship is constitutionally protected, the first element of the *Yoder* test should be satisfied by a showing that the prohibition of the construction of churches has a detrimental impact on the congregation's ability to exercise its right to worship.

2. Exclusion from Residential Districts as an Undue Burden

The second element of the *Yoder* test, which must be satisfied to show a constitutional violation, is that governmental action must unduly burden free exercise.¹⁴⁹ In *Lakewood*, the Sixth Circuit concluded that the zoning ordinance only indirectly burdened the Jehovah's Witnesses' free exercise of religion and that an indirect burden does not satisfy the second element of the *Yoder* test. The Supreme Court in *Sherbert*, however, acknowledged that an indirect burden may have the same effect as a direct burden. Quoting the language in *Braunfeld v. Brown* the *Sherbert* Court said: "If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect."¹⁵⁰ A municipality cannot enact a regulation prohibiting a certain religious group or groups from worshipping, but by enacting an ordinance regulating the place of worship, a municipality indirectly can achieve the same result. The Wisconsin Supreme Court recognized the seriousness of the indirect effect of an ordinance regulating the location of churches: "Any restriction upon the opportunity to build a house of worship is at least a potential burden upon the freedom of those who would like to worship there. Whether the burden is slight or substantial will depend on the circumstances."¹⁵¹

145. *Id.* at 308.

146. See *Grosz v. City of Miami Beach*, 721 F.2d 729, 738 (11th Cir. 1983) (A zoning ordinance that prohibits churches or synagogues in residential districts "affects prayer and religious services, and so involves conduct.").

147. See, e.g., *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote. . . ."); *Jones v. City of Opelika*, 316 U.S. 584, 611 (1942) (Murphy, J., dissenting), *rev'd*, 319 U.S. 103 (1943) (the freedom of worship is "essential to our political welfare and spiritual progress. . . .").

148. See *supra* text accompanying note 136. This may not always be the case. For instance, Orthodox Jews are prohibited by their religious doctrine from travelling on the Sabbath. Consequently, their religious belief requires that the synagogue be built within walking distance of the members' homes. See *Young Israel Org. of Cleveland v. Dworkin*, 105 Ohio App. 89, 92, 133 N.E.2d 174, 176 (1956).

149. See *supra* text accompanying note 137.

150. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (quoting *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961)).

151. *Lake Drive Baptist Church v. Village of Bayside*, 12 Wis. 2d 585, 599-600, 108 N.W.2d 288, 296 (1961).

The burden on a group's religious practice caused by a zoning ordinance might be considered slight, for instance, if a suburban municipality allowed a congregation to worship in existing homes, churches, schools, and meeting halls, but prohibited the construction of new churches in residential districts. Nevertheless, these alternatives, although superficially reasonable, present some difficulties. If corporate worship¹⁵² is considered an indispensable part of the practice of a faith¹⁵³ limiting the congregation to worship in private homes should violate the constitution if the size of the congregation precludes home worship.¹⁵⁴ Moreover, limiting worship to homes may create the very problems that a community ostensibly tries to eliminate. Worship in homes may require parking on the residential street and may create noise problems since a home and its yard are not designed to alleviate noise.¹⁵⁵

Forcing the congregation to use existing churches, schools, or meeting halls may present other difficulties. These structures may not reflect the theology of a particular faith. For example, the Catholic canon law requires that the building used for worship be attached to other buildings for the rite of consecration and that profane uses be prohibited from above or below the sanctuary.¹⁵⁶ The architecture of the churches may also reflect the theology of most religious sects and may be considered a visual, permanent form of worship.¹⁵⁷ Schools and meeting halls may be theologically unsuitable since the nondescript atmosphere may create a message that is contradictory to a particular faith's doctrine.¹⁵⁸

In the same respect, requiring a congregation to use other church buildings may pose several problems. First, the quantity of old churches in a suburban community may be small or nonexistent if the suburban community has only recently expanded into undeveloped land where few churches originally existed. Only new churches

152. Corporate worship is the gathering of the congregation together to worship in public to provide a center of reference outside each member's own immediate experience. This is contrasted with worship between an individual member and a supreme being and worship among a member's immediate family. Olsen, *The Closet, the House, and the Sanctuary*, 98 *THE CHRISTIAN CENTURY* 1285 (1981).

153. *See id.*; *see also* Boyd, *Contexts for Worship*, 92 *THE CHRISTIAN CENTURY* 830 (1975).

154. The Lakewood, Ohio Congregation of Jehovah's Witnesses has 175 members.

155. In *Lakewood* the church construction plans included off-street parking. Brief for Appellant at 7, *Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood*, 699 F.2d 303 (6th Cir.), *cert. denied*, 104 S. Ct. 72 (1983).

156. J. O'CONNELL, *CHURCH BUILDING AND FINISHING: THE CHURCH'S WAY* 16 (1955).

157. D. BRUGGINK & C. DROPPERS, *CHRIST AND ARCHITECTURE* 1 (1965). The symbolic importance of a church is exemplified by the actions of the Protestants during the Reformation. The Roman Catholic churches taken over by the Protestants were altered because of theological considerations, not aesthetic tastes. *Id.* at 2. The Supreme Court has recognized the importance of this visual message: "[T]he church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943). These theological messages are protected under the speech clause or the free exercise clause of the first amendment.

[R]eligious worship *qua* speech is not different from any other variety of protected speech as a matter of constitutional principle [the respondents argue]. I believe that this proposition is plainly wrong. Were it right, the Religion Clauses would be emptied of any independent meaning in circumstances in which religious practice took the form of speech.

Widmar v. Vincent, 454 U.S. 263, 284 (1981) (White, J., dissenting). Furthermore, the speech clause and the free exercise clause overlap. For example, religious speech directed toward members of a religious sect is protected by the free exercise clause, while religious speech directed toward the public is protected by the speech clause. *See Note, Religious Worship Held to be a Form of Protected Speech*, 5 *WHITTIER L. REV.* 61 (1983).

158. A meeting hall or a school may be suitable to the Jehovah's Witnesses since the type of structure the Congregation wishes to construct would be similar to a meeting hall.

would be built to meet the expanded needs of the community. Second, if the congregation is forced to rent the building, the congregation may not be able to alter the building to conform to its religious doctrine. This is an important consideration for the Jehovah's Witnesses, whose theology is quite different concerning the use and the meaning of the structure.¹⁵⁹ Third, unoccupied church structures in suburban communities usually are vacated because the structures are too small to accommodate new members moving into the community and, therefore, may be inadequate to accommodate sizable congregations.

Even though schools, churches, and meeting halls in the excluded residential areas of a suburban community may not provide suitable places for worship, the burden on the congregation caused by the exclusion still may be slight if the municipality allows churches to be constructed in other areas of the city. In the *Lakewood* case, for instance, churches could be built by special permit in nine percent of the city.¹⁶⁰ The congregation, however, asserted that even though there were suitable parcels of land in commercial districts, the congregation financially was unable to purchase the land.¹⁶¹ The Congregation contended that this financial barrier also prohibited the construction of a church in commercial districts. The Sixth Circuit rejected this argument and, citing *Braunfeld*, stated that an indirect economic burden does not give rise to a constitutional protection.¹⁶² The court's position in *Lakewood* nevertheless appears to be inconsistent with *Sherbert*,¹⁶³ and *Thomas*,¹⁶⁴ in which the Court held that an indirect economic burden justified a religious exemption.¹⁶⁵ *Braunfeld* did involve an economic burden,¹⁶⁶ but is distinguishable from *Lakewood* since a strong state interest counterbalanced the statute in *Braunfeld*. As the *Sherbert* Court stated:

The [*Braunfeld*] Court recognized that the Sunday closing law which that decision sustained undoubtedly served "to make the practice of [the Orthodox Jewish merchants'] . . . religious beliefs more expensive." But the statute was nevertheless saved by a countervailing factor which finds no equivalent in the instant case—a strong state interest in providing one uniform day of rest for all workers.¹⁶⁸

The *Lakewood* case is arguably more similar to *Sherbert* and *Thomas* than *Braunfeld*, as the municipalities' stated exclusion is weak. The *Sherbert* and *Thomas* decisions appear to indicate that the fact that a burden on religious activity is economic is irrelevant. Consequently, an indirect economic burden may satisfy the undue burden element of *Yoder*.¹⁶⁹

159. W. C. STEVENSON, *YEAR OF DOOM, 1975: THE STORY OF JEHOVAH'S WITNESSES* 50 (1967).

160. See *supra* text accompanying note 18.

161. See *supra* text accompanying note 20.

162. *Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood*, 699 F.2d 303, 307 (6th Cir.) (citing *Braunfeld v. Brown*, 366 U.S. 599 (1961)), *cert. denied*, 104 S. Ct. 72 (1983).

163. *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

164. *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981).

165. See *supra* text accompanying notes 130 and 139.

166. In *Braunfeld*, the state enacted a Sunday closing law that indirectly made Orthodox Jews' religion more expensive. The loss of one day's revenue, *Braunfeld* asserted, was the difference between keeping his shop open and closing it permanently. *Braunfeld v. Brown*, 366 U.S. 599, 601 (1961).

167. See *supra* text accompanying notes 182-92.

168. *Sherbert v. Verner*, 374 U.S. 398, 408 (1963) (citations omitted).

169. *Grosz v. City of Miami Beach*, 721 F.2d 729, 737 (11th Cir. 1983) ("It is especially unclear whether *Braunfeld* still creates presumptive validity for governmental actions that impose only indirect burdens. No Supreme Court case since *Braunfeld* has relied on the direct/indirect rhetoric to uphold governmental action.").

In the freedom of speech area of the first amendment, the Supreme Court has considered the severity of the burden placed on the fundamental right of speech through the use of zoning.¹⁷⁰ In *Young v. American Mini Theatres*,¹⁷¹ the Court held that adult theatres validly may be dispersed through a municipality's use of its zoning power. Since the concentration of adult theatres "tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere,"¹⁷² zoning is an appropriate tool to alleviate those ill effects. Three factors behind the *Young* decision may be relevant to the church exclusion issue. First, the *Young* Court considered the content of the speech and concluded that the speech at issue is not accorded full protection by the constitution.¹⁷³ Second, the *Young* Court was impressed with the city council's findings that the ill effects of the speech were serious¹⁷⁴ and that the restriction would have the desired result of ameliorating the ill effects.¹⁷⁵ Last, the restriction did not apply to a "myriad of locations."¹⁷⁶

The factors that convinced the Court in *Young* to uphold a zoning ordinance restricting speech should lead to the opposite result in *Lakewood*, especially in light of the *Young* Court's dictum that "the situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to lawful speech."¹⁷⁷ First, religious activities have received full protection under the due process clause of the fourteenth amendment.¹⁷⁸ Religious activities, unlike some other forms of speech,¹⁷⁹ do not get partial protection under the constitution. Second, in *Lakewood* the city council did not make specific findings that the existence of churches in the community would have ill effects or that the zoning ordinance excluding churches would ameliorate any ill effects. Finally, the court did not find a "myriad" of locations to which the ordinance did not apply, since under the Lakewood ordinance, construction of new churches was limited to an area representing only ten percent of the city.¹⁸⁰

Further, cases subsequent to *Young* have reinforced the *Young* Court's position that a zoning ordinance may not suppress or greatly restrict access to lawful speech. In *Schad v. Borough of Mount Ephraim*,¹⁸¹ the Court held that nude dancing, which is fully protected speech, could not be excluded from a municipality. Also, several

170. See, e.g., *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) (live nude dancing); *Young v. American Mini Theatres*, 427 U.S. 50 (1976) (adult movies).

171. 427 U.S. 50 (1976).

172. *Id.* at 55.

173. *Id.* at 70.

174. *Id.* at 54.

175. *Id.* at 71.

176. *Id.* at 71 n.35.

177. *Id.* at 71 n.35 (1976).

178. *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 714 (1981).

179. Speaking for the majority, Justice Stevens stated,

Whether political oratory of philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theatres of our choice.

Young v. American Mini Theatres, 427 U.S. 50, 70 (1976).

180. See *supra* text accompanying note 18; see also *Grosz v. City of Miami Beach*, 721 F.2d. 729, 739 (11th Cir. 1983) (the city's zoning regulations allowed "religious institutions to operate [in] one half of the City's territory.").

181. 452 U.S. 61 (1981).

lower federal courts have held that the regulation of adult theatres is unconstitutional when the distance requirements from certain other buildings has the effect of excluding adult theatres from the community.¹⁸² The free exercise clause similarly makes no distinction between outright exclusion and the effect of exclusion. The Court in *Braunfeld* stated a law may be declared constitutionally invalid “[i]f the purpose or effect of a law is to impede the observance of one or all religions. . . .”¹⁸³ The Lakewood ordinance’s exclusion of churches from ninety percent of the community combined with the prohibitive expense of purchasing land in unrestricted, commercial districts, operated to effectively exclude churches from the city.¹⁸⁴ Consequently, the effect of the zoning ordinance, total exclusion from the community, may rise to the undue burden required by *Yoder*.

3. *The Compelling Interests of Suburban Municipalities*

Under the third part of *Yoder* and *Thomas* the municipality must show that a compelling governmental interest exists and that the regulation is the least restrictive means to promote that interest.¹⁸⁵ Since *Euclid*, courts have deferred to municipalities’ zoning decisions.¹⁸⁶ However, in *Schad*, the Supreme Court stated that “the standard of review [in zoning cases] is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed.”¹⁸⁷ When the right to worship is threatened, then, the burden should shift to the municipality to show more than a substantial relationship under *Euclid*. The municipality should have to show the compelling state interest required by *Yoder* and *Thomas*.¹⁸⁸

Lakewood, like many other municipalities with similar ordinances, probably enacted its ordinance to protect residential areas from traffic hazards, noise, a decrease in property values, and to create an aesthetically pleasing residential area.¹⁸⁹ Traffic hazards and noise relate to public health and safety, while property values and aesthetics relate to public convenience.¹⁹⁰

Health and safety¹⁹¹ are considered to be more substantial state interests than public comfort and convenience¹⁹² in determining whether a state interest exists that

182. *Alexander v. City of Minneapolis*, 698 F.2d 936 (8th Cir. 1983) (ordinance would reduce adult uses from thirty to twelve); *Basiardanes v. City of Galveston*, 682 F.2d 1203 (5th Cir. 1982) (dispersal requirements exclude adult theatres from 80% to 90% of the areas from which they are not already banned); *Keego Harbor Co. v. City of Keego Harbor*, 657 F.2d 94 (6th Cir. 1981) (every location in the municipality was within 500 feet of a regulated use like the ordinance required).

183. *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961) (emphasis added).

184. *Grosz v. City of Miami Beach*, 721 F.2d 729, 740 (11th Cir. 1983) (“The Sixth Circuit [in *Lakewood*] faced, if anything, a closer balance than the one called for today—as opposed to the one half of Miami Beach territory where Appellees may conduct their religious services, the City of Lakewood permits church buildings on only around ten percent of its land.”).

185. *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981).

186. See *supra* text accompanying note 45.

187. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981).

188. See *supra* text accompanying notes 131 & 141.

189. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

190. *Giannella, Religious Liberty, Nonestablishment, and Doctrinal Development Part I: The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1390–1416 (1967).

191. *Id.* at 1390.

192. *Id.* at 1397.

is compelling enough to place constraints on the constitutionally protected right of freedom of religion. Thus, whether the community's interest in a zoning ordinance relates more to health and safety or public convenience and comfort will determine whether the ordinance passes constitutional muster. Aesthetic considerations arguably relate more to public convenience and comfort and alone may not be enough to justify a zoning ordinance that restricts religious practice.¹⁹³ Justice Douglas acknowledged in *Village of Belle Terre v. Boraas* that aesthetics must give way to constitutionally protected rights.¹⁹⁴ Also, protecting property values is not itself a compelling state interest since property values are affected by the public health, safety, convenience, or welfare. The fluctuation of property values is simply the effect of zoning.

Noise and traffic hazards are problems that municipalities have the power to remedy¹⁹⁵ since noise and traffic hazards relate to public health and safety. However, zoning ordinances prohibiting new churches in residential districts could not eradicate noise and traffic hazards altogether. Municipalities would be eliminating those hazards only to the extent that they are created by members of the new church. Hazards would remain to the extent that they are caused by individuals residing within the district or by members of churches already located in residential districts. Under *Thomas*, however, the municipality must show that exclusion from residential areas is the least restrictive means to mitigate those hazards. Less restrictive means than excluding churches from the community are clearly available to reduce noise and traffic hazards. Traffic hazards could be mitigated through the use of traffic signs and lights.¹⁹⁶ Also, the traffic speed could be reduced in the area, so violators, rather than excluded congregations, could bear the cost of violation. Alternatively, a zoning ordinance could be drawn narrowly to require that lots being used for religious purposes have a portion set aside for adequate off-street parking.¹⁹⁷ Noise levels also could be regulated by building codes requiring soundproofing or by punishing individuals who create noise above a certain level.¹⁹⁸ These means to alleviate the health and safety hazards caused by churches and their members all are less drastic than the exclusion of churches. Not only would the alternative means mitigate the hazards caused by churches and their members but they also would mitigate those noise and traffic hazards that still would occur despite the exclusion of new churches. Thus, municipalities could achieve their objectives through means that are less restrictive than total exclusion from residential areas.

In sum, it should be difficult for a suburban municipality to show a compelling state interest in excluding churches from residential districts. Since the economic burden on church groups created by zoning coupled with, as in the *Lakewood* case,

193. Jones, *Church-State Religions: Our Constitutional Heritage*, in RELIGION AND CONTEMPORARY SOCIETY 156, 181 (H. Stahmer ed. 1963) quoted in Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development Part I. The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1397 (1967).

194. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7 (1974).

195. See *supra* text accompanying note 67.

196. *Board of Zoning Appeals v. Decatur, Ind. Co. of Jehovah's Witnesses*, 233 Ind. 83, 92, 117 N.E.2d 115, 120 (1954).

197. Brief for Appellant at 45, *Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood*, 699 F.2d 303 (6th Cir.), cert. denied, 104 S. Ct. 72 (1983).

198. *Id.* at 44.

the exclusion of churches from ninety percent of the community, has the effect of prohibiting congregational worship in the community, restrictive zoning ordinances should be found to violate the free exercise clause of the first amendment. Accordingly, when the free exercise clause would be violated through restrictive zoning, the construction of churches should be allowed in residential districts.

C. *The Establishment Clause Problem*

If the prohibition of new church buildings in residential districts in suburban communities is found to violate the free exercise clause, then a court may order the municipality to permit a congregation to construct a church building in a residential district. This poses another first amendment problem: allowing churches in residential areas, while excluding other secular interests, may violate the establishment clause of the first amendment.¹⁹⁹

The Constitution requires that "Congress shall make no law respecting an establishment of religion. . . ."²⁰⁰ The meaning of the establishment clause has changed since its addition to the Constitution. Historically the establishment clause was interpreted to permit a close and friendly relationship between church and state, but to require that the state not prefer one religion over another.²⁰¹ In *Everson v. Board of Education*,²⁰² the Supreme Court appeared to interpret the free exercise clause to allow absolutely no aid to religious organizations. Nevertheless the Court allowed government aid to bus schoolchildren to parochial schools because the aid enabled parents to "get their children, regardless of their religion, safely and expeditiously to and from accredited schools."²⁰³ Less than five years after the *Everson* decision, the Court appeared to adopt a position of "free exercise neutrality."²⁰⁴ The Court in *Zorach v. Clausen*²⁰⁵ held that a program that released students for religious instruction at locations other than school was valid. The Court concluded that "[t]o hold that . . . [government] . . . may not . . . [accommodate the public service to spiritual needs] . . . would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe."²⁰⁶ Hence aid that accommodates the free exercise of religion is neutral for establishment purposes.²⁰⁷

Although a legislative body implemented the incidental aid in *Zorach*, the Supreme Court also held in *Sherbert*²⁰⁸ that a judicially created religious exemption

199. See *Abington Township v. Schempp*, 374 U.S. 203 (1963); see also *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 652 (1981) ("Nor for present purposes do religious organizations enjoy rights to communicate, distribute, and solicit on the fairgrounds superior to those of other organizations having social, political, or other ideological messages to proselytize.").

200. U.S. CONST. amend. I.

201. See, e.g., J. STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 261 (1861).

202. 330 U.S. 1 (1947).

203. *Id.* at 18.

204. KATZ, RELIGION AND THE AMERICAN CONSTITUTION 91 (1964).

205. 343 U.S. 306 (1952).

206. *Id.* at 314.

207. See, e.g., *Braunfeld v. Brown*, 366 U.S. 599, 608 (1961) (Court said that a legislatively created religious exemption to a Sunday closing law would be valid).

208. *Sherbert v. Verner*, 374 U.S. 398 (1963).

does not violate the establishment clause. In *Sherbert*, Justice Brennan stated that “the extension of unemployment benefits . . . reflects nothing more than the governmental obligation of neutrality in the face of religious differences.”²⁰⁹ In his concurrence, Justice Stewart vigorously objected to Justice Brennan’s seemingly simple resolution of the conflict between the free exercise clause and the establishment clause.²¹⁰ Justice Stewart suggested that the Court’s expansive interpretation of the establishment clause requires that “government must blind itself to the differing religious beliefs and traditions of the people.”²¹¹ The *Sherbert* decision, Justice Stewart concluded, created a preference for an exemption on a religious ground over an exemption on a secular ground and was contrary to the holding in *Abington Township v. Schempp*.²¹² In *Schempp*, the Court held that a legislative enactment requiring that either the Bible be read or the Lord’s Prayer be recited was a violation of the establishment clause.²¹³ The Court found that the purpose and effect of the law was to advance religion even though the program was voluntary and the state alleged several secular purposes for the legislation.

The *Schempp* decision, other decisions by the Supreme Court,²¹⁴ Justice Brennan’s majority opinion in *Sherbert*, and Justice Stewart’s concurrence in *Sherbert* display the disagreement among the Justices and the inconsistencies among decisions about the meaning of the establishment clause. Moreover, this disagreement has continued in recent decisions. In *Thomas v. Review Board of Indiana Employment Security Division*,²¹⁵ the Court, relying on *Sherbert*, held that a religious exemption from the unemployment compensation system did not violate the establishment clause. During the same term, however, in *Heffron v. International Society for Krishna Consciousness*²¹⁶ the Court suggested that religious organizations have no preference to solicit on fairgrounds over other secular organizations.

Although this divergence of opinion continues, most commentators who have followed the conflict agree that the establishment clause protects certain core values.²¹⁷ The first value protected by the establishment clause is “religious voluntarism,”²¹⁸ or the freedom to choose among the various creeds and faiths.²¹⁹ This concept also is implicit in the free exercise clause, which provides for freedom of religious belief and the right to engage in religious activity that is not coerced by the state. Since a religious organization will prosper and develop only if it has the voluntary support of its members, voluntary association will lead to competition

209. *Id.* at 409.

210. *Id.* at 413.

211. *Id.* at 416.

212. 374 U.S. 203 (1963).

213. *Id.* at 223.

214. *See, e.g.,* *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (government cannot “constitutionally pass laws or impose requirements which aid all religions as against nonbelievers . . .”); *McGowan v. Maryland*, 366 U.S. 420, 441–42 (1961) (“the First Amendment . . . did not simply bar a congressional enactment *establishing a church*; it forbade all laws *respecting an establishment of religion*.”) (emphasis in original).

215. 450 U.S. 707 (1981).

216. 452 U.S. 640 (1981).

217. *See generally* Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513 (1968).

218. *Id.* at 517.

219. *Id.*

among these organizations. Competition, in turn, will strengthen religion and society by forcing religious organizations to succeed on their own, intrinsic merits. This process distills excellence, which again produces benefits for society.²²⁰ The second value protected by the establishment clause, political noninvolvement,²²¹ is needed to ensure free competition among religious sects. Insulation from the political processes will promote free competition among religious organizations and thus produce beneficial results for society. The establishment clause promotes these values by requiring government to remain a neutral observer in this process.

These values may be applied to religious uses of land. For instance, if government would provide aid solely to a religious organization for the purchase of land when land use is regulated solely by the marketplace, neither value is promoted. Religious voluntarism is not promoted because a religious organization no longer is succeeding on its own intrinsic merit. Furthermore, political noninvolvement is not promoted since government has hindered the free competition among religious organizations by providing aid for purchases of land.

Today local governments have increased the amount of regulation in society to promote the general welfare of the citizens. One method of regulation adopted to benefit society is zoning. Residential users are favored because the hazards and annoyances of commercial and industrial uses are relegated to another part of town.²²² Commercial users are benefited because the concentration of commercial uses will attract potential customers to one area and, to the advantage of customers, will make the competition among users more visible.²²³ Industrial users also are benefited because utilities and transportation facilities can be centrally located at reduced costs.²²⁴ Thus, government involvement in land-use regulation provides benefits to society.

Although traditional establishment notions require that government abstain from aiding religious organizations, the increased land-use regulation has caused traditional establishment notions to be applicable no longer. Previously, religious uses of land were not disfavored. Currently, however, zoning officials are given power to determine what value is to be given to religious property uses.²²⁵ By restricting the property available for religious uses in suburban communities, zoning officials severely disadvantage religious organizations by forcing them to compete with commercial users for land at higher prices.²²⁶ This does not promote the values the establishment clause is meant to protect.²²⁷ Government involvement has prohibited new religious organizations from building a place of worship, while other religious organizations and secular organizations already existing at the time of the prohibition of new churches in residential districts are permitted to continue under the preexist-

220. *Id.*

221. *Id.*

222. 2 R. ANDERSON, *supra* note 3, § 9.24.

223. *Id.* § 9.38.

224. *Id.* § 9.40.

225. Giannella, *supra* note 217, at 538-39.

226. *See supra* text accompanying note 20.

227. Giannella, *supra* note 217, at 538-41.

ing, nonconforming use doctrine.²²⁸ The value of religious voluntarism is undermined because of the increased political involvement. Consequently, the free competition of religions is suppressed.

Since any governmental attempt to avoid benefiting religious organizations would not promote the values protected by the establishment clause in the zoning context, a more preferable result would be to adopt a course that would promote religious voluntarism and political noninvolvement. Inclusion of churches in residential districts would allow religious organizations to enjoy the benefits accruing to existing religious organizations and the rest of the community. Since the benefit to religious organizations would be on par with benefits accorded other interest groups, government involvement would be neutralized, and the value of political noninvolvement would be promoted. Likewise, religious voluntarism would be promoted since there would not be governmental interference and favoritism among different religious sects. A court order permitting the construction of a church in a residential district in *Lakewood* situations thus would not violate the establishment clause²²⁹ because the order would promote the values underlying the establishment clause.

IV. CONCLUSION

Since the development of suburban communities, zoning has had a unique effect on the market for land available for religious uses. The use of zoning to prohibit the construction of churches in residential districts creates shortages of land for the construction of churches in residential districts, while limiting the supply in commercial districts. The effect of this is to deny religious groups, especially minorities, the right to worship within the community. In those situations, judicial activism is necessary to assure religious freedom. A judicial order requiring a building permit to be issued in a residential district would not violate the establishment clause, since the governmental aid would effectuate the values underlying the establishment clause. Consequently, a religious exemption to a zoning ordinance is an appropriate remedy to secure the right to the free exercise of religion.

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228. The doctrine allows the continuance of uses begun prior to the enactment of a zoning ordinance prohibiting that use even though the use does not conform to the requirements of the enactment. I P. ROHAN, *ZONING AND LAND USE CONTROLS*, § 1.02 [5][b][iv] (1983).

229. The *Schempp* decision is not necessarily inconsistent with this result. *Schempp* requires that a legislative act may neither advance nor aid religion, nor oppose or inhibit religion. *Abington Township v. Schempp*, 374 U.S. 203, 226 (1963). The *Schempp* Court expressly left open the question whether the lack of governmental aid, neutral for establishment clause purposes, would violate the free exercise clause. *Id.* at 226 n.10.

