# RELIGIOUS USES OF LAND AND ZONING: THE NEED FOR A NEW FRAMEWORK

Gary Close*

In seventeen words the First Amendment prohibits Congress, and by incorporation through the Fourteenth Amendment, the states,[1] from creating legislation which would prohibit the free exercise of religion. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..."[2] Any government action which touches on religious activity then is potentially an impermissible infringement on free exercise rights. However, the Supreme Court has not interpreted the First Amendment to give blanket immunity from governmental regulation to religious activity. The freedom to believe is absolute, but the right to act on those beliefs is sometimes subject to governmental regulation.[3] Some level of regulatory interaction between church and state is inevitable. Churches do not exist in a vacuum.

The problem which zoning poses is at what level of governmental zoning regulation are free exercise issues brought to play? That is, when is a church's right to be left alone violated by a zoning ordinance? In Lemon v. Kurtzman,[4] the Supreme Court expressly cited zoning regulations as a permissible governmental "contact" with religious conduct. The Court did not say when the permissible governmental contact becomes impermissible. State and lower federal courts have had to make this decision. These decisions have been inconsistent in large measure because the Supreme Court has yet to develop a clear test to determine when an infringement on free exercise rights has occurred. While Sherbert v. Verner[5] is the accepted standard by which to judge free exercise issues, it is by no means clear.[6] Sherbert balances the governmental interest against the church's First Amendment interest. But before it does so, the analysis asks whether the ordinance impacts on a central religious belief. Sherbert may make use of "religious belief" as part of

---

*Gary Close is a 3rd year law student at Marshall-Wythe, a member of the state board of directors for the Virginia Society for Human Life, Co-Chairman of the Marshall-Wythe Federalist Society and former newseditor for the STAR-EXPONENT in Culpeper, Virginia.

---

[1] Everson v. Board of Education, 330 U.S. 1, 8 (1947).

[2] U.S. Const. Amend. I.

[3] Reynolds v. United States, 98 U.S. 145 (1878).

[4] 403 U.S. 602, 614 (1971).

[5] 376 U.S. 403 (1963).

[6] L. Tribe, American Constitutional Law, 813-835 (1978).

its test, but the Supreme Court has constantly refused to define what constitutes a valid religious belief.[7] Without knowing what constitutes a valid religious belief, protected by First Amendment heightened scrutiny standards, it is hard to know what uses of land are more central to religious belief and, therefore, are more likely to qualify for First Amendment protection.

This lack of a clear standard leaves lower courts with no guidance when faced with the competing interest of the state to control land use and the church's desire to operate free from governmental interference. Often municipalities argue, and courts accept, narrow definitions of religious activity. This places most church action in the secular field, such as building construction, and beyond the sticky standards of review required by Sherbert. Other courts rule that almost any activity undertaken by churches is protected by the First Amendment and, therefore, immune from zoning regulations.

Throughout the country churches and municipalities are clashing over zoning regulations. In Fairhaven, Massachusetts, local zoning administrators ruled that Bible studies were home occupations and, therefore, prohibited under the city's zoning ordinances.[8] In Fairfax County, Virginia, a zoning administrator's attempt to define permissible religious activity, in the context of the county's zoning plan, raised a public furor among county congregations.[9] He ruled that activity not within the county's definition was prohibited without a special permit. Presently, the City of Colorado Springs is seeking an injunction to halt worship services in a private home. The city argues the worship services are in violation of its zoning regulations.[10] The general consensus among many religious leaders is that churches more often than not are losing zoning cases once the issue gets to court.[11] "The courts have been extremely skeptical of religious organizations claiming special dispensation," said Geoffrey Stone, a professor at the University of Chicago Law School, in a recent Washington Post article on the issue.[12]

As one commentator has already noted, there is no guarantee

---

[7] Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707 (1981). Fowler v. Rhode Island, 345 U.S. 67 (1953).

[8] Swallow, "Church-State Dispute Finds A New Arena: Zoning Boards," Washington Post, Oct. 21, 1985, at A-1.

[9] Id.; Zoning Intepretation Number 52, Fairfax County Zoning Department, Fairfax, VA, June 14, 1984.

[10] City of Colorado springs v. Richard Blanche, Civ. Action No. 85 CU 3241, Division No. 5 (1986).

[11] Washington Post at A-8.

[12] Id.

that the application of zoning laws, a twentieth century invention, will not over time undermine the protections granted churches in the constitution.[13] What is needed, before the issue becomes more politicized, is an analysis of the competing interests and a clear test designed to fairly address those interests.

**Part I. Roots of the Conflict: The State's Interest in Zoning.**

That there is a conflict between the land control interests of the state and the church's desire for unhindered activity seems to come as no surprise to anyone. Indeed, most commentators on the general subject find conflict between the two inevitable.[14] One commentator found the conflict due to new roles taken on by churches, such as church schools and day care centers, and a concurrent furor on the part of zoning officials to regulate anything that moved.[15]

Zoning is an outgrowth of the state's expanded role in society. It is a vehicle for public control and direction over private land use.[16] In 1916, New York City passed the first comprehensive zoning ordinance. Others followed New York's lead. They did not go unchallenged, and in 1926, the Supreme Court ruled on the constitutionality of comprehensive zoning ordinances. In Village of Euclid v. Ambler Realty,[17] the Court came down solidly on the side of zoning ordinances. They are a valid exercise of the state's broad police powers, and as such are valid unless they are clearly arbitrary, unreasonable, and have no substantial relation to the public's health, safety, morals or general welfare.[18]

The zoning power of municipalities was reaffirmed and more strongly entrenched after the Supreme Court's Belle Terre[19] decision. In that decision, Justice Douglas outlined the proper goals of zoning and the power from which the state may enforce ordinances to achieve those goals.

---

[13] Comment, Zoning Ordinances, Private Religious Conduct, and the Free Exercise of Religion, 76 NW. U.L. Rev. 786, 790 (1981).

[14] Reynolds, Zoning the Church: The Police Power Versus the First Amendment, 64 B.U.L. Rev. 767 (1985); Note, Land Use Regulation and the Free Exercise Clause, 84 Colum. L. Rev. 1562 (1984); Walker, What Constitutes a Religious Use For Zoning Purposes, 27 Cath. Law. 129 (1982).

[15] 64 B.U.L. Rev. at 768, fn. 14.

[16] 76 NW. U.L. Rev., supra note at 795.

[17] 272 U.S. 365 (1926).

[18] Id. at 391.

[19] 416 U.S. 1 (1974).

> 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. The police power is not confined to elimination of filth, stench, and unhealthy places. It 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.[20]

Creation of quiet neighborhoods is a valid governmental objective according to Belle Terre. Exclusion of churches from neighborhoods is often based on that very objective. The reasoning used is that churches create noise and traffic problems. Belle Terre encourages localities to exclude those activities that create noise and traffic, including churches, to preserve peace in residential neighborhoods.

However, where fundamental freedoms are involved, the Supreme Court has, since Belle Terre, placed some limits on a municipality's zoning powers. Two cases, Moore v. City of East Cleveland[21] and Schad v. Mount Ephraim,[22] have carved out niches in the state's overall zoning power. In Moore, just three years after the Belle Terre decision, the Court held that where fundamental freedoms are infringed upon, zoning ordinances must come under a heightened standard of review -- the "rational relation" test outlined in Belle Terre does not apply.[23]

In Schad, the contested ordinance excluded all live entertainment, including nude dancing, from the municipality. The Court found this restricted expression protected by the First Amendment. The Court found the ordinance unconstitutional. The Court's rationale is especially relevant to the problem of this article. Although Justice White acknowledged the broad power of local governments to zone land, he also stressed that, "The zoning power must be exercised within constitutional limits."[24] Where constitutional protections are threatened, White set out a two-tiered standard of review. First, White said the standard of review for a zoning ordinance is "determined by the right assertedly threatened or violated rather than by the power being exercised."[25] Since the right being threatened in Schad was protected by the First Amendment, the Court used a strict

---

[20] Id. at 9.

[21] 431 U.S. 494 (1977).

[22] 452 U.S. 61 (1981).

[23] Id. at 499.

[24] Schad, 452 U.S. at 60.

[25] Id.

scrutiny standard of review.[26] Secondly, White said a reviewing court must decide whether the proponent of the ordinance used the least restrictive means to further the legitimate state interest. If not, the ordinance fails.[27]

The Supreme Court applied these two principles to the Schad case and found the city ordinance lacking.

As if to underscore in red ink Justice White's opinion, Justice Blackmun wrote a concurrence which reiterates much of what White wrote. He made unequivocably sure that the presumption of validity, usually given zoning ordinances, is destroyed when First Amendment questions are involved:

> I would emphasize that the presumption of validity that traditionally attends a local government's exercise of its zoning power carries little, if any, weight where the zoning regulation trenches on the rights of expression protected under the First Amendment.[28]

While municipal ordinances clearly enjoy a strong presumption of validity because of the state's broad police powers, the Schad opinion makes it equally clear that where protected rights are affected, the presumption is sometimes lost.

Euclid and Belle Terre stand for the proposition that zoning regulations are a proper expression of the state's police power and enjoy a presumption of validity. The Euclid court said a rational relation between the ordinance and the power upon which the ordinance was based is all that is required to remain valid upon judicial review.

Moore and Schad chilled this presumption of validity. Where fundamental freedoms, including freedom of worship, is restricted by a zoning ordinance, the zoning ordinance loses its presumption of validity. Schad specifically stands for the principle that when a zoning ordinance restricts a protected First Amendment activity, the ordinance must pass constitutional muster under a strict scrutiny standard. And that higher standard is triggered by the mere assertion that First Amendment activity is threatened.

Courts have not applied these principles to zoning disputes where churches are involved. The reason is simple. Churches claim the zoning ordinance restricts their free exercise rights. Courts react by applying the Sherbert free exercise analysis. Often, the analysis ignores Schad and Moore while emphasizing the presumption of validity zoning ordinances enjoy under Euclid and Belle Terre.

---

[26] Id. at 71.

[27] Id. at 70.

[28] Schad, 452 U.S. at 77.

**Part II. The Traditional Analysis Applied by Courts: Sherbert v. Verner.**

Once a religious group claims a zoning ordinance infringes on their free exercise rights, the courts turn to Braunfeld v. Brown[29] and Sherbert v. Verner[30] for guidance. These two cases set the standards by which courts determine whether a governmental regulation impermissibly restricts religious activity. The problem they present is two-fold. Firstly, the two cases create different standards of review. Sherbert does not overrule Braunfeld, but Sherbert gives a higher level of protection to First Amendment free exercise claims than does Braunfeld. Secondly, the Sherbert analysis, when applied by courts, is used in a way inconsistent with the Moore and Schad decisions.

In Braunfeld, the Supreme Court upheld a Sunday closing law against a free exercise challenge by an Orthodox Jew. He claimed the mandated Sunday closing prevented him from compensating for business he lost by closing on Saturday: the Sabbath according to his faith. The loss in business, he claimed, made it impossible for him to continue in his livelihood and remain true to his faith. The Court held that the statute was enacted to achieve a legitimate, secular state objective.[31] It did not compel a choice between religious practice and criminal penalty; "the Sunday law simply regulated a secular activity and, as applied to appellants, operated so as to make the practice of their religious belief more expensive."[32] Therefore, it passed constitutional muster. Braunfeld, then stands for the proposition that where the purpose of the law is secular, where it incidentally burdens religious activity and does not make a religious belief criminal --the statute has a presumption of validity.

While not overturning Braunfeld, Sherbert v. Verner greatly expanded the extent to which religious interests could be protected from state infringement. In Sherbert, the appellant was a Seventh-Day Adventist who was fired by her employer for refusing to work on Saturday--her faith's Sabbath. She could not find work and applied for unemployment benefits. The state denied her the benefits because she would not accept work when offered. Apparently, the work offered to the Seventh-Day Adventist required Saturday hours. The law required applicants for unemployment to look for work. If work was offered, the

---

[29] 366 U.S. 599 (1961).

[30] 374 U.S. 398 (1963).

[31] Braunfeld, 366 U.S. at 606.

[32] Id. at 605.

applicant had to accept the job. Failure to do so triggered cessation of the unemployment benefits.

The Court struck down the state law upon which unemployment benefits had been denied. To force her to accept work contrary to her religious beliefs in order to receive unemployment benefits was an impermissible infringement the Court said.

Braunfeld and Sherbert are inconsistent. The Braunfeld Court held that where a law with a secular purpose incidentally burdens religious practice, the law has a presumption of validity. The Sherbert Court held that a law with a secular purpose may be invalid when it has an incidental effect on religious practice. The conflict is obvious and noted by Justices Stewart, Harlan, and White in their concurring opinions to Sherbert. Despite this inconsistency, the majority opinion refused to overrule Braunfeld. The result is two separate tests for free exercise analysis.

Inconsistency is one legacy of Sherbert. Another legacy is the tripartite test outlined in the opinion. To determine whether or not legislation impermissibly infringes on free exercise rights, the Court will ask: (a) does the government action burden the practice of a particular religious belief,[33] (b) if yes, is there a compelling state interest for doing so,[34] and (c) if so, did the government use the means for accomplishing this interest which are least restrictive on the religious practice?[35] If the public interest is compelling and no less restrictive means are available, then the regulation passes constitutional muster.

How have lower courts applied the Sherbert test? City of Chula Vista v. Pagard[36] and Grosz v. City of Miami Beach[37] both offer an example of the test's application. A close reading of the two cases shows that the courts, in effect do not apply the Sherbert test. Either court's ignore the religious nature of the activity regulated as in Chula Vista or they ignore the Sherbert analysis as in Grosz.

**Part III. Problems in the Current Analysis**

The problems in current free exercise analysis, when applied

---

[33] Sherbert, 374 U.S. at 403.

[34] Id. at 406.

[35] Id. at 407.

[36] 159 Cal. Rptr. 29 (1981).

[37] 721 F.2d 729 (1983).

to zoning disputes, has not gone unnoticed.[38] Two of the more recent comments on the issue have summarized together the major flaws in the analysis touched upon by other commentators.[39]

1. The Note Analysis.[40]

A note in the 1984 Columbia Law Review specifically identifies three major problems in the court's free exercise test. the first, and perhaps most damaging problem from the perspective of churches, is the evaluation of the religious practice. In the Sherbert analysis, this is the first step courts should take. Whether they follow Sherbert or not, all courts evaluate the religious nature of the burdened activity if for no other reason than that churches claim a religious activity is burdened by the zoning regulations. "This is an important threshold inquiry, for if a burdened practice is not deemed to be religious, it merits no free exercise protection--regardless of whether the public interest is compelling and the regulation narrowly drawn."[41]

There are two approaches to deciding whether a practice is of religious significance: (1) the sincerity of the group's claim[42] or, (2) the centrality of that practice to the group's religion. The note correctly points out that evaluation by sincerity, the court's assessment of the religious group's good faith, is more in keeping with Thomas v. Review board and its injunction against a court using secular standards by which to judge the validity of religious beliefs. In Thomas, a Jehovah's Witness quit his job at a steel plant because it produced steel for weapons. He felt working at the plant conflicted with his religious beliefs. The state refused to give him unemployment benefits. The state argued that Thomas resigned not because of religious reasons, but more because of personal philosophical preferences. Therefore, the state argued, it was not obligated to give Thomas unemployment benefits.

The trial court agreed with the state, but the Supreme Court did not. Wrote Chief Justice Burger:

Relgious beliefs need not be acceptable, logical,

---

[38] See, Reynolds, Zoning the Church: The Police Power Versus the First Amendment. 64 B.U.L. Rev. 767 (1984); Preysner, Zoning the Church: Toward a Concept of Reasonableness. 12 Conn. L. Rev. (1980).

[39] Note, Land Use Regulation and the Free Exercise Clause. 84 Colum. L. Rev. 1562 (1984); Walker, What Constitutes a Religious Use for Zoning Purposes, 27 Cath. Law. 129 (1982).

[40] Note, supra note 64.

[41] Id. at 1573.

[42] See, Note, Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities. 90 Yale L. J. 350, 371 (1980) (the note suggests religious sincerity may be measured by the lack of profit or accumulation of material gains associated with the religious belief).

> consistent or comprehensible to others in order to merit First Amendment protection...Courts are not arbiters of scriptural "interpretation."[43]

The Court accepted Thomas' good faith claim that he quit his job because of his religious beliefs.

The second approach to deciding whether a practice is of relgious significance is the centrality approach. According to the note, the determination of what is "central"; to a relgious faith and, therefore, worthy of First Amendment protection invites arbitrary judicial evaluation of what constitutes a relgious belief or practice. In effect, a court uses its values in determining whether or not a religion's practices are worthy of protection. The Chula Vista analysis is a good example of this kind of process. In Chula Vista, a religious group's communal living arrangements was deemed in violation of zoning ordinances. The courts ruled against the religious group. The religious group's communal living was, according to the court's standards, a secular expression of belief, despite the fact that the defendants "sincerely believed" communal living to be "affected with religious character."[44] The court decided communal living was not central to the sect's religion despite the fact that the sect defined communal living as central to its faith. Once the relgious practice is deemed secular, the analysis stops. The state is not required to demonstrate a less restrictive means of regulation was unavailable. According to the note, the centrality analysis should not be a threshold test. Judging the centrality of a religious belief is at best slippery. It ought to be left to the end of the analysis, or a last resort, after sure and concrete First Amendment safeguards have been examined and found lacking.

The second problem the note identifies in the present free exercise analysis is the nature of the permitted burden. The language of Sherbert allows for manipulation by courts to find only a very narrow range of burdens on relgious practices. Sherbert invites courts to find at the outset that a practice is not relgious. Chula Vista is an example of this. Because the relgious burdens in zoning cases are not "severe, life-threatening economic sanctions,"[45] but rather burdens of "convenience, dollars or aesthetics,"[46] they are dismissed as unimportant. But the note correctly points out that nothing in the Sherbert decision indicates that the free exercise protections should be drawn so narrowly. Because they are drawn narrowly, most courts

---

[43] Thomas, 450 U.S. at 714, 715, 716.

[44] Chula Vista, 159 Cal. Rptr. at 36.

[45] Lakewood, 699 F.2d at 306.

[46] Grosz, 721 F.2d at 739.

find the asserted practice outside the protections of the First Amendment.

The third identified problem is the overwhelming strength of the asserted governmental interest in zoning matters. When the analysis reaches the balancing stage, it almost invariably tips in the government's favor. Zoning regulations are tied to the state's strongest interest--the health, safety, and welfare of society as a whole. The church's interest pales in comparison.

2. The Walker Test.[47]

Drawing on Sherbert, Moore, Thomas v. Review Board and a number of New York state cases, Walker argues that free exercise issues should be decided with sensitivity to First Amendment protections. He argues that presently in zoning cases courts try to ignore free exercise issues rather than grapple with their complexities. The most common approaches are to find the alleged relgious use secular or to find it outside the "core" of relgious belief. Once a use is found secular, courts apply a rational basis standard of review. Walker argues this unnecessarily restricts protected relgious activity and opens up much religious activity to state regulation. The problem in present free exercise analysis in zoning cases according to Walker, stated simply, is that lower courts are not following the heightened standards of review required when relgious activity is infringed upon. Part of the reason for this lapse is the narrow definitions of religious activity used.

3. Proposed Solutions.

The Walker article calls for use of the Sherbert analysis[48] but within a more rigidly defined framework. First, he advocates an expanded conception of relgious activity. This brings many more zoning cases under the Sherbert analysis. Secondly, he says to be consistent with Moore and Thomas v. Review Board, courts should address only the sincerity of the belief--not its centrality to the relgious faith as a whole.

The note advocates a more radical change in the court's free exercise analysis. It lowers the threshold for free exercise issues to come into play, expands the concept of impermissible burdens on religion, restructures how we should evaluate the government's interest, and then balances the two interests. The new test will, according to the note, lessen the number of rejected religious claims based upon a threshold analysis.

First, the note calls for postponement of judicial inquiry into the centrality of the relgious use until the end of the

---

[47] Walker, supra note 64.

[48] Id. at 182, 183.

analysis. It adopts a "sincerity" standard, just as Walker does, in order for a free exercise analysis to be triggered. If a good faith claim is made by a religious group that its land use is protected from zoning ordinances because of religious belief---the court will accept the claim. This is in keeping with Schad, which held that judicial review should be based on the right "assertedly threatened" rather than the power being exercised.[49] Postponing the centrality issue also forces the state to first make a case for the importance of its interest rather than dismissing the church's interest before a balancing analysis is started.[50]

Secondly, the note would expand the concept of impermissible relgious burdens. The note points to Wisconsin v. Yoder[51] as support for this proposition. In Wisconsin, a neutral state education law affected a relgious practice. The Supreme Court found it to impermissibly infringe on the free exercise rights of Amish parents to control the education of their children. Under Braunfeld, it would stand. But Yoder held even indirect effects of religious-neutral laws can create impermissible burdens. Again, this acts to expand the area in which free exercise analysis is applicable. Thus, the effect of this stage of the note analysis would be to bring any law that impacted on relgious practice under a free exercise analysis.

Thirdly, the note shifts the emphasis on the government's interest. Rather than focus on whether the interest is "compelling," the note requires judicial inquiry into the possibilities for compromise. The burden falls upon the state to prove why compromise is not acceptable. Whether or not the state can show that compromise is impossible is a factual finding for courts to make.

Lastly, the note analysis requires balancing the burden on the relgious practice against the governmental interest. The note suggests that severity of burden to the religious interest should be measured by the degree to which the regulation actually inhibits religious observances.

As a guidepost in determining the relgious burden, the note suggests a "centrality" analysis. The Sherbert analysis, as is, tempts courts to make the determinations at the beginning of the inquiry. Here, it is near the end. The court initially determines if the regulation touches upon something that is "central" to the sect's belief and practice. The more central the regulated belief or practice, the greater the burden on the religion.

---

[49] Schad, 452 U.S. at 71.

[50] Note, supra note 64 at 1578.

[51] 406 U.S. 205 (1972).

The flaw with the "centrality" test as pointed out earlier is the substitution of judicial values and conceptions as to what is central to a sect's belief for the sect's own interpretation of its belief system.

**Part V. Conclusion**

What the note and Walker analysis does is give a presumption of validity to free exercise claims. It is up to the government to prove why a relgious exemption should not be granted. There is nothing wrong with this shift. It flows logically from the Schad and Moore decisions. They indicated First Amendment freedoms, those fundamental to individual liberty, should be given a high degree of protection. Presently, in zoning cases, First Amendment freedoms are not being protected. Religious uses are found secular by courts and, therefore, outside free exercise analysis. The note analysis brings these uses into the free exercise realm as they should be. According to Schad, the right assertedly threatened should trigger the standard of review.

Does the note analysis mean life will be easier for zoning officials or for neighborhoods where yards are wide and blue-eyed children run free? The answer is no. Municipalities and home owners will have to accommodate religious uses of property. Increased traffic, loud hymn singing, church bells, and unruly church crowds will all have to be endured by neighborhoods where churches locate. First Amendment freedoms, in order to flourish, often require accommodation from other segments of society:

> The courts have repeatedly held that citizens must endure a certain amount of inconvenience in order to protect First Amendment rights... There are numerous instances in which a citizen's lesser protected rights are forced to yield to the higher protection for a First Amendment right.[52]

The note analysis merely brings church use of land into the realm of First Amendment protection where it belongs.

---

[52] Comments, 76 NW. U. L. Rev. at 808.