THE ZONING OF RELIGIOUS INSTITUTIONS AFTER *LYNG V. NORTHWEST INDIAN CEMETERY PROTECTIVE ASSOCIATION*

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INTRODUCTION

The determination of what constitutes a "religious use" for the purposes of state or local zoning ordinances is a difficult question.[1] The issue presents a tension between the government's admittedly strong interest in regulating local areas and the right of individual entities to the free exercise of their religious beliefs.[2] These often conflicting interests have not escaped the notice of the courts. Indeed, state courts have adopted widely divergent solutions to deal with the problem. Still, at no point has the United States Supreme Court decided a case that would unify, or at least give some guidance to, the state courts attempting to define "religious use."

Though the Supreme Court has frequently heard zoning cases dealing with various first amendment issues,[3] it has consistently refused to grant certiorari to zoning cases that implicate the free exercise clause of the first amendment.[4] Indeed, no federal

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[1] Walker, *What Constitutes a Religious Use for Zoning Purposes*, 27 CATH. LAW. 129, 129-130 (1982).

[2] *Id.* at 130-31.

[3] *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981); Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976).

[4] *See* Grosz v. City of Miami Beach, 721 F.2d 729 (11th Cir. 1983), *cert. denied*, 469 U.S. 827 (1984); Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303 (6th Cir. 1983), *cert. denied*, 464 U.S. 815 (1983); Marsland v. Int'l Soc'y for Krishna Consciousness, 66 Haw. 119, 657 P.2d 1035 (1983), *appeal dismissed*, 464 U.S. 805 (1983); Lubavitch Chabad House of Illinois, Inc. v. City of Evanston, 112 Ill. App. 3d 223, 445 N.E.2d 343 (1982), *cert. denied*, 464 U.S. 992 (1983); Medford Assembly of God v. City of Medford, 72 Or. App. 333, 695 P.2d 1379 (1983), *cert. denied*, 474 U.S. 1020 (1985).

appellate court addressed the free exercise clause in the zoning context until 1983.[5] This lack of guidance from the federal judiciary has given rise to a plethora of disparate state court approaches to free exercise zoning cases. The time is ripe for a unified approach.[6]

The time may have come. Though the Supreme Court has still not decided a case which specifically addresses what is considered a religious use in the zoning context, it has recently addressed a related question. In *Lyng v. Northwest Indian Cemetery Protective Association*,[7] the Court set forth criteria to determine the types of government regulation allowed under the free exercise clause of the first amendment.[8] Unlike many of the prior state court approaches, Justice O'Connor's opinion in *Lyng* did not focus on whether the use involved was religious or not. Instead, the *Lyng* Court focused on the impact of the government regulation upon the practice and beliefs of the particular religious group involved.[9]

In this article, I will attempt to show that the Supreme Court's new formulation of what is protected under the free exercise clause has unified a once diverse and eclectic body of case law. Though the Court in *Lyng* did not directly deal with a religious zoning question, it opened the door for local zoning boards across the country to zone religious institutions virtually the same way they would zone any other property. The zoning boards no longer have to examine the use in question. Indeed, whether the use itself is religious is now irrelevant. Based on *Lyng*, government zoning is valid as

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

[6] *Cf.*, Note, *In Search of Objective Criteria For a National Standard of Review in Church Zoning: Islamic Center of Mississippi, Inc. v. City of Starkville*, 11 GEO. MASON L. REV. 147, 148 (1989).

[7] 485 U.S. 439, 108 S. Ct. 1319 (1988).

[8] U.S. CONST. amend. I. The first amendment to the United States Constitution provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." *Id.*

[9] 485 U.S. at ___, 108 S. Ct. at 1326.

long as it does not directly or indirectly prohibit the practice or belief of a particular religion.[10]

The article will first briefly examine the power of governments to zone based upon *Village of Euclid v. Ambler Realty Co.*[11] Second, it will review the facts and style of *Lyng v. Northwest Indian Cemetery Protective Association.*[12] Third, the article will examine Justice O'Connor's opinion for the majority in *Lyng*. This third section will include the three part "test"[13] of what types of government action are prohibited under the free exercise clause.[14] Fourth, the article will examine the impact of *Lyng* upon various states' treatment of religious use property in the zoning context. The final section will examine *Lyng*'s impact upon Virginia law.

TRADITIONAL POWERS OF LOCAL GOVERNMENTS TO ZONE

In 1926, the Supreme Court decided *Village of Euclid v. Ambler Realty Co.*,[15] a case that was destined to become the foundation of modern zoning law.[16] The *Euclid* court observed the need for comprehensive zoning plans and for accompanying restrictions upon the use of private property.[17] These plans were a result of modernization and were necessary for the smooth functioning of society.[18] Under the

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[10] *Id.*

[11] 272 U.S. 365 (1926).

[12] 485 U.S. 439, 108 S. Ct. 1319 (1988).

[13] Justice O'Connor does not propose a "test" per se. She merely sets out the relevant criteria, 485 U.S. at ___, 108 S. Ct. at 1326.

[14] As will be noted below, the term "religious use" is now obsolete and should be discarded.

[15] 272 U.S. 365 (1926).

[16] Walker, *supra* note 1, at 146.

[17] *Id.* (discussing Euclid, 272 U.S. at 386-87).

[18] *Id.* at 146-47 (discussing Euclid, 272 U.S. at 386-87).

court's analysis, zoning regulations were given a presumption of constitutional validity.[19] Only when the zoning ordinance was arbitrary, unreasonable and without any substantial relationship to public health, welfare, safety or morals would the ordinance be deemed unconstitutional.[20]

The Supreme Court has consistently upheld this presumption of validity. It has applied the presumption in cases involving government appropriation of private land for the purpose of devising a coordinated zoning plan;[21] in cases involving government restriction on the composition of families that could live in single family dwellings;[22] and in cases involving government regulation of adult uses.[23] When a zoning decision has infringed upon a fundamental right, the Court has been quick to strike down the proposed zoning ordinance.[24] The free exercise of religion is clearly a fundamental right.[25]

Limitations on the free exercise of religion have traditionally been allowed, under the government's police power. The Supreme Court has held that the freedom to believe is absolute, but that the freedom to act in the furtherance of those beliefs is not.[26] Religious conduct remains subject to regulation for the protection of society.[27]

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[19] *See* Euclid, 272 U.S. at 388-89.

[20] *Id.* at 395.

[21] Berman v. Parker, 348 U.S. 26 (1954).

[22] Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

[23] City of Renton v. Playtime Theatres, 475 U.S. 41 (1986) (The Court based *Renton* on both first amendment and zoning analyses).

[24] *See* Moore v. City of E. Cleveland, 431 U.S. 494 (1977) (regulation found to infringe on personal choice in matters of family and family life).

[25] *See* Walker, *supra* note 1, at 154.

[26] Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940); *see also*, McDaniel v. Paty, 435 U.S. 618 (1978).

[27] Cantwell, 310 U.S. at 304.

For example, one's religious beliefs may not justify the committing of an overt criminal act.[28] On the other hand, the Court has also held that some aspects of religious exercise cannot in any way be restricted or burdened by federal or state legislation.[29] The test traditionally applied in determining the validity of zoning ordinances is whether the state has a compelling interest in the legislation and whether less restrictive means exist to accomplish the state objective.[30]

In *Lyng*, Justice O'Connor set out new[31] criteria to be considered when determining whether government action has violated the free exercise clause. Those criteria severely limit the situations where government action implicates free exercise rights. After *Lyng*, the free exercise clause will apply only when the plaintiffs are in some way prohibited from practicing their religion.

The impact of narrowly defining what is protected by the free exercise clause is significant. Clearly, strict scrutiny review is appropriate when first amendment rights are at issue.[32] By narrowly defining what is protected by the free exercise clause, Justice O'Connor was able to avoid strict scrutiny review in *Lyng*. In the Court's view, no first amendment concerns were implicated.[33] Therefore, the government did not need to show a compelling need for its action.[34] A mere legitimate state interest test was good enough. Justice O'Connor did not change the level of review for occasions when

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[28] Reynolds v. United States, 98 U.S. 145, 162-64 (1878).

[29] Branfield v. Brown, 366 U.S. 599, 603 (1961).

[30] Sherbert v. Verner, 374 U.S. 398, 406-07 (1963).

[31] This may not actually be a "new" approach. Before *Sherbert* the Supreme Court used analysis similar to that used in *Lyng* when deciding free exercise issues. *See* Note, *Wisconsin v. Yoder: The Right to Be Different-First Amendment Exemption for Amish under the Free Exercise Clause*, 22 DE PAUL L. REV. 539, 545-46 (1972).

[32] Thomas v. Collins, 323 U.S. 516 (1945).

[33] Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. at ___, 108 S. Ct. at 1326.

[34] *Id.*

first amendment free exercise rights are implicated; instead she drastically reduced the number of occasions when an infringement rises to that level.

FACTS AND STYLE OF *LYNG V. NORTHWEST INDIAN CEMETERY PROTECTIVE ASSOCIATION*

In *Lyng v. Northwest Indian Cemetery Protective Association*,[35] the United States Forest Service planned to complete a seventy-five mile road between two California towns by building a six mile connecting segment (the G-O road) through a national forest.[36] The area had historically been used by members of three Indian tribes to conduct religious rituals for the purpose of personal spiritual development.

A study commissioned by the Forest Service found that specific sites within the area were used for religious rituals, and that the area as a whole had great religious significance for the Indians. According to the study, successful religious use of the area depended on privacy, silence, and an undisturbed natural setting. The study found that construction along any of the available routes would cause serious and irreparable damage to the sanctity of the area.

Despite these findings, the Forest Service decided to proceed with the construction. The Forest Service chose a route through the area that avoided archeological sites as well as the sites used by contemporary Indians for specific spiritual activities. The Forest Service also adopted a plan allowing for the harvesting of timber in the area, with a half mile protective zone around the specific religious sites.

An Indian organization, individual Indians, and others challenged both the timber-harvesting and the road-building decisions in the United States District Court for the

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[35] 485 U.S. 439, 108 S. Ct. 1319 (1988).

[36] The following factual description can be found at 485 U.S. at ___, 108 S. Ct. at 1321-22.

Northern District of California.[37] The district court found that both the timber-harvesting and road-building decisions violated the free exercise clause of the first amendment and several federal statutes.[38] With regard to the first amendment claim, the district court permanently enjoined the timber-harvesting and the road-building.[39] The Ninth Circuit affirmed the decision concluding that the Government failed to demonstrate a compelling interest in the completion of the G-O road.[40]

ANALYSIS OF *LYNG v. NORTHWEST INDIAN CEMETERY PROTECTIVE ASSOCIATION*

In *Lyng v. Northwest Indian Cemetery Protective Association*,[41] the Supreme Court reversed the Ninth Circuit decision and determined that the United States Forest Service could build a six mile stretch of highway through government land considered sacred by local Indians.[42] The Court reached this decision despite the appellate court's prediction that the construction and use of the road would "virtually destroy the Indians' ability to practice their religion."[43] Writing for the majority, Justice O'Connor based the Court's decision on two separate grounds.

First, the Court stated that the government had a "right to use what is, after all, *its* land"[44] (emphasis in original). The Court viewed the building of the highway as

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[37] Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586, 589-90 (N.D. Cal. 1983).

[38] *Id.* at 594-96.

[39] *Id.*

[40] Northwest Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 695 (9th Cir. 1986).

[41] 485 U.S. 439, 108 S. Ct. 1319 (1988).

[42] *Id.* at ___, 108 S. Ct. at 1321.

[43] *Id.* at 1326 (quoting Northwest Indian Cemetery Protective Ass'n, 795 F.2d 688, 693 (9th Cir. 1986).

[44] *Id.* at ___, 108 S. Ct. at 1327.

involving "legitimate conduct by government of its own affairs."[45] The Court also cited *Bowen v. Roy*[46] for the proposition that the free exercise clause "does not afford an individual a right to dictate the conduct of the Government's [own] internal procedures."[47] Because the government action at issue in *Lyng* affected government land, rather than private land, this portion of the Court's decision is inapplicable to cases involving the zoning of private property.

Second, and more important for zoning concerns, the Court also stated that the sacred Indian lands were not entitled to first amendment protection under the free exercise clause because the government action of building the road did not prohibit the practice of the Indian religion.[48]

In *Lyng*, Justice O'Connor started from the perspective that the government action was "lawful"[49] and "legitimate."[50] She then set forth three criteria to be considered when determining whether government action is prohibited under the free exercise clause. When phrased in the form of questions, these criteria form a three-part test for what government action is permissible under the free exercise clause:

1) Whether the government action actually prohibits the practice of religion;[51]
2) whether the government action has a tendency to coerce individuals to act contrary to their religious beliefs;[52]
3) whether the government action imposes penalties on the practice of that

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[45] *Id.* at ___, 108 S. Ct. at 1326.

[46] 476 U.S. 693 (1986).

[47] Lyng, 485 U.S. at ___, 108 S. Ct. at 1325.

[48] *Id.* at ___, 108 S. Ct. at 1329.

[49] *Id.* at ___, 108 S. Ct. at 1326.

[50] *Id.*

[51] *Id.*

[52] *Id.*

religion.[53]

If the answer to all three of these questions is negative, then no infringement of the free exercise of religion has occurred. All other "incidental effects of government programs," including those "that may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs" do not give rise to constitutional concerns.[54]

Justice O'Connor based these criteria upon the literal text of the free exercise clause that states that "Congress shall make no law *prohibiting* the free exercise [of religion]." (emphasis in original).[55] Only government action that somehow prohibits the practice of religion is unconstitutional. Mere interference with religious practices will not do.[56]

This three part test does not focus upon the land use in question. It also does not focus upon the government action per se. Instead, it examines the effect of the government regulation of the land use on the practice of religion. The phrase "religious use," previously the cornerstone of "church zoning" jurisprudence, is now obsolete. As Justice O'Connor stated: "[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government."[57] Her point is that whether the land use is religious or not is irrelevant. Indeed, the *Lyng* Court admitted that the use at issue was religious.[58] The

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[53] *Id.* This would come into play in a situation similar to that in *Sherbert v. Verner*, 374 U.S. 398 (1963), where ineligibility for unemployment benefits, based solely on a refusal to violate the Sabbath, was considered a fine on religious belief.

[54] Lyng, 485 U.S. 439, 108 S. Ct. 1326 (1988).

[55] *See id.* at 1329 (quoting U.S. CONST. amend. I).

[56] *Id.*

[57] *Id.* at ___, 108 S. Ct. 1326 (quoting Sherbert, 374 U.S. at 412 (Douglas, J., concurring)).

[58] *Id.*

pertinent question after *Lyng* is whether the government action prohibits the practice and belief of a particular religion.

By narrowly defining which governmental actions the free exercise clause disallows, *Lyng* invalidated, or at least undermined, a substantial amount of state case law defining "religious uses." Traditionally, state courts, to varying degrees, have protected religious uses of property from the states' otherwise plenary zoning power. Under *Lyng*, this must change. *Lyng* only barred actions which prohibit, as opposed to actions which inhibit the practice of a particular religion.[59]

The Court made the practical argument that the "government simply could not operate if it were required to satisfy every citizen's religious needs and desires."[60] The Court went on to point out that virtually every government action will affect the spiritual well-being of some person.[61] The first amendment cannot give an individual citizen "a veto over public programs that do not prohibit the free exercise of religion."[62]

It should be noted that Justice O'Connor tempered her position. She stated that nothing in the majority's opinion "should be read to encourage governmental insensitivity to the religious needs of any citizen."[63] As evidence of the government's sensitivity, she pointed to the accommodations made by the Forest Service to ensure that the Indians' religious practices were disturbed as little as possible by the building of the road.[64] This limitation on government conduct, *i.e.*, sensitivity to religious needs, is, as the dissent noted, a "toothless exhortation."[65] It is really no limitation at all.

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[59] *Id.*

[60] *Id.* at ___, 108 S. Ct. at 1327.

[61] *Id.*

[62] *Id.*

[63] *Id.* at ___, 108 S. Ct. at 1327-28.

[64] *Id.* at ___, 108 S. Ct. at 1328.

[65] *Id.* at ___, 108 S. Ct. at 1338 (Brennan, J., dissenting).

In his dissenting opinion, Justice Brennan argued that the free exercise clause has a much broader scope than the majority allowed.[66] In Brennan's view, government actions that merely inhibit, in addition to those that prohibit, religious use are invalid under the first amendment.[67] Brennan stated that the free exercise clause is directed against any form of governmental action that inhibits or frustrates religious practice.[68] He rejected the majority's contention that the first amendment bars only outright prohibitions, indirect coercion, and financial penalties on the free exercise of religion.[69]

Brennan viewed the majority's decision to allow the Forest Service to build the G-O road through sacred Indian lands as impermissible interference with the practice of the Indians' religion.[70] First, the majority's decision refused "to even acknowledge the constitutional injury the [Indians would] suffer."[71] Second, the majority's "refusal" to affirm the injunction "essentially [left] Native Americans with absolutely no constitutional protection against perhaps the gravest threat to their religious practices."[72] Brennan cryptically concluded that this decision left the Indians with a hollow freedom, which "fail[ed] utterly to accord with the dictates of the First Amendment."[73]

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[66] *Id.* at ___, 108 S. Ct. at 1330 (Brennan, J., dissenting).

[67] *Id.* at ___, 108 S. Ct. at 1335 (Brennan, J., dissenting).

[68] *Id.*

[69] *Id.* at ___, 108 S. Ct. at 1333-34 (Brennan, J., dissenting).

[70] *Id.* at ___, 108 S. Ct. at 1330 (Brennan, J., dissenting).

[71] *Id.*

[72] *Id.*

[73] *Id.* at ___, 108 S. Ct. at 1340 (Brennan, J., dissenting). Justice Brennan's characterization of the majority decision as bad first amendment law will not be addressed here. This paper makes no attempt to critique the majority's reasoning in *Lyng*. This paper attempts to examine the impact of the *Lyng* decision, not question its wisdom.

Lyng is distinguishable from zoning cases because it involves use of federal and not private lands.[74] Therefore, the case does not compel state courts to change their free exercise standards in the zoning area. Still, *Lyng* is a guiding light in the traditionally dark and murky free exercise area.[75] State courts must now adopt a new approach to determine how churches and other religious institutions may be zoned. In every state, the new approach will give great power to zoning boards. Because states have widely different approaches to the free exercise question, each will have its own unique adaptations to the new standard.

VARIOUS STATE TESTS AND *LYNG*'S EFFECT ON THOSE TESTS

The first amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[76] The United States Supreme Court has never addressed the clause in the specific context of zoning regulations.[77] As a result of this lack of guidance, states have developed individual approaches to determine what is considered a religious use. Approximately five schools of thought can be discerned from the diverse case law.[78] These approaches are best exemplified by the approaches of: 1) California; 2) Texas

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[74] *Id.* at ___, 108 S. Ct. at 1327.

[75] The Supreme Court has stated that the language of the Religion Clauses of the first amendment "is at best opaque." Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

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

[77] *See supra* note 4.

[78] At least one commentator has stated that only two groups could be discerned, *i.e.*, the California and the New York approaches. In his view all of the other approaches fell into one of these two camps. *See* Pearlman, *Zoning and the Location of Religious Establishments*, 31 CATH. LAW. 314, 317 (1986).

and Pennsylvania; 3) the federal courts; 4) Michigan, New Jersey and Oregon; 5) New York.[79]

The California Approach

California courts employ the most restrictive approach regarding whether churches may be excluded from certain areas.[80] California gives great weight to legislative judgment regarding zoning issues and is loathe to second-guess those judgments. The basic standard in California was stated in *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville.*[81] There, a California court held a church could be prohibited from single family districts as long as a legislative body of a community made a valid judgment that the churches in those district would cause traffic, noise and parking problems.[82] Like the majority in *Lyng*, the *Porterville* court started from the view that the zoning regulation was legitimate.[83] The *Porterville* court allowed the religious nature of the use in question to be taken into account as one of several factors to be considered when making a zoning decision.[84] The weight given this religious factor was not determined by the court, but by the community group making the zoning decision.[85] The court analogized the regulation of religious institutions through zoning ordinances to the regulation of religious institutions

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[79] Goldberg, *Gimme Shelter: Religious Provision of Shelter to the Homeless as a Protected Use Under Zoning Laws*, 30 WASH. U.J. URB. & CONTEMP. L. 75 (1986).

[80] *Id.* at 90-91 n. 94.

[81] 90 Cal. App. 2d 656, 203 P.2d 823 (1949), *appeal dismissed*, 338 U.S. 805 (1949).

[82] *Id.* at ___, 203 P.2d at 825.

[83] *Id.* at ___, 203 P.2d at 825-26.

[84] *Id.* at ___, 203 P.2d at 825.

[85] *Id.*

through building codes.[86] According to the court, the plaintiff had the burden of proving that the regulation was unreasonable.[87] The plaintiff failed to make such a showing.[88]

Since *Porterville*, the California courts have continued to hold that communities have the right to exclude churches from residential areas.[89] Those courts have generally treated religious uses the same as other uses for zoning purposes.[90] Under the California standard, the community must merely show a rational basis for zoning the church as it did.[91] One court has even explicitly rejected the majority position disallowing restriction of churches as an extreme viewpoint which ignores the basis of modern day zoning.[92] Although the California courts have not entirely ignored the free exercise limitations involved in zoning religious institutions,[93] they have held that the consideration of those limitations should be at the planning stage rather than at the judicial stage.[94]

The restrictive nature of the California approach and its deference to legislative judgment will continue to have vitality after *Lyng*; however, the method in which California weighs the religious nature of a use will have to change. The California

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[86] *Id.*

[87] *Id.* at ___, 203 P.2d at 826.

[88] *Id.*

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

[90] *See* Minney, 164 Cal. App. 2d 12, 330 P.2d 255 (1958); *see also*, Garden Grove, 176 Cal. App. 2d 136, 1 Cal Rptr. 65 (1959).

[91] Minney, 164 Cal. App. 2d 12, 330 P.2d 255 (1958). The use of a rational basis standard can be implied from the court's decision.

[92] *Id.*

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

[94] *Id.*

approach does not examine the effect of the religious behavior upon the belief of the petitioners. Under the criteria set forth in *Lyng*, the petitioner's religious belief is the center of the analysis.

Applying the new criteria to the fact situation in *Porterville*, for instance, the court would examine whether the denial of the permit prohibited the practice of the religion, coerced the believers into acting contrary to their religious beliefs or financially penalized them for their beliefs. Because the zoning restriction in *Porterville* allowed churches in other parts of the city,[95] the practice of the petitioners was neither prohibited nor substantively frustrated. The case also offers no evidence that it would cost the religious practitioners any more money to build their church in a non-residential area. Under the *Lyng* test, therefore, the court would find no infringement of the right of free exercise of religion.[96]

The Texas/Pennsylvania Approach[97]

The Pennsylvania courts look at the purpose of the land's use to determine whether the conduct in question constitutes a "religious use" of the property.[98] Under this approach, if the purpose is found to be secular, the zoning ordinance will be upheld.[99] Thus, a cemetery was found to be secular even though the land on which the

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[95] Porterville, 90 Cal. App. 2d at ___, 203 P.2d at 824.

[96] Factually, this case is remarkably similar to *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303 (6th Cir. 1983), *cert. denied*, 464 U.S. 815 (1983). *Lakewood* is discussed extensively below.

[97] One commentator has stated that Texas and Pennsylvania represent separate approaches. *See* Goldberg, *supra* note 79, at 91. I believe, however, that Texas and Pennsylvania follow the same theoretical approach although the Texas approach is more restrictive in application.

[98] Goldberg, *supra* note 79.

[99] *Id.* (citing *In re* Russian Orthodox Church, 397 Pa. 126, 152 A.2d 489 (1959)). It makes no difference what type of entity is conducting the use. Mere ownership by a religious entity does not indicate a religious use. Russian Orthodox at 129, 152 A.2d at 491.

cemetery rested was owned by a church.[100] Similarly, a religious, for-profit radio station was held not to be a religious use.[101] Religious use has been broadly defined in Pennsylvania. A Pennsylvania court has defined "church" as protecting "any purpose connected with the religious practices which the group or sect maintaining that particular church desires to pursue."[102] For example, Pennsylvania courts have found retreat houses,[103] houses used to lodge travelling missionaries, and houses to conduct religious classes and to do office work are within the definition of churches.[104]

The perspective of the Pennsylvania courts must change. Courts must not focus on the proposed use by the religious entity. Courts should focus on the effect of the government action on the religious belief. Note that under *Lyng*'s criteria the issue is not the effect of the government decision on the use itself, but on the religious belief of the petitioners.

For example, in the Pennsylvania cemetery case,[105] the court would not examine whether the use of the cemetery was religious, nor would the court ask whether the government action affected the use of the cemetery. After *Lyng*, the court should focus upon whether the government's restriction of the use of the property affected the belief of the petitioners. The *Lyng* approach focuses on the beliefs of the religious petitioners, not upon the effect of the government regulation on the use. The government's zoning of the cemetery did not prohibit the practice of the religion. The case offers no

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[100] Russian Orthodox at 129, 152 A.2d at 491.

[101] Goldberg, *supra* note 79, at 91-92 (citing Gallagher v. Zoning Board of Adjustment, 32 Pa. D & C.2d 669 (Dist. & County Ct. 1963)).

[102] Goldberg, *supra* note 79, at 92 (citing *In re* Stark, 72 Pa. D & C. 168, 189 (1950)).

[103] *Id.*

[104] Goldberg, *supra* note 79, at 92 (citing Conversion Center v. Zoning Bd. of Adjustment, 2 Pa. Commw. 306, ___, 278 A.2d 369, 370 (1971)).

[105] Russian Orthodox, 397 Pa. 126, 152 A.2d 489 (1959).

evidence that the zoning restriction financially penalized the practice of the religion or that it had a tendency to coerce individuals into acting contrary to their religious beliefs. Therefore, after *Lyng*, the zoning in the cemetery case would be valid.

Although the Texas approach is theoretically similar to the Pennsylvania approach, the Texas view is more restrictive in its application. Like Pennsylvania, Texas courts look to the use in question to determine whether it is religious or secular. If the use is secular, it is not protected from zoning regulation. Unlike Pennsylvania, however, the Texas courts construe the meaning of religious use narrowly.[106] Although both states examine the use in question, the use will have to be closer to the core of the religious beliefs in Texas than it would be in Pennsylvania to receive protection.[107]

Coe v. City of Dallas[108] gives a good example of the restrictive nature of the Texas approach. In *Coe*, the appellants, believers in faith healing, sought to compel the City of Dallas to issue a building permit for the purposes of building a church.[109] The court upheld the city council's determination that the proposed site was not a church even though the building was going to have 600 square feet of church proper attached to 2400 square feet of healing or prayer space.[110] One commentator has noted that the city council's decision that the building was not a church was probably erroneous.[111]

After *Lyng*, the restrictive nature of this approach will remain substantially unchanged. Texas courts will continue to rarely invoke first amendment analysis in church zoning cases. Justice O'Connor's opinion indicates that the United States

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[106] Goldberg, *supra* note 79, at 91 (discussing Heard v. City of Dallas, 456 S.W.2d 440 (Tex. Civ. App. 1970)).

[107] *Cf.*, Goldberg, *supra* note 79, at 90-92.

[108] 266 S.W.2d 181 (Tex. Civ. App. 1953).

[109] *Id.* at 182-83.

[110] *Id.* at 183.

[111] Walker, *supra* note 1, at 163 (1982).

Supreme Court, like the courts of Texas, is willing to trust the legislature's decision on the appropriate location for churches. In practice, there should be no change in the result of church zoning cases in Texas.

The rationale of the Texas approach will change somewhat, however, because these courts must now shift their examination of "religious uses" away from the use itself and focus on the effect of the government's regulation of that use upon the practice of the religion involved. Thus, in *Coe*, the question is not whether the religious healing that would occur in the healing space is a religious use, but whether the denial of the building permit prohibits the practice of the religion, penalizes the practitioners of the religion for their beliefs, or somehow coerces those practitioners into acting contrary to their beliefs.

Under the new criteria, the court would most likely find that the church in *Coe* would not pass the three part test. The denial of the building permit, absent evidence that the church was unable to build elsewhere in the city, does not prohibit the practice of the religion. Additionally, no evidence exists showing that the zoning restriction either coerced the petitioners into not believing in faith healing or imposed any financial penalty for holding that belief. Therefore, the denial of the building permit would not implicate first amendment concerns.

The Federal Approach

Three federal courts have specifically addressed the circumstances under which religious institutions may be zoned. Each court differs slightly on the test to be applied in determining what is a religious use. The most thorough treatment of the topic was given by the Eleventh Circuit in *Grosz v. City of Miami Beach.*[112] The *Grosz* court put the test in terms of two threshold questions:

[112] 721 F.2d 729 (11th Cir. 1983), *cert. denied*, 469 U.S. 827 (1984).

1) whether the government action regulated religious belief or religious conduct?[113] If the government is attempting to regulate the plaintiff's beliefs, the regulation was invalid. If, however, the regulation was merely attempting to regulate religious conduct, then the first threshold would be passed. If the government action validly regulated conduct, the court would move to the second consideration;[114]

2) whether the regulation had a secular purpose as well as a secular effect?[115] A sectarian purpose was prohibited, whereas a secular purpose was allowed.[116]

With its focus on the government action, the initial inquiry in *Grosz* is, to some extent, still correct after *Lyng*. The first part of the *Grosz* test is inaccurate because it examines the government's purpose for the zoning restriction instead of the actual effect of that restriction. Part one of the *Grosz* test examines whether the government action somehow infringes upon the practice of religious beliefs. The purposes of the regulation are irrelevant. The effect of the regulation on the practice of the religion is what is important.

For the same reason the second part of the *Grosz* test is incorrect after *Lyng* to the extent that it looks exclusively to the purposes of the government action and not to the effect of the government action upon the beliefs of the petitioners.[117] The purposes of the regulation are irrelevant after *Lyng*. There, the majority did not find that the government's purposes in constructing the G-O road were vital. That was not the

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[113] *Id.* at 733.

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] The *Grosz* court gave some consideration to the effect of a government regulation, noting that a law would violate the free exercise clause if the "essential effect of the government action [was] to influence negatively the pursuit of religious activity or the expression of religious belief." *Id.* at 733.

crucial issue. The crucial issue was whether the government's use prohibited the practice of religion.[118]

The second federal case to address the zoning of religious institutions was *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood.*[119] *Lakewood* involved a church which wanted to relocate in a residential neighborhood consisting of large one and two-family homes.[120] The church was initially denied an exception to the local residential zoning for several reasons, including noise and traffic hazards.[121] After a comprehensive rezoning of the city, the zoning ordinance left the property in a single-family district that did not permit churches. The church was again denied a permit.[122]

The *Lakewood* court examined the nature of the religious observance and the burden placed on that observance by the zoning regulation.[123] The court concluded that though financial and aesthetic burdens existed, they were only indirect burdens. Therefore, first amendment rights were not implicated.[124] The court held that relocating to a more attractive part of the city, though desireable, was not an indispensable tenet of the religious belief.[125] The fact that only 10% of the land in the city was suitable for a new church was not a factor in the decision. If the church wished to locate in

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[118] 485 U.S. at ___, 108 S. Ct. at 1326.

[119] 699 F.2d 303 (6th Cir. 1983), *cert. denied*, 464 U.S. 815 (1983).

[120] *Id.* at 304.

[121] *Id.* at 304-05.

[122] *Id.* at 305.

[123] *Id.* at 306-07.

[124] *Id.* at 307-08.

[125] *Id.* at 307.

a residential neighborhood, it could buy existing churches or buildings in 90% of the city or use the 10% of the city that was zoned for religious uses.[126]

The *Lakewood* analysis should continue to have vitality after *Lyng* and should still be an appropriate standard for determining whether a zoning regulation infringes upon the free exercise clause. Applying the three criteria of *Lyng* to the situation in *Lakewood*, one gets the same result with virtually the same reasoning. The denial of the building permit did not prohibit the exercise of religion. The religious group could still practice their religion either where they had been doing so previously or in the 10% of the city left open for churches. No one was compelled to act contrary to their religious beliefs. The petitioners could still practice in the same manner and in the same location as they had before. Finally, the financial penalty imposed by the city, *i.e.*, not allowing the church to build on residential property, did not directly penalize the petitioners for their beliefs.[127] No fine was imposed for the belief of the religion.

The most recent federal case to address the church zoning issue is *Islamic Center of Mississippi, Inc. v. City of Starkville*.[128] *Islamic Center* involved a group of Muslim college students who were denied a permit to establish a religious institution as a place of worship and housing. The Fifth Circuit determined that the students' proposed establishment of a place of worship was a religious use and strictly scrutinized the state action.[129] The court held that the denial of the permit impermissibly burdened

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[126] *Id.* at 307. Note that the Supreme Court has previously employed similar reasoning in the case of adult uses. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).

[127] Arguably, any added costs the church accrued in finding and purchasing alternate land could be construed as similar to the costs the court found offensive in *Sherbert v. Verner*, 374 U.S. 398 (1963). I have not taken that view here, however, because the penalty involved in *Sherbert*, *i.e.*, no unemployment benefits unless applicant worked on the Sabbath, was a direct penalty to the free exercise of religion. *Id.* Here, any added cost would be an indirect cost to the petitioner.

[128] 840 F.2d 293 (5th Cir. 1988).

[129] *Id.* at 300.

the students' free exercise rights and suggested that it amounted to a denial of equal protection under the law.[130]

In light of *Lyng*, the Fifth Circuit's decision in *Islamic Center* is troublesome. The decision could go either way. It could be argued that the denial of the permit did not prohibit the students from practicing their religion. They did not have a place of worship before they applied for the permit but they had still worshipped; no coercion of any type was involved here, and there was no financial penalty for practicing their beliefs. On the other hand, the structure involved here was a "church," *i.e.*, a place of worship. If the free exercise clause does not prohibit the government from denying a permit to an organization attempting to establish (as opposed to merely relocating as in *Lakewood*) a religious institution, then it would seem that *Lyng* has essentially read the free exercise clause out of zoning issues.

The Michigan/New Jersey/Oregon Approach

This view focuses not upon the use as in the Pennsylvania approach, but upon the structure involved. These courts ask whether the building or property affected by the government regulation is a "church."[131] Thus, in *Portage Township v. Full Salvation Union*,[132] camp meetings requiring the use of tents and shacks were found to violate the local zoning ordinance and were not considered a religious use.[133] The court reasoned that, even though religious services were conducted in the tents, not every place where religious services were held is a "church."[134]

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[130] *Id.*

[131] Goldberg, *supra* note 79, at 92.

[132] 318 Mich. 693, 29 N.W.2d 297 (1947), *appeal dismissed*, 333 U.S. 851 (1948), *reh'g denied*, 334 U.S. 830 (1948).

[133] *Id.* at 699-700, 29 N.W.2d at 800.

[134] *Id.* at 700, 29 N.W.2d at 300.

Similarly, in *Sexton v. Bates*,[135] the Superior Court of New Jersey found that a Jewish mikvah[136] was not a "church" or "accessory use" and disallowed a building permit authorizing alterations for its construction in a one family house.[137] The court, though accepting the religious importance of the mikvah, narrowly construed the term "church"[138] to be "a place where persons regularly assembled for worship."[139] One commentator has correctly noted that by this narrow "semantic inquiry," the New Jersey Court "effectively precluded consideration of the free exercise questions presented by the restriction."[140]

After *Lyng*, this restriction, *i.e.*, the refusal of the building permit to build a mikvah in a home zoned as residential, would not prohibit the practice of the religion, financially penalize the practice of the religion, or coerce Jewish believers into acting contrary to their religious beliefs. The mikvah could still take place in an authorized place of worship, at no extra cost to the believers. As long as the city authorized some place for the mikvah, no free exercise claims would succeed under *Lyng*. In short, after *Lyng*, as long as this zoning restriction is not arbitrary, it is valid.

Using similar reasoning, an Oregon court upheld the local county commissioner's denial of a conditional use permit for a church, school and gymnasium in a residentially zoned district.[141] The court upheld the administrative board's decision because a rational

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[135] 17 N.J. Super. 246, 85 A.2d 833 (1951), *affirmed, sub nom*, Sexton v. Essex County Ritualarium, 21 N.J. Super. 329, 91 A.2d 162 (1952).

[136] A mikvah, used mostly by Jewish females, is a ritualistic bathing place for purification in accordance with Jewish law. *Id.* at 252-53, 85 A.2d at 835-36.

[137] *Id.* at 248, 85 A.2d at 838-39.

[138] The court assumed that something had to fit into the definition of church to be considered an accessory use. *Id.* at 258, 85 A.2d at 839.

[139] *Id.* at 255, 85 A.2d at 837.

[140] Walker, *supra* note 1, at 159.

[141] Archdiocese of Portland v. County of Washington, 254 Or. 77, 458 P.2d 682 (1969) (en banc).

basis existed for the board's decision.[142] The court here, as the New Jersey court in *Sexton v. Bates*, did not consider the structure involved as essential to the religious belief of the plaintiffs.[143] It was not a "church" and therefore was not entitled to free exercise protection.

Again, after *Lyng*, the Supreme Court would not consider these "religious uses" sufficient to trigger the free exercise clause. A school and gymnasium are not absolutely essential to the plaintiff's beliefs; denial of the permit imposes no financial penalty upon the believers; and the denial of the permit did not coerce the plaintiffs to act contrary to their religious beliefs. No first amendment rights are implicated. In sum, the Michigan/New Jersey/Oregon "is it a church?" approach should have no application after *Lyng*. There, the Court explicitly stated that the "Indian religious practices [were] intimately and inextricably bound up" with the land at issue in the case.[144] In Michigan/New Jersey terms, the land at issue in *Lyng* was a "church." This factor did not influence the Court's decision. The focus now is not on the structure but on the effect of a restriction on actual beliefs.

The New York Approach

New York has the most expansive definition of "religious use." The New York approach is the majority approach in the United States.[145] In New York, a religious use is broadly defined as "a conduct with a religious purpose."[146] This requirement has been interpreted to include "any conduct which is in accordance with the doctrines, practices

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[142] *Id.* at 87, 458 P.2d at 686-87.

[143] *Id.*

[144] Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, ___, 108 S. Ct. 1319, 1326 (1988).

[145] *See* Pearlman, *Zoning and the Location of Religious Institutions*, 31 CATH. LAW. 314, 317 (1986).

[146] Slevin v. Long Island Jewish Medical Center, 66 Misc. 2d 312, 316, 319 N.Y.S.2d 937, 943 (Sup. Ct. 1971).

or regulations of a religious organization."[147] Any activity related to the purpose of a religious organization is a religious use.[148] This expansive protection of churches is based upon the theory that churches, synagogues and other religious institutions serve a high moral purpose and therefore should not be subject to local zoning as are other properties.[149]

Lyng and any progeny should effectively destroy this approach. The judicial zoning exercised by the New York courts when reviewing religious use issues is contrary to the language and spirit of *Lyng*. The "Constitution does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours.[150] That task, to the extent it is feasible, is for the legislatures and other institutions."[151]

The New York approach is invalid after *Lyng* for two reasons. First, New York courts erroneously focus upon the use rather than the effect of the government action. Second, they are very expansive in their definition of religious use. Clearly, the intention of the court in *Lyng* was to limit, not increase, the protection the free exercise clause offered against the government's power to regulate religious property.

For example, in *Community Synagogue v. Bates*,[152] the New York Court of Appeals reversed a zoning board's determination denying a use permit under a village

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[147] Goldberg, *supra* note 79, at 93 (citing Note, *Judicial Definition of Religious Use in Zoning Cases*, URB. L. ANN 291, 292 (1973)).

[148] 2 R. ANDERSON, AMERICAN LAW OF ZONING, § 12.25 at 460 (2d ed. 1976).

[149] Community Synagogue v. Bates, 1 N.Y.2d 445, 136 N.E.2d 488, 154 N.Y.S.2d 15 (1956).

[150] Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, ___, 108 S. Ct. 1319, 1327 (1988).

[151] *Id.*

[152] 1 N.Y.2d 445, 136 N.E.2d 488, 154 N.Y.S.2d 15 (1956).

zoning ordinance.[153] The court found the local board's factual conclusion that the property was to be utilized for other than a church or other strictly religious use to be incorrect.[154] The court concluded that to allow the zoning board to have the authority to deny an application for a church at any particular location would be to confer upon it the power to dictate the location of a place of worship, and to thereby interfere with the "free exercise and enjoyment of religious profession and worship."[155]

This type of judicial factual review of zoning decisions is entirely against the basic notion of the *Lyng* decision. The *Lyng* approach would presume the validity of the zoning board's decision. Then, it would use the three part test. If no type of prohibition, penalty or coercion appeared, then the zoning regulation would be valid. With its expansive view, New York effectively defines zoning ordinances that affect religious property as presumptively invalid. Clearly, this is contrary to the intent and language of *Lyng*.

In *Diocese of Rochester v. Planning Board*,[156] a companion case to *Bates*, the court held that an adverse effect on property values, loss of potential tax revenue, decreased enjoyment of neighboring property, possible traffic hazards and lack of opportunity for future residential development failed to justify the denial of a building permit for a church and school.[157] Here, as in *Bates*, the New York courts required a compelling[158] interest by the state to justify the imposition of burdens on a religious institution. The very means most often invoked to justify imposition of zoning under

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

[154] *Id.* at 453. 136 N.E.2d at 493, 154 N.Y.S.2d at 21-22.

[155] *Id.* at 458, 136 N.E.2d at 496, 154 N.Y.S.2d at 26 (quoting N.Y. CONST. art. I,
sec. 3).

[156] 1 N.Y.2d 508, 136 N.E.2d 827, 154 N.Y.S.2d 849 (Sup. Ct. 1956).

[157] *Id.* at 524-26, 136 N.E.2d at 835-37, 154 N.Y.S.2d at 861-63.

[158] The *Diocese of Rochester* court did not use the word "compelling."

the rational basis inquiry--diminished potential tax revenue and enjoyment of property--were explicitly found to be insufficient to deny the church the use of its property for religious purposes.[159]

In short, under the New York approach, any use of property that is connected in any way with the beliefs of a religious organization is protected from the zoning authority of the local government. After *Lyng*, this position is constitutionally unsound.

LYNG'S EFFECT ON VIRGINIA LAW

Unlike the states addressed above, Virginia courts have never directly addressed the role of the federal or state[160] free exercise clauses in the zoning context. The question in Virginia, therefore, is not how to change the law regarding the zoning of religious institutions but how to merge existing zoning law with free exercise jurisprudence after *Lyng*. In Virginia, a zoning board's decision to zone an area is considered a "legislative" action.[161] There is a rebuttable presumption that legislative actions are reasonable,[162] and the party challenging the zoning regulation has the burden of rebutting that presumption.[163] "Legislative action is [considered] reasonable if the matter in issue is fairly debatable."[164] An issue is "fairly debatable" when the evidence offered in support of the opposing views would lead objective and reasonable persons

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[159] Walker, *supra* note 1, at 173.

[160] VA. CONST. art. I § 16.

[161] County Bd. of Arlington County v. Bratic, 237 Va. 221, 227, 377 S.E.2d 368, 371 (1989).

[162] *Id.* at 371.

[163] Bratic, 237 Va. at 227, 377 S.E.2d at 371; Bd. of Supervisors in Loudoun County v. Lerner, 221 Va. 30, 34, 267 S.E.2d 100, 102 (1980).

[164] Bratic, 237 Va. at 227, 377 S.E.2d at 371; *see also*, Fairfax County v. Parker, 186 Va. 675, 680, 44 S.E.2d 9, 12 (1947).

to different conclusions.[165] When the issue of reasonableness is "fairly debatable," the legislative decision to zone will be sustained.[166]

Thus, when coupled with these existing standards, *Lyng* allows Virginia localities to zone churches freely, as long as the following conditions are met:

1) The zoning decision is a reasonable one (whether the decision is correct is an issue over which objective and reasonable people could differ);
2) The Board is "sensitive" to the religious nature of the property;
3) The zoning action does not impose financial penalties on the practice of that religion;
4) The zoning decision does not actually prohibit the practice of religion; and,
5) The government action does not tend to coerce individuals to act contrary to their religious beliefs.

Thus, Virginia lawmakers have a relatively free hand when zoning religious institutions. As long as they act reasonably and take religious beliefs into consideration when making zoning decisions, they should be able to zone religious facilities with minimal constraint.

CONCLUSION

The *Lyng* decision provides a unified approach to what has been a diverse and confused area of the law. Because no Supreme Court decision had ever addressed the free exercise clause in the land use context, state courts had differed widely on the protection afforded religious institutions in the zoning context. Although not directly applicable to the zoning context, *Lyng* is significant because it establishes

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[165] Bratic, 237 Va. at 227, 377 S.E.2d at 371.; *see also*, Fairfax County v. Williams, 216 Va. 49, 58, 216 S.E.2d 33, 40 (1975).

[166] Bratic, 237 Va. at 227, 377 S.E.2d at 371.

some basic parameters under which state and lower federal courts can continue to guide free exercise jurisprudence in land use legislation. These parameters are:

1) The protection afforded religious institutions by the free exercise clause is narrow, not broad as has been suggested by some commentators.[167]
2) Whether something is protected by the free exercise clause will be determined by looking at three criteria:
    a) whether the government action actually prohibits the practice of religion;
    b) whether the government action has a tendency to coerce individuals to act contrary to their religious beliefs;
    c) whether the government action imposes financial penalties on the practice of that religion.
3) The government, at least to some extent, must continue to be sensitive to the needs of religious institutions.

Lyng has given state courts some guidance in an area where none had previously existed. To conform with *Lyng*, every state that has addressed the issue of church zoning must now change to some degree. The broadest approaches, *e.g.*, New York's, are now invalid. While it is true that religious uses have traditionally been viewed as favored uses,[168] how this favoritism will be factored in the free exercise clause is unclear after the *Lyng* decision. Specific details will have to be determined in subsequent cases. Some protection does survive; how much is uncertain.

Even with this surviving protection, *Lyng* has severely limited any first amendment protection of religious institutions in the land use context. After *Lyng*, the

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[167] Walker, *supra* note 1, at 173. *See also*, Note, *In Search of Objective Criteria For a National Standard of Review in Church Zoning: Islamic Center of Mississippi, Inc. v. City of Starkville*, 11 GEO. MASON U.L. REV. 147 (1989).

[168] *See* Garden Grove Congregation of Jehovah's Witness v. City of Garden Grove, 176 Cal. App. 2d 136, 1 Cal. Rptr. 65 (1959).

standard in the religious zoning context should be similar to the *Lakewood* holding discussed above. First amendment protection will be construed narrowly. As long as local zoning boards are somewhat solicitous of the concerns of religious institutions, these boards can essentially zone religious institutions as they would any other properties. *Lyng* gives the state power at the expense of the church.