NOTE

Constitutional Review of Building Codes and Zoning Ordinances Applied to Parochial Schools: *City of Sumner v. First Baptist Church*

I. INTRODUCTION

In *City of Sumner v. First Baptist Church*,[1] the Washington Supreme Court held that when a parochial school is closed because its sponsoring church financially cannot comply with school building code standards,[2] the building code burdens the congregants' constitutionally protected religious freedom.[3] Thus,

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

2. In 1974, the city of Sumner adopted the UNIFORM BUILDING CODE (Int'l Conference of Bldg. Officials 1973 ed.) [hereinafter cited as BUILDING CODE]. *First Baptist Church*, 97 Wash. 2d at 11, 639 P.2d at 1364 (plurality opinion). The building did not meet the code's fire safety standards for schools. *Id.* at 20, 639 P.2d at 1369 (Dolliver, J., dissenting). Other building code violations included inadequacies in floor space, ventilation, and restroom facilities. *Id.*

3. U.S. CONST. amend. I states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." Although WASH. CONST. amend. XXXIV, amending WASH. CONST. art. I, § 11, provides that "no one shall be molested or disturbed in person or property on account of religion . . .," *First Baptist Church* apparently did not rest upon a construction of the Washington Constitution. *See infra* note 155.

The plurality stated that in addition to the fundamental right to religious freedom, the congregants had a fundamental right to send their children to a church-operated school. *First Baptist Church*, 97 Wash. 2d at 5, 7, 639 P.2d at 1361, 1362. This right has developed in a piecemeal manner, through cases not necessarily involving parochial education. *E.g.*, Meyer v. Nebraska, 262 U.S. 390, 399-402 (1923) (parents have the right to direct their children's upbringing, including foreign language study); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (parents' child-rearing rights include the right to educate their children in a parochial school); Farrington v. Tokushige, 273 U.S. 284, 298-99 (1927) (parents' child-rearing rights include right to direct linguistic and cultural aspects of their child's education); Wisconsin v. Yoder, 406 U.S. 205, 213-14, 232-33 (1972) (parents have a fundamental right and interest in directing the religious upbringing of their children). *See also* Moore v. City of East Cleveland, 431 U.S. 494, 499-504 (1977) (recognizing freedom of choice in family matters as a fundamental liberty); Seward Chapel, Inc. v. City of Seward, 655 P.2d 1293, 1301 n.29 (Alaska 1982) (federal constitution gives parents the right to educate their children in a parochial school); State v. Whisner, 47 Ohio St. 2d 181, 214, 351 N.E.2d 750, 769 (1976) (parents have a fundamental right to direct their children's education). *See generally* J. NOWAK, R. ROTUNDA

the court ruled that when this financial burden is established, the building code, as applied to the parochial school, is invalid unless the code can withstand strict judicial scrutiny.[4]

The court also held that when a City Planning Commission's refusal to issue a special use permit prevents a church from operating its school in the church's residential district location, the Commission's application of the city's zoning ordinance[5] infringes upon the congregants' religious freedom.[6] Thus, the court ruled that the zoning ordinance, as applied to the parochial school, also is invalid unless the denial of the permit could withstand strict judicial scrutiny.[7]

The *First Baptist Church* court should not have required strict scrutiny of either the building code or the zoning ordinance applications. In reaching its decision, the court incorrectly analyzed Supreme Court decisions construing the free exercise clause,[8] and drew mistaken parallels between the two Sumner ordinances and laws that the Supreme Court has identified as burdening religious freedom.[9] The court should have distin-

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AND J. N. YOUNG, CONSTITUTIONAL LAW 1055 (2d ed. 1983) [hereinafter cited as CONSTITUTIONAL LAW]; L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-13, at 882-84 (1978); *id.* § 15-21.

4. *First Baptist Church*, 97 Wash. 2d at 7-10, 639 P.2d at 1362-64. This strict scrutiny standard is discussed *infra* notes 35-39 and accompanying text. The *First Baptist Church* court did not reach a majority opinion. *See infra* note 34. However, Justice Utter concurred with the plurality's use of a strict scrutiny standard of review. 97 Wash. 2d at 14-15, 639 P.2d at 1366 (Utter, J., concurring). With Justice Utter's concurrence, a majority of the justices agreed that if a financial burden were established, the building code would burden the congregants' religious freedom and would have to undergo strict scrutiny. The majority apparently regarded the financial burden as established, although the case was remanded to the trial court for determination of that question. *See infra* note 162. In this Note, the combined holdings of Justice Utter and the plurality will be referred to as the holding of the court.

5. SUMNER, WASH. CITY CODE tit. 11 (1976) [hereinafter cited as ZONING ORDINANCE]. The zoning ordinance forbids certain "special property uses" in the R-1 (residential) district in which the Church is located unless authorized by a "special permit" issued by the City Planning Commission. ZONING ORDINANCE, *supra*, §§ 11.16.020(a)(9), .180(a)(1). These "special property uses" include churches and public, private, and parochial schools. *Id.*, § 11.16.180(a)(1). The Church applied for and was denied a special use permit. 97 Wash. 2d at 17-18, 639 P.2d at 1368 (Dolliver, J., dissenting).

6. As with the building code, a majority of the court agreed that if the zoning ordinance prevented the Church's school from operating in the Church's basement, the zoning ordinance would burden the congregants' religious freedom. *First Baptist Church*, 97 Wash. 2d at 7-10, 639 P.2d at 1362-64 (plurality opinion); *id.* at 14-15, 639 P.2d at 1366 (Utter, J., concurring).

7. *Id.* at 7-10, 639 P.2d at 1362-64.

8. *See infra* notes 53-68 and accompanying text.

9. *Id.*

guished between generally applicable laws such as Sumner's building code and zoning ordinance that, in regulating the peripheral aspects of religious conduct, incidentally make a religious practice less convenient or more expensive,[10] and laws that effectively penalize the practice of religion.[11] The court should have required the trial court to review the Sumner ordinances under the standards for laws that regulate the time, place, and manner of exercising first amendment freedoms.[12] Using these standards to review the ordinance would have provided a reasonable approach to protecting religious practices from the unnecessary, unintended effects of government regulation, and would have helped insure that the generally applicable regulations were applied in a nondiscriminatory manner.[13]

II. Background

The First Baptist Church of Sumner ("Church") has operated for over seventy-five years at its present location in a residential section of Sumner, Washington.[14] In 1978 the church membership, in accordance with their religious convictions, established a church-operated school, the Washington Christian Academy ("Academy").[15] The Academy was housed in the church basement.[16]

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10. *See infra* note 121 and accompanying text.

11. *See infra* notes 132-42 and accompanying text.

12. *See infra* notes 179-205 and accompanying text.

13. *See infra* notes 179-231 and accompanying text.

14. *First Baptist Church*, 97 Wash. 2d at 3, 639 P.2d at 1360.

15. *Id.* The Church viewed the Academy not merely as an educational facility, but as an integral and inseparable part of the Church's educational ministry. *Id. See infra* note 45. The congregants' beliefs concerning education are shared by many parents who find that public education undermines their goals for guiding their children's religious upbringing, both by inculcating values contrary to the parents' religious values, and also by occupying the hours in the day that are available to integrate religious training into a child's general education. *See, e.g.*, City of Concord v. New Testament Baptist Church, 118 N.H. 56, 382 A.2d 377 (1978); State v. Whisner, 47 Ohio St. 2d 181, 198-212, 351 N.E.2d 750, 761-68 (1976).

It has been estimated that one million children in America currently are enrolled in fundamentalist Christian schools, which are similar to the Academy. The schools reportedly number approximately twenty thousand, with an estimated three additional schools being established each day. Most of these schools are housed in churches, often in the church basements. Solorzano, *In New Christian Schools, Jesus is the Teacher*, U.S. News & World Rep., March 5, 1984, at 46.

16. *First Baptist Church*, 97 Wash. 2d at 3, 639 P.2d at 1360. The church basement is a multipurpose area that the Church routinely uses for a variety of activities. The Academy's students and staff had never exceeded fifty, while the number of persons occupying the basement for other church activities often exceeds fifty. Brief of Appel-

The City Building Inspector found that the church building did not meet the city's building code requirements for schools, including several of the code's safety standards.[17] However, the building previously had passed inspection for use as a church.[18] The Church attempted to comply with the building code by making several improvements,[19] but claimed it was unable to finance the major structural improvements necessary to satisfy

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lants at 4-5, City of Sumner v. First Baptist Church, 97 Wash. 2d 1, 639 P.2d 1358 (1982) [hereinafter cited as Brief of Appellants].

17. The city took an uncompromising position in enforcing the building code. *First Baptist Church*, 97 Wash. 2d at 4, 639 P.2d at 1360. There was disagreement among the court's members over whether the code's strict enforcement was necessary for safety. *Compare id.* at 4, 639 P.2d at 1360-61 (plurality opinion) (several of the standards might have been highly technical) *with id.* at 20, 639 P.2d at 1369 (Dolliver, J., dissenting) (the code violations posed a health and safety hazard) *and id.* at 22, 639 P.2d at 1370 (Roselini, J., concurring in the dissent) (the code violations created a fire hazard).

18. *First Baptist Church*, 97 Wash. 2d at 3, 639 P.2d at 1360. The Church passed inspection in June 1978, approximately one month before the July 1978 inspection in which the building inspector determined that the Academy did not comply with the code. Verbatim Report of Proceedings at 48-50, City of Sumner v. First Baptist Church, No. 275198 (Pierce County, Wash. Super. Ct., June 22, 1979). The Church argued that the June 1978 inspection established that the building was safe for use as a school. Brief of Appellants, *supra* note 16, at 30. However, the Church was exempt from the building code's standards for churches because its church use antedated the city's 1974 enactment of the code. BUILDING CODE, *supra* note 2, § 104(g), provides that a building in existence at the time of the code's passage may have its existing use continued if the use is not dangerous to life. The building inspector stated at trial that the Church's compliance was partly based upon its "grandfathered in" status, thereby indicating only that the building posed no danger to life when used as a church. Verbatim Report of Proceedings, *supra*, at 50. Because the nature of a building's use as a school differs from the nature of its use as a church, a safe church building does not necessarily provide a safe school building. Factors such as the hours of use, the activities conducted within the building, and the age and number of the occupants all affect a building's safety. *See generally* BUILDING CODE, *supra* note 2, *passim*.

The Church claimed that the building was in fact safe for use as a school, and that because doctrinally the Academy was an integral part of the Church's ministry, the Academy was a church use under the building code. Thus, the Church argued that the Academy was exempt from the building code under the Church's grandfather clause exemption. Brief of Appellants, *supra* note 16, at 14-23. *See* 97 Wash. 2d at 11-12, 639 P.2d at 1364-65. Similarly, the Church claimed that the Academy was covered by the Church's grandfather exemption from the zoning ordinance. Brief of Appellants, *supra* note 16, at 14-23. *See* 97 Wash. 2d at 12-13, 639 P.2d at 1365. The supreme court did not decide these issues, leaving them to be decided when the case was remanded to the trial court. *Id.* at 12-13, 639 P.2d at 1365. However, Justice Dolliver was correct in rejecting these arguments. *See* 97 Wash. 2d at 21-22, 639 P.2d at 1369-70 (Dolliver, J., dissenting). Although doctrinally the Church and the Academy were indivisible, the laws' interpretations should be controlled by the character of the property's use, not by the nature of the using organization. *See infra* note 218. Thus, although the Academy may have been part of the Church as a matter of doctrine, the Church's doctrine should not control the Academy's classification under the building code or the zoning ordinance.

19. *First Baptist Church*, 97 Wash. 2d at 3-4, 639 P.2d at 1360.

the code's requirements.[20]

The Academy also violated the city's zoning ordinance. The Church had not obtained the special use permit required to operate a school in a residential neighborhood,[21] and also had failed to provide the number of off-street parking spaces required by the ordinance.[22] The city sought, and was granted, an injunction closing the Academy until the school complied with the building code and the zoning ordinance.[23] The injunction did not affect the building's use as a church.[24]

The trial court granted the injunction upon determining that the church building did not meet the building code's requirements for schools, without determining whether the violations actually posed a danger to health or safety.[25] The trial court rejected the Church's claim that, because the code was enforced in an unnecessarily strict manner and imposed prohibitive costs, the code unconstitutionally infringed upon the congregants' religious freedom.[26] The trial court also rejected the Church's claims that enforcing the zoning ordinance to close the

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20. *Id.* at 4, 639 P.2d at 1360. The Church asserted its financial inability by affidavit. Affidavit of Larry D. Ferguson in Opposition to Motion for Summary Judgment at 3, City of Sumner v. First Baptist Church, No. 275198 (Pierce County, Wash. Super. Ct., June 14, 1979).

21. The Church had applied for a special use permit to operate the Academy in the Church's basement. The City Planning Commission held a public hearing on the application, at which the Church's neighbors voiced opposition to the school. No Church representative attended the hearing. At the close of the meeting, the Commission denied the Church's request for the permit. Brief of Respondent at 2, City of Sumner v. First Baptist Church, 97 Wash. 2d 1, 639 P.2d 1358 (1982) [hereinafter cited as Brief of Respondent]. After the Church was notified that its request for a special use permit had been rejected, the Church claimed that it had not received adequate notice of the first hearing, and requested another hearing on the permit application. *Id.* at 3. The city scheduled a rehearing, but the Church withdrew its permit request, claiming that no permit was required because all of the Church's activities, including the Academy, were ordinary church activities. *Id.* The Church made no further attempt to obtain a special use permit. *Id.*

22. *First Baptist Church*, 97 Wash. 2d at 4, 639 P.2d at 1360. The Church had only one off-street parking space, while the zoning ordinance required that the Academy provide eight parking spaces. Findings of Fact and Conclusions of Law at 8, City of Sumner v. First Baptist Church, No. 275198 (Pierce County, Wash. Super. Ct., Aug. 21, 1979).

23. The injunction forbade the Academy from operating until the Church complied with the zoning ordinance by obtaining a special use permit and by providing additional off-street parking, and until the Church conformed its building to the school building code requirements. *First Baptist Church*, 97 Wash. 2d at 2-4, 639 P.2d at 1360.

24. *Id.*

25. *Id.*

26. *Id.* at 4, 8-10, 639 P.2d at 1361-63.

Academy violated the free exercise clause[27] and that the Academy was exempt from both the building code and the zoning ordinance because of grandfather clause exemptions.[28] The Washington Court of Appeals, Division II, stayed the city from enforcing the injunction pending appeal to the Washington Supreme Court.[29]

III. The Washington Supreme Court's Decision

The Washington Supreme Court held that the trial court erred in rejecting the Church's first amendment claims.[30] The court remanded the case for further fact finding, stating that if the "practical effect" of the building code were prohibitively to increase the cost of operating the Academy, the code would incidentally and indirectly infringe upon the Church's school ministry.[31] The supreme court held that, in that context, the code would burden the congregants' religious freedom, requiring strict scrutiny to test the code's validity.[32] The court also required strict scrutiny review of the zoning ordinance as applied to the Academy if the "practical effect" of that law were to close the

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27. The trial judge apparently rejected the Church's first amendment arguments on a summary judgment motion, although he did not issue an order so stating. City of Sumner v. First Baptist Church, No. 4268-II (Wash. App. Oct. 16, 1979) (order granting stay) at 2-3.

28. *First Baptist Church*, 97 Wash. 2d at 4-5, 639 P.2d at 1361. The Sumner building code provides: "Buildings in existence at the time of the passage of this Code may have their existing use or occupancy continued, if such use or occupancy was legal at the time of the passage of this Code, provided such continued use is not dangerous to life." Building Code, *supra* note 2, § 104(g). The Sumner zoning ordinance provides: "[T]he lawful use of any building existing at the time of the adoption of the ordinance codified in this title, although such use does not conform to the regulations specified by this chapter for the district in which such building is located, may be continued." Zoning Ordinance, *supra* note 5, § 11.20.020.

29. City of Sumner v. First Baptist Church, No. 4268-II (Wash. App. Oct. 16, 1979) (order granting stay).

30. City of Sumner v. First Baptist Church, 97 Wash. 2d 1, 5, 639 P.2d 1358, 1361-62 (1982) (plurality opinion); *id.* at 15, 639 P.2d at 1366 (Utter, J., concurring).

31. *Id.* at 5-10, 639 P.2d at 1361-64 (plurality opinion); *id.* at 14-15, 639 P.2d at 1366 (Utter, J., concurring).

32. *Id.* at 7-10, 639 P.2d at 1362-64 (plurality opinion); *id.* at 15, 639 P.2d at 1366 (Utter, J., concurring).

When a law burdens religious freedom, the law is not necessarily unconstitutional. *See* United States v. Lee, 455 U.S. 252, 257 (1982). A facially neutral regulation is unconstitutional only if it *unduly* burdens the free exercise of religion. Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) (emphasis added). Whether the burden is undue is determined by a strict scrutiny balancing test, unless the burden is only incidental. *See infra* notes 35-39 and accompanying text.

Academy.[33] The controversiality of the *First Baptist Church* decision is reflected, in part, in the six separate opinions filed in the case.[34]

IV. Constitutional Analysis

A. *Introduction*

Under the Supreme Court's strict scrutiny balancing test, a party claiming protection under the free exercise clause must first prove that the challenged law has substantially burdened the free exercise of his religion.[35] If such a burden is shown[36]

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33. *First Baptist Church*, 97 Wash. 2d at 7-10, 639 P.2d at 1362-64 (plurality opinion); *id.* at 15, 639 P.2d at 1366 (Utter, J., concurring).

34. Chief Justice Brachtenbach and Justices Dimmick and Stafford joined Justice Hicks' opinion to form the plurality. *First Baptist Church*, 97 Wash. 2d at 14, 639 P.2d at 1365. Justice Utter concurred with the plurality's strict scrutiny balancing test requirement. *Id.* at 14-15, 639 P.2d at 1366 (Utter, J., concurring). Justice Williams concurred in the result, but endorsed a less rigorous, intermediate standard of review. *Id.* at 15-16, 639 P.2d at 1366-67 (Williams, J., concurring). Justice Dore also concurred in the result, but without expressing an opinion on the constitutional issues in the case. In his opinion, the Academy was exempt from both the building code and the zoning ordinance under the grandfather clauses. 97 Wash. 2d at 16, 639 P.2d at 1367 (Dore, J., concurring). Justice Dolliver rejected the Church's constitutional claims and, thus, would not have required strict scrutiny. In his opinion, the Academy also was not exempt under the grandfather clauses. In any case, he believed the Academy was dangerous to life and thus could not, under either of these theories, escape complying with the building code. *Id.* at 16-22, 639 P.2d at 1367-70 (Dolliver, J., dissenting). Justice Rosellini expressed no opinion on the proper standard for reviewing the Church's first amendment claims. Because he believed that the building code deficiencies posed a danger to life, Justice Rosellini would not, under any theory, have excused the Academy from complying with the code. *Id.* at 22-23, 639 P.2d at 1370 (Rosellini, J., concurring in the dissent of Dolliver, J.).

The court's internal distress is further illustrated by the extensive consideration the court gave the case. The case first was argued before the court in October 1980. The case was reargued in November 1981. 97 Wash. 2d at 3, 639 P.2d at 1360. On October 1, 1981, the court requested an amicus curiae brief. This brief was submitted by Dean Fredric C. Tausend and Professor David E. Engdahl of the University of Puget Sound School of Law on November 2, 1981, and supported the Church's claims both on the grandfather clause issues and on the first amendment issues. Brief Amicus Curiae, City of Sumner v. First Baptist Church, 97 Wash. 2d 1, 639 P.2d 1358 (1982). The court finally decided the case on February 4, 1982. 97 Wash. 2d at 1, 639 P.2d at 1358. Justice Hicks candidly acknowledged that the court had "not been of one mind on the issues concerned." *Id.* at 3, 639 P.2d at 1360. Because the plurality opinion was drafted by a departing member of the court and was issued after his departure, *see id.* at 14, 639 P.2d at 1365, expediency may have played a role in ending the court's deliberations, possibly requiring a decision sooner than was desired.

35. Constitutional Law, *supra* note 3, at 1061.

36. If no substantial burden on religious freedom is proved, then generally the statute need only be "rationally related" to a legitimate state interest. "[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particu-

then the Court, under the second part of the test, determines whether the state has demonstrated a compelling interest in enforcing the challenged law.[37] Unless the state shows this com-

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lar legislative measure was a rational way to correct it." Williamson v. Lee Optical Co., 348 U.S. 483, 487-88 (1955). *See also* Village of Belle Terre v. Boraas, 416 U.S. 1, 7-9 (1974); Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303, 305 (6th Cir.), *cert. denied*, 104 S. Ct. 72 (1983). This minimum rationality standard has been particularly applicable when building codes and zoning ordinances have been challenged, because the laws involve the public health, safety, and welfare, and because of the Supreme Court's special deference to local communities' decisions concerning building and zoning regulations. *See, e.g.*, Queenside Hills Realty Co. v. Saxl, 328 U.S. 80, 82-83 (1946) and *infra* note 219.

However, as to the administrative application of a zoning ordinance, the denial of a special use permit must be based upon substantial evidence showing that granting the permit would be detrimental to the community's health, safety, morals, or general welfare. State *ex rel.* Wenatchee Congregation of Jehovah's Witnesses v. City of Wenatchee, 50 Wash. 2d 378, 382-86, 312 P.2d 195, 197-99 (1957). *See also* Pentagram Corp. v. City of Seattle, 28 Wash. App. 219, 227-29, 622 P.2d 892, 896-97 (1981).

This Note argues that an intermediate time, place, and manner analysis should be used when laws such as the Sumner ordinances incidentally affect religious practices, even when there exists no substantial burden on religion that would justify strict scrutiny review. *See infra* notes 179-205 and accompanying text.

37. *See* Thomas v. Review Bd., 450 U.S. 707, 718 (1981). The Court also has referred to this compelling interest as an "interest of the highest order." *Id. See* Commentary, *Douglas v. Faith Baptist Church Under Constitutional Scrutiny*, 61 NEB. L. REV. 74, 76 n.18 (1982).

The requirement that the state prove a compelling interest in the challenged law is a characteristic of definitional balancing. Definitional balancing is an approach whereby the asserted state interest is balanced against other values, such as the freedom to practice one's religion. The values are balanced without reference to the specific facts of the case. *See* Marcus, *The Forum of Conscience: Applying Standards Under the Free Exercise Clause*, 1973 DUKE L.J. 1217, 1241-42. *See also* Note, *Freedom of Religion and Science Instruction in Public Schools*, 87 YALE L.J. 515, 539 n.116 (1978).

Definitional balancing is distinguished from ad hoc balancing. Ad hoc balancing involves assessing the facts of a case and balancing the state's interest against a party's asserted interest. *See* Marcus, *supra*, at 1239-40; Schlag, *An Attack on Categorical Approaches to Freedom of Speech*, 30 UCLA L. REV. 671, 673-74 (1983). Although the Court's compelling state interest test is, in theory, a definitional balancing approach, the Court's test as applied also includes an element of ad hoc balancing. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part I. The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1384 (1967); Marcus, *supra*, at 1242. *See, e.g., Wisconsin v. Yoder*, where the Court said that a law burdening religious freedom was invalid unless the state had an "interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." 406 U.S. 205, 214 (1972). *See also* United States v. Lee, 455 U.S. 252, 257-61 (1982) and *Yoder* at 233-34 (implying that the Court's test involves, in part, an ad hoc balancing of interests).

The test the Washington Supreme Court adopted in *First Baptist Church* appears more ad hoc than the United States Supreme Court's balancing test. The court employed a fairly subjective "accommodation" standard that would involve a particularized assessment of the importance of the religious interest in each case. *See First Baptist Church*, 97 Wash. 2d at 9-10, 639 P.2d at 1363-64 (plurality opinion); *id.* at 15, 639 P.2d at 1366 (Utter, J., concurring). *But see id.* at 8-9, 639 P.2d at 1362-63 (plurality opinion).

pelling interest, the law is invalid.[38] Even when the state has a compelling reason for the law, the law is invalid if the state could accomplish its compelling objectives by alternative means that would lessen the burden on religious freedom.[39]

The Washington Supreme Court held that if application of the zoning ordinance prevented the Church from operating the Academy in its building, the ordinance would burden the congregants' religious freedom.[40] The court also held that if the financial effects of complying with the building code significantly affected the Church's ability to operate the Academy, the building code would substantially burden the congregants' religion. Thus, the Church would have satisfied the first part of the balancing test with respect to both ordinances.[41] Although the court remanded the case for determination of whether these burdens existed, the court's opinion treated the burdens as established.[42]

In concluding that the Church satisfied the first part of the test, the court had to make two determinations. First, the court had to determine whether the activity for which the Church claimed protection was religious in nature.[43] Because the city

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Because an ad hoc approach places courts in the position of assessing the importance of a value that the Constitution has already deemed fundamental, ad hoc balancing, particularly when religious freedoms are involved, has been criticized. *See, e.g.*, Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327 (1969); Note, *Freedom of Religion and Science Instruction in Public Schools*, 87 YALE L.J. 515, 539 n.115 (1978). *See also* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 657-60 (1974) (Rehnquist, J., dissenting) (criticizing ad hoc decisionmaking); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 11-12, 25, 35 (1959) (arguing that cases should be decided by standards that transcend the case at hand).

38. *See* Thomas v. Review Bd., 450 U.S. 707, 718 (1981).

39. *Id.* CONSTITUTIONAL LAW, *supra* note 3, at 1061. This least restrictive means test has two aspects. First, the regulation must be closely tailored to accomplish the compelling state interest without unnecessarily regulating the religious conduct claiming protection. *See* L. TRIBE, *supra* note 3, § 14-10, at 849; Giannella, *supra* note 37, at 1390. Second, and a corollary to the first aspect, the state must accommodate the religious practice claiming protection unless granting an exemption for all similarly situated religious practitioners would be unmanageable. *See* United States v. Lee, 455 U.S. 252, 259-60 (1982); Thomas v. Review Bd., 450 U.S. 707, 718-19 (1981); Wisconsin v. Yoder, 406 U.S. 205, 221-24, 228-29 (1972); Sherbert v. Verner, 374 U.S. 398, 407-09 (1963); Giannella, *supra* note 37, at 1390. *Cf.* Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 652-54 (1981) (necessity of time, place, and manner regulation must be assessed in terms of the hardship of making exceptions for all similarly situated parties).

40. *First Baptist Church*, 97 Wash. 2d at 7-8, 639 P.2d at 1362-63.

41. *Id.*

42. *See id.* at 3-10, 639 P.2d at 1360-63; *infra* note 162.

43. *See* Thomas v. Review Bd., 450 U.S. 707, 713-14 (1981); *First Baptist Church*,

conceded that the Academy involved a religious practice,[44] the Academy satisfied the religious-nature requirement.[45] The second determination the court had to make was whether the zoning ordinance and the building code burdened the congregants' religious freedom.[46]

Determining whether a law burdens a religious activity involves evaluating whether the law's effect on the religious activity is substantial,[47] and also whether the effect on the religious activity should be treated as governmental action subject to constitutional limitations.[48] The court found that the impact

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97 Wash. 2d at 14, 639 P.2d at 1366 (Utter, J., concurring) (citing Wisconsin v. Yoder, 406 U.S. 205, 216 (1972)).

Defining religion in the first amendment has itself presented the Court with a difficult problem. Several commentators have discussed the Court's treatment of this problem and have proposed approaches to defining religion. *E.g.*, L. TRIBE, *supra* note 3, § 14-6; Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579; Freeman, *The Misguided Search for the Constitutional Definition of "Religion,"* 71 GEO. L.J. 1519 (1983), and sources cited at 1519 n.3; Weiss, *Privilege, Posture and Protection: "Religion" in the Law*, 73 YALE L.J. 593 (1964); Comment, *Beyond Seeger/Welsh: Redefining Religion Under the Constitution*, 31 EMORY L.J. 973 (1982).

44. *First Baptist Church*, 97 Wash. 2d at 3, 639 P.2d at 1360. Although the city's concession was qualified, the court treated the religious-nature issue as established. *See id.* (plurality opinion); *id.* at 14-15, 639 P.2d at 1366 (Utter, J., concurring).

45. Even without the city's concession, the Academy qualified as a religious practice protected by the first amendment. Numerous cases have held that a school regarded as an integral part of a church's religious mission is a religious practice. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 615-16 (1971); City of Concord v. New Testament Baptist Church, 118 N.H. 56, 57-61, 382 A.2d 377, 378-80 (1978); State v. Whisner, 47 Ohio St. 2d 181, 199-200, 351 N.E.2d 750, 761-62 (1976). The Academy was regarded as an integral part of the Church's mission. Brief of Appellants, *supra* note 16, at 23. "The tenets of faith and beliefs of the members of the First Baptist Church require as a convictional matter that their children receive an education which is biblical in its framework, philosophy, and suppositional standards." *Id.* at 3-4. The First Baptist Church established the Academy "to fulfill [the Church's] religious mission and the desires of the families in the church to obey such scriptural passages as Proverbs 22:6 and Deuteronomy 6:7 to train their children within a scriptural context." Brief of Appellants, *supra* note 16, at 4. The congregants were "convinced that there were not suitable Christian schools of like practice and faith within a reasonable, workable area in which [to] . . . enroll their children." *Id.*

46. Merely alleging a burden on religious freedom does not give rise to strict scrutiny. Parties claiming the protection of the free exercise clause must prove that their religious freedom has been burdened. *See* State v. Whisner, 47 Ohio St. 2d 181, 200, 351 N.E.2d 750, 762 (1976); CONSTITUTIONAL LAW, *supra* note 3, at 1054.

47. A de minimis burden on religious freedom will not support a free exercise claim. CONSTITUTIONAL LAW, *supra* note 3, at 1054. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 218 (1972) (requiring a *substantial* burden to support a free exercise claim).

48. Whether a governmental action's ultimate effect upon religious conduct should be attributed to the action for purposes of this balancing test involves a policy decision about the extent to which government must accommodate religion. *See generally* L. TRIBE, *supra* note 3, § 14-4; *infra* notes 139-43. Because the first amendment restrains

of the zoning ordinance and the building code on the Academy would be substantial if the laws' "practical effects" were to prohibit the Church from operating the Academy.[49] The difficult question for the court was whether the ultimate impact upon the Academy of the generally applicable laws should be subject to the limitations of the free exercise clause.[50]

The court decided that the impact of applying the zoning ordinance to forbid the Church from operating the Academy in the Church's basement was subject to first amendment limitations. The court also determined that the building code's financially prohibitive impact upon the Academy burdened the congregants' religious freedom.[51] The court acknowledged that both laws only indirectly and incidentally burdened the Academy, because compliance with the laws would not violate a fundamental tenet of the church members' faith.[52] Yet, the court attempted to draw analogies between the impact of the Sumner laws upon the Academy and the burdens on religious freedom that the Supreme Court addressed in *Wisconsin v. Yoder*[53] and in *Thomas v. Review Board*.[54] The analogies are not convincing.[55]

In *Yoder*, the Supreme Court held that Wisconsin's compulsory attendance law violated the Amish's right to exercise their religion freely.[56] Although the Amish had no explicit religious

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government from interfering with religious practices, the government's posture in causing the substantial effect upon religion is important for ascertaining if the government has a duty to prevent the effect. *See* Sherbert v. Verner, 374 U.S. 398, 412 (1963) (Douglas, J., concurring). *See generally infra* notes 109-43 and accompanying text. *Cf.* CONSTITUTIONAL LAW, *supra* note 3, at 497-523 (discussing the state action doctrine, under which the effect of private conduct upon constitutionally protected rights may be attributed to a law, and thus subject the law to constitutional limitations).

49. City of Sumner v. First Baptist Church, 97 Wash. 2d 1, 7, 639 P.2d 1358, 1362 (1982).

50. *See id.* at 16-22, 639 P.2d at 1367-69 (Dolliver, J., dissenting); *id.* at 15-16, 639 P.2d at 1366-67 (Williams, J., concurring).

51. *See id.* at 4-8, 639 P.2d at 1361-63 (plurality opinion); *id.* at 14-15, 639 P.2d at 1366 (Utter, J., concurring).

52. *Id.* at 7, 639 P.2d at 1362 (plurality opinion). *See id.* at 20-21, 639 P.2d at 1369 (Dolliver, J., dissenting); *infra* notes 119-21 and accompanying text.

53. 406 U.S. 205 (1972).

54. 450 U.S. 707 (1981).

55. *See* 97 Wash. 2d at 19-21, 639 P.2d at 1368-69 (Dolliver, J., dissenting). The court, *id.* at 7, 639 P.2d at 1362, cited three other cases in support of its decision: NLRB v. Catholic Bishop, 440 U.S. 490 (1979); State v. Whisner, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976); and State v. LaBarge, 134 Vt. 276, 357 A.2d 121 (1976). None of these cases were analogous to *First Baptist Church*. *See infra* note 64.

56. 406 U.S. 205 (1972). The Court stated that the Wisconsin law required the

tenet prohibiting their children from attending public school beyond the eighth grade,[57] the law contravened the Amish's basic religious tenets in two ways. First, the schooling exposed Amish children to worldly attitudes, goals, and values contrary to the Amish's sincere religious belief that they should "be not conformed to this world."[58] Second, compulsory high school attendance substantially interfered with the Amish children's religious development and integration into their faith-community's way of life.[59] In *Yoder*, the Amish could not have complied with the law without violating their religious tenets; the law necessarily undermined their religious values.[60]

In *Thomas v. Review Board*,[61] the Court held that Indiana's unemployment compensation law, which conditioned significant economic benefits upon conduct prohibited by Thomas' religious beliefs, infringed upon Thomas' religious freedom. Thomas' religious beliefs forbade his involvement in producing military weaponry. After the roll foundry where Thomas worked closed, Thomas' employer transferred him to a department that produced tank turrets for the military. Upon learning that the company no longer had any departments that did not produce weaponry, Thomas quit his job. The State denied Thomas unemployment compensation because he quit his job voluntarily and not for "good cause."[62] The Indiana law violated Thomas' religious freedom because the sole basis for denying Thomas unemployment compensation was his religious stance. The condition on unemployment benefits penalized Thomas for not violating his religious beliefs.[63]

Amish to act in a manner inconsistent with their religious beliefs, under threat of criminal sanction. *Id.* at 218. Such a law creates a direct burden on religion. *See* text accompanying note 120.

57. 406 U.S. at 223.

58. *Id.* at 210-11, 216-17. The scriptural reference is to *Romans* 12:2. The *Yoder* Court characterized this type of burden as "subjective." 406 U.S. at 218.

59. 406 U.S. at 211, 218. The *Yoder* Court characterized this kind of interference as "objective." *Id.* at 218.

60. *Id.* at 218. *See* City of Sumner v. First Baptist Church, 97 Wash. 2d 1, 20, 639 P.2d 1358, 1369 (1982) (Dolliver, J., dissenting).

61. 450 U.S. 707 (1981).

62. *Id.* at 709-13.

63. *Id.* at 717-18. *Thomas* presented a situation similar to Sherbert v. Verner, 374 U.S. 398 (1963), discussed *infra* notes 129-38 and accompanying text, except that Thomas' beliefs were not based upon a belief shared by all members of his religious sect. 450 U.S. at 711-17. Although the burden on Thomas' religion was indirect, the Court required strict scrutiny because the Indiana law unconstitutionally conditioned the receipt of unemployment benefits upon performance of religiously prohibited conduct.

Thus, both in *Yoder* and in *Thomas*, the challenged law forced the claimant to choose either yielding religious values to a government-imposed standard or suffering a government-imposed penalty.[64] In contrast, neither establishing the Academy in another location nor upgrading the Church's building so that it complied with the code's school building standards would have undermined the congregants' religious values.[65] Neither the zoning ordinance nor the building code penalized the Church for operating the Academy. Rather, because the Church would be inconvenienced by relocating the Academy and was financially unable to comply with the building code,[66] the court held that the laws effectively closed the Church's school ministry.[67] The court's weak analogies to *Yoder* and *Thomas* did not explain why the inconvenience and economic impact of the zoning ordinance and the building code burdened the religious practice con-

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450 U.S. at 717-18. *See generally infra* notes 135-36. *But see* Garvey, *Freedom and Equality in the Religion Clauses*, 1981 SUP. CT. REV. 193, 198-203 (arguing that neither *Sherbert* nor *Thomas* involved a burden on religious freedom because both Thomas and Sherbert could freely and voluntarily choose their courses of conduct).

64. *Thomas*, 450 U.S. at 717-18; Wisconsin v. Yoder, 406 U.S. 205, 218 (1972). The other cases the Washington Supreme Court cited in support of its decision involved laws with similar undermining tendencies. *See* NLRB v. Catholic Bishop, 440 U.S. 490, 499-507 (1979) (because NLRB's restrictions on Church's teacher standards risked undermining the Catholics' goals for their religious education program, the Court construed the National Labor Relations Act to avoid that constitutional issue); State v. Whisner, 47 Ohio St. 2d 181, 203-10, 351 N.E.2d 750, 764-67 (1976) (state regulations that controlled nearly every minute of instruction time impeded the school's ability to incorporate religious instruction into classroom lessons); State v. LaBarge, 134 Vt. 276, 280-81, 357 A.2d 121, 124-25 (1976) (as the Washington Supreme Court understood *LaBarge*, Vermont's regulation of private school teachers risked undermining the school's religious objectives. However, the court misinterpreted *LaBarge*. *LaBarge* was decided on other grounds. *See* 134 Vt. at 277-81, 357 A.2d at 123-24.)

65. *First Baptist Church*, 97 Wash. 2d at 20-21, 639 P.2d at 1369 (Dolliver, J., dissenting). The congregants probably attached religious significance to conducting their school in the Church's building, rather than at another location, especially in light of their belief that the Academy was an integral part of their Church. *See supra* note 45. In that event, denying the Academy a special use permit so that the zoning ordinance forbade operating the Academy in the Church's building might impose a burden on the central tenets of the religious practice. *See infra* note 217.

However, the court did not base its decision on this ground. Although the court directed the trial court on remand to examine the "practical effect" upon the congregants' religious freedom of strictly enforcing the zoning ordinance and the building code, 97 Wash. 2d at 10, 639 P.2d at 1363, the court assumed that because the ordinances precluded the Academy from operating in the Church's basement, the law burdened the congregants' religion. *See id.* at 7-10, 639 P.2d at 1362-64.

66. *First Baptist Church*, 97 Wash. 2d at 4, 639 P.2d at 1360. *See supra* note 20.

67. *First Baptist Church*, 97 Wash. 2d at 7, 639 P.2d at 1362.

ducted within the building.[68]

The court's confusion is understandable. Although Supreme Court decisions in cases involving the free exercise clause have produced a balancing test,[69] the Court never has clearly articulated its test.[70] In particular, the Court has not provided clear principles for identifying the burdens upon religious freedom that would trigger a strict scrutiny standard of review.[71] Because the Court's analytic approach to free exercise claims evolved over many years, the Court's decisions do not easily yield those principles.[72] Nevertheless, certain principles have emerged for identifying burdens on religious freedom. The Washington Supreme Court misunderstood those principles in *First Baptist Church.*

B. Identifying Burdens on Religious Freedom That Require a Strict Scrutiny Standard of Review

The principles for identifying burdens on religious freedom that require a strict scrutiny standard of review emerged from decisions spanning more than a century.[73] Commentators have stated that the Court's treatment of church-state conflicts evolved through three main stages.[74] *Reynolds v. United*

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68. *See id.* at 16, 20, 639 P.2d at 1367, 1369 (Dolliver, J., dissenting).

69. *See supra* notes 35-39 and accompanying text.

70. *See* State v. Shaver, 294 N.W.2d 883, 890 (N.D. 1980). *Compare* United States v. Lee, 455 U.S. 252, 256-60 (1982) *and* Thomas v. Review Bd., 450 U.S. 707, 718 (1981) (articulated general principles for applying the free exercise clause) *with* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (clearly articulated a three-part test for applying the establishment clause. *But see* Lynch v. Donnelly, 52 U.S.L.W. 4317, 4320 (1984) (the establishment clause erects a variable barrier between church and state, and the Court is unwilling to confine itself to any single test for claims under the establishment clause); Mueller v. Allen, 103 S. Ct. 3062, 3066 (1983) (warning that this three-part test is merely a "helpful sign post") (quoting Hunt v. McNair, 413 U.S. 734, 741 (1973)). Thus, although a test has emerged from the free exercise cases, the test has not been clearly stated by the Court and does not provide substantial predictability.

71. Although the Court has stated that a law is invalid or is subject to strict scrutiny if the law's "purpose or effect is to impede" religion, Sherbert v. Verner, 374 U.S. 398, 404 (1963) and Braunfeld v. Brown, 366 U.S. 599, 607 (1961), the Court has not expressly indicated which effects it would recognize as impeding religion.

72. *See infra* notes 73-80 and accompanying text.

73. The Court interpreted the free exercise clause for the first time in Reynolds v. United States, 98 U.S. 145 (1879). *See infra* note 92.

74. Note, *Secular Control of Non-Public Schools*, 82 W. VA. L. REV. 111, 112-13 (1980); Recent Development, *Constitutional Law—Wisconsin v. Yoder (U.S. 1972)*, 18 VILL. L. REV. 955, 956-57 (1973). *See generally* CONSTITUTIONAL LAW, *supra* note 3, at 1053-59; Galanter, *Religious Freedoms in the United States: A Turning Point?*, 1966 WIS. L. REV. 217, 235-42; Comment, *Zoning the Church: Toward a Concept of Reasona-*

States[75] marked the first major stage in the Court's development of free exercise clause doctrine, during which the Court adjudicated free exercise claims with an absolutist, natural law approach.[76] *Cantwell v. Connecticut*[77] signaled the Court's second major stage of doctrinal development, replacing the former absolutist approach with a balancing approach.[78] The Court's third major stage began with *Sherbert v. Verner*,[79] where the Court introduced the present strict scrutiny balancing test.[80]

This evolutionary process generally followed doctrinal developments in cases involving other first amendment rights, particularly the right of free speech,[81] and occurred because of the exigencies created by several changes in American society and in its jurisprudence since the Court's decision in *Reynolds*. Some of these changes included the growth of pluralism in the United States;[82] the expanded role of government regulation in society;[83] and the Court's decision to apply the free exercise

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bleness, 12 CONN. L. REV. 571, 599 n.89 (1980).

The evolution of the Court's free exercise clause doctrine did not, of course, take place in isolation, but rather reflected the Court's doctrinal developments in many other areas of law. In particular, the free exercise cases have reflected the Court's various approaches to cases involving other first amendment values. *See infra* note 81 and accompanying text.

75. 98 U.S. 145 (1879).

76. *See infra* note 85.

77. 310 U.S. 296 (1940).

78. *See infra* notes 108-10 and accompanying text.

79. 374 U.S. 398 (1963).

80. *See* L. TRIBE, *supra* note 3, § 14-10, at 852.

81. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 403-04 (1963) (free exercise claim), utilizing the approaches of NAACP v. Button, 371 U.S. 415, 438 (1963) (claims of freedom of expression and of association), and American Communications Ass'n v. Douds, 339 U.S. 382, 402 (1950) (claims of freedom of speech and of association); Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940) (decided under a combined free exercise and free speech approach), utilizing the approach of Schneider v. Town of Irvington, 308 U.S. 147, 160-62 (1939) (decided solely on free speech grounds, although religious interest was present). *See generally* CONSTITUTIONAL LAW, *supra* note 3, at 1056-57 (free exercise cases decided after *Cantwell* and before 1960 were decided on combined free speech-free exercise grounds); L. TRIBE, *supra* note 3, § 14-10, at 852 n.35 (*Sherbert* employed in the free exercise context the least restrictive alternative—compelling state interest analysis that had been articulated in free speech cases).

The Court has developed many different approaches to analyzing first amendment claims. *See generally, e.g.*, Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 908-16 (1963). The three-stage evolutionary process in free exercise doctrine reflected points in this much more complex development of general first amendment doctrine, a discussion of which is beyond the scope of this Note.

82. This growth in pluralism increased the scope of activities claiming protection as religion. *See infra* notes 99-106 and accompanying text.

83. *See* Thomas v. Review Bd., 450 U.S. 707, 720-21 (1981) (Rehnquist, J., dissent-

clause through the fourteenth amendment to the states.[84] These changes increased the occasions for litigating free exercise claims. During this process the Court shifted from a relatively absolute, natural law method of analysis[85] to a balancing approach.[86] This balancing approach weighs the individual's right to freely exercise his religion against societal interests that conflict with the individual's religious practice.[87] The balancing approach recognizes a broader range of conflicts between government and religion than the absolute approach, sometimes subjecting a law's unintended effects to constitutional review.[88]

Although laws can affect religion in numerous ways, the Court has limited application of its balancing test to conflicts involving a close connection between a law and its effect on a religious practice. This limitation is a policy decision as to government's duty to accommodate religion when enacting generally applicable laws.[89] Regardless of the severity of the law's ultimate impact on the religious practice, only laws that have this close connection to the effect on the religious practice burden

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ing); L. TRIBE, *supra* note 3, §§ 1-6, 14-1; Giannella, *supra* note 37, at 1383, 1387. *See generally* C. SCHULTZE, THE PUBLIC USE OF PRIVATE INTEREST 6-12 (1977). As both the state and the federal governments' roles in society increased, new types of burdens on religious freedom developed. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 404-06, 409-10 (1963) (conditions on state government largess burdened religious freedom). *Cf.* Wisconsin v. Yoder, 406 U.S. 205, 217 (1972) (as the society around the Amish community changed, conflicts increased between society and the Amish's religious practices). *See generally* Reich, *The New Property*, 73 YALE L.J. 733 (1964) (increased government regulation has radically affected individual liberties by vesting in government significant control over the means of exercising those liberties).

84. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). U.S. CONST. amend. XIV, § 1 provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." In *Cantwell*, the Court held that the amendment's concept of liberty protected from state interference included religious freedom. *Cantwell* at 303.

85. *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 162-65 (1879). For discussions of this early natural law theory, see generally E. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW (1955); E. PATTERSON, JURISPRUDENCE: MEN AND IDEAS OF THE LAW §§ 4.10-.18 (1953).

86. *See infra* notes 105-08 and accompanying text. A balancing approach already had been evolving, having been combined with natural law concepts in the Court's decisions under the doctrine of substantive due process. When the Court withdrew from deciding cases under a substantive due process rationale, natural law concepts were retained in the Court's balancing approach to the protection of fundamental rights. *See generally* 4 C. HAINES, HARVARD STUDIES IN JURISPRUDENCE: THE REVIVAL OF NATURAL LAW CONCEPTS 166-85, 232-34 (1930); CONSTITUTIONAL LAW, *supra* note 3, at 452-59.

87. Balancing might be accomplished on an ad hoc basis or by a definitional approach. *See supra* note 37.

88. *See infra* notes 108-43 and accompanying text.

89. *See infra* notes 108-12, 139-43 and accompanying text.

religion in a manner that requires strict scrutiny.[90] The Court's adoption of this "proximity" requirement for identifying burdens on religious freedom may be seen by reviewing the evolution of the Court's present balancing test.

The evolution of free exercise doctrine began in *Reynolds v. United States*,[91] where the Court first interpreted the free exercise clause.[92] In *Reynolds*, the Court articulated a distinction between beliefs and actions[93] that still appears in many decisions involving free exercise claims.[94] This distinction related both to the definition of the term "religion" in the first amendment, and to the scope of the amendment's protection. With respect to religious beliefs, religion was broadly and abstractly defined.[95] Congress could neither prescribe nor proscribe religious beliefs of any sort.[96] With respect to religious actions, however, religion in the first amendment had a narrower meaning. The meaning of religion in the first amendment, as that term encompassed religious actions, was tied to tradition and to the

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90. *See infra* notes 111-43 and accompanying text.

91. 98 U.S. 145 (1879).

92. *Reynolds* was the Court's first clear construction of the free exercise clause. Previously the Court had rejected a free exercise claim on the ground that the free exercise clause did not apply to the states. Permoli v. Municipality No. 1, 44 U.S. (3 How.) 589, 609 (1845). The Court also had required that church property receive the same protection against state encroachments as was given to the property of non-religious corporations. Terrett v. Taylor, 13 U.S. (9 Cranch) 43, 49-50 (1815). However, that decision was not based on first amendment grounds. In Watson v. Jones, 80 U.S. (13 Wall.) 679, 727-29 (1872), the Court held, in a pre-*Erie* decision, that under federal common law courts must defer to the determinations of church governments in matters of church doctrine. Similarly, in Bouldin v. Alexander, 82 U.S. (15 Wall.) 131, 139-40 (1873), the Court held that courts must defer to the determinations of the majority of the members of a congregational church in matters of church doctrine.

93. *Reynolds*, 98 U.S. at 164, 166.

94. *See, e.g.*, Bob Jones Univ. v. United States, 103 S. Ct. 2017, 2034-35 (1983); McDaniel v. Paty, 435 U.S. 618, 626-27 (1978); Sherbert v. Verner, 374 U.S. 398, 402-03 (1963); Braunfeld v. Brown, 366 U.S. 599, 603 (1961); Grosz v. City of Miami Beach, 721 F.2d 729, 733 (11th Cir. 1983); City of Sumner v. First Baptist Church, 97 Wash. 2d 1, 14, 639 P.2d 1358, 1366 (1982) (Utter, J., concurring); State v. Meacham, 93 Wash. 2d 735, 741, 612 P.2d 795, 798 (1980).

Given the expanded view of religion and the growth of government regulation, however, the distinction between beliefs and actions now is of little help in finding limits on government restrictions on religion. *See* L. TRIBE, *supra* note 3, § 14-8, at 837-38. *See also* Wisconsin v. Yoder, 406 U.S. 205, 220 (1972).

95. The Court used the term "religion" to describe numerous unorthodox beliefs and practices, including the practice of polygamy that led to Reynolds' bigamy conviction. *See* 98 U.S. at 162, 166.

96. "[By the first amendment] Congress was deprived of all legislative power over mere opinion [including religious beliefs]. . . ." 98 U.S. at 164.

Court's perception of the framers' intent.[97] Traditional (particu-

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97. *See* L. TRIBE, *supra* note 3, § 14-6, at 826. The *Reynolds* Court said:

> The word "religion" is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted. The precise point of the inquiry is, what is the religious freedom which has been guarantied?

98 U.S. at 162.

After briefly rehearsing the history of the first amendment, the Court discussed statements by Madison and Jefferson, and concluded that truly religious actions would not be in violation of social duties or subversive of good order. 98 U.S. at 162-64. The Court then looked to the social setting in which the first amendment was adopted, determined that polygamy was a violation of the social duties contemplated by the framers of the amendment, and rejected Reynolds' constitutional claim. 98 U.S. at 164-66.

Twelve years later, the Court defined religion by distinguishing between "one's views of his relations to his Creator, and to the obligations they impose, of reverence for his being and character, and of obedience to his will," and the "form of worship of a particular sect." Davis v. Beason, 133 U.S. 333, 342 (1890). The Court then said that "[i]t was never intended or supposed that the [First] Amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society." *Id.* Because Davis had registered to vote while belonging to the Mormon Church, which at the time formally encouraged polygamy, the Court upheld Davis' conviction of violating an Idaho law forbidding from voter registration anyone who belonged to an organization that encouraged polygamy. The Court said:

> To extend exemption from punishment for such crimes would be to shock the moral judgment of the community.
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> . . . .
>
> Probably never before in the history of this country has it been seriously contended that the whole punitive power of the government, for acts recognized by the general consent of the Christian world in modern times as proper matters for prohibitory legislation, must be suspended in order that the tenets of a religious sect encouraging crime may be carried out without hindrance.
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> . . . .
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> Crime is not the less odious because sanctioned by what any particular sect may designate as religion.

133 U.S. at 341-45.

During the same term the Court upheld a federal statute revoking the charter of the Mormon Church and confiscating much of its property. Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890). The law was justified, the Court said, because by "the enlightened sentiment of mankind;" as found in "the spirit of Christianity and of the civilization which Christianity has produced in the Western World," polygamy was merely a "pretense," not the practice of religion. *Id.* at 49-50.

Thus, in the early cases involving the religion clauses of the first amendment, the Court tied the meaning of the term "religion" to the perceived historical setting of the amendment's adoption. Although religious beliefs could neither be prescribed nor proscribed, the area within which the Court permitted acting in accordance with those beliefs was circumscribed by traditional Christian standards. *See generally* 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1874, 1877 (2d ed. 1851) (observing the first amendment's underlying assumption that Christian principles would guide social policy); 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 314-18 (Bradley ed. 1945) (observing the prevailing influence of the Christian religion, particularly as the

larly Christian) religious practices enjoyed complete protection from federal criminal sanctions.[98] These traditional practices circumscribed the boundaries of protected religious conduct.

Despite the Court's early deference to the framers' intent, the Court's concept of religion changed as society changed.[99] America became increasingly pluralistic during the early 1900s.[100] With the growth of government at both the state and the federal levels and the decision in *Cantwell v. Connecticut*[101] incorporating the free exercise clause into the fourteenth amendment,[102] the increasingly pluralistic society had greater opportunity through litigation to redefine religion in the free exercise clause.[103]

While retaining the distinction between beliefs and actions,[104] the *Cantwell* Court abandoned the ties to the framers' intent that were established in *Reynolds*.[105] No longer was

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framework for social morality, in the United States during the early 1830's).

98. *See supra* note 97.

99. *See infra* note 106.

100. *See id. See generally* S. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA 527 (1902). ("Only so far forth as the individual citizens shall be actuated by religious or Christian motives can the government be religious or Christian. No mere form of words put into the fundamental law can alter that condition, and no legal constraint can make that Christian which is not such.")

101. 310 U.S. 296 (1940).

102. *Id.* at 303. Even the incorporation of the free exercise clause into the fourteenth amendment represented a shift away from reliance upon the framers' intent. *See* Thomas v. Review Bd., 450 U.S. 707, 720-22 (1981) (Rehnquist, J., dissenting); Jaffree v. Board of School Comm'rs, 554 F. Supp. 1104, 1113-26 (D. Ala.), *rev'd sub nom.*, Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding*, 2 STAN. L. REV. 5 (1949). *But see* Abington School Dist. v. Schempp, 374 U.S. 203, 254-58 (1963) (Brennan, J., concurring) (both religion clauses in the first amendment apply to the states to protect religious liberty); Bird, *Freedom from Establishment and Unneutrality in Public School Instruction and Religious School Regulation*, 2 HARV. J. L. & PUB. POL'Y 125, 129 n.17 (1979) (the free exercise clause applies to the states, but the establishment clause does not so apply); Curtis, *The Fourteenth Amendment and the Bill of Rights*, 14 CONN. L. REV. 237 (1982) (the framers of the fourteenth amendment intended the Bill of Rights to apply to the states).

103. Most Supreme Court decisions construing the free exercise clause have been decided since the 1940 *Cantwell* decision. *See generally* R. MILLER & R. FLOWERS, TOWARD BENEVOLENT NEUTRALITY: CHURCH, STATE, AND THE SUPREME COURT 59-66 (1977) (discussing Supreme Court free exercise decisions).

104. *Cantwell*, 310 U.S. at 303-04. *See supra* notes 93-94 and accompanying text.

105. *See supra* notes 91-97 and accompanying text. Today many, if not most, commentators state that the framers' intent is not particularly relevant to interpreting the first amendment's religion clauses, either because of changed social conditions or because of ambiguity about the framers' intent. *See, e.g.*, CONSTITUTIONAL LAW, *supra* note 3, at 1029-30; L. TRIBE, *supra* note 3, §§ 14-2, -3; Giannella, *supra* note 37, at 1382-84; Kur-

religion in the free exercise clause different from religion in the abstract.[106] Implicit in this expansion of the scope of protected activity was the need for limiting principles. This need was compounded by the increasingly pervasive role of government in society.[107] Thus, the *Cantwell* Court introduced a balancing test: religious conduct of any sort was subject to regulation, but not to *undue* infringement.[108] Whereas in *Reynolds* the free exercise clause absolutely protected religious conduct that did not violate

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land, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3 (1978-79); Marcus, *supra* note 37, at 1232-33. *But see* Lynch v. Donnelly, 52 U.S.L.W. 4317, 4319 (1984).

106. This change reflected the end of any semblance of consensus among the general population about religion. According to Professor Tribe, "even before the . . . [end of the nineteenth] century, dramatic changes were surfacing in American religion. . . . Religion in America, always pluralistic, has become radically so in the latter part of the twentieth century." L. TRIBE, *supra* note 3, § 14-6, at 826. *See also* Abington School Dist. v. Schempp, 374 U.S. 203, 240-41 (1963) (Brennan, J., concurring); Braunfeld v. Brown, 366 U.S. 599, 606 (1961). This increased pluralism "made it all but inevitable that the Supreme Court would modify the narrow understanding of 'religion'. . . ." L. TRIBE, *supra* note 3, § 14-6, at 827.

Professor Tribe marks Justice Douglas' opinion in United States v. Ballard, 322 U.S. 78 (1944), as beginning a particular shift in the meaning of religion in the free exercise clause. L. TRIBE, *supra* note 3, § 14-6, at 829. In *Ballard*, the Court held that only the adherent's sincerity could be scrutinized; the truth of a religious doctrine was beyond judicial review. 322 U.S. at 86. Justice Douglas in *Ballard* substantially equated freedom of religious beliefs with freedom of thought, thus broadening the concept of religion protected under the first amendment. *Id.* at 86-87. In later cases, religion had to be broadened to include non-theistic ideologies. L. TRIBE, *supra* note 3, § 14-6, at 829-30.

Thus, by the early 1960's the Court had broken many ties with the past; the meaning of religion in the first amendment now could be discovered by reference to the thinking of the contemporary pluralistic American society. *See, e.g.*, United States v. Seeger, 380 U.S. 163, 180-85 (1965) and McGowan v. Maryland, 366 U.S. 420, 461 (1961) (Frankfurter, J., concurring) (religion in the Constitution is defined by social concepts of religion, however changing).

107. *See supra* note 83.

108. 310 U.S. 296, 303-04 (1940). *See generally* R. MILLER & R. FLOWERS, *supra* note 103, at 60-63. This balancing approach had previously been used in a similar case decided on free speech and free press grounds. Schneider v. Town of Irvington, 308 U.S. 147, 160-62 (1939). In applying this new approach to free exercise claims, the Court generalized the *Reynolds* decision as articulating a belief/action distinction. Freedom to believe was absolute, but "[c]onduct remain[ed] subject to regulation for the protection of society." 310 U.S. at 303-04. However, the Court went on to say, "The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, *unduly* to infringe the protected freedom." *Id.* at 304 (emphasis added). Yet, without the underlying assumptions of what conduct was absolutely protected by the free exercise clause, *see supra* notes 95-98 and accompanying text, the *Cantwell* belief/action distinction offered little protection under the Court's new balancing test. *See* L. TRIBE, *supra* note 3, § 14-8, at 838. *See also* Wisconsin v. Yoder, 406 U.S. 205, 220 (1972); McGowan v. Maryland, 366 U.S. 420, 462-63 (1961) (Frankfurter, J., concurring).

social duties as understood by the framers,[109] after *Cantwell* nearly all religious conduct was subject to changing contemporary social standards.[110]

Cantwell marked the advent of the second major stage in the Court's development of free exercise clause doctrine. After *Cantwell* the Court, in identifying burdens on religious freedom that give rise to this balancing test, had to define the extent of government's duty to accommodate religion.[111] This duty to accommodate religion has been imposed only when there is a nexus between the challenged law and the religious practice of the party claiming free exercise clause protection.[112]

This nexus is a causation element describing the proximity between a law's purpose and the law's ultimate effect on the central tenets of the religion.[113] The degrees of proximity do not fall neatly into categories, but the Court has identified at least three kinds of burdens that serve as reference points for analyzing the relationship between a law and its effect on religion. The Court has distinguished between burdens that are "direct"[114] and those that are "indirect."[115] Among those burdens that are indirect, the Court has further distinguished between burdens that operate upon the central tenets underlying a religious practice, and burdens that are merely "incidental," operating upon

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109. *See supra* note 97. However, even the *Reynolds* Court was applying contemporary social standards. *See* 98 U.S. at 165-67.

110. The *Cantwell* Court still relied upon tradition to establish social acceptability, however. Thus, past societal standards continued to influence the Court. *See* 310 U.S. at 303-04.

111. Clearly not every consequence of government action that affects a religious practice gives rise to a free exercise claim. In Braunfeld v. Brown, the Court said:

> [W]e are a cosmopolitan nation made up of people of almost every conceivable religious preference. . . . [I]t cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions. We do not believe that such an effect is an absolute test for determining whether the legislation violates the freedom of religion protected by the First Amendment.

366 U.S. 599, 606-07 (1961). Because the first amendment restricts the exercise of governmental power, the limits of that restriction must be defined by reference to the manner in which the power operates to restrict religion, not merely by assessing the magnitude of the law's ultimate effect on a religious practice. *See infra* notes 139-43 and accompanying text. *See also* Sherbert v. Verner, 374 U.S. 398, 412-13 (1963) (Douglas, J., concurring).

112. *See infra* notes 139-43 and accompanying text.

113. *See id.*

114. *See infra* note 120 and accompanying text.

115. *See infra* note 121 and accompanying text.

the secular, peripheral aspects of a religious practice, but consequentially affecting the central religious tenets.[116] The strict scrutiny balancing test must be applied only when the burden on religion is direct or, though indirect, operates upon the central religious tenets; the strict scrutiny test has not been required when the burden is merely incidental.[117]

In *Braunfeld v. Brown*,[118] the Court attempted to articulate this nexus requirement, indicating for the first time that direct burdens should be distinguished from indirect burdens in determining the proper standard for reviewing the challenged law.[119] A direct burden on religion was said to occur when a religious practice is outlawed.[120] An indirect burden was less clearly defined, but appeared to result from a law that had the effect of making the practice of religion more difficult or more expensive.[121]

In *Braunfeld*, Orthodox Jewish merchants challenged Penn-

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116. *See infra* notes 118-39 and accompanying text. These three categories of burdens on religion, "direct," "indirect but not incidental," and "incidental," resemble the three categories of governmental benefits to religion that have been identified in establishment clause cases. Under that classification scheme, government aid to religion is impermissible if it flows from a law that purposefully aids religion or has the effect of aiding religion, unless that effect is merely remote and incidental. *See* Lynch v. Donnelly, 52 U.S.L.W. 4317, 4321 (1984); L. TRIBE, *supra* note 3, §§ 14-8, -9. Professor Tribe would employ the establishment clause classification scheme in analyzing free exercise claims. *See id.*, §§ 14-8, -9.

117. *See infra* notes 139-43 and accompanying text. *But cf.* Jewish Reconstructionist Synagogue v. Village of Roslyn Harbor, 38 N.Y.2d 283, 287-91, 342 N.E.2d 534, 538-40 (1975) (invalidating zoning ordinance on free exercise grounds where Church could not afford to comply with setback requirements and where ordinance would limit the location of the Church, although the court did not clearly employ a strict scrutiny standard of review), *cert. denied*, 426 U.S. 950 (1976).

118. 366 U.S. 599 (1961).

119. *Id.* at 605-07.

120. *Id.* at 606. *See* State v. Shaver, 294 N.W.2d 883, 889 (N.D. 1980); Marcus, *supra* note 37, at 1238. A law may directly burden religious freedom by prohibiting affirmative religious conduct, as in Reynolds v. United States, 98 U.S. 145 (1879) (upheld bigamy conviction of Mormon whose religion required practice of polygamy). A law also may directly burden religious freedom by compelling conduct repugnant to a religious adherent's beliefs. *See, e.g.*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (compulsory flag salute, which to Jehovah's Witnesses was forbidden idolatry, violated the Jehovah's Witnesses' religious liberty). In these circumstances, the connection between the exercise of governmental power and its effect on religion is clear.

121. *See Braunfeld*, 366 U.S. at 606. Indirect burdens typically have involved the economic effects of legislation upon religion. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963); *Braunfeld*, 366 U.S. at 605-06. However, economic impact per se has not been sufficient to establish a burden on religious freedom. *See infra* notes 139-43 and accompanying text.

sylvania's Sunday closing law.[122] The merchants complained that because their religion's Sabbath-observance required them to close their shops on Saturday, the Sunday closing laws disadvantaged the Jewish merchants, compared with their Christian competitors whose Sabbath coincided with the required Sunday closing.[123] Although the Court recognized that the laws had a substantial adverse economic effect upon the Jewish merchants, the Court denied the merchants relief.[124] The burden on the Sabbatarians' religious freedom was "only indirect," and did not require strict scrutiny.[125]

In *Braunfeld*, the Court appeared to hold that indirect burdens categorically required less scrutiny than direct burdens; if a law adversely affected a religious practice without subjecting the practitioner to criminal sanctions, the law was valid unless it had an invalid purpose or effect, was overly broad, or invidiously discriminated among religious practitioners.[126] But two years later, in *Sherbert v. Verner*,[127] the Court clarified its test by further distinguishing among indirect burdens.[128]

The *Sherbert* Court made clear that merely characterizing a

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122. 366 U.S. at 600. *Braunfeld* was one of four companion cases involving challenges to state Sunday closing laws. The three other cases were: McGowan v. Maryland, 366 U.S. 420 (1961) (Maryland Sunday closing law); Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961) (Pennsylvania Sunday closing law); and Gallagher v. Crown Kosher Super Market, 366 U.S. 617 (1961) (Massachusetts Sunday closing law). The cases involved various claims, including claims under the free exercise clause, the establishment clause, the due process clause, and the equal protection clause. In each case the law was upheld.

123. *Braunfeld*, 366 U.S. at 601-02.

124. *Id.* at 603-09. *See also* McGowan v. Maryland, 366 U.S. 420, 520-22 (1961) (Frankfurter, J., concurring) (opinion applying to *Braunfeld*).

125. *Braunfeld*, 366 U.S. at 605-06. However, the *Braunfeld* Court's analysis went beyond a mere rationality review. *See infra* note 184.

126. *Id.* at 606-09. The Court generally has used the "purpose or effect" analysis in cases involving the establishment clause. *See generally* CONSTITUTIONAL LAW, *supra* note 3, at 1030-31; L. TRIBE, *supra* note 3, §§ 14-8, -9.

127. 374 U.S. 398 (1963).

128. The Court entered the third major stage of free exercise doctrinal development in *Sherbert*. *See supra* notes 74-80 and accompanying text.

Justice Stewart argued that *Sherbert* effectively overruled *Braunfeld*. 374 U.S. at 417-18 (Stewart, J., concurring in result). Many, if not most, commentators agree with Justice Stewart that *Braunfeld* should not survive the *Sherbert* decision. *See, e.g.*, L. TRIBE, *supra* note 3, § 14-10, at 854-55; Kauper, *The Warren Court: Religious Liberty and Church-State Relations*, 67 MICH. L. REV. 269, 274-76, 287-88 (1968); Marcus, *supra* note 37, at 1225. However, these commentators also recognize that *Sherbert* did not overrule *Braunfeld*. L. TRIBE, *supra* note 3, § 14-10, at 854-55; Kauper, *supra*, at 274-76, 287-88; Marcus, *supra* note 37, at 1239. *See also* CONSTITUTIONAL LAW, *supra* note 3, at 1058.

burden either as direct or as indirect would not determine the proper standard of review.[129] While direct burdens on religion still were subject to strict scrutiny, the Court also required strict scrutiny for certain types of indirect burdens.[130] The Court did not, however, overrule *Braunfeld*.[131] The *Sherbert* Court refined the *Braunfeld* direct/indirect distinction by holding that the state has a duty to administer its laws so as not to penalize or discourage the exercise of religion, even when the laws only indirectly affect religious practices.[132] But the *Sherbert* Court did not require strict scrutiny whenever a law merely impacts a religious practice.

In *Sherbert*, the Court applied strict scrutiny in reviewing the challenged application of the South Carolina Unemployment Act.[133] Adell Sherbert had been denied unemployment benefits solely because her religious beliefs were inconsistent with the Act's Saturday work availability requirement.[134] In other contexts the conditioning of welfare benefits upon forfeiture of constitutional rights had been recognized as an unconstitutional

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129. *Sherbert*, 374 U.S. at 403-04.

130. *Id. See infra* notes 133-38 and accompanying text.

131. *Sherbert*, 374 U.S. at 403-09. *See supra* note 128. The majority opinion in *Sherbert* was written by Justice Brennan, whose dissent in *Braunfeld* focused upon the impact on religion resulting from the Sunday closing law. *See Braunfeld*, 366 U.S. at 613 (Brennan, J., concurring and dissenting). In *Sherbert*, Justice Brennan attempted to distinguish *Sherbert* from *Braunfeld* by reference to a balancing test, listing differences in the burdens on the respective religious interests, in the substance of the respective state interests, and in the alternative means available to accomplish each interest. *See Sherbert*, 374 U.S. at 408-09. Justice Brennan observed in *Sherbert* that the economic impact on the Sabbatarians in *Braunfeld* was a "less direct burden" than the burden involved in *Sherbert*, and also distinguished *Braunfeld* on the basis that the "strong" state interest in the Sunday closing laws, which could be accomplished by no less restrictive means than were used in *Braunfeld*, was "wholly dissimilar" to South Carolina's interests in disqualifying Sherbert from unemployment benefits. *Id.* at 408-09. Justice Brennan restated *Braunfeld* as requiring only a strong state interest, rather than the compelling one required in *Sherbert*. *Id.* at 408. Justice Stewart, whose dissent in *Braunfeld*, 366 U.S. at 616, focused upon economic impact per se for determining a burden on religion, was unconvinced by Justice Brennan's distinction in *Sherbert* because he continued to focus upon the impact on religious practices rather than upon the manner in which the impact occurred. *See* 374 U.S. at 417-18 (Stewart, J., concurring in the result).

132. *Sherbert*, 374 U.S. at 404-06.

133. *Id.* at 399, 404-06.

134. "Appellant . . . was discharged by her South Carolina employer because she would not work on Saturday, the Sabbath Day of her faith." *Id.* at 399. Her refusal to work on Saturday was deemed by South Carolina to be without "good cause," which under the State's unemployment compensation law rendered her ineligible for benefits. *Id.* at 400-01. "Here . . . appellant's declared ineligibility for benefits derives solely from the practice of her religion. . . ." *Id.* at 404.

exercise of power, penalizing the exercise of those rights.[135] Because Sherbert's religious practice was the basis for denying her benefits to which she otherwise was entitled, the Court viewed the denial as a penalty, equivalent to a prior restraint on Sherbert's Sabbath observance.[136] The *Sherbert* Court strictly scrutinized the denial under a "compelling state interest" test,[137] even though the burden on religion was only indirect.[138]

The *Braunfeld/Sherbert* dichotomy shows that the Court has distinguished indirect burdens by examining the relationship between the core, or sine qua non, of the religious practice and the governmental conduct causing the burden. The *Sherbert* Court did not extend strict scrutiny protection to all instances where a law ultimately results in inconvenience or economic hardship to a religious practice;[139] rather, the Court extended

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135. *See generally* CONSTITUTIONAL LAW, *supra* note 3, at 528-30, 546-51; O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 CALIF. L. REV. 443 (1966); Comment, *Another Look at Unconstitutional Conditions*, 117 U. PA. L. REV. 144, 152 (1968). *See also* sources cited in *Sherbert*, 374 U.S. at 405 n.6.

136. The [ineligibility] ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

. . . .

[T]o condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.

Sherbert, 374 U.S. at 404-06. The penalty exacted by the law for the privilege of exercising the constitutional right to practice religion was the forfeiture of an interest in the unemployment benefits. *See id.* at 410. Thus, the Court was viewing the kind of burden in *Sherbert* as equivalent to a prior restraint, such as the license taxes imposed upon colportage in Follett v. Town of McCormick, 321 U.S. 573 (1944) and Murdock v. Pennsylvania, 319 U.S. 105 (1943).

137. 374 U.S. at 403 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)). It appears that the Court's first use of a compelling state interest element in a first amendment balancing test was in NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 463 (1958).

138. 374 U.S. at 404-05. *See generally* L. TRIBE, *supra* note 3, § 14-10, at 851-52 (discussing the existence of the pervasive affirmative state as the reason the economic effect in *Sherbert* was treated as an infringement on religious liberty).

Thus, the expansion of free exercise clause protections in *Sherbert* stemmed from two earlier developments. First, the doctrine of unconstitutional conditions and the emergence of the pervasive, affirmative state, changing the concept of "property," brought the unemployment compensation law in *Sherbert* within the reach of the prior restraint precedents. Second, the evolving strict scrutiny test for infringements of first amendment freedoms added the compelling state interest requirement to the free exercise clause balancing test.

139. *Sherbert*, 374 U.S. at 409-10.

such protection only to cases in which the law has a close nexus to the core of the religious practice.[140] In such cases, the core of the religious practice usually is an operative element in applying the law,[141] and the Court will, as a policy matter, recognize the law's effect as within the reach of the free exercise clause.[142] In

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140. Recognizing the effect of a law as a burden on religion implies some sort of limiting factor. *Cf.* Cantwell v. Connecticut, 310 U.S. 296, 304 (1940) (the freedom to practice religion must have appropriate limitations to preserve the state's power to regulate for the protection of society). One such factor is the substantiality of the burden. *See supra* note 47. A second factor is a matter of policy, involving considerations analogous to those underlying the tort concept of proximate or legal causation, that is based upon a decision as to the increasingly pervasive state's duty to insulate religion from the effects of generally applicable laws. *Cf.* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 42, at 244-45; § 43, at 254-58 (4th ed. 1971) (discussing tort concept of proximate cause). Borrowing the tort concept of legal causation is useful for articulating a limiting factor, as courts and commentators have demonstrated by using the concept in numerous other applications. *See, e.g.*, C. MCCORMICK, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 177 (2d ed. 1972) (discussing the use of the legal causation doctrine in determining the degree of attenuation in the relationship between cause and effect that is required to remove the taint from evidence obtained through unlawful police conduct); L. TRIBE, *supra* note 3, § 3-22 (discussing a prudential limitation on standing to assert a claim in federal court that is similar to the tort legal causation doctrine). *Cf. id.* § 18-7 (discussing the presence of the pervasive, positive state as a factor in state action analysis). Legal causation also is used in criminal law as a factor to limit responsibility for the ultimate consequences of an act. *See* W. LA FAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 35 (1972).

141. In *Sherbert*, a burden on religion occurred when unemployment benefits were denied because Sherbert observed the Sabbath of her faith. "[N]o State may 'exclude individual . . . members of any . . . faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation.'" 374 U.S. at 410 (emphasis in original) (quoting Everson v. Board of Educ., 330 U.S. 1, 16 (1947)). *See also* 374 U.S. at 412 (Douglas, J., concurring). ("This case is resolvable . . . solely in terms of what government may not do to an individual in violation of his religious scruples.") In Thomas v. Review Bd., 450 U.S. 707, 709-18 (1981), Thomas' religious freedom was burdened when he was denied unemployment benefits because his religiously based conscientious objection to manufacturing weapons was deemed not to be a "good cause" for voluntarily terminating employment. *See supra* notes 61-63 and accompanying text.

142. The Court carefully limited *Sherbert's* recognition of a burden on religious freedom to cases where unconstitutional conditions were placed upon the exercise of religion. 374 U.S. at 404-05, 409-10. Whether other indirect burdens on religion will give rise to a claim under the free exercise clause depends upon a court's perception of the state's duty to accommodate religious practices in its general regulatory schemes. The Court and some commentators have described this duty in terms of avoiding governmental coercion against religion. *See, e.g.*, Thomas v. Review Bd., 450 U.S. 707, 717-18 (1981) (coercive impact of an unconstitutional condition was a burden on religion); *Sherbert*, 374 U.S. at 404 n.5 (coercive effect on exercise of first amendment rights burdens those rights); Abington School Dist. v. Schempp, 374 U.S. 203, 223 (1963) (dictum, in case decided on the same day as *Sherbert*, stating that the free exercise clause is predicated on coercion); CONSTITUTIONAL LAW, *supra* note 3, at 1054. The precise meaning of the term "coercion" as used by the Court is unclear. It appears that when indirect burdens are involved, the term is used to describe instances where the state exacts a price for the

cases such as *Braunfeld*, where the effect on a religious practice is more remotely related to the law's objective and the law only incidentally impacts religion by burdening a secular aspect of the religious conduct, the law's ultimate impact on the religious practice is not a burden on religion requiring strict scrutiny.[143]

Although this distinction between laws that effectively penalize protected activities and laws that only incidentally affect such activity has been articulated in free speech cases,[144]

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right to engage in a religious practice, but not to instances where the religious practitioners are required to bear the costs usually associated with an activity. *See Sherbert*, 374 U.S. at 412 (Douglas, J., concurring). *See, e.g., Thomas*, 450 U.S. at 717-20; *Sherbert*, 374 U.S. at 403-06, 409-10; Murdock v. Pennsylvania, 319 U.S. 105, 112 (1943). *Cf.* Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 103 S. Ct. 1365, 1369-76 (1983) (discriminatory ink and paper tax violated the first amendment's protection of the press, although a generally applicable tax would not). Mere adverse impact does not amount to coercion. Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303, 306-08 (6th Cir.), *cert. denied*, 104 S. Ct. 72 (1983). *See supra* note 111. *But see* CONSTITUTIONAL LAW, *supra* note 3, at 1054. ("[A]ny regulation which substantially impairs the practice of a religion will be sufficiently 'coercive' to merit further review under the balancing test.") The authors of this treatise are unclear as to when a regulation's effects "impair" a religious practice. It is doubtful that they intended that mere impact should suffice.

Another way of stating this coercion requirement is in terms of the centrality to the religion of the interest affected by the regulation. *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc.*, 699 F.2d at 306-07. This articulation defines coercion by reference to individual rights rather than by reference to the nature of the government action and presumes a close connection between the law and the interest affected. Similarly, the distinction between religious beliefs and religious actions, *see supra* text accompanying notes 93-94, may be used to describe a law's coercive impact upon religion by describing the proximity between the law and its impact upon religious beliefs. *See, e.g.*, Abram v. City of Fayetteville, 281 Ark. 63, ___, 661 S.W.2d 371, 372-73 (1983).

143. *See* Braunfeld v. Brown, 366 U.S. 599, 605-09 (1961); Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303, 306-08 (6th Cir.), *cert. denied*, 104 S. Ct. 72 (1983); Pinski v. Village of Norridge, 561 F. Supp. 605, 607 (N.D. Ill. 1982); Seward Chapel, Inc. v. City of Seward, 655 P.2d 1293, 1299-1301 (Alaska 1982). *Cf.* L. TRIBE, *supra* note 3, §§ 12-2, -20. (Under Professor Tribe's "two track" classification scheme for ways in which government may abridge free speech, the incidental impact on speech of a generally applicable law, aimed only at noncommunicative aspects of the speech, is a "track-two inhibition," which generally does not require strict scrutiny review.)

144. *See, e.g.*, Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 68-69 n.7 (1981). In this Note, citations to *Schad* and to Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), are not intended to suggest that religious activities are on the same footing as so-called adult theaters and bookstores. In addition to the different treatment given to such establishments because they involve commercial activity, compared with the treatment of non-commercial speech activity, religion has an important historical and traditional role in society that should be taken into account in assessing whether the activity "is basically incompatible" with other activities in a zoning district. *See Schad*, 452 U.S. at 75. Purveying literature and entertainment to appeal to prurient interests often has attendant harms that render that activity basically incompatible with other activities in a zoning district, *see Young*, 427 U.S. at 63-73, while many religious activities are not

the distinction generally has not been articulated in free exercise cases.[145] The Washington Supreme Court missed the distinction, taking out of context a statement in *Sherbert* that "any incidental burden on the free exercise of appellant's religion may be justified [only] by a 'compelling state interest'. . . ."[146] The court concluded that "[t]he fundamental tenet involved need not be directly impacted for the regulation to be constitutionally infirm."[147] *Sherbert* does not support the supreme court's conclusion. In *Sherbert*, the Court held that a law may be constitutionally infirm even though the law does not directly burden a practice by prohibiting it, but the Court still required a direct impact upon a fundamental tenet of the religion.[148] The Wash-

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repugnant to the neighborhood atmosphere. *See generally* Annot., 74 A.L.R.2d 377, § 2 (1960). Nevertheless, because both activities are protected by the first amendment, the applications of first amendment protections to both activities share analytic similarities.

145. *But see* Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303, 306-08 (6th Cir.), *cert. denied*, 104 S. Ct. 72 (1983); State v. Cameron, 184 N.J. Super. 66, 79-81, 445 A.2d 75, 82-83 (1982), *aff'd*, 189 N.J. Super. 404, 460 A.2d 191 (1983); Damascus Community Church v. Clackamas County, 45 Or. App. 1065, 1072-73, 610 P.2d 273, 277 (1980), *appeal dismissed*, 450 U.S. 902 (1981).

146. Sherbert v. Verner, 374 U.S. 398, 403 (1963) *quoted in* City of Sumner v. First Baptist Church, 97 Wash. 2d 1, 7-8, 639 P.2d 1358, 1362 (1982).

147. *First Baptist Church*, 97 Wash. 2d at 8, 639 P.2d at 1362. *Sherbert* does not support this focus on mere impact. Justice Hicks quoted *Sherbert* as requiring strict scrutiny for "any incidental burden on the free exercise of . . . religion." 97 Wash. 2d at 7-8, 639 P.2d at 1362 (quoting *Sherbert*, 374 U.S. at 403). However, the context of that language is significant. The *Sherbert* Court contrasted an "incidental burden" with direct burdens on religion and with "no infringement" on religious freedom. 374 U.S. at 403. Following that discussion, the *Sherbert* Court inquired whether the unemployment insurance disqualification imposed "any burden" on Sherbert's religious freedom. *Id.* To answer that question, the Court turned to the nature of the regulation involved. The Court noted that the pressure upon Sherbert to forsake her religious practices was an indirect result of the law, because the law imposed no criminal sanctions for not working on Saturday. "But this is only the beginning . . . of our inquiry. . . . [Under some circumstances, a] law is constitutionally invalid even though the burden may be characterized as being only indirect." 374 U.S. at 403-04 (quoting Braunfeld v. Brown, 366 U.S. 599, 607 (1961)). The Court then went on to describe the nature of the governmental conduct that put "the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." *Sherbert*, 374 U.S. at 404. *See also id.* at nn.5-6.

Thus, the *Sherbert* Court did not look just at the degree of the law's impact, but also looked at the manner in which the power exerted by the government affected the central tenets underlying Sherbert's religious practice. Contrary to the Washington Supreme Court's assertion, Sherbert did require that a fundamental tenet underlying the religious practice be directly affected by the law, even though no direct burden was required. Although the *Sherbert* Court used the term "incidental" in its analysis, 374 U.S. at 403, the Court's opinion did not hold that mere impact resulting from the regulation of peripheral aspects of religious conduct will support a free exercise claim.

148. *See supra* notes 133-43 and accompanying text, and *supra* note 147.

ington Supreme Court's conclusion that a direct impact on a fundamental tenet of the Church "has never been a requirement"[149] is a non sequitur, belying the cases cited as support.[150]

Because the Washington Supreme Court identified the zoning restriction and the building code's economic burden upon the Academy as incidental burdens on religious freedom,[151] and because the court believed that any substantial incidental burden on the exercise of religion was subject to strict scrutiny,[152] the supreme court held that the trial court erred in not reviewing the Sumner laws under that strict scrutiny standard.[153] However, those incidental effects on the Academy did not infringe upon the congregants' free exercise of religion.[154] The laws merely regulated secular aspects of the school operation. Although the ordinances significantly affected the Church's operation of the Academy, the laws did not penalize the Church for operating its parochial school. Thus, the court should not have required the trial court to use the *Sherbert* strict scrutiny standard of review.[155]

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149. *First Baptist Church*, 97 Wash. 2d at 7, 639 P.2d at 1362.

150. *See supra* notes 55-68 and accompanying text.

151. *First Baptist Church*, 97 Wash. 2d at 7-8, 639 P.2d at 1362.

152. *See id.*

153. *Id.* at 8-10, 639 P.2d at 1362-64.

154. *See supra* notes 65-68 and accompanying text. *Accord*, Grosz v. City of Miami Beach, 721 F.2d 729, 735-40 (11th Cir. 1983); Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303, 306-07 (6th Cir.), *cert. denied*, 104 S. Ct. 72 (1983); Pinski v. Village of Norridge, 561 F. Supp. 605, 607 (N.D. Ill. 1982); Seward Chapel, Inc. v. City of Seward, 655 P.2d 1293, 1299-1301 (Alaska 1982); Abram v. City of Fayetteville, 281 Ark. 63, ___, 661 S.W.2d 371, 372-73 (1983); Hough v. North Star Baptist Church, 109 Mich. App. 780, 783-84, 312 N.W.2d 158, 159-60 (1981) (per curiam); Damascus Community Church v. Clackamas County, 45 Or. App. 1065, 1072-73, 610 P.2d 273, 277 (1980), *appeal dismissed*, 450 U.S. 902 (1981); Antrim Faith Baptist Church v. Commonwealth, ___ Pa. Commw. ___, ___, 460 A.2d 1228, 1230-31 (1983). *See also* Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) (dictum) (building and zoning regulations are necessary and are permissible church-state contacts).

155. *See* Hough v. North Star Baptist Church, 109 Mich. App. 780, 783-84, 312 N.W.2d 158, 159-60 (1981) (per curiam); Antrim Faith Baptist Church v. Commonwealth, ___ Pa. Commw. ___, ___, 460 A.2d 1228, 1230-31 (1983). (Both courts rejected free exercise claims and upheld building codes under facts very similar to those in *First Baptist Church.*) Numerous cases have rejected free exercise claims and upheld zoning ordinances under facts similar to those in *First Baptist Church. See, e.g.*, Grosz v. City of Miami Beach, 721 F.2d 729, 735-40 (11th Cir. 1983); Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303, 306-07 (6th Cir.), *cert. denied*, 104 S. Ct. 72 (1983); Seward Chapel, Inc. v. City of Seward, 655 P.2d 1293, 1299-1301 (Alaska 1982); Abram v. City of Fayetteville, 281 Ark. 63, ___, 661 S.W.2d 371, 372-73 (1983); State v. Cameron, 184 N.J. Super. 66, 79-81, 445 A.2d 75, 82-83 (1982) *aff'd*, 189 N.J. Super. 404, 460 A.2d 191 (1983); Damascus Community Church v. Clackamas County, 45 Or. App. 1065, 1072-73, 610 P.2d 273, 277 (1980), *appeal dismissed*, 450 U.S.

V. The Effect of the Washington Supreme Court's Decision

Because the Washington Supreme Court remanded the case to the trial court for the prescribed balancing of interests,[156] the court did not address the practical difficulties that would result from its decision. One foreseeable consequence of the court's decision on the zoning issue is that a Washington city generally will not be able to exclude parochial schools from a residential district, at least when the sponsoring church is permitted in the district.[157] A broad reading of the decision suggests that strict

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902 (1981). Of course, the Washington Supreme Court might have construed the Washington Constitution to require strict scrutiny in *First Baptist Church*. *See generally* Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. Puget Sound L. Rev. 491 (1984). In addition to the Church's federal first amendment claim, the Church had claimed the protection of the Washington Constitution. *See First Baptist Church*, 97 Wash. 2d at 4, 639 P.2d at 1361 (plurality opinion); *id.* at 14, 639 P.2d at 1366 (Utter, J., concurring). Wash. Const. amend. XXXIV, amending Wash. Const. art. I, § 11, provides:

> Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state.

If the *First Baptist Church* plurality opinion had contained "an explicit statement that the decision [was] 'alternatively based on bona fide separate, adequate, and independent [state] grounds,' " then the opinion would rest upon an interpretation of the state constitution sufficiently clear to avoid Supreme Court review of the court's construction of the federal constitution. Utter, *supra*, at 505-06 (alteration in original) (quoting Michigan v. Long, 103 S. Ct. 3469, 3476 (1983)). However, the plurality did not indicate that its decision rested upon the Washington Constitution. Thus, *First Baptist Church's* authority and precedential value as an interpretation of the Washington Constitution is doubtful.

156. *First Baptist Church*, 97 Wash. 2d at 10, 639 P.2d at 1363-64. After the case was remanded, the trial court did not apply the Supreme Court's strict scrutiny test because the parties settled their dispute by stipulated judgment. Stipulation For and Order of Dismissal, City of Sumner v. First Baptist Church, 97 Wash. 2d 1, 639 P.2d 1358 (1982).

157. 2 A. Rathkopf, The Law of Zoning and Planning 126 (4th ed. Supp. 1983). *See First Baptist Church*, 97 Wash. 2d at 19, 639 P.2d at 1368 (Dolliver, J., dissenting).

Shortly after the *First Baptist Church* decision, the Washington Supreme Court remanded another parochial school zoning case for reconsideration in light of *First Baptist Church*. Peace Assembly Church v. City of Tacoma, No. 301828, letter op. at 3 (Pierce County, Wash. Super. Ct., Aug. 9, 1982). Peace Assembly Church's parochial school, serving forty-nine students, violated the zoning ordinance of the city of Tacoma, Washington. Before *First Baptist Church* was decided, the city had sought an injunction to close the school. The trial court granted the injunction on the city's motion for summary judgment. *Id.* at 1-3. When the case was remanded after the *First Baptist Church* decision, the trial court applied strict scrutiny in an ad hoc manner and invalidated the zoning ordinance as applied to the parochial school. *Id.* at 7-8.

scrutiny is required whenever a city bars a religious property use from a residential district,[158] and that strict scrutiny review may be required for zoning restrictions on other activities protected by the first amendment.[159] The decision's effect may be to require strict scrutiny of zoning laws whenever they substantially affect a protected activity, a result that nullifies a city's power to regulate the time, place, and manner of first amendment activities.[160] This places a limitation on a city's zoning power that the Supreme Court has refused to ascribe to the Constitution.[161]

The court's decision recognizing the building code's economic burden as an infringement upon the free exercise of religion is even more problematic. First, if a trial court must determine whether a regulation imposes actual financial hardship upon a church,[162] making such a determination may impermissibly entangle government in the church's religious affairs.[163] Par-

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158. Because the court did not base its decision upon any violation of a religious tenet that might have resulted from the zoning restriction, there is no reason to treat a parochial school any differently than any other religious use with respect to the proper standard of review to be applied to a zoning restriction.

159. *See infra* note 187 and accompanying text. Under this reasoning, buildings housing protected speech, press, and assembly activities could claim protection from building codes and zoning ordinances under the *First Baptist Church* decision.

160. *See infra* note 204 and accompanying text.

161. *See* Seward Chapel, Inc. v. City of Seward, 655 P.2d 1293, 1300-01 (Alaska 1982). *See, e.g.*, Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (upheld zoning ordinance that dispersed "adult" theaters, limiting the theaters' locations without banning them from the city). Damascus Community Church v. Clackamas County, 45 Or. App. 1065, 1072-73, 610 P.2d 273, 277 (1980), *appeal dismissed*, 450 U.S. 902 (1981). *See also* Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) (dictum).

162. The plurality stated that the First Baptist Church could not afford to comply with the building code. *First Baptist Church*, 97 Wash. 2d at 4, 7, 639 P.2d at 1360, 1362. However, this statement must be read in light of the instruction to the trial court to "consider the practical effect uncompromising enforcement of the City's building code and zoning ordinance will have on appellants' First Amendment rights." *Id.* at 10, 639 P.2d at 1363 (plurality opinion). *See also id.* at 15, 639 P.2d at 1366 (Utter, J., concurring). Thus, although the court treated the burden as established, it did not determine that the Church had established actual financial hardship. The court left this determination for the trial court.

163. *See* Serritella, *Tangling with Entanglement: Toward a Constitutional Evaluation of Church-State Contacts*, 44 LAW AND CONTEMP. PROBS. 143, 143-46, 154 (1981). This entanglement between government and a church may violate both the establishment clause and the free exercise clause. *See id.* at 154.

It is not clear how a trial court would determine actual financial hardship to the organization. Because the supreme court instructed the trial court to make this determination, the higher court might have believed that the affidavit of the Academy's principal, *see supra* note 20, stating that the Church could not afford to make the building improvements, was insufficient. As with any witness, the statements and testimony of

ticularly when a religious organization has a multi-faceted ministry, such a determination might involve a court or an administrative agency in scrutinizing the organization's expenditures and passing judgment upon the propriety of the organization's resource allocation.[164] This entanglement of government with religion may violate both the establishment clause and the free exercise clause.[165]

Second, if a court granted a church an exemption because the church was financially *unable* to comply with a regulation,[166] presumably the exemption would expire if the church became financially able to comply.[167] This approach would imply ongoing policing by the court or administrative agency, causing administrative hardship and further compounding the risk of impermissible church-state entanglement.[168]

To avoid this entanglement, the court or agency would have to defer to the religious organization's determination that it was unable to bear the regulation's financial burden.[169] Thus, almost every generally applicable law with substantial economic consequences would be subject to strict scrutiny review if, even in good faith, a religious organization in its resource allocation placed a low priority on complying with a particular law's

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members of religious organizations should be respected. Lemon v. Kurtzman, 403 U.S. 602, 618 (1971). At the same time, however, rules of evidence foreclose a court from considering religious beliefs in assessing the credibility of a witness, including those of a witness testifying about a religious organization's ability to bear an expense. *See* FED. R. EVID. 610; WASH. R. EVID. 610. The Washington Constitution also prohibits questioning a witness in a state court concerning "his religious belief to affect the weight of his testimony." WASH. CONST. amend. XXXIV, amending WASH. CONST. art. I, § 11.

164. *See* United States v. Lee, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring); Walz v. Tax Comm'n, 397 U.S. 664, 674-75 (1970); *id.* at 691 (Brennan, J., concurring).

165. *See* Serritella, *supra* note 163, at 154. U.S. CONST. amend. I provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

166. *See supra* note 162-63.

167. Alternatively, the knowledge that if financial resources become available they must be used to comply with requirements that a church considers unnecessary or of low priority could influence the church's financial planning and resource allocation. *Cf.* Walz v. Tax Comm'n, 397 U.S. 664, 692 (1970) (Brennan, J., concurring).

168. Administrative hardship usually is not, by itself, a determinative factor. *See* Braunfeld v. Brown, 366 U.S. 599, 608 (1961); L. TRIBE, *supra* note 3, § 14-10, at 853. *But see* United States v. Lee, 455 U.S. 252, 259-60 (1982). More important is the extent and duration of the state's contacts with the church that would result from this ongoing policing arrangement. *See* Walz v. Tax Comm'n, 397 U.S. 664, 674-75 (1970).

169. *Cf.* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 724-25 (1976) (courts must defer to Church's determinations in matters of church doctrine and government); United States v. Ballard, 322 U.S. 78, 86-88 (1944) (courts may only inquire into whether a religious belief is sincerely held, and may not assess the verity of the belief).

requirements. The opportunity for unnecessary church-state conflicts would increase—conflicts that should be minimized whenever possible.[170]

A third consequence of the strict scrutiny standard imposed by the supreme court is the loss of the objective decision-making criteria contained in generally applicable laws such as the Sumner building code. Although such laws often are applied with varying rigidity,[171] they nevertheless provide substantial objectivity and certainty.[172] By contrast, under the least restrictive means tier of the strict scrutiny balancing test,[173] general standards are substituted for objective rules.[174] In the case of a building code, quantifiable, articulated, and generally applicable rules are replaced by a vague standard: "make it safe."

Safety is a relative concept.[175] Although an official administering the code generally could not impose stricter safety requirements than those specified in the building code,[176] making an individualized determination increases the risk of discriminatory enforcement and magnifies the extent and the duration of contacts between government and the religious organization.[177] The resulting entanglement of government with

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170. *See* Walz v. Tax Comm'n, 397 U.S. 664, 674-75 (1970); Serritella, *supra* note 163, at 157-58.

171. *See* C. FIELD & S. RIVKIN, THE BUILDING CODE BURDEN 35 (1975); THE REPORT OF THE PRESIDENT'S COMM'N ON HOUSING 217-18 (1982). *Cf.* Ackerman, *Regulating Slum Housing Markets On Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093, 1095 (1971).

172. The very existence of a building code establishes rules that serve as reference points for evaluating the code standards as applied. The code provisions may not be optimal, *see infra* notes 211-12, but the requirements were formulated by experts in a detached setting, thereby serving as a check on the kind of broad administrative discretion that may be constitutionally impermissible. *See infra* note 205 and accompanying text. *Cf.* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 657-58 (1974) (Rehnquist, J., dissenting). *See generally* Giannella, *supra* note 37, at 1381; Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

173. *See supra* note 39 and accompanying text.

174. However, even under the strict scrutiny balancing test required by the court, the trial court still may have decided that the complications involved in making particularized determinations in applying the building code would justify denying the Church's claim. *See* United States v. Lee, 455 U.S. 252, 259-61 (1982). *See also supra* note 39.

175. *See* S. SEIDEL, HOUSING COSTS & GOVERNMENT REGULATIONS: CONFRONTING THE REGULATORY MAZE 71, 94, 306 (1978).

176. The Sumner building code provides minimum standards. BUILDING CODE, *supra* note 2, § 102. In some unusual instances, standards stricter than those in the code might be required. *See id.* § 203.

177. *See* Serritella, *supra* note 163, at 157-58. *Cf.* A. COX, FREEDOM OF EXPRESSION 49-50 (1980) (chief danger to freedom of expression by minority groups lies in ordinances giving to local authorities wide discretion in the ordinances' enforcement). As a practical

religion has the potential for more harassing and oppressive contacts than the systematic, periodic inspections required by the building code.[178] Although the supreme court's objective of protecting religious freedom is commendable, by requiring strict scrutiny in *First Baptist Church*, the court in fact opened the way for governmental intrusion into the affairs of religious organizations.

VI. A Recommended Alternative Approach

The court should have reviewed Sumner's zoning ordinance and building code under the intermediate scrutiny standards[179] applicable to statutes that regulate the time, place, and manner of exercising first amendment rights.[180] Such a regulation is valid

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matter, a building inspector often is not qualified to make an independent assessment of a building's safety; his inspection must rely upon standards prescribed by experts. *See* Hough v. North Star Baptist Church, 109 Mich. App. 780, 785, 312 N.W.2d 158, 160 (1981) (per curiam).

178. *See* Serritella, *supra* note 163, at 157-58.

179. "Intermediate scrutiny" is used here to denote a standard of review that is less stringent than "strict scrutiny," but less deferential than "minimum scrutiny." *Cf.* L. Tribe, *supra* note 3, §§ 16-30, -31 (discussing intermediate scrutiny standard in equal protection doctrine). This approach is more ad hoc than the strict scrutiny test, *see supra* note 37, but rather than balancing the value of a religious practice against the importance of the state interest, only the degree of infringement, determined by the manner in which the law affects religion, is balanced against the state interest. *See* Grosz v. City of Miami Beach, 721 F.2d 729, 735-40 (11th Cir. 1983).

180. *See Grosz*, 721 F.2d at 739-41; Seward Chapel, Inc. v. City of Seward, 655 P.2d 1293, 1300 (Alaska 1982); State v. Cameron, 184 N.J. Super. 66, 79-81, 445 A.2d 75, 82-83 (1982), *aff'd*, 189 N.J. Super. 404, 460 A.2d 191 (1983); Damascus Community Church v. Clackamas County, 45 Or. App. 1065, 1072-73, 610 P.2d 273, 277 (1980), *appeal dismissed*, 450 U.S. 902 (1981). *See, e.g.*, Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 68-77 (1981); Young v. American Mini Theatres, Inc., 427 U.S. 50, 62 (1976); *id.* at 78-80 (Powell, J., concurring); Poulos v. New Hampshire, 345 U.S. 395, 405-08 (1953). *See generally* Constitutional Law, *supra* note 3, at 977, 984-88.

Courts have adopted numerous approaches to resolving disputes involving regulation of religious property uses. A discussion of these approaches is beyond the scope of this Note. Sources discussing the regulation of religious property uses include the following: 2 R. Anderson, American Law of Zoning §§ 12.18-.27 (2d ed. 1976); J. Curry, Public Regulation of the Religious Use of Land (1964); 7 E. McQuillin, The Law of Municipal Corporations §§ 24.519, .520 (3d ed. 1981 rev. vol.); 8 *Id.* §§ 25.131f, .131g (3d ed. 1976 rev. vol.); 2 A. Rathkopf, The Law of Zoning and Planning ch. 20 (4th ed. 1983); 1 P. Rohan, Zoning and Land Use Controls § 3.05[4] (1983); 3 N. Williams, American Planning Law ch. 77 (1975); 6 E. Yokley, Zoning Law and Practice §§ 35-14, -62 (4th ed. 1980); Walker, *What Constitutes a Religious Use for Zoning Purposes*, 27 Cath. Law. 129 (1982); Comment, *Zoning the Church: Toward a Concept of Reasonableness*, 12 Conn. L. Rev. 571 (1980); Comment, *Zoning Ordinances, Private Religious Conduct, and the Free Exercise of Religion*, 76 Nw. U. L. Rev. 786 (1981); Annot., 11 A.L.R.4th 1084 (1982); Annot., 74 A.L.R.3d 14 (1976); Annot., 62 A.L.R.3d 197 (1975); Annot., 74 A.L.R.2d 377 (1960).

if it is content-neutral,[181] significantly furthers a substantial and legitimate governmental interest, is narrowly drawn and is not subject to arbitrary application, and does not absolutely prevent the exercise of first amendment rights.[182]

Although this doctrine concerning time, place, and manner regulations developed in cases principally involving freedom of speech in a public forum,[183] the principles should apply equally

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181. When the law regulates speech, the law must be content neutral. *See* Young v. American Mini Theatres, Inc., 427 U.S. 50, 63, 67 n.27 (1976); L. TRIBE, *supra* note 3, § 12-2, at 580-82. Similarly, when the law regulates religious conduct, the law should regulate only the secular aspects of the conduct, without reference to the religious tenets that prompted the conduct.

182. United States v. Grace, 103 S. Ct. 1702, 1707 (1983) (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 103 S. Ct. 948, 955 (1983); Young v. American Mini Theatres, Inc., 427 U.S. 50, 79-80 (1976) (Powell, J., concurring) (citing United States v. O'Brien, 391 U.S. 367, 377 (1968)).

183. *See generally* CONSTITUTIONAL LAW, *supra* note 3, at 973-88.

Closely related to the limitations on government's management power over a public forum are the limitations on government's control over conduct that includes symbolic speech. *Cf.* Young v. American Mini Theatres, Inc., 427 U.S. 50, 78-79 (1976) (Powell, J., concurring) (applying the four-part *O'Brien* test to a zoning regulation because, like the time, place, and manner cases cited, the regulation imposed only an incidental burden on speech). *Compare* United States v. O'Brien, 391 U.S. 367, 377 (1968) (four-part test for propriety of regulations applying to "nonspeech" connected with symbolic speech) *with* United States v. Grace, 103 S. Ct. 1702, 1707 (1983) (similar standards for valid time, place, and manner regulations in a traditional public forum). *See generally* CONSTITUTIONAL LAW, *supra* note 3, at 988-96 (discussing the first amendment's protection of symbolic speech).

When a party claims that his act is protected symbolic speech, the distinction between protected speech-conduct and unprotected nonspeech-conduct, although often unclear, *see* L. TRIBE, *supra* note 3, § 12-7, ultimately must be based upon whether the law aims at communicative impact or at noncommunicative impact. *See id.* § 12-2, at 580. *But see* Schlag, *supra* note 37, at 676-77. Of course, determining what conduct associated with the exercise of religion is or is not protected by the first amendment must be achieved by a method different from the objective method used to distinguish symbolic speech from conduct. The determination of what is religious conduct is a subjective one that ultimately depends only upon whether the religious practitioner sincerely attaches religious significance to the regulated conduct itself. *See* United States v. Ballard, 322 U.S. 78, 86 (1944). This difference in analysis reflects the difference in the values protected by the free speech clause and the free exercise clause. In protecting speech, the goal is to protect the flow of ideas. Although the ideas may differ, and although the purposes for and proper manner of protecting the flow of ideas may be debated, *see, e.g.*, Emerson, *supra* note 81, at 877-86, questions of whether the communication of ideas is disrupted generally may be treated similarly, and therefore objectively. The free exercise clause, however, was designed to protect the *exercise* of religion, and thus the question whether a religious practice is disrupted must be answered by reference to the practitioner's subjective religious tenets. *See* Bird, *supra* note 102, at 131. Once the protected cores of speech and of the exercise of religion are identified, however, the same approach should be used in both instances for protecting the core activity from unnecessary incidental burdens by limiting regulation of the peripheral activities. *See infra* note 187 and accompanying text. *See, e.g.*, Grosz v. City of Miami Beach, 721 F.2d 729, 737 (11th Cir.

to regulations of the exercise of religion.[184] The Supreme Court historically has applied the time, place, and manner analysis to

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1983).

Even when conduct accompanying symbolic speech is characterized as nonspeech, the regulation of that conduct is subject to limitations because of the regulation's incidental restrictions upon protected speech. *See* Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 68 n.7 (1981). When religious conduct is intertwined with conduct of no independent religious significance, the peripheral aspects of religious conduct should be partially protected to protect the core religious conduct, just as nonspeech-conduct is partially protected in order to protect the symbolic speech-conduct from incidental burdens. In both cases the reason for protecting the peripheral conduct is to prevent unnecessary burdens on the core activities and to guard against oppressive, covert discrimination in the law's administration. *See* CONSTITUTIONAL LAW, *supra* note 3, at 977. *See also supra* notes 179-82 and accompanying text.

184. *See* Pepper, *The Conundrum of the Free Exercise Clause—Some Reflections on Recent Cases*, 9 N. KY. L. REV. 265, 276 n.56 (1982). *See, e.g.*, Grosz v. City of Miami Beach, 721 F.2d 729, 739-41 (11th Cir. 1983); Seward Chapel, Inc. v. City of Seward, 655 P.2d 1293, 1300-01 (Alaska 1982); Damascus Community Church v. Clackamas County, 45 Or. App. 1065, 1072-73, 610 P.2d 273, 277 (1980), *appeal dismissed*, 450 U.S. 902 (1981). In Braunfeld v. Brown, the Supreme Court seemingly approved of using a time, place, and manner mode of analysis for those indirect burdens that do not amount to a burden on religion that requires strict scrutiny:

> [I]f the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals [and not to impede the observance of one or all religions or invidiously to discriminate between religions], the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden. See Cantwell v. Connecticut, [310 U.S. 296, 304-05 (1940)]. . . .

366 U.S. 599, 607 (1961). In the cited portion of the *Cantwell* opinion, the Court, after stating that legislation aimed at a legitimate end must not unduly infringe upon religious freedom, stated that general and nondiscriminatory time, place, and manner regulations might be proper. *Cantwell*, 310 U.S. at 304. The *Braunfeld* Court also cited two decisions where the Court struck down ordinances that "required religious colporteurs to pay a license tax as a condition to the pursuit of their activities because the State's interest, the obtaining of revenue, could be easily satisfied by imposing this tax on nonreligious sources." *Braunfeld*, 366 U.S. at 607 n.4 (citing Follett v. Town of McCormick, 321 U.S. 573 (1944) and Murdock v. Pennsylvania, 319 U.S. 105 (1943)). *See also* McGowan v. Maryland, 366 U.S. 420, 462-63 (1961) (Frankfurter, J., concurring) (opinion applying to *Braunfeld*). A careful reading of *Follett* and *Murdock* shows that those cases struck down license taxes as prior restraints on the exercise of religion, focusing on the nature rather than the substantiality of the tax, and without concern over alternative methods for obtaining municipal revenues. *See Follett*, 321 U.S. at 577-78; *Murdock*, 319 U.S. at 112-14; *id.* at 118 (Reed, J., dissenting); and *id.* at 134-35 (Frankfurter, J., dissenting). *Accord*, Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 103 S. Ct. 1365, 1373 n.9 (1983). Nevertheless, the *Braunfeld* restatement of *Murdock* and *Follett* appears to indicate that the *Braunfeld* Court thought more than minimum scrutiny should be used to test laws that have substantial, incidental effects on religious practices. *See also* Sherbert v. Verner, 374 U.S. 398, 408-09 (1963). Thus, the *Braunfeld* Court required generally applicable laws that impose incidental burdens on religion to be more narrowly drawn than would be required under a minimum scrutiny standard. 366 U.S. at 607-09.

laws that regulate both speech and religious activities.[185] By this approach, the Court has recognized that the exercise of religion is, like speech, a form of expression,[186] and that the regulation of both types of expressive activity should be treated similarly. The Supreme Court also has analyzed first amendment claims without distinguishing among the several clauses, "indicating that the various first amendment protections should be construed uniformly. . . ."[187]

The policy of protecting first amendment values that limits government's ability to regulate the time, place, and manner of speech in a public forum[188] should also limit government regulation of conduct at the periphery of the core religious practice.[189] In a public forum, government holds the property in trust for the benefit of society, subject to the first amendment's limitations on government's power to manage the forum.[190] Government generally may not aim its regulations at the communicative aspects of speech, but may regulate the noncommunicative impact of the speech in order to preserve the general public's enjoyment of the property.[191] Thus, in a public forum, government generally may limit the time, place, and manner of speech to prevent harm to the public associated with the speech when the harm does not derive from the viewpoint expressed.[192] At the

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185. *E.g.*, Widmar v. Vincent, 454 U.S. 263 (1981); Poulos v. New Hampshire, 345 U.S. 395, 405-08 (1953); Cox v. New Hampshire, 312 U.S. 569, 574-78 (1941); Cantwell v. Connecticut, 310 U.S. 296, 304-05 (1940).

186. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 269, 276 (1981). *See generally* A. Cox, Freedom of Expression 1-2 (1980) (discussing freedom of expression as the common value protected by the first amendment clauses). *Cf.* Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 659 n.3 (Brennan, J., dissenting in part); Cantwell v. Connecticut, 310 U.S. 296, 306-08 (1940).

187. Bird, *supra* note 102, at 130 n.18A. *See also, e.g.*, Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 103 S. Ct. 1365, 1370-71 (1983); Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 68-71 (1981); Democratic Party of the United States v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 124 (1981); Sherbert v. Verner, 374 U.S. 398, 403-07 (1963); Thomas v. Collins, 323 U.S. 516, 529-31 (1944).

188. *See generally* Constitutional Law, *supra* note 3, at 977-83.

189. *See supra* notes 139-43 and accompanying text.

190. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 103 S. Ct. 948, 954-55 (1983). *See* Hague v. CIO, 307 U.S. 496, 515-16 (1939) (dictum). The scope of the first amendment's limitations in a public forum varies with the degree to which the government property serves as a forum for public expression. *See Perry Educ. Ass'n*, 103 S. Ct. at 954-55.

191. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 103 S. Ct. 948, 954-55 (1983); L. Tribe, *supra* note 3, §§ 12-2, -20.

192. *See* L. Tribe, *supra* note 3, §§ 12-2, -20. When the harm to be prevented derives from the speech itself, the speech may be restricted only to prevent a clear and

same time, the regulations must be carefully designed not to intrude upon the protected communicative aspects of speech.[193] Because government has a duty to accommodate speech in the forum,[194] the regulations imposing incidental restrictions on the communicative aspects of speech must bear a substantial relationship to a significant legitimate governmental interest.[195]

As it does with its proprietary claims in a public forum, the state claims certain property rights when it exercises its police power over private property.[196] When private property is used for the exercise of first amendment rights, including the practice of religion, government's police power claim to private rights may be limited by the first amendment, just as government's proprietary rights are limited by first amendment rights to a public forum.[197] If the regulation is not aimed at aspects of the property having independent religious significance to the religious practitioner,[198] the first amendment's limitations on the police power need only protect the practitioner from the regulation's incidental burdens.[199] Like the limitations on government's power to control noncommunicative aspects of speech when managing a public forum for the public good,[200] the limitations on the police power for the protection of first amendment rights against incidental burdens need not be great. In such cases the police power controls over private property, like the time, place, and manner regulations of speech in a public forum, need only be carefully formulated substantially to further a sig-

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present danger or "imminent lawless action." *See* Hess v. Indiana, 414 U.S. 105, 108 (1973) (per curiam) (quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) and citing Terminiello v. Chicago, 337 U.S. 1, 4 (1949)). *See also* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 103 S. Ct. 948, 955 (1983).

193. *See supra* note 182 and accompanying text.

194. Although commentators disagree whether the government's duty to accommodate speech in a public forum requires an affirmative, minimum access guarantee or merely a policy of nondiscrimination in allowing access, *see generally* Note, *The Public Forum: Minimum Access, Equal Access, and the First Amendment*, 28 STAN. L. REV. 117 (1975), a recent decision appears to have imposed at least a limited affirmative duty to allow access to forums that are, by tradition, forums for public communication. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 103 S. Ct. 948, 954-55 (1983).

195. *See supra* note 182 and accompanying text.

196. *See* Queenside Hills Realty Co. v. Saxl, 328 U.S. 80, 82-83 (1946); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

197. *See supra* notes 188-95 and accompanying text.

198. *See supra* notes 139-43 and accompanying text, *supra* note 183, and *infra* note 217.

199. *See supra* notes 139-43 and accompanying text.

200. *See supra* notes 179-82 and accompanying text.

nificant government interest and to minimize the potential for abuse in their administration.[201]

This time, place, and manner analysis provides a reasonable, intermediate approach to balancing the state's legitimate police power interests against the needs of religious practitioners to be free from unnecessary obstacles to their religious expression.[202] Recognizing that the goal of this balancing of interests is mutual accommodation,[203] this intermediate approach avoids the often outcome-determinative choice between strict scrutiny and minimal scrutiny.[204] In addition, this approach provides an objective method of analysis that reduces the danger that facially neutral regulations will covertly be used to discriminate against particular religions.[205]

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201. *See id.*; Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 641 (1981); CONSTITUTIONAL LAW, *supra* note 3, at 977.

202. Some state courts have recognized the need for an intermediate approach to balancing these interests. These courts have found that zoning regulations are unreasonable and thus violate due process when churches are wholly excluded from residential districts. *See* Comment, *Zoning the Church: Toward a Concept of Reasonableness*, 12 CONN. L. REV. 571, 575-76 and nn.14-15 (1980); Annot., 74 A.L.R.2d 377, § 2, at 380-81 (1960). By presuming that a zoning ordinance is arbitrary when it excludes churches from residential districts, these courts in effect provide an intermediate standard of review for a limited class of religious property uses.

203. *See* Lynch v. Donnelly, 52 U.S.L.W. 4317, 4318-19 (1984); City of Sumner v. First Baptist Church, 97 Wash. 2d 1, 15, 639 P.2d 1358, 1366 (1982) (Utter, J., concurring); L. TRIBE, *supra* note 3, § 14-4. *See generally* United States v. Lee, 455 U.S. 252, 259-61 (1981); Walz v. Tax Comm'n, 397 U.S. 664, 669-70 (1970); Zorach v. Clauson, 343 U.S. 306, 313-14 (1952); Jones v. City of Opelika, 316 U.S. 584, 624 (1942) (Black, J., dissenting), *rev'd*, 319 U.S. 103 (1943).

204. One of the problems with the two-tiered review that generally is used by courts resolving free exercise cases is that a court is put to a choice between scrutiny that is " 'strict' in theory and fatal in fact . . . [and scrutiny that is] minimal . . . in theory and virtually none in fact." Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). *See also* Craig v. Boren, 429 U.S. 190, 210-11 n.* (1976) (Powell, J., concurring) (acknowledging this intermediate scrutiny standard). It likely was this harsh choice that led the *First Baptist Church* court to choose strict scrutiny, and which led Justice Williams to advocate some form of intermediate scrutiny. *See First Baptist Church*, 97 Wash. 2d at 15-16, 639 P.2d at 1366-67 (Williams, J., concurring).

Strict scrutiny protection still is available, however, when the regulatory scheme violates a sect's fundamental tenets by substantially infringing upon nonsecular aspects of the religious practice. *See infra* note 217 and accompanying text.

205. *See* Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 649 (1981). Although laws might be subject to discriminatory enforcement, that is a different matter. The concern in scrutinizing a time, place, and manner regulation is that the law itself is drafted to reduce the likelihood and the possible extent to which the regulation could be misused in oppressing a protected interest. *See* Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1969). *See also* Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). In addition, an ascertainable standard prevents a regulatory ordi-

Sumner's building code satisfies the criteria for a valid time, place, and manner regulation. First, the code does not discriminate between similar secular and religious uses.[206] Rather, the code's standards change according to the intensity and character of the building's use.[207] Second, the code significantly furthers a substantial governmental interest. Both the Church and the city agreed that making the building safe for conducting the Academy was important,[208] and the government's interest in protecting the safety of children has been repeatedly articulated in case law.[209] Third, the code is narrowly drawn and is not subject to arbitrary application. Although the Church argued that many of the required building code standards were highly technical,[210] the standards were promulgated by experts in a detached setting,[211] and reflect commonly accepted levels of risk.[212] Of

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nance from effectively banning the religious practice by causing uncertainty about what conduct is proscribed, and thereby intimidating individuals to forego conduct of uncertain legality. *See Grayned*, 408 U.S. at 109.

206. Under the building code, the religious nature of a building use does not determine the building use's classification. *See* BUILDING CODE, *supra* note 2, § 402, *passim*.

207. *See generally* BUILDING CODE, *supra* note 2, §§ 402, 501, *passim*. This is a valid, nondiscriminatory classification scheme. *See* Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 648-49 (1981); Abram v. City of Fayetteville, 281 Ark. 63, ___, 661 S.W.2d 371, 372-73 (1983); Damascus Community Church v. Clackamas County, 45 Or. App. 1065, 1073, 610 P.2d 273, 277 (1980), *appeal dismissed*, 450 U.S. 902 (1981).

208. *See* Brief of Appellants, *supra* note 16, at 31; Brief of Respondent, *supra* note 21, at 29-30.

209. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 233-34 (1972) (state may intervene between parents and child to prevent injury to child's health or safety, even in contravention of parents' religious guidance); Prince v. Massachusetts, 321 U.S. 158, 169-70 (1944) (upheld enforcement of child labor laws in contravention of child's guardian's religious guidance); Jehovah's Witnesses v. King County Hospital, 278 F. Supp. 488, 504-05 (W.D. Wash. 1967) (requiring child's blood transfusion contrary to parents' religious beliefs), *aff'd per curiam*, 390 U.S. 598 (1968).

210. *First Baptist Church*, 97 Wash. 2d at 4, 639 P.2d at 1360.

211. *See* BUILDING CODE, *supra* note 2, at 5. *But see* C. FIELD & S. RIVKIN, *supra* note 171, at 35, 41-42, 100-01; S. SEIDEL, *supra* note 175, at 77-81, and Rivkin, *Courting Change: Using Litigation to Reform Local Building Codes*, 26 RUTGERS L. REV. 774, 774-81 (1973) (building code standards are subject to significant influence by building materials manufacturers and trade associations).

212. Risk averseness varies from one individual to another, and what is an optimal level of safety cannot be objectively determined. *See* S. SEIDEL, *supra* note 175, at 74, 306. Nevertheless, building codes serve as approximations of commonly accepted safety levels. Uniformity of application, in turn, accustoms consumers to particular levels of safety, which may then become expected. Building codes also serve to internalize the costs of a building that, without the code, would be born by parties other than the property owner. *See* S. SEIDEL, *supra* note 175, at 74. *But see* Oster & Quigley, *Regulatory Barriers to the Diffusion of Innovation: Some Evidence From Building Codes*, 8 BELL J. ECON. 361, 364 (1977).

course, the code's requirements are not absolute; the code itself provides for exceptions,[213] and for discretion in its enforcement.[214] But this discretion does not necessarily subject the code to arbitrary application. The community's experience in similar building code applications should provide a basis for identifying which code provisions are unnecessary in a particular case.[215] Requiring that the code's highly specific standards be applied in a consistent manner prevents the unbridled discretion that would render the law constitutionally defective.[216] Fourth, the building code does not, by its terms, prohibit the Church from operating the Academy.[217]

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213. *See, e.g.*, BUILDING CODE, *supra* note 2, § 104(g), *quoted in First Baptist Church*, 97 Wash. 2d at 11, 639 P.2d at 1364; *id.* § 106 (allowing use of alternate materials and methods of construction when approved by the building official).

214. *See, e.g.*, BUILDING CODE, *supra* note 2, §§ 202, 302(a), 501. Discrimination in the enforcement of a building code is a danger because few buildings strictly comply with the code, and thus the reasonableness of the code provisions depends to an extent upon the fairness of the official who is administering the law. Sometimes an administrative official's bias may affect his perspective in enforcing the code. *See, e.g.*, S. SEIDEL, *supra* note 175, at 86-88. And because typically the official's determination is given great discretion, a minimal review of building code applications may have the same effect as vesting broad discretion in an administrator. *See generally supra* note 205. But this concern is not a defect in the code; rather, this concern should indicate to courts that a closer review should be given to the application of building codes to religious property uses, assuring that de facto standards for applying the regulations, established by similar applications, have been followed in the case being reviewed. *See infra* note 226.

215. Reference to similar applications uses the standards for safety that have come to be expected in the community; a significant variation from those standards would suggest discrimination in the code's enforcement. *Cf.* Lubavitch Chabad House v. City of Evanston, 112 Ill. App. 3d 223, ___, 445 N.E.2d 343, 347 (1982) (discriminatory enforcement of zoning ordinance found where Church satisfied requirements for special use permit and only difference between the Church and other approved churches was in doctrinal matters), *cert. denied*, 104 S. Ct. 485 (1983). The *First Baptist Church* court emphasized the strict manner in which the city had enforced its building code and zoning ordinance. *See* 97 Wash. 2d 1, 4-10, 639 P.2d 1358, 1360-63 (1982). Thus, the *First Baptist Church* court might properly have required strict scrutiny of the Sumner ordinances as applied if their uncompromising enforcement amounted to discrimination. *See infra* note 226.

216. *See* Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1969). *See also supra* note 205 and accompanying text.

217. Neither the building code nor the zoning ordinance regulated any land or building characteristic that, by itself, was of religious significance to the Church. The building code regulated the manner in which the Academy was conducted, and the zoning ordinance regulated the place where it was conducted. *Accord*, Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood, 699 F.2d 303, 306-07 (6th Cir.), *cert. denied*, 104 S. Ct. 72 (1983); Seward Chapel, Inc. v. City of Seward, 655 P.2d 1293, 1299-1300 (Alaska 1982); Abram v. City of Fayetteville, 281 Ark. 63, ___, 661 S.W.2d 371, 372-73 (1983); Hough v. North Star Baptist Church, 109 Mich. App. 780, 783-84, 312 N.W.2d 158, 159-60 (1981). In contrast, a building regulation or zoning ordinance could conflict with religious values themselves. *Cf.* Pillar of Fire v. Denver Urban Renewal

Similarly, Sumner's zoning ordinance, under which the Church was denied a permit to operate the Academy, also is a valid time, place, and manner regulation. The ordinance is facially nondiscriminatory[218] and significantly furthers the sub-

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Auth., 181 Colo. 411, 418-20, 509 P.2d 1250, 1254 (1973) (eminent domain proceeding involving Pillar of Fire faith's structure, claimed to be sui generis because of unique historical and symbolic importance to the faith, raised first amendment issues requiring balancing test). *Compare* Wilson v. Block, 708 F.2d 735, 742-45 (D.C. Cir.) (development of public lands did not violate the free exercise clause where land did not play an indispensible role in Indians' religious practices), *cert. denied*, 104 S. Ct. 371 (1983), *with* Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586, 594-95 (N.D. Cal. 1983) (Forest Service plan to develop part of national forest violated religious freedom of Indians for whom the land played a central role in the practice of their religion). *See generally* Comment, *Raising the Free Exercise Clause Against Urban Renewal: Subaltern Status for Planners?*, 8 URBAN L. ANN. 219 (1974) (discussing *Pillar of Fire*).

In some respects every church or church school, including their respective locations, might be considered sui generis to the congregation using the property. *See id.* at 221 n.11. *Cf.* Note, *Architecture, Aesthetic Zoning, and the First Amendment*, 28 STAN. L. REV. 179 (1975). The Colorado courts were unwilling to adopt this position, however. After *Pillar of Fire* was remanded to the trial court, that court held that the Church had not proved that its structure was sui generis. The Colorado Supreme Court affirmed that decision. Denver Urban Renewal Auth. v. Pillar of Fire, 191 Colo. 238, 240-41, 552 P.2d 23, 24-25 (1976).

218. The zoning ordinance's use of the terms "church" and "parochial school" in its classification scheme did not discriminate among religious uses on the basis of content. The general rule in construing a zoning ordinance is that the nature of the use rather than the nature of the using organization should control the interpretation. *See* Twin-City Bible Church v. Zoning Bd. of App., 50 Ill. App. 3d 924, 927, 365 N.E.2d 1381, 1383-84 (1977); Annot., 64 A.L.R.3d 1087, § 2(a), at 1091 (1975); Annot., 62 A.L.R.3d 197, § 2(a), at 201 (1975). Although the terms "church" and "parochial school" may, for first amendment issues, take on the broad meaning given to the term "religion," *see supra* note 106, those terms have a narrow meaning in zoning ordinances, a meaning developed in case law and tied to legislative intent. *See* Abram v. City of Fayetteville, 281 Ark. 63, ___, 661 S.W.2d 371, 372 (1983). *See generally* Annot., 74 A.L.R.3d 14 (1976); Annot., 62 A.L.R.3d 197 (1975). By placing public, private, and parochial schools in the same classification, ZONING ORDINANCE, *supra* note 5, § 11.16.180(a)(1), the ordinance is facially nondiscriminatory. *See* Annot., 74 A.L.R.3d 14, § 5(b) (1976). Thus, the terms "church" and "parochial school" are not impermissible content-based classifications, but describe objectively determinable activities; this classification scheme, aimed at regulating the peripheral, secular aspects of traditional religious land uses, is valid. Hough v. North Star Baptist Church, 109 Mich. App. 780, 784-85, 312 N.W.2d 158, 160 (1981); Antrim Faith Baptist Church v. Commonwealth, ___ Pa. Commw. ___, ___, 460 A.2d 1228, 1230-31 (1983); *See* Damascus Community Church v. Clackamas County, 45 Or. App. 1065, 1073, 610 P.2d 273, 275-77 (1980), *appeal dismissed*, 450 U.S. 902 (1981). *Cf.* Young v. American Mini Theatres, Inc., 427 U.S. 50, 63-72 (1976) (city may distinguish between "adult" movie theaters and other theaters in its zoning ordinance because of the differences in the effects of the respective theaters on their neighborhood environments).

By this same reasoning, the court should have rejected outright the Church's argument that, because the Academy was doctrinally inseparable from the Church, the Academy was a church use rather than a parochial school under the zoning ordinance and building code. *See First Baptist Church*, 97 Wash. 2d at 13, 639 P.2d at 1365.

stantial governmental interests underlying zoning ordinances.[219] Although the ordinance gives the Planning Commission discretion to decide whether to allow a parochial school to operate within a residential district, that discretion is limited to considerations of land use regulation.[220] Finally, the ordinance does not prevent parochial schools from operating in the community.[221] Thus, Sumner's zoning ordinance and building code both satisfied the constitutional requirements for statutes that regulate the time, place, and manner of exercising first amendment freedoms.

By using this intermediate standard of review, the court still could have shielded the Academy from unnecessarily harsh regulations,[222] and could have prevented "the more covert forms of discrimination that may result when arbitrary discretion is

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219. One stated purpose of the zoning ordinance was "the protection and promotion of public health, safety, and general welfare." ZONING ORDINANCE, *supra* note 5, § 11.04.020. The Supreme Court often has recognized the importance of a city's power to zone for the public interest. *See, e.g.*, Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 68 (1981). *Accord*, Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 569 (1981) (Burger, C.J., dissenting) (concepts of federalism require special deference in limiting a community's zoning power). The zoning power allows a city to regulate even protected activities. *Schad*, 452 U.S. at 75. The permit system provided by the Sumner ordinance could, if properly applied, significantly further the city's interest in assuring that activities within a district are not "basically incompatible with the normal activity" in the district. *Id.*

220. The limitations on the City Planning Commission's authority to deny the permit request are specified in ZONING ORDINANCE, *supra* note 5, § 11.16.190. That section provides that the planning commission, in granting a special property use, is to be guided by considerations of whether the use requested is within the intent of the ordinance, whether the use is in the public interest, and whether the use will not damage adjacent property by decreasing its value, creating excessive noise, or creating hazards or other nuisances. A similar ordinance was upheld against a free exercise claim in Damascus Community Church v. Clackamas County, 45 Or. App. 1065, 1068-69, 610 P.2d 273, 274-75 (1980), *appeal dismissed*, 450 U.S. 902 (1981). However, the court still could have determined whether the Planning Commission used the specified criteria in rejecting the Church's permit request, rather than illegitimately rejecting the request because of neighbor opposition. *See supra* note 21. *Cf.* Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 121-23 (1928) (ordinance, permitting philanthropic property use only with the consent of the owners of two-thirds of the neighboring property, held arbitrary and in violation of due process).

221. The city is free, under the first amendment, to limit or even prohibit parochial schools in residential districts, as long as the effect is not to deny the schools reasonable access to the community. *See* Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303, 306-07 (6th Cir.), *cert. denied*, 104 S. Ct. 72 (1983); Seward Chapel, Inc., v. City of Seward, 655 P.2d 1293, 1299-1301 (Alaska 1982). *Cf.* Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976). However, such a limitation might be considered unreasonable, and therefore violative of due process. *See supra* note 202. Excluding the schools from the entire community would violate the free exercise clause. *Cf.* Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 75-77 (1981).

222. *See First Baptist Church*, 97 Wash. 2d at 9, 639 P.2d at 1363; *supra* note 132.

vested in some governmental authority."[223] Although discriminatory enforcement would have remained a possibility,[224] the free exercise and equal protection clauses[225] were available to prevent the city from administering its laws with an uneven hand.[226]

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223. Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 649 (1981).

224. *See supra* note 214. Decisions relating to the use of real estate for religious purposes often evoke emotional responses, which may lead to discrimination in administering a building code or deciding upon a special use permit application. Besides the danger that administrative bodies or individuals will enforce a zoning ordinance in accordance with their own biases, the ordinance's enforcement may be affected by the biases of neighboring property owners. Neighborhood resistance toward unorthodox religious activities is not uncommon. *See, e.g.*, Menendez, *Welcome to Rajneeshpuram, Oregon: Where "God" Drives a Rolls-Royce and a Religious Civil War is Brewing*, CHURCH & STATE, Oct. 1983, at 4-7 (conflict between citizens of Antelope, Oregon and an Indian guru's commune, incorporated as the City of Rajneeshpuram, has developed into a bitter legal conflict over land-use laws); Comment, *Zoning the Church: Toward a Concept of Reasonableness*, 12 CONN. L. REV. 571, 574 n.8 (1980); Comment, *Zoning Ordinances, Private Religious Conduct, and the Free Exercise of Religion*, 76 NW. U. L. REV. 786, 786-88 nn.1-7 (1981).

225. The federal and state constitutional provisions expressly protecting religion are quoted at *supra* note 3. Discrimination on the basis of religion generally violates the free exercise clause. *See* Sherbert v. Verner, 374 U.S. 398, 402-10 (1963).

In addition, U.S. CONST. amend. XIV, § 1 provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." WASH. CONST. art. I, § 12 provides: "No law shall be passed granting to any citizen . . . privileges or immunities which upon the same terms shall not equally belong to all citizens. . . ." The state and federal equal protection provisions have been similarly construed. Texas Co. v. Cohn, 8 Wash. 2d 360, 374, 112 P.2d 522, 529 (1941). The Supreme Court has indicated that religious classifications generally are unjustified and therefore violate the equal protection clause. *See* Oyler v. Boles, 368 U.S. 448, 456 (1962). However, as a practical matter, a claim of religious discrimination would normally be analyzed solely as a free exercise claim. *See* CONSTITUTIONAL LAW, *supra* note 3, at 816-18.

226. *See* Sherbert v. Verner, 374 U.S. 398, 402 (1963). However, proving invidious discrimination against religion in the enforcement of a law may be difficult. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266-68 (1977). Simply showing inequality in the enforcement of the law usually will not be sufficient. *Id.* at 266; State v. Nixon, 10 Wash. App. 355, 358, 517 P.2d 212, 214 (1973). Unlike race or gender, religious beliefs and practices are so diverse that often they do not fit into discreet categories for purposes of showing a pattern of discrimination. And as a practical matter, a zoning district may not have enough comparable property uses to show discrimination in a particular case.

Nevertheless, proving a significant variation from the usual manner of enforcement may indicate invidious discrimination in the application of the zoning ordinance or building code. *See Metropolitan Hous. Dev. Corp.*, 429 U.S. at 266-67. The *First Baptist Church* court emphasized the strict manner in which the city had enforced its building code and zoning ordinance. City of Sumner v. First Baptist Church, 97 Wash. 2d 1, 4-10, 639 P.2d 1358, 1360-63 (1982). If the city's uncompromising enforcement of the Sumner ordinances amounted to discrimination against religion, the court would have been correct in finding a burden on religion that required a strict scrutiny standard of review. *Cf.* Lubavitch Chabad House v. City of Evanston, 112 Ill. App. 3d 223, ___, 445 N.E.2d 343, 347 (1982) (discriminatory enforcement of zoning ordinance violated free exercise

Admittedly a church's suit will not succeed as often under a time, place, and manner analysis as it would under a strict scrutiny standard of review.[227] However, to require a particularized review whenever government, acting within its legitimate sphere of authority, incidentally affects the special religious practices of an individual or a group would lead to anarchy,[228] and possibly to a dilution in the protection now accorded the central components of religious practices.[229] A secular government, by definition, has a limited duty and capacity to accommodate religious practices.[230] By using the Constitution to attack those limits, some religious organizations may temporarily gain advantage. But these temporary gains may ultimately place religious freedom in jeopardy; in attempting to avoid the harshness of generally applicable laws in a secular society, those religious adherents may find their freedoms lost through dilution with less important interests, or through entanglement with government.[231]

VII. Conclusion

Neither Sumner's zoning ordinance nor its building code infringed upon the religious freedom of the members of the First Baptist Church of Sumner.[232] Thus, the Washington Supreme Court should not have required a strict scrutiny review of those laws which, as applied, only incidentally burdened the practice of religion.[233] The court should have upheld the laws as valid time, place, and manner regulations, and should have only required the trial court to determine whether the ordinances had

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clause), *cert. denied*, 104 S. Ct. 485 (1983).

227. *See supra* note 226.

228. *See* Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972) ("the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests."); Braunfeld v. Brown, 366 U.S. 599, 606-09 (1961). *Cf.* Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632, 656-57 (1974) (Powell, J., concurring) (requiring individualized treatment often is impractical, particularly when administrative discretion is essential to the regulatory scheme).

229. Requiring strict scrutiny of laws that only incidentally impact a religious practice could dilute the protections currently given to the core of religious practices by increasing the hardship to society of accommodating religious practices. Cf. *supra* notes 81-110 and accompanying text.

230. *See* United States v. Lee, 455 U.S. 252, 259-61 (1982); Braunfeld v. Brown, 366 U.S. 599, 606 (1961); Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970).

231. *See supra* notes 156-78 and accompanying text.

232. *See supra* notes 50-155 and accompanying text.

233. *See supra* notes 151-55 and accompanying text.

been applied in a nondiscriminatory manner. When laws such as the Sumner ordinances only incidentally burden a religious practice, applying those laws in a uniform, nondiscriminatory manner minimizes church-state conflicts and best protects the cherished religious liberty that is guaranteed to us by the Constitution.[234]

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234. *See supra* notes 156-78, 202-05 and accompanying text.