Rajneeshpuram: Religion Incorporated

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Notes

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The first amendment of the United States Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." These two clauses, known as the establishment clause and the free exercise clause respectively, establish the constitutional mandate of government "neutrality" toward religion. Government must steer "a neutral course between the two Religious Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." Yet, while neutrality is the central principle of both clauses, there is no single standard for determining what is a religiously neutral act. Instead, the neutrality, and hence permissibility, of a governmental

1. U.S. Const. amend. I.
3. The free exercise clause was held applicable to the states in Cantwell v. Connecticut, 310 U.S. 296 (1940). The establishment clause was held applicable to the states in Everson v. Board of Educ., 330 U.S. 1 (1947).
5. J. Nowak, supra note 2, at 1029. The Supreme Court itself recognized the lack of guidance:

[It] is evident from the numerous opinions of the Court, and of justices in concurrence and dissent in the leading cases applying the Establishment Clause, that no "bright line" guidance is afforded. Instead, while there has been general agreement upon the applicable principles and upon the framework of analysis, the Court has recognized its inability to perceive with invariable clarity the "lines of demarcation in this extraordinarily sensitive area of constitutional law."


Justice Harlan, in a separate opinion in Walz, attempted to set forth a standard by drawing an analogy between an equal protection analysis and a freedom of religion analysis:

[917]
act must be examined in terms of the challenge to that act.6

Rajneeshpuram, an incorporated Oregon city dedicated to the teachings of Bhagwan Shree Rajneesh, represents a challenge to this constitutional mandate of governmental “neutrality.” Bhagwan Shree Rajneesh, an Indian guru,7 and his disciples have made Rajneeshpuram their home. The Bhagwan’s followers incorporated Rajneeshpuram as an Oregon municipality,8 where they have created a unique religious community dedicated to the teachings and messages of Rajneeshism.9 The city, incorporated as the fulfillment of a religious vision, naturally raises new questions for the interpretation of “separation of church and state.” In light of the number of religious communities throughout the nation and the current Supreme Court’s increasing willingness to “accommodate” religion,10 Rajneeshpuram will represent an important constitutional question for the first amendment.

This Note presents the United States Supreme Court’s test for evaluating establishment clause challenges, adopted in Lemon v. Kurtzman,11 and then analyzes the incorporation of Rajneeshpuram under that test. The analysis discusses whether the incorporation violates the establishment clause of the first amendment by “establishing an impermissible

Neutrality in its application requires an equal protection mode of analysis. The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders. In any particular case the critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter.

Walz, 397 U.S. at 696 (Harlan, J., separate opinion). The Court, however, has never adopted Harlan’s approach. “Instead, the Court has reviewed the claims under the different clauses on independent bases and has developed separate tests for determining whether a law violates either clause.” J. NOWAK, supra note 2, at 1029.

6. As the Supreme Court stressed in Lynch v. Donnelly, 104 S. Ct. 1355 (1984): “[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area.” Id. at 1362. “In each case, the inquiry calls for line drawing; no fixed per se rule can be framed.” Id. at 1361; see also Nyquist, 413 U.S. at 773; Tilton v. Richardson, 403 U.S. 672, 677-78 (1971); Lemon v. Kurtzman, 403 U.S. 602, 614 (1971); Walz, 397 U.S. at 668 (“the purpose was to state an objective, not to write a statute”).

7. Bhagwan Shree Rajneesh left his ashram, or community of Hindus, in Poona, India, and came to the United States in 1981. N.Y. Times, Mar. 18, 1983, at A14, col. 2 (city ed.). Rajneesh means “the blessed one” in Hindi. Id. He and his followers, called “Rajneeshees” or “Sannyasins,” started a commune in Montclair, New Jersey, in late 1981. The group left New Jersey and settled on a ranch in central Oregon. Id. The Bhagwan and his disciples currently reside on the ranch and have incorporated a part of it as a municipality called Rajneeshpuram. Id.; see infra notes 80-87 & accompanying text; see also ECONOMIST, Sept. 29, 1984, at 28-29.

8. See infra notes 80-87 & accompanying text.

9. See infra notes 129-33 & accompanying text.

10. This notion of “accommodation” was first expressed in Zorach v. Clauson, 343 U.S. 306, 312-14 (1952) (upholding a program of release-time for prayer outside public school premises).

union between religion and government.” The Note also considers whether Rajneeshpuram’s sharing of state revenues violates the establishment clause by providing constitutionally prohibited aid to religion. The Note then addresses the free exercise implications that a denial of municipal status and revenue distribution might raise. The Note concludes by appraising the relevance of each religion clause to the instant case and suggesting an analysis that would preserve the Court’s neutral path. Specifically, the Note determines that Rajneeshpuram’s existence results in establishment clause violations, while the lack of incorporated municipal status will not impinge on the free exercise of its inhabitants.

Establishment Clause Precedent

The United States Supreme Court has applied the establishment clause12 to correct or prevent acts of the government “respecting an establishment of religion.”13 As the Supreme Court has often noted, the drafters’ choice of the word “respecting” was not inadvertent. The drafters of the Constitution did not merely wish to preclude the actual “establishment” of a state church or a state creed; rather, they sought to outlaw any enactment that might constitute “a step that could lead” to the unity of government and religion.14 In the oft-quoted words of Thomas Jefferson, the first amendment seeks to erect, as near as possible, “a wall of separation, between church and state.”15 In particular, the drafters believed that individual religious liberty could be safeguarded only if government “was stripped of all power to tax, to support, or otherwise to assist any or all religions,”16 and conversely that only by “rescu[ing] temporal institutions from religious interference”17 could the civil liberties of the population be preserved.

To ensure these protections, the United States Supreme Court in Lemon v. Kurtzman18 consolidated the current tripartite test for determining the constitutionality of government action under the establishment clause.19 First, the government action “must have a secular


13. U.S. Const. amend I.


15. See Torcaso, 367 U.S. at 493; Everson, 330 U.S. at 16.


17. Id. at 15 (citations omitted); see L. Tribe, supra note 2, § 14-3, at 816-19.

18. 403 U.S. 602 (1971) (striking down two state programs that provided financial aid to nonpublic schools).

19. Id. at 612-13. This test has been reaffirmed in subsequent Supreme Court decisions. See, e.g., Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216, 3221-22 (1985); Thorton v. Calder, Inc., 105 S. Ct. 2914, 2917 (1985); Wallace v. Jaffree, 105 S. Ct. 2479, 2489 (1985);
legislative purpose;"\textsuperscript{20} second, "its principal or primary effect must be one that neither advances nor inhibits religion;"\textsuperscript{21} and third, it must not foster "an excessive government entanglement with religion."\textsuperscript{22} The Lemon Court held that a failure to satisfy any one of these three requirements would be sufficient to render the challenged act unconstitutional.\textsuperscript{23}


Recently, Justice Brennan praised the Lemon tripartite test as being well tailored to further establishment clause principles:

This well defined three-part test expressed the essential concerns animating the Establishment Clause. Thus, the test is designed to ensure that the organs of government remain strictly separate and apart from religious affairs, for a "union of government and religion tends to destroy government and degrade religion." And it seeks to guarantee that government maintains a position of neutrality with respect to religion and neither advances nor inhibits the promulgation and practice of religious beliefs.


20. Lemon, 403 U.S. at 612.

21. Id. (citing Board of Educ. v. Allen, 392 U.S. 236, 243 (1968)). This second prong of the Lemon test demonstrates the polar forces of the religion clauses. Advancing religion constitutes establishment, but inhibiting religion means prohibiting its free exercise, which the Court has held also constitutes a violation of the separation of church and state. Constitutional Dilemma, supra note 2, at 565-66 (citing Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947)). For an application of this dual violation concept, see McDaniel v. Paty, 435 U.S. 618, 636 (1978) (Brennan, J., concurring).

22. Lemon, 403 U.S. at 613 (citing Walz v. Tax Comm'n, 397 U.S. 664, 674 (1978)). The excessive entanglement concept is thought to introduce into religion clause jurisprudence a "phrophylactic dimension." Ripple, The Entanglement Test of the Religion Clauses—A Ten Year Assessment, 27 U.C.L.A. L. REV. 1195, 1200 (1980). "Administrative relationships between religious and civil authorities are forbidden not only when they result in government support or direction of religious enterprises but also when they are 'pregnant with dangers of excessive government direction' of such enterprises." Id. (quoting Lemon, 403 U.S. at 620).

In attempting to reduce potential church-state strife, "[r]elationships which might cause religiously-based disputes are forbidden—whether or not any real friction between the church and civil state is actually present." Ripple, supra, at 1200-01 (emphasis in original). Further, a secondary role for "excessive entanglement" is to act as an " 'early warning system' for more traditional establishment clause hurdles," such as the question of primary effect. Id. at 1203 (citing Nyquist, 403 U.S. at 798).

23. Lemon, 403 U.S. at 613; see The Supreme Court, 1970 Term, 85 HARV. L. REV. 3, 168 (1971); Note, State Aid to Nonpublic Elementary and Secondary Schools Held Violative of the Establishment Clause of the First Amendment, 17 VILL. L. REV. 574, 581 (1972). It has been suggested that the latter two factors are both "effects" tests; the former focuses on the effects of the government action on religion while the latter focuses upon the effects of the government action on the relationship existing between church and state. Id. at 581. The
The *Lemon* test has been applied by the Supreme Court either to strike down or uphold legislation in various arenas of conflict: sabbatarian exemptions, conscientious objector status, and school prayer. Two arenas, however, are particularly analogous to the focus of this Note and, therefore, will be examined more closely: aid to religious institutions and delegation of governmental authority.

**Aid to Religious Institutions: *Lemon v. Kurtzman***

An important arena in which the Supreme Court has had ample opportunity to apply the three-part *Lemon* analysis is government financial aid to religious institutions. The opinion in *Lemon* itself illustrates the Court's approach in this area.

The relationship between the second and third phases of the test appear "to be such that where the degree of advancement of religion is slight and subordinate, a greater degree of entanglement would be justified." *Id.* at 581 n.52. "On the other hand, where the advancement of religion is significant and substantial, a significantly lesser degree of entanglement would be sufficient to render a program unconstitutional." *Id.*

24. See, e.g., Gallagher v. Crown Kosher Mkt., 366 U.S. 617 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961); Two Guys v. McGinley, 366 U.S. 582 (1961); McGowan v. Maryland, 366 U.S. 420 (1961). In these so-called “Sunday Closing Law” cases, the Supreme Court found that laws proscribing certain business activities on Sundays were not necessarily motivated by religion and, hence, were not laws “respecting an establishment of religion.” *McGowan*, 366 U.S. at 445. The Court reasoned that such laws had become an inherent part of an effort to improve the health, safety, and general well-being of this country's citizens, wholly apart from its original genesis in religion. *Id.* The Court stated that to strike down such laws would be to give a “constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and state.” *Id.* The Court also held that such laws did not violate the free exercise clause of the first amendment. *Id.* at 453. Two years later, the Court held that it was a violation of the free exercise clause to deny employment compensation to a Seventh-Day Adventist who would not accept an available position that would require her to work on Saturdays. Sherbert v. Verner, 374 U.S. 398, 403-06 (1963).

25. Welsh v. United States, 398 U.S. 333, 356-57 (1970) (Harlan, J., concurring). In *Welsh*, Justice Harlan described the issue in the case as whether a statute that defers to an individual's "views emanat[ing] from adherence to theistic religious beliefs is within the power of Congress." *Id.* at 356. He stated that in order to pass muster, such a statute, having chosen to exempt, “cannot draw the line between theistic or nontheistic religious beliefs on the one hand and secular beliefs on the other," for such distinctions are not compatible with the neutrality mandated by the establishment clause. *Id.*

26. See, e.g., Engel v. Vitale, 370 U.S. 421 (1962). In *Engel*, the Supreme Court invalidated a New York law allowing state officials to compose a prayer and require that it be recited each day, despite the fact that the prayer was nondenominational and pupils who did not want to participate could be excused. *Id.* at 425-26. One year later, the Court struck down a Pennsylvania law permitting state officials to require a reading from the Bible or a recitation of the Lord's Prayer. Abington School Dist. v. Schempp, 374 U.S. 203, 226-27 (1963). The Court did not, however, speak in absolutes. Should study of the Bible or religion be presented objectively as part of a secular program of education, the Court reasoned that it would comport with the principles of the first amendment. *Id.* at 225; see also Stone v. Graham, 449 U.S. 39 (1980).

27. 403 U.S. 602 (1971).

Lemon involved state financial aid programs in Pennsylvania and Rhode Island. The Pennsylvania Nonpublic Elementary and Secondary Education Act provided for the “purchase” of certain secular educational services from nonpublic schools. The statute authorized the Pennsylvania Superintendent of Public Instruction to reimburse eligible schools for teachers’ salaries, textbooks, and instructional materials. Reimbursement was prohibited for any course that contained subject matter expressing religious teaching or the morals or forms of worship of any sect. Similarly, the 1969 Rhode Island Salary Supplement Act authorized state officials to pay a salary supplement directly to teachers of secular subjects in nonpublic elementary schools. Both statutes were carefully drafted to ensure that aid was provided only to the secular aspects of parochial education. Under both state systems, however, Catholic schools were the main beneficiaries of the programs.

Both state programs were challenged under the establishment clause
of the first amendment. After examining the "cumulative criteria" gleaned from prior cases dealing with the establishment clause, the Court enunciated its three-part test for determining whether an act passes muster under that clause. The Court then applied the new test to the two state programs. The Court found that both statutes passed the "secular purpose" test, and that it was unnecessary to consider their "primary effect." The "excessive entanglement" criterion, however, proved to be the determinative factor.

In order to determine whether the statutes successfully met the "excessive entanglement" standard, the Court focused on three sub-factors: "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." Considering factors such as the proximity of the schools to churches and the pervasive religious atmosphere inside the classrooms, the Court first concluded that parochial schools constituted "an integral part of the religious mission of the Catholic Church." Because the states' parochial school systems were essentially similar, the Court found that both systems had a substantial religious character and purpose.

The nature of the aid that the two statutes provided also militated against their approval. Both acts authorized supplementing the salaries of teachers of secular subjects. Non-ideological assistance, such as transportation and secular textbooks, had been held constitutionally permissible, but the Lemon Court reasoned that "teachers have a substantially different ideological character from books." Thus, the Court suspected that this aid could possibly lead to dangerous church-state entanglements. For example, parochial school teachers could be seriously

37. Id. at 608, 611.
39. See supra text accompanying notes 20-22.
40. Lemon, 403 U.S. at 613. The Court accepted the statement of purpose offered by both Rhode Island and Pennsylvania: "to enhance the quality of the secular education in all schools covered by the compulsory attendance laws." Id.
41. Id. at 613-14. Relying on the defect of excessive entanglement, the third prong of its test, the Court did not decide whether the effect of the legislative programs would violate the establishment clause. Id. See J. NOWAK, supra note 2, at 1034, in which the authors view the Court's discussion as indicating that it would have found a prohibited effect in these programs had it analyzed the cases under this prong of the Lemon test.
42. Lemon, 403 U.S. at 613-14.
43. Id. at 615.
44. Id. at 616.
45. Id. at 616, 620.
46. Id. at 607-11.
47. See supra note 28.
48. Lemon, 403 U.S. at 617.
impaired in their duties if they had to avoid mingling religion with secular subjects. The Pennsylvania statute had the additional defect of providing financial aid directly to the parochial schools.

The Court concluded that the above factors gave rise to "entangling church-state relationships of the kind the Religion Clauses sought to avoid." In order to effectively supervise such programs and to satisfy the first amendment, "[a] comprehensive, discriminating, and continuing state surveillance [would] inevitably be required . . ." Moreover, the Court feared that these statutes would engender a divisive political atmosphere by polarizing voters along religious lines. As a result of this analysis, the Court declared the two state statutes unconstitutional.

Delegation of Governmental Authority to Religious Organizations: Larkin v. Grendel's Den, Inc.

As Justice Black forcefully noted in Everson v. Board of Education: "The 'establishment of religion' clause of the First Amendment means at least this: . . . Neither a state nor federal government, can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa." Regardless of the precise phraseology describing this first amendment mandate, the Supreme Court clarified in Larkin v. Grendel's Den, Inc., that at minimum it precludes a state from ceding governmental powers to a religious organization.

Grendel's Den, Inc., a restaurant, was denied a license to sell alcoholic beverages by a local Massachusetts licensing agency. Under Massachusetts law, the issuance of a liquor license could be prohibited if the applicant's place of business was located within a 500-foot radius of an objecting church or school. The Massachusetts Alcoholic Beverage Control Commission sustained the Cambridge License Commission's de-

49. Id. at 618-19.
50. Id. at 621. In the opinion of the Court, this factor clearly distinguished it from the statutes involved in Everson and Allen. Id.
51. Id. at 616.
52. Id. at 619.
53. Id. at 622.
54. Id. at 607.
57. Id. at 15-16 (emphasis added).
59. The Grendel's Den Court also pointed out that "[a]t the time of the Revolution, Americans feared not only a denial of religious freedom, but also the danger of political oppression through a union of civil and ecclesiastical control." Grendel's Den, 459 U.S. at 127 n.10; see also McDaniel v. Paty, 435 U.S. 618, 622-23 (1978). See generally B. Bailyn, Ideological Origins of the American Revolution 98-99 n.3 (1967).
nial of the liquor license solely on the basis of an objection submitted by the Holy Cross Armenian Catholic Church, which was located ten feet from the restaurant. 62 Grendel's Den brought an action against the state and city licensing commissions challenging the validity of this Massachusetts law under the establishment clause of the first amendment. 63 The Supreme Court held that the delegation to churches of the power to veto applications for liquor licenses violated the establishment clause of the first amendment. 64

The Grendel's Den Court commenced its analysis by recognizing the state's power to protect the environment around certain institutions through the exercise of reasonable zoning laws. 65 The Court noted that judicial deference to the exercise of zoning powers in the area of liquor regulation is particularly appropriate in light of the states' extensive powers under the twenty-first amendment. 66 The majority stated, however, that because the Massachusetts statute delegated to religious entities the power to veto certain liquor license applications, it was not afforded the judicial deference warranted by a legislative zoning judgment. 67 When the exercise of a state's power to zone pursuant to the tenth and twenty-first amendments impinges upon the guarantees of the establishment clause, the Court reasoned that the former must give way to the latter. 68

The court, referring to Thomas Jefferson's concept of a "wall of separation," 69 explained that the establishment clause grew out of a belief that religion and government must be insulated from each other in order to coexist. 70 The Court recognized that a limited degree of entanglement is inevitable in a modern society, but viewed vesting discretionary governmental power in a religious body as a substantial breach of the "wall of separation." 71

Next, the Court turned to an analysis of this "breach" under the Lemon test. It acknowledged that the state has a legitimate governmen-

62.  Grendel's Den, 459 U.S. at 118.
63.  Id.
64.  Id. at 120.
65.  Id. at 121.
66.  Id. at 121-22 (citing California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 106-10 (1980); California v. LaRue, 409 U.S. 109 (1972)).
67.  459 U.S. at 122 (citing Arno v. Alcoholic Beverages Control Comm'n, 377 Mass. 83, 89, 384 N.E.2d 1223, 1227 (1979)). The Court based this conclusion on the most recent construction of the statute by the highest Massachusetts court. 459 U.S. at 122 n.4 (citing Arno, 377 Mass. at 89, 384 N.E.2d at 1227).
68.  See Grendel's Den, 459 U.S. at 122 n.5.
69.  Grendel's Den, 459 U.S. at 122 (citing Reynolds v. United States, 98 U.S. 145, 164 (1879)) (quoting Reply from Thomas Jefferson to an address by a committee of the Danbury Baptist Association (January 1, 1802), reprinted in 8 WRITINGS OF THOMAS JEFFERSON 113 (Washington 1861)).
70.  Grendel's Den, 459 U.S. at 122.
71.  Id. at 123.
tal interest in protecting the environment around certain institutions. Thus, the statute had a valid secular purpose, satisfying the first requirement of Lemon. The Court found, however, that the primary effect of the section advanced religion because the standardless delegation of veto power empowered churches to promote "explicitly religious goals," a result proscribed by the second prong of the Lemon test.

Applying the third prong of the Lemon test, the majority reasoned that Massachusetts law resulted in the very "fusion of governmental and religious functions" that was feared by the framers when the establishment clause was adopted. The Court found that by substituting the unguided and unilateral power of a church for the reasoned decision-making of a legislative body, "the statute enmesh[ed] churches in the processes of government." In holding that the Massachusetts statute violated the third prong, the Court concluded that "few entanglements could be more offensive to the spirit of the Constitution."

Having reviewed establishment clause precedent on financial aid and governmental delegation of authority to religious organizations, this Note now examines the incorporation of Rajneeshpuram.

The City of Rajneeshpuram

The Incorporation of Rajneeshpuram

In 1981, the Indian guru Bhagwan Shree Rajneesh and his followers
purchased a 64,22980 acre parcel of land81 in rural Wasco County, Oregon.82 Thereafter, Bhagwan Shree Rajneesh and his followers, "Rajneeshees," took the necessary steps to incorporate over 2,000 acres83 of the parcel, now known as Rancho Rajneesh,84 as a municipality. On

Author dated Sept. 19, 1984 (copy on file with The Hastings Law Journal) [hereinafter cited as Mayor's Letter to Author].

Since 1982, the disciples have constituted a majority of Antelope's residents, established several businesses, occupied five of the six city council seats, had one representative on the Antelope School Board, and elected one of their members as mayor. The new city council then established a nudist park, enacted the first city property taxes, increased the water rates and hired a Rajneeshee as City Attorney. Washington Post, July 30, 1983, at A3, col. 1.

On September 18, 1984, the citizens of Antelope voted to change the city's name to the City of Rajneesh. The City of Rajneesh now has a population of 95. At a recent City Council meeting, the City of Rajneesh appointed one of the council members as Peace Force Commissioner and voted to create their own peace force to provide police protection. Mayor's Letter to Author, supra. The Rajneesh City Council has also granted Rajneesh Investment Corporation (RIC) a conditional use permit to place 48 apartment units on two parcels of land that the corporation owns in the town. Oregonian, Oct. 17, 1984, at C5, col. 5.

Although they share similar characteristics, Rajneeshpuram and the City of Rajneesh might be legally distinguished in the context of the establishment clause on the basis of the state's involvement in their respective incorporations. Rajneeshpuram with its infrastructure, as discussed infra text accompanying notes 95-128, was proclaimed a municipal incorporation by Wasco County, a political subdivision of Oregon state. The City of Antelope, on the other hand, was a preexisting municipal corporation operating under Oregon law before the disciples constituted a majority of its citizens. The State of Oregon merely acknowledged the name change. This distinction allows for different conclusions as to whether the state's acts violate the establishment clause. See infra text accompanying notes 172-213.

In light of the similarity of the two cities' organizational infrastructure, however, a court could still conclude that an excessive intermingling between church and state existed in the City of Rajneesh. See infra text accompanying notes 193-211. A court could also conclude that state revenue sharing by the City of Rajneesh violated the first amendment. See infra text accompanying notes 222-64. It is important to note, however, that any differences between the two cities' power distribution and land ownership may alter these conclusions. For example, if the City Council of the City of Rajneesh merely consists of Rajneeshees without the pervasive overlapping of authority among the various religious organizations, discussed infra text accompanying notes 95-128, the City of Rajneesh would have a much stronger free exercise claim that could tip the balance in favor of its constitutionality. See infra text accompanying notes 292-301. For a similar comparison between Rajneeshpuram and Utah cities predominantly made up of Mormons, see infra notes 149-69 & accompanying text.

80. 64,229 acres is more than twice the size of San Francisco. 21 FUNK & WAGNALLS STANDARD REFERENCE ENCYCLOPEDIA 7794 (1969).


82. Wasco County is a political subdivision of the State of Oregon with a population of approximately 22,000 inhabitants. San Francisco Examiner, Sept. 17, 1984, at Al, col. 5.

83. Subsequently, the City annexed 119 additional acres; however, the Oregon Court of Appeals in Perkins v. City of Rajneeshpuram, 68 Or. App. 726, 686 P.2d 369 (1984), affirmed the Land Use Board of Appeals order disallowing the City's annexation of 119 acres of agricultural land, and its rezoning of the land for urban use. This decision is likely to be appealed. Hence, the exact city limits are presently undefined.

November 4, 1981, the Wasco County Court ordered that an incorporation election be held.85 The election was held on May 18, 1982, and the incorporation was approved by a unanimous vote of the 154 electors.86 On May 26, 1982, the Wasco County Court issued a Proclamation of Incorporation in which the city of Rajneeshpuram ("Rajneeshpuram" or the "City") was recognized as a putative municipal corporation under Oregon state law.87

As a duly incorporated municipality within the political subdivision of Wasco County, Rajneeshpuram may exercise the full range of sovereign powers and authority delegated to municipal corporations under the law of Oregon.88 Since its incorporation, Rajneeshpuram has exercised these powers by organizing a city government, electing a city council, and enacting a city charter.89 The City Council, in which the City has vested all its municipal powers,90 has subsequently established a "peace force" certified under state law to provide the City's inhabitants with police protection.91 It has also taken zoning and other land use actions.92

In addition to delegation of certain powers, Oregon state law also provides for the apportionment and distribution of certain state revenues to Oregon cities.93 Consequently, the incorporated municipality of Rajneeshpuram is entitled to receive a proportional share of these revenues. Prior to December 31, 1983, the state distributed $10,484.86 in state revenues to the City under various state revenue sharing statutes.94

The Infrastructure of Rajneeshpuram

The ownership, organization, and governmental authority of Rajneeshpuram is dispersed among four separate entities: Rajneesh

D1, col. 2. The investment in the ranch exceeds $100 million. Id. at D2, col. 5. Labor on the ranch is considered "worship" and is done without pay by the disciples. This practice resembles that of the Shakers who also receive no monetary compensation for their labor. Id.
86. Complaint for Declaratory Relief at 4, State v. City of Rajneeshpuram, No. 84-359 (D. Or. filed Mar. 28, 1984) (copy on file with The Hastings Law Journal ) [hereinafter cited as Complaint].
87. Id.
88. OR. REV. STAT. §§ 221.005-.106 (1983).
89. Complaint, supra note 86, at 6.
91. Complaint, supra note 86, at 2.
92. Id.
94. Complaint, supra note 86, at 6.
vestment Corporation ("RIC"), Rajneesh Foundation International ("RFI"), Rajneesh Neo-Sannyas International Commune ("the Commune"), and the City Council, acting on behalf of the City.

RIC is a "for profit" corporation doing business in and organized under the laws of the State of Oregon. In the fall of 1981, RIC was incorporated for the purpose of engaging "in any and all lawful activity for which corporations may be organized under O[regon] R[evised] S[tatutes] Chapter 57" and was capitalized by means of a transfer from RFI to RIC of the 64,229 acre Rancho Rajneesh in exchange for stock. RIC is the sole owner of Rancho Rajneesh, which includes all the real property, except one county road, within the entire City. Bhagwan Shree Rajneesh's Secretary, or top aide, is a member of RIC's Board of Directors and her husband is both a member of the Board and RIC's president; together they constitute a controlling majority of that Board. All of the directors and officers of RIC are Rajneeshees.

RFI is a nonprofit corporation organized under the laws of the state of New Jersey and doing business in Oregon. It is a religious foundation exempt from taxation under the Internal Revenue Code. Its corporate purpose is as follows:

This corporation is a non-profit organization organized exclusively for charitable purposes and particularly for the spreading of religious teachings and messages of Bhagwan Shree Rajneesh which enables one to enjoy life in its fullest dimensions; to achieve the state of universal

96. Id.
98. Id. at 10.
99. Rajneeshpuram is situated entirely within the confines of Rancho Rajneesh and is comprised of three separate parcels of land, which are joined only by Wasco County Road 305. Road 305 is the only public thoroughfare and the only publicly owned property within the City and Rancho Rajneesh. The portion of Road 305 which passes through and connects the incorporated areas has been included within the City and has been redesignated "Sufi Road." Id. at 5.
100. Id. at 8. Subsequent to the writing of the text, the Rajneesh's Secretary resigned her positions in the Commune during the weekend of September 14, 1985, amid charges by the Commune's top officials that she tried to poison a number of Commune members. San Francisco Chron., Sept. 17, 1985, at A3, col. 1. Therefore, the Note reflects her role as of the time the State's complaint was filed.
101. Complaint, supra note 86, at 8.
102. Id. at 10.
103. Id. at 7.
religiousness which is the essence and source of all religions by reviving and reexperiencing with the lost, hidden and esoteric techniques of meditation which have existed in all the basic religions; to do any other act or thing incidental to or connected with the foregoing purposes or in advancement thereof . . . .

RFI headquarters is located in the neighboring City of Rajneesh, formerly known as Antelope, Oregon. In addition to marketing the Rajneeshe's books, video tapes, tape recordings, and photographs, "RFI is a part of the organizational infrastructure through which Rajneeshees conduct their religious practices." Bhagwan Shree Rajneesh has assigned property rights to RFI and his Secretary is RFI's president. RFI owns all of the stock in RIC.

In December 1981, RFI leased to the Commune all real property in and surrounding the City. By the terms of the lease, RFI was granted an option to lease back all or any part of the subject property for RFI's use for religious purposes. When RFI subsequently conveyed the 64,229 acres (including the real property of the City) to RIC, it assigned its rights under the lease agreement to RIC, but expressly reserved all leaseback rights. Thus, RFI retains the power to lease back the property for religious purposes.

The Commune is a nonstock corporation organized under the Oregon Cooperative Corporation Act. The Commune was incorporated in December 1981 and its purpose is "to be a religious community whose life is, in every respect, guided by the religious teachings of Bhagwan Shree Rajneesh and whose members live a communal life with a common treasury . . . ." The Commune is governed by a Board of Directors and its day to day business is conducted by corporate officers. The bylaws of the Commune designate the Secretary of Bhagwan Shree Rajneesh as an ex officio member of the Commune's governing body and

107. The Rajneeshees had not originally planned to settle in Antelope (now the City of Rajneesh), but then moved in and established RFI headquarters because Oregon law forbade them from conducting business outside an incorporated city. Washington Post, July 30, 1983, at A3, col. 2.
108. Id.
110. Id.
111. Id. at 8.
112. Id. at 6.
113. Id. at 12.
114. Id.
115. Id. at 12-13.
116. Id. at 13.
118. Id. art. III.
give her control over admission to and expulsion from membership in the Commune.\footnote{Complaint, supra note 86, at 11.} Applications for membership in the Commune are considered by the Board of Directors as a whole, but no one may be admitted as a member without the Secretary’s approval.\footnote{Id. at 7.} The Secretary’s husband is the “Senior Executive” of the Commune.\footnote{Id. at 8.} All of the Commune members are Rajneeshees.\footnote{Id. at 7.}

The Commune owns a long-term leasehold on all of the Rancho Rajneesh land.\footnote{Id. at 10. This leasehold includes all of the real property (except the county road) within Rajneeshpuram. Id.} All city real property and offices, including City Hall, are subleased or otherwise made available to the City by the Commune.\footnote{Id. at 7-8.} Consequently, all residents of the City are either members or invitees of the Commune.\footnote{See infra notes 164-65 & accompanying text. Most of the City, including City Hall, is accessible only by means of roads operated by the Commune for its members and invitees. Only a small portion of the City is accessible by use of Wasco County Road 305. The Commune possesses and has exercised substantial direct control over visitor access to the City and visitors’ activities within the City. All visitors are asked to “check in” and may be required to obtain a “visitor’s pass” as a condition to frequenting or patronizing any facilities, other than City Hall, which are not located directly on the county road right of way. Some visitors have been required to submit to searches as a condition of access to the City. Complaint, supra note 86, at 12.}

The City Council consists of five members,\footnote{RAJNEESHPURAM, OR., RAJNEESHPURAM CHARTER OF 1982 ch. II, § 7.} all of whom are Rajneeshees. The mayor of Rajneeshpuram is also the Corporate General Manager of the Commune. On behalf of RIC, he has exercised corporate powers and has acted as a spokesperson on behalf of RFI.\footnote{Complaint, supra note 86, at 9.} The Recorder and Treasurer of Rajneeshpuram is also Treasurer of the Commune, a City Budget Committee member, and a city planning committee (“Committee for Citizen Involvement”) member. Another council member is a reserve officer on the Rajneeshpuram “Peace Force” and has been employed by RFI.\footnote{Id.}

As the above description depicts, the governing power of Rajneeshpuram rests in just a few hands. The interrelationship between the City’s governing bodies and the religious organization’s highest authority blurs the church-state distinction.

\section*{Religious Character of the City}

In addition to the religious functions served by RFI and the Comm-
mune, the City itself has a distinct religious character. The Rajneeshees assert that the development of a religious community at Rancho Rajneesh is the fulfillment of a "religious vision" by the followers of Bhagwan Shree Rajneesh, and that incorporation as a city is necessary to provide essential services to members of their religion so that they can practice the tenets of Rajneeshism. The City functions as the worldwide "spiritual mecca" for Rajneeshees, and serves as both a monument to and a residence for Bhagwan Shree Rajneesh.

According to Rajneesh religious tenets, work on the Ranch is a form of worship: work stations conducted by the Commune are called "temples" and each temple is supervised by a religious "coordinator." Coordinators meet frequently to discuss the unified work of the Commune. Supervision by the Commune and religious designation extends to Rajneeshpuram and its various "city functions," such as the provision of police services.

The Current Controversy

Based on the foregoing facts, the Oregon Attorney General's office, on behalf of the State of Oregon, filed a complaint for declaratory relief. The state seeks a judicial determination as to whether it may rec-

129. In tribute to the Rajneesh master, the streets through the center of the City are paved with red volcanic ash. Washington Post, July 30, 1983, at A3, col. 1. The City residents wear red and orange, the colors of the sun. Id. The Complaint quotes the population of Rajneeshpuram at 1,200 with 500 registered electors. Complaint, supra note 86, at 9

130. Complaint, supra note 86, at 16.

131. Mark Greenfield, as attorney for 1,000 Friends of Oregon, expects the Rajneeshees to transform their commune into a booming city of 100,000 to accommodate the Rajneesh's 300,000 worldwide followers. That number would make Rajneeshpuram the second largest city in Oregon. Rajneeshees maintain that 100,000 is a "little high," but have neither confirmed nor denied any precise figure. Washington Post, July 30, 1983, at A3, col. 3. The Rajneeshees plan to make Rajneeshpuram a university community where Rajneesh's form of meditation can be taught. Id. Currently, Rajneeshpuram serves as the site for three annual religious festivals.

132. Complaint, supra note 86, at 17.

133. Id. at 13.

134. This Note addresses solely the first amendment issues involved in Rajneeshpuram's incorporation and revenue sharing. The City, RFI, RIC, and their leaders have been and are currently involved in substantial litigation on various issues. For example, some of the entities involved in Rajneeshpuram have or do face suits pertaining to violation of federal public accommodation laws, see San Francisco Examiner, Sept. 23, 1984, at A1, col. 1; defamation, see Oregonian, Oct. 17, 1984, at C5, col. 2; and land use violations, see Perkins v. City of Rajneeshpuram, 68 Or. App. 726, 686 P.2d 369 (1984); see also Friends of Or. v. City of Rajneeshpuram, 64 Or. App. 755, 669 P.2d 1183 (1983).

135. Complaint, supra note 86. The action was originally filed in the Circuit Court for
ognize Rajneeshpuram as a lawful political subdivision of the state, and whether it may provide the City with services and a share of state revenues without violating the establishment clauses of the Oregon and United States Constitutions. Because of this constitutional controversy, the state refuses to recognize the municipal status of Rajneeshpuram and to provide it with further distributions of revenue sharing funds.

The defendants, the City and its officials and residents, contend in their answer to the State's complaint that Rajneeshpuram is lawfully incorporated according to Oregon law, and therefore is entitled to exercise all of the sovereign governmental powers authorized by the laws and the Oregon State Constitution. The defendants further contend that Oregon law entitles the City to receive and expend state revenues. In addition, officials of Rajneeshpuram have demanded that the City's "Peace Force" be given continuing access to the Oregon Law Enforcement Data System, which is available to governmental law enforcement agencies, and that state officials charged with building code and land use administration give effect to zoning and other land use actions taken by the City. The City also demands that the State of Oregon accede to its


Complaint, supra note 86, at 2.
137. Id.
138. Id. at 5.
139. The state named as defendants: Rajneeshpuram, a putative Oregon municipal corporation; Wasco County, a political subdivision of the State of Oregon; Robert M. Brown, Sheriff of Wasco County; RFI, a New Jersey corporation; RIC, an Oregon corporation; the Commune, an Oregon corporation; Ma Anand Sheela, Secretary of Bhagwan Shree Rajneesh, President of RFI, member of RIC's Board of Directors, and ex officio member of the Commune's Board of Directors; Swami Prem Jayananda, Ma Anand Sheela's husband, President of RIC, Senior Executive of the Commune, and former Police Commissioner of Rajneeshpuram; Ma Yoga Vidya, President of the Commune; Swami Krishna Deva, Mayor of Rajneeshpuram and Corporation General Manager of the Commune; Ma Prem Archan, member of the Rajneeshpuram City Council and of the City Budget Committee; Swami Deva Sandeesh, former City Council member and current member of the City Budget Committee and Commune; Ma Prem Patipada, Rajneeshpuram City Council and Commune member; Ma Deva Jayamala, Rajneeshpuram City Council and City Budget Committee member; Ma Sat Prabodhi, Recorder and Treasurer of Rajneeshpuram, Treasurer of the Commune, City Budget Committee member, and Committee for Citizen Involvement member; and Ma Deva Rikta, Rajneeshpuram City Council member, reserve officer on the City's "Peace Force," and former employee of RFI, individually and as representative of the class of all current residents of Rajneeshpuram. Id. at 1. Wasco County has been realigned as a plaintiff in this action.
140. Complaint, supra note 86, at 15; see also Defendant's Motion to Dismiss at 1, State v. City of Rajneeshpuram, No. 84-359 (D. Or. filed Aug. 16, 1984) (defendants moved to dismiss the state's action under Fed. R. Civ. P. 12(b)) (copy on file with The Hastings Law Journal).
141. Complaint, supra note 86, at 18.
142. Id. at 2.
143. Id. at 3.
state law claim that the City is a duly constituted Oregon municipality.144

The State of Oregon contends that it has a valid constitutional defense to the state law claims of the City, arguing that recognition of the municipal status of the City and distribution of state revenues and services to the City145 would violate the establishment clause of the United States Constitution.146

Because the validity of the City's incorporation depends upon the determination of the constitutionality of the City, this Note now turns to an analysis of that issue in light of the Supreme Court's Lemon test.147

Establishment Clause Analysis of Rajneeshpuram

Religious Control

In order to analyze Rajneeshpuram under the establishment clause, the "church-state" relationship existing in the City must be defined. This requires a careful examination of the relationship between the religious and governmental organizations of Rajneeshpuram.

Any consideration of the constitutionality of the relationship between the state and religion must address the fact that much of American religious life is inherently associational,148 interposing the religious community or organization between the state and the individual believer. Since the original colonists came to America in search of religious freedom, there have been numerous examples of Americans congregating and settling in religiously homogeneous communities. Yet, never in the history of this nation has the existence of a validly incorporated city been challenged on establishment clause grounds, despite the fact that numerous cities continue to exercise governmental powers for the benefit of citizens of the same faith. These communities express the founding Americans' commitment to establishing a haven where people could practice their religion freely.

Members of the Church of Jesus Christ of Latter Day Saints, more commonly known as Mormons, present an excellent example of a homogeneous religious community. They fled from religious persecution in Ohio, Missouri, and Illinois before finally settling in Utah,149 where they

144. Id. at 15.
145. As of March 27, 1984, the state holds $11,018.66 in revenue sharing funds that the City would be entitled to if it is found to be a valid municipality. Id.
146. Id. at 15. The state also contends that such recognition and distribution would violate article I, §§ 2, 3, 4, and 5 of the Oregon Constitution. Id; see infra note 171.
149. Farrell, Utah Inside the Church State, Denver Post, Nov. 21, 1982, (Magazine), at 22, col. 1, 2.
now constitute seventy-two percent of the population and wield considerable economic and political influence. Some have dubbed Utah "The Church-State." The governor of Utah, the mayor of Salt Lake City, and all of Utah's congressmen and senators are Mormon. Ninety percent of the state legislature is Mormon and the Utah Supreme Court has a Mormon majority. In many Utah counties, ninety percent of local officials are Mormons and at least twenty-one cities have city councils that are one hundred percent Mormon.

At first glance, Rajneeshpuram may appear not to differ greatly from the Mormon communities, or from any other community in which members with similar religious beliefs have joined together to form a municipality. Like many Utah cities, Rajneeshpuram has a government elected by and representing a single religious group. The religious influence, however, goes beyond Rajneeshpuram's numbers and leaders. Rajneeshpuram is more than just another religiously homogeneous community. In contrast to the freedom in Mormon communities to belong to any religion, the City's residents are not free to reject Rajneeshism. Furthermore, although the Mormon church owns a majority of the private property in Utah, the Mormon church does not and cannot prohibit non-Mormons from entering its communities. In Rajneeshpuram, however, a single religious entity owns all the City's property and has the power to exclude non-believers. Thus, while non-adherents are free to reside in Utah cities, they are not in Rajneeshpuram. These two distinctions, complete land ownership and absolute control over residence, justify different constitutional treatment. The establishment clause does not prohibit people of the same faith from gathering in self-government. It does prohibit, however, religious control of government, the concept embodied in the word "church-state" and the very "establishment" forbidden by the first amendment. Thus, although a particular religion's adherents, such as the Mormons, may be free to incorporate a city, a religious entity itself cannot.

To completely understand the difference between Mormon commu-

150. Id. at 22, col. 3.
151. See id.
152. See, e.g., id.
153. Id. at 22, col. 2.
154. Id.
155. Id. at 22, col. 3.
156. Id.
157. NATIONAL COUNCIL OF CHURCHES OF CHRIST, CHURCHES AND CHURCH MEMBERSHIP IN THE UNITED STATES IN 1980: AN ENUMERATION BY RELIGION, STATE & COUNTY BASED ON DATA RECORDED BY III CHURCH BODIES (1982).
159. Farrell, supra note 149, at 22, col. 3.
160. See Oregonian, supra note 158, at 136, col. 1.
nities and Rajneeshpuram, the infrastructure of Rajneeshpuram must be explored. Technically, the four communal groups—RIC, RFI, the Commune, and the City—161—are four separate entities serving four distinct purposes within Rajneeshpuram. The mere fact that some citizens participate in more than one of the groups and wear both religious and governmental “hats” is not per se unconstitutional.162 The constitutional issue arises when these two “hats” coalesce. Put another way, when the technically separate forms of legal organization, a city, a religious foundation, a development corporation, and a religious cooperative, virtually amount to the same religious entity under religious control, a constitutional violation can occur.

Every city is controlled by its constituents, religious or otherwise, for all democratic governing bodies are subject to the “coercive” nature of the economic, political, and social pressures reflected at the ballot box. Given the interlocking nature of its four communal groups, however, Rajneeshpuram is subject to a much more direct religious control than most other cities.

The power distribution within Rajneeshpuram illustrates this control. RFI is the sole owner of RIC, which in turn owns all the City’s real property. RIC leases all its property to the Commune, subject to RFI’s option to lease back for religious purposes. As stated previously,163 the lessee Commune was created specifically to further the purposes of Rajneeshism and is dedicated to creating and maintaining a religious community guided by the teaching of Bhagwan Shree Rajneesh. The Commune organizes city-wide events such as the annual festival, plans civic projects such as land developments, and manages the City’s workforce in all its labors.

The City, in turn, receives all its property directly from the Commune. The City actually was organized by the Commune to administer the distribution of its leased property to its members. Thus, the City has been created to implement the religious mission of both the Commune and RFI.

As lessee, the Commune controls all the land in Rajneeshpuram. In addition to controlling land ownership, the Commune controls residency.164 The Commune makes residential property available only to

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161. The Rajneesh Humanity Trust foundation is a fifth corporation involved in Rajneeshpuram’s infrastructure. The purpose of the foundation, directed by the Secretary of Bhagwan Shree Rajneesh as its president, is to aid the settlement of 2,000 homeless people in Rajneeshpuram. San Francisco Examiner, Sept. 23, 1984, at A24, col. 6.


163. See supra text accompanying notes 113-25.

164. If only Rajneeshees are permitted residence within Rajneeshpuram, the state’s Proclamation of Incorporation may also violate the equal protection clause of the fourteenth amendment by recognizing the incorporation of a municipal entity that discriminates on reli-
individuals of the foundation’s religious faith or their invitees. In fact, it would be contrary to the Commune’s stated purpose to admit anyone not adhering to Rajneeshism. Thus, residency in the City depends upon admission to the religious Commune, and continued residence is contingent upon continued adherence to the faith.

Because eligibility for civic office is based on local residency, the Commune can effectively oust officials from office by merely terminating their residency. Therefore, the Commune has power to control city officials.165

The Commune’s bylaws delegate the power over membership in the Commune to the Secretary of Bhagwan Sheree Rajneesh, and designate the Secretary as ex officio member of the Commune’s governing body. The Secretary is recognized as the spokesperson for the Commune’s religious leader and has a power of attorney to speak and act for him on all religious matters.166 The Secretary167 is also president of RFI. Because RFI is the sole shareholder in RIC, control over RFI is effectively control over RIC, the land owner.168 As president of RFI, the Secretary could at any time reclaim the City’s land for religious purposes.

By virtue of the exclusivity of land ownership and the subsequent religious grounds in their admissions policies. Only a person denied residence in Rajneeshpuram on religious grounds would, however, have standing to raise this claim. See Lemon, 403 U.S. at 611 n.5.

165. If indeed only adherents of Rajneeshism are allowed to reside in the City and, consequently, to hold city office, this may also violate the United States Constitution. Containing the only language outside the Bill of Rights bearing directly on religion, article VI, § 3 states that “no religious test shall ever be required as a qualification to any office or public trust under the United States.” U.S. CONSR. art. VI, § 3. The clause applies only to the federal government; however, article I, § 4 of the Oregon Constitution similarly prohibits religious tests for office. Thus, any residency requirement based on religion affecting the right to hold office would also violate the state constitution.

The establishment clause and the free exercise clause of the first amendment have also been interpreted to forbid a state to condition public office upon an individual’s religious beliefs. See Torcaso v. Watkins, 367 U.S. 448 (1961) (invalidating an oath of belief in God required of a notary public). Hence, a violation of article VI, § 3 is also a violation of the first amendment. See State v. Celmer, 80 N.J. 405, 417, 404 A.2d 1, 7 (1972).

It is not clear, however, whether this would be an alternative independent ground for invalidation of the original incorporation, or whether a remedy may exist in judicial invalidation of the restrictive residence policy. As a practical matter, the first amendment clauses are dispositive in cases challenging alleged “religious tests,” and the religious test clause is now of little independent significance. See, e.g., American Communications Ass’n v. Douds, 339 U.S. 382, 414-15 (1950); Anderson v. Laird, 316 F. Supp. 1081, 1093 (D.D.C. 1970), rev’d on other grounds, 466 F.2d 283 (D.C. Cir.), cert. denied, 409 U.S. 1076 (1972).

166. Bhagwan Shree Rajneesh has delegated to his Secretary the power to exercise control over the affairs of the Commune.

167. The Secretary is also President of Rajneesh Humanity Trust foundation. See supra note 161.

168. Even if it were not, the Secretary and her husband, the President of RIC, control RIC by constituting a majority of its Board of Directors.
control of residence, the Commune and RIC have effective control of the City. Consequently, the incorporation of Rajneeshpuram as a city creates a power structure that subjects the city to the actual, direct control of an organized religion and its leaders.169

169. When faced with this substantive unity of religious control, a court might regard the City, Commune, RFI, and RIC as one entity for purposes of evaluating the constitutionality of Rajneeshpuram's incorporation. In analogous cases the courts have "exalted substance over form," have "pierced the corporate veil," and have found one entity to be the "alter ego" of another. See, e.g., Amfac Foods, Inc. v. International Sys. & Controls Corp., 294 Or. 94, 654 P.2d 1092 (1982) (under some circumstances corporate shareholders may be held liable if the corporation is a mere "instrumentality" or "alter ego"); see also People v. Teolis, 20 Ill. 2d 95, 169 N.E.2d 232 (1960) (The mere ownership of all the realty in a municipality by one corporation, an association of the majority of the residents, does not in itself void the incorporation of the municipality, but if in fact any private person or corporation was found to control a city for its own private purpose, this would evidence an improper or illegal exercise of municipal government powers and bear upon the issues presented in a quo warranto proceeding.).

Similarly, in Martin v. Oregon Bldg. Auth., 276 Or. 135, 554 P.2d 126 (1976), the Oregon Supreme Court held that an allegedly independent legal entity created to avoid the prohibition on the incurring of indebtedness by the state was in fact the state, and that the "independence" created in an attempt to validate the creation of a state debt was a "scheme which would fool only a lawyer." Id. at 145, 554 P.2d at 131.

The Supreme Court also emphasized the importance of substance over form in Lemon:

This is not to suggest, however, that we are to engage in a legalistic minuet in which precise rules and forms must govern. A true minuet is a matter of pure form and style, the observance of which is itself the substantive end. Here we examine the form of the relationship for the light that it casts on the substance. 403 U.S. at 614.


By applying a standard of "strict scrutiny" in Marsh v. Alabama, 326 U.S. 501, 507 (1945), the Court exalted substance over form by concluding that a private property owner was required to allow religious solicitation, i.e., could not restrict first amendment rights, because its property, although private, was the functional equivalent of a town or city.

The holding of Marsh v. Alabama has been restricted to the facts of that case by recent Supreme Court cases. It is now established that an owner of a privately owned shopping mall may not be compelled to permit the exercise of first amendment rights on the property. Hudgens v. NLRB, 424 U.S. 507 (1976) (overruling Food Employees v. Logan Valley Plaza, 391 U.S. 308 (1968)); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972). Private property owners' constitutional property rights are not outweighed by first amendment considerations unless the private property has all the attributes of a town. Hudgens, 424 U.S. at 520.

Rajneeshpuram is the functional equivalent of a religious organization. All four entities are wholly composed of each other and are manifestations of one religious group. In essence, RFI, RIC, the Commune, and the City are a single entity living on one budget. Thus, applying "strict scrutiny" standards to the operations of Rajneeshpuram, a court would likely find that these technically separate legal forms of organization are, in reality, alter egos of each other.
Incorporation as a Municipality

This section analyzes whether the incorporation of Rajneeshpuram, which bestows upon the community all the powers of a municipality, constitutes a violation of the establishment clause. It examines Ore-

170. This section of the Note does not discuss the possible invalidation of the municipality for land use reasons. See Oregonian, Oct. 18, 1984, at C3, col. 1 (Oregon Supreme Court agrees to hear case regarding invalidation of Rajneeshpuram for land use violations).

171. This Note addresses only the federal constitutional questions posed by Rajneeshpuram's incorporation. The State of Oregon has brought claims under article I, §§ 2, 3, 4, and 5 of the Oregon State Constitution. Complaint, supra note 86, at 3. Oregon Constitutional requirements, however, may be dispositive of the issues involved. See Deras v. Myers, 272 Or. 47, 535 P.2d 541 (1975) (federal Constitution is not controlling when a state constitution provides greater protections to the citizen).

In Eugene Sand & Gravel, Inc. v. City of Eugene, 276 Or. 1007, 558 P.2d 338 (1976), the Oregon Supreme Court held that article I, §§ 2, 3, and 5 of the Oregon State Constitution, prohibiting an establishment of religion, are co-extensive with the establishment clause of the first amendment. While the court stated that the Lemon test was appropriate to determine a statute's validity under the Oregon Constitution, Id. at 1013, 558 P.2d at 342, its recent decisions on other constitutional issues exhibit a trend toward a greater reliance on independent analysis of the Oregon Constitution. See, e.g., State v. Caracher, 293 Or. 741, 653 P.2d 942 (1982) (Oregon free to impose stricter standards on police conduct than fourth amendment requires). This trend, if extended to the present issue, suggests that state and federal analysis may produce different conclusions despite their reliance on identical tests.

For example, the Oregon Constitution sets forth a strict prohibition against the payment of money for the benefit of religion, perhaps stricter than any federal requirement. Dickman v. School Dist., 232 Or. 238, 366 P.2d 533 (1961), cert. denied, 371 U.S. 823 (1962). Oregon Constitution article I, § 5 provides: “No money shall be drawn from the Treasury for the benefit of any religion or theological institution . . . .” OR. CONST. art. I, § 5. In Dickman, the court held that the furnishing of school books to children in a parochial school violated article I, § 5 because such assistance aided the school's religious, as well as secular, purposes. Although the United States Supreme Court later held that such aid would not violate the federal Constitution, Board of Educ. v. Allen, 392 U.S. 236 (1968), Dickman still appears to be the law in Oregon. Therefore, if the distribution of state revenue funds to the City benefits religion, see infra text accompanying notes 214-64, such distribution would likely violate article I, § 5 of the Oregon Constitution, independently of the federal constitutional issue.

Additionally, the article I § 5 prohibition may apply by analogy to local governments as well as to the state government, thus subjecting Rajneeshpuram itself to the prohibition against payment of money for the benefit of religion. Article I, § 5 applies to school districts, which carry out functions of the executive branch of state government. Dickman, 232 Or. 238, 366 P.2d 533 (1961); Fisher v. Clackamas County School Dist. 12, 13 Or. App. 56, 507 P.2d 839 (1973). In Dickman and Fisher, the court did not consider the existence of state support for public schools. It therefore appears that the word “Treasury” does not simply mean the State Treasury, but is broad enough to include any public funds. Because cities, like school districts, are created by state law to carry out purposes contemplated by state law, their funds seemingly would be included within the scope of article I, § 5. Furthermore, the principles leading to the adoption of article I, § 5 would be violated to the same extent by a city contribution to religion as by a state contribution. Accordingly, article I, § 5 is probably intended to reach any expenditure for the benefit of religion by any government body. If this conclusion is correct, then any expenditure by the City that benefits religion, see infra text accompanying notes 224-44, would also constitute an independent violation of article I, § 5, of the Oregon State Constitution.
gon's Proclamation of Incorporation and the City's corporate existence.

Under Lemon, three characteristics must be present to justify state action against an establishment clause attack: secular purpose, primary secular effect, and absence of excessive entanglement. Thus, the first question under the Lemon test is whether the state's recognition of Rajneeshepura as a municipality serves a secular legislative purpose.

Wasco County, for the State of Oregon, issued a Proclamation of Incorporation for Rajneeshepura. The purpose of this issuance appears to be a recognition of the will of the majority who voted on the incorporation issue. Furthermore, the incorporation of a community as a city has the secular purpose of providing the benefits of effective local government to its inhabitants. Nothing in the Oregon statute pertaining to incorporation or the proclamation suggests anything but a religiously neutral purpose. Certainly, any community, whether religious or not, may incorporate as a city provided it obtains enough votes. Thus, the proclamation of Rajneeshepura as a municipal incorporation, as with any municipal creation, furthers a legitimate secular purpose.

Independent of the first criterion, the state's proclamation must also satisfy the second prong of the Lemon test: its principal or primary effect must be one that neither advances nor inhibits religion. The primary effect of the state's act was to grant the City power to act as a municipal government. The issue, then, is whether this recognition of Rajneeshepura as a city with sovereign governmental powers advances or inhibits religion.

Under the "primary effect" analysis, an analogy may be drawn be-

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172. By issuing a Proclamation of Incorporation, Wasco County, for the State of Oregon, purported to acknowledge Rajneeshepura's lawful incorporation and the City's entitlement to exercise the sovereign governmental powers that the laws and the Oregon Constitution authorize cities to exercise.

One major source of municipal legislative authority in Oregon is the Oregon Constitution. Article IV, § 1(5) and article XI, § 2, the municipal “home rule” provisions, reserve to the people of the cities the right to adopt city charters. Home rule provisions empower people to confer jurisdiction over municipal affairs upon their city governments. A home rule charter cannot empower a city to exercise jurisdiction over matters of statewide concern.

The people of Rajneeshepura have adopted a city charter. The Rajneeshepura City Charter provides that “[t]he city shall have all powers which the constitution, statutes, and common law of the United States and of this state expressly or impliedly grant or allow municipalities . . . .” Rajneeshepura, Or., Rajneeshepura Charter of 1982 ch. II, § 4.


174. See supra note 21 & accompanying text.
between this case and the situation in *Larkin v. Grendel's Den.*\(^{175}\) In *Grendel's Den,* the Court found that, by conferring upon churches a veto power over governmental licensing authority, the state statute had delegated legislative power to a religious body and, thus, had violated the establishment clause.\(^{176}\) In reaching this conclusion, the Court held that the delegation of governmental powers to a religious body had the primary effect of advancing religion.\(^{177}\)

*Grendel's Den* dealt with the exercise by a church of a comparatively insignificant governmental power: a veto over the issuance of a liquor license. By comparison, the Oregon State Proclamation of Incorporation makes available to Rajneeshpuram the exercise of all the sovereign powers of a city, such as the right to levy taxes, to expend funds, to enact city ordinances and regulations, and to establish a municipal court to enforce those regulations. If such delegation of veto power to a church violates the establishment clause, the incorporation of a religious community as a city, with all its inherent legislative, executive, and judicial powers must also violate that clause as an impermissible advancement of religion.

The circumstances of Rajneeshpuram and *Grendel's Den* differ in one respect. In *Grendel's Den,* the state's authorization of governmental power was to a church or religious organization; here the authorization of governmental power is to a city with a constituency consisting of a group of religious people. In short, a city is not the functional equivalent of a church. This distinction, however, seems insignificant in light of the religious uniformity and religious control of Rajneeshpuram. Effectively, an organization formed for religious purposes and encouraging specific religious beliefs serves the same function as a church.\(^{178}\) As demonstrated earlier,\(^{179}\) Rajneeshpuram is not merely a city whose inhabitants just happen to be of the same religion; it is a city created for religious purposes, built on land purchased for religious purposes, and wholly composed of and controlled by a religious organization. Under these cir-

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176. *Id.* at 126.
177. In fact, the court proclaimed the mere appearance of such a delegation to be a benefit to religion: "In addition, the mere appearance of a joint exercise of legislative authority by church and state provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred." *Id.* at 125-26; *see also* Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216, 3226 (1985) ("Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any—or all—religious denominations . . . .")
178. The term "church" can mean an organization for religious purposes and it "can also have the more physical meaning of a place where persons regularly assemble for worship." Guam Power Auth. v. Bishop of Guam, 383 F. Supp. 476 (D.C. Guam 1974) (citations omitted). Under the latter definition, the Commune, and ultimately the City itself, is the functional equivalent of a church; it is a "mecca" or place where Rajneeshees worldwide assemble for worship. *See supra* text accompanying notes 129-33.
179. *See supra* text accompanying notes 158-69.
cumstances, to hold that the incorporation of Rajneeshpuram does not have the primary effect of advancing religion would be to deny constitutional guarantees under the guise of formalistic legal distinctions. As Justice Rehnquist concluded in his dissent in *Grendel's Den*: “Surely we do not need a three part test to decide whether the grant of actual legislative power to churches is within the proscription of the Establishment Clause of the First and Fourteenth Amendments.”

The primary effect of the State’s Proclamation of Incorporation is to allow Rajneeshpuram, a city controlled by religious entities, to wield coercive state powers. The New Jersey Supreme Court reached a similar conclusion in *State v. Celmer*. In *Celmer*, a New Jersey statutory scheme granted various municipal powers to the Ocean Grove Camp Meeting Association of the United Methodist Church (the “Association”). The court held that these statutes violated the establishment clause of the first amendment. The court reached this conclusion after examining both the internal workings of the Association and the powers granted to it by the legislature.

At the time it obtained its corporate charter, the Association adopted a set of bylaws to regulate the internal affairs of the organization. These bylaws stated that the main purpose of the Association was “providing and maintaining for the members and friends of The United Methodist Church a proper, convenient and desirable permanent camp meeting ground and Christian seaside resort.” To achieve this goal, the Association retained title to all lands, streets, walks, parks and other public places located in the camp grounds. The property was then subdivided and leased to persons “in sympathy with the objects of the Association.” All transfers were, and remained, subject to the approval of the Association’s president.

The bylaws also established a Board of Trustees, in which the legislative and executive powers of the Association were vested. Responsibility for the day-to-day operations of the community had been delegated to the Board’s executive, program, and development committees, which were responsible respectively for the administrative, religious, and financial concerns of the Association.

Over a period of years, the New Jersey legislature granted the Association’s Board various police powers exercisable only by municipalities.

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184. *Id.* at 411, 404 A.2d at 3 (citation omitted).
185. *Id.*
186. *Id.* at 411, 404 A.2d at 3-4.
187. *Id.*
188. *Id.* at 412, 404 A.2d at 4.
These powers included responsibility for the construction and maintenance of public highways, streets, walks, and parks within the camp grounds; veto power over public highway construction in Ocean Grove; exclusive jurisdiction to make and enforce rules and regulations to promote and protect the public health and to prescribe penalties for this violation; and the right to establish a municipal court to enforce their ordinances. In effect, the legislature granted to the Association the ability to function as a municipality.

In light of the Association's religious purposes, such a grant of municipal powers violated the establishment clause by fusing secular and ecclesiastical power: "Regardless, however, of the precise phraseology that one utilizes to describe the First Amendment mandate, there can be no question but that at a minimum it precludes a state from ceding governmental powers to a religious organization."  

The circumstances in Celmer parallel the delegation of municipal powers to Rajneeshpuram even more closely than does Grendel's Den. The Commune, like the Association, has a stated religious purpose and selects its members on the basis of religious criteria. The Commune leases all the land to the City much like the Association, which granted lots to persons of the same religious ideals. Like the Association President, the Secretary retains approval over residency. The City Council and Commune directors serve the same day to day functions as the Association's Board of Trustees and committees. Like the Association, the City, by virtue of its incorporation, has been granted all municipal powers. Thus, Celmer supports the conclusion that the Proclamation of Incorporation violates the establishment clause.  

The third prong of the Lemon test requires that the state's act does not foster excessive government entanglement with religion. The state Proclamation of Incorporation proclaimed Rajneeshpuram a duly incorporated municipality under the laws of Oregon. As a political subdivision of Wasco County and the State of Oregon, Rajneeshpuram has continuous contacts with the state on many bureaucratic and administrative levels. Many state agencies must deal with Rajneeshpuram in administering programs, issuing licenses, determining entitlements, dis-

189. Id. at 412-13, 404 A.2d at 4.
190. Id. at 416, 404 A.2d at 6.
191. Arguably, the recipient of governmental powers in these two cases is sufficiently different to distinguish the results. In Celmer, the Association as a religious body improperly received municipal powers, whereas in Rajneeshpuram's case, the City Council as representatives of the municipality, and not the Commune, that has received the identical powers. As discussed earlier, however, in supra note 169, a court could find the Commune to be the alter ego of the City, thereby leaving the analogy intact.
193. See supra text accompanying notes 85-88.
tributing state revenues, and reviewing local government actions. This constant interaction between the state and Rajneeshpuram, a city where every facet of day to day existence is dedicated to the tenets of Rajneeshism, provides an ongoing opportunity for excessive government involvement with religion.

For example, the current litigation between Rajneeshpuram's corporate entities and the state's Land Use Board of Appeals ("LUBA") provides an opportunity for excessive state involvement. The private landowner RIC seeks to convert Rajneeshpuram into a booming urban area; LUBA maintains that RIC's plan for converting the rural area violates current land use regulations. Any final decision regarding this issue may implicate religious as well as legal considerations. For example, one principal reason behind RIC's and Rajneeshpuram's plans is their desire to establish a large urban community that will eventually house all Rajneesh worshippers and students who wish to visit the "mecca" or join its community. Because there are approximately 300,000 Rajneeshees worldwide, any prohibitions on its land use may ultimately have an impact on Rajneeshpuram's ability to serve as a gathering place for Rajneeshees. Therefore, although LUBA is the appropriate forum for land use adjudications, the state might necessarily become overly entangled with religious concerns in its administrative dealings.

The state's Proclamation of Incorporation also fosters excessive government entanglement with religion by overlapping religious and civil functions. In Grendel's Den, the Supreme Court concluded that while "[s]ome limited and incidental entanglement between church and state authority is inevitable in a complex modern society, . . . the concept of a 'wall' is substantially breached by vesting discretionary governmental powers in religious bodies." Furthermore, the "wall of separation between church and state" has been breached in Rajneeshpuram. The state's Proclamation of Incorporation fuses religious and secular functions. When a religious body has the sole power to select the inhabitants and officers of a city, that body effectively controls governmental power in that city. If a mere transfer of legislative veto power to an eccelesiastical body results in excessive entanglement, granting municipal status and its accompanying coercive powers to Rajneeshpuram also creates impermissible entanglement. In Rajneeshpuram, the religion is the communal corporation;
the communal corporation gives existence to the City; and the City is the government. A clearer entanglement is unimaginable.

Another benchmark of impermissible entanglement is whether the state action at issue would result in excessive monitoring of local authorities. On any occasion when adherents of a particular creed also possess governmental power, a legal tension may arise between the liberty of belief to which they are entitled and the requirement of governmental religious neutrality. The religious character, land ownership structure, and close intercorporate relationships of the City would probably require state monitoring to ensure Rajneeshpuram's compliance with first amendment restrictions.199

This monitoring would result in an impermissible entanglement of government with religious affairs.200 For example, if the City chose to establish a state-supported public school, the state might believe it necessary to supervise its curriculum, textbooks, and teaching methods in order to confirm that only secular subjects were being taught. It was this type of entanglement between church and state that the Lemon Court found to be excessive.201


In Celmer, discussed supra text accompanying notes 181-91, the court concluded that granting municipal powers to a religious entity fostered an excessive entanglement with religion. Celmer, 80 N.J. at 417, 404 A.2d at 6. The court found that the legislature had in effect transformed the religious organization into the community's civil government and that "such a fusion of secular and ecclesiastical power . . . violate[d] both the letter and spirit of the first amendment." Id.

199. Like the unrestricted powers bestowed upon the church in Grendel's Den, the sovereign powers conferred upon the City as a municipality are virtually limitless. The state's proclamation does not provide assurances that the municipal powers will be exercised in a religiously neutral manner. Moreover, given the religious character of Rajneeshpuram, there are no "effective means of guaranteeing" that the power "will be used exclusively for secular, neutral, and nonideological purposes." Nyquist, 413 U.S. at 780. The Court in Grendel's Den placed great significance on a similar lack of assurances and guarantees. Grendel's Den, 459 U.S. at 125.

In Lemon, the potential for impermissible use of government aid was based primarily on the substantial religious character of parochial schools and on the religious authority over the school system and teachers. 403 U.S. at 616-18. The Court, when faced with this potential, concluded that government surveillance would therefore be required: "A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected." Id. at 619. Given the extent of religious pervasiveness in Rajneeshpuram, it seems likely that the same concerns would be invoked and that the same need for surveillance would therefore apply.


201. Lemon, 403 U.S. at 619-20. For another example of the need for state monitoring, see infra text accompanying notes 254-64. This type of administrative regulation of religious activities also endangers government neutrality in religious matters. When there is a high degree of administrative contact and regulation, programs that survive regulation may appear
As part of its excessive entanglement analysis, the Lemon Court also considered whether a government act was likely to promote political divisiveness along religious lines. Indeed, Oregon’s authorization of government power by Rajneeshpuram has promoted political subdivision and sectarian controversies. For example, an Albany, Oregon citizen is waging a petition drive to place a measure on the state ballot asking officials to force the Rajneeshees from Oregon. Also, three neighboring ranchers are charging that the creation of a city in the arid, barren buttes of central Oregon violates the state’s strict land use laws, and violence has been threatened by both sides.

to bear governmental approval. This impression echoes the impermissible symbolic benefit to religion that the Court articulated in Grendel’s Den, 459 U.S. at 125-26.

Furthermore, such regulation also endangers the freedom of religious societies by requiring them to be responsive to government administrators in order to maintain the flow of benefits and approval. Whether such regulation could constitute a free exercise claim would depend on the coerciveness of the regulation, the impact on the religious society’s beliefs, its ability to practice those beliefs, and the degree of voluntariness in the society’s response.

202. As part of its constitutional inquiry under the establishment clause, the Supreme Court has looked at the degree of political divisiveness promoted by the challenged activity. See, e.g., Meek v. Pittenger, 421 U.S. 349, 365 n.15, 372, 374-78 (1975); Lemon, 403 U.S. at 622-24. While political divisiveness alone cannot serve to invalidate otherwise permissible conduct, Lynch v. Donnelly, 104 S. Ct. 1355, 1364 (1984), it is a factor considered in the excessive entanglement inquiry. J. Nowak, supra note 2, at 1301; see also Lemon, 403 U.S. at 622.

In Lynch, however, the Court intimated that, unless the case involved a direct subsidy to religious institutions, an inquiry into political divisiveness is inappropriate. Lynch, 104 S. Ct. at 1364-65; see also Mueller v. Allen, 463 U.S. 388, 403-04 n.11 (1983). The Court nevertheless analyzed the political divisiveness element even though no direct subsidy was involved in that case. Lynch, 104 S. Ct. at 1365. Therefore, political divisiveness is relevant in determining the degree of government entanglement.

203. Lemon, 403 U.S. at 622-23.

204. See generally Tension Building Over Oregon Sect, N.Y. Times, Sept. 16, 1984, at 38, col. 1 (city ed.).


206. Id.; see also The Oregonian, Oct. 20, 1984, at B1, col. 1.

207. The first major act of violence involving the sect occurred in Portland, Oregon, on July 29, 1983, when three explosions hit a downtown hotel owned by the Rajneeshees. One man was seriously wounded, and damage was estimated at more than $100,000. Washington Post, July 30, 1983, at A3, col. 2. Later, an anonymous caller warned Bhagwan Shree Rajneesh that a group in Seattle has offered $10,000 for someone to kill him. N.Y. Times, Aug. 6, 1983, at 5, col. 6 (city ed.). More recently, the Secretary has warned that if hostilities result in injury to any of her people they will be answered with violent revenge. San Francisco Examiner, Sept. 23, 1984, at A24, col. 6.

The neighboring town of Rajneesh has also stirred its share of controversy. The last act of the old Antelope city council was to deed back the city's church to its previous owner in order to keep it out of Rajneeshee hands. Before that, the council attempted to disincorporate the town to “keep it from being taken over by the disciples.” N.Y. Times, April 17, 1982, at 7, col. 1 (city ed.). See generally N.Y. Times, Dec. 19, 1982, at 32, col. 1 (city ed.) (discussion of political division in Antelope, Oregon, between the “old” city council and the Rajneesh citizens).

Prior to the move to Oregon, the settlement of Rajneeshees in New Jersey had also created communal dissension. An aggressive corps of New Jersey citizens formed committees,
Ordinarily, vigorous political debate is a healthy manifestation of our democratic system of government. Political division along religious lines, however, was one of the principal evils against which the first amendment was intended to protect. The first amendment was founded on the principle that a union between church and state leads to persecution and civil strife.

Rajneeshpuram is plagued by litigation and denounced in its every move. Wasco County’s issuance of municipal status to Rajneeshpuram not only placed the city at the heart of civil litigation, but also made it the target of religious controversy and political fire.

In at least four ways then, the state’s proclamation fosters an excessive government entanglement with religious activities contrary to the establishment clause: first, the state itself may become overly involved with religion in its dealings with Rajneeshpuram; second, the granting of municipal sovereignty to Rajneeshpuram enmeshes religion in government functions; third, any surveillance of Rajneeshpuram by the state to ensure “separatism” would result in impermissible government intermingling with religion; and finally, the exercise of government power by the Rajneeshpuram has resulted in political divisiveness along religious lines, which will exacerbate the entanglement of Oregon’s state and local governments with religion.

In sum, Oregon’s Proclamation of Incorporation, despite its valid secular purpose, has the primary effect of advancing religion and fos-

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208. Freund, Public Aid to Parochial Schools, 82 HARV. L. REV. 1680, 1692 (1969) (cited with approval in Nyquist, 413 U.S. at 755 n.54 and in Lemon, 403 U.S. at 622). Professor Tribe points out that the ideal of separatism “calls for much more than the institutional separation of church and state; it means that the state should not become involved in religious affairs and that sectarian differences should not be allowed unduly to fragment the body politic.” L. TRIBE, supra note 2, § 14-3, at 819.


210. The majority in Lynch noted that “[a] litigant cannot, by the very act of commencing a lawsuit . . . create the appearance of divisiveness and then exploit it as evidence of entanglement.” 104 S. Ct. at 1365. Thus, the Oregon Attorney General could not rely on its own actions as evidence of political controversy caused by the City’s incorporation. This language seemingly does not preclude the litigant from raising other lawsuits as examples of political divisiveness. Accordingly, the Attorney General should be able to rely on other numerous lawsuits involving Rajneeshpuram as evidence of excessive entanglement.


212. The Court’s decision in Grendel’s Den shows that even when a valid secular purpose exists, the challenged activity might not be valid when the objective could be accomplished readily through essentially nonreligious means. Grendel’s Den, 459 U.S. at 123-24. Here, Ore-
ters excessive government entanglement with religion. Consequently, the state’s act in incorporating Rajneeshpuram violates the establishment clause of the first amendment of the United States Constitution.213

State Revenue Sharing

Oregon’s distribution of state revenues to Rajneeshpuram raises a second major constitutional issue. Oregon has a state revenue sharing system that distributes certain state revenue to its municipalities.214 These revenues, with the exception of state highway funds,215 are distributed to Oregon cities for general government purposes. As an Oregon city, Rajneeshpuram is entitled as a matter of state law to a proportionate share of these revenues.216

As noted earlier, “neutrality” or “separatism” reflects the view that religion and government function best if each remains independent of the other.217 Implicit in this ideal is the principle that “under no circumstance should religion be financially supported by public taxation.”218 This section analyzes whether the allocation of state funds to Rajneeshpuram through state revenue sharing violates this principle of the establishment clause.

The Oregon legislative provision allowing for revenue sharing among municipalities has a bona fide secular purpose.219 The state colon...
lects taxes in order to finance government. Municipalities are the local "arms" of state government. Just as the states in Lemon had an interest in enhancing the quality of secular education in all schools, Oregon has an interest in apportioning its income among its various political subdivisions for local expenditures.

Nonetheless, the propriety of the legislature's purpose may not immunize the law from further scrutiny. Accordingly, the statute must also satisfy the second prong of the Lemon analysis: the statute must not have the primary effect of advancing or inhibiting religion.

At first glance, the religiously neutral statutes seem to pass this test as well. The Oregon revenue statutes provide all municipalities with state funds. Rajneeshpuram is merely one of the beneficiaries under a statewide program of allocating income. Although the cumulative statewide effect of these revenue statutes may be religiously neutral, the actual neutral in purpose does not constitute an establishment of religion. McGowan, 366 U.S. 420, 442 (1961); see also Marsh v. Chambers, 463 U.S. 783, 790-92 (1983); Harris v. McRae, 448 U.S. 297, 319-20 (1980). The test is whether the expenditure or planning serves a legitimate secular purpose, not whether it also has ties to a religious doctrine.

Furthermore, the City's act cannot be invalidated merely because it would require involvement with religious entities. See generally L. Tribe, supra note 2, § 14-9, at 839-40. The Supreme Court made this result clear when it stated that Bradfield v. Roberts, 175 U.S. 291 (1899), "dispels any notion that a religious person can never be in the State's pay for a secular purpose ... ." Roemer v. Board of Pub. Works, 426 U.S. 736, 746 (1976). In fact, if the City refused to assist in planning and financing public functions with an organization merely because it was religious, it would probably violate the free exercise clause by taking a position in opposition to religion. As stated in Everson v. Board of Education, "[The First Amendment] requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used as to handicap religions than it is to favor them." 330 U.S. at 18.

On the other hand, expenditures or planning that coincides with religious beliefs may not have a sufficiently secular purpose. Because Rajneeshpuram is first and foremost a religious community (such a state of affairs is not only evident from its name, but also from the purposes underlying its formation, its internal structure, and the various activities that it undertakes), every city expenditure may be suspect.

Consider a city ordinance providing for funding and improvements in preparation for an annual religious festival. To what extent do expenditures, planning, and engineering for such a city improvement have a clearly secular purpose when every such improvement directly affects the religious commune or property owner? See Lynch, 104 S. Ct. at 1368 (O'Connor, J., concurring) (The proper inquiry under the purpose prong of Lemon is whether the government intends to convey a message of endorsement or disapproval of religion.); cf. Gilfillan v. City of Philadelphia, 637 F.2d 924 (3d Cir. 1980) (city's financial and other assistance to the archdiocese of Philadelphia for a mass and sermon to be delivered by Pope John Paul II resulted in an establishment clause violation), cert. denied, 451 U.S. 987 (1981).

L. Tribe, supra note 2, § 14-9, at 839 (emphasis in original).
distribution of state funds to Rajneeshpuram raises serious constitutional questions. The issue is whether the distribution of state revenues to Rajneeshpuram has the primary effect of advancing or inhibiting religion.\textsuperscript{222}

To determine whether a program has a sufficiently secular effect, the Court asks whether the secular impact is sufficiently separable from the religious impact, and whether the class benefited is sufficiently broad to include religious and non-sectarian groups. In other words, the Court looks to see if a particular program has the effect of singling out religious groups as its beneficiaries.

The aim of any municipal expenditure is to benefit the city's residents and property. For example, the furnishing of fire and police protection obviously confers a private benefit to residents and their property, and yet municipal expenditures on such protections are proper municipal functions and benefit the public community as a whole. In fact, it is difficult to imagine any city-funded service or activity that is not intended to benefit the public as a body; and the city's inhabitants as individuals. The distribution of state funds to a city that comprises only members of one religion, however, by its very nature advances that particular religion.

Such a benefit would, however, be separable from and only incidental to its primary effect of providing secular municipal benefits. The expenditure of state funds in order to provide such services cannot be invalidated simply because it incidentally benefits a religion or citizens in the practice of that religion.\textsuperscript{224} Like all municipalities, Rajneeshpuram must provide municipal services to its residents. The mere provision of these services in a religious community cannot be construed as having

\textsuperscript{222} It might be argued that a facially neutral statute which distributes funds to all of the cities in a state, only one of which happens to be controlled by a particular religious organization, does not have a primary effect of advancing religion. A constitutional breach of the establishment clause, however, is not measured by a statistical analysis. \textit{Nyquist}, 413 U.S. at 775. The \textit{Nyquist} Court stated that direct aid to religion does not have a "constitutionally permissible ceiling" because it is clear from the cases that such aid "in whatever form is invalid." \textit{Id.} at 780.

\textsuperscript{223} L. Tribe, supra note 2, § 14-9, at 840.

\textsuperscript{224} \textit{Nyquist}, 413 U.S. at 771. For examples of state programs conferring only incidental benefits to religions, see Roemer v. Board of Pub. Works, 426 U.S. 736 (1976) (state funds authorized to private religious institutions for separate secular activities); Hunt v. McNair, 413 U.S. 734 (1973) (sustaining a state bond proposal to benefit a Baptist college); Tilton v. Richardson, 403 U.S. 672 (1971) (federal aid to subsidize construction of buildings to be used for secular activities at a religious college held not to have a religious effect); Walz v. Tax Comm'n, 397 U.S. 296 (1970) (tax exempt status for religious institutions as nonprofit organizations held not to constitute establishment); Board of Educ. v. Allen, 392 U.S 236 (1968) (upholding free secular textbooks to parochial schools); McGowan v. Maryland, 366 U.S. 420 (1961) (Sunday closing law upheld); Everson v. Board of Educ., 330 U.S. 1 (1947) (reimbursement for bus transportation to Catholic parochial schools upheld).
the primary effect of advancing religion.225 Rajneeshpuram's corporate and religious infrastructure suggests, however, a direct link between state funds and sectarian benefits that exceeds a merely incidental provision of municipal services.

The added difficulty in the case of Rajneeshpuram is that every city expenditure will benefit only a single property owner226 because all City property is owned by one entity, RIC. Any land development projects, city improvements, or community ameliorations will increase the land's value and thereby benefit its owner. The religious Commune, as RIC's tenant, as the City's lessor, and as occupant, is the current beneficiary of any and all such improvements. While the Commune and its members will receive the practical advantages of land developments in everyday life, RIC, as the property owner, will receive all accrued long-term benefits. Ultimately, any benefits RIC receives are also benefits to RFI, as RIC's sole stockholder.

225. Professor Tribe notes that the mere fact that there is an incidental benefit to a religious organization or to religion itself does not invalidate a government act when the primary purpose and effect is to further a secular rather than religious end. L. TRIBE, supra note 2, § 14-9, at 889-40.

226. The single property owner as beneficiary poses an additional problem under Oregon state law. Article XI, § 9 of the Oregon Constitution provides in part: "No county, city, town, or other municipal corporation, by vote of its citizens or otherwise, shall become a stockholder in any joint company, corporation or association, whatever, or raise money for, or loan its credit to or in aid of, any such company, corporation, or association . . . ." OR. CONST. art. XI, § 9. By its terms, article XI, § 9 was designed to curb speculation, which in many instances resulted in pecuniary loss to the taxpayer. Johnson v. School Dist., 128 Or. 9, 12, 270 P. 764, 765 (1929); see also 43 Op. Att’y Gen. 186 n.4 (1983).

Article XI, § 9 and similar provisions have given birth to the "public purpose" doctrine. Simply stated, the doctrine holds that public money cannot be appropriated for private purposes. The Oregon Supreme Court has adopted a very broad test to be applied in determining whether an expenditure of government funds satisfies the restrictions of the public purpose doctrine. In Carruthers v. Port of Astoria, 249 Or. 329, 438 P.2d 725 (1968), the court stated that "[t]he only valid criterion would seem to be whether the expenditures are sufficiently beneficial to the community as a whole to justify governmental involvement." Id. at 341, 438 P.2d at 730 (quoting Note, Incentives to Industrial Relocation: The Municipal Industrial Bond Plans, 66 HARV. L. REV. 898, 903 (1953)); see also Miles v. City of Eugene, 252 Or. 528, 532, 451 P.2d 59, 61 (1969); Nicoll v. City of Eugene, 52 Or. App. 379, 628 P.2d 1213 (1981).

With respect to expenditures of public funds by cities, the cases generally hold that, if there is a substantial public benefit, the expenditure will not be unlawful merely because a private purpose is also served. See, e.g., Carruthers, 249 Or. at 341, 438 P.2d at 730. Hence, an expenditure of general benefit to all property in a city ordinarily could be made without possible objection even if some private benefits are gained.

In Rajneeshpuram, however, city expenditures uniquely and exclusively benefit corporate citizens. Publicly funded land improvements that accrue to a single landowner may violate the public purpose doctrine by calling into question the substantiality of the public benefit gained by those expenditures. If the court found this to be true, the public purpose doctrine violation may represent independent state grounds for the invalidation of Rajneeshpuram. At a minimum, the courts undoubtedly would review religious affiliations, this scrutiny would trigger the third prong of the Lemon test—excessive entanglement. See infra notes 245-64 & accompanying text.
Consider, for example, the creation of a university in Rajneeshpuram. Assume that the City by ordinance expends state funds to finance this project. As the City’s citizens, the Commune and its members will enjoy the benefits of the day to day use of the university; they will be able to educate themselves and their children, as well as have access to a scholarly library. Should the City disincorporate or the Commune’s lease expire, however, the university will remain for the benefit of the property owner, RIC. Because RFI wholly owns RIC, any economic benefit received by RIC is income to RFI. RFI’s option to lease back the City’s property further complicates this scenario: if at any time RFI should exercise its option to lease back all the City’s property, all city improvements, including the university, would accrue to it as lessee. Furthermore, because RFI’s option allows it to lease back the land for its religious purposes, the university and all such improvements may ultimately exist for the use and enjoyment of religion.

The Supreme Court struck down a part of federal aid program for this very reason. In *Tilton v. Richardson*, while sustaining almost all aspects of a federal aid program to church-related colleges, the Court unanimously struck down one clause of the federal statute in question. Under that clause, the government was entitled to recover a portion of its grant to a sectarian institution in the event that the constructed facility was used to promote religion by converting the building to a chapel or otherwise allowing it to be “used to promote religious interests.” Because the statute provided that the penalty for religious use would expire at the end of twenty years the facilities would thereafter be available for use by the institution for any sectarian purpose. In striking down this provision, the plurality opinion emphasized that “[l]imiting the prohibition for religious use of the structure to 20 years obviously opens the facility to use for any purpose at the end of that period.” The original federal grant would then be advancing religion. A leaseback to RFI for religious purposes would produce the same impermissible effect that the *Tilton* Court invalidated.

The corporations and the Commune have complete control of the City. Payment of state funds to the City is in effect the payment of state funds to the corporations, to the Commune, and ultimately to religion.

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227. *Any* expenditure by the City may also pose a separate and independent constitutional problem. Rajneeshpuram, as a political subdivision of the state, must also adhere to establishment clause requirements. Due to the narrowness of the class benefitted, however, any City expenditure could raise serious constitutional questions. *See Nyquist*, 413 U.S. at 794.

228. 403 U.S. 672 (1971).

229. *Id.* at 683.

230. *Id.*

231. *Id.*

232. *Id.*

233. It should be noted that the City can spend revenues on the maintenance, expansion,
Thus, despite the secular purposes of the revenue statutes, the distribution of public funds to Rajneeshpuram amounts to a direct benefit to religion.234

Unlike *Walz v. Tax Commission*,235 which upheld tax exempt status236 for all educational and charitable nonprofit institutions,237 the distribution of state funds to the City constitutes successive annual appropriations that benefit only one religious group.238

Furthermore, the *use* of this money is controlled by that same religious group.239 The payments to the City under the revenue statutes are

or improvement of Wasco County Road 305, the sole publicly owned strip of land in Rajneeshpuram. Even these expenditures, however, would indirectly benefit the Rajneesh corporations and Commune; public road improvements generally would increase accessibility to the City and raise neighboring property values. Again, because all land adjacent to the county road is owned by RIC, it would indirectly benefit from such improvements.

234. If the Court finds that payments to the City are equivalent to payments to religious organizations, the distribution of state revenues to Rajneeshpuram may also violate the free exercise clause of the first amendment by indirectly channeling the monies of taxpayers of many faiths to the City for the propagation of one faith. *See Lemon*, 403 U.S. at 627-28 (Douglas, J., concurring).


236. Id. at 680.

237. Id. at 673. The Court has also considered the breadth of the class benefited in sustaining particular forms of aid to nonpublic school pupils. *See, e.g., Wolman v. Walter*, 433 U.S. 229 (1977); *Board of Educ. v. Allen*, 392 U.S. 236 (1968); *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

238. It may be argued that the true beneficiaries of the state statute are all the residents of Rajneeshpuram and not merely the corporate arms of Rajneeshism. In Rajneeshpuram, however, residence is apparently predicated on religious affiliation. (If the court finds this to be the case, the state's distribution of funds to Rajneeshpuram may also violate the equal protection clause of the fourteenth amendment by providing state assistance to a community that discriminates on religious grounds in their admission policies. *See Lemon*, 403 U.S. at 611 n.5.) As demonstrated earlier, the owner corporation and its cooperative lessee may limit residence in Rajneeshpuram to those who satisfy their particular residence requirements. Any resident who fails to meet these conditions may be required to leave. Indeed, the Secretary, president of the Rajneesh Humanity Trust, told the 3,500 newcomers to Rajneeshpuram as part of Trust's "homeless" project that "if you're going to be here, you're going to participate in the program." *'Non-Participation' Leads to Ejection from Commune*, Oregonian, Oct. 22, 1984, at B1, col. 2. Among other things, participating in the program "means going to the drive-by" and watching Bhagwan Shree Rajneesh drive by in one of his Rolls-Royces. *Id.* Attendance at the Saturday mass meeting is also mandatory. *Id.* at B1, col. 6. Non-participation has already led to some expulsions. *Id.* at B1, col. 1. Thus, in effect, residents may enjoy the benefits of City expenditures only by sufferance of the single property owner and its lessee. In fact, this residency requirement merely demonstrates the extent to which the distribution's secular impact is indeed inseparable from its religious impact.

239. When faced with a statute that allowed discretionary use of government funds, the *Nyquist* Court concluded:

No attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes, nor do we think it possible within the context of these religion-oriented institutions to impose such restrictions . . . . Absent appropriate restrictions on expenditures for these and similar purposes, it simply cannot be denied that this section has a primary effect that advances religion
not payments for services rendered, nor are they for a specific proper purpose. Instead, the payments are for any municipal purpose determined by the City in its discretion. The City Council in which the City's municipal powers are vested exercises that discretion on the City's behalf. The City Council is elected by an electorate subject to the control of the Commune and RIC, which are themselves religious entities. Given this political control, the City Council may be pressured into appropriating money for religious purposes. There is no guarantee that the City Council will use these payments in exclusively secular ways. Absent such guarantees, these payments could be used to promote religious ends.

Given this "potential for impermissible fostering of religion," Oregon's distribution of public funds to Rajneeshpuram has the primary effect of advancing religion. As stated by the Court in Nyquist, "[i]n the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes... direct aid in whatever form is invalid." Although the Commune and the inhabitants of Rajneeshpuram are entitled to receive the same municipal services as all other residents of the state, a city, county, or state cannot provide public funds to a religious organization to be used in its discretion. Therefore, although Oregon revenue statutes might be facially neutral and provide funds to all municipalities state wide, their application to Rajneeshpuram results in direct

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413 U.S. at 774.

240. The Supreme Court considers this pressure to commingle secular and sectarian purposes a serious threat to the establishment clause mandate. For example, in concluding that a state statute had the primary effect of advancing religion, the Court in Grand Rapids School Dist. v. Ball noted that the danger arises "not because the public employee [is] likely deliberately to subvert his task to the service of religion, but rather because the pressures of the environment might alter his behavior from its normal course." 105 S. Ct. 3216, 3225 (1985) (quoting Wolman v. Walter, 433 U.S. 229, 247 (1977)); see also Lemon, 403 U.S. at 617.

241. [A] mere statistical judgment will not suffice as a guarantee that state funds will not be used to finance religious education... The Rhode Island Legislature has not, and could not, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. The State must be certain, given the Religious Clauses, that subsidized teachers do not inculcate religion... Nyquist, 413 U.S. at 778-79 (quoting in part Lemon, 403 U.S. at 619) (emphasis in the original); see also Levitt v. Committee for Pub. Educ., 413 U.S. 472, 480 (1973) ("[T]he state is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination.").

242. This potential for abuse parallels the Grendel's Den Court fear that a standard less delegation of veto power would enable a church to favor its members. The Court concluded that this mere possibility for abuse violated the second prong of the Lemon test. See supra note 74.


244. Nyquist, 413 U.S. at 780 (emphasis added).
aid to a religious organization and, therefore, has the improper primary effect of advancing religion. Payments to religion cannot be upheld because the religion has taken on the form of a city.

Under the third prong of the *Lemon* test, excessive entanglement,"#45 the state action must not foster an excessive government entanglement with religion."#46 Because "[t]he test is inescapably one of degree,"#247 the Supreme Court has devised guidelines for an "excessive entanglement" inquiry: "In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the state provides, and the resulting relationship between the government and the religious authority."#248 This subsection applies these guidelines to ascertain whether the state’s payments to Rajneeshpuram promote an unconstitutional degree of governmental involvement in religion.

As demonstrated above,"#249 the beneficiaries of Oregon’s payments to Rajneeshpuram are RIC, the Commune, RFI, the City Council, and the City's inhabitants. Both RFI and the Commune expressly declare in their articles of incorporation that their raison d’etre is to follow the teaching of Bhagwan Shree Rajneesh;"#250 thus, their character and purposes are admittedly religious. RIC is a seemingly neutral investment corporation, but, as RFI’s wholly owned subsidiary, it too takes on religious overtones."#251 Finally, the City Council members and the City inhabitants are Rajneeshees and members of the Commune; as Commune members and devout Rajneeshees, their goal is to create a religious community in which to live and teach. Indeed, Rajneeshpuram is the product of that mission. Thus, the character and purposes of the group that benefits from Oregon’s payments to Rajneeshpuram are religious.

The *Lemon* Court found that this type of pervasively religious character and purpose led to an excessive involvement with religion."#252 In

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#245. The Court in *Nyquist* found that it was unnecessary to address the excessive entanglement issue because the state’s act had the primary effect of advancing religion. *Nyquist*, 413 U.S. at 780. In other words, if a state act has the primary effect of advancing religion, it might by necessity involve excessive government entanglement with religion. This is true because, in a religious environment, governmental supervision is needed to guarantee that government funds are furnishing only secular benefits. Yet, it is this very same supervision within a religious context that breached the third *Lemon* prohibition against excessive involvement with religion. Thus, once a court has determined that the allocation of state revenue to Rajneeshpuram primarily benefits religion, a separate determination that the allocation also involves excessive entanglement may be unnecessary.


#248. *Lemon*, 403 U.S. at 615.

#249. See supra notes 226-27 & accompanying text.

#250. See supra notes text accompanying notes 106, 118.

#251. See supra text accompanying note 112.

Lemon, the benefited schools had a substantial religious character, the teachers were subject to religious control and discipline, and the religious authority pervaded the entire school system.253 Under those circumstances, government contact with the school required involvement with religion.

In Rajneeshpuram, all of the benefited groups have a significant religious character, the City Council members and City inhabitants are subject to religious control,254 and religion pervades the entire City and its infrastructure. As in Lemon, the religious character and purposes of the benefited group may lead to excessive government involvement with religion.

The nature of the aid is another factor considered in the excessive entanglement inquiry.255 There are two crucial questions: first, whether the aid requires government involvement; second, whether this involvement would call for official and continuing government surveillance.

Unlike Walz, in which the government "aid" was merely an exemption and not a transfer of funds,256 the Oregon revenue statutes provide for a direct money subsidy to Rajneeshpuram. As the Walz court noted, direct money payments clearly require substantial government involvement.257 Additionally, this aid would require continuing governmental surveillance. The Oregon statutes do not provide for a single allocation of state funds, rather they set up an enduring system under which annual appropriations are calculated and distributed. This revenue sharing system could lead to administrative entanglement: "the history of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance."258 Thus, the nature of the aid to Rajneeshpuram also promotes the need for government contacts with a religiously dominated community.

The relationship that would result from Oregon's distribution of funds to Rajneeshpuram further denotes impermissible entanglement. Given the religious character of Rajneeshpuram, virtually the only way

253. Id. at 616-17.
254. See supra notes 163-69 & accompanying text.
255. See supra text accompanying note 248.
256. Walz, 397 U.S. at 675. The Walz court concluded that "[t]he grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state . . . . There is no genuine nexus between tax exemption and establishment of religion." Id.
257. The Walz Court stated that "[o]bviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards." Id. (cited with approval in Lemon, 403 U.S. at 621).
258. Lemon, 403 U.S. at 621.
to ensure that the City's expenditures were for secular purposes would be
to place strict restrictions on the use of the City's funds.

It may be argued that the state need not monitor any City activities. In *Board of Education v. Allen*,\(^\text{259}\) the Supreme Court rejected the contention that a statute which permitted loaning school books to private schools could be misused to provide religious schools with religious literature. The Court stated that "[a]bsent evidence, we cannot assume that school authorities . . . are unable to distinguish between secular and religious books or that they will not honestly discharge their duties under the law."\(^\text{260}\) Given this language, the state cannot presume that City officials will ignore religious neutrality in their dealings with Rajneeshpuram's religious entities. This suggests that there would be no need for the state to monitor the City's activities and to determine the secular propriety of each expenditure.

The difference between the state aid in *Allen* and the state aid to the City makes this argument unpersuasive. In *Allen*, the state provided school books to private schools. School authorities then inspected the books to ensure their religious neutrality. These inspections did not lead to excessive government entanglement with religion. Here, the state is providing financial assistance to the City for its discretionary use. Unlike that of school books, the religious neutrality of city officials is not readily ascertainable. Even if a determination could be made, authorities cannot determine conclusively that City officials will remain neutral.

The *Lemon* Court reached a similar conclusion with respect to parochial school teachers: "Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and the subjective acceptance of the limitations imposed by the First Amendment.\(^\text{261}\) The Court concluded that "[a] comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected."\(^\text{262}\) An examination to assure that each City expenditure

\(\text{259. 392 U.S. 236, 244-45 (1968).} \)
\(\text{260. Id. at 245.} \)
\(\text{261. Lemon, 403 U.S. at 619.} \)
\(\text{262. Id. Four years after Lemon, the Court went even further in finding a need for government surveillance. In Meek v. Pittenger, 421 U.S. 349 (1975), the Court considered the constitutionality of several new forms of aid to nonpublic schools. Among other forms of assistance, the statute provided for auxiliary guidance, testing, and remedial and therapeutic services by public school employees who would provide services at the private schools. The state sought to avoid a religious effect by using its own employees to provide assistance in developing purely secular educational skills. In this way, the state hoped to avoid the necessity for a surveillance of the teachers and programs, which might constitute an excessive entanglement. See id. at 371-72.} \)

The Court, however, found the use of state employees insufficient to guarantee a purely secular program. *Id.* The majority recognized the possibility that even a public school employee might advance religious ends in such a situation. Consequently, the Court held that it is
has both a secular purpose and a primarily secular effect would involve subjective judgments as to what the religious purposes of the foundation and the Commune are, and how the action could inhibit or advance those purposes. It would be necessary to examine the motivations and purposes of city officials, the cumulative effects of their actions upon the community and the degree of intracity government involvement with religious entities. In particular, the government would have to inspect and evaluate the City's financial records, community projects, and ordinances in order to determine which expenditures, if any, might be religiously motivated or have primary religious beneficial effects. Thus, the surveillance and enforcement necessary to ensure the secular use of state funds constitute "prophylactic contacts [that] will involve excessive and enduring entanglement between state and church."263

Taken as a whole, the government intrusion into a religious community through distribution of public funds, restrictions necessarily imposed

impossible to avoid all possible religious effects even in secular programs for remedial students, without official supervision of the programs on a scale that would result in a prohibited form of entanglement. Id. The monitoring of religiously affiliated city officials in a pervasively religious community would likely entail as much government involvement with religion as would the supervision of state employees working in parochial schools.

263. Lemon, 403 U.S. at 619. Professor Nowak has discussed the particular dangers involved with administrative entanglement:

Additionally, this type of involvement may undermine the neutrality of government itself. A high degree of regulation will require some formal administration to ensure that the day-to-day regulations are followed and that reporting requirements are met. However, in the long run, administrators and those who are being regulated frequently develop a mutuality of interest. It is in the interest of the public administrators to please those who are regulated in order to maintain their position and increase the power of their agency. Similarly, it is in the interest of the regulated entities to accommodate, if not control, those who regulate them so that they will receive favorable rulings in areas where the administrators exercise some discretion. This mutuality of interest can lead to the "capture" of administrative agencies by those whom they are supposed to regulate and make it difficult to determine whether such agencies are acting on behalf of the public or the regulated entity. There is no reason to believe that the regulation of religious activities would follow a different pattern.

J. Nowak, supra note 2, at 1046. Professor Nowak cites Larkin v. Grendel's Den as an example of his proposition that the excessive entanglement branch of the establishment clause test was meant to avoid the danger to both secular government and religious autonomy that accompanies a sharing of power and entanglement of administrative agencies. Id. at 1046 n.6 (citing Grendel's Den, 459 U.S. 116).

The Court's language in Lemon supports Professor Nowak's "capture" theory. There, the Court discussed the natural tendency of governmental programs to take on a life of their own: "[M]odern governmental programs have self-perpetuating and self-expanding propensities. These internal pressures are only enhanced when the schemes involve institutions whose legitimate needs are growing and whose interests have substantial political support." Lemon, 403 U.S. at 624. The Court analogized between this expansive propensity of governmental programs and the potential "downhill momentum" of constitutional theory, suggesting that the constitutional approval of a relatively innocuous governmental benefit to religion is the first step in an inevitable progression that ultimately leads to the establishment of state religion. Id.
on the appropriate use of those funds, and the surveillance required to enforce those restrictions culminates in an excessive entanglement with religion.\textsuperscript{264}

In summary, the state wide application of Oregon's revenue statutes has a legitimate secular purpose. In the statutes' application to Rajneeshpuram, however, the primary effect is to advance religion by providing public aid to religious organizations. Furthermore, the statutes enmesh the state in administrative involvement with Rajneeshpuram and thereby foster excessive entanglement with religion. Thus, the application of the Oregon statutes to Rajneeshpuram violates the establishment clause.

\textbf{Free Exercise of Religion Analysis}

Any analysis of Rajneeshpuram's constitutionality under the establishment clause must be balanced against the first amendment's parallel religious guarantee: the free exercise of religion.\textsuperscript{265} The free exercise clause prohibits government proscription of religious beliefs.\textsuperscript{266} It does not, however, automatically preclude the regulation of all activities that have religious implications.\textsuperscript{267} Yet, the essential question is whether the government action impermissibly burdens a religious belief by regulating an action important to the practice of that religion.\textsuperscript{268}

In general, the burden imposed by the state action on religious practices is balanced against the state's interest in the regulation.\textsuperscript{269} The party challenging the state action must first show that the law burdens the practice of his or her religion.\textsuperscript{270} The state must then demonstrate a significant secular reason for the challenged law.\textsuperscript{271} In balancing the two interests, the Court has considered the degree of the burden imposed on

\textsuperscript{264} As the \textit{Lemon} Court concluded, "the cumulative impact of the entire relationship arising under the statutes . . . involves excessive entanglement between government and religion." \textit{Lemon}, 403 U.S. at 614. There have been no political controversies (other than the Attorney General's suit) directly related to the allocation of state funds to Rajneeshpuram. Consequently, this Note does not address the potential political divisiveness created by Oregon's payments.

\textsuperscript{265} The first amendment provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I. The free exercise clause was first held applicable to the states in \textit{Cantwell} v. Connecticut, 310 U.S. 296 (1940).

\textsuperscript{266} \textit{Torcaso} v. \textit{Watkins}, 367 U.S. 488 (1961) (invalidating a state requirement that a person take an oath that required a belief in God in order to qualify for public employment).

\textsuperscript{267} \textit{Reynolds} v. \textit{United States}, 98 U.S. 145 (1879).

\textsuperscript{268} See generally J. NOWAK, supra note 2, at 1053-54.


\textsuperscript{271} Id.
the religious practice, the importance of the secular interest furthered, the extent to which that interest would be impaired by accommodating the religious practice, and the availability of less restrictive means to achieve the state's interest. If the state interest is truly significant, the state action and consequent burden on religious practice is permissible, provided that the state interest could not be accomplished by means less burdensome to the religious practice. On the other hand, if the state's interest is of a lesser magnitude, the state must accommodate the religious practice.

A relatively recent Supreme Court decision, McDaniel v. Paty, provides a helpful application of this balancing test to a "free exercise" challenge. This provision was the basis of a suit by a candidate defeated by a cleric in a state election, who argued that the elected candidate should be disqualified under the statute because he was an ordained minister.

The Court unanimously found that the statute was unconstitu-
Chief Justice Burger’s plurality opinion held that the disqualification statute violated the free exercise clause because it conditioned McDaniel’s right to the free exercise of his religion on the surrender of his right to seek office. Justice Burger first asserted that the minister’s free exercise rights were not absolute because the statute operated against the minister’s “status” and not his belief. The state’s infringement on the minister’s religiously motivated activities could only be justified, however, by state interests “of the highest order.” While Tennessee asserted that its interest was to prevent entanglement of church and state in the civil lawmaking function of the legislature, the Court found that that interest was not sufficiently important without a showing of current validity to justify an infringement of the minister’s free exercise rights. In other words, given Tennessee’s failure to demonstrate the reality of the alleged dangers of clergy participation in the political process, the state’s infringement on free exercise could not withstand the constitutional challenge.

Application to Rajneeshpuram

Oregon’s denial of municipal status to Rajneeshpuram may place a burden on its inhabitants’ right to freely exercise their religion. The Rajneeshees could allege that the religious community’s existence hinges on its incorporation as a municipality, and argue that a self-sufficient municipality is essential to their religious autonomy. In other words, the community could contend that its religious beliefs and practices require its removal from secularized society, and that therefore it could not

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282. *McDaniel*, 435 U.S. at 629. In so holding, the Court reversed the Tennessee Supreme Court, which had decided in favor of the defeated candidate, Paty. *Paty v. McDaniel*, 547 S.W.2d 897, 910 (Tenn. 1977), *rev’d*, 435 U.S. 618 (1978). Although the case was decided without dissent, no majority opinion was rendered because the justices could not agree on a single rationale to support the result.

283. *McDaniel*, 435 U.S. at 620 (plurality opinion).
284. *Id.* at 626 (quoting *Sherbert*, 374 U.S. at 406).
286. *Id.*
287. *Id.* For this reason, the Chief Justice concluded that *Torcaso* did not control the case and that the law was, therefore, not automatically invalid as “depriving the clergy of a civil right solely because of their religious beliefs.” *Id.* at 626. Yet, Justices Brennan and Marshall in their concurrence saw no real distinction between a religious belief and the act of declaring a belief in religion, such as one’s calling to the ministry. *Id.* at 634-35 (Brennan, J., concurring).

288. *Id.* at 628 (plurality opinion) (quoting *Yoder*, 406 U.S. at 215).
289. *McDaniel*, 435 U.S. at 628; *id.* at 641 (Brennan, J., concurring).
290. *Id.* at 628.
291. *Id.*
292. *Id.* at 628-29.
293. This is essentially the same argument used by the Amish community in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In their free exercise attack on Wisconsin’s compulsory public school attendance law, the Amish argued that their ability to educate their children at home
successfully be integrated in another community without forfeiting its constitutional right of free exercise.\textsuperscript{294}

Certainly, a group of people with a common interest have a right to form a city and then "take over" that city by getting their candidates elected.\textsuperscript{295} In particular, Oregon acknowledges the right of its adult citizens to organize themselves and create a municipality. There is no constitutional basis to disqualify such a group of citizens from this political activity merely because their common interest arises out of their religious affiliation.\textsuperscript{296} Rajneeshes are citizens of the United States and thus are entitled to enjoy secular benefits and privileges without regard to their religion.\textsuperscript{297} As the Court noted in \textit{McDaniel}, with respect to holding public office,\textsuperscript{298} the state cannot condition the exercise of a constitutional right upon the surrender of another. Here, Oregon apparently seeks to

\begin{itemize}
  \item after the eighth grade was a critical component to their entire way of life, which is dictated by their religion. \textit{Id.} at 209-13.
  \item In response to this argument, Oregon could point out that Rajneeshpuram's actions contradict this contention. For example, Rajneeshes have successfully integrated themselves in the neighboring town of Rajneesh, see supra note 79, and have actively sought the inclusion of "outsiders" within their community. \textit{See supra} note 161. In any case, Rajneeshpuram thus far has not made any such contention.
  \item Professor Tribe states that "[t]o strike down a public choice on the sole ground that it incidentally makes religious actions easier or less costly would clearly be to single out religious groups for hostile treatment, contrary to the mandate of the first amendment's free exercise clause." L. \textsc{Tribe}, \textit{ supra} note 2, § 14-9, at 840; \textit{see also} \textit{Everson}, 330 U.S. at 18 (first amendment does not require state to be the adversary of religion).
  \item Torcaso, 367 U.S. at 495-96; \textit{see also} \textit{McDaniel}, 435 U.S. at 640-41 (Brennan, J., concurring) ("Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally."); \textit{Walz}, 397 U.S. at 670 ("adherents of particular faiths and individual churches frequently take strong positions on public issues . . . of course, churches, as much as secular bodies and private citizens have that right"). \textit{See generally} L. \textsc{Tribe}, \textit{ supra} note 2, § 14-12, at 866-67 ("American courts have not thought the separation of church and state to require that religion be totally oblivious to government or politics . . . . [t]o view such religious activity as suspect, or to regard its political results as automatically tainted, might be inconsistent with first amendment freedoms of religious and political expression . . . .") (cited with approval in \textit{McDaniel}, 435 U.S. at 641 n.25 (Brennan, J., concurring)).
  \item Moreover, as the \textit{Lynch} Court noted, the first amendment does not require this type of total separation: "No significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government. 'It has never been thought either possible or desirable to enforce a regime of total separation . . . .'" \textit{Lynch}, 104 S. Ct. at 1359 (quoting in part from Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 256, 760 (1973)).
  \item \textit{McDaniel}, 435 U.S. at 639 (Brennan, J., concurring) ("[G]overnment may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits."); \textit{see also} \textit{Everson}, 330 U.S. at 16 (the state "cannot exclude . . . the members of any other faith because of their faith, or lack of it, from receiving the benefits of public welfare legislation." (emphasis in original)). \textit{See generally} Giannella, \textsc{Religious Liberty, Nonestablishment, and Doctrinal Development, Part II, The Nonestablishment Principle}, 81 \textsc{Harv. L. Rev.} 513, 527 (1968).
  \item \textit{McDaniel}, 435 U.S. at 626 (plurality opinion); \textit{Sherbert}, 374 U.S. at 406.
\end{itemize}
deny Rajneeshpuram citizens the right to incorporate as a municipality based on their religious affiliations. If the incorporation of Rajneeshpuram is essential to the continued existence and autonomy of the religious community, the disallowance of its existence would seem to impose an unconstitutional penalty on free exercise. Furthermore, invalidating Rajneeshpuram’s incorporation as a city and denying it access to state revenues due to its religious character would seem to classify its existence on the basis of religion, and thereby run afoul of both religion clauses.

On the other hand, although Rajneeshpuram citizens have the same guaranteed rights of all citizens of the United States, those rights must be exercised within constitutional bounds. “Clearly freedom of belief protected by the free exercise clause embraces freedom to profess or practice that belief,” but “that does not mean that the right to participate in

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300. Some commentators have argued that the government should be “religiously blind” and follow a “strict neutrality theory,” which would prohibit classification in terms of religion either to confer a benefit or impose a burden. See, e.g., P. Kurland, supra note 2, at 18; Weiss, Privilege, Posture, and Protection: Religion in the Law, 73 Yale L.J. 593 (1964); cf. L. Tribe, supra note 2, § 14-4, at 819-23 (discussing the “strict neutrality theory”). See generally P. Kauper, Religion and the Constitution 64-67 (1964).

In fact, some commentators have argued for “political neutrality,” which would permit the inclusion of religious associations in any governmental scheme whose secular purposes justify such inclusion. See, e.g., Cushman, Public Support of Religious Education in American Constitutional Law, 45 Ill. L. Rev. 333, 348 (1950); Giannella, supra note 297, at 519. The argument is that, if religious voluntarism is to be a reality, then religious groups, as part of the community, should share in benefits accorded to the public generally. Id. at 519.

Under both of these theories, government programs that benefit religion, such as the incorporation and revenue sharing in Rajneeshpuram’s case, would be permitted as long as no religious classifications were employed. P. Kurland, supra note 2, at 80-85. See generally L. Tribe, supra note 2, § 14-4, at 821. The Court has, however, consistently refused to adopt these theories. Indeed, the Court has held that religious classifications not only are permitted in some instances, but at times are even required. See, e.g., Sherbert v. Verner, 374 U.S. 398 (1963) (state must modify its unemployment compensation requirement of willingness to work Mondays through Saturdays in order to accomodate the needs of those religiously opposed to working on Saturday); cf. McDaniel, 435 U.S. at 639 (Brennan, J., concurring) (“such rigid conceptions of neutrality have been tempered by constructions upholding religious classifications where necessary to avoid [a] manifestation of... hostility [toward religion] at war with our national tradition as embodied in the First Amendment’s guaranty of the free exercise of religion.” (quoting McCollum v. Board of Educ. 333 U.S. 203, 211-212 (1948))).

301. See McDaniel, 435 U.S. at 630, 632, 635 n.8, 636 (Brennan, J., concurring). Justice Brennan found that in addition to violating the free exercise clause, Tennessee's disqualification statute also violated the establishment clause by having a primary effect which inhibits religion. Id. at 636.

302. Id. at 631 (Brennan, J., concurring). It should be remembered, however, that the judgment of the Court distinguished religious beliefs from acts that manifest that belief. Id. at 626-27 (plurality opinion). The Court hesitated to give sweeping first amendment protection to all religious practices and acts because “the absolute protection afforded belief by the First Amendment suggests that a court should be cautious in expanding the scope of that protection
religious exercises is absolute . . . .”303 The state's “interests of the highest order”304 can “overbalance legitimate claims to the free exercise of religion.”305

In 

McDaniel, Tennessee asserted that its interest in preventing the establishment of a state religion was of the highest order.306 The Court refused “to inquire whether promoting such an interest is a permissible legislative goal,”307 however, because Tennessee failed to demonstrate that its establishment clause concerns had current validity.308 The Court found that without such a demonstration, “the American experience provides no persuasive support for the fear that clergymen in public office will be less careful on anti-establishment interests or less faithful to their oaths of civil office than their unordained counterparts.”309 Therefore, the Supreme Court concluded that the state interest was not sufficiently compelling310 to justify the burden imposed on free exercise.311

Here, assuming arguendo that the state's denial of municipal status and state revenues would burden Rajneeshpuram's citizens' free exercise of religion, the state's interest in the present case is significantly different from that in 

McDaniel and would likely dictate a different outcome. First, the means used by Tennessee to implement its interest is distin-

since to do so might leave government powerless to vindicate compelling state interests.”  

Id. at 627 n.7 (emphasis in the original).

303. Id. at 631 n.2 (Brennan, J., concurring). Thus, even Justice Brennan, joined by Justice Marshall, acknowledged that although "a sharp distinction cannot be made between religious belief and religiously motivated action," id., "[w]e have recognized that 'even when the action is in accord with one's religious convictions, [i]t is not totally free from legislative restrictions."

Id. (quoting from Sherbert v. Verner, 374 U.S. 398, 403 (1963)).


305. Id. at 215, quoted with approval in McDaniel, 435 U.S. at 628.


307. Id. at 628.

308. Id.

309. Id. at 629.

310. Justice Brennan argued that the establishment clause cannot “be used as a sword to justify repression of religion or its adherents from any aspect of public life”:

The State's goal of preventing sectarian bickering and strife may not be accomplished by regulating religious speech and political association. The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities. Government may not inquire into the religious beliefs and motivations of officerholders—it may not remove them from office merely for making public statements regarding religion, or question whether their legislative actions stem from religious conviction.

In short, government may not as a goal promote “safe thinking” with respect to religion and fence out from political participation those, such as ministers, whom it regards as overinvolved in religion.

Id. at 641 (Brennan, J., concurring) (citations omitted).

311. Id. at 629 (plurality opinion). But cf. id. at 635 n.8 (Brennan, J., concurring) (balancing test unnecessary because Tennessee's statute violated the free exercise clause by establishing a religious classification as a basis for qualification for political office).
guishable from that employed by Oregon. In *McDaniel*, Tennessee flatly prohibitted the political participation of ministers in the legislature.\(^{312}\) Oregon, on the other hand, has not expressly conditioned the right to participate in government upon the surrender of religious free exercise. Nor has Oregon sought to condition municipal status or financial assistance on religious abstinence. Oregon is not absolutely barring the incorporation of all religiously uniform communities or statutorily prohibiting economic aid to all religious groups; the state is merely insisting that given the particular facts and power structure of Rajneeshpuram, the incorporation of the community would be inconsistent with the first amendment.\(^{313}\) While persons of the same faith who choose to live in the same area can incorporate a city, a religion itself cannot. Of course, a religious commune can adopt rules for its own governance or protection of its unique cultural and spiritual characteristics. The religious commune, or any other religious or private body, may also call upon the sovereign power of the state to aid in the enforcement of those rules. The commune may not, however, exercise that sovereign power itself. Thus, Oregon does not seek to invalidate a coalition of individuals who happen to share certain religious beliefs, but rather to block the union of religious and civil functions inherent in the exercise of governmental power by religious bodies.\(^{314}\)

Second, the nature of the state’s establishment clause interest in *McDaniel* differs from that proffered here by Oregon. In *McDaniel*, the state feared the political participation of religious leaders in general.\(^{315}\) Here, however, Oregon does not attempt to deny individuals the right to participate in government,\(^{316}\) but seeks to prevent the establishment of a local government subject to religious control.\(^{317}\) Furthermore, while Tennessee failed to show that clergy participation in politics posed any real or current constitutional danger,\(^{318}\) Oregon can demonstrate a real potential for constitutional conflict within the incorporated commu-

\(^{312}\) Id. at 620.

\(^{313}\) See Complaint, *supra* note 86.

\(^{314}\) Additionally, in Tennessee, the prohibition used to implement the state’s establishment clause concerns was not only sweeping, but also statutory. *McDaniel*, 435 U.S. at 620. This raised the question of whether “establishment prevention” is a proper legislative goal. Here, however, the state is seeking judicial relief. Complaint, *supra* note 86. Unlike the state legislature, the judiciary as constitutional interpreter is the appropriate forum for establishment clause enforcement. See *McDaniel*, 435 U.S. at 642 (Brennan, J., concurring) (“with judicial enforcement of the establishment clause”). Thus, the Oregon legislature has avoided creating self-determining evaluations of the first amendment’s guarantees and has left the balance between the religion clauses to be determined by the courts.

\(^{315}\) *McDaniel*, 435 U.S. at 628-29 (plurality opinion).

\(^{316}\) This point is supported by the fact that the state has not claimed that the existence of the neighboring City of Rajneeshee violates the establishment clause. Rajneeshees currently hold five of the town’s six city council member seats. See *supra* note 79.

\(^{317}\) See *supra* text accompanying notes 163-69.

\(^{318}\) *McDaniel*, 435 U.S. at 628-29.
This potential conflict is caused by religious control over residency, land ownership, and civic expenditures. Finally, while Tennessee could have readily detected a particular cleric's violations of neutrality in office, Oregon would have to monitor and evaluate the conduct of an entire city, its officials, and each of its sovereign acts in order to ascertain violations by Rajneeshpuram. The governmental intrusion posed by this surveillance would itself constitute an establishment clause violation. Thus, unlike the Tennessee statute, Oregon's refusal to incorporate and fund Rajneeshpuram constitutes the least restrictive means of protecting and enforcing its legitimate establishment clause concerns.

Not only are Tennessee's and Oregon's interests of a different degree and nature, their impact on the free exercise of religion also differs greatly. In *McDaniel*, the burden on free exercise was both direct and severe: an individual simply could not be both a minister and a legislative delegate. In contrast, Oregon's invalidation of the City's incorporation would place only a minimal burden, if any at all, on religious practices. There is no significant deprivation of free exercise of religion merely because the property on which the religion may be practiced cannot take on the attributes of a city. Additionally, Oregon does not challenge the right of its citizens to join together with fellow believers to develop and reside in a religiously inspired communal environment in which every aspect of their daily life is a form of worship, guided by the teachings of a religious leader.

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319. *See supra* notes 174-213, 226-64 & accompanying text.
320. *McDaniel*, 435 U.S. at 629 (plurality opinion).
321. *See supra* notes 193-201, 245-64 & accompanying text.
322. This choice parallels the one made by the Court in *Walz v. Tax Comm'n*, 397 U.S. 664, 674-76 (1970). In *Walz*, the Court had to choose between granting tax exempt status to churches or taxing them, both of which require government involvement with religion. *Id.* The Court allowed the exemption and concluded that taxing churches would actually give rise to greater government involvement with religion than would the exemption. *Id.* In general, the state activity that requires the least amount of government entanglement with religion is constitutionally preferable. Thus, because Oregon's invalidation of the City's corporate status would require less government entanglement with religion than would surveillance of the community to ensure compliance with the establishment clause, it is less restrictive and constitutionally preferable.

323. State v. Celmer, 80 N.J. *405*, 420, 404 A.2d 1, 8 (1979). A free exercise claim in this context is relevant, if at all, only to the question of how land use regulations may be enforced against a religious community. *See generally* Oregonian, Oct. 27, 1984, at C2, col. 1. If, for example, the only way that a religious community could comply with restrictions on population density was for the community to incorporate as a city, it is possible that the community could assert a free exercise right to an exemption from the land use laws. The appropriate accommodation of religion in that case would, however, arguably be to exempt the community from the requirement that it obtain city status, not to confer upon the community the sweeping sovereign powers that city status carries with it. *Sherbert v. Verner*, 374 U.S. 398 (1963).
Furthermore, unlike Tennessee, Oregon is not prohibiting individuals who preach Rajneeshism from running for or holding public office. Nor is the state depriving citizens of political rights because of their religious beliefs. Oregon is merely refusing to allow religious leaders to incorporate their own city to achieve political power.

In summary, *McDaniel* presented the Supreme Court with a confrontation between the establishment and free exercise clause barriers.\(^{325}\) The present case does not, however, create a similar conflict because the state’s invalidation of one of its municipalities and denial of state funds to that municipality would not inhibit the free exercise of religion. Even assuming arguendo that such a conflict exists, the establishment clause prohibition on allowing a religion to exercise governmental authority should be given greater weight than the minimal burden imposed on the community’s free exercise of religion.\(^{326}\) The issue is not whether the state’s citizens have the right to religious freedom, for the Constitution guarantees each individual that freedom; but whether the incorporation and financial aiding of a religious community under the present facts can be squared with the dictates of the establishment clause. No church, synagogue or religious foundation can constitutionally acquire sovereign state powers by bringing its adherents into its privately owned property to incorporate as a city. The free exercise clause cannot be used to protect the religion’s actions when those very actions would have been prohibited by the establishment clause had the religion not acquired the attributes of a city. In other words, the free exercise clause should not be used as a tool for bringing about establishment clause violations. The free exercise clause cannot grant with one hand what the establishment clause has forbidden with the other.\(^{327}\)

**Conclusion**

Oregon’s proclamation recognizing Rajneeshpuram’s incorporation as a municipality, and Oregon’s distribution of state revenues to Rajneeshpuram, violate the establishment clause of the first amendment. Each of these acts have a primary effect that advances religion, and each excessively entangles government with religion.

Moreover, the state may deny corporate municipal status and a proportional share of state revenues to Rajneeshpuram without violating the free exercise clause of the first amendment. Should a court find that the

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\(^{325}\) *Constitutional Dilemma*, supra note 2, at 581.


\(^{327}\) *See* Nyquist, 413 U.S. at 788-89.
free exercise clause is at issue in the Rajneeshpuram case, the state's compelling establishment clause interests would likely outweigh any incidental burden on free exercise. Absent a showing of a heavy and direct burden imposed on the religious community by such denials, the first amendment's establishment clause principles must govern.

As the United States Supreme Court forcefully summarized in *Larkin v. Grendel's Den*:

Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn.

The Court must draw such a line at Rajneeshpuram.

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329. *Id.* at 307 (emphasis in original) (quoting *Lemon*, 403 U.S. at 625).
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