

Ben Townsend Note: Mathew D. Staver, while probably a nice guy, is no friend of the Lordship Church movement. He takes the historical facts of unincorporation and twists them so that Jerry Falwell can own more property in Virginia by incorporating Thomas Road Baptist Church. Congratulations fellows! You just turned 200 years of good law upside down. Now churches in Virginia and West Virginia can be “legitimate” in the eyes of the State. It still goes to show us that a Lawyer – even a Christian Lawyer – merely sells himself out to where the money comes from. Attaboy Mathew! I hope Falwell’s millions continue to fund your Law organization. So much for principle.

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DISESTABLISHMENTARIANISM COLLIDES WITH THE FIRST AMENDMENT: THE GHOST OF THOMAS JEFFERSON STILL HAUNTS CHURCHES

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SUMMARY:

... As this article will show, the methods of disestablishment included prohibiting the incorporation of churches, confiscating property, and limiting the amount of real and personal property that churches may own. ... The General Assembly shall not grant a charter of incorporation to any church or religious denomination, but may secure the title to church property to an extent to be limited by law. ... Even if Rev. Falwell's Church were permitted to incorporate, any land transfer to the Church in violation of the Statutes is void, because such transfer violates the land limitation restrictions and trustee requirements of the Statutes. ... A Virginia Attorney General opinion answering the question of taxation posed by the Commissioner of Revenue gives some guidance as to the similar inquiry which a clerk must undertake to determine whether church property is "exclusively" used for religious purposes pursuant to Section 58.1-811. ... " Since the Charter Provision and the Statutes governing church property are neither neutral nor generally applicable, the Commonwealth of Virginia must demonstrate a compelling interest in retaining the laws, which interest is satisfied by the least restrictive means available. ... Only West Virginia has a similar restriction on churches. ... Churches cannot incorporate and must obtain trustees in order to hold real or personal property. ...

TEXT:

[*43]

I. Introduction

This history of church-state relations in the Commonwealth of Virginia date back to Thomas Jefferson and James Madison. Efforts by Jefferson and others to disestablish the state church may be likened to an army conquering a foreign enemy. The state established church was viewed as a remnant of the British government. Disestablishment was considered to be part of the ongoing Revolution. As this article will show, the methods of disestablishment included prohibiting the incorpora-

tion of churches, confiscating property, and limiting the amount of real and personal property that churches may own. n3

The remnants of the disestablishment movement remain today, as reflected in Virginia's Constitution and statutory laws. n4 An entire statutory scheme to this day restricts the amount of real and personal property a church may own, and further requires court supervision of church property transactions. n5 Although churches have complained about these [*44] laws for years, until recently no one has challenged them under the United States Constitution. Reverend Jerry Falwell, pastor of the Thomas Road Baptist Church (hereinafter "Church") found himself in a strange position when his Church sought to build a 12,000 seat sanctuary. The land on which the sanctuary was to be constructed exceed the meager 15 acres allowed by state law. n6 Thus, the Church would not be able to hold title its own place of worship. The Church then brought the first ever constitutional challenge against Virginia's Constitution and state laws. n7 In section two, this article will overview the [*45] background of Rev. Falwell's dilemma as well as the history of Virginia in reference to its treatment of churches.

Section three of the article will then analyze these Eighteenth Century laws in light of Twenty-First Century jurisprudence under the Free Exercise, Establishment and Assembly Clauses of First Amendment to the United States Constitution. The article will also overview the application of the Equal Protection Clause to Virginia's constitutional and statutory scheme. Finally, section three will consider the application of the Religious Land Use and Institutionalized Persons Act (hereinafter "RLUIPA"). n8 The Statues are inextricably intertwined as part of an overall scheme to prevent churches from holding unlimited amounts of real and personal property.

II. Background: The Church's Religious Beliefs And Practices

In its Complaint, the Church alleged having a sincere religious belief which including providing "a home for Christian prayer, worship, and education for the people of Lynchburg, Virginia, the nation, and the world." n9 Since its inception in 1956, the Church, known as Thomas Road Baptist Church, has been led by Rev. Jerry Falwell. n10

At the time of the complaint, sanctuary was located on 28.88 acres in a residential area in the City of Lynchburg. n11 The Church contended that it had outgrown its current sanctuary in Lynchburg, and thus began "to construct a new facility on approximately sixty acres elsewhere in Lynchburg." n12 The Church Trustees held title to the land where the Church sanctuary was located, and sought to take title to the additional acreage where the new Church sanctuary was under construction. n13 The Church also desired to incorporate as part of the expansion project. The Church contended that taking and holding title to this additional acreage and filing articles of incorporation would cause the Church to violate Virginia's Constitution and the Statutes which regulate ownership of [*46] property by churches. n14

A. Virginia's Charter Provision Prohibits **Church Incorporation**.

Pursuant to a provision in the Virginia Constitution (hereinafter "Charter Provision"), the Church is not permitted to incorporate. Virginia's Constitution states the following:

The General Assembly shall not grant a charter of incorporation to any church or religious denomination, but may secure the title to church property to an extent to be limited by law. n15

The Virginia General Assembly initially handled all requests by both secular and religious organizations to incorporate, but in 1902, the Virginia Constitution was amended wherein the General Assembly duty was delegated to the newly-established State Corporation Commission. n16 In addition to the Charter Provision, which bans **church incorporation**, Article XI of the Virginia Constitution now states the following:

Subject to the provisions of this Constitution and to such requirements as may be proscribed by law, the Commission shall be the department of government through which shall be issued all charters, and amendments or extensions thereof, of domestic corporations and all license of foreign corporations to do business in this Commonwealth. n17

Organizations and associations other than churches are [*47] permitted to incorporate in Virginia. n18 The Virginia Charter Provision does not prohibit the incorporation of any type of organization or association other than a church. n19

B. Virginia Laws Limit Church Property Ownership.

Virginia statutory law sets forth an entire chapter which is designed solely to address church property ownership. n20 Interestingly, this statutory scheme begins by reciting Thomas Jefferson's Bill for Establishing Religious Freedom, which was first enacted by the Virginia General Assembly on January 16, 1786. n21 The same statutory scheme next declares that the "rights" asserted in the act "are of the natural rights of mankind." n22 The statutes then honor Jefferson by stating that on the 200th Anniversary of the enactment "the Virginia Act for Religious Freedom, the 1986 Virginia General Assembly commends their eighteenth century predecessors for their wisdom and foresight" and then declares the second full week of every January to be celebrated as "Religious Freedom Week." n23 The sixteenth day of January is then declared to be "Religious Freedom Day." n24

[*48] The statutory scheme then sets forth a series of sections which address the ownership and disposition of church real and person property, the appointment of trustees by the Circuit Court, the limitations on the amount of real and personal property which a church may own, and oversight of property ownership and management by the Circuit Court. n25

Virginia Statutes place a cap on the amount of real and personal property that a church is permitted to own. n26 Due to the restrictions, church trustees are not permitted to hold in excess of fifteen acres of real property within a city unless the city has an ordinance allowing the trustees to hold up to fifty acres. n27 The trustees of a church may not hold more than two hundred and fifty acres within the county. n28 Furthermore, a church may not hold more than ten million dollars in personal property excluding books and furniture. n29 The restrictions are part of a longstanding tradition in the Commonwealth of Virginia - restrictions which predate the incorporation of the First Amendment to the States through the Fourteenth [*49] Amendment. n30

Beginning in 1777 with the disestablishment movement, Virginia began confiscating church property. n31 Since at least 1842, Virginia has permitted limited ownership of property but has severely restricted church property rights. n32 In 1902 the church property laws were amended by an Act entitled "Chap. 323. - An ACT to amend and re-enact sections 1398, 1402, 1403, and 1404 of the Code of Virginia, so as to enable religious congregations, churches, and their trustees to take and hold personal estate." n33 The predecessor to Section 57-7.1 (requiring churches to hold property by trustees subject to limitation on the amount) is Section 1398 of the 1902 Act. The predecessor to Section 57-12 (limiting the amount of property a church may own) is Section 1403 of the

1902 Act Because Sections 1398 and 1402 were enacted as a single legislative Act, Section 57-7.1 and Section 57-12 are tied together in history and meaning. Although the amount of property that churches are permitted to own has increased over the years, the restrictions have not been lifted. n34 Currently, church trustees are not permitted to [*50] hold in excess of 15 acres within any city, unless the city has an ordinance allowing the trustees to hold up to 50 acres. n35

Pursuant to Section 57-7.1 of the Code of Virginia, churches are not permitted to purchase, or to receive by gift or will, any real or personal property without either the court appointment of trustees under Section 57-8, or the existence of an ecclesiastical officer who is authorized to administer church affairs under Section 57-16 and Section 57-7.1 entitled "What transfers for religious purposes valid," states:

Every conveyance or transfer of real or personal property, whether inter vivos or by will, which is made for the benefit of any church, church diocese, religious congregation or religious society, whether by purchase or gift, shall be valid, subject to the provisions of 57-12... . No such conveyance or transfer shall fail or be declared void for insufficient designation of the beneficiaries in any case where the church, church diocese, religious congregation or religious society has lawful trustees in existence, is capable of securing the appointment of lawful trustees upon application as prescribed in 57-8, or has ecclesiastical officers pursuant to the provisions of 57-16. n36

A conveyance of property to a church is not valid if it violates the provisions of Section 57-12. Additionally, since Section 57-7.1 enumerates the permitted transfers "for the benefit of any church" in Virginia, and provides that transfers are not void if the church has trustees or ecclesiastical officers that can take title, it follows that no transfers of property are permitted for the benefit of any Virginia church that does not have either the requisite trustees n37 or ecclesiastical officers. n38 In [*51] other words, a conveyance of property to a church is valid only if (1) the church has the requisite trustees or ecclesiastical officers, and (2) the total amount of property which the church will hold following the conveyance does not exceed the limitations provided by the Statutes.

Section 57-12 of the Virginia Code, as amended n39 by the General Assembly via House Bill 183 in March 2002, sets forth the current property restrictions as follows:

Quantity of real and personal property trustees may hold.

Such trustees shall not take or hold at any one time more than fifteen acres of land in a city or town, nor more than 250 acres outside of a city or town and within the same county. The city or town council of any city or town may by ordinance, however, authorize such trustees to take and hold in such city or town not more than fifty acres of land at any one time; if such acreage is to be devoted exclusively, and is subsequently so devoted, to (i) a church building, chapel, cemetery; (ii) offices exclusively used for administrative purposes of the church; (iii) a Sunday school or parochial school building or playground thereof; (iv) parking lots for the convenience of those attending any of the foregoing; (v) administrative offices located on such church property leased by the church to a nonprofit hospital; or (vi) a church manse, parsonage or rectory. Such trustees of a church diocese may take or hold not more than 250 acres in any one county at any one time.

Such trustees shall not take or hold money, securities or other personal property to the extent that such taking or holding causes the money, securities or other personal property held at the time of taking by such trustees to exceed in the aggregate, exclusive of the books and furniture aforesaid, the sum of ten [*52] million dollars. n40

During the spring 2002 term of the General Assembly, the Attorney General, personally or through others, made efforts to have Section 57-12's restrictions on property eliminated. The Attorney General was not in favor of the passage of the new version of Section 57-12 because, in his opinion, Section 57-12 is unconstitutional. Attorney General Jerry Kilgore has publically stated that Section 57-12 is unconstitutional because it treats churches differently from secular organizations. n41 The new version of Section 7-12 is even more restrictive on property ownership than the former version of 57-12, which was previously applied against the Church. Under the new Section 57-12, the trustees of a church are limited to holding a maximum of 15 acres in any city for the benefit of the church, unless the city chooses to permit the trustees to hold up to 50 acres. n42 The former Section 57-12 allowed cities to increase the property limit to 50 acres regardless of the use of the church property. n43 The current Section 57-12 only permits cities to increase the property limit from 15 to 50 acres if the additional 35 acres are used for certain specifically listed purposes. n44

In an attempt to avoid the burdensome restrictions imposed on churches, the trustees of the Church incorporated a number of nonprofit organizations to hold title to various parcels of land. n45 Even if the Church were permitted to incorporate in Virginia, like secular organizations, the limitations of Section 57-7.1 still apply and prevent the Church from being owning more land than permitted by Section 57-12. n46 Any transfer of land in violation of state law is void ab [*53] initio. A case in West Virginia illustrates this principle. The only two states in the country which prohibit **church incorporation** and restrict church ownership of property are Virginia and West Virginia. n47 When West Virginia broke away from Virginia, it retained many of the laws established in Virginia, including the laws regulating churches. In 1982, the Supreme Court of Appeals of West Virginia in *Ones v. Morris* n48 declared a grant of interest in land to an out-of-state incorporated church void ab initio, stating that "the precedent that any conveyance to an ecclesiastical corporation in contravention of the statutes of mortmain is absolutely void, and not voidable, is overwhelming." n49 The property at issue in *Ones* was once held by an unincorporated church in West Virginia. n50 A reverter clause governing the property provided that the property revert to the out-of-state incorporated church should the local church split from the denomination. n51 Because the interest in the land could not legally be transferred to an incorporated church, a subsequent attempted transfer of the property from the out-of-state incorporated church to trustees in West Virginia was also void. n52 The conveyance was void because West Virginia law prohibited **church incorporation**. n53 Thus, a conveyance of property in violation of state law (whether that law be a prohibition on incorporation or a prohibition on the amount of land a church may own) is void. Even if Rev. Falwell's Church were permitted to incorporate, any land transfer to the Church in violation of the Statutes is void, because such transfer violates the land limitation restrictions and trustee requirements of the Statutes.

Rev. Falwell and the trustees of Church filed suit on November 9, 2001 to challenge, inter alia, the constitutionality [*54] of the former Section 57-12. n54 The Virginia Attorney General filed a Motion to Dismiss, arguing that he was not the proper party because the Attorney General did not have a sufficient enforcement connection to Section 57-12. n55 On February 8, 2001, the District Court dismissed, without prejudice, the Attorney General as a defendant. n56 Unlike the new Section 57-12, n57 the former Section 57-12 did not specifically state that the Attorney General was a proper party to be named defendant in a suit challenging the validity of 57-12. n58

As noted above, after his dismissal, the Attorney General lobbied the General Assembly to repeal Section 57-12, claiming the provision is unconstitutional. n59 Explaining why the General Assembly rebuffed the Attorney General, Lynchburg Assemblyman Preston Bryant commented:

As a body we take very seriously the separation of church and state. We pay great homage to the Jeffersonian principles embodied in the statute - that you don't want provisions that could lead to unbridled growth (of a church), which could lead, theoretically, to an overpowering state church. n60

Not only did the General Assembly rebuff the Attorney General, the legislative body made Section 57-12 even more restrictive n61 and named the Attorney General as the enforcer of the provision and the proper party to defend the law against legal challenges. n62 Pursuant to the new Section 57-12:

The Office of the Attorney General shall intervene on behalf of any city, town or county to enforce the provisions of this section. The Office of the Attorney General shall be the proper party to be named as the defendant in any suit or action brought against the Commonwealth challenging the validity of this section. n63

In a case where a legal challenge was mounted to laws dating back to the Eighteenth Century, a Maryland district court addressed a law that caused the plaintiff harm by its very [*55] existence. n64 Plaintiff Churchly, a Methodist minister, filed suit seeking a declaratory judgment against a provision of the Maryland Constitution that declared clergymen ineligible to be state legislators. n65 Churchly was allowed to file as a candidate for election to the Maryland House of Delegates, but had campaign difficulties because of the possibility that the provision might be upheld. n66 The Governor and the Attorney General admitted the provision was unconstitutional. n67 Thus, the only controversy was the justiciability of the case. n68 The Court noted that it was "impossible to say what could happen if he were elected" and that it was also "possible that a subsequent Attorney General might disagree" that the provision was invalid. n69 The mere existence of the provision resulted in an injury, the suit constituted a "case or controversy." n70 The consequences to the Plaintiffs "are not merely possibilities which may not take place... . Rather, they are possibilities which, because of their very existence, result in a very real and immediate injury." n71 Thereinafter, the Court declared the provision unconstitutional under the Free Exercise Clause of the United States Constitution. n72

Likewise, Section 57-12 has caused harm to churches in Virginia by virtue of its very existence. The amendment to Section 57-12 now clears up any ambiguity as to the identity of the enforcer of the statutory scheme. n73 The 2002 amendment also indicates the General Assembly's desire to maintain the validity of the Eighteenth Century laws.

C. Church Property Limits Are Enforced And Monitored.

Section 57-12 is enforced, in part, through Section 57-15, wherein church trustees must petition to obtain court approval to sell, encumber, extend encumbrances, improve, make a gift of, or exchange land, or to settle boundaries between adjoining property by agreement. Section 57-15 states:

[*56]

The trustees of a ... church or religious denomination ... in whom is vested the legal title to such land ... may file their petition in the circuit court of the county or the city wherein the land ... lies ... asking leave to sell, encumber, extend encumbrances, improve, make a gift of, or exchange the land, or a part thereof, or to settle boundaries between adjoining property by agreement. Upon evidence being produced before the court that it is the wish of the congregation, or church or religious denomination or society ... to sell, exchange, encumber, extend encumbrances, make a gift or, or improve the property or settle boundaries by agreement, the court shall make such as order as may be proper n74

The Statutes require church trustees to file a petition in Circuit Court whenever the church wishes to convey, encumber, make improvements or modifications to land. n75 The practical effect of Section 57-12, as implemented through 57-15, prohibits churches from engaging in any land transaction that results in the trustees owning more property than permitted by law.

1. Enforcement by Cities, Towns and Counties.

In addition to the Attorney General, who is now required to enforce the property limitations, there are a number of local enforcers of the land limitations. Towns, cities and counties are local enforcers of the land limitations through their taxing and zoning powers. The Virginia Constitution provides property tax exemptions for "real estate and personal property owned and exclusively occupied or used by churches or religious [*57] bodies for religious worship... ." n76 If the city tax assessor concludes that a church hold property is in excess of 15 acres, the city may tax such property. n77

The Virginia Constitution exempts certain real and personal property "owned and exclusively occupied or used by churches or religious bodies for religious worship or for the residences of their ministers." n78 The operative word is "own." Pursuant to *Section 57-12 of the Virginia Code*, a church may not lawfully own more than fifteen acres in a city unless the city raises the limit to fifty acres. Thus, the Code defines how much church property is exempt from property tax.

Cities have the power to enforce service charges except on buildings or "adjacent land [which is] lawfully owned and held by churches or religious bodies" n79 If the church unlawfully owns property, it is not exempt from the service charge which the city may impose. Property held in excess of fifteen acres is unlawfully held by the church and is subject to taxation by the local governing body. In addition to the power to tax, local governing bodies have the power to control the use of property through its zoning provisions. If a local governing body determines that our the a church does not lawfully own the property which is the subject of a zoning request (because it exceeds 15 acres), the local authorities may refuse to grant a variance, conditional use permit, or permission to occupy a particular tract of land. n80

On August 12, 1983, Lynchburg Circuit Judge William W. Sweeney issued an Order with respect to the Old Time Gospel Hour, Inc., a ministry related to Rev. Falwell's Church. n81 The [*58] Order states that prior to the mid-1970s, title to certain property was vested in various organizations, and beginning around 1975, title to certain properties at issue were transferred and consolidated in Old Time Gospel Hour, Inc., a Virginia nonprofit corporation. The Order then states, "It has been suggested in the briefs that one reason for the transfers of title to Old Time was to avoid the land ownership restriction imposed on churches in Virginia. Churches, through their trustees, may not

own more than 10 acres of land in the City. Anything over this is taxed." n82 The Order further states that to be tax exempt, Church must "lawfully" own the property, meaning that Rev. Falwell's Church must have "legal title to the property." n83 The Order further states that if Old Time's property held in excess of the state law limitation were exempt, "Old Time would be immediately in violation of the State and City Code provisions placing limits on how much land churches and similar bodies may own. As a church, all of its real estate over 10 acres would be taxable." n84 Ruling that Old Time is not a church, the Court opined:

Even if it were held to be a church or similar organization, such ruling would be of little benefit to Old Time because all holdings over 10 acres would be immediately taxable. To stretch the law in this case would be to set dangerous precedents for other tax exemption cases. The church limitation laws would lose their meaning if they could be circumvented. n85

Finally, the Court concluded that "placing more property in the name of the church would make the property tax exempt if the acreage limitation is not exceeded." n86

2. Enforcement by Town Clerks.

The Virginia Code requires the town clerk to "exercise all the powers conferred and perform all the duties imposed upon such officers by general law and may perform such other duties, not inconsistent with his office, as may be requested of him by the governing body." n87 The relevant portion of the Virginia Code states the following:

Every writing authorized by law to be recorded, with all [*59] certificates, plats, schedules or other papers thereto annexed or thereon endorsed, upon payment of fees for the same and the tax thereon, if any, shall, when admitted to record, be recorded by or under the direction of the clerk on such media as are prescribed by 17.1-239. However, the clerk may refuse to accept any writing for filing or recordation unless:

(i) each individual's surname only, where it first appears in the writing, is underscored or written entirely in capital letters, (ii) each page of the instrument or writing is numbered, (iii) the Code section under which any exemption for recordation tax is claimed is clearly stated on the face of the writing, (iv) the names of all grantors and grantees are listed as required by 55-48 and 55-58, and (v) the first page of the document bears an entry showing the name of either the person or entity who drafted the instrument, except that papers or documents prepared outside of the Commonwealth shall be recorded without such entry. In addition, no deed shall be accepted for record by the clerk unless it is accompanied by a current business or residence address of the grantee or designee... n88

Relevant to the inquiry herein, in order for a deed or other document to be recorded, the person or entity (in this case the Church) must pay the appropriate fees and the tax thereon, and if an exemption is claimed, the specific section of the Virginia Code granting the exemption must be clearly stated on the face of the document. If there is a dispute over the proper fees or taxes to be paid by the Church, then the clerk may not, indeed as will be seen later, dare not, accept the document for recordation.

The Virginia Code addresses the recordation tax to be paid upon recording a deed. The relevant section states, "On every deed admitted to record, except a deed exempt from taxation by law, there is hereby levied a state recordation tax. The rate of the tax shall be fifteen cents on every \$ 100 or fraction thereof of the consideration of the deed or the actual value of the property conveyed, whichever is greater." n89 The determination of the proper amount of the recordation tax is the duty

of the clerk. The amount of the tax is not insignificant. The recordation tax is fifteen cents on every \$ 100, which extrapolated is \$ 15 on every \$ 1,000, or \$ 1,500 on every \$ 100,000 or \$ 15,000 on every \$ 1,000,000, and so on. The amount of the recordation tax can be significant. The question which the clerk must decide is whether the deed or the instrument is exempt from taxation by law, or whether a portion of the deed or instrument is exempt from taxation by law.

Section 58.1-811 of the Virginia Code states that the tax [*60] imposed by 58.1-801 shall not apply to any deed conveying real estate "to the trustee or trustees of any church or religious body where such real estate is intended to be used exclusively for religious purposes, or for the residents of the minister of any such church or religious body; ... n80

Each clerk, monthly or oftener if called upon by the Comptroller, shall make out a statement, upon forms prepared by the Comptroller, of all taxes and other money belonging to the Commonwealth collected by him during the preceding month. The statement shall be signed by the clerk and sent to the Comptroller, and the clerk shall at the same time pay into the state treasury the amount of taxes collected by him. n91

The clerk for the circuit court of Fairfax County posed a question to the Attorney General for the Commonwealth of Virginia which required an answer to the following: "What liability does the clerk have, and what recourse does the clerk have against the property owner who owes the recordation tax?" n92 In answering the clerk's question regarding liability for the under assessment of recordation tax, the Attorney General opined the following:

The remaining questions concern a clerk's liability in remedies for an erroneous under assessment of recordation tax ... thus, a clerk is responsible for the proper assessment, collection and accounting of recordation taxes. If a clerk fails to assess, collect and account for their proper amount of recordation tax, the clerk becomes personally liable for the tax deficiency. n93

In the Lucas case cited by the 1984 Attorney General [*61] opinion, the question arose regarding a controversy over a debtor's obligations. One party argued that the recordation of the deed was void because the clerk did not receive the appropriate tax. The Supreme Court of Virginia noted the following:

The clerk is liable for the tax if he records the deed. The law is directory to him, and gives him authority to demand and receive the tax before he can be required to admit the deed to record. If he chooses to admit it to record without receiving prepayment of the tax, he thereby assumes the liability for it, just as if it had actually been paid to him. The government loses nothing, for his liability for it is the same as if he had actually received it, so that it is only a question with him whether he will waive the actual prepayment, and trust the party who is chargeable with it, and assume liability for himself, just as if he had actually received it. n94

A Virginia Attorney General opinion answering the question of taxation posed by the Commissioner of Revenue gives some guidance as to the similar inquiry which a clerk must undertake to determine whether church property is "exclusively" used for religious purposes pursuant to Section 58.1-811. The Commissioner of Revenue for the City of Staunton posed a question to the Attorney General "whether certain vehicles owned by the Potomac Conference of Seventh-day Adventists, a State-wide organization, which are located in Staunton, are exempt from taxation under the laws of the Commonwealth of Virginia." n95 The Attorney General noted that pursuant to then Section 58-12(2) of the Virginia Code, certain real property and furnishings used within churches and parson-

ages are exempt from property taxation. Conference-owned vehicles did not fall within the purview of that provision. The Attorney General addressed whether these vehicles were taxable and then concluded that the "question of [*62] whether the religious organization uses these motor vehicles 'exclusively on a non-profit basis for charitable, religious or educational purposes' remains." n96 Based on the assumption that the vehicles were employed solely in moving teachers and/or ministers as required by the Conference in the operation of its schools and spiritual affairs, the Attorney General concluded that such "vehicles are exempt from personal property taxation, assuming they are used as the Conference assets, if the vehicles used in moving teachers and ministers are not available for use by them in their individual capacities." n97

When determining the amount of recordation tax due, the clerk must make several determinations. First, the clerk must conclude that the deed or the instrument to be recorded is on the proper form. Second, the clerk must make a determination as to the amount of the proper taxes, if any, which should be received by the grantee trustees of the church. The clerk must determine whether "such real estate is intended to be used exclusively for religious purposes, or for the residents of the minister of any church or religious body." n98 When the clerk submits the accounting reports to the Commonwealth regarding the amount of taxes collected, or when the clerk is audited, the clerk must be prepared for someone to second guess his or her decision and to challenge the under assessment of taxes. A clerk would be foolish to conclude that a church could use property granted to it "exclusively" for religious purposes if the church is prohibited by Section 57-12 and Section 57-15 from owning the property in the first place. n99

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3. Enforcement Through Probate.

In *Tauber v. Commonwealth of Virginia*, n100 the Commonwealth Attorney of the City of Alexandria sought to be a party to enforce a constructive trust over assets held by trustees in a dissolution of a foreign charitable corporation. The Supreme Court of Virginia noted that "the Commonwealth's attorney is a proper party to this litigation" pursuant to *Section 55-29 of the Virginia Code*, which provides that the Commonwealth Attorney has a duty to make a motion in circuit court to appoint trustees when a "gift, grant or will [for educational, literary or charitable purposes] is recorded and no trustee has been appointed" and to otherwise enforce the execution of a trust. n101

Transfers pursuant to a will, bequest, or charitable trust are valid only if permitted by the Virginia Code. "There was a time in the life of this State when charitable bequests were not valid. But this inhibition, like many others, has gone by the march of time. Remedial and curative statutes, found in the Code... have given life to such bequests. The attainment of this desired end was in the power of the legislature and it has exercised it." n102

Prior to 1902, the ability of churches in Virginia to receive personal or real property through a gift, devise or trust was severely restricted. Since churches are not able to incorporate in the state of Virginia, the legislature needed to enact enabling statutes for trustees to hold property. n103 However, the longstanding "law in effect since 1842 as to real property contained strict provisions as to the quantity of land..." n104. Property devised in excess of the permitted quantity of land or personal property through gifts, grants or bequests are invalid. n105

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In the light of a historical background, the Constitution, and the legislative enactments, it is clear that the economic and resulting political power of churches was what was sought to be limited. The limitation contemplates a restriction on this power and all its forms, not only where the legal title is vested in the church or religious congregation, or the trustees thereof, but where the beneficial title, the right to use the fruits of the corpus of the gift, grant or bequest, is vested in the church or religious congregation, or the trustees thereof... . Can there be any doubt that the economic power of churches which the legislature intended to restrict and which the Constitution directed should be restricted does not include the value of beneficial interest? We think not. n106

In *Owen*, the Virginia Appeals Court dealt with a testamentary gift which willed certain real and personal property to a Baptist church. n107 The will had a residuary clause which disposed of the testator's entire estate. The trial court permitted the distribution of the will, according to the donor's intent, by allowing a portion of the real property that did not exceed the statutory property limitation to be taken by the church. n108 The remainder of real property had to be sold, and the proceeds combined with the personal property in the will for the church to take the proceeds. The court noted that the "trial court properly held that the devises declared invalid fell into the residuary clause." n109

Section 57-7.1 of the Virginia Code now validates transfers made to trustees of a church "subject to the provisions of 57-12." n110 Section 57-12 limits the amount of real and personal property a church may hold. n111 If property is devised to a church in excess of the amount allowed by the Statutes, the excess is void. n112

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D. History Of Religious Struggles In Virginia.

The provisions of Virginia law that restrict church ownership of real and personal property is best understood in light of the history of church-state relations in Virginia and the thirteen colonies. As the colony of Virginia was settled in 1607, it was divided into parishes, each parish having an Anglican minister who was paid through taxes assessed against the residents, regardless of their membership in the church. n113 The development of Virginia's church-state relationship began in 1609 with the establishment of the Anglican Church as the official church in Virginia. n114 The Virginia legislature passed laws regarding church governance, and penalized nonattendance. n115 Later, the Episcopal Church replaced the Anglican Church and became the official church in Virginia. In fact, by 1775, eight of the thirteen colonies had established churches, including Virginia. n116 Established churches were generally known as territorial parishes, which were public corporations, and any person who resided within the territorial boundaries of the designated parish had to be a member of that parish. n117 By 1776, the popularity of the established church **[*66]** began to wane as the numbers of Presbyterians and Baptists began to rise. n118

Thomas Jefferson and James Madison led the movement in opposition to the incorporation of churches, or the state establishment of a church, within Virginia in the late Eighteenth Century. "The theories of church-state separationism and religious liberty professed by Madison and Jefferson are reflected in Virginia's constitutional ban against the granting of a charter of incorporation to any church or religious denomination." n119 Jefferson's and Madison's opposition to the incorporation of churches in Virginia takes on a new meaning when one considers that the concept of "incorporation" was different during the late Eighteenth Century than it is today. "The King's consent

[was] absolutely necessary to the erection of any corporation, either impliedly or expressly given. So too, in Colonial America, approval of the State was required to set up a corporation, and an unincorporated association could not hold property in its own name." n120

In 1777, Thomas Jefferson drafted the Bill for Establishing Religious Freedom, which was one of many measures in an ambitious revision of the laws of Virginia. n121 In the same year, the General Assembly suspended taxation for the support of Anglican ministers. n122

In 1784 the Protestant Episcopal Church n123 held a convention and drafted a petition to the legislature, in which the church requested incorporation as the "clergy of the Protestant Episcopal Church in Virginia ... to regulate all the spiritual concerns of that Church - alter its form of worship, and institute such canons, by-laws, and rules for the government and good order thereof, as are suited to their religious principles." n124 The clergy further requested that the church vestries be relieved of their secular functions and that [*67] they be elected only from among church members, and further petitioned for that the legislature reaffirm their title to the glebe lands and other church property. n125 In November of 1784, the House of Delegates resolved that "acts ought to pass for the incorporation of all societies of the Christian religion, which may apply for the same." n126 The Presbyterians and the Baptists protested the petition filed by the Episcopal Church, arguing instead that the glebe lands be appropriated by the state. n127

Prompted by Baptist groups, the Virginia legislature revoked the corporate charter of the Episcopal Church in 1786 and ordered the confiscation of several thousand acres of glebe lands in 1799. n128 The corporate charter was never restored; indeed, religious corporate charters have been considered unconstitutional in Virginia since 1786. n129 In 1786, the Virginia General Assembly passed a bill which redefined Virginia's church-state relationship, which bill "unincorporated" the Anglican Church and disestablished the Anglican Church in Virginia. n130

One of the primary concerns of Virginians was that a church might accumulate and own too much land, and therefore retain its influence. In 1802, Virginia passed legislation that expropriated the vacant church lands after the disestablishment of the Anglican Church.

Perhaps his most important decision of local significance involved the constitutionality of a Virginia act passed in 1802, expropriating the vacant glebe lands of the Episcopal Church. Beginning with the Declaration of Rights in 1776, the proponents of religious freedom had persistently fought to destroy the favored position of the Anglican Church. The Act of 1802 not only represents the culmination of this struggle, but may well mark the only time a state has ever expropriated church property for public purposes. n131

"The constitutional provision restricting the amount of church property to limits to be prescribed by law was wisely [*68] designed to empower the legislature to guard against the too great accumulation of such property." n132 Madison wrote, "There is an evil which ought to be guarded against in the indefinite accumulation of property from the capacity of holding it in perpetuity by ecclesiastical corporations." n133

The (Anglican) Episcopal Church challenged the seizures, claiming the Commonwealth lacked the authority to take away vested property rights. n134 The Virginia Supreme Court rejected the argument, holding that the established church was abolished with the Revolution, and since the glebe lands was, for the most part, purchased by taxes supporting the church, the property reverted back to the Commonwealth. n135 However, in 1815, Justice Joseph Story, writing for the United States Supreme Court, found that incorporating the (Anglican) Episcopal Church vested title to the

property in the church, and thus the confiscation of the property by the state of Virginia was unconstitutional. n136 Nevertheless, the Commonwealth continued to confiscate church property, and in a later challenge to the practice, continued to uphold Virginia's right to take the land. n137

The origin and purpose of the Statutes is evident from even a cursory examination of Virginia history. Regardless of the origin of these laws on **church incorporation** and property ownership, these restrictions have survived to modern times. n138 In *Seaburn's Executor v. Seaburn*, n139 the Virginia Supreme [*69] Court observed the following:

It was argued by the counsel for the appellant, that the jealousy of church encroachments which existed at the time of the revolution, and for a period thereafter, has long since ceased, that the policy of the state on this subject has undergone a material change, and that we ought now to apply a liberal, and not a strict, rule of construction to a statute authorizing the acquisition of property for religious uses.

It is not perceived that there has been any such material change of the policy of the state as the counsel supposed. No trace of any such change is to be found in the first amended constitution of 1830, nor in the case of *Gallego's ex'ors v. The Attorney General*, decided so late as 1832. The opinion of President Tucker in that case, in which the policy of the state is so ably vindicated, has since met with general, if not universal approbation; which seems to be still unabated. In the amended constitution of 1851 it was, for the first time, provided, as a part of our organic law, that "the general assembly shall not grant a charter of incorporation to any church or religious denomination; but (it is added) may secure the title to church property to an extent to be limited by law." Art. iv, 32. The object of this section was to prevent the accumulation of church property, and to authorize the title only to so much as might be deemed necessary, and consistent with the welfare of the state, to be secured by law to religious uses. n140

III. Constitutional Analysis of Eighteenth Century Laws With Twenty-First Century Jurisprudence.

Much of the substantive law applicable to the Virginian Charter Provision and Statutes is found in federal case law [*70] addressing the First and Fourteenth Amendments to the United States Constitution. In addition to federal Constitutional law, the Religious Land Use and Institutionalized Persons Act was passed overwhelmingly Congress and signed into law in September of 2000. In light of both the United States Constitution and RLUIPA, Virginia's prohibition against **church incorporation** and limitation of church property ownership can no longer stand.

A. Overview Of The First Amendment Free Exercise of Religion Clause.

The First Amendment to the United States Constitution states in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ..." n141 The second clause is referred to as the Free Exercise Clause, and was incorporated through the Fourteenth Amendment to the states in 1940. n142 While Virginia may have been able to discriminate against churches prior to 1940, the Commonwealth may no longer do so in light of the applicability of the Free Exercise Clause to the state. In an interestingly similar case, the United States Supreme Court found Tennessee's constitution, which prohibited ministers from running for elected office, to be in violation of the Free Exercise Clause. n143 The original purpose of the law "was primarily to assure the success of a new political experiment, the separation of church and state." n144 "Thomas Jefferson initially advocated such a position in his 1783 draft of a constitution for Virginia." n145 How-

ever, later in his life, Jefferson "concluded that experience demonstrated there was no need to exclude clergy from elected office." n146 The notion of [*71] prohibiting ministers from elected office was rooted in the "disestablishment experiment." n147 By the mid-1970s, only two states (Maryland and Tennessee) continued to disqualify ministers from public office. n148 "However widely that view may have been held in the 18th century by many, including enlightened statesmen of that day, the American experience provides no persuasive support for the fear the clergymen in public office will be less careful of anti-establishment interests or less faithful to their oaths of civil office than their unordained counterparts." n149 A plurality of the Court found the Tennessee Constitution violated McDaniel's "First Amendment right to the free exercise of his religion made applicable to the States by the Fourteenth Amendment." n150 The principal facts and historical background in McDaniel are virtually identical to the Virginia scheme - both grew out of the disestablishment movement and both were designed to limit the power of churches. In the same way McDaniel found Tennessee's Constitution in violation of the Free Exercise Clause, so Virginia's Charter Provision and Statutes cannot withstand constitutional scrutiny.

Under the Free Exercise Clause, a law that burdens religious practice need not be justified by a compelling governmental interest if it is neutral and of general applicability. n151 However, where such a law is not neutral or generally applicable, "it must undergo the most rigorous of scrutiny: it must be justified by a compelling governmental [*72] interest and must be narrowly tailored to advance that interest." n152 "Neutrality and general applicability are interrelated, and failure to satisfy one requirement is a likely indication that the other has not been satisfied." n153

A law is not "neutral" if it specifically targets religion or religious groups for adverse or disparate treatment. n154 If the object of the law or ordinance is to infringe upon or restrict practices because of their religious motivation, the law is not neutral. n155 The protections of the Free Exercise Clause apply with greater force if the law at issue restricts or prohibits conduct because it is undertaken for religious reasons. n156 To determine the object of a law, the first inquiry is to examine its text, "for the minimum requirement of neutrality is that a law not discriminate on its face." n157 A law or ordinance violates facial neutrality if it specifically pertains to a religious practice, and a secular meaning is not discernable from the language or context of the law. n158

In addition, a law or ordinance is not neutral if its purpose is discriminatory against religion, even though the text of the law or ordinance is not "overtly" discriminatory. n159 The Free Exercise Clause "forbids subtle departures from neutrality," n160 and "covert suppression of particular religious beliefs." n161 "Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." n162 The Free Exercise Clause protects against subtle governmental hostility. "The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." n163

[*73] A law that sets up a system of individualized exemptions is not "generally applicable." n164 In *Smith*, the Supreme Court recognized that when a law provided a system of individualized exemptions, that law could not be neutral nor general in application. n165 The *Smith* Court stated:

The statutory conditions in [*Sherbert and Thomas*] provided that a person was not eligible for unemployment compensation benefits if, "without good cause," he had quit work or refused available work. The "good cause" standard created a mechanism for individualized exemptions. As the plurality pointed out in *Roy*, our decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of "religious hardship" without compelling reason. n166

The Third Circuit Court of Appeals followed Smith in Fraternal Order of Police Newark Lodge No. 12 v. City of Newark. n167 The Newark Police Department had a Policy regarding the wearing of beards by officers. The Policy provided an exemption for medical reasons. The Police Department refused to exempt two Sunni Muslim officers who sought to wear a beard because of their sincerely held religious belief. The Court pointed out that where a system provides for individualized exemptions (as in unemployment cases), the government may not refuse to extend the same exemptions to religious hardship without a compelling reason. n168 The Third Circuit noted that the Supreme Court reiterated the individualized exemption concept and applied it outside of the unemployment compensation context in Lukumi. n169

[*74] While the Supreme Court did speak in terms of "individualized exemptions" in Smith and Lukumi, it is clear from those decisions that the Court's concern was the prospect of the government's deciding that secular motivations are more important than religious motivations. If anything, this concern is only further implicated when the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection. n170

"All laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice." n171 The Third Circuit stated that the Police Department's decision to provide medical exemptions while refusing religious exemptions was sufficiently suggestive of discriminatory intent so as to trigger strict scrutiny under Smith and Lukumi. n172 As the Supreme Court has stated, "In circumstances in which individualized exemptions from a general requirement are available, the government may not refuse to extend that system to cases of 'religious hardship' without compelling reason." n173

If a law is neither neutral nor generally applicable, strict scrutiny applies and the government must show a "compelling governmental interest and must be narrowly tailored to advance that interest." n174 In Lukumi, the Supreme Court stated, "The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions." n175 Since the Charter Provision and the Statutes governing church property are neither neutral nor generally applicable, the Commonwealth of Virginia must demonstrate a compelling interest in retaining the laws, which interest is satisfied by the least restrictive means available. The compelling interest test is an extremely stringent one, and most laws or burdens on religious activity "will not meet the test." n176 "It is basic that no showing merely of a rational relationship to some colorable state interest [will] suffice; in this highly sensitive [*75] constitutional area, "only the gravest abuses endangering paramount interests give occasion for permissible limitation." n177.

Even if the Virginia could muster a compelling government interest, the Commonwealth must still demonstrate the relevant laws are narrowly tailored to advance that interest. "The absence of narrow tailoring suffices to establish the invalidity of [an] ordinance." n178 [A] law restrictive of religious practice must advance "interests of the highest order" and must be narrowly tailored in pursuit of those interests." n179

1. The Charter Provision Violates The Free Exercise Clause

Pursuant to the Virginia Constitution, a church is not permitted to incorporate. The Virginia Constitution states: "The General Assembly shall not grant a charter of incorporation to any church or re-

religious denomination" n180 The Charter Provision's ban on **church incorporation** was enacted to limit the influence of churches within Virginia. n181

The prime object of the mortmain acts was to repress the alarming influence of ecclesiastical corporations, which had, even as early as the Norman conquest, monopolized so much of the land in England, that the abbot of St. Albans told the conqueror that the reason why he had subjugated the country by the single victory at Hastings was "because the land, which was the maintenance of martial men, was given and converted to pious employments and for the maintenance of holy votaries." n182

Such a purpose is blatantly unconstitutional, resulting in extreme hostility against religion and government censorship [*76] of religion and religious ideas. The allegation that suppression of religious influence was the purpose behind the Charter Provision is enhanced when considering that the Virginia Statutes place a limit on the amount of real and personal property that churches may own. n183

Rev. Falwell and his Church sued Virginia's State Corporation Commission in federal court for refusing to allow the Church to incorporate in Virginia, alleging that the Charter Provision violated the First Amendment. n184 In a landmark decision, the court agreed with the Church, ruling that the Charter Provision violated the First Amendment's Free Exercise Clause. n185 The court held that because the "provision is neither neutral, nor generally applicable, nor in furtherance of a compelling governmental interest," the Charter Provision is unconstitutional. n186 The court found that the Charter Provision is not facially neutral, as it "has no meaning within the secular context; it plainly refers to "a religious practice." n187

The Charter Provision is not neutral on its face; it specifically targets religion for disparate treatment. n188 A law or ordinance whose object is to infringe upon or restrict practices because of their religious motivation is not neutral. n189 The "minimum requirement of neutrality is that a law not discriminate on its face." n190 The face of the Charter Provision singles out churches and places a prohibition on them that is not placed on any other type of organization or association in Virginia.

Virginia law allows any organization or association other than a church to incorporate for any "lawful purpose or purposes," including charitable, benevolent, educational, civic, patriotic, social, fraternal, literary, cultural, athletic, scientific, agricultural, horticultural, animal husbandry, professional, commercial, industrial, or trade association. n191 Besides [*77] churches, the only other type of organization or association that cannot incorporate in Virginia is a criminal organization, whose purpose is not lawful. n192 Corporation status provides many benefits to organizations, including limited liability, ability to sue, ability to own property, and enter into legal contracts. n193 "It is true that religious people (or groups of religious people) cannot be denied the opportunity to exercise the rights of citizens simply because of their religious affiliations or commitments, for such a disability would violate the right to religious free exercise ... which the First Amendment guarantees as certainly as it bars any establishment." Finding that the Charter Provision was neither neutral nor generally applicable, the Falwell court concluded that denying incorporation "to defined individuals solely on account of their religion" is discriminatory. n194 A discriminatory provision rarely survives "strict scrutiny." n195

By specifically prohibiting religious denominations and churches from incorporating, the Charter Provision "lacks facial neutrality" as it specifically denies churches a legal right that is available to all other organizations or associations. n196 The Charter Provision is devoid of any reference to a

secular meaning. The plain and obvious meaning from the text of the Charter Provision is to disadvantage churches and religious denominations by not allowing them to incorporate while all other organizations and associations are afforded this right. By prohibiting churches from incorporating, the Charter Provision is not neutral towards religion. "A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' towards religion ... favoring neither one religion over others nor religious adherents collectively over nonadherents." n197 The obvious purpose behind the Charter Provision is to lessen the influence of churches within Virginia. n198 In addition, the Charter Provision is not generally applicable. By its very terms, the Charter Provision only applies to prohibit "churches and religious [*78] denominations" from incorporating. It does not apply to secular organizations; nor does it apply to religious organizations. The Charter Provision only applies to "churches and religious denominations." n199

The Charter Provision violates the Free Exercise Clause because it is not neutral nor generally applicable, and cannot be justified by a compelling governmental interest, nor is it narrowly tailored to achieve any compelling interest. n200 It is hard to imagine a compelling governmental interest to justify providing a legal right of incorporation to all groups and organizations, but specifically denying such right only to churches. What compelling reason is there in the Twenty-First Century to prohibit churches from incorporating? This question is especially difficult for Virginia to answer when (1) today there are no state established churches and (2) Virginia allows religious organizations to incorporate. It makes no sense to allow a religious organization to incorporate and yet deny the same right to churches.

Although the court in *Falwell v. Miller* sought to defend Thomas Jefferson and opined that the Charter Provision was not the result of hostility towards religion, n201 in 1832, the Virginia Supreme Court admitted the hostile purpose of the prohibition against **church incorporation**:

No man at all acquainted with the course of legislation in Virginia, can doubt, for a moment, the decided hostility of the legislative power to religious incorporations. Its jealousy of the possible interference of religious establishments in matters of government, if they were permitted to accumulate large possessions, as the church has been prone to do elsewhere, is doubtless at the bottom of this feeling. The legislature knows, as was remarked by the counsel, that wealth is power. Hence, the provision in the bill of rights; hence, the solemn protest of the act on the subject of religious freedom; hence, the repeal of the act incorporating the episcopal church, and of that other acts which invested the trustees appointed by religious societies with power to manage their property; hence too, in part, the law for the sale of the glebe lands; hence, the tenacity with which applications for permission to take property in a corporate character (even the necessary ground for churches [*79] and graveyards) have been refused. n202

Incorporation provides a number of benefits and protections. Can anyone imagine Microsoft operating as an unincorporated association? n203 One commentator noted the following regarding incorporation:

Unless state law provides otherwise, **unincorporated associations remain incapable of suing or being sued, holding or transferring title to property, and entering into contracts and other legal obligations.** In those states where some or all of the traditional legal disabilities persist, an association generally may act only through its membership.

It is also important to observe that most if not all states still hold that members of an unincorporated association are personally responsible for the acts of other members or agents of the association, at least if the acts occur in the course of association activities or if the members knew or should have known of the acts and thus by implication approved them. This potential legal liability of each member is doubtless the principal disadvantage of the association form of organization.
n204

Only West Virginia has a similar restriction on churches. n205 It is not surprising that West Virginia has a similar constitutional provision as Virginia, as West Virginia split from Virginia and formed a new state in 1863. Commenting on West Virginia's prohibition against **church incorporation**, one scholar [*80] concluded:

The validity of such a provision is suspect under the prevailing construction of the first amendment's religion clauses by the United States Supreme Court, for it denies churches a valuable benefit available generally to nonreligious charitable and noncharitable organizations without a sufficient compelling justification. n206

It is difficult to conceive of a compelling interest to prohibit churches from incorporating when forty-eight states allow churches to incorporate. The only conceivable interests are outdated and violate the Free Exercise Clause.

This legacy behind the Charter Provision stems from disestablishment and is a remnant of the old mortmain Statutes in England. In *Osnes*, the Supreme Court of West Virginia stated that West Virginia's constitutional provision that prohibits churches from incorporating descended from Virginia. n207 The court then stated, "Furthermore, this constitutional provision is the legitimate progeny of the English statutes of mortmain which played a central role in the law of property in England." n208 "The prime object of the mortmain acts was to repress the alarming influence of ecclesiastical corporations." n209 A government in the Twenty-First Century cannot justify a law that specifically targets a religion with the intent of silencing and limiting its influence.

Even if Virginia could conceive of a compelling governmental interest, the Charter Provision still violates the Free Exercise Clause as it is not narrowly tailored to achieve that interest. The Charter provision is a blanket prohibition against **church incorporation**. If the interest in limiting the influence of churches were valid today, the Charter Provision does not advance that interest. The only difference in some religious corporations compared to churches is the former may lack worship services. It make no sense to allow religious associations to incorporate and yet deny the same right to churches. A flat ban on **church incorporation** is not narrowly tailored to serve an compelling interest, especially when all other organization (including religious organizations other [*81] than a church) may incorporate. Thankfully, reason has prevailed and Virginia churches will now receive equal treatment and can enjoy all the benefits of incorporation if they so choose. The time has now come to completely eliminated the remaining statutory scheme which continues to discriminated against churches in their ownership and management of property.

2. The Statutes Violate the Free Exercise Clause

Like the Charter Provision, the Statutes specifically target religion and provide for a system of individualized exemptions. Any organization or association may hold an unlimited amount of real or personal property except churches. In other words, secular and religious organizations are "exempt" from the property restrictions which are imposed only on churches. To survive constitutional scrutiny, the Statutes must be justified by a compelling governmental interest that is advanced in the least restrictive means. n210

The Statutes violate the Free Exercise Clause of the First Amendment because they specifically target religion and religious practices for disparate treatment. Section 57-7.1 lists what transfers are valid for religious purposes in Virginia, and requires either the court appointment of trustees pursuant to Section 57-8, or the existence of an ecclesiastical officer who is permitted to administer church affairs. Pursuant to Section 57-12, church trustees are not permitted to hold over 15 acres within a city unless the city provides an exception allowing church trustees to hold up to 50 acres of land.

A flat limit of the amount of property a church can own is a state-mandated limitation on church growth, and a state-mandated limitation of a church's ministry. The circumstances surrounding Rev. Falwell's Church points out the absurdity of the property limitations. Under the currently law, the Church will not be permitted to own the 12,000 seat sanctuary in which worship services are conducted. Although some churches in Virginia have set up nonprofit corporations to hold property, Virginia law places a limitation on the combined amount of [*82] property held by the trustees of the church and any other property held by any other source which is devoted exclusively for the church. n211 Thus, the Statutes operate as an absolute barrier to the sincerely-held religious beliefs of the members of the Church to worship together.

Section 57-12 is enforced, in part, via Section 57-15. n212 Section 57-15 requires trustees of a church to obtain court approval before attempting to sell, encumber, extend encumbrances, improve, make a gift of, or exchange land, or to settle boundaries between adjoining property by agreement. n213 Section 57-15 unjustifiably requires church trustees to seek government approval before engaging in any type of land transaction. A church cannot sell its land without first obtaining government approval. A church cannot enter into an agreement with a neighbor to allow the neighbor a right-of-way over the property without first seeking approval from the Circuit Court. Section 57-15 places a burden on churches which is not placed on any other person, organization, or association. The Statutes violate the principle of "neutrality" and are not generally applicable because they specifically target churches. n214

As recently as 1951, the Virginia Supreme Court candidly acknowledged the hostile purpose of the prohibitions against churches owning an unlimited amount of land:

No man at all acquainted with the course of legislation in Virginia, can doubt, for a moment, the decided hostility of the legislative power to religious incorporations. Its jealousy of the possible interference of religious establishments in matters of government, if they were permitted to accumulate large possessions, as the church has been prone to do elsewhere, is doubtless at the bottom of this feeling. The legislature knows, as was remarked by the counsel, that wealth is power. Hence the provision in the bill of rights; hence the solemn protest of the act on the subject of religious freedom; hence the repeal of the act incorporating the episcopal church, and of that other act [*83] which invested the trustees appointed by religious societies with power to manage their property; hence too, in part, the law for the sale of the glebe lands; hence with tenacity with which applications for permission to take property in a corporate character (even the necessary ground for

churches and graveyards) have been refused. The legislature seems to have been fearful, that the grant of any privilege, however trivial, might serve but as an entering wedge to greater demands. Nor did this apprehension of the dangers of ecclesiastical establishments, spring up for the first time with out republican institutions. The history of ages had attested the proneness of such establishments to vast accumulations of property... .

In light of the historical background, the constitution, and the legislative enactments, it is clear that the economic and resulting political power of churches was what was sought to be limited. The limitation contemplates a restriction on this power in all its forms, not only where the legal title is vested in the church or religious congregation, or the trustees thereof, but where the beneficial title, the right to use the fruits of the corpus of the gift, grant, or bequest, is vested in the church or religious congregation, or the trustees thereof... . Can there be any doubt that the economic power of churches which the legislature intended to restrict and which the Constitution directed should be restricted does not include the value of beneficial interests? We think not. n215

The outright openness of the Virginia Supreme Court regarding the obvious hostile motive behind these Statutes is chilling. Perhaps viewing history from the court's vantage point in 1832 would provide some resonance to the reader, but viewing this language through modern eyeglasses offends the First Amendment. To repeat the above language from the vantage point of the Maguire decision in 1951 is unjustifiable. The Virginia Supreme Court should have distanced itself from [*84] such language, but it chose not to do so. The United States Constitution cannot countenance such anti-religious sentiment. The opinions and history behind these laws reek with hostility.

One of the historical reasons for limiting church ownership of land was to "repress the alarming influence of ecclesiastical corporations." n216 In light of current history, Virginia does not have a compelling governmental interest in requiring government oversight of church land transactions. In Justice White's concurring opinion in McDaniel, he noted that all 50 states are prevented from the establishment of religion, "and yet all of the States other than Tennessee are able to achieve this objective without burdening ministers' rights to candidacy." n217 Tennessee's rationale for continuing the discriminatory practice was therefor "unfounded." n218 Surely, churches can be trusted to properly handle land transactions in the same manner as secular and religious organizations. There is certainly no evidence of massive land-grabbing by churches in the other 48 states that has necessitated land ownership restrictions. The 48 states which do not have similar limitations do not have established religions despite the fact that churches may own and manage property in whatever amount in whatever manner desired, without government restrictions and oversight. n219

Even if Virginia had a compelling governmental interest, the Statutes must be the least restrictive means of achieving that interest. A flat limit on the amount of property that a church can own cannot be the least restrictive means of achieving any governmental interest, let alone a compelling one. In addition, requiring a church to obtain governmental approval before engaging in a land transaction cannot be the least restrictive means of achieving any compelling interest. A law that burdens religious exercise must be narrowly tailored and must be the least restrictive means of achieving the compelling governmental interest. n220 The Statutes do not meet the required test.

[*85]

B. The Charter Provision And The Statutes Violate The Equal Protection Rights Of Churches.

The Charter Provision and the Statutes violate the Equal Protection Clause. n221 The Equal Protection Clause mandates that no state shall "deny to any person within its jurisdiction the equal protection of the laws." n222 This Clause "is essentially a direction that all persons similarly situated should be treated alike." n223 "Equal protection limits the power of a legislature to target a particular individual, organization, or group by requiring that the legislature confer benefits or impose costs in a larger, neutrally defined group: it cannot pick on just the most vulnerable." n224 The Supreme Court has established the appropriate standards for determining the validity of state legislation under the Equal Protection Clause:

Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classifications challenged be rationally related to a legitimate state interest. n225

If the legislative classification negatively affects a suspect class, then courts may uphold the classification only if it is "precisely tailored to serve a compelling governmental interest." n226 The Charter Provision and the Statutes violate the Equal Protection Clause by drawing lines based on religion, and then singling out a particular practice (congregating in churches) for unequal treatment. The Charter Provision singles out churches and bars them from incorporating. The Virginia Charter Provision "appears outdated in light of the prevailing view that permits incorporation of religious organizations under general incorporation statutes." n227 The Statutes single out churches and limit and control of their property ownership and management, while allowing all other types of groups and organizations to own and manage unlimited amounts of property. The Commonwealth cannot provide a compelling [*86] interest to support these laws. Even assuming a compelling interest, the laws in question are not narrowly tailored to achieve any compelling interest.

Even if a rationale basis standard were used, the Charter Provision and the Statutes would not pass Constitutional muster. "If a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end." n228 In *Romer v. Evans*, n229 the Supreme Court struck down a Colorado Constitutional Amendment under equal protection grounds. In *Romer*, the citizens of Colorado voted and approved an amendment that prohibited all legislative, executive, or judicial action that was designed to protect homosexual persons from discrimination. n230 The Supreme Court, concerned about the amendment's broad classification, stated that "laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." n231 The defendants argued that the primary rationale for the amendment was respect for other citizens' freedom of association. n232 The Court found that the "breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them." n233 In the same manner, the breadth of the Charter Provision and the Statutes is so far removed from any conceivable justification that they must be struck down. Singling out churches and denying them a right that is conferred on all other groups and organizations is hostile only towards churches, and is unequal treatment of similarly-situated persons or groups. n234 The justification for prohibiting churches from incorporating serves no rational basis. Prohibiting churches from owning land or personal property, while all other groups and organizations can own an unlimited amount of real and personal property is unequal treatment. Requiring churches to obtain judicial approval to appoint trustees and before making a land transaction is unequal treatment when no other person or organization has to obtain similar approval. The Charter [*87] Provision and the Statutes work together to treat churches as second class entities in Virginia.

C. Overview Of The Establishment Clause.

The first clause of the First Amendment, commonly referred to as the Establishment Clause, states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ..." n235 The Establishment Clause was incorporated through the Fourteenth Amendment to the states in 1947. n236 Although the initial portion of the First Amendment has been the subject of much litigation, the Supreme Court has consistently reiterated a clear principle: The Establishment Clause forbids government in inhibiting religion, or from being hostile towards religion. "The First Amendment requires the state to be 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 so as to handicap religions, than it is to favor them." n237 The Establishment Clause certainly does not require that religion be suppressed or thwarted. The government need only remain neutral towards religion. The Supreme Court has observed the following:

Our cases leave no doubt that in commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice. Rather, there is "ample room under the Establishment Clause for benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." n238

[*88] The Supreme Court invalidated a school district's policy on its face as violative of the Establishment Clause due to the "policy's text and the circumstances surrounding its enactment." n239 Rejecting the district's argument that a facial challenge to the policy must fail because the policy had not yet been applied, the Court observed "the Constitution also requires that the Court keep in mind the myriad, subtle ways in which Establishment Clause values can be eroded, and guard against other different, yet equally important, constitutional injuries." n240 The United States Supreme Court has considered the validity of a variety of laws under the Establishment Clause without considering facts regarding the application thereof. n241

In *Lemon v. Kurtzman*, n242 the Supreme Court set forth three requirements any government activity must meet in order to avoid running afoul of the Establishment Clause: (1) The activity must have a secular purpose n241; (2) The activity's primary effect must neither advance nor inhibit religion n244; and (3) The activity must not foster excessive entanglement with religion. n245 An Establishment Clause violation occurs if any one of the three prongs are not met. n246

In a case with striking similarity to the *Falwell* n247 case, the United States Supreme Court struck down Tennessee's Constitution which prohibited ministers from running for elected office. n248 Although the plurality agreed that the provision violated the First Amendment Free Exercise Clause, Justice Brennan, joined by Justice Marshall, wrote a concurring **[*89]** opinion, in which he found that Tennessee's Constitution violated both the Free Exercise and the Establishment Clauses. n249 Justice Brennan noted that the provision which established a "religious classification ... imposes a disability [on those involved] in protected religious activity." n250 If the minister were to renounce the ministry, he could run for office, but because of his status as a minister, he was disqualified. n251 Brennan found that excluding ministers from elected office "manifests patent hostility toward, not neutrality respecting, religion; forces or influences a minister or priest to abandon his ministry as the price of public office, and, in sum, has a primary effect which inhibits religion." n251 Although some of the early colonies and statesmen (including Thomas Jefferson) supported these measures, Justice Brennan observed:

The regime of religious liberty embodied in state constitutions was very different from that established by the Constitution of the United States. When, with the adoption of the Fourteenth Amendment, the strictures of the First Amendment became wholly applicable to the States, earlier conceptions of permissible state action with respect to religion - including those regarding clergy disqualification - were superceded. n252

Justice Brennan then opined that the limits of permissible governmental action with respect to religion under the Establishment Clause "must reflect an appropriate accommodation of our heritage as a religious people" n254 Accordingly, Tennessee's ban on clergy running for office was unconstitutional. Similarly, the Charter Provision and the Statutes violate the Establishment clause as they are hostile towards religion, create significant burdens for churches, and excessively entangle the state with the church.

1. The Charter Provision Violates The Establishment Clause.

a. The Charter Provision Lacks A Secular Purpose

The Charter Provision prohibition against **church incorporation** lacks a legitimate secular purpose. n255 It is [*90] difficult to conceive of any secular purpose behind a law that bans churches from incorporating when the same law allows any other group to incorporate. n256 The history behind the Charter Provision illuminates a hostile purpose of silencing churches and reducing their influence within Virginia.

"No man at all acquainted with the course of legislation in Virginia, can doubt, for a moment, the decided hostility of the legislative power to religious incorporations." n257 The general concept of "incorporation" was different in the eighteenth century than it is today. "The King's consent [was] absolutely necessary to the erection of any corporation, either impliedly or expressly given. So too, in Colonial America, approval of the State was required to set up a corporation, and an unincorporated association could not hold property in its own name." n258

In some colonies the Church of England was established by law, and there its parishes enjoyed peculiar corporate privileges. After the American Revolution, some believed that the incorporation of any religious body violated the constitutional separation of church and state. In 1811, President James Madison vetoed a congressional act to incorporate an Episcopal Church in the District of Columbia due to his view that incorporation would set up a religious establishment in violation of the First Amendment. n259

Interestingly, in 1815, the United States Supreme Court disagreed with Virginia's prohibition against incorporation. In *Terrett v. Taylor*, n260 Justice Joseph Storey noted the following:

[*91]

While, therefore, the legislature might exempt the citizens from a compulsive attendance and payment of taxes in support of any particular sect, it is not perceived that either public or constitutional principles required the abolition of all religious corporations.

The Commonwealth of Virginia has refused to follow the United States Supreme Court's directive in these areas. Perhaps that was due to the independence of the states in the 1800s. However, the United States Constitution is the supreme law of the land in the Twenty-First Century, and as such, Virginia's laws must give way to the constitutional protection provided to churches. n261

There has never been a secular purpose underlying the Charter Provision. The tendency to disfavoring churches that began early in Virginia's history has never ceased.

Virginia's Charter Provision is outdated in light of the modern day concept of "incorporation" where all lawful organizations and associations are permitted to incorporate. Today, corporations are not "endorsed" by the government merely because of the corporate status. Incorporating a church today is far from an establishment of religion. To the contrary, withholding from a church the right to incorporate lacks any secular purpose.

b. The Charter Provision Inhibits And Is Hostile To Religion.

The Charter Provision and the Statutes it spawned has set the state of Virginia on a collision course with churches. The intent of these provisions was and still is to suppress churches. Under the United States Constitution, Virginia's purpose behind these provisions, no matter how laudable once thought, is unconstitutional today. The effect of the Charter Provision is to make it difficult for churches in Virginia to operate, own land, transact business, and grow. The Charter Provision was the first step in preventing unlimited land ownership and related rights and privileges. The Virginia Supreme Court did not hide its State's history of hostility towards church ownership of land:

[If churches] were permitted to accumulate large possessions, as the church has been prone to do elsewhere, is doubtless at the bottom of this feeling. The legislature knows, as was remarked by the counsel, that wealth is power... The legislature seems to have been fearful, that the grant of any [*92] privilege, however trivial, might serve but as an entering wedge to greater demands of the church... The church, if made capable to take, while it is continually acquiring, from the liberality of the pious, or the fears of the timid, or the credulity of the ignorant, never can part with any thing; and thus, like those sustaining powers in mechanics, which retain whatever they once have gained, it advances with a step that never retrogrades. n262

Neutrality has been the touchstone in the area of church-state relations ever since the United States Supreme Court first incorporated the First Amendment to the states through the Fourteenth Amendment. The Supreme Court observed that "government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits." n263

Incorporation provides many benefits to organizations, including ability to own land, sue, enter into contracts, and enjoy limited liability. n264 The Charter Provision's primary effect violates the second prong of Lemon n265 because it is not neutral, but is hostile towards religion. "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." n266

c. The Charter Provision Excessively Entangles The State With Religion.

The Charter Provision necessarily entangles the state with religion. One consequence of Charter Provision is that a church cannot own land in its own name. Consequently, Virginia has adopted statutes that allow for church trustees to own land. n267 Nevertheless, a church must seek permission from a state court "asking leave to sell, encumber, extend encumbrances, improve, make a gift of, or exchange the land, or a part thereof, or to settle boundaries between adjoining property by agreement." n268 Constant interaction between the courts and churches necessitates excessive governmental entanglement in violation of the Establishment [*93] Clause.

The Charter Provision applies only to "churches and religious denominations." n269 Since religious organizations are permitted to incorporate in Virginia, the State Corporation Commission must determine whether the entity applying for corporate status is a "church or religious denomination." What distinguishes a "church" and a "religious denomination" on the one hand from a "religious" organization on the other hand?

It is easy to see that if the civil courts are to inquire into all these matters, the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination may, and must, be examined into with minuteness and care, for they would become, in almost every case, the criteria by which the validity of the ecclesiastical decrees would be determined in the civil court. n270

Churches often differ from religious corporations in their form of worship. Must state officials deny the right to incorporate to one entity because it engages in group worship, and yet offer the right to incorporate to a religious group that carries on charitable service but does not engage in worship? The United States Supreme Court has already rejected attempts by the state to parse religious speech from worship. n271 "Merely to draw the distinction would require the [state] - and ultimately the courts - to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases." n272 The Charter Provision clearly fails the third prong of Lemon.

2. The Statutes Violate the Establishment Clause.

a. The Statutes Lack A Secular Purpose.

From Virginia's Constitutional provision prohibiting **church incorporation**, to the limitations on real and personal property ownership and the paternalistic requirement of court oversight in property transactions, there is ample evidence that churches have long been disfavored under Virginia law. This [*94] discriminatory treatment has not subsided since it was birthed by the disestablishment movement. In *Seaburn's Executor*, n273 the Virginia Supreme Court discussed the stability of Virginia's position against the accumulation of property by churches:

It was argued by the counsel for the appellant, that the jealousy of church encroachments which existed at the time of the revolution, and for a period thereafter, has long since ceased, that the policy of the state on this subject has undergone a material change, and that we ought now to apply a liberal, and not a strict, rule of construction to a statute authorizing the acquisition of property for religious uses. It is not perceived that there has been any such material change of the policy of the state as the counsel supposed. No trace of any such change is to be found in the first amended constitution of 1830, nor in the case of *Gallego's ex'ors v. The Attorney General*, decided so late as 1832. The opinion of President Tucker in that case, in which the policy of the state is so ably vindicated, has since met with general, if not universal approbation; which seems to be still unabated. In the amended constitution of 1851 it was, for the first time, provided, as a part of our organic law, that "the general assembly shall not grant a charter of incorporation to any church or religious denomination; but (it is added) may secure the title to church property to an extent to be limited by law." Art. iv, 32. The object of this section was to prevent the accumulation of church property, and to authorize the title only to so much as might be deemed necessary, and consisted with the welfare of the state, to be secured by law to religious uses. n274

Preventing churches from gaining power and influence is the reason behind the tangled web of laws that govern Virginia churches. The Statutes limiting the amount of church property, and requiring governmental approval before a church may engage in land transactions, lack any secular purpose. The Statutes are clearly aimed at reducing church growth and limiting the influence of a church in a city or county. The purpose of the Statutes is evident considering the history of church-state relations in Virginia. Laws that inhibit church land ownership were meant to control the influence and power of churches in Virginia. Consequently, the real and only purpose of the Statutes is to silence and control churches. [*95] Silencing the influence of churches is not a secular purpose; it is decidedly and blatantly anti-religious.

b. The Statutes Inhibit and Are Hostile Towards Religion.

The Statutes cause churches many difficulties in their everyday operations and in their outreach to the community. n275 The Virginia Supreme Court has candidly acknowledged Virginia's hostility toward churches by observing "however humble its beginning, accumulation is the natural result of the power vested in any religious society to acquire property. ... Such, I conceive, are the general grounds, upon which rests the legislative policy, in relation to the power of acquiring and holding property by religious societies." n276

The Statutes single out churches and place them in a disadvantageous position as compared to all other groups. By limiting the amount of property that the Church can legally own, the Statutes handicap the Church in violation of the Establishment Clause. The primary purpose and effect of the Statutes is to inhibit religion. The Statutes violate the second prong of Lemon. n277

c. The Statutes Excessively Entangle The Government With Religion.

It is difficult to conceive of a more entangling situation than where a church has to seek governmental permission before engaging in a land transaction, or where the State inventories the amount of property owned by a church. n278 Deeds are recorded in the city or county records, leaving no doubt about the quantity of property held on behalf of a church. n279 When church trustees acquire land, the deed is recorded by the city or county clerk. The clerk is required to notify the State whenever such property is acquired. n280 Of course, since land transfers to or from a church must be court-approved, a church has little chance of obtaining land over the [*96] limits permitted by state law. n281

Although "churches" are prohibited from owning unlimited amounts of property, other "religious" entities have no similar prohibition. Thus, Virginia officials must determine whether the entity in question is merely "religious" as opposed to a "church." There are no standards to guide the Commonwealth officials in determining how one may distinguish "religious" entities from "churches", nor are there standards to determine whether to allow a church to own, sell or encumber land. Difficult questions arise. Does the court consider as an element of proof the congregation's intentions to sell or own land? Does the court have to analyze the church's statement of faith and bylaws to determine the proper procedure for selling land? Should a court consider whether selling or owning land is in the best interest of the church? How would a court know what is best for the church? By requiring court approval for land transactions and by limiting the amount of property a church may own, the Statutes have created a situation that excessively entangles state with religion, and violates the Establishment Clause.

In addition, limiting the amount of property that a church can own necessarily entangles the state with religion. What must a church and the government do with respect to the building of a new church sanctuary on a second location when the old sanctuary is on fifteen acres of land? The need for concurrent ownership of the land for both the new and old sanctuary puts the Rev. Falwell's Church in a dilemma.

The Virginia legislature has determined that a church should not possess more than \$ 10,000,000 in personal property, or more than 15 acres of real property in a city, or 250 acres in a county. n282 Unless the legislature simply took a stab in the dark or was playing "Russian Roulette" with a church's ability to own property, the legislature most assuredly considered factors relevant to how much property a church should own. In setting the property limit, what factors did the legislature consider? Did the legislature consider the church's mission, size, ability to operate, finances, and land ownership? Did the legislature simply ignore the financial demands of churches in Virginia in assessing a cap on personal property? [*97] The process in determining the cap on property ownership excessively entangles the state with religion and violates the Establishment Clause.

D. The Charter Provision And The Statutes Violate The Right To Peaceable Assembly.

"Congress shall make no law ... abridging ... the right of the people to peaceably assemble." n283 "The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental." n284 The Free Speech Clause was incorporated through the Fourteenth Amendment to the states in 1931. n285 The Supreme Court of the United States has stated that an "individual's freedom to speak, to worship, and to petition the government for the redresses of grievances could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed." n286

The Charter Provision and Statutes violate the Church members' right to peaceable assembly by placing severe limitations and restrictions on the ability of religious people to organize, meet and assemble. The laws place unreasonable restrictions on groups based on their status as a church, thereby substantially burdening the free exercise of their religion and freedom of expressive activity. The governing board of a church should be permitted to incorporate in order to gain some protection from civil liability in carrying out their official church duties. The members of an unincorporated association may be held jointly liable for actions of others members of the association. n287 One can only imagine if Microsoft Corporation [*98] were prohibited from incorporating to limit director liability, how the recent antitrust litigation could have been personally devastating to the directors. n288 Additionally, church members should have the right to acquire property that they need in order to assemble. Congregants should be permitted to obtain all the property that they believe suits the needs of their church. These needs should be determined by the members or those who govern the church, rather than by the State. Indeed, churches need to be free to transfer and manage the property where their members choose to associate. Members can never freely assemble as long as their church remains firmly under the thumb of the State.

The United States Supreme Court has stated that "among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition." n289 Like the freedom of speech, the right to freely associate and to gather in a peaceful manner is a fundamental right protected by the First

Amendment. It is beyond dispute that the First Amendment shields association as well as expression. n290

The Charter Provision and the Statutes allow the State to restrict and prohibit association of like-minded individuals who want to organize in a church, to worship and engage in religious exercises. Since the "practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process," any [*99] restriction on group advocacy should meet with strict scrutiny. n291 The right to free speech protects the marketplace for "the clash of different views and conflicting ideas," and oftentimes this "clash" can only be achieved when individuals collectively combine to make known their views because individually their "voices would be faint or lost." n292 The reason the First Amendment protects free association is because effective advocacy is "undeniably enhanced by group association." n293 The First Amendment does not allow the State to prohibit "persons sharing common views [from] banding together to achieve a common end" n294 Yet, Virginia's antiquated laws infringe on the right of church members to associate with one another. Church members not only desire to worship together, they also desire to give property to their church for the purpose of facilitating their worship and ministry. The Statutes have a direct and immediate impact on the right to associate with one another, and therefore are unconstitutional.

E. The Statutes Violate The Religious Land Use And Institutionalized Persons Act.

The Religious Land Use And Institutionalized Persons Act (hereinafter "RLUIPA") prohibits any governmental entity from imposing or implementing a land use regulation that substantially burdens the religious exercise of a person, including a church, unless the government has a compelling interest, and the regulation is the least restrictive means of achieving that interest. n295 In addition, RLUIPA prohibits a [*100] government from imposing or implementing a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution, and from imposing or implementing a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination. n296

Enacted into law in September 2000, RLUIPA is to be "construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." n297 Congress defined "religious exercise" to include, "any exercise of religion, whether or not compelled by, or central to a system of religious belief." n298 "Government" includes "a State, county, municipality, or other governmental entity created under the authority of a State." n299 A "land use regulation" includes any zoning or landmarking law, or the [*101] application of such a law "that limits or restricts a claimant's use or development of land." n300 RLUIPA reinstates the compelling state interest standard to any state law that "limits or restricts a claimant's use or development of land." n301 A state law and a local law that prohibits the ownership of land is the ultimate limitation and restriction on a claimant's use or development of land.

In *Murphy v. Zoning Commission of the Town of New Milford*, n302 a Connecticut District Court applied RLUIPA in striking down an ordinance that limited the number of people that could attend a Bible study in a home. In *Murphy*, the City instituted a land use regulation that limited the plaintiffs from having more than twenty-five persons in their home. n303 The plaintiffs had been holding Bible studies in their home, and occasionally had more than twenty-five persons present. The City argued that the land use regulation did not substantially burden the plaintiffs' religious beliefs because they could still hold the Bible study, provided that the meeting consisted of no more

than twenty-five people. n304 The plaintiffs testified that the purpose of the meetings was to help people in need, and that "if a twenty-sixth person needed the help of the prayer group, he did not want to turn that person away." n305 The City argued that the government had a compelling interest to limit the size of the group, i.e., safety concerns. n306 The court held that a flat out prohibition of the size of a group was not the least restrictive means to achieve any legitimate interest of traffic and safety. n307 "Defendants must next demonstrate that the governmental action taken in 'furtherance of the compelling interest' is by the 'least restrictive means.' That is, [*102] the city must show that there are 'no other alternative forms of regulation' which would fulfill the state interest." n308 "Defendants' actions did not address the amount of traffic generated by the participants of the prayer group meetings. Rather, the Commission's opinion speaks entirely in terms of the number of people allowed to be present in plaintiff's home on Sunday afternoons." n309 In the same manner, the Statutes do not address permissible concerns, but instead restrict the amount of property the Church may own, thus restricting how many people may worship in the Church. Arbitrarily limiting the size of all churches impermissibly burdens churches and limits the number of people who may worship together.

The Statutes violate RLUIPA as they substantially burden churches, treat religious groups and organizations on an unequal basis as non-religious groups and organizations, and discriminate against churches on the basis of religion or religious denomination. Limiting the size of a church limits the number of people to which a church can minister, and places a substantial burden on the exercise of religion. In the same way, requiring a church to obtain governmental approval before engaging in any land transaction places a substantial burden on a church's exercise of religion by severely limiting the autonomy of a church and placing a burden on the church that is not placed on any other type of group or organization. Accordingly, these Statutes violate RLUIPA. n310

RLUIPA was intended to prohibit all states, counties, and municipalities from enacting laws that forbade churches from meeting and assembling. n311

Religions are practiced by communities of believers. At the very core of religious liberty is the ability to assemble for worship. Finding a location for a new church, however, can be extremely difficult in the face of pervasive land use regulation and the nearly unlimited discretionary power of land use authorities. The frustration of this core First Amendment right is not limited to certain religions or to certain area of land. Churches, large and small, are unwelcome in suburban residential neighborhoods and in commercial districts alike. n312

[*103] The Statutes severely limit and restrict the development of land by prohibiting the ownership of real property. n313 It is difficult to conceive of a greater limitation or restriction on land than a ban on the ownership of land. Sections 57-7.1 and 57-12 do not regulate all land ownership within a city or county; only a church's ownership of land over 15 acres within a city and 250 acres within a county is regulated. Section 57-15 regulates the manner in which a church can transact land by requiring churches to obtain governmental approval before engaging in any land transaction. Section 57-15 does not regulate all land transactions; only land transactions concerning church-owned land are restricted. Even if Virginia could assert a compelling governmental interest, a pre-determined limit placed only on church property ownership is not "narrowly tailored" to achieve that interest. n314

In addition, the Statutes violate RLUIPA as they "impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution" and "impose or implement a land use regulation that discriminates against

any assembly or institution on the basis of religion or religious denomination." n315 The Statutes apply only to churches. Other assemblies can own an unlimited amount of property in any city or county in Virginia. Organizations other than churches do not have to obtain governmental approval before engaging in a land transaction. Consequently, the Statutes treat churches on less than equal terms with nonreligious assemblies, and discriminate against churches in violation of the RLUIPA. n316

IV. Conclusion

Virginia's laws have led to the micromanagement of churches by the State. Churches cannot incorporate and must obtain trustees in order to hold real or personal property. Furthermore, in order to use, encumber, improve or transfer land, the trustees must file a petition in court. These outdated prohibitions and requirements have become burdensome, costly and tiresome to the Virginia churches. The impact of the [*104] Charter Provision and the Statutes is clearly seen as applied against Rev. Falwell's Church, which sought to build its new 12,000 seat sanctuary on 60 acres of property. Under the Statutes, the Church found itself in the strange position of not being able to own the sanctuary in which the Church sought to conduct worship. The property limitations prohibited the Church from obtaining title insurance, and thus the Church could not use the property as collateral to complete the construction.

The scheme woven by the Charter Provision and the Statutes was designed to limit the power of churches as part of the disestablishment movement. Unfortunately, the ghost of disestablishment has continued to haunt modern-day churches. Churches were first prohibited from incorporating. Then, the Commonwealth confiscated church property. The Virginia General Assembly later passed laws "permitting" churches to hold title to property through trustees. The Statutes prescribe severe limitations of the amount of and the manner by which churches may hold and use property. The property scheme is designed to not only limit the amount of property held by trustees of a church, but are also designed to take into consideration property held by a separate entity if that property is devoted to church purposes. In other words, the property scheme limits the combined amount of property held by the church trustees and any other property held by any other source if that property is devoted exclusively to church purposes. That which cannot be done directly may not be done indirectly. Consequently, under no circumstances may Rev. Falwell's Church worship in a 12,000 sanctuary situated on 60 acres of land.

Ironically, the Twenty-First Century church now has most to fear from Virginia, not vice versa. One can only wonder how Thomas Jefferson would react to this reversal of fortunes. Hopefully he would change his mind as he did with laws he once supported that banned clergy from elected office. Regardless what Jefferson would think today, and irrespective of the necessity of these laws in the early years of Virginia, there is no conceivable way that the State would be harmed by allowing a church to enjoy the equal rights under the law. Forty-eight states have not been harmed by allowing churches to incorporate; neither have the states been overpowered by churches desiring to hold an unlimited amount of real and [*105] personal property. n317 Churches do not need the government to oversee their land transactions. There are no established churches in America today. History has proven there is no risk that churches will control and own the state by allowing them to own and manage property without government restrictions. The American experiment has proven that Virginia's Charter Provision and Statutes no longer serve any valid purpose.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law
Ownership & Transfer
Public Entities
Estate, Gift & Trust Law
Personal Gifts
Lifetime Gifts
Governments
Local Governments
General Overview

FOOTNOTES:

n1. Mathew D. Staver, B.A. 1980, Southern College; M.A. 1982, Andrews University; J.D. 1987, University of Kentucky. Currently President and General Counsel of Liberty Counsel, a civil liberties public interest law firm specializing in constitutional law and Chairman of Liberty University School of Law Steering Committee.

n2. Anita L. Staver, B.A. 1986, University of Kentucky; M.A. 1992, Liberty University; J.D. 2002, Barry University School of Law. Works in the area of constitutional law with Liberty Counsel.

n3. The prohibition against **church incorporation** and the restrictions on church property ownership "trace their roots to the founding of the republic and the pen of Thomas Jefferson." See *Falwell v. City of Lynchburg*, 198 F. Supp. 2d 765, 768 (W.D. Va. 2002).

n4. Until rules unconstitutional under the first Amendment in 2002, the Virginia Constitution prohibited churches and religious denominations from incorporating. See Va. Const. art. IV, 14, cl. 20 [hereinafter Charter Provision]. Chapter 57 of the Virginia Code places unique disabilities on churches and religious denominations regarding ownership and management of real and personal property.

n5. See *Va. Code Ann. 57-7.1* (Michie 2002) (requires the appointment of trustees to churches in order to validate any land transaction); *Va. Code Ann. 57-8* (allows the Circuit Court to appoint trustees); *Va. Code Ann. 57-12* (limits churches to owning no more than 15 acres of real property in the city or town unless a city or town permits by ordinance up to 50 acres under limited circumstances, no more than 250 acres in any county, and no more than \$ 10,000,000 in personal property); and *Va. Code Ann. 57-15* (requires trustees to churches to first obtain permission from the Circuit Court to sell, encumber, extend encumbrances, improve, make a gift of, or exchange the land, or a part thereof, or to settle boundaries between adjoining property by agreement). After Falwell filed suit in November of 2001, the Virginia General Assembly overwhelmingly passed an amendment to section 57-12 making the property limitation even more restrictive. See *Va. Code Ann. 57-12*. Now the Attorney General is mandated by section 57-12 to "intervene on behalf of any city, town or county to enforce" the land limit and is also "the proper party to be named as the defendant in any suit or action brought against the Commonwealth challenging" its validity. *Va. Code Ann. 57-12*.

n6. See *Va. Code Ann. 57-12* (Michie 1995).

n7. See *Falwell*, 198 F. Supp. 2d at 765; *Falwell v. Miller*, 203 F. Supp. 2d 624 (W.D. Va. 2002). Falwell sued the City of Lynchburg, along with the following entities through their official capacity representatives: the Virginia Attorney General, the State Corporation Commission, the Clerk of the Court for the City of Lynchburg, the Circuit Court for the City of Lynchburg and the Commonwealth Attorney for the City of Lynchburg. See *Falwell*, 198 F. Supp. 2d at 770-71. After distancing themselves from the enforcement of the challenged provisions, Judge Moon dismissed the case against the Attorney General, the Clerk of the Court,

the Circuit Court and the Commonwealth Attorney, finding no case or controversy. *Id.* The State Corporation Commission was the sole remaining defendant. *Id.* During oral argument, Judge Moon literally told the Church to go out and break the law and see what happens. The Church argued it could not break the law because to do so would cloud title to the property. See *Transcript of Argument, February 1, 2002, Falwell v. Lynchburg, 198 F. Supp. 2d at 765*, and on file with the authors. Despite the court's suggestion to break the law, a plaintiff need not "first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Steffel v. Thompson, 415 U.S. 452, 459 (1974)*; see also *Baggett v. Bullitt, 377 U.S. 360, 373 (1964)* ("Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law.") The case then proceeded against the State Corporation Commission with respect to Virginia's Constitution which prohibits churches and religious denominations from incorporating. See *Falwell, 203 F. Supp. 2d at 624*. After Judge Moon dismissed some of the named defendants, the Virginia General Assembly amended the law to require the Attorney General to enforce the property limitations in Section 57-12 and naming the Attorney General as a "proper party" to defend any challenge to the law, Falwell then filed a second suit against the statutory property scheme, naming only the Virginia Attorney General as the defendant. See *Falwell v. Kilgore, No. 6:02-CV-0021 (W.D. Va. filed April 10, 2002)*.

n8. U.S.C. 2000 cc, et seq.

n9. *Falwell v. Lynchburg, 198 F. Supp. 2d 765, 769 (W.D. Va. 2002)*.

n10. *Id.*

n11. *Id.*

n12. *Id.*

n13. *Id.* This new building is designed to hold up 12,000 people for worship in the main sanctuary. Clearing of the land was already underway at the time the suit was filed. *Id.*

n14. *Id.*

n15. Va. Const. art. IV, 14, cl. 20. On November 5, 1996, Question 5 of a Proposed Constitutional amendment was narrowly defeated. Question 5 read as follows: "Shall the Constitution of Virginia be amended to remove the language which prohibits the General Assembly from passing a law permitting incorporation of any church or religious organization?" Cf. <http://www.co.henrico.va.us/registrar/returns.htm> (passed in Henrico County) with <http://scholar.lib.vt.edu/VA-news/WDBJ-7/elec1196.htm> (at the time 92% of the counties were reporting, the split was 50% in favor and 50% opposed). The proposed amendment apparently passed in some counties, but failed statewide and therefore the state Constitution was not amended. The wording of the proposed amendment was slightly misleading because the Virginia Charter Provision does not prohibit the incorporation of any "religious organization." The Constitution prohibits the incorporation of any "church or religious denomination." Va. Const. art. IV, 14, cl. 20.

n16. See Va. Const. art. XI, 1.

n17. Va. Const. art. XI, 2. Virginia statutes similarly provide the following: Subject to such requirements as may be prescribed by law, the Commission shall be the department of government through which shall be issued all charters, and amendments or extensions

thereof, of domestic corporations and all license of foreign corporations to do business in this Commonwealth." *Va. Code Ann. 12.1-12*.

n18. Virginia law allows any organization or association other than a church to incorporate for any "lawful purpose or purposes," including charitable, benevolent, educational, civic, patriotic, social, fraternal, literary, cultural, athletic, scientific, agricultural, horticultural, animal husbandry, professional, commercial, industrial, or trade association. See *Va. Code Ann. 13.1-825* Besides churches, the only other type of organization or association that cannot incorporate in Virginia is a criminal organization, whose purpose is not lawful. Corporate status provides many benefits to organizations, including limited liability, ability to sue, ability to own property, and enter into legal contracts. *Va. Code Ann. 13.1-et seq.*

n19. An adverse decision regarding incorporation may administratively be appealed to the State Corporation Commission, and from there the appeal proceeds to the Virginia Supreme Court. See *Va. Code Ann. 12.1-39*; *Va. Sup. Ct. R. 5:21(a)*. The Attorney General is automatically a party to any appeal from a decision of the Commission. *Va. Sup. Ct. R. 5:21(b)*. The Attorney General is also required by law to conduct all civil litigation involving the Commission. See *Va. Code Ann. 2.2-507*. However, an aggrieved party bringing a civil rights claim under *42 U.S.C. 1983* need not exhaust state administrative or judicial remedies before filing suit in federal court. See *Steffell v. Thompson, 415 U.S. 452, 472 (1974)* ("When federal claims are premised on *42 U.S.C. 1983* ... we have not required exhaustion of state judicial or administrative remedies."); See also *McCrary v. Burrell, 516 F.2d 357, 361 (4th Cir. 1975)*.

n20. *Va. Code Ann. 57-1*, et seq.

n21. *Va. Code Ann. 57-1*.

n22. *Va. Code Ann. 57-2*.

n23. *Va. Code Ann. 57-2.01*

n24. *Id.*

n25. Section 57-3 addresses "glebe lands and church property," including the "Glebe Fund." *Va. Code Ann. 57-3*. Section 57-4 states that any donation to an incorporated church prior to January 30, 1806, shall continue to be valid as if the church had continued to exist as a corporate body. *Va. Code Ann. 57-4*. Section 57-5 provides that the act to incorporate R. E. Lee Camp, No. 1, Confederate Veterans, approved March 13, 1884, remains valid. *Va. Code Ann. 57-5*. Section 57-6 states the act to incorporate the Lee Memorial Association, approved on January 14, 1871, along with other associated acts, shall continue in force. *Va. Code Ann. 57-6*. Section 57-7.1, provides that any conveyance or transfers of property for the benefit of any church is valid so long as the church has property trustees or ecclesiastical officers and the property limitations are not exceeded. *Va. Code Ann. 57-7.1*. Section 57-8 authorizes the appointment of trustees by the Circuit Court. *Va. Code Ann. 57-8*. Section 57-9 outlines how property disputes shall be resolved by the Circuit Court. *Va. Code Ann. 57-9*. Section 57-10 states that title to books and furniture is vested in the trustees of the church who may hold books and furniture in the same manner has real property. *Va. Code Ann. 57-10*. Section 57-11 provides that trustees of a church may sue in their own name, and that third-party beneficiaries of trusts or deeds may file suit against the members of the church. *Va. Code Ann. 57-11*.

Section 57-12 places limitation on the amount of property trustees of a church may own. *Va. Code Ann. 57-12*. Section 57-13 allows members of a church to bring legal action against the trustees to compel the property application of the property. *Va. Code Ann. 57-13*. Section 57-14 provides that members may bring suit to have the land sold or mortgaged. *Va. Code Ann. 57-14*. Section 57-15 requires that the Circuit Court approve most decisions pertaining to the ownership and management of church property. *Va. Code Ann. 57-15*. Section 57-15.1 through Section 57-69 contain detailed regulations regarding additional concerns governing church property. *Va. Code Ann. 57-15.1 to 57-69*.

n26. *Va. Code Ann. 57-12*.

n27. *Id.*

n28. *Id.*

n29. *Id.*

n30. See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (incorporating Free Exercise Clause); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (incorporating the Establishment Clause).

n31. Current Virginia law still provides how certain "glebe lands and church property" is to be disposed. *Va. Code Ann. 57-3*:

The glebe lands and church property, or the proceeds thereof held by the authorities of any county under the act of January 12, 1802, or under any other act, which may not have been applied to some particular object under a local statute passed for the purpose, shall be appropriated to such object or objects, other than for a religious purpose, as may be voted for in such county (at such time and place as the circuit court may prescribe) by a majority of the person entitled to vote in the county for a delegate therefrom to the General Assembly, and, if no such object be so voted for, shall remain vested in such authorities and be appropriated by them for the benefit of the poor of such county; provided that the counties of Essex, Middlesex and Lancaster may use the "Glebe Fund," together with other funds, for improvements to the courthouse and related facilities.

Id. (emphasis added).

n32. "The law in effect since 1842 as to real property contained strict provisions as to the quantity of land and declared that the trustees should not take or hold at any one time more than two acres of land in a city or town or more than seventy-five acres of land in the county." *Maguire v. Loyd*, 67 S.E.2d 885, 892 (Va. 1951). Restrictions on church property ownership in Virginia began with the disestablishment movement and mortmain laws as far back as 1777. *Id.* at 889-90.

n33. Va. Code Ann. 64-1398 (1902) (predecessor to Section 57-7.1), Va. Code Ann. 64-1402 (1902) (predecessor to Section 57-11), Va. Code Ann. 64-1403 (1902) (predecessor to Section 57-12) and Va. Code Ann. 64-1404(1902) (predecessor to Section 57-13).

n34. After the Commonwealth confiscated the glebe lands and other church property, the General Assembly later permitted churches to own limited amounts of property, beginning with an acre or two and increasing to 15 acres today, and from a few thousand dollars to \$ 10,000,000.

n35. *Va. Code Ann. 57-12*.

n36. Id.

n37. Section 57-8, entitled "Appointment of trustees to effect the purposes of conveyances, etc.; validation of certain appointments" states:

The circuit court of the county or the circuit or corporation court of the city, or the judge thereof in vacation, wherein there is any parcel of such land or the greater part thereof may, on the application of the proper authorities of such church diocese, religious congregation, church, or religious society or branch or division thereof, from time to time appoint trustees, either where there were, or are, none or in place of former trustees, and on such application and without notice to the trustee or trustees change those so appointed whenever it may seem to the court or judge proper to effect and promote the purpose and object of the conveyance, devise, or dedication, and the legal title to such land shall for that purpose and object be vested in the trustees for the time being and their successors.

Va. Code Ann. 57-8.

n38. *Va. Code Ann. 57-16* provides:

Wherever the laws, rules or ecclesiastic polity of any church or religious sect, society or denomination commits to its duly elected or appointed bishop, minister or other ecclesiastical officer shall have power to acquire by deed, devise, gift, purchase or otherwise, any real or personal property, for any purpose authorized and permitted by its laws, rules or ecclesiastical polity, and not prohibited by the laws of Virginia, and the power to hold, improve, mortgage, sell and convey the same in accordance with such laws, rules and polity, and in accordance with the laws of Virginia.

n39. From 1993 until re-enacted in April 2002, Section 57-12 provided:

Such trustees shall not take or hold at any one time more than 15 acres of land in a city or town, nor more than 250 acres outside of a city or town and within the same county. The city or town council of any city or town may by ordinance, however, authorize such trustees to take and hold in such city or town not more than 50 acres of land at any one time; such trustees of a church diocese may take or hold not more than 250 acres in any one county at any one time; and they shall not take or hold money, securities or other personal property to the extent that such taking or holding causes the money, securities or other personal property held at the time of taking by such trustees to exceed in the aggregate, exclusive of the books and furniture aforesaid, the sum of ten million dollars.

Va. Code Ann. 57-12.

n40. *Va. Code Ann. 57-12.*

n41. Jeffrey Sykes, Assembly Rewrites Church Land Bill: Attorney General Rebuffed in Try to Eliminate Law, *The News and Advance*, Mar. 9, 2002, at A-3. (stating "It has always been Jerry Kilgore's position that the law is unconstitutional because it treats churches differently from any other organization")

n42. *Va. Code Ann. 57-12.*

n43. *Va. Code Ann. 57-12.*

n44. Some of these related ministries and the amount of land they own include: (1) Liberty Broadcasting Network, Inc. - 313.698 acres; (2) Liberty University - 246.21 acres; (3) TRBC Ministries, LLC - 1201.607 acres; (4) Lynchburg Christian Academy - 20 acres; (5)

Liberty University Trust, Inc. - 26.496 acres; (6) Liberty Alliance Institute - 1.63 acres; (7) Freedom Liberty Partners - 61.775 acres; (8) Elim, Inc. - 5.631 acres; and (9) Old Time Gospel Hour - .31 acres.

n45. As a result of the statutory scheme, churches in Virginia cannot obtain a title insurance commitment for any property in excess of the amount permitted by law. Although incorporation typically allows the incorporated entity to hold title to property in the entity's name, the Statutes still impose restrictions on how much property may be owned by churches, or which is dedicated exclusively for the use of the church. *Maguire v. Lloyd*, 67 S.E.2d 885, 892-93 (Va. 1951).

n46. The state of New York has a voluminous collection of laws entitled "Religious Corporations Law." See *N.Y. Religious Corporations Law 2-a* (McKinney 2002). The laws govern churches incorporated in New York or churches incorporated outside of New York that operate within the state but contain no specific property limitations. *Id.* However, Section 12(1) of the Religious Corporation Law requires court approval for the sale, mortgage, or long-term lease of real property by a church. 12(1). A New York court faced with applying the provisions of Section 12(1), overviewed the history of the *Religious Corporations Law*. *Wolkoff v. Church of St. Rita*, 505 N.Y.S.2d 327, 330 (1986).

n47. 298 S.E.2d 803 (W. Va. 1982).

n48. *Id.* at 805.

n49. *Id.* at 804.

n50. *Id.*

n51. *Id.* at 809. The court also held that parties other than the state could challenge a void conveyance to an incorporated church. *Id.* at 808.

n52. *Id.* at 809.

n53. See *Falwell v. Lynchburg*, 198 F. Supp. 2d 765, 770 (W.D. Va. 2002)..

n54. See *id.* at 773-76.

n55. *Id.* at 776.

n56. *Va. Code Ann.* 57-12.

n57. See *Falwell*, 198 F. Supp. 2d at 774 ("The challenged provisions ... 57-12 ... contain no language stating how they may be enforced at all, let alone what the Attorney General's particular enforcement role would be.").

n58. See Sykes, Assembly Rewrites Church Land Bill: Attorney General Rebuffed in Try to Eliminate Law, *The News and Advance*, Mar. 9, 2002, at A-3.

n59. *Id.*

n60. *Id.*

n61. *Va. Code Ann.* 57-1

n62. *Id.*

n63. See *Kirkley v. Maryland*, 381 F. Supp. 327, 329 (D. Md. 1974).

n64. *Id. at 328.*

n65. *Id. at 328-29.*

n66. *Id. at 329.*

n67. *Id.*

n68. *Kirkley, 381 F. Supp. at 329.*

n69. *Id. (citing Poe v. Ulman, 367 U.S. 497, 508 (1961)).*

n70. See *Kirkley, 381 F. Supp. at 329.*

n71. *Id. at 331.*

n72. *Va. Code Ann. 57-15* (emphasis added). The Attorney General noted that Section 57-15 requires "court approval for the sale of church land." vol. Va. Op. Att'y Gen. 194 (1996) (citing *Globe Furniture Co. v. Jerusalem Church, 49 S.E. 657, 658 (Va. 1905)* ("Trustees who hold legal title for benefit of congregation may not 'sweep away' congregation's house of worship, and they have 'no power of their own volition' to sell property." Va. Op. Att'y Gen. 194, n.4 (1996)) and *Cain v. Rea, 166 S.E. 478, 480 (Va. 1932)* ("Statutes provide convenient method for encumbering church property." 1996 Va. Op. Att'y Gen. 194, n.4). The Attorney General opined that "based on the Supreme Court's construction of the meaning of 'church' in Article 2 and the constitutional prohibition against the incorporation of churches, it is my opinion that a nonstock corporation is not required to obtain court approval pursuant to 57-14 or 57-15 to convey property held by the corporation." Va. Op. Att'y Gen. 194 (1996).

n73. "We have repeatedly said that in a case of doubtful meaning of a statute the practical construction given to it by public officials entrusted with its administration, acted upon by the people, and not changed by the General Assembly through the years, is decisive." *Nuttall v. Lankford, 43 S.E.2d 37, 44 (1947)* (citing *South East Pub. Serv. Corp. v. Commonwealth, 181 S.E. 448, 452 (1935)*).

n74. Va. Const. art. X, 6(a)(2).

n75. See supra nn. 84-88. "The legislative branch of a local government in the exercise of its police power has wide discretion in the enactment and amendment of zoning ordinances." *Boggs v. Bd. of Supervisors of Fairfax County, 178 S.E.2d 508, 509 (Va. 1971)* (quoting *Bd. of County Supervisors of Fairfax County v. Cooper, 107 S.E.2d 390, 395 (Va. 1959)*).

n76. Va. Const. art. X, 6(a)(2).

n77. *Va. Code Ann. 58.1-3402(A).*

n78. *Va. Concrete Co. v. Bd. of Supervisors, 197 Va. 821, 829 (1956)*. The Commonwealth Attorney for Fairfax County sought injunctive relief against Virginia Concrete Company for violation of a zoning ordinance. *Id. at 822*. The court found the Commonwealth Attorney had the authority to enforce local violations of zoning ordinances. *Id. at 829*.

n79. See *Old Time Gospel Hour, Inc. v. City of Lynchburg*, slip op. 1 (Lynchburg Cir. Ct. 1983). The opinion is on file with the authors. Since the Church was not able to hold more real estate than the amount permitted by law, Rev. Falwell incorporated a separate nonprofit

corporation knows as Old Time Gospel Hour, Inc. This corporation held property in its own name, but it remained separate from the Church and was not considered a church.

n80. *Id.* at 2. In 1983, the real property limit for churches was 10 acres. *Id.*

n81. *Id.* at 24.

n82. *Id.* at 19

n83. *Id.* at 21.

n84. *Id.*

n85. *Va. Code Ann. 15.2-1634.*

n86. *Va. Code Ann. 17.1-223* (emphasis added).

n87. *Va. Code Ann. 58.1-801.*

n88. *Va. Code Ann. 58.1-811* (emphasis added). *Section 58.1-802 of the Virginia Code* imposes an additional recordation tax to be paid by the grantor. In other words, Section 58.1-801 imposes a recordation tax on deeds, instruments or writings, and Section 58.1-802 imposes an additional tax on the same deed, instrument or writing to be paid by the grantor. In other words, the grantee and the grantor must pay recordation taxes. However, if the Church is a grantor, then Section 58.1-811(c)(5) completely exempts from recordation tax a deed "conveying real estate from any church or religious body." *Va. Code Ann. 58.1-811(c)(5)*. To the extent that the property is not used "exclusively" for religious purposes, Sections 58.1-801 and 58.1-811(A)(2) still impose the recordation tax on a deed, instrument or writing if the Church is the grantee. Section 58.1-811(b)(2) exempts a recordation tax on any deed of trust or mortgage given by the trustee or the trustees of a church or religious body which is otherwise imposed by Section 58.1-803 (deeds of trust or mortgages) and Section 58.1-804 (construction loan deeds of trust or mortgages). Notwithstanding these exemptions, a church, as noted above, may only claim exemption from the recordation tax if the church is the grantee to the extent that the "real estate is intended to be used exclusively for religious purposes, or for the residence of the minister of any church or religious body." *Va. Code Ann. 58.1-811(a)(2)*.

n89. *Va. Code Ann. 58.1-3175.*

n91. *Lucas, 76 VA at 281.*

n92. See *Lucas, Sergeant, & Co. v. Claffin & Co.*, 76 Va. 269, 1882 WL 6022 at 7 (VA) (emphasis added); see also *Interstate Ry. Co. v. Robert*, 105 S.E. 463 (Va. 1920) (Auditor of public accounts charged clerk with under collection of recordation tax and requested the clerk to personally make up the difference.); *Fed. Land Bank of Baltimore v. Hubard*, 178 S.E. 16 (Va. 1935) (Bank applied for Writ of Mandamus to require clerk to record a document without an additional recordation tax which the clerk argued was due.); *White v. Schwartz*, 83 S.E.2d 376 (Va. 1954) (Suit filed against clerk to obtain a refund of portion of recordation tax which the clerk argued was owed.); Va. Op. Att'y Gen. n.2 (1987) (Not every writing presented to the clerk with a proper acknowledgment must be recorded.); vol. Va. Op. Att'y Gen. page (1987) (A second fee should be imposed.).

n93. Va. Op. Att'y Gen. at 1 (1978).

n94. *Id.*

n95. *Id.*

n96. *Va. Code Ann. 58.1-811(a)(2)* (emphasis added).

n97. The clerk of the city or county is required to notify the Commonwealth whenever property is acquired by a church and the amount of the property so acquired. See *Va. Code Ann. 58.1-03360.1*. The Statutes allow for property held by an ecclesiastical church to be to be held in the name of the bishop or ecclesiastical officer rather than in the name of church trustees. See *Va. Code Ann. 57-16*. Thus, the clerk may have to inquire into the "rules or ecclesiastic polity" of the church to determine if the property may be held by the bishop or ecclesiastical officer. See *Va. Code Ann. 57-16(1)*. Such an inquiry may violate the First Amendment. The Supreme Court has explained the reasons for limiting government meddling in church affairs. It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to the one which is less so. *Watson v. Jones, 80 U.S. 679, 729 (1871)*. "It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretation of those creeds." *Hernandez v. Comm'r 490 U.S. 680, 699 (1989)*. "Religious beliefs need not be acceptable, logical, consistent, or comprehensive to others in order to merit First Amendment protection." *Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 714 (1981)*.

n98. *255 Va. 445 (1998)*.

n99. *Id. at 452*.

n100. *Owen v. Bank of Glad Spring, 81 S.E.2d 565, 571 (Va. Ct. App. 1954)*(citation omitted).

n101. See *Maguire v. Loyd, 67 S.E.2d 885, 889, 892-93 (Va. 1951)*.

n102. *Id. at 892*.

n103. See *id.*

n104. *Id. at 893*. See also *More v. Perkins, 192 S.E. 806, 811 (Va. Ct. App. 1937)* (Constitution prohibits **church incorporation** and thus limits church ownership of property and statute places limitation on amount of real property church may own.); *Globe Furniture Co. v. Trustees of Jerusalem Baptist Church, 49 S.E. 657, 658 (Va. 1905)* (stating that Virginia churches cannot be incorporated and any property held is limited by statute).

n105. *Owens, 81 S.E.2d at 567-68*.

n106. *Id. at 574*.

n107. *Id. at 573*.

n108. See *Va. Code Ann. 57-71*.

n109. *Va. Code Ann. 57-12*.

n110. See *id.* For example, if a church received a devise consisting of 20 acres of real property, and the church already holds through its trustees 5 acres, then the property limit

would be exceeded by 10 acres. The church can only accept 10 acres and must convert the remaining 10 acres into personal property by selling the land and taking the cash. See *id.* The procedure is of course dependant on two factors: (1) the will must have a residuary clause, and (2) the resulting amount of cash received by the church through the sale of the excess property may not cause the church to exceed the personal property limitation. To the extent the devise causes the church to exceed either one or both the real and personal property limitations, the church may not accept the gift. See *id.* Here the Circuit Court would enforce the property limitations by means of probate. If the property were given to a church through a trust, the Attorney General and the Commonwealth Attorneys have the authority to intervene to enforce the terms of the trust, and thus to enforce compliance with state law. See *Va. Code Ann. 55-29.1* and *Va. Code Ann. 15.2-944.1(A)*. In *Sweet Briar Institute v. Button*, the Virginia Attorney General and the Commonwealth Attorney were defendants in a testamentary controversy pursuant to their authority to intervene in certain disputes involving charitable trusts. *280 F. Supp. 312 (W.D. Va. 1967)*.

n111. See Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, *36 Wm. & Mary L. Rev.* 837, 880-81 (1995).

n112. See Robert L. Cord, *Separation of Church and State* 3-4 (1982). See also H.K.J. Kenrode, *Separation of Church and State in Virginia* 1 (Da Capo Press 1910); Miryan Neulander Kay, *Separation of Church and State in Jeffersonian Virginia* 1-2 (1969).

n113. Eckenrode, *Separation of Church and State in Virginia* 2-17 (Da Capo Press 1910).cite not available

n114. See *Engle v. Vitale*, *370 U.S. 421, 427-28 (1962)*.

n115. See Carl Zollmann, *Classes of American Religious Corporations*, *13 Mich. L. Rev.* 566, 566-68 (1915). The First Amendment did not prohibit the establishment of a State church as the Bill of Rights originally applied only to the Federal government. *Id.* It was not until 1940 and 1947 that the Supreme Court applied the First Amendment to state governments through the Fourteenth Amendment. See *Cantwell*, *310 U.S. 296, 303-04 (1940)* (incorporation of Free Exercise Clause) and *Everson*, *330 U.S. 1 (1947)* (incorporating of Establishment Clause). See also *Terrett v. Taylor*, *13 U.S. 43, 46-47 (1815)*; *Turpin v. Lockett*, *10 Va. 113 (1804)*, 1804 WL549 at 13 (Va.).

n116. See Thomas E. Buckely, *Church and State in Revolutionary Virginia* 8-9 (1977). See also Underkuffler-Freund, *supra* note 107, at 882 ("Two -thirds of the people of Virginia were religious dissenters by the time of the Revolution.").

n117. Patty Gerstenblith, *Associational Structures of Religious Organizations*, vol. *BYU. L. Rev.* 439, 462 (1995).

n118. Francis Helminski, *Canon Law and Mystical Body: Religious Corporations in Minnesota*, *22 Ham. L. Rev.* 689, 691 (1999).

n119. Now codified in the Virginia Code. See *VA. CODE ANN. 57-1*.

n120. See Buckely, *supra* note 112, at 34-37.

n121. The Anglican Church took on this name after Independence.

n122. See *Buckley, supra* note 112, at 86 (quoting Religious Petitions, 1774-1802, June 4, 1784).

n123. *Id. at* 86-87.

n124. Eckenrode, *supra* note 117, at 92.

n125. See *Buckley, supra* note 112, at 165.

n126. *Id. at* 170-71. "The glebe lands were the lands which had been acquired by the parishes of the Anglican Church since 1607." Note, Judge Spencer Roane of Virginia: Champion of States' Rights - Foe of John Marshall, *1953 Harv. L. Rev.* 1242, 1246 n. 39 (citing George McLaran Brydon, 2 *Virginia's Mother Church* 492 (1952)).missing source

n127. See Eckenrode, *supra* note 109, at 116-55.

n128. See Robert L. Cord, *Separation of Church and State* 3-4 (1982).

n129. See Note, Judge Spencer Roane of Virginia: Champion of States' Rights - Foe of John Marshall, *1953 Harv. L. Rev. at* 1246. See also George McLaran Brydon, 2 *Virginia's Mother Church* 492, 503 (1952).missing source

n130. *Trs. of the Gen. Assembly of the Presbyterian Church v. Guthrie*, 10 S.E. 318, 322 (Va. 1889).

n131. Erika King, Tax Exemptions and the Establishment Clause, *49 Syracuse L. Rev.* 971, 974 n.8 (1999)(quoting James Madison on Religious Liberty 89-94 (Alley, ed. 1985)).

n132. See *Turpin v. Lockett*, 10 Va. 113 (1804), 1804 WL 549 (Va.).

n133. *Turpin*, 1804 WL 549, at 20-21.

n134. See *Terrett v. Taylor*, 13 U.S. 43 (1815).

n135. See *Selden v. Overseers of the Poor of Loudoun*, 38 Va. 127 (1840), 1840 WL 2222 (Va.).

n136. Similarly, Mexico has a long history of restrictions on church ownership of land. In Mexico, the sixteenth-century Spanish conquest brought Catholic missionaries. Over the centuries, "the greater became the Church holdings, and they were usually of the best land in a given community, the less land was left for the laity to own, and the fewer were the chances that the very small incipient middle class would get a foothold.' During the war with the United States in the 1840s, Mexicans "looked with longing eyes at that wealthiest of all institutions of the country, the Church.' By the 1850s,'the Catholic Church owned half the land in Mexico and actively opposed its independence from Spain.' To break its power, President Benito Juarez "stripped the church of its property, except for church buildings, closed monasteries and convents, nationalized cemeteries and made marriage a strictly civil act.' Having regained some of its power, the church backed the rich in the revolution of 1910. Provisions of the Mexican Constitution of 1917 nationalizing church property, banning parochial schools, and limiting the political and property rights of clerics were finally enforced in 1926, prompting the church to close its doors to provoke a popular rebellion. Beginning in the 1940s, however, state and church reached an informal accommodation, and "the church ... managed to acquire property by setting up private corporations.' Finally, in 1992, the constitution was amended to permit church ownership of property and restore the clerics' civil rights.

However, the amendment specifically prohibits both a cleric (and his relatives), as well as the religious association to which he belongs, from inheriting property, if the cleric had ministered to the decedent (and is not closely related to the decedent). Moreover, implementing legislation "restricts the rights of churches to own businesses and communications media."

Evelyn Brody, *Charitable Endowments and the Democratization of Dynasty*, 39 *Ariz. L. Rev.* 873, 914-15 (1997) (citations omitted).

n137. 56 *Va.* 423 (1859), 1859 *WL* 4575 (Va.).

n138. *Seaburn's*, 1859 *WL* 4575, at 5 (emphasis added).

n139. U.S. Const. amend. I (1791).

n140. See *Cantwell v. Connecticut*, 310 *U.S.* 296, 303 (1940).

n141. See *McDaniel v. Paty*, 435 *U.S.* 618, 629 (1978). The *McDaniel* decision was a plurality opinion. All Justices concurred in the judgment that the Tennessee Constitution violated the United States Constitution. Justices Burger, Powell, Rehnquist and Stevens reasoned that the Tennessee Constitution violated the Free Exercise Clause. Justices Brennan and Marshall argued the provision violated both the Free Exercise and the Establishment Clauses. Justice Stewart found the Tennessee Constitutional provision invalid under *Torcaso v. Watkins*, 367 *U.S.* 488 (1961) (striking down Maryland's requirement that public officials profess belief in God). Justice White contended that prohibiting clergy from running for elected office violated the Equal Protection Clause.

n142. *McDaniel*, 435 *U.S.* at 622.

n143. *Id.* at 623.

n144. *Id.* at 623 n.4. The Supreme Court referred to Jefferson's change of mind by pointing to a letter he wrote to Jeremiah Moore in 1800:

In the same scheme of a constitution [for Virginia which I prepared in 1783, I observe] an abridgment of the right of being elected, which after 17 years more of experience & reflection, I do not approve. It is the incapacitation of a clergyman from being elected. The clergy, by getting themselves established by law, & ingrafted into the machine of government, have been a very formidable engine against the civil and religious rights of man. They are still so in many countries & even in some of these United States. Even in 1783 we doubted the stability of our recent measures for reducing them to the footing of other useful callings. It now appears that our means were effectual. The clergy here seem to have relinquished all pretensions to privilege, and to stand on a footing with lawyers, physicians, &c. They ought therefore to possess the same rights.

Id. at 623 n.4 (quoting P. FORD, 9 *Works of Jefferson* 143 (1905)).

n145. *Id.* at 625.

n146. See *id.* Maryland's Constitutional provision which prohibited ministers from holding elected office was struck down in 1974. See *Kirkley*, 381 *F. Supp.* at 327.

n147. *McDaniel*, 435 *U.S.* at 629.

n148. *Id.*

n149. See *Employment Div. Dept. of Human Resources v. Smith*, 494 *U.S.* 872 (1990).

n150. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 521 (1993).

n151. *Id.*

n152. See *id.* at 532.

n153. See *id.* (striking down an ordinance that prohibited animal slaughter because the ordinance was created to prohibit a religious group from engaging in the religious ritual of animal sacrifices).

n154. See *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961) (plurality opinion); see also *Bowen v. Roy*, 476 U.S. 693, 703 (1986) ("It was historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause.")

n155. *Lukumi*, 508 U.S. at 533.

n156. See *id.*

n157. See *Gillette v. United States*, 401 U.S. 437 (1971); see also *Romer v. Evans*, 517 U.S. 620 (1996).

n158. *Gillette*, 401 U.S. at 452.

n159. *Bowen v. Roy*, 476 U.S. 693, 703 (1986).

n160. *Lukumi*, 508 U.S. at 534.

n161. *Waltz v. Tax Comm'n*, 397 U.S. 646, 696 (1970).

n162. *Smith*, 494 U.S. at 884.

n163. See *id.*

n164. *Id.* at 884 (citations omitted). Both *Sherbert* and *Thomas* involved claims for unemployment compensation benefits. See *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981). In *Sherbert*, the Supreme Court held that South Carolina could not constitutionally apply eligibility provisions of an unemployment compensation statute so as to deny benefits to a claimant who had refused employment where the job required her to work on Saturday, her Sabbath. Critical to the Court's analysis was that South Carolina did not require other claimants to accept jobs that required work on Sundays. See *id.* at 406. In *Thomas*, the Supreme Court held that Indiana's denial of unemployment compensation benefits to a claimant, who terminated his job because his religious beliefs forbade participation in production of armaments, violated his First Amendment right to free exercise of religion.

n165. 170 F.3d 359 (3d Cir. 1999).

n166. See *id.* at 364 (citing *Smith*, 494 U.S. at 884).

n167. See *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 364 (1999); see also *Lukumi*, 508 U.S. at 537-38.

n168. *Fraternal Order of Police*, 170 F.3d at 365.

n169. *Lukumi*, 508 U.S. at 542.

n170. See *Fraternal Order of Police*, 170 F.3d at 365.

n171. *Lukumi*, 508 U.S. at 537-538 (emphasis added)(quoting *Bowen v. Roy*, 476 U.S. 693, 708 (1986)).

n172. *Id.* at 531-532.

n173. 508 U.S. at 523 (emphasis added) (citation omitted).

n174. *Lukumi*, 508 U.S. at 546 (quoting *Smith*, 494 U.S. at 888).

n175. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

n176. *Lukumi*, 508 U.S. at 546.

n177. *Id.* (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978)).

n178. Va. Const. art. IV, 14(20). For over 200 years, the state of Virginia has refused to allow churches to incorporate. In 1902, the General Assembly delegated the task of handling corporations to the State Corporation Commission. From 1902 to the present, the Commission has followed the obvious prohibition against **church incorporation**. Interpretations of state law by a state Commission which have not been overruled or altered by the General Assembly is "decisive" when determining intent and application of the law. See *Nuttall v. Lankford*, 43 S.E.2d 37, 44 (Va. 1947); *S.E. Pub. Serv. Corp. v. Virginia*, 181 S.E. 448 (Va. 1935).

n179. See *Osnes v. Morris*, 298 S.E.2d 803, 805 (W.Va. 1982).

n180. *Id.* Mortmain acts "had for their object to prevent lands getting into the possession or control of religious corporations..." Black's Law Dictionary 913 (5th ed. 1979).

n181. See *Va. Code Ann.* 57-12, 15.

n182. See *Falwell v. Miller*, 203 F. Supp. 2d 624 (W.D. Va. 2002). The Church alleged violations of the Establishment Clause, and the right to Free Exercise of Religion, Peaceable Assembly and Equal Protection. See Amended Complaint at 1-2, *Falwell v. Miller*, and on file with the authors. The District Court in *Falwell v. Miller* addressed only the Free Exercise claim and never mentioned, let alone decided, the other claims brought by the Church.

n183. See *id.* at 632.

n184. *Id.* at 633.

n185. *Id.* at 630 (quoting *Lukumi*, 508 U.S. at 531).

n186. See *Lukumi*, 508 U.S. at 532.

n187. See *id.*

n188. See *id.* at 533.

n189. See *Va. Code Ann.* 13.1-825.

n190. See *id.*

N191. See *Va. Code Ann.* 13.1-825.

n192. *Falwell*, 203 F. Supp. 2d at 631.

n193. *Id.* at 632. See also *Lukumi*, 508 U.S. at 546.

n194. *Falwell*, 203 F. Supp. 2d at 630.

n195. *Bd. of Educ. v. Grumet*, 512 U.S. 687 (1994) (quoting *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973)).

n196. See *Lukumi*, 508 U.S. at 534 ("Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.").

n197. On its face, the Charter Provision does not apply to synagogues or mosques. In *Larson v. Valente*, 456 U.S. 228, 246 (1982), the Supreme Court stated that "the fullest realization of true religious liberty requires that government ... effect no favoritism among sects ... and that it work deterrence of no religious belief." (quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963)).

n198. See *Falwell*, 203 F. Supp. 2d at 631.

n199. See *Falwell*, 203 F. Supp. 2d at 630.

n200. *Gallego's v. Attorney General*, 30 Va. 450 (1832), 1832 WL 1845, at 16-17 (Va. 1832) (emphasis added). "[*The Gallego and the Trs. of the Philadelphia Baptist Ass'n v. Hart's Ex'rs*, 17 U.S. 1 (1819)] cases were apparently repudiated in *Protestant Episcopal Education Society v. Churchman's Representatives*, 80 Va. 718 (1885) and this latter case was followed in *Trustees of the General Assembly of the Presbyterian Church v. Guthrie*, 89 Va. 125 (1889). However, in *Fifield v. Van Wyck's Executor*, 94 Va. 557, 27 S.E. 446 (1897) the Supreme Court of Appeals brushed aside the language in the *Churchman* and *Guthrie* cases as dictum and reinstated *Gallego* as the leading Virginia authority." *Smith v. Moore*, 343 F.2d 594, 600 n.6 (4th Cir. 1965). The Supreme Court of Virginia was previously called the Supreme Court of Appeals. In 1951, the Virginia Supreme Court breathed new life into the *Gallego's* case by favorably quoting large portions of the opinion, including the section quoted above. See *Maguire*, 67 S.E.2d at 892-893. As recent as 1990, the language regarding the "decided hostility of the legislative power to religious incorporations" was cited by a federal District Court in Virginia. See *Bates v. Cekada*, 130 F.R.D. 52, 56 (E.D. Va. 1990).

n201. Until December of 1992, the American Bar Association was an unincorporated association. The ABA quickly incorporated within two weeks after members of the ABA were sued individually over a dispute regarding accreditation practices involving Massachusetts School of Law at Andover. See Complaint for Declaratory, Preliminary and Permanent Injunctive Relief, P86, filed in *Staver v. Am. Bar Ass'n*, 169 F. Supp. 2d 1372 (M.D. Fla. 2001).

n202. Richard R. Hammar, *Pastor, Church & Law* 129 (2d ed. 1991).

n203. See *Osnes*, 298 S.E.2d at 805 ("This constitutional provision descended to us from the State of Virginia"). West Virginia's provision would likely fall if challenged by a church in that state.

n204. Hammar, *supra* note 198, at 275.

n205. *Osnes*, 298 S.E.2d at 805.

n206. Id.

n207. Id.

n208. See *Lukumi*, 508 U.S. at 531-32. Strict scrutiny (compelling interest achieved in the least restrictive manner) is applicable not only when the law targets religion; it is also applicable in so-called hybrid cases. A hybrid case is one in which a Free Exercise claim is combined with some other constitutional right. See *Smith*, 494 U.S. at 881. Strict scrutiny is applicable because the statutes target religion. Strict scrutiny is also applicable because any church challenging the Statutes would present a hybrid claim, which, at a minimum would include First and Fourteenth Amendment claims.

n209. See *Maguire*, 67 S.E.2d at 893.

n210. See *Va. Code Ann* 57-15.

n211. *Va. Code Ann.* 57-15 states that:

The trustees of such ... church or religious denomination ... in whom is vested the legal title to such land ... may file their petition in the circuit court of the county or the city wherein the land ... lies ... Upon evidence being produced before the court that it is the wish of the congregation, or church or religious denomination or society ... to sell, exchange, encumber, extend encumbrances, make a gift or, or improve the property or settle boundaries by agreement, the court shall make such order as may be proper.

n212. See *Lukumi*, 508 U.S. at 533.

n213. *Maguire*, 67 S.E.2d at 892-93 (quoting *Gallego's*, 30 Va. 450, 1832 WL 1845, at 16-17 (*Va.* 1832) (emphasis added)). Focusing on the personal property restrictions in Section 57-12, the *Maguire* court noted that the "fundamental underlying purpose of the legislature was to fix a monetary limit on ownership of personalty by churches, exclusive of books and furniture. This purpose may not be thwarted by an attempt to do indirectly that which cannot be done directly." *Maguire*, 67 S.E.2d at 893. The *Maguire* opinion then states that the limitations proscribed by Section 57-12 "include economic wealth ... under whatever guise it is maintained so long as the church is the sole beneficiary therefrom, ..." Id. To calculate the amount property, the *Maguire* court required the property "in the hands of trustees other than the church" be combined with the property of the "church." The total amount of property between the two entities cannot exceed Section 57-12. Thus, property held by trustees of a non-profit corporation for use by a church, combined with property held by trustees of the church, may not together be greater than the limitations proscribed under Section 57-12.

n214. See *Osnes*, 298 S.E.2d at 805.

n215. *McDaniel*, 435 U.S. at 645 (White, J., concurring).

n216. Id.

n217. West Virginia patterned many of its law governing **church incorporations** and property limitations on Virginia law. See *Powell v. Dawson*, 32 S.E. 214 (*W. Va.* 1899).

n218. See *Lukumi*, 508 U.S. at 533.

n219. The Fourteenth Amendment to the United States Constitution was ratified by the states on July 9, 1868.

- n220. U.S. Const. amend. XIV (1868).
- n221. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).
- n222. *LC&S, Inc. v. Warren County Area Plan Comm'n*, 244 F.3d 601, 603 (7th Cir. 2001).
- n223. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).
- n224. *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982).
- n225. Patty Gerstenblith, *Associational Structures of Religious Organizations*, 1995 *BYU L. Rev.* 439, 465.
- n226. *Romer v. Evans*, 517 U.S. 620, 631 (1996).
- n227. See *id.*
- n228. See *id.* at 624.
- n229. *Id.* at 634.
- n230. See *id.* at 635.
- n231. *Id.*
- n232. See *City of Cleburne*, 473 U.S. at 439.
- n233. U.S. Const. amend. I (1791).
- n234. See *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947)
- n235. *Id.* at 18; see also *Lemon v. Kurtzman*, 403 U.S. 602, 619-622 (1971); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring) ("Brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious ... are not only not compelled by the Constitution, but, it seems to me, are prohibited by it."); see also *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (stating that the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.") The "accommodation of religion is a necessary aspect of the Establishment Clause jurisprudence because, without it, government would find itself effectively and unconstitutionally promoting the absence of religion over its practice." *Ehlers-Renzi v. Connelly Sch. of the Holy Child, Inc.*, 224 F 3d 283, 287 (4th Cir. 2000).
- n236. *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 705 (1994) (quoting *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334 (1987)(Statute creating special school district for religious village which worked to exclude all but those in the village violated Establishment Clause.)).
- n237. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).
- n238. *Id.* at 292 (internal citation omitted). A facial challenge is appropriate when the text of a law cannot be applied in a constitutional manner with any given set of facts. See *United States v. Salerno*, 481 U.S. 739, 746 (1987).
- n239. See *Santa Fe*, 530 U.S. at 290; *Edwards v. Aguillard*, 482 U.S. 578 (1987) (invalidating Louisiana's "Creationism Act"); See also *Wolman v. Walter*, 433 U.S. 229 (1977);

Comm'n for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 1973. The standing requirements in Establishment Clause cases have been relaxed. See *Lamont v. Woods*, 948 F.2d 825, 829-30 (4th Cir. 1991). See also Marc Rohr, *Tilting at Crosses: Non-Taxpayer Standing to Sue Under the Establishment Clause*, 11 *Ga. St. Univ. L. Rev.* 495 (1995).

n240. 403 U.S. at 602.

n241. *Id.* at 612.

n242. *Id.* (citing *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968)).

n244. See *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring).

n245. See *Falwell v. Lynchburg*, 198 F. Supp. 2d 765 (W.D. Va. 2002).

n246. See *McDaniel*, 435 U.S. at 618.

n247. *Id.* at 630 (Brennan, J., concurring).

n248. *Id.*

n249. *Id.* at 634.

n250. *Id.* at 636.

n251. *Id.* at 637.

n252. *Id.* at 638.

n254. Given the opportunity, some churches choose to remain unincorporated. See Paul M. Karszen, *Imposing Corporate Forms on Unincorporated Denominations: Balancing Secular Accountability With Religious Free Exercise*, 55 *S. Cal. L. Rev.* 155 (1981). However, this choice should be up to the church body, not to the government. Interestingly, Thomas Jefferson observed the following:

Every religious society has a right to determine for itself the times for [its religious] exercises, & the objects proper for them, according to their own particular tenants; and this right can never be safer than in their own hands, where the constitution has deposited them.

Thomas Jefferson Letter to Rev. Samuel Miller (1808), quoted in Merrill D. Peterson ed., *Thomas Jefferson: Writings*, 1186-87 (1984). Indeed, the Constitution ensures that churches have the "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicolas Cathedral of the Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952).

n255. *Gallego's*, 30 *Va.* at 450 (1832), 1832 *WL* 1845 at 16-17 (*Va.* 1832).

n256. Francis Helminski, *Canon Law and Mystical Body: Religious Corporations in Minnesota*, 22 *Hamline L. Rev.* 689, 691 (1999).

n257. *Id.*

n258. U.S. 43, 49 (1815).

n259. See *Marbury v. Madison*, 5 U.S. 137 (1803).

n260. *Gallego's*, 30 *Va.* 450, 1832 *WL* 1845, at 16-17.

n261. *McDaniel*, 435 U.S. at 639 (Brennan, J., concurring).

n262. See Va. Code Ann. 13.1, et seq.

n263. *403 U.S. at 612.*

n264. *Peck v. Upshur County Bd. of Educ., 155, 284 F.3d 274 (4th Cir. 1998)*

n265. See Va. Code Ann. 57-12 and 57-15.

n266. See Va. Code Ann. 57-15 (emphasis supplied).

n267. See Va. Const. art. IV 14(20).

n268. *Watson v. Jones, 80 U.S. 679, 733-734 (1871).*

n269. See *Widmar v. Vincent, 454 U.S. 263, 269 (1981).*

n270. *Id. at 271 n.9; id. at 272 n.11.*

n271. *56 Va. 423, 1859 WL 4575.* Seaburn left a will which directed his executor to build two churches on certain of his properties and to hire a minister with proceeds from the sale of his estate. *Id.* Seaburn's attempted devises and bequests were invalid because no Virginia law was enacted to permit devises and bequests to uncertain beneficiaries. See *id.* At the time, Virginia law authorized only "conveyances" by deed and not "devises" of property for the use of a religious congregation.

n272. *Seaburn, 1859 WL 4575 5.* (emphasis added).

n273. See *Maguire, 67 S.E. 2d at 892-93.*

n274. *Gallego's, 30 Va. 450, 1832 WL 1845 at 16-17 (Va. 1832).*

n275. *403 U.S. at 612.*

n276. See Va. Code Ann. 57-15.

n277. The clerk must report to the Commonwealth when churches obtain real property and the amount thereof. The statute requiring the clerk to report churches to the Commonwealth is part of the same statute regarding the taking of property by the state through its power of eminent domain. See Va. Code Ann. 58.1-03360.1.

n278. See Va. Code Ann. 57-16(1).

n279. See Va. Code Ann. 57-15. Even if it were possible for a church to slip by the initial gatekeepers (the circuit court judge and the city or county clerk) and obtain more land than is permitted, the Attorney General is mandated by Section 57-12 of the Code of Virginia to enforce the property limits.

n280. See Va. Code Ann. 57-12.

n281. U.S. Const. amend. I (1791).

n282. *DeJonge v. Oregon, 299 U.S. 353, 364 (1937).*

n283. See *Stromberg v. California, 283 U.S. 359 (1931).*

n284. *Roberts v. United States Jaycees, 468 U.S. 609 (1983); see Gilmore, 417 U.S. at 575*

n285. ""Members of an unincorporated church organization, who are actually instrumental in incurring liabilities for it, or who either authorize or ratify its transactions or those made in its name, are personally liable therefor, while those who in no way participate in such transactions are exempt from liability. Thus it has been held that the members composing a building committee of an unincorporated church organization in charge of the work of constructing a church are individually liable for material furnished them for building, although it is charged to the organization and the seller was informed that the material would be paid for out of the proceeds of church fairs, voluntary subscriptions, and donations." *Catlett v. Hawthorne*, 157 Va. 372 (1931) (quoting 23 R.C.L. 432). See also Kimberly A. Davison, Note, *Cox v. Thee Evergreen Church: Liability Issues of the Unincorporated Association, Is It Time for the Legislature To Step In?* 46 *Baylor L. Rev.* 231, 235-36 (1994). The Virginia Statutes provide that a fiscal officer may sign an instrument without personal liability if the Circuit Court enters an order pursuant to Sections 57-14 and 57-15. See *Va. Code Ann.* 57-15.1. Thus, if such an order is not entered, the fiscal officer may be personally liable. Outside of this narrow protection for a fiscal officer, the Virginia Statutes do not insulate either the trustees or the members from personal liability.

n286. See *United States v. Microsoft Corp.*, 253 F.3d 34 (2001), cert. denied, 122 S.Ct. 350 (2001)).

n287. *Healy v. James*, 408 U.S. 169, 181 (1972).

n288. *Buckley v. Valeo*, 424 U.S. 1, 15 (1976). See also *Citizens Against Rent Control v. Berkley*, 454 U.S. 290, 300 (1981) (To limit "the right of association places an impermissible restraint on the right of expression."); *Gilmore*, 417 U.S. at 575 (The right to free association not only protects the right to gather together, but it also "applies to the beliefs we share ..."); *De Jonge*, 299 U.S. at 365. ("Peaceful assembly for lawful discussion cannot be made a crime."); *Carey v. Brown*, 447 U.S. 455, 467 (1980) (Expression regarding issues of public concern "has always rested on the highest rung of the hierarchy of First Amendment values."); *NAACP v. Button*, 371 U.S. 415, 444-45 (1963) (For the Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered.)

n289. See *Citizens Against Rent Control*, 454 U.S. at 294.

n290. *Id.* at 294-95. See *id.* at 296. (While there may be some activities "legal if engaged in by one, yet illegal if performed in concert with others, ... political expression is not one of them.")

291. *NAACP v. Alabama ex. rel. Patterson*, 357 U.S. 449, 460 (1958).

n292. See *Citizens Against Rent Control*, 454 U.S. at 294.

n293. See 42 U.S.C.A. 2000cc, et seq. RLUIPA states as follows:

(a) Substantial burdens

(1) General rule

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or in-

stitution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution-

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) Scope of application

This subsection applies in any case in which-

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) Discrimination and exclusion

(1) Equal terms

No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) Nondiscrimination

No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) Exclusions and limits

No government shall impose or implement a land use regulation that-

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

U.S.C. 2000cc.

n294. See *id.*

n295. See 42 U.S.C. 2000cc-3(g) (emphasis supplied).

n296. See 42 U.S.C. 2000cc-5-7(A).

n297. *Id.* at (4)(A).

n298. *Id.* at (5).

n299. See 42 U.S.C. 2000cc(a); See also 146 Cong. Rec. E1563-64(daily ed. Sept. 22, 2000) (statement of Hon. Charles T. Canady) ("The phrase 'in furtherance of a compelling governmental interest' is taken directly from RFRA [the Religious Freedom Restoration Act, 42 U.S.C. 2000bb], which was enacted in 1993; the phrase was and is intended to codify the traditional compelling interest test."); *Mayweathers v. Terhune*, 2001 WL 804140 at 3 (E.D. Cal.) (In denying defendants' motion to dismiss filed in response to prisoners' RLUIPA claim, the court concluded that "RLUIPA's prohibition is clear. The Act bars the recipient of federal funds from placing substantial burdens on an inmate's free exercise of religion absent a compelling interest and the employment of the least restrictive means.")

n300. 148 F. Supp. 2d 173 (D. Conn. 2001).

n301. See *id.* at 176.

n302. See *id.* at 188.

n303. See *id.* at 189.

n304. See *id.*

n305. See *id.* at 190

n306. See *id.* (quoting *Sherbert*, 374 U.S. at 407).

n307. *Id.*

n308. See *Murphy*, 148 F. Supp. at 188.

n309. See 42 U.S.C. 2000cc-5(4); see also Religious Liberty Protection Act: Hearing on H.R. 1691 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 106th Cong.

n310. *Id.*

n311. See 42 U.S.C. 2000cc-5(5).

n312. See *Lukumi*, 508 U.S. at 533 ("if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, ... and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." (citing *Smith*, 494 U.S. at 878-879)).

n313. 42 U.S.C. 2000cc(b)(1)&(2).

n314. See 42 U.S.C. 2000cc(a)(1) and 42 U.S.C. 2000cc(b)(1)&(2).

n315. Besides Virginia and West Virginia, the only other state imposing any limits on property ownership of churches is Tennessee. The Tennessee law, which dates back to 1843, limits churches (whether incorporated or not) to owning land at only one location "for purposes of public worship, or for a parsonage, or for a burial ground." *TENN. CODE ANN.* 66-2-201 (2000). The authors are unaware of any current challenge to Tennessee's law, but contend that the law is facially unconstitutional and could be challenged by a church in Tennessee that owns property at one location and desires to obtain property at an additional location within the state.