

# HASIDIC HULLABALOO

## *Destination New York State*

Of all the places where a major church/state controversy heading to the Supreme Court might erupt, a grungy pub on a side street in a large city is probably not the first place you'd think of, but that's exactly what happened in the mid-1980s at a hole in the wall in Cambridge, Massachusetts, called Grendel's Den. The case was about the constitutionality of a Massachusetts law that gave churches the power to prevent nearby bars and restaurants from getting liquor licenses. When Grendel's applied for the twenty-seventh liquor license in the vicinity of the Holy Cross Armenian Parish, the church decided that enough was enough and vetoed the application.

Perhaps it should have surprised nobody that a bar named after a monster who allegedly descended directly from Cain and is described alternatively in *Beowulf* as a "demon corpse," "hell-serf," and "captain of evil" wouldn't shrink from a fight with a church. After all, if you believe the scholars (and goodness knows you should always believe the scholars), Beowulf—the hero who pulls off Grendel's arm, leaves him to crawl off to a cave and bleed to death, decapitates him, and then kills his mother for good

measure—might very well have been meant to exemplify Christian values. With this in mind, who could really have blamed Grendel's Den for being so sensitive to the church's veto?

Whether it was out of revenge or simply good business sense, Grendel's Den sued the church, arguing that the Massachusetts law violated the First Amendment. The Supreme Court agreed with the bar. The problem with the law was that it gave the power to make official decisions directly to religious institutions. As Justice Burger, no great champion of secularism, wrote, the law “substitutes the unilateral and absolute power of a church for the reasoned decisionmaking of a public legislative body acting on evidence and guided by standards, on issues with significant economic and political implications. . . . Ordinary human experience and a long line of cases teach that few entanglements could be more offensive to the spirit of the Constitution.” In other words, whatever the separation of church and state may or may not mean, it's got to mean that the church cannot *be the actual state*. In this chapter, I will explain this point, and then when I'm done with that, I'll tell you all about my visit to what might be the weirdest place in the entire country.



I actually spent a lot of time in Grendel's during college, drinking too much cheap beer and acting like a total moron. I'm pretty sure the last time I was there, I ended up puking. I guess I have the First Amendment to thank for that opportunity. Our founding fathers would be so proud! Since I now live only fifteen minutes away from Grendel's by subway, I figured it would be fun to go back and check the place out. I also thought it would be interesting to see how the church had fared following its defeat. I wondered

whether it had managed to thrive despite the generations of drinkers who had slaked their thirst, according to the Supreme Court decision, a mere ten feet from its back wall.

I made it to the bar about ten minutes before I was supposed to meet my friends, so I had some time to look around. I walked up and down the nearby streets looking for anything that resembled a church, but all I could see was a restaurant called Upstairs at the Square, a funky Indian place across the street, and an office building. I thought that maybe the office building was really a church, but when I smushed my face up against the glass door and looked inside, it was clear that the office building was just an office building. Something had changed. There was simply no church anywhere in the vicinity. Unless I had read the opinion wrong (had it said ten miles?), it appeared that I had a little mystery on my hands.

Descending into the bar, I passed on my left a framed copy of an article from the *New York Times* written the day after the Court announced its decision. Next to the article was a picture that also appeared in the paper; in it, the bar's owners are celebrating the victory by drinking champagne right outside the bar's entrance. I took a seat at the bar, ordered a Harpoon IPA, and looked around. I hadn't been to this place for at least fifteen years. The bar was still the dive that I remembered from college—crowded, low ceilinged, packed with tables, and kind of clammy. It actually smelled sort of like a cave where a monster might crawl in to die.

I was curious about why there didn't seem to be a church around anywhere, so I called over to the bartender and asked him. He was probably in his late twenties, with a scraggly beard on his cheeks and a well-worn Red Sox cap on his head. I resisted the urge to call him “barkeep,”

which is something I've always wanted to call a bartender, usually when I want to "settle up" or order a "double." He was somewhat familiar with the case, though not the details, and he told me that the church had been torn down years before, though he didn't know exactly when. He suggested that the church used to stand where there was now a Peet's coffee shop. This seemed questionable. The court opinion says that the church and bar stood back to back, but the part of the bar that faced Peet's didn't seem to me to be the back, although who can really say what counts as the back of a tiny dive? In any event, it didn't matter. The key point was that the church had long ago ceased to exist, while the bar was still thriving. Mystery solved. Satan 1, Jesus 0.

Before long, my friends Miriam and Aaron arrived. Both had been students in my Law and Religion seminar a few years before. Both were practicing Jews, smart, and very funny. Indeed, I quickly decided to steal several of their jokes. Like, remember that joke about "Satan 1, Jesus 0"? That was Miriam's.

At the time, Aaron had a job that gave him unlimited access to a binding machine, and so he had taken the liberty of putting together three bound copies of *Larkin v. Grendel's Den*, complete with a nifty cover that utilized several fonts to stunning effect. When the barkeep came over to take their drink orders, he saw the opinion and asked for a copy, which Aaron kindly turned over. Aaron engaged him in some banter about the case, and we learned a couple more tasty tidbits. For one thing, the very bar our drinks were resting on had apparently been constructed from the old pews of some long-abandoned church. Not the church that tried to veto the bar's liquor license, we were assured, but some other church. We all found this a little creepy. Also, we learned that Laurence

Tribe, the famous Harvard law professor who had argued the bar's case in the Supreme Court many years ago, continued to come in all the time to eat and drink. I asked the bartender if Tribe had to pay, and the young guy waved his hands around as if to take in the entire place. "Everything is free. Anything he wants," he said. Pretty good deal, I figured, for a guy who probably makes one and a half gazillion dollars a year in legal fees.

The bar made out of church pews seemed to be just one aspect of Grendel's general uneasiness with religion. Even the religious symbols strewn about the bar seemed to reveal a passive-aggressive distaste for religious faith. We were there on the seventh day of Hanukkah, only four days before Christmas, and there were holiday lights hung up around the bar, but not many. Miriam found a fake Christmas tree about a foot and a half tall hidden away in a corner behind some newspapers and dirty plates. Instead of a star on the top, there was a dreidel. The dreidel looked authentic enough to me, but then again I hadn't picked up a dreidel since losing in the finals of the National Dreidel Tournament back in 1982. Aaron and Miriam, however, really knew their way around a dreidel, and they pointed out that the letters on this one were questionable. The hei and the gimel were written more or less correctly, but the other two letters looked more like an indecipherable scribble and maybe the number "7" than any letter that belonged on any self-respecting Hanukkah top.

I found another instance of this hostility to religion when I excused myself to use the men's room. Hanging on the wall next to the bathroom door was a framed document entitled "Declaration in Defense of Science and Secularism," signed by a bunch of famous Harvard scientists and other intellectuals. The document, which I also found later on the Internet, complains that "far too

many Americans, including influential decision-makers, [fail] to understand the nature of scientific inquiry” and that “this disdain for science is aggravated by the excessive influence of religious doctrine on our public policies.” Specifically, the declaration calls for political leaders “to maintain a strict separation between church and state and, in particular, not to permit legislation or executive action to be influenced by religious beliefs.”

Now, I’m a strong separationist myself, and just as much as the next guy who has taken first-grade science, I think it’s sad that 20 percent of Americans think that the sun revolves about the earth (as the declaration notes). But this secularist view that religion should be a private matter of little relevance to public decision making kind of drives me nuts. For one thing, it is perfectly clear that the First Amendment does not prohibit citizens, legislators, or even presidents from consulting their religious beliefs when making decisions about public policy. Moreover, we should probably be glad that people rely on their religious beliefs when making important decisions. If they couldn’t, or didn’t feel free to, we might not have had abolitionism or the civil rights movement or the Endangered Species Act, all of which drew some of their strongest support from religious people acting on their most deeply held beliefs.

I’ll get back to this issue of religion and public decision making in a minute, but first things first. Why did *Grendel’s Den* rightly win its lawsuit against the state? Remember that the *Grendel’s* case involved a simple and quite narrow question, which is this: is it okay for the government to delegate its actual decision-making authority to a church? The Court’s answer, with which I agree, was no.

For all sorts of reasons which have been written about in dusty volumes by academics and aren’t worth mention-

ing here, government actors delegate their powers to other actors all the time. Congress delegates its lawmaking powers to administrative agencies, such as the Food and Drug Administration and the Environmental Protection Agency. State legislatures do the same. Agency heads delegate their powers to subordinates. Subordinates delegate to their subordinates. Agencies themselves delegate their policy-making powers to subagencies, and even sometimes to private parties. And so on. Whether, and under what conditions, these delegations are legal is a convoluted topic that in law schools is covered in a course called Administrative Law, which most students find excruciatingly boring, and not only when I'm teaching it. But whatever the merits of delegation of governmental power might be in general, acts of delegation like the one involved in the *Grendel's Den* case are surely invalid. If courts are going to interpret the establishment clause ("Congress shall make no law respecting an establishment of religion") to prevent anything at all short of the government setting up an official state religion, then delegation of actual governmental power to religious institutions should not be allowed.

The Massachusetts law challenged in *Grendel's Den* said that "premises . . . located within a radius of five hundred feet of a church or school shall not be licensed for the sale of alcoholic beverages if the governing body of such church or school files written objection thereto." The term "church" was defined broadly, as it always is in these kinds of statutes, to encompass all sorts of religious buildings, so the problem with the law wasn't that the statute preferred some religions over others. The problem was that it gave complete power and discretion to the church to decide which liquor licenses to approve and which to reject. The church, in other words, was acting as the gov-

ernment, and its decisions had official governmental effects on private parties like *Grendel's Den*.

The Supreme Court worried that a church could reject a liquor license for any reason at all, no matter how discriminatory or stupid that reason might be. So, in his opinion, Justice Burger complained that a church could theoretically reject someone's license application "for explicitly religious goals [such as] favoring liquor licenses for members of that congregation or adherents of that faith." During oral argument, the justices wondered about even more dastardly motives. "What happens if the church . . . only allows bars in its neighborhood that sell Irish whiskey?" one justice asked. When the lawyer representing Massachusetts tried to head off the question with an Irish-whiskey-specific response, the justice threatened to rephrase the question in terms of tequila.

If the Court had upheld the law in *Grendel's Den*, we might have a very different-looking government, one much more dangerous than the one we already have. Nothing would stop the legislature—federal, state, local—from giving power to a church (or a temple, or a mosque, or an organization of Taoists or Hare Krishnas) to decide who should enjoy a tax break or who should get a broadcast license or who deserves unemployment benefits or disability accommodations. Can you imagine if a Jew had to go to the corner Protestant church to contest a parking ticket, or a Catholic had to visit the local Buddhist temple to ask for a tax extension? Maybe if it were still the fifteenth century or something. But these days we expect the government to apply its laws in the same way to everyone, regardless of our religious beliefs or nonbeliefs. We might not trust that the government will in fact do this in every situation, but we should trust the inclination of religious groups to be impartial far less. If the Court had

decided that the government could delegate its core functions to religious groups, then it would have been saying that churches could basically run the country. If that's not an "establishment of religion," then what would be?



It is important, however, to keep in mind exactly what the Massachusetts statute said. That statute was unique in that it gave actual decision-making power to churches. Most statutes don't do that. So compare the following two laws:

Law 1: The state shall grant no liquor licenses within five hundred feet of a church or school.

Law 2: The state shall grant no liquor licenses within five hundred feet of a church or school, if the church or school objects to the license.

The second law is the one that the Court struck down in *Grendel's Den*. The first law, on the other hand, is just a simple zoning law, like ones that exist in communities all over the country and that are without question constitutional. Unlike Law 2, Law 1 does not give any actual decision-making power to any religious institution. In the first law, the legislature, not the church, has made the determination about what bars can go where.

Maybe you've come across one of these zoning laws, or at least heard of a controversy involving some new bar or adult bookstore or strip club that can't open because it's too close to a school or hospital or church. News stories about these disputes pop up all the time. In 2003 a neighborhood group in Old West Lawrence, Kansas, objected to a bar called Rick's Place moving into a nearby strip mall, because it would have been too close to an Or-

thodox church in the same strip mall. According to one news account, “Rick’s Place . . . is a blue-collar bar with a regular clientele, sort of a Lawrence version of Cheers, the fictional bar from the popular television series.” Of course, the proximity to the church was probably not the real reason the neighbors objected to the bar. Most likely, they just didn’t want drunk people in the neighborhood screaming at lampposts and throwing up in the bushes. The bar’s opponents were happy enough to use the “no bar too close to a church” law to serve their purposes. For its part, the church wasn’t so sure. It would have preferred the sandwich shop that had previously intended to move into the strip mall, but as to whether the bar should be allowed to move there, the parish president told a reporter, “We’d prefer it not go there. But who are we to decide what God has in mind?”

Then there was the 2002 brouhaha in Wichita over whether an “Adult Superstore” could continue to exist despite standing next door to a church. For years, neighborhood residents had tried to drive the store out of town, passing out antipornography leaflets to customers and holding prayer vigils on the sidewalk. The upright citizens of Wichita argued that “this type of business seems to attract people with no scruples” and claimed that “children would find sex toys when they mowed the lawn.” Finally, the neighborhood organizers successfully urged the city to deny the store a new license. In May 2002, a police officer gave employees thirty minutes to close the store or face being arrested. Preferring to stay clear of the local prison, the employees gave in and closed the store. The victorious neighbors planned a party to celebrate their success, and apparently to give thanks to God. As one activist put it, “We are elated and we give the Lord all the credit on this one.” It turned out their celebration was premature. When

the owner challenged the procedure the city followed in closing the store, the city decided to settle the lawsuit. The result? Two months after the city closed the store down, it allowed the store to reopen and gave the owner over sixty thousand dollars to make up for her lost business. Satan 2, Jesus 0 (this time in OT).

Although zoning laws may not always be politically viable, they generally *are* constitutionally acceptable. The point here is not to say whether these zoning laws are good policy. They might be, or they might not be. Defenders generally argue that they are necessary to protect children from the harmful “secondary effects” of having a bar in the neighborhood. Are they right? I don’t know. I’m not a child psychiatrist. I hope they’re wrong, since I live with my son in a building that contains a bar. My only point is that such zoning regulations do not violate the First Amendment.

Why is this? It’s because the primary purpose and effect of your typical zoning law is not to help or promote or advance religion. In the late sixties, in a case brought by a guy with the unfortunate name of Lemon, the Court crafted a crude test, known forever after as the “*Lemon* test,” that says a law violates the establishment clause only if it has the primary purpose or the primary effect of promoting religion, or if it involves excessive entanglement between government and religion. Many scholars have pointed out, often in incredibly long articles with inexcusable titles like “The Future of the *Lemon* Test: A Sweeter Alternative,” “Making *Lemon*-Aid from the Supreme Court’s *Lemon*,” and “*Lemon* is a Lemon,” that the *Lemon* test is unsatisfactory in many ways. How much “entanglement” is too much? What counts as “promotion,” anyway? These commentators are right, and indeed the Court itself, while continuing to mention the test in

nearly every church/state case, has molded specific versions of the *Lemon* test to fit differing situations. But there is really no need to do much tinkering to understand why zoning laws such as the one in Wichita that almost, but not quite, spelled doom for the Adult Superstore are constitutional.

For one thing, zoning laws don't involve any entanglement of government and religion. While the *Grendel's* law completely entangled governmental and religious functions by giving churches the official power to veto liquor licenses, the typical zoning law does no such thing. Moreover, the purpose of these zoning laws is not to promote religion, and that's not their main effect. As one court upholding such a zoning law explained, "It is difficult to see how religion is advanced at all by the ordinance in light of the fact that no financial support is involved, no sponsorship of religious activities is created, and no government involvement with religion is incurred." It is true that a zoning law might confer some incidental benefit on churches. A church protected by a zoning law does not have to take its own steps to protect visiting children from drunk guys and sex toys. But a church protected by the city fire department doesn't have to fight its own fires either, and nobody thinks that's a problem. Why should the zoning law be any different?

I hope that the distinction I'm drawing between zoning laws and laws that delegate government authority to churches is clear. This will not be the last distinction in the book, and it is by no means the trickiest. But some of these things can get confusing, especially to those who don't spend all day doing this law stuff. Maybe it would help to go through an example. This may seem like a surprise quiz, but don't worry, you won't be graded on it. Imagine a state legislature passes the following four laws:

Law A provides for trash pickup around large churches three times a week, but around small churches only twice a week.

Law B criminalizes the possession of a firearm or sharpened blade within a “rock’s throw” of any school or church.

Law C provides that nobody shall park their Hummer in front of any church during services without a permit.

Law D authorizes the head of any church congregation to issue an enforceable fine of one thousand dollars to anyone who litters within city limits.

Which one of these violates the rule set out in *Grendel’s Den*?

The correct answer is D. Only Law D confers actual governmental authority and discretion upon a religious actor. Law C is almost certainly fine; it’s basically just like the zoning laws in Wichita and Old West Lawrence, except that it wisely discriminates against obnoxiously giant trucks instead of beer drinkers. Law B likewise gives no power to churches and thus poses no establishment clause problems. The “rock’s throw” part is idiotic and perhaps invalidly vague, but that’s not a First Amendment problem. Law A might run into trouble for distinguishing among types of churches, but even that distinction might be all right, since large churches are likely to generate more trash than smaller ones. In any event, there’s no delegation of government power in Law A, so it’s not a *Grendel’s Den* issue.



Now that that’s over, let’s return to *Grendel’s* itself and its proudly displayed Declaration in Defense of Science and