

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-878

TITLE JOHN P. LARKIN ET AL., Appellants
v.
GRENDDEL'S DEN, INC.

PLACE Washington, D. C.

DATE October 4, 1982

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(202) 628-9300
440 FIRST STREET, N.W.
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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments
next in Larkin v. Grendel's Den.

Mr. Caruso, I think you may proceed whenever
you're ready.

ORAL ARGUMENT OF GERALD J. CARUSO, ESQ.,
ON BEHALF OF THE APPELLANTS

MR. CARUSO: Thank you, Your Honor.

Mr. Chief Justice and may it please the Court:

This case raises a question concerning the
state's power to regulate alcoholic beverages. The
state law at issue is Massachusetts General Law, Chapter
138, Section 16(c). That statute prohibits the issuance
of a liquor license to any establishment located within
500 feet of a church or school if the church or school
objects to the issuance of the license.

The Massachusetts Supreme Court addressed the
issues presented here and upheld the constitutionality
of the statute. The First Circuit Court of Appeals
concurred in that ruling, but reversed itself in an en
banc decision which is now the subject of this appeal.

The First Circuit ruled that Section 16(c)
violates the establishment clause. In the First
Circuit's view, the statute has the primary effect of
advancing religion because it extends to churches but

1 not to all similarly situated institutions a more than
2 de minimis benefit.

3 In defense of the en banc decision, Grendel's
4 advances an alternative rationale. In Grendel's view,
5 the statute improperly delegates legislative power to
6 churches and thereby violates the establishment clause.

7 The state contends that Section 16(c) embodies
8 a legislative effort to accommodate competing interests
9 and to control the placement of liquor licenses in
10 Massachusetts. We also contend --

11 QUESTION: Mr. Caruso.

12 MR. CARUSO: Yes.

13 QUESTION: Could I ask you a question about the
14 procedure followed by the Court of Appeals before you
15 get any more deeply into the merits?

16 MR. CARUSO: Sure.

17 QUESTION: As I understand it, the Plaintiffs,
18 the Respondents here, asserted a couple of
19 constitutional claims and a statutory antitrust claim in
20 the district court, did they not?

21 MR. CARUSO: Yes, Your Honor.

22 QUESTION: And then all of those went up on
23 appeal to the First Circuit?

24 MR. CARUSO: Yes. There were three claims that
25 went up on appeal. Initially, the case was brought as

1 applied and facially, I might point out. When it was
2 filed in the district court, it was filed both as an as
3 applied attack to the challenge and a facial challenge
4 to the statute.

5 The district court, after Grendel's -- the
6 Commonwealth moved to dismiss and asked the district
7 court to abstain on the as applied section of the
8 complaint, the district court denied our motion to
9 dismiss, we then entered into an agreement of facts and
10 contested claims with Grendel's. Those claims were due
11 process, establishment clause, and equal protection, and
12 the Sherman Act claim.

13 QUESTION: And all of those --

14 MR. CARUSO: All of that went up to the First
15 Circuit.

16 QUESTION: Well, in view of all of our talking
17 in our opinions about how at least this Court, and I
18 think we've said other federal courts too, should first
19 address statutory claims before they reach
20 constitutional claims, isn't it a little odd that the
21 First Circuit addressed constitutional claims and didn't
22 resolve the statutory claim?

23 MR. CARUSO: Well, insofar as the statutory
24 claim was the supremacy clause claim under the antitrust
25 laws, Your Honor, I think the First Circuit -- I don't

1 know why the First Circuit chose to proceed the way it
2 did on the en banc review.

3 If the statutory claim was the antitrust action
4 that Your Honor is concerned about, that we look at as a
5 supremacy clause claim, on whether the statute should be
6 struck down under the supremacy clause. That was the
7 basis of Grendel's's claim. We defended against that
8 prior to the Rice decision coming down, we defended
9 against that by claiming that the Sherman state action
10 exemption applied. The district court disagreed with
11 that.

12 I don't know if I answered your question.

13 QUESTION: But the antitrust claim is still a
14 live one as between these two parties, I take it?

15 MR. CARUSO: Yes. The antitrust claim is, as
16 well as the as applied claim. Those two claims lay back
17 in the district court ready for further adjudication.

18 QUESTION: But it wasn't as if the antitrust
19 claim hadn't been appealed to the First Circuit. The
20 First Circuit had it before it and simply chose not to
21 address it.

22 MR. CARUSO: Yes, Your Honor. I should --

23 QUESTION: Not to dispose of it.

24 MR. CARUSO: I should also add, Your Honor,
25 that the original panel of the First Circuit did address

1 that claim. Judge Campbell in his decision upheld the
2 district court's action holding, saying that the Sherman
3 -- the state action exemption did not apply. The en
4 banc panel did not address it.

5 QUESTION: The First Circuit said first of all
6 that you weren't entitled to summary judgment on your
7 antitrust claim.

8 MR. CARUSO: That's what the court said in
9 essence, yes.

10 QUESTION: Mr. Caruso, I'm just curious. The
11 initial panel decision was three Court of Appeals
12 judges, wasn't it? And the en banc was also three?

13 MR. CARUSO: Yes, Your Honor.

14 QUESTION: How'd that happen?

15 MR. CARUSO: Well, the First Circuit, as you
16 know, Your Honor, consists of four judges. The original
17 panel was made up of Judge Campbell, Judge Coffin, and
18 Judge Hoffman out of the Eastern District of Virginia.

19 QUESTION: Oh, I see, sitting by designation.

20 MR. CARUSO: Right. Now, when Grendel's
21 applied for a rehearing en banc, petitioned for a
22 rehearing en banc, Judge Briar recused himself because
23 of my brother's participation in the case. Judge Briar
24 taught at Harvard as well.

25 So that left Judge Barnes, Judge Coffin and

1 Judge Campbell. They all voted to grant rehearing en
2 banc. So it was the difference of one judge that
3 changed the constitutional issues here, results.

4 QUESTION: Had the case remained on the
5 statutory basis, would we be here now on this case?

6 MR. CARUSO: I'm sorry, Your Honor?

7 QUESTION: Had the case been resolved on the
8 statutory grounds?

9 MR. CARUSO: Well, I think insofar as Grendel's
10 was challenging our statute under the antitrust laws and
11 essentially claiming that the federal court should
12 strike down the statute because it violated the
13 antitrust laws, I frankly, after this Court's decision
14 in Rice v. Norman Williams, don't think that Grendel's
15 claim is going to prevail there.

16 QUESTION: But in any event, it's another
17 constitutional issue.

18 MR. CARUSO: It is another constitutional issue
19 and it is somewhere in this proceeding that we engage
20 in. We think it's back in the district court. Of
21 course, if this Court chose to uphold the en banc
22 panel's decision, all that would be for nought anyway.

23 The state contends, as I said, that the statute
24 embodies a legislative effort to accommodate competing
25 interests and to control the location of liquor licenses

1 in Massachusetts. We also contend that the statute is
2 well within our broad Twenty-First Amendment police
3 powers, and it neither advances religion nor creates an
4 excessive entanglement with religion.

5 After briefly discussing the facts, we will
6 direct our argument to three main points: First, the
7 statute gives to churches only an incidental benefit,
8 which does not advance religion; Second, the failure of
9 the statute to include all institutions similar to
10 churches and schools does not violate the establishment
11 clause.

12 QUESTION: Does it not delegate to a religious
13 institution a power that is perhaps thought to be a
14 governmental power?

15 MR. CARUSO: No, it doesn't, Your Honor.
16 That's the final argument. We will argue that Section
17 16(c) does not delegate legislative power to churches or
18 schools. It simply permits them to waive an otherwise
19 applicable zoning prohibition on the placement of liquor
20 licenses.

21 QUESTION: Suppose the statute said that all
22 liquor licenses in Massachusetts shall be controlled by
23 a board consisting of the leader of the Catholic Church,
24 the Protestant churches. You wouldn't buy that, would
25 you?

1 MR. CARUSO: I would not buy that, Your Honor.

2 QUESTION: May I ask you the difference between
3 that one and this one?

4 MR. CARUSO: Well, Your Honor, here this
5 statute represents the legislature's judgment of the
6 public interest.

7 QUESTION: So did the first one, I assumed.

8 MR. CARUSO: No, Your Honor. In that case the
9 legislature really --

10 QUESTION: Well, my hypothetical is the state
11 legislature passed it --

12 MR. CARUSO: The state legislature has given to
13 churches in that case, or private persons for that
14 matter, anyone, the power to decide and not decide
15 whether or not a liquor license should issue. That is
16 substantially different from this case.

17 QUESTION: Like what?

18 MR. CARUSO: Here the statute reads that no
19 premises shall be licensed if the governing body of the
20 church objects. Here there is a legislative prohibition
21 which can be waived. It's a legislative protection for
22 churches and schools, which can be waived. And there
23 doesn't seem to be any dispute between the parties, laws
24 which permit individuals to waive otherwise applicable
25 zoning prohibitions do not delegate --

1 QUESTION: Well, assuming I understand why a
2 church would not want a bar and grill in its
3 neighborhood, how do I understand that a church wants a
4 bar and grill next door? I mean, what does that
5 promote, a situation where a church wants a bar and
6 grill next door to the church? Now, what interest does
7 that promote?

8 MR. CARUSO: Well, Your Honor, if I understand
9 your question correctly, and I may not, I think if you
10 look at the statute in the context of its historical
11 development, you get a better flavor for what the
12 legislature is promoting here.

13 The statute was initially active as a flat
14 ban. It totally prohibited liquor licenses from being
15 issued within 500 feet of a church or school.
16 Subsequently the legislature amended the statute and
17 permitted the issuance of a liquor license, but the
18 license applicant had to go to the church and school and
19 solicit the assent of the church or school.

20 Finally, in 1970 the legislature amended the
21 statute further and permitted liquor licenses -- or
22 relieved the applicant from soliciting the assent of
23 churches and schools, and placed the burden of objection
24 on the protected institutions.

25 So you see, Your Honor, what the legislature

1 has done here is, the legislature has decided that
2 churches and schools shall be protected with what we
3 might call a zone of tranquility, but the legislature
4 has also determined that if a church or school does not
5 have any objection to a liquor license being within its
6 500-foot zone of tranquility that the legislature is not
7 going to prohibit the license from being there any
8 more.

9 QUESTION: How can you call it a zone of
10 tranquility with 14 licensees in the zone?

11 MR. CARUSO: Your Honor, there's approximately
12 26 licensees in this zone.

13 QUESTION: How can you call it a zone of
14 tranquility?

15 MR. CARUSO: Well, Your Honor, the purpose of
16 the statute was twofold. The purpose of the statute was
17 to protect churches and schools from liquor license
18 establishments and the noise and dirt and abuse --

19 QUESTION: And as soon as one is established,
20 why, that purpose has been frustrated.

21 MR. CARUSO: Well, yes, Your Honor, only in
22 this extent. The second purpose of the statute was to
23 help facilitate the issuance of liquor licenses. In
24 1954 when the statute was first passed, there were no
25 liquor licenses in Harvard Square in 500 feet of

1 whatever church existed there. Today the legislature

2 --

3 QUESTION: Well, then there's been a change in
4 legislative policy.

5 MR. CARUSO: Only to the extent --

6 QUESTION: You earlier seemed to be arguing
7 that the three statutes were functionally equivalent. I
8 think now you're saying they're quite different.

9 MR. CARUSO: I think they are functionally
10 equivalent, Your Honor.

11 QUESTION: Well, hasn't there been a change in
12 policy from one that said you can't have any to one that
13 says you can have 26?

14 MR. CARUSO: Your Honor, only to the extent
15 that the legislature now does not now --

16 QUESTION: The legislature says, we don't care,
17 but if the church cares it can't open.

18 MR. CARUSO: No, I disagree with you, Your
19 Honor. I think the legislative policy remains the
20 same. Simply --

21 QUESTION: The same as when it prohibited them
22 entirely? How can that be the same as having 26?

23 MR. CARUSO: Well, the legislature I think now
24 believes that if a church does not have -- a church may
25 not object to one, to a liquor license, especially in a

1 congested area like Harvard Square, that's around the
2 corner and up the street.

3 QUESTION: Well, I understand. But if you
4 phrase it in terms of the church objecting, then you're
5 saying the legislature doesn't have its own policy. It
6 says, we'll let the church decide what it wants, and
7 that's a pure delegation, isn't it?

8 MR. CARUSO: I think if the legislature had
9 that policy it would have. But I don't think that's
10 what happened here, and that's why the Massachusetts
11 Supreme Judicial Court as it went through the history
12 determined that the legislature -- the legislature's
13 policy remained essentially the same.

14 I also might point out, Your Honor, that here
15 we're dealing with a statewide statute. The statute
16 applies not only to the Harvard Square area of
17 Cambridge, Massachusetts, but it also applies to the
18 Berkshire Hills and the Cape Cod and the islands off
19 Massachusetts.

20 QUESTION: Mr. Attorney General, may a church
21 exercise what you characterize as a waiver on a
22 selective basis, so that it would allow a liquor store
23 in one building and deny it in an adjacent building?

24 MR. CARUSO: That is --

25 QUESTION: That's permissible under the

1 statute?

2 MR. CARUSO: That is possible, Your Honor.

3 QUESTION: And that could be done arbitrarily,
4 with no reason, no standard prescribed by the
5 legislature. Suppose one of the liquor stores was
6 operated by a friend of the bishop and the other not?

7 MR. CARUSO: We would argue, Your Honor -- and
8 this was why we asked that the district court abstain in
9 this case. We would argue that in that case the person
10 could seek relief, administrative or judicial, from the
11 operation of the statute. We believe that the Supreme
12 Judicial Court of Massachusetts and the ABCC will read
13 into any improper motives -- will not permit improper
14 motives in a pleaded and proved case.

15 This one here is a facial challenge. And it is
16 correct, Your Honor, that the Massachusetts legislature
17 does not require a reason by the church. However, the
18 reason is presumed. The presumption is that the church
19 is objecting for legitimate police and safety and health
20 requirements.

21 QUESTION: What happens if the church only has
22 bars that sell Irish whisky?

23 MR. CARUSO: If the church?

24 QUESTION: Only allows bars in its neighborhood
25 that sell Irish whisky.

1 MR. CARUSO: I would rely back on my --
2 QUESTION: Well, I'm going from there to
3 tequila.
4 MR. CARUSO: Sure.
5 QUESTION: So I mean, I can go anywhere I want
6 to go.
7 MR. CARUSO: I would fall back on my position,
8 Your Honor, that that case --
9 QUESTION: Why should I, as a legitimate
10 businessman, have to go and ask a church whether I can
11 do business?
12 MR. CARUSO: The option, Your Honor, was that
13 you couldn't do business in that zone of protection at
14 all because there was a legislative prohibition.
15 QUESTION: But that's not today. This is
16 today. I just got the money today.
17 MR. CARUSO: What the legislature has done --
18 QUESTION: Now, don't leave out any of my
19 points. I just got the money today and I want to open
20 up a bar and a grill, and I've got to ask the church's
21 permission.
22 MR. CARUSO: No, you don't, Your Honor. If you
23 want to open up a bar and a grill near a church --
24 QUESTION: Yes.
25 MR. CARUSO: The legislature has decided that

1 that is not a suitable site.

2 QUESTION: Oh, no. It said it's not a suitable
3 site unless you get the permission of the church.

4 MR. CARUSO: I disagree, Your Honor.

5 QUESTION: Well, what did the state say?

6 MR. CARUSO: I think the legislature has
7 determined that in proximity of a church or a school is
8 not a suitable site for liquor establishments unless
9 there's no good reason why the liquor establishment
10 shouldn't be developed there. We're talking about
11 geographic locations, Your Honor.

12 QUESTION: I'm talking about what the statute
13 says. The statute says exactly what I said. I cannot
14 open up my business in that area that's near the church
15 without the permission of the church to tell me whether
16 or not I can spend my money in my property.

17 MR. CARUSO: You can apply for a liquor
18 license, Your Honor.

19 QUESTION: Will I get it without the permission
20 of the church?

21 MR. CARUSO: If the church objects, you would
22 not get it. Unless the church objected --

23 QUESTION: Then don't I have to get the
24 permission of the church?

25 MR. CARUSO: Yes, Your Honor.

1 QUESTION: How do you distinguish that from
2 giving the church, whatever church is picked out, the
3 power to issue the license? How is it distinguishable?

4 MR. CARUSO: Well, Your Honor, once the site is
5 established as being suitable, then the state remains
6 the official determining body as to whether or not the
7 liquor license would issue. The church is merely given
8 an opportunity to waive a legislative prohibition.

9 And the statute, Your Honors, has to be viewed
10 against the background, the traditional background in
11 this country, of permitting abutters to waive
12 legislative zoning protections. It must be viewed in
13 that --

14 QUESTION: And is that true of all 26 other
15 licensed establishments in this zone? Were they all
16 establishments which made an application which the
17 church could have objected to but did not?

18 MR. CARUSO: No, Your Honor. There are some
19 that were licensed prior to the passage of the statute.

20 QUESTION: In 1954?

21 MR. CARUSO: In 1954. Some of them were
22 licensed between 1954 and 1968, which means that the
23 church mustn't have been there. And then others were
24 licensed after. There were 14 that were licensed after
25 the church.

1 QUESTION: 1968?

2 MR. CARUSO: Yes.

3 QUESTION: To which the church might have, but
4 did not, object?

5 MR. CARUSO: Yes, Your Honor.

6 QUESTION: Do you think the Court of Appeals en
7 banc held that a flat ban within 500 feet of any liquor
8 establishments would be unconstitutional also?

9 MR. CARUSO: Yes, Your Honor. I think the en
10 banc panel's decision would --

11 QUESTION: Which would make the consent issue
12 irrelevant?

13 MR. CARUSO: Right, Your Honor.

14 QUESTION: Isn't the consent issue made pretty
15 much irrelevant by cases like New Motor Vehicle Board of
16 California v. Orrin Fox, where the Court says that
17 almost any system of private or quasi-private law could
18 be subject to the same objection? Court approval of an
19 eviction, for example, becomes necessary only when the
20 tenant protests his eviction, and he alone decides
21 whether he'll protest.

22 MR. CARUSO: Yes, Your Honor. And the very
23 next sentence, the Court cited to the Cusack case, which
24 was a case earlier --

25 QUESTION: The opinion below also seems to me

1 to read that even if a flat ban would be sustainable,
2 this conditional -- or this consent, the consent
3 provision, renders it unconstitutional. Do you think
4 it's sort of an alternative holding?

5 MR. CARUSO: It's very difficult to say what
6 the en banc panel was doing, Your Honor. It seems to me
7 that the en banc panel said that if you give any benefit
8 to a church and do not include enough other
9 institutions, even a zoning benefit, then that zoning
10 benefit will be unconstitutional.

11 QUESTION: Which has nothing to do with getting
12 a consent.

13 MR. CARUSO: Right, Your Honor. We think that
14 the en banc panel's decision was much too broad.

15 QUESTION: Incidentally, Mr. Caruso, don't many
16 state statutes like this take the form of a flat ban?

17 MR. CARUSO: Yes, Your Honor.

18 QUESTION: And did you just suggest to my
19 brother White that they'd be unconstitutional?

20 MR. CARUSO: Under the en banc panel decision,
21 Your Honor.

22 QUESTION: That's what I was asking. They
23 would invalidate that too, I think.

24 MR. CARUSO: Yes, Your Honor. I believe that
25 under the en banc panel decision those flat bans would

1 be unconstitutional.

2 QUESTION: Have they been tested in any
3 states?

4 MR. CARUSO: Well, in many states -- every
5 single court decision that we have found has upheld this
6 type of statute.

7 QUESTION: Including all the flat bans?

8 MR. CARUSO: Including the flat bans and the
9 consent provisions.

10 QUESTION: State.

11 MR. CARUSO: State courts. It's never been --
12 well, in the Fifth Circuit, Your Honor, the Fifth
13 Circuit in Big Sandy versus city of --

14 QUESTION: It wouldn't be New Orleans?

15 MR. CARUSO: No, Your Honor.

16 QUESTION: Because they don't have any closing
17 law down there. They serve liquor 24 hours a day, every
18 day including Sunday.

19 MR. CARUSO: Your Honor, I've never been to New
20 Orleans, so I defer to your knowledge on that.

21 (Laughter.)

22 QUESTION: Do you know whether the attacks on
23 the flat ban statutes have been on establishment clause
24 grounds?

25 MR. CARUSO: Yes, they have, Your Honor,

1 consistently on establishment clause grounds. I should
2 say, even when there's a consent provision the attacks
3 have been on both establishment clause and delegation
4 issues.

5 Mostly, the bans have been presumed, I think we
6 can fairly say, constitutional. All commenters, all
7 textbooks and Am.Jur., they all assume that these flat
8 bans are constitutional, even though they don't contain
9 enough other types of institutions.

10 And I might say, Your Honors, that with regard
11 to the consent mechanism the cases seem to indicate that
12 when the use is offensive then they don't -- they permit
13 these types of consent mechanisms when the use is an
14 offensive use or viewed as an offensive use. And you
15 won't find many cases striking down these consent
16 provisions dealing with liquor establishments.

17 However, when the use is one which is not
18 considered offensive or would interfere with somebody
19 else's property, those consent mechanisms are usually
20 struck down.

21 QUESTION: Mr. Caruso, you don't make any
22 argument that the Twenty-First Amendment supports you on
23 the establishment clause?

24 MR. CARUSO: We do, Your Honor. In our view --
25 and in our brief we argue that the Twenty-First

1 Amendment of course gives us broad power to determine
2 where in our Commonwealth liquor will be distributed,
3 and that we have --

4 QUESTION: But you don't argue that the
5 Twenty-First Amendment makes this constitutional
6 irrespective of the establishment clause?

7 MR. CARUSO: No. If there were an
8 establishment clause problem, Your Honor, we would not
9 defend against it with the Twenty-First Amendment. But
10 we do believe that the Twenty-First Amendment in this
11 case permits us to act in this way.

12 QUESTION: May I ask you one question. You
13 mentioned cases holding that a consent mechanism is
14 permissible if the use is an offensive use.

15 MR. CARUSO: Yes.

16 QUESTION: Are some of those cases -- do they
17 sustain a consent mechanism where there have been some
18 offensive uses within the area and then they have been
19 permitted to object to an additional offensive use?

20 MR. CARUSO: To the best of my knowledge, Your
21 Honor. But usually these cases are as applied cases.
22 This one here is a facial challenge.

23 QUESTION: It was stipulated, wasn't it?

24 MR. CARUSO: It was stipulated as a facial
25 challenge.

1 QUESTION: Wasn't it also stipulated there are
2 a lot of other taverns in the area?

3 MR. CARUSO: Yes, it was, Your Honor.

4 QUESTION: So we do know what the facts are.

5 MR. CARUSO: We do know what the facts are,
6 only to the extent that there are other liquor
7 establishments in the area.

8 But most of these other cases --

9 QUESTION: But under the decision the consent
10 mechanism is invalidated statewide in all situations.

11 MR. CARUSO: Right, Your Honor. That would be
12 the effect.

13 QUESTION: That's the facial challenge.

14 MR. CARUSO: That's the facial challenge. It's
15 not just applicable to Grendel's here. It's a statewide
16 challenge to our licensing procedure.

17 QUESTION: Do you think we need to be stuck
18 with a stipulation about some facial challenge?

19 MR. CARUSO: Well, I think so, Your Honor,
20 because --

21 QUESTION: Why? Why? That's just making it a
22 broader constitutional decision than necessary.

23 MR. CARUSO: Well, Your Honor, if you want to
24 remand it back and let us have a trial on the as applied
25 claims Grendel's makes, the Commonwealth may be willing

1 to do that. But we entered into the stipulation
2 believing that there would be a presumption --

3 QUESTION: Why should the district court be
4 forced to make a facial -- to answer a facial challenge
5 just by a stipulation, if it would be a much narrower
6 decision if decided as applied?

7 MR. CARUSO: We asked the district court to
8 abstain, Your Honor, from the as applied.

9 QUESTION: Well, but you stipulated that it was
10 a facial --

11 MR. CARUSO: Following the motion to -- the
12 denial of our motion to dismiss, we viewed it as we had
13 no opportunity to get those as applied claims back into
14 the state court, to see. I also asked the district
15 court to certify a question over to the Supreme Judicial
16 Court. We believed that we would stand a better -- we
17 would not want the federal court to decide the as
18 applied claim prior to a state court looking at the
19 issue.

20 I would like to save a couple of minutes for
21 rebuttal if I could. I thank you.

22 CHIEF JUSTICE BURGER: Mr. Tribe.

23 ORAL ARGUMENT OF LAURENCE H. TRIBE, ESQ.

24 ON BEHALF OF APPELLEE

25 MR. TRIBE: Mr. Chief Justice, may it please

1 the Court:

2 Let me begin by clarifying what I think are
3 some possible confusions about the facial and as applied
4 aspects of this case and about the Sherman Act. It I
5 think was not really odd that the First Circuit in its
6 en banc rehearing did not resolve the statutory claim
7 first, because once the original panel of the First
8 Circuit had held that *Parker v. Brown* was not a bar as a
9 matter of law to what might ultimately become an as
10 applied trial of our antitrust claims, there was no
11 longer much dispute about that.

12 We were not pressing beyond the original
13 complaint. We have not pressed a facial challenge to
14 this law under the antitrust acts.

15 QUESTION: Do you think that's a permissible
16 posture under our cases, to say that we have a statutory
17 claim here but we're not going to press it right now,
18 we're going to press our constitutional claim?

19 MR. TRIBE: Justice Rehnquist, I think it would
20 be problematic if they were at the same level, if they
21 were both facial claims. The reason it's permissible
22 here is that we think there are very strong
23 constitutional reasons, principally under the
24 establishment clause, not to call *Father Arkalian* to the
25 stand and begin inquiring into what the motives were for

1 the denial of the liquor license in this case.

2 Indeed, we think that, as this Court did in the
3 Lovell case, Lovell v. Griffin, and in other cases where
4 the gravamen of the attack is to the sweeping and
5 unaccountable nature of the power delegated, that it
6 should, and that it was proper for the lower courts to,
7 resolve the facial challenge first.

8 QUESTION: But do you find any authority in our
9 cases for saying that in those circumstances you take
10 the constitutional claim before you take the statutory
11 claim?

12 MR. TRIBE: Well, as Justice White pointed out,
13 there's a constitutional supremacy clause claim in any
14 event. Edgar v. Mite last term is a case where this
15 Court ultimately decided on constitutional, rather than
16 statutory preemption grounds under the Williams Act.

17 QUESTION: That's still a supremacy clause.

18 MR. TRIBE: That's right. So there's no way of
19 avoiding a constitutional issue here, isn't that right?
20 That is, I take it the point is that even the antitrust
21 --

22 QUESTION: It used to make a difference --
23 there used to be a difference in old three-judge court
24 practice.

25 MR. TRIBE: That's right, under the Kessler.

1 QUESTION: But not here.

2 MR. TRIBE: And it seems to me that's clear
3 here for the additional reason that --

4 QUESTION: Well, but if the Sherman Act applies
5 there isn't any constitutional issue remaining. It's
6 perfectly clear that if there's a violation of the
7 Sherman Act then the supremacy clause requires that it
8 be enforced.

9 MR. TRIBE: Yes. But Justice Stevens, I think
10 as Justice White is suggesting, the Court hasn't treated
11 the preemption ground --

12 QUESTION: But the doctrine of avoiding
13 constitutional issues would be served by addressing the
14 Sherman Act claim first.

15 MR. TRIBE: The Sherman Act claim here would
16 not avoid the fundamental issue, which would still be
17 before the Court.

18 QUESTION: If you won on the Sherman Act claim
19 we would avoid the constitutional issue.

20 MR. TRIBE: Well, Your Honor, let me suggest
21 why that's not quite true. To win on the Sherman Act
22 claim, I think we would have to concede that the First
23 Circuit's original panel decision that a facial Sherman
24 Act attack is implausible here. We'd have to concede
25 that there's a great deal in that.

1 To win on the Sherman Act claim, we would have
2 to show that the church in this case was wielding its
3 veto power as part of an anticompetitive scheme to
4 benefit certain contributors. And it seems to me that
5 whatever this Court might hold in *Brown v. Socialist*
6 *Workers Party*, argued this morning, there's very good
7 reason to believe that under its entanglement decisions
8 an inquisition into the contributors of this church and
9 the reason the veto was wielded in this case and not in
10 others as to the other 14 licenses that have been
11 granted in the last decade would pose such serious
12 constitutional problems --

13 QUESTION: Well, did you allege a conspiracy
14 between the church and the other licensees?

15 MR. TRIBE: There is an allegation in this
16 case. That's what the Sherman Act claim is all about,
17 and I hope the Court is not detained by it. The Sherman
18 Act claim suggests that, as Justice Brandeis believed
19 when he testified on this matter back in 1891, that the
20 temptation to venal exercise of this kind of power --

21 QUESTION: Well, let me hold you up, because
22 I'm not really familiar with the details of the
23 allegation. Does the complaint filed by counsel for
24 your client allege a conspiracy between the archbishop
25 or the priest or whatever he is and the licensees in

1 that community?:

2 MR. TRIBE: It alleges --

3 QUESTION: And if it is so alleged, why
4 shouldn't that case be tried?

5 MR. TRIBE: Because in order to prove that,
6 Your Honor, we would anticipate the other side would
7 argue that the kind of evidence we would need is
8 constitutionally --

9 QUESTION: You must have that evidence if you
10 made that allegation.

11 MR. TRIBE: We have reason to believe it. But
12 in order to probe it, in order to probe it in the way
13 that would be necessary to ultimately succeed, we would
14 have to overcome another constitutional obstacle, the
15 obstacle that they suggest in their briefs when they
16 argue that administrative assessment of the church's
17 concerns -- this is at page 85 of the Attorney General's
18 brief -- that administrative assessment of the church's
19 concerns and of the reasons for the exercise of its veto
20 would itself create such grave entanglement problems as
21 to pose a constitutional obstacle.

22 QUESTION: Only that's administrative
23 assessment. You're talking about judicial assessment.

24 MR. TRIBE: Well, but as this Court has held in
25 cases such as Serbian Orthodox and others, either

1 judicial or administrative assessment of the internal
2 motives and workings of a religious body's
3 decisionmaking process raises grave First Amendment
4 problems.

5 QUESTION: Don't you need more than belief?

6 MR. TRIBE: But we're not asking this Court to
7 act on the basis of --

8 QUESTION: You said all you have is belief.
9 That's what you just said.

10 MR. TRIBE: To file the original complaint.
11 But we are asking this Court, as we asked successfully
12 the First Circuit, to rule that this law is void on its
13 face, that its void on its face because --

14 QUESTION: But do you have a right to assert
15 something on belief?

16 MR. TRIBE: On information and belief, yes, of
17 course, Your Honor, and it was asserted on that basis.
18 The belief is based on information that we think could
19 be developed, but to which there may be constitutional
20 --

21 QUESTION: Information which you have?

22 MR. TRIBE: On the basis of what was known when
23 the complaint was filed.

24 But I really think this is a distraction.

25 QUESTION: Well, it's a distraction largely

1 because you've made it one, I think. The United States
2 Attorney could certainly file a criminal action based on
3 these same allegations of antitrust claims, and I can't
4 imagine any serious constitutional objection to that
5 case being tried on the facts that were developed.

6 MR. TRIBE: Your Honor, it seems to me that the
7 same argument exactly could have been made in Eubank,
8 where this Court facially invalidated an ordinance
9 giving power to private parties to tell others what to
10 do with their property, and instead, and instead the
11 Court said that the illustrations of abuse are simply
12 relevant to showing how facially void the law is.

13 The same argument could have been made in
14 Lovell. The same argument could be made in the cases
15 involving --

16 QUESTION: Was there a statutory claim in each
17 of those cases?

18 MR. TRIBE: No. In each of those cases there
19 was a claim, but nonetheless a narrower ground was
20 available, namely an as applied invalidation.

21 QUESTION: But that was a choice between two
22 constitutional grounds, at any rate.

23 MR. TRIBE: I think that's correct, Your
24 Honor.

25 QUESTION: To what extent, Mr. Tribe, do you

1 think the opinion of the first panel is any factor in
2 this case? I got the impression that you thought it had
3 some standing.

4 MR. TRIBE: No, I was only suggesting as a
5 matter of understanding the evolution of the antitrust
6 issue that one look at it. It's the other side --

7 QUESTION: As soon as an en banc was voted,
8 that vacated the first opinion and it's a complete
9 nullity, is it not?

10 MR. TRIBE: Yes, Mr. Chief Justice Burger.

11 QUESTION: The First Circuit doesn't have any
12 other practice, does it?

13 MR. TRIBE: No. That's correct, that is the
14 only opinion before this Court, is an opinion holding
15 that this law is unconstitutional on its face. And I
16 think in understanding that opinion it's necessary to
17 recognize that the entanglement difficulties of
18 assessing its validity as applied in a particular case
19 both may have explained the court's reaching for a
20 facial ground and avoiding the antitrust issue, which
21 would require a trial with entanglement.

22 QUESTION: But the only antitrust issue I see
23 stated in your amended complaint in this case was a
24 preemption claim, that this statute was invalid --

25 MR. TRIBE: As applied.

1 QUESTION: -- on its face and as applied --
2 MR. TRIBE: Correct.
3 QUESTION: -- because its operation is
4 preempted by the Sherman Act.
5 MR. TRIBE: That's correct, Your Honor.
6 QUESTION: That's what you say.
7 MR. TRIBE: And that is what we believe.
8 QUESTION: Yes. Well, but that is a
9 constitutional issue the way it's posed.
10 MR. TRIBE: And therefore this Court's practice
11 of avoiding constitutional issues would not suggest --
12 QUESTION: Mr. Tribe, that's not a fair reading
13 of your complaint. In paragraph 12 you allege on
14 information and belief that certain congregation
15 members, because of their contributions to the parish or
16 otherwise, exerted substantial influence on the
17 governing board in order to protect themselves from
18 competition. And that's a factual allegation, and I
19 certainly don't see any establishment clause problem in
20 putting on the witness stand some licensee and asking
21 him if he did that.
22 What's the -- and you say that's more sensitive
23 constitutionally than reaching the ultimate
24 constitutional issue in the case?
25 MR. TRIBE: I would say that the inquiry into

1 why the church exercised its veto power is a --

2 QUESTION: No, no. Those allegations talk
3 about the other conspirators and their contributions and
4 their attempt to influence the church; you say you
5 couldn't try to prove that without --

6 MR. TRIBE: I don't say it's impossible, Mr.
7 Justice Stevens. I'm only suggesting that we would --

8 QUESTION: You say there are greater
9 constitutional issues at stake there than deciding the
10 ultimate issue on the merits here, that's what you're
11 saying.

12 QUESTION: Well, Mr. Tribe, the only relief you
13 ask is to enjoin the operation of this statute. You
14 didn't ask for any injunction against violating the
15 Sherman Act or any damages for Sherman Act violation.
16 The only time you mention the Sherman Act is in
17 paragraph 20, where you say that it preempts the
18 operation of this statute.

19 MR. TRIBE: We ask for a declaration of two
20 kinds, Mr. Justice White. We ask for a declaration that
21 the statute on its face and as applied violates the
22 First and Fourteenth Amendments; and a declaration that
23 when applied -- this is in paragraph 2 -- as applied to
24 approve and effectuate these agreements, it would
25 violate the Sherman Act.

1 QUESTION: And hence the statute may not
2 operate.

3 MR. TRIBE: May not so operate. Hence the use
4 of the veto power in this way must be enjoined or at
5 least declared invalid.

6 Now, I don't deny, Justice Stevens, that it is
7 possible -- and indeed, we originally drafted --

8 QUESTION: What's more, you do allege private
9 agreements, as well as just the facial effect of the
10 statute.

11 MR. TRIBE: We allege such agreements.

12 QUESTION: Right, okay.

13 MR. TRIBE: But if we --

14 QUESTION: So you disagree with Justice White's
15 last comment?

16 MR. TRIBE: But it's -- the private agreements
17 are -- let me explain, Justice Stevens.

18 QUESTION: I'm referring to paragraph 12 of the
19 complaint, as well as paragraph 20.

20 MR. TRIBE: Correct.

21 QUESTION: 20 refers back to the private
22 agreements alleged in 12.

23 MR. TRIBE: But those private agreements would
24 have no effect on Grendel's Den in this case had they
25 not led the church to exercise its veto power.

1 QUESTION: I understand.

2 MR. TRIBE: And the only relief we sought was
3 not damages against the private parties. The only
4 relief we sought was a declaration that the church's
5 exercise of this veto, because of the underlying private
6 agreements, could not be given effect by the state
7 officials.

8 It was at that point that the state officials
9 said, well, that's clearly an attempt to apply the
10 Sherman Act to state action, and it's at that point that
11 the private action becomes relevant. The state has not
12 mandated these agreements. We therefore believe that at
13 an as-applied trial it could be shown, within the
14 confines of this Court's delimitation of the Parker v.
15 Brown doctrine, that the reason the veto was exercised
16 was anticompetitive agreements and therefore the state
17 officials should not have given effect to the exercise.

18 But it would not be enough to prevail at that
19 trial to show that there were some people who had
20 unlawful agreements, because that didn't hurt Grendel's
21 Den. To prevail we would have to inquire into the
22 reason the veto was exercised. That inquiry would
23 violate the establishment clause or at least would raise
24 serious problems.

25 QUESTION: Why would it violate the

1 establishment clause? Why did you deny this okay for
2 this liquor license? Because -- the answer would either
3 be, because we were persuaded by our contributors or,
4 alternatively, because we didn't like all the drinking
5 in the neighborhood. I don't know what the religious
6 issue is.

7 MR. TRIBE: Well, I suppose if we had to rest
8 with their answer, without pursuing the matter further
9 through depositions and interrogatories, there'd be no
10 problem. But ordinarily at such a trial one is able to
11 pursue the matter further. And the very position the
12 state has taken in this case is that the reason this
13 absolute veto is so terrific is that it prevents one
14 from piercing the shield of the church and going into
15 the reasons.

16 QUESTION: Well, suppose we -- suppose we
17 decided or suppose that you would even agree that there
18 was no entanglement problem in adjudicating this case on
19 an as-applied basis under the First Amendment. Now,
20 should the Court be stuck with a stipulation between the
21 parties nevertheless to decide it on its face?

22 Let's just suppose that it's claimed that the
23 statute is invalid both on its face and as applied.
24 Now, should the Court first get to the applied issue or
25 on its face?

1 MR. TRIBE: Well, there are two -- I'm afraid
2 that the only way I can answer that is to say that there
3 are two levels of as-applied analysis here. One is to
4 say that when the statute is applied to create a
5 crazy-quilt like this, in which 14 licensees, some right
6 around the corner, some across the street, get a liquor
7 license and others don't, that that is a violation of
8 the Constitution.

9 There's another kind of as-applied claim, which
10 is to suggest that in this case the veto was applied
11 either to exact contributions for the church or to
12 advance the church's religious beliefs. Now, what we
13 suggest is that either of those grounds is highly
14 problematic, the second because of the entanglement
15 involved in the inquiry into the motives of the church
16 and the first because the invalidity of this blank check
17 of absolute veto power that is handed to the church does
18 not depend upon the facts of the particular case.

19 If the state wants, as the State of
20 Massachusetts purports to want, to allow the views of
21 churches to be weighed and considered in making
22 judgments that accommodate religious needs, it has ample
23 means for doing that. Indeed, the licensing authorities
24 of Massachusetts are ready to listen to the claims of
25 all neighboring abutters, all churches, all others, as

1 to why they might not want liquor in the neighborhood or
2 why they might want it in some instances and not in
3 others.

4 QUESTION: Putting aside your stipulations in
5 this case, are you representing to the Court your view
6 that there was no way to decide this case without
7 reaching constitutional issues? Is that your position?

8 MR. TRIBE: I don't believe that this Court can
9 decide that the judgment -- well, let me see. I suppose
10 there's no way to have resolved ultimately the claim
11 that Grendel's wanted to advance, the claim that this
12 veto should not be enforced, without reaching some
13 constitutional issue.

14 QUESTION: As someone else has suggested to
15 you, the framing of the issues in the case doesn't
16 control the Court on what issue should be decided. Now,
17 again, do you say there was no way the court could have
18 avoided the constitutional issue?

19 MR. TRIBE: I think there is no way the court
20 could have avoided it, however we framed the question,
21 given the relief we sought, and surely the parties have
22 the right to seek particular relief. The relief we
23 sought was the removal of the burden of this veto. Now,
24 in order to gain that relief we would have to have shown
25 either that the delegation of veto power was

1 unconstitutional, which we believe we have shown both
2 under the due process clause and under the establishment
3 clause, or that the way in which the veto was wielded in
4 this particular case and the reasons for which it was
5 wielded -- not just the private agreements that might
6 have lain behind it, the reasons the veto was exercised
7 -- violated our rights, either because of the Sherman
8 Act or because of our rights under the Thirteenth and
9 Fourteenth Amendments.

10 We don't believe that there is any way the case
11 could have been framed to resolve that issue without
12 reaching a constitutional question of entanglement and
13 without reaching, even under the Sherman Act, the
14 question of preemption. For that reason, we don't think
15 that a constitutional issue has somehow been foisted
16 upon the federal judiciary in this case. We think it's
17 unavoidable in the factual posture of a veto having been
18 exercised by a church.

19 QUESTION: Mr. Tribe, I'm embarrassed that I
20 haven't examined the Sherman Act claim more closely
21 before. But am I correct in noting that you didn't sue
22 any of the alleged conspirators?

23 MR. TRIBE: That's correct.

24 QUESTION: That's a rather strange Sherman Act
25 claim.

1 MR. TRIBE: Because our primary sense was not
2 -- the complaint here really was that Grendel's Den was
3 subject to the absolute discretion of one neighbor, the
4 church, and that that was fundamentally unfair, that it
5 was threatening to put them out of business, and that it
6 was subjecting them to the kind of power that the
7 framers never imagined that churches or other private
8 parties would exercise.

9 Now, as it happened, we also thought if we
10 could not establish that that fundamental proposition
11 was correct and that it was facially void, that at that
12 point we ought to have a right in the particular facts
13 of this case, despite the constitutional entanglement
14 problems, to see relief from this particular veto.
15 Suing the particular individuals in this case, rather
16 than seeking invalidation of the delegation of power,
17 would not have given the relief sought, which was this
18 liquor license, and in any event would have raised very
19 difficult problems of trial, given the entanglement
20 problems, of finding out why the church in fact
21 exercised its veto.

22 And therefore the harm that we sought relief
23 from, the denial of the license, was harm that could be
24 removed only by seeking declaratory or injunctive relief
25 against these state officials. The power that was

1 exercised here, and I think this is important in light
2 of Justice Rehnquist's question about New Motor v. Fox,
3 was not just the power to trigger a public inquiry. In
4 New Motor v. Fox, as the majority pointed out in Justice
5 Brennan's opinion, the only effect of the refusal of the
6 old franchisee to tolerate the incursion by a new
7 franchisee was to open up a public hearing.

8 In this case the effect is far greater than
9 that. The effect is absolutely and totally, as the
10 State Supreme Court ruled and as the State Commissioners
11 of the Alcoholic Beverage Control Commission said,
12 absolutely to veto the license permanently. And during
13 the ten years in which that veto has been exercised,
14 others have been licensed.

15 Now, we don't think that it is incumbent upon
16 Grendel's Den to engage in a problematic inquiry into
17 the internal motives of the church, though if we had to
18 at trial we would certainly try, in order to obtain
19 relief under the rather simple proposition, which I
20 think the framers would have found self-evident, that
21 the owners of property cannot be told what to do with
22 their property in the unfettered, unreviewable,
23 unaccountable discretion of a single private body,
24 namely a church.

25 QUESTION: Mr. Tribe, I'm still worried about

1 the original proposition of alleging that some dealers
2 will pay off somebody and get permission. Couldn't you
3 just as easily say that the Alcoholic Beverage Control
4 Board itself might take a little money and throw the act
5 on that basis?

6 MR. TRIBE: But happily, Justice Marshall,
7 there are laws against bribery. There are no laws
8 against making contributions to a church in order to
9 show that one is good-spirited and that one is not going
10 to be a problematic neighbor. And the line between a
11 payoff and a contribution --

12 QUESTION: It could be that you've never heard
13 of anything like it before.

14 MR. TRIBE: Justice Brandeis feared that
15 exactly this would happen.

16 QUESTION: In 18-what?

17 MR. TRIBE: In 1891.

18 QUESTION: Well, this is 1982.

19 MR. TRIBE: But the problem is an enduring
20 one. It was his point that, although he was an ardent
21 prohibitionist and believed in local zoning power, it
22 was his belief that the temptation to shade things a
23 little and make decisions on impermissible bases would
24 be irresistible, but difficult to prove in particular
25 cases. And he was talking about a veto power wielded by

1 all neighbors, not a veto power wielded by one neighbor
2 that happens to be a church dedicated to divine
3 worship.

4 So that the abuse that led him, despite his
5 belief about temperance and despite his belief about the
6 importance of local zoning, the abuse that would inhere
7 in this kind of governmental power being delegated to
8 private parties was something that ought to be prevented
9 by not giving this kind of veto power.

10 QUESTION: I agree, but I don't see the
11 necessity for saying the reason is because they'll take
12 money illegally.

13 MR. TRIBE: Well, Justice Marshall, that is the
14 necessity to which we would be placed if Justice
15 Rehnquist's suggestion that there ought to be an
16 antitrust trial --

17 QUESTION: Well, count me out of that.

18 MR. TRIBE: That is not, Justice Marshall, by
19 any means indispensable to our prevailing. What we are
20 saying is that giving a property owner that happens to
21 be a church a power of life and death over nearby
22 establishments violates the Constitution.

23 It is the sort of power that in England they
24 had for hundreds of years, finally got rid of in the
25 Beer Act of 1830; the kind of power that the American

1 colonies refused to give their established churches. It
2 is the kind of power that Massachusetts didn't delegate
3 when it had a flat ban on liquor in 1954.

4 QUESTION: Would you concede that a flat ban
5 was constitutional?

6 MR. TRIBE: Well, happily, this case doesn't
7 pose the issue.

8 QUESTION: That wasn't what I asked you.

9 MR. TRIBE: Well, if it were a very narrowly
10 focused flat ban, it might pose problems. But I do not
11 think the First Circuit suggested that it would be
12 unconstitutional -- that is, if the state were to say
13 that we don't believe that liquor and religion mix --
14 then the case would be much more like the decisions in
15 LaRue and Bellanca saying that liquor and sex don't mix,
16 where this Court has said that that's a permissible
17 determination.

18 And it seems to me that the argument could
19 nonetheless be made that when a branch of Alcoholics
20 Anonymous has no veto power, that is when a branch of
21 Alcoholics Anonymous is not surrounded by a liquor-free
22 zone, when libraries and hospitals are not surrounded by
23 liquor-free zones, to surround certain churches with
24 those zones might still be preferential treatment. But
25 that issue is not presented here.

1 The reason we have such a crazy-quilt in an
2 area that, as Justice Stevens points out, is hardly
3 tranquil and hardly sober, namely the business core of
4 Harvard Square, the reason we have such a crazy-quilt is
5 that this is not a flat ban, and because it's not a flat
6 ban --

7 QUESTION: The reason you have a crazy-quilt in
8 Harvard Square -- we don't have any information about
9 whether or not there are crazy-quilts in the other parts
10 of Massachusetts.

11 MR. TRIBE: That's right. Some of the quilts
12 might not be as crazy. But the power itself --

13 QUESTION: Or crazy at all.

14 MR. TRIBE: Or crazy at all.

15 But the way to assure that those crazy-quilts
16 be avoided is not to delegate unreviewable,
17 unaccountable power to a single body whose
18 unaccountability is even greater than that of other
19 private owners, because in the case of other private
20 owners there isn't even an arguable barrier under the
21 establishment clause to probing and not just accepting
22 the initial answer about what the motives were, probing
23 the real motives.

24 Here there is a double bind --

25 QUESTION: Mr. Tribe, do you think the Court of

1 Appeals meant to invalidate this statute wholly aside
2 from the consent issue, if there was just a flat ban
3 unconnected to --

4 MR. TRIBE: I think, Justice White, the opinion
5 is ambiguous. I think they meant to say there are two
6 infirmities and that they don't decide whether either
7 standing alone would suffice. They say it's a benefit
8 to a narrow class.

9 QUESTION: I take it your argument in your
10 brief and here is primarily on the consent.

11 MR. TRIBE: That's right. And we don't think
12 it matters whether you call it consent or waiver. We
13 think frankly --

14 QUESTION: Well, I agree. But you're not
15 urging a holding that flat bans are unconstitutional?

16 MR. TRIBE: No, because we think that, just as
17 Justice Rehnquist would want to avoid the whole
18 constitutional issue, certainly that more difficult
19 constitutional issue should be avoided here.

20 What we're saying is that this Court has never
21 upheld and should never uphold a provision whereby a
22 single private owner, especially a church, has an
23 unaccountable power over the livelihood and property of
24 others.

25 We also believe that this Court should not

1 subject --

2 QUESTION: Mr. Tribe, if you don't rely on the
3 flat ban analogy, then your delegation argument, it
4 seems to me, would be equally strong if the power to
5 veto were given, say, to a bank or to the largest tavern
6 in the neighborhood.

7 MR. TRIBE: That's right. Justice Stevens, we
8 make this entirely separate delegation argument, which
9 we think is strong enough to prevail whether it's a
10 church or not. We think it is strengthened for two
11 reasons because it's a church:

12 First, that violates the establishment clause
13 principle of not giving special privileges to churches;

14 But second, insofar as one might otherwise cure
15 a delegation by implying some power of review or
16 revision of the sort that the State Supreme Court here
17 refused to find in the earlier case that came before it,
18 that ability to review the motives of the delegatee is
19 drastically reduced when the power is delegated to a
20 church. So in that sense and in that sense only, the
21 claim is made much stronger by virtue of the religious
22 character of the person to whom power is delegated.

23 QUESTION: I take it your argument, however,
24 would invalidate the statute even if it gave -- if it
25 was a very general consent provision.

1 MR. TRIBE: That's right.

2 QUESTION: As long as a church was included, it
3 would be invalid?

4 MR. TRIBE: Under the establishment clause, I
5 think that's right, Justice White. But that's why it
6 becomes I think important, since someone might argue
7 that it violates the free exercise clause to excise
8 churches from that kind of power. That's why we take
9 some solace from the fact that our argument with respect
10 to the delegation of power generally does not depend on
11 the fact that it's a church.

12 I want to stress that this Court has never
13 upheld unilateral power in a single property owner to
14 determine, without public review or accountability, how
15 others may use their property. Certainly New Motor v.
16 Fox was not such a case. In New Motor v. Fox, one way
17 or the other during the time of the dispute between the
18 old and the new franchisee someone would have to be out
19 of luck. This is a permanent deprivation as long as the
20 church maintains its veto.

21 QUESTION: That thesis would avoid the
22 establishment clause problem, wouldn't it?

23 MR. TRIBE: It would certainly avoid the
24 establishment clause problem, and it would be a welcome
25 opportunity for this Court to remind people that those

1 decisions, although they may look old -- Eubank v.
2 Richmond, 1912; Washington ex rel. Seattle v. Roberge,
3 1928 -- represent good law.

4 QUESTION: They not only look old, but they've
5 been scarcely ever cited since they've been decided.

6 MR. TRIBE: Well, this Court cited them with
7 approval in 1976 in Eastlake.

8 QUESTION: Once.

9 MR. TRIBE: That was once.

10 The reason I think they've rarely been cited is
11 that most people have followed them and obeyed them.
12 That is, the effrontery of a state in deciding that the
13 livelihood of a restaurant in Harvard Square is going to
14 depend on one property owner's whim is something that
15 this Court has happily been spared in most cases.

16 This case is worse in a very special way. In
17 all of those cases where the Court has gone in various
18 ways depending on factual nuances, at least it could be
19 said that a neighborhood of owners got to vote somehow
20 on whether a particular use would be allowed or not.
21 Never in this Court have we been confronted with a
22 situation where one owner has a decisive veto power over
23 an otherwise lawful activity.

24 And why someone who is subjected to that veto
25 should have to go through a trial and psychoanalyze the

1 reasons the veto was exercised, something that as a last
2 resort we would be willing to do, before the obvious
3 constitutional question is disposed of, is really beyond
4 me. I don't think anything would be gained by it.

5 QUESTION: Mr. Tribe, do you think this Court's
6 opinion in Cusack was wrong?

7 MR. TRIBE: Well, I think it was one of the
8 more difficult cases in the area. I think it was
9 wrongly decided, Justice O'Connor. But I think it's
10 distinguishable in several ways.

11 QUESTION: Well, is it distinguishable if we
12 apply the interpretation of Section 16(c) given it by
13 the Massachusetts Supreme Judicial Court?

14 MR. TRIBE: Well, the Massachusetts Supreme
15 Judicial Court interpreted the purposes of the waiver as
16 -- of the current veto, which they describe specifically
17 in their opinion as a veto. They said this is the
18 delegation of a veto power at page 175A of the
19 Jurisdictional Statement Appendix. They said its
20 purpose is really no different from that of a waiver.

21 It seems to me that this Court's cases -- and
22 it's not up to the State Supreme Court to interpret them
23 -- establish that it's not the underlying purpose of the
24 choice between waiver and veto that counts. What counts
25 is that other private parties have been given the power

1 to dispose of the fate of other private parties.

2 But even if Cusack were controlling and one
3 said this is a waiver, there'd be a fundamental
4 difference. In Cusack, the owners of over half the
5 property in the area had to vote on the matter. It was
6 a little like the referendum case in which the Chief
7 Justice upheld spot zoning by the City of Eastlake.

8 This Court could well hold that the question of
9 when property owners as a collectivity can be given a
10 kind of local option over the entry of nonconforming
11 uses, such as a billboard in a residential area, is a
12 difficult and different question from the question when
13 one property owner, not involved in Cusack or Roberge or
14 Eubank, can unilaterally dispose of how others may use
15 their property.

16 That question it seems to me can lead to only
17 one answer if the due process clause is to mean rule of
18 law rather than subjection to someone else's whim and
19 will.

20 QUESTION: Well, but Mr. Tribe, would you
21 suggest this statute could be cured by allowing the
22 veto, but it be exercised by a vote among the 26
23 existing tavern owners?

24 MR. TRIBE: It would no longer be a veto. If
25 there were a neighborhood referendum --

1 QUESTION: Well, the 26 tavern owners are the
2 people allowed to vote in the referendum.

3 MR. TRIBE: Well, it would be at least a
4 different case. I wouldn't recommend that the law be so
5 amended --

6 QUESTION: I wouldn't think so.

7 MR. TRIBE: -- because I think it would pose
8 other constitutional problems.

9 CHIEF JUSTICE BURGER: Mr. Tribe, your time has
10 expired.

11 MR. TRIBE: Thank you very much.

12 CHIEF JUSTICE BURGER: Do you have anything
13 further?

14 Thank you, gentlemen. The case is submitted.

15 (Whereupon, at 3:03 p.m., the case in the
16 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:
John P. Larkin Et Al., Appellants v. Grendel's Den, Inc.

No. 81-878

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY Deene Hammond