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## Government Regulation of Religiously Based Social Services: The First Amendment Considerations

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# Government Regulation of Religiously Based Social Services: The First Amendment Considerations\*

By CARL H. ESBECK\*\*

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\* This paper was first presented at the conference on *Religion in Public Life: Access, Accommodation & Accountability*, held at the University of Pennsylvania on May 30-June 1, 1991, under the auspices of the Bicentennial Conference on the Religion Clauses.

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## Introduction

A daunting welter of variables confronts anyone who sets out to systematize the First Amendment's effect on the government's role in regulating social services operated by religious organizations. The task is further complicated because the regulations in question often were promulgated as a consequence of the monitoring that inevitably accompanies government spending on private-sector welfare programs. The most suitable methodology should take into account: 1) the nature of the organizations that are the object of the government's regulation or program of aid; 2) the interrelationship between government and religious organizations that results from the regulation or aid; and 3) the difference, if any, in the First Amendment's application to regulations benefiting religion through use of its spending power as opposed to those burdening religious organizations through police power oversight.<sup>1</sup>

One can examine the first of these variables, the nature of the organizations that are the objects of government's regulation or the recipients of its aid, by focusing both on the purpose of the religious organization through which the aid is channelled and on the type of persons the government's program ultimately seeks to help. Religious charities and social service ministries characterized by the clientele they serve comprise quite a long and differentiated list: preschools and child day care centers; temporary shelters for abused children; foster homes and adoption placement agencies; residential care or group-care homes for abused or neglected children and adjudicated juvenile offenders; adolescent or teen counseling centers; crisis pregnancy counseling centers; maternity homes for women with crisis pregnancies; temporary shelters for battered women; rehabilitation centers for alcoholics, drug abusers, and the unem-

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1. These first two factors have similarities with the elements of the Supreme Court's administrative-entanglement analysis formulated in religiously affiliated school aid cases. For example, in *Roemer v. Board of Public Works*, 426 U.S. 736 (1976) (plurality opinion), Justice Blackmun said entanglement analysis requires looking at:

(1) the character and purposes of the benefitted institutions, (2) the nature of the aid provided, and (3) the resulting relationship between the State and the religious authority.

*Id.* at 748; see also *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971).

ployed; AIDS hospices; prison ministries, police and prison chaplaincies; halfway houses for adults convicted of crimes; storehouses of free (or reduced-price) food, used clothing and household items; centers for free meals (soup kitchens) and temporary shelters for the homeless (rescue missions); low-income housing renovation programs; long-term care facilities for the disabled, retarded, and mentally ill; long-term care facilities for the elderly (retirement, nursing, and invalid homes); elderly day-care centers; centers for vocational training or employment of the disabled; literacy and English-as-a-second-language programs; hospitals and community health clinics; dispute resolution and legal aid centers; draft counseling centers; financial counseling centers; marital and family counseling centers; recreational programs, summer camps and retreat centers for youth and adults; and support groups of every stripe for persons suffering from life's many vicissitudes.

Government aid programs and regulatory schemes are generally arranged into the foregoing categories and thus by the type of social problem addressed. The case law sometimes focuses on whether the purpose of the religious organization is to meet life's physical needs or to address moral failings.<sup>2</sup> Courts are more wary, for example, about government aid to address teenage pregnancy than about public funding for social ministries providing emergency housing, free food, or employment of the disabled. The courts also show increased sensitivity depending on the impressionability or vulnerability of the persons a government program seeks to reach. For example, the courts show deference to legislation assisting adults, but give greater scrutiny where a program benefits a religious ministry to children or adolescents.<sup>3</sup>

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2. See, e.g., Justice O'Connor's concurring opinion in *Bowen v. Kendrick*, 487 U.S. 589, 623 (1988) (citation omitted):

Government has a strong and legitimate secular interest in encouraging sexual restraint among young people. At the same time, as the dissent rightly points out, "[i]here is a very real and important difference between running a soup kitchen or a hospital, and counseling pregnant teenagers on how to make the difficult decisions facing them." . . . Using religious organizations to advance the secular goals of the AFLA, without thereby permitting religious indoctrination, is inevitably more difficult than in other projects, such as ministering to the poor and the sick. I nonetheless agree with the Court that the partnership between governmental and religious institutions contemplated by the AFLA need not result in constitutional violations, despite an undeniably greater risk than is present in cooperative undertakings that involve less sensitive objectives.

3. See, e.g., Justice Brennan for the Court in striking down the share-time school program in *School Dist. v. Ball*, 473 U.S. 373, 390 (1985) (footnote omitted):

[A]n important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices. The inquiry into this kind of effect must be conducted with particular care when many of the

The class of persons that the government ultimately seeks to assist is another factor that complicates constitutional analysis. In the case of foster care programs and adoption agencies, for example, the religious organization has a role *in parens patriae*.<sup>4</sup> When government places a child with a religious organization, the Free Exercise Clause arguably requires the state to shield the child from religious coercion by the organization.<sup>5</sup> In placing the child, moreover, government may be asked to honor the religious preference of the biological parents.<sup>6</sup> There are still other occasions when government has near total control over individuals placed in restricted environments, such as adults in mental institutions, the armed forces, or those confined in penitentiaries.<sup>7</sup> In the latter situation, for example, the Free Exercise Clause requires government to provide for the religious needs of those incarcerated by permitting reasonable access to church-affiliated prison ministries.<sup>8</sup> On still other occasions when government compels an adjudicated individual to be in transitional confinement, such as a community-based, alcohol treatment program or halfway house for delinquents, the interplay between an individual's freedom-from-religion and no-establishment of religion is complicated when the program or house is operated by a religious organization and has a faith-centered method of behavior modification.

As outlined in the first paragraph, the second fundamental variable is the interrelationship between government and religion that results from the program of aid or governmental regulation. This factor can be subdivided into two considerations. One consideration is the form of the aid provided by the program. For example, the government benefit may

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citizens perceiving the governmental message are children in their formative years. The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice.

*Compare* *Engel v. Vitale*, 370 U.S. 421 (1962) (striking down prayer for school-age children) with *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding prayer at beginning of legislative session).

4. The inherent authority of a sovereign over minors and incompetent persons. BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

5. *See, e.g.,* *Arneith v. Gross*, 699 F. Supp. 450 (S.D.N.Y. 1988) (foster children in Roman Catholic group-care home filed suit for injunction against home's confiscation of their contraceptive devices and prescriptions).

6. *See infra* Part III.B.3.

7. *See* *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 297 n.72 (1963) (Brennan, J., concurring) (chaplain services in prisons). The Establishment Clause has been found not to forbid chaplains in the military service, *Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985), nor in prisons, *Rudd v. Ray*, 248 N.W.2d 125 (Iowa 1976).

8. *See* *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (rejecting claim of prisoners, members of Islamic faith, who challenged prison regulations relating to time and places of work that had effect of preventing attendance at worship service).

take the form of direct cash transfers and grants, reduced postal rates, low-interest bonds, vouchers, scholarships, tax credits or deductions, free training of employees, or in-kind transfers of goods such as surplus food, used furniture or real estate. Certain forms of benefits, such as day-care vouchers or child-care tax credits, may reduce church-state entanglements and thus lower First Amendment concerns.<sup>9</sup>

The other consideration is the structure of the religious organization's social ministry. Courts and legislatures seem interested in finding "walls" or boundaries that separate a social ministry from its affiliated church or other core religious community. Presumably these separating structures facilitate the receipt of government aid without violating the Establishment Clause, as well as auger in favor of sustaining the resulting regulatory oversight.

There is both a *de jure* or formal, legal structure and a *de facto* or true, functional structure between a social ministry and its religious parent. The *de jure* structure entails the jural relationship between the church and its social service agency. Examples of relationships are: integrated auxiliary of the church; separate but wholly controlled subsidiary, nonprofit corporation; corporation sole of an archbishop; separate, nonprofit corporation without interlocking directorates; or para-church, nonprofit corporation unaffiliated with any denomination.

The *de facto* structure considers the actual working relationship between a church and the social ministry. In reality, social ministries fall not into a neat typology, but along a continuum from the wholly secular to the very core of what a given religion professes to be all about. Nonetheless, the five constructs that immediately follow will be useful. These heuristic categories appear in the order of least to greatest relatedness to the core of organized religion, and thus in increasing order of potential First Amendment concern:

1. Commercial businesses that merely happen to be owned or operated by a religious organization; for several years they have paid "unrelated business income tax."<sup>10</sup>
2. Nonprofit organizations that for all practical purposes operate on a secular, pay-their-own-way basis; today a large portion of the budget is met by government programs; their tie to a church is more historical, albeit, many retain a chaplain, religious icons on the walls, chapels, and clerics on the board of directors; for exam-

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9. See *infra* note 26 and accompanying text.

10. I.R.C. §§ 511-512 (1986) (unrelated business income tax); see, e.g., *De La Salle Inst. v. United States*, 195 F. Supp. 891 (N.D. Cal. 1961) (sale of wines by Christian Brothers subject to tax). See generally LYNN R. BUZZARD & ROBERT A. BUZZARD, UNRELATED BUSINESS INCOME TAX: LIABILITIES OF CHURCHES AND MINISTRIES (1990).

ple, many hospitals, nursing homes, facilities for mentally retarded, YM-YWCAs.

3. Nonprofit organizations that in substantial part operate out of a vibrant religious base and motivation; although a fee for services may be charged, it often does not pay the cost of service; thus, a large portion of the budget is met by private donations; their activities have little commercial potential, but in a normative sense are charitable or benevolent; there probably exist "nonprofit, secular counterparts" to such ministries; for example, many temporary shelters for battered women, alcoholic treatment centers, maternity homes, soup kitchens.

4. Nonprofit organizations that are "pervasively sectarian" as that term is defined by the Supreme Court;<sup>11</sup> these organizations are in principal part instruments for the propagation of the faith; they may be an integral part of a church, be separately incorporated but affiliated with a church, or be a parachurch organization that nevertheless is fully identified with a particular faith perspective: for example, many church camps, prison ministries, crises pregnancy counseling centers.

5. Churches, mosques, synagogues, temples, or other "houses of worship," using those terms not to identify buildings, but to describe the organization or society that is the core community around which a religion identifies and defines itself, conducts its worship, teaches doctrine, and propagates the faith to children and adult converts.

As set out in the first paragraph, the third fundamental variable in this effort to systematize our topic is whether the government's interaction with social service ministries is in the nature of a benefit or a burden. Police power regulation burdens religion, whereas spending power programs both benefit religion and entail accompanying oversight that may burden religious ministry. The First Amendment, and in particular the Establishment Clause, is concerned with more than improper government aid to religion. The Religion Clauses also limit interaction between church and state in the form of regulation, whether of police power or spending power origin, that unduly interferes with a ministry's religious beliefs or practices.<sup>12</sup> Logically, there are three basic questions here that the Religion Clauses address:

1. In what circumstances may government (in purpose or effect) advance, by funding or otherwise, a belief or practice of a religion?
2. In what circumstances may government (in purpose or effect) advance, by funding or otherwise, a religious organization?
3. In what circumstances does the First Amendment protect the institutional integrity of a religious organization from governmental restrictions?

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11. See *infra* note 77.

12. See *infra* note 28.

Questions 1 and 2 are principally Establishment Clause issues, whereas question 3 implicates both the Free Exercise and Establishment Clauses.

The Establishment Clause prohibits governmental largesse from going to the advancement of certain religious practices (question 1) and certain religious organizations (question 2), although cases and commentators disagree over where these lines should be drawn. However, when the benefit to a social ministry is in the form of a legislative exemption from regulations imposed on secular organizations similarly situated, this is generally permitted by the Establishment Clause.<sup>13</sup>

Finally, do the Religion Clauses insulate certain religious organizations from regulations invasive of their faith practices (question 3), when secular organizations similarly situated have no such First Amendment immunity from regulation? To further complicate the matter, the strength of a Religion Clauses defense apparently depends on whether the source of the government's authority is police power or spending power. Following the recent decision in *Rust v. Sullivan*,<sup>14</sup> in a government-funded program, the government may restrict participants' free speech in furtherance of reasonable governmental policies unrelated to the suppression of the speech. The same is presumably true of religious freedom, for in principle these First Amendment guarantees are not distinguishable in this context.

The foregoing issues posed in questions 1, 2, and 3 are addressed in Parts I and II. Part III surveys the Supreme Court and lower-court case law, as well as federal and state legislation, that directly bear on the First Amendment rights of social service ministries.

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13. See *infra* notes 45-49 and accompanying text.

14. 111 S. Ct. 1759 (1991) (sustaining restrictions on federally funded family planning clinics by prohibiting abortion-related counseling, referrals, or advocacy by health care professionals, and by requiring funded clinics to maintain facilities, personnel, and records separate from clinics that provided abortion-related services). The Court rejected the argument that congressional spending power was being used to create an unconstitutional condition. The regulations placed a condition on the federally funded program, explained the Court, not a condition on the health care professional:

The Title X *grantee* can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent . . . .

. . . [O]ur "unconstitutional conditions" cases involve situations in which the government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program.

*Id.* at 1774 (emphasis in original).



## I. Is Strict Separationism No Longer Plausible?

For centuries, churches and other religious institutions have engaged in charity as part of their understanding of themselves and their calling to meet the physical and spiritual needs of humanity.<sup>15</sup> In the eighteenth century, the period of our nation's founding, and through much of the nineteenth century, social welfare was marked by an amicable cooperation between public and private philanthropy.<sup>16</sup>

Following the Civil War, and increasingly during the first quarter of this century, government undertook a more affirmative role in allocating the goods and opportunities available in society and thereby profoundly affecting the structure of the social order. At first, charitable ministries of religious organizations continued to work along side, but largely uninvolved with, these governmental "secular counterparts." The Great Depression and the government's response to it through the New Deal, determined that government, rather than private, agencies would have primary responsibility for charity.<sup>17</sup> Voluntary societies were simply overwhelmed with the need. This reallocation of responsibility occurred as the notion of state police power expanded from initially addressing only the health and safety concerns of the population, into a power to legislate on behalf of the "general welfare" broadly defined.<sup>18</sup> The growth in publicly provided services also paralleled the government's ability to raise the large sums of money required to pay for these pro-

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15. WALTER I. TRATTNER, *FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA* 2-6, 32-34 (4th ed. 1989); A.P. STOKES, *2 CHURCH AND STATE IN THE UNITED STATES* 255 (1950). On the history of church involvement in the social welfare field and the manner whereby differences in theology affect the character of ministry to the needy, see BERNARD J. COUGHLIN, *CHURCH AND STATE IN SOCIAL WELFARE* 15-43 (1965) (Protestant, Catholic and Jew); JAMES LEIBY, *A HISTORY OF SOCIAL WELFARE AND SOCIAL WORK IN THE UNITED STATES* 12-22 (1978) (importance of Protestant ethic in American thought on interrelationship of work, economy and charity); Robert H. Bremner, *Private Philanthropy and Public Needs: Historical Perspective*, in 1 *RESEARCH PAPERS* 89, 90-92 (Comm'n on Private Philanthropy and Public Needs 1977) (Puritans and Quakers). For a description of developments concerning religious charities and government in the State of New York, see JOHN W. PRATT, *RELIGION, POLITICS, AND DIVERSITY: THE CHURCH-STATE THEME IN NEW YORK HISTORY* 204-24 (1967).

16. TRATTNER, *supra* note 15, at 34-36; Bremner, *supra* note 15, at 103-04.

17. TRATTNER, *supra* note 15, at 256-58; LEIBY, *supra* note 15, at 274-75.

18. See generally WILLIAM NELSON, *THE ROOTS OF AMERICAN BUREAUCRACY, 1830-1900* (1982); STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920* (1982); LOREN BETH, *THE DEVELOPMENT OF THE AMERICAN CONSTITUTION, 1877-1917* (1971); Calvin Woodward, *Reality and Social Reform: The Transition from Laissez-Faire to the Welfare State*, 72 *YALE L.J.* 286 (1962).

grams through taxation of an expanding economy.<sup>19</sup> Finally, the needs of the waves of immigrants, and the nation's industrialization and urbanization, placed greater demands on government to provide social services.<sup>20</sup> Progressively, many spheres of society once deemed private, or at least non-statist, gave way to this governmentalization.<sup>21</sup>

Yet a third phase has been unfolding in modern times, namely a return to the provision of social services through a partnership of government and the private sector. Two considerations are fueling this partial reversion: budgetary constraints on government and widespread discontent with the inefficiency and poor quality of the government programs.<sup>22</sup> The President's "thousand points of light" theme is a sound-bite description of the government's ever growing turn to the entrepreneurial, volunteer sector to meet society's social welfare needs.

An interpretation of the Establishment Clause using a strict separationism framework, means that government must doggedly avoid utilizing its power to grant any benefits to, or incur measurable interaction with, religious organizations.<sup>23</sup> While acknowledging that government must be "neutral" as to religion, separationists reject the argument that it is nonneutral for government to exclude religious organizations from equal participation with other private-sector organizations in social welfare, entitlement, and grant programs. The religious liberty they advocate is over against a government deeply involved with churches and their educational and social welfare auxiliaries. Government cannot help but affect everything it touches, including religion. Strict separationists would avoid this at all cost because each individual should exercise complete freedom of conscience in matters of religious faith, a faith neither encouraged nor tainted by involvement with government. Anything less

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19. See TRATTNER, *supra* note 15, at 201-15; George H. Guilfoyle, *Church-State Relations in Welfare*, 3 CATH. LAW. 112, 118 (1957).

20. See HAROLD L. WILENSKY & CHARLES N. LEBEAUX, *Industrial Society and Social Welfare* 49-89 (1958); STOKES, *supra* note 15, at Vol. I, 693.

21. This development is most easily traced in the common school or public school movement, which has substantially supplanted church-operated primary and secondary education. Today independent religious schools comprise a mere 9.1% of the children being educated at the primary and secondary levels. Kline Capps & Carl H. Esbeck, *The Use of Government Funding and Taxing Power to Regulate Religious Schools*, 14 J. L. & EDUC. 553, 554 n.5 (1985). But the same phenomena, on a somewhat lesser scale, has taken place in the arena of charity and social welfare.

22. TRATTNER, *supra* note 15, at 328-34; COUGHLIN, *supra* note 15, at 133-49. See LESTER M. SALAMON & ALLEN J. ABRAMSON, *THE NONPROFIT SECTOR IN THE REAGAN EXPERIMENT* 222 (J. Palmer & I. Sawhill eds., 1982).

23. See generally Carl H. Esbeck, *A Typology of Church-State Relations in Current American Thought*, 8 FAITH AND MISSION 3, 7-12 (1990) (defining and comparing "strict" and "freewill" separationists).

will both corrupt religion and make government into an instrument of religious imposition. Accordingly, strict separationists insist church and state, each within its own sphere and for their mutual protection, are to remain as completely uninvolved with one another as possible.

When government was small and much of society was in the private sector, this strict notion of separationism was quite plausible. The social service ministries of religious organizations could be deeply involved in societal life, and at the same time largely avoid interaction with government. With the arrival of "big government" and the "welfare state," however, enforcing an absolutist separationism would require confining social ministries to smaller and smaller enclaves of private life. Thus, the insistence that a hermetic separation of church and state is "neutral" is less plausible. If social service ministries are to participate as partners with government, strict separationist theory demands that religious social services must first secularize. These secularizing demands run the gamut of the superficial (insistence that religious symbols be stripped from a charity's walls) to the very substantive (jettisoning all sectarian content in an agency's program or curriculum).

The American religious community has responded in various ways. Some were eager to secularize, thus trading their faith distinctives for government dollars. This was little loss for some, because the ecclesial leadership no longer held to the proselytizing purposes on which the ministry was founded. Others sought to qualify for the state aid, but asked for accommodation and tolerance of the agency's sectarian distinctives where the religious practices could be segregated from the delivery of "secular" services. Still others resisted and refused to participate at all in the government programs. Such resistance was either to maintain the integrity of the religious program or because the leaders themselves agreed with the strict separationist view as the only sure means of keeping religion from being compromised by too close an involvement with government. Unless the devotees of a religion, these leaders argued, are willing to finance the entire budget of its charities by sacrificial giving, it is better that the ministry close its doors than go on the dole.

On the ascendancy is the argument that to secularize religious social ministries in order that they might participate in government programs on an equal basis with their secular counterparts, is a "penalty" the Establishment Clause does not demand. Indeed, some have argued, as yet unsuccessfully,<sup>24</sup> that denial of equal participation is invidious discrimination and thus a violation of the very religious liberty guaranteed by the

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24. See, e.g., Richard Neuhaus, *Establishment is not the Issue*, 4 THE RELIGION & SOCIETY REPORT 1-3 (June 1987); Michael W. McConnell, *The Selective Funding Problem: Abor-*

First Amendment. In any event, the more extreme forms of separationism are built upon two myths: that modern government has limited control over the resources of society diverted to charity, and that church-related social services take place within discrete and clearly defined boundaries easily segregated from the charitable organization's sectarian beliefs and practices.<sup>25</sup>

Different means of delivering benefits to religious social agencies are therefore touted. Some of these means are day-care certificates for low-income parents, school vouchers, and tax credits. These devices stand out because the government provides aid *directly* to parents, students, or those ultimately to benefit from the social service. Thus the element of recipient choice can work to insulate the religious charity from direct involvement with government officials. Further, the many recipients — not government — choose which religious or secular agency benefits from the statutory aid.<sup>26</sup> The success of the recipient-choice means of delivering aid both in safeguarding the institutional integrity of the religious ministry and in achieving equal private-sector participation in welfare programs remains to be seen.

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*tions and Religious Schools*, 104 HARV. L. REV. 989 (1991) (arguing, *inter alia*, that denial of funding for religious schools acts to deny religious choice).

25. Justice Brennan, concurring in *Walz v. Tax Comm'n*, 397 U.S. 664, 680 (1970), observed that religious enterprises are not easily separated into the sacred and the profane:

Appellant assumes, apparently, that church-owned property is used for exclusively religious purposes if it does not house a hospital, orphanage, weekday school or the like. Any assumption that a church building itself is used for exclusively religious activities, however, rests on a simplistic view of ordinary church operations. As the appellee's brief cogently observes, "the public welfare activities and the sectarian activities of religious institutions are . . . intertwined . . . . Often a particular church will use the same personnel, facilities and source of funds to carry out both its secular and religious activities." Thus, the same people who gather in church facilities for religious worship and study may return to these facilities to participate in Boy Scout activities, to promote antipoverty causes, to discuss public issues, or to listen to chamber music. Accordingly, the funds used to maintain the facilities as a place for religious worship and study also maintain them as a place for secular activities beneficial to the community as a whole. Even during formal worship services, churches frequently collect the funds used to finance their secular operations and make decisions regarding their nature.

. . . Appellee contends that "[a]s a practical matter, the public welfare activities and the sectarian activities of religious institutions are so intertwined that they cannot be separated for the purpose of determining eligibility for tax exemptions." If not impossible, the separation would certainly involve extensive state investigation into church operations and finances.

*Id.* at 688-89, 691.

26. See *Mueller v. Allen*, 463 U.S. 388, 399-400 (1983) (upholding a state income tax deduction for parents paying parochial school tuition); *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986) (upholding a state vocational rehabilitation grant to disabled student choosing training as cleric).

American religious communities are sensitive to the threat to their sectarian distinctives when becoming unduly allied with or "used" by government to achieve state policy goals. It is understood (but perhaps unevenly appreciated) that when a temporal service is rendered by religion, this worldly contribution is only possible if religion itself retains its integrity and purity of selfless motivation. Religion must maintain some distance from politics and the affairs of state. It is fundamental — and admittedly paradoxical — that the worldly uses of religion often diminish in precisely the same degree that religious social agencies themselves become worldly:

[T]he worldly contribution of religion is possible only if religion itself remains otherworldly. In recent years we have been told over and over again how religion must become more worldly, more of service to society, more "relevant" in terms of this or that social or political agenda. . . . [A]ny institution remains "relevant" as long as it has something distinctive to offer. Religious institutions are no exception. The religious institution that becomes indistinguishable from other institutions, such as political lobbies or therapeutic agencies or radical caucuses (or, needless to add, conservative caucuses), in very short order has great difficulty answering the question of why it should exist as a separate institution at all. At this point it has become "irrelevant" in the strictest sense of the word — the sense of redundancy and obsolescence.<sup>27</sup>

To be sure, the entire nation gains when religious ministries serve the temporal needs of society. Ultimately, however, religious communities do not exist to sustain the social and political order, albeit such is often a derivative of religious good works. If government were to use religion as merely another tool to achieve policies of state, the church is in danger of becoming a harlot to the aims of government. The doctrine of church autonomy — a line of First Amendment cases recognizing the unique institutional character of organized religious communities — has grown in part, out of this realization.<sup>28</sup>

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27. Peter L. Berger, *The Serendipity of Liberties, in THE STRUCTURE OF FREEDOM: CORRELATIONS, CAUSES, AND CAUTIONS* 1, 16 (R.J. Neuhaus ed., 1991).

28. Unlike the instrumental and entirely individualistic concept of freedom for noncommercial voluntary associations, the Establishment Clause inescapably acknowledges the distinct existence or ontology of religious organizations through the requirement of church-state separation. The legal duty of maintaining the institutional separation of church and state is addressed to government and the involvement it contemplates with identifiable sectarian societies and their particular modes of religious practice. No other private associations must be separated from government. Unlike all other voluntary associations, the separation mandate is testimony that the place of religious organizations has been recognized as a special problem for which the Establishment Clause is directed to making special provision. ("Special" here implies neither favoritism nor hostility toward religious organizations, but simply indicates unique treatment.) *The Juridical Status of Churches*, in *INSTITUTE OF CHURCH AND STATE:*

## II. Government Conferring Benefits and Imposing Burdens on Religious Ministries and the Establishment Clause

Before turning to specific types of laws affecting social ministries, it is helpful to briefly survey Supreme Court First Amendment cases concerning welfare programs benefiting and burdening religious organizations. The cases fall into four lines of authority: (A) when legislation confers a benefit on religious organizations, and the same benefit is afforded to secular organizations similarly situated; (B) when legislation withholds a benefit from religious organizations, whereas the same benefit is available to secular organizations similarly situated; (C) when legislation refrains from imposing a regulatory burden on religious organizations, whereas the burden is imposed on secular organizations similarly situated; and (D) when legislation imposes a burden on religious organizations, and the same burden is imposed on secular organizations similarly situated.

### A. Government Conferring a Benefit on Religious Organizations, When the Benefit is Generally Afforded to Others Similarly Situated

The question often arises whether the Establishment Clause permits government to confer a benefit on religion, when the same benefit is con-

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PROCEEDINGS 1, 29, 36, 47-49 (O'Toole ed., 1958) (comments by Brady and Pfeffer); *cf.*, Herbert Richardson, *Civil Religion in Theological Perspective*, in AMERICAN CIVIL RELIGION 161, 178-80 (Richey & Jones eds., 1974). The institutional separation of church and state implemented by the Establishment Clause is for the mutual benefit of both. Accordingly, the church refrains from co-opting the state's influence or the civil law's coercive power to achieve its sectarian purposes. Reciprocally, the church *qua* church is safeguarded, absent compelling reasons, from state interference within its spiritual and ministerial province. The Supreme Court's cases have recognized in the First Amendment this fuller, quasi-sovereign conception of liberty held by religious organizations. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-11, at 1236 (2d ed. 1988); MEIR DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY 177 (1986) (church autonomy identified as an example of "neo-feudalist influence on constitutional thinking"); Mark DeWolfe Howe, *Political Theory and the Nature of Liberty*, 67 HARV. L. REV. 91, 92-95 (1953) (church autonomy identified as the "political philosophy of pluralism" that gives religious bodies "some of the prerogatives of sovereignty"); Frederick M. Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99; Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981); *Developments in the Law: Religion and the State*, 100 HARV. L. REV. 1606, 1740-81 (1987). This is most easily seen in cases sustaining the assertion by churches of a right of autonomy from civil jurisdiction. See Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) (no civil court authority to hear claim by dissident cleric that church violated its internal rules of procedure); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952) (overturning state legislation that displaced church administrator appointed by Russian Orthodox Church and passed control to the Russian Church in America).

ferred on all others similarly situated.<sup>29</sup> Such benefits may take the form of direct cash grants, reduced postal rates, vouchers, tax credits, and in-kind transfers such as textbooks, surplus food or the use of public facilities. The Supreme Court's analysis has remained the much criticized three-part test of *Lemon v. Kurtzman*:

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."<sup>30</sup>

The Court and Congress have found that a benefit generally available to secular recipients may also be conferred on religious students and parochial school parents,<sup>31</sup> patients choosing religious hospitals;<sup>32</sup>

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29. Many Supreme Court cases concern governmental aid that benefits only religion, thus these cases are not pertinent to this discussion. See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (public display of menorah and nativity of Christ); *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam) (posting of Ten Commandments in public school classroom); *School Dist. v. Schempp*, 374 U.S. 203 (1963) (devotional Bible reading at public school); *Engel v. Vitale*, 370 U.S. 421 (1962) (public school prayer); *McCollum v. Board of Educ.*, 333 U.S. 203 (1948) (on-campus release time for religion classes).

30. 403 U.S. 602, 612-13 (1971) (citations omitted). This three-part test has come in for considerable criticism, including critical comment by several Justices of the Supreme Court. See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573, 655, 659 (1989) (Justice Kennedy, joined by Chief Justice Rehnquist and Justices White and Scalia, suggests a test that "government may not coerce anyone to support or participate in any religion or its exercise; and it may not . . . give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so'"); *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting, suggests the abandonment of the purpose prong of the *Lemon* test); *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting, suggests a test whereby government may support religion so long as there is no preferential treatment between religions); *Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring, suggests a test of no-endorsement of religion); *Committee for Public Educ. & Relig. Liberty v. Nyquist*, 413 U.S. 756, 821-23 (1973) (White, J., dissenting) (objecting to the entanglement prong of the *Lemon* test as creating an insoluble dilemma for state aid to church-related programs and complaining of the majority's application of the second prong as *any* rather than the *primary* effect).

Criticism of *Lemon* and recent changes in the personnel of the Supreme Court have caused commentators to speculate that the *Lemon* test will be overruled during the 1991 Term when the Court takes up the case of *Lee v. Weisman*, 908 F.2d 1090 (1st Cir. 1990), *cert. granted*, 111 S.Ct. 1305 (U.S. Mar. 18, 1991) (No. 90-1014).

31. Concerning students, see *Board of Educ. v. Mergens*, 110 S. Ct. 2356 (1990) (equal access to speech forum at high school); *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986) (vocational rehabilitation program to study at college of choice); *Widmar v. Vincent*, 454 U.S. 263 (1981) (equal access to speech forum at university); *Board of Educ. v. Allen*, 392 U.S. 236 (1968) (loan of secular textbooks for use at schools); *Cochran v. Board of Educ.*, 281 U.S. 370 (1930) (free secular textbooks). Concerning parents, see *Mueller v. Allen*, 463 U.S. 388 (1983) (state income tuition tax deduction for parents of school-aged children); *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (reimbursement to parents for cost of school transportation). There are, of course, numerous Supreme Court cases where aid to primary and secondary parochial schools—as distinct from aid to students or parents—has been denied. These cases are collected *infra* note 75.

church-related colleges<sup>33</sup> and teenage counselling centers,<sup>34</sup> parents choosing church-based day care centers;<sup>35</sup> taxpayers contributing to religious groups;<sup>36</sup> and nonprofit tax exempt religious organizations.<sup>37</sup>

It is unclear whether the government may aid religious organizations but not nonreligious organizations with like tasks. In *Zorach v. Clauson*,<sup>38</sup> the Supreme Court sustained a public school, off-campus release-time program for students to attend religious classes, but not classes of other subject matter. However, several recent cases suggest that the benefit must target a more inclusive group of recipients as defined by a secular purpose or criteria.<sup>39</sup>

In conferring a benefit, the government may not discriminate by design or purpose on the basis of religious affiliation or denominational membership.<sup>40</sup> However, the court has upheld programs that have a dis-

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32. Both Medicare and Medicaid have explicit freedom-of-choice provisions permitting a recipient to choose a church-based hospital. See 42 U.S.C. § 1395a (1988); 42 U.S.C. § 1396a(a)(23) (1988).

33. *Roemer v. Board of Pub. Works*, 426 U.S. 736 (1976) (plurality opinion); *Hunt v. McNair*, 413 U.S. 734 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971). Both *Roemer* and *Hunt* are discussed *infra* note 77.

34. *Bowen v. Kendrick*, 487 U.S. 589 (1988). *Bowen* is discussed *infra* text accompanying notes 86-111.

35. A tax credit is available for child-care expenses of two-paycheck families, including families who select a church-based preschool. I.R.C. § 21 (1988). Under Title XX of the Social Security Act, day-care centers, including those with religious affiliation may be reimbursed for the cost of providing services to qualified low-income families. See 42 U.S.C. § 1397a (1988).

36. Federal income tax deductions are provided to those making charitable contributions, including donations to religious organizations. I.R.C. § 170 (1988).

37. Tax-exempt status is available, *inter alia*, to religious organizations. I.R.C. § 501(c)(3) (1988).

38. 343 U.S. 306 (1952).

39. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 10-18 nn.2-8 (1989) (plurality opinion) (striking down sales tax exemption for sales of religious literature by religious organizations; tax exemptions for religious groups and activities must embrace the nonreligious as well as the religious as defined by some overarching secular purpose such as cultural and moral improvement of society); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (dicta suggesting that moment of silence to begin school day is constitutional if statute does not mention prayer and purpose is not wholly religious); *id.* at 62 (Powell, J., concurring); *id.* at 67 (O'Connor, J., concurring); *id.* at 84 (Burger, C.J., dissenting); *id.* at 90 (White, J., dissenting); *id.* at 91 (Rehnquist, J., dissenting); *Mueller v. Allen*, 463 U.S. 388 (1983) (tax deduction available to all parents of school-age children; distinguishing Committee for Pub. Educ. & Relig. Liberty v. Nyquist, 413 U.S. 756 (1973) (striking down tax credit available only to parochial school parents)); see also *Board of Educ. v. Mergens*, 110 S. Ct. 2356 (1990) (equal access to public forum case that found no violation, *inter alia*, because forum open to all student groups); *Widmar v. Vincent*, 454 U.S. 263 (1981) (same).

40. *Larson v. Valente*, 456 U.S. 228 (1982) (charitable solicitation law struck down, *inter alia*, because of evidence that legislature motivated by animus toward new religious movements); *Gillette v. United States*, 401 U.S. 437, 451-52 (1971) (selective service system that granted conscientious objector status to pacifists, but not to those holding "just war" belief,



parate impact or discriminatory effect on the basis of religious belief.<sup>41</sup>

## B. Government Withholding a Benefit from Religious Organizations, When the Benefit is Available to Others Similarly Situated

In designing programs of aid, the Court has held that the First Amendment generally does not require government to confer benefits on religious organizations merely because the aid goes to secular groups similarly situated.<sup>42</sup> The only exceptions are where the Supreme Court has held that the Free Exercise Clause requires that the benefit be extended to religious individuals,<sup>43</sup> or the Free Speech Clause requires that

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was constitutional, *inter alia*, because exemption rooted in religious belief and not membership in particular denomination or church); *Wilson v. NLRB*, 920 F.2d 1282 (6th Cir. 1990), *petition for cert. filed*, 60 U.S.L.W. 3014 (1991) (No. 90-1362) (holding section 19 of National Labor Relations Act unconstitutional due to its requirement of membership in "bona fide religion" to take advantage of union membership exemption).

41. *Hernandez v. Commissioner*, 490 U.S. 680, 696 (1989) (denial of tax deduction for money paid to receive a service provided by new religious movement that adversely affects its adherents not thereby unconstitutional; IRS requirement that deductible contributions be without consideration was constitutionally neutral); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.30 (1983) (tax exemption legislation that in its interpretation has effect of disfavoring religious belief that races should not mix or inter-marry not unconstitutional); *Hefron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981) (state fair regulation concerning crowd control that had adverse effect on religious practice of soliciting sales and contributions from public not unconstitutional); *Gillette v. United States*, 401 U.S. 437, 454-60 (1971) (selective service legislation that in its effect favored religious pacifists over "just war" adherents not unconstitutional).

42. *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 nn.29-30 (1983) (religious, racially discriminatory school).

43. *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829 (1989) (state unemployment compensation may not be denied to person unwilling to accept employment that conflicts with religious belief or practice); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987) (same); *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981) (same); *Sherbert v. Verner*, 374 U.S. 398 (1963) (same).

There are four steps in every claim brought under the Free Exercise Clause. First, the claimant must show that his religious belief is sincerely held. Second, the claimant must show that the government's action burdens his religious belief, i.e., coercion of conscience is present to a degree that cannot be fairly said to be insignificant. Once the sincerity and coercion elements are demonstrated, the burden of producing evidence shifts to the government. At this point, the free exercise claimant prevails unless the state can prove two elements: first, that the societal interests at stake are compelling; and, second, that the state cannot achieve its purpose by means less restrictive to conscience. See *Frazee*, 489 U.S. 829; *Thomas*, 450 U.S. 707; and *Sherbert*, 374 U.S. 398.

The recent case of *Employment Div. v. Smith*, 494 U.S. 872 (1990), ostensibly overturns this time-honored four-step test, but it remains to be seen if *Smith's* material departure from precedent will become the standing order. Certainly alarms are sounding that *Smith* has worked a sea of change in Free Exercise Clause doctrine. See, e.g., Michael McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990); Douglas Laycock, *The Remnant of Free Exercise*, 1990 SUP. CT. REV. 1. Indeed, Congress has under consideration legislation to circumvent the harsh results of the *Smith* decision. See Religious

a public forum be available to everyone — including religious groups — without regard to the content of the speech.<sup>44</sup>

### C. Government Refraining from Imposing a Burden on Religious Organizations, When the Burden is Applicable to Others Similarly Situated

The Court has held that a legislature may refrain from imposing regulatory burdens on religious societies for reasons of tolerance or to reduce church-state entanglement,<sup>45</sup> and that such exemptions need not be extended to a more inclusive group as defined by a secular purpose or criteria.<sup>46</sup> A legislature may not grant an exemption with the purpose to discriminate along denominational lines or by religious affiliation.<sup>47</sup> However, a religious practice or belief may be exempted if the exemption has a secular purpose. Such an exemption may have an incidental effect of discriminating on the basis of religious belief,<sup>48</sup> and such an exemption need not be broadened when to do so invites increased church-state

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Freedom Restoration Act of 1991, H.R. 22797, 102d Con., 1st Sess., 137 CONG. REC. H5210 (1991).

44. *Board of Educ. v. Mergens*, 110 S. Ct. 2356 (1990) (public school may not, consistent with Free Speech Clause, deny equal access to limited public forum because content of speech is religious); *Widmar v. Vincent*, 454 U.S. 263 (1981) (same).

45. *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (upholding constitutionality of § 702 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-i (1988), which exempts from its nondiscrimination requirements discrimination on the basis of religion by religious employers); see *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123 (1982) (dictum approving zoning ordinances that protect houses of worship); *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772 (1981) (unemployment tax); *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979) (National Labor Relations Act); 10 U.S.C. § 774 (1987), overturning *Goldman v. Weinberger*, 475 U.S. 503 (1986) (denying free exercise right to military chaplain to wear religious headgear indoors contrary to regulations); "Church Amendment" to the Hill-Burton Act providing that denominational hospitals receiving federal aid under the act need not perform abortion or sterilization procedures if contrary to their beliefs, 42 U.S.C. § 300a-7 (1988) (the constitutionality of the Church Amendment was upheld in *Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308 (9th Cir. 1974)).

46. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (plurality opinion) (discussing why the religion-only benefit upheld in *Zorach v. Clauson*, 343 U.S. 306 (1952), and the religion-only exemption in *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987), are consistent with the Establishment Clause); *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327; *Forest Hills Early Learning Ctr., Inc. v. Grace Baptist Church*, 846 F.2d 260 (4th Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989) (constitutional to exempt church-operated child care centers from state regulations); see *Commonwealth v. Arlan's Dep't. Store*, 357 S.W.2d 708 (Ky 1962), *appeal dismissed*, 371 U.S. 218 (1962) (constitutional to exempt Jewish businesses from Sunday closing law).

47. See cases cited *supra* note 40.

48. *Gillette v. United States*, 401 U.S. 437 (1971); see *Hernandez v. Commissioner*, 490 U.S. 680 (1989); *Bob Jones University v. United States*, 461 U.S. 574, 604 n.30 (1983); *Heffran v. International Sec'y for Krishna Consciousness*, 452 U.S. 640 (1981).

entanglement.<sup>49</sup>

Concerning tax burdens, a legislature may refrain from imposing such a burden on religion,<sup>50</sup> so long as the tax exemption also benefits similarly situated nonreligious groups as justified by some overarching secular criteria.<sup>51</sup>

#### D. Government Imposing a Burden on Religious Organizations, When the Burden is Imposed on Others Similarly Situated

The Court has held that a legislature need not refrain from imposing a general regulatory burden on religious organizations,<sup>52</sup> except in cases of extreme inhibition of religion or instances of highly invasive administrative entanglement.<sup>53</sup> In First Amendment analysis, regulatory burdens are more likely to be problematic when dealing with pervasively sectarian organizations<sup>54</sup> and the noncommercial aspects of religious organizations.<sup>55</sup>

A legislature need not refrain from imposing a general tax that falls on religion, except in cases of extreme inhibition of religion or instances of highly invasive administrative entanglement.<sup>56</sup> However, no flat license tax may operate as a prior restraint on religion, nor may religious

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49. *Gillette*, 401 U.S. 437, 450; see *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 396-97 (1990); *Hernandez*, 490 U.S. 680; *Bob Jones Univ.*, 461 U.S. at 604 n.30; *Widmar v. Vincent*, 454 U.S. 263, 272 n.11 (1981).

50. *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (exemption from property tax); see *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772 (1981) (exemption from unemployment compensation tax).

51. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 10-18 nn.2-8 (1989).

52. *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290 (1985) (federal maximum hour and minimum wage laws).

53. The two exceptions are violative of the second and third prongs of *Lemon*. See *supra* note 30 and accompanying text.

54. See *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979) (National Labor Relations Act not applicable to lay teachers employed by Catholic primary and secondary schools). The term "pervasively sectarian" is defined *infra* note 77.

55. *Tony & Susan Alamo Found.*, 471 U.S. at 292 (maximum hour and minimum wage legislation applicable to the following operations of religious ministry: "service stations, retail clothing and grocery outlets, hog farms, roofing and electrical construction companies, a record keeping company, a motel, and companies engaged in the productions and distribution of candy") *But cf.* *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378 (1990).

56. *Jimmy Swaggart Ministries*, 493 U.S. at 392, 395-96; *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989); *Bethel Baptist Church v. United States*, 822 F.2d 1334 (3d Cir. 1987), *cert. denied*, 485 U.S. 959 (1988) (discussed *infra* note 63); *cf.* *Hernandez v. Commissioner*, 490 U.S. 680 (1989); *United States v. Lee*, 455 U.S. 252 (1982) (requiring Amish employer to withhold social security tax from wages of his employers, *inter alia*, because of government's compelling interest in uniform tax collection compliance).

activity be singled out for burdensome tax treatment.<sup>57</sup>

### III. A Review of the Statutory and Common-Law Interaction with Social Service Ministries

As explored in Part II, the interplay between law and religious agencies devoted to working on social problems takes the form of both regulatory burdens and the provision of a variety of governmental benefits.<sup>58</sup> This interaction with the positive law is at three levels: (A) federal statutory law and regulations promulgated thereunder; (B) state and local legislation and its accompanying regulations; and (C) the common law in its various manifestations of contract, tort, property, and trust law. This part addresses in turn each of these three levels.

#### A. Federal Statutes and Regulations

The federal law can be usefully divided into four categories: (1) labor law and employee benefits legislation; (2) taxes, tax regulation, and tax benefits; (3) civil rights acts prohibiting discrimination in employment and public accommodations; and (4) spending power legislation.

Principal examples of the interaction between social ministries and federal labor law and employee benefits legislation are: (i) the Federal Unemployment Tax Act;<sup>59</sup> (ii) the Fair Labor Standards Act and Child

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57. See *Jimmy Swaggart Ministries*, 493 U.S. at 385-92 (distinguishing and explaining *Follett v. Town of McCormick*, 321 U.S. 573 (1944), and *Murdock v. Pennsylvania*, 319 U.S. 105 (1943)).

58. See generally AMERICAN JEWISH CONGRESS, REPORT OF THE TASK FORCE ON SECTARIAN SOCIAL SERVICES AND PUBLIC FUNDING (1990); Thomas W. Pickrell & Mitchell A. Horwich, "Religion As an Engine of Civil Policy": A Comment on the First Amendment Limitations on the Church-State Partnership in the Social Welfare Field, LAW & CONTEMP. PROBS., Spring 1981, at 111; George H. Guilfoyle, *Church-State Relations in Welfare*, 3 CATH. LAW. 112 (1957); Timothy S. Burgett, Note, *Government Aid to Religious Social Services Providers: The Supreme Court's "Pervasively Sectarian" Standard*, 75 VA. L. REV. 1077 (1989).

59. 26 U.S.C. §§ 3301-3311 (1988). Two cases have reached the Supreme Court raising First Amendment defenses to the application of the FUTA to religious organization; however, neither case was decided on that issue. See *California v. Grace Brethren Church*, 457 U.S. 393 (1982); *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772 (1981).

For cases in the lower courts raising the issue of whether the FUTA is unconstitutional when applied to religious social services, see *Terwilliger v. St. Vincent Infirmary Medical Ctr.*, 804 S.W.2d 696 (Ark. 1991) (organization operated much as secular hospital, Catholic Medical Center is not exempt); *Employment Div. v. Rogue Valley Youth for Christ*, 770 P.2d 588 (Or. 1989) (state law exempting churches and church-run religious groups from paying FUTA is unconstitutional); *Kendall v. Director of the Div. of Employment Sec.*, 473 N.E.2d 196 (Mass. 1985) (Catholic special education facility for developmentally disabled is exempt); *Baptist Children's Homes v. Employment Sec. Comm'n*, 290 S.E.2d 402 (N.C. Ct. App. 1982) (church need not pay tax for ordained minister who worked as house parent at children's home); *Bishop Leonard Regional Catholic Sch. v. Unemployment Comp. Bd. of Review*, 593 A.2d 28 (Pa. Commw. 1991) (denial of unemployment compensation to teacher discharged for

Labor Law Act;<sup>60</sup> (iii) the National Labor Relations Act;<sup>61</sup> (iv) the Immigration Reform and Control Act;<sup>62</sup> (v) the Social Security Act and

misconduct by Catholic school because she married a divorced non-Catholic does not violate Establishment Clause). See generally Agatstein, *Unemployment Insurance and the Religion Clauses of the United States Constitution*, 10 J. NAT'L ASS'N ADMIN. JUDGES 63 (1990).

60. 29 U.S.C. §§ 201-219 (1988). In *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290 (1985), the Supreme Court upheld the application of the FLSA to a religious organization. However, the activities held subject to the act were commercial in nature: service stations, retail clothing and grocery outlets, hog farms, roofing and electrical contracting, a record keeping company, a motel, and a candy business. *Id.* at 291-92.

The minimum wage and maximum hour provisions of the FLSA have been found applicable to ministerial employees of church-affiliated schools. See *DeArment v. Harvey*, 932 F.2d 721 (8th Cir. 1991); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir.), *cert. denied*, 111 S. Ct. 131 (1990).

For cases in the lower courts raising the issue of whether the Child Labor Law Act is unconstitutional when applied to religious social services, see *McLaughlin v. McGee Bros. Co.*, 681 F. Supp. 1117 (W.D.N.C. 1988), *aff'd sub nom. Brock v. Wendell's Woodwork, Inc.*, 867 F.2d 196 (4th Cir. 1989) (application of child labor laws to church's rehabilitation ministry for children not unconstitutional); *Shiloh True Light Church of Christ v. Brock*, 670 F. Supp. 158 (W.D.N.C. 1987) (application of child labor laws to church's vocational training program not unconstitutional).

61. 29 U.S.C. §§ 151-169 (1988). In *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979), the Supreme Court held that the NLRA did not apply to parochial schools. While finding it unnecessary to reach the issue, the Court said that NLRA application to lay teachers at a parochial school would raise serious First Amendment questions. *Id.* at 502, 504.

For cases in the lower courts raising the issue of whether the NLRA is unconstitutional when applied to religious social services, see *NLRB v. Hanna Boys Ctr.*, 940 F.2d 1295 (9th Cir. 1991) (residential home and school for boys owned by Catholic Church not exempt); *NLRB v. Kemmerer Village, Inc.*, 907 F.2d 661 (7th Cir. 1990) (foster home of Presbyterian Church not exempt); *Volunteers of America v. NLRB*, 777 F.2d 1386 (9th Cir. 1985) (alcoholism services division of church not exempt); *NLRB v. The Salvation Army of Massachusetts Dorchester Day Care Ctr.*, 763 F.2d 1 (1st Cir. 1985) (church-affiliated day care center not exempt); *Volunteers of America—Minnesota—Bar None Boys Ranch v. NLRB*, 752 F.2d 345 (8th Cir.), *cert. denied*, 472 U.S. 1028 (1985) (residential treatment and religious education center not exempt); *Denver Post of the Nat'l Soc'y. of the Volunteers of Am. v. NLRB*, 732 F.2d 769 (10th Cir. 1984) (religious-affiliated medical center not exempt); *St. Elizabeth Hosp. v. NLRB*, 715 F.2d 1193 (7th Cir. 1983) (religious hospital not exempt); *St. Elizabeth Community Hosp. v. NLRB*, 626 F.2d 123 (9th Cir. 1980), *appeal after remand*, 708 F.2d 1436 (9th Cir. 1983) (Catholic hospital's prisoner ministry, youth recreational program, camps and retreats not exempt); *Tressler Lutheran Home for Children v. NLRB*, 677 F.2d 302 (3d Cir. 1982) (church-operated nursing home not exempt); *NLRB v. St. Louis Christian Home*, 663 F.2d 60 (8th Cir. 1981) (church-affiliated residential treatment center for abused and neglected children not exempt). See generally Ellyn S. Rosen, Note, *Keeping the Camel's Nose Out of the Tent: The Constitutionality of N.L.R.B. Jurisdiction over Employees of Religious Institutions*, 64 IND. L.J. 1015 (1989).

62. 8 U.S.C. § 1324a (1986). For cases raising the issue of whether the Immigration Reform and Control Act is unconstitutional when applied to religious social services, especially those working within the "sanctuary movement," see *American Friends Serv. Comm. v. Thornberg*, 718 F. Supp. 820 (C.D. Cal. 1989), *aff'd*, 941 F.2d 808 (9th Cir. 1991) (Quaker organization not exempt); *Intercommunity Ctr. for Justice and Peace v. INS*, 910 F.2d 42 (2d Cir. 1990) (Catholic community center for justice and peace not exempt); *American Baptist Churches v. Meese*, 666 F. Supp. 1358 (N.D. Cal. 1987) and 712 F. Supp. 756 (N.D. Cal.

ERISA,<sup>63</sup> and (vi) the Occupational Safety and Health Act.<sup>64</sup>

Principal examples of the interaction of social ministries and federal taxes, tax regulation and tax benefits are: (i) regulations governing the lobbying and political activities of Internal Revenue Code Section 501(c)(3) organizations;<sup>65</sup> (ii) the case law resisting the IRS requirement to annually file Form 990;<sup>66</sup> (iii) the Church Audit Procedures Act,<sup>67</sup> and

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1989) (First Amendment rights of sanctuary workers not violated); *cf.* *Presbyterian Church v. United States*, 870 F.2d 518 (9th Cir. 1989), *on remand*, 752 F. Supp. 1505 (D. Ariz. 1990) (investigative practices by INS agents violated First Amendment rights of churches suspected of participating in sanctuary movement).

63. Under the Social Security Amendments of 1983, Pub. L. No. 98-21, § 102(b)(1)(C), (b)(2), 97 Stat. 70-71, and the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494, churches became liable for the payment of social security taxes on their employees unless they opted out within a statutorily defined period. In the event that a church chooses not to participate, its employees become subject to the social security tax at the self-employment rate. In either instance, the church is required to withhold the tax and pay the appropriate funds to the government. Prior to the amendments, nonprofit organizations including churches were automatically excluded from social security participation unless they affirmatively elected to participate.

In *Bethel Baptist Church v. United States*, 822 F.2d 1334 (3d Cir. 1987), *cert. denied*, 485 U.S. 959 (1988), a church and its pastor, employees, and certain members, unsuccessfully challenged these amendments as violative of First Amendment rights. Relying on *United States v. Lee*, 455 U.S. 252 (1982), the Court held that the government's compelling interest in maintaining a sound revenue system outweighed religious liberty concerns.

Concerning the applicability of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (1988), to religious organizations, see Jack Myers, *The Church Plan Under Recent Pension Legislation*, 27 CATH. LAW. 185 (1982); Thomas G. Tracy, *Church Plans*, 60 TAXES 33 (1982).

64. 29 U.S.C. §§ 651-678 (1988). Depending on the nature of their activities, a religious ministry may be subject to both federal and state-enacted job-safety legislation, e.g., a religious-affiliated employment center for the disabled or mentally retarded. The federal act applies to all corporations, including nonprofit corporations. 29 U.S.C. § 652. No exemptions obtain for religious, education, or charitable corporations. The federal act applies to all employers "affecting commerce," 29 U.S.C. § 652(5), which evidences an intent to assert jurisdiction to the fullest extent permitted by the Commerce Clause. OSHA imposes duties on employers to follow applicable administrative regulations for their industry in order to provide safe working conditions. Noncompliance with the regulations can result in judicial enforcement proceedings and/or fines and imprisonment. A state may preempt the federal standards on submission to and approval by the federal Secretary of Labor of a state plan of enforcement. 29 U.S.C. § 667.

65. I.R.C. § 501(c)(3) imposes two restrictions on nonprofit, tax-exempt public charities, including religious social ministries: First, a blanket prohibition on the organization's involvement in political campaigns; and second, a requirement that no substantial part of its activities be devoted to influencing legislation, i.e., lobbying. See LYNN R. BUZZARD & SHERRA ROBINSON, I.R.S. POLITICAL ACTIVITY RESTRICTIONS ON CHURCHES AND CHARITABLE MINISTRIES (1990); Richard L. Haight, *Lobbying for the Public Good: Limitations on Legislative Activities by Section 501(c)(3) Organizations*, 23 GONZ. L. REV. 77 (1987); Wilfred R. Caron & Deirdre Dessingue, *IRC Sec. 501(c)(3): Practical and Constitutional Implications of "Political" Activity Restrictions*, 2 J.L. & POL. 169 (1985).

66. Under 26 U.S.C. § 6033(a)(2)(A)(i) and Treas. Reg. § 1.6033-2(g)(5), an organization is an "integrated auxiliary of a church" exempt from filing an informational return if it is (1)

(iv) the utilization of IRC Sections 170 and 501(c)(3) to disfavor religious organizations acting contrary to "public policy."<sup>68</sup>

Principal examples of the interaction of social ministries and federal legislation prohibiting discrimination in employment and public accommodations are: (i) Titles II and VII of the Civil Rights Act of 1964;<sup>69</sup> (ii)

tax exempt, (2) affiliated with a church, and (3) its principal activity is exclusively religious. Under Treas. Reg. § 1.6033-2(g)(5)(ii), "[a]n organization's principal activity will not be considered to be exclusively religious if that activity is educational, literary, charitable, or of another nature (other than religious) that would serve as a basis for exemption under section [26 U.S.C.] § 501(c)(3)."

The courts have rejected, as inconsistent with congressional intent, the IRS view stated above that religious charities cannot be "exclusively religious." See *Tennessee Baptist Children's Home, Inc. v. United States*, 790 F.2d 534 (6th Cir. 1986) (church-affiliated tax-exempt charity can be "exclusively religious integrated auxiliary" exempt from annual filing of informational Form 990); *Lutheran Children & Family Serv. v. United States*, 1986 WestLaw 7834 (E.D. Pa. 1986) (same); *Lutheran Social Serv. v. United States*, 758 F.2d 1283 (8th Cir. 1985), *on remand*, 583 F. Supp. 1298 (D. Minn. 1986) (same). See generally Edward Gaffney, *Governmental Definition of Religion: The Rise and Fall of the IRS Regulations on an "Integrated Auxiliary of a Church"*, 25 VAL. U. L. REV. 203 (1991).

67. 26 U.S.C. § 7611 (1988). See JAMES E. GUINN, CHURCH AUDITS UNDER THE 1984 TAX REFORM ACT, EXEMPT ORGANIZATIONS ¶¶ 3063-3691 (1985).

68. See *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983), in which the Supreme Court upheld the IRS's revocation of the tax-exempt status of a religious university and a church-affiliated primary and secondary school because of their racially discriminatory practices. Without explicit statutory authorization from Congress, the IRS had issued a revenue ruling stating that continued exemption of private, racially discriminatory schools was inimical to "public policy." *Id.* at 579. In an extended discussion, the Court held that the IRS's ruling was a fair interpretation of the Internal Revenue Code, *id.* at 585-99, and in accord with the wishes of Congress despite its inaction on the matter, *id.* at 599-603. Concurring in part and concurring in the judgment, Justice Powell wrote separately to express his concern that tax benefits should not be used to impose on nonprofit organizations a requirement of fidelity to government orthodoxy, *id.* at 606-09, and to object to the notion that the IRS "is invested with authority to decide which public policies are sufficiently 'fundamental' to require denial of tax exemptions," *id.* at 611.

Notwithstanding the agreed finding of fact that the discriminatory practices of the two schools arose out of religious beliefs, the Court held that a compelling interest in eradicating racism in education overcame any Free Exercise or Establishment Clause defenses. *Id.* at 602-03, 603 nn.29-30.

The IRS continues to enforce revenue procedures setting forth guidelines for determining whether a private school or preschool — including those that are church related — are engaging in racial discrimination. Rev. Proc. 72-54, 1972-2 C.B. 834; Rev. Proc. 75-50, 1975-2 C.B. 587. Each school must certify annually to the IRS that it has satisfied certain requirements directed at preventing racial discrimination. This is accomplished on form 5578.

69. Title II is codified at 42 U.S.C. § 2000a-a-6 (1988), and Title VII is codified at 42 U.S.C. § 2000e-e-17 (1988). In *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987), the Supreme Court held that § 702 of Title VII did not violate the Establishment Clause. Section 702 exempts religious organizations from the prohibition on religious discrimination in employment.

For lower court cases involving the First Amendment and discrimination by religious social services, see *Speer v. Presbyterian Children's Home & Serv. Agency*, 55 Empl. Prac. Dec. (CCH) ¶ 40,512 (Tex. D. Ct. 1990) (children's home does not waive § 702 exemption by

the Equal Pay Act of 1963;<sup>70</sup> (iii) the Age Discrimination in Employment Act of 1975;<sup>71</sup> and (iv) the Americans With Disabilities Act of 1990.<sup>72</sup>

In terms of complexity and probable future expansion, by far the more interesting religious liberty issues arise when pursuant to its spending power, the federal government enacts programs providing benefits to private-sector social service agencies. Over 350 federal statutory programs provide aid to private-sector organizations through grants, contracts, or cooperative agreements.<sup>73</sup> The social ministries of religious bodies are presumptively eligible to participate in many of these programs.<sup>74</sup> Each program's benefits are accompanied by regulatory burdens. Of course, all such programs require the private-sector agencies to

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hiring members of different religious denomination); *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 736 F. Supp. 1018 (E.D. Mo. 1990), *aff'd*, 929 F.2d 360 (8th Cir. 1991) (discharge of chaplain, a female priest, not actionable against religious hospital under Title VII and Age Discrimination Act); *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697 (8th Cir. 1987), *reh'g denied*, 840 F.2d 583 (8th Cir. 1988) (dismissal of a pregnant, single employee for violating girls club's "role model rule" not violative of Title VII); *Ninth & O Street Baptist Church v. EEOC*, 616 F. Supp. 1231 (W.D. Ky. 1985) (EEOC may conduct investigation into discrimination charge at church child-care center); *Fike v. United Methodist Children's Home, Inc.*, 493 F. Supp. 935 (E.D. Va. 1980), *rev'd*, 660 F.2d 489 (4th Cir. 1981), *and summary judgment on remand*, 547 F. Supp. 286 (E.D. Va. 1982), *and aff'd*, 709 F.2d 284 (4th Cir. 1983) (children's home replacement of executive director with ordained minister not Title VII violation). *See generally* Laycock, *supra* note 28; Mark F. Kohler, Comment, *Equal Employment or Excessive Entanglement? The Application of Employment Discrimination Statutes to Religiously Affiliated Organizations*, 18 CONN. L. REV. 581 (1986).

70. 29 U.S.C. § 206(d) (1988). There are no reported cases involving a religious social ministries clashing with the Equal Pay Act of 1963. For cases involving the First Amendment and discrimination by church-based schools, see *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir.), *and cert. denied*, 111 S. Ct. 131 (1990) ("head of household" allowance for married, male teachers with dependent children, but not for similarly situated females, violates act); *EEOC v. Tree of Life Christian Schs.*, 751 F. Supp. 700 (S.D. Ohio 1990) (same).

71. 42 U.S.C. §§ 6101-6107 (1988). For cases involving the First Amendment and age discrimination by religious social ministries, see *Lukaszewski v. Nazareth Hosp.*, 764 F. Supp. 57 (E.D. Pa. 1991) (First Amendment not violated by application of act to religious hospital); *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 736 F. Supp. 1018 (E.D. Mo. 1990), *aff'd*, 929 F.2d 360 (8th Cir. 1991) (discharge of chaplain, a female priest, not actionable against religious hospital under Title VII and Age Discrimination Act); *cf. Cochran v. St. Louis Preparatory Seminary*, 717 F. Supp. 1413 (E.D. Mo. 1989) (act cannot be applied to seminary).

72. 42 U.S.C. §§ 12101-12213 (Supp. 1991). The act exempts religious organizations from its title prohibiting discrimination in public accommodations. *Id.* § 12187. Although not exempt from the act's title prohibiting discrimination in employment, religious entities may have religious preferences and require employees to follow its religious tenets. *Id.* § 12113(c).

73. Michael W. McConnell, *Political and Religious Disestablishment*, 1986 B.Y.U. L. REV. 405, 420-21.

74. *See id.* at 421-29; Burgett, *supra* note 58, at 1081-87; *Bill to Provide for Judicial Review of the Constitutionality of Grants or Loans Under Certain Acts: Hearings on S. 2097 Before the Subcommittee on Constitutional Rights of the Senate Judiciary Comm.*, 89th Cong., 2d Sess. 699-716 (1968) (noting welfare programs that may provide benefits to religious social services).



account for the use of public moneys or the proper utilization of an in-kind transfer of goods. Often, however, the regulations are more pervasive: moving from the noncontroversial health and safety standards; progressing on to nondiscrimination requirements as to employees and individuals served by the social service agency; and, most meddlesome, to various degrees of control over the curriculum or program content offered by the religious ministry as it meets the temporal needs of its clientele. An additional complexity is introduced when the federal legislation involves state and local governments in both revenue sharing and the regulatory oversight of the private-sector programs.

### 1. *Supreme Court Cases on Aid to Social Ministries*

Although the Supreme Court, with limited exceptions, has blocked most forms of government spending on primary and secondary schools operated by religious organizations,<sup>75</sup> this has not been the pattern concerning government aid to church-affiliated institutions of higher education.<sup>76</sup> The Court has found most primary and secondary schools to be "pervasively sectarian," whereas church-related colleges generally are not.<sup>77</sup> Hence, church secondary schools generally cannot receive govern-

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75. The Court struck down government aid in *Aguilar v. Felton*, 473 U.S. 402 (1985) (public school teachers providing remedial education and attendant materials at religious school campus); *School Dist. v. Ball*, 473 U.S. 373 (1985) (public instructional equipment); *Meek v. Pittenger*, 421 U.S. 349 (1975) (counseling and special education services provided at religious school campus; loan of instructional equipment); *Committee for Pub. Educ. & Relig. Liberty v. Nyquist*, 413 U.S. 756 (1973) (grants for building maintenance; tuition grants to parents; tuition tax credits); *Sloan v. Lemon*, 413 U.S. 825 (1973) (tuition reimbursement); *Levitt v. Committee for Pub. Educ. & Relig. Liberty*, 413 U.S. 472 (1973) (reimbursement for cost of teacher-prepared testing and record keeping required by law); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (teacher salary supplement; cash reimbursement for textbooks).

The Supreme Court has upheld state aid to primary and secondary religious schools in *Mueller v. Allen*, 463 U.S. 388 (1983) (tuition tax deductions); *Committee for Pub. Educ. & Relig. Liberty v. Regan*, 444 U.S. 646 (1980) (subsidy for state-prepared testing and record keeping required by law); *Wolman v. Walter*, 433 U.S. 229 (1977) (textbooks; standardized tests and scoring services; diagnostic services on campus with therapeutic services to follow off-campus if indicated); *Meek v. Pittenger*, 421 U.S. 349 (1975) (loan of textbooks); *Board of Educ. v. Allen*, 392 U.S. 236 (1968) (textbooks); *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (reimbursement for bus transportation).

76. *Roemer v. Board of Pub. Works*, 426 U.S. 736 (1976) (plurality opinion); *Hunt v. McNair*, 413 U.S. 734 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971).

77. In *Roemer v. Board of Pub. Works*, 426 U.S. 736, 758-59 (1976) (plurality opinion), the Supreme Court turned back a challenge to the constitutionality of a state funding program that afforded noncategorical grants to eligible colleges and universities, including sectarian institutions that awarded more than just seminarian or theological degrees. In discussion focused on the fostering of religion, the Supreme Court said:

[T]he primary-effect question is the substantive one of what private educational activities, by whatever procedure, may be supported by state funds. [*Hunt v. McNair*, 413 U.S. 734 (1973)] requires (1) that no state aid at all go to institutions that are so

ment aid, for these schools exist to propagate the faith. Interestingly, when the government benefit to primary and secondary schools is directed to parents or students, as opposed to aid given directly to the religious school, the Court has recently upheld the governmental program.<sup>78</sup>

Unlike the many lawsuits concerning church-affiliated schools, the Supreme Court has reviewed only two cases challenging the constitutionality of a welfare program that benefitted, *inter alia*, a religious social ministry.<sup>79</sup> In *Bradfield v. Roberts*,<sup>80</sup> a corporation located in the District of Columbia known as Providence Hospital was chartered in 1864 by act of Congress. The legislation establishing the corporation was facially neutral in that it made no mention of religion, nor was the hospi-

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“pervasively sectarian” that secular activities cannot be separated from sectarian ones, and (2) that if secular activities *can* be separated out, they alone may be funded.

*Roemer*, 426 U.S. at 755 (emphasis in original).

The Baptist college in *Hunt* and the Roman Catholic colleges in *Roemer* were held not to be “pervasively sectarian.” The record in *Roemer* supported findings that the institutions employed chaplains who held worship services on campus, taught mandatory religious classes, and started some classes with prayer. However, there was a high degree of autonomy from the Roman Catholic Church, the faculty was not hired on a religious basis and had complete academic freedom except in religious classes, and students were chosen without regard to their religion. The challenged state aid in *Hunt* was for the construction of secular college facilities. The legislation granted the authority to issue revenue bonds. The Court upheld the legislation, commenting on the primary-effect test:

Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.

*Hunt*, 413 U.S. at 743

A comparison of the colleges in *Roemer* and *Hunt* with the elementary and secondary schools in *Committee for Pub. Educ. & Relig. Liberty v. Nyquist*, 413 U.S. 756, 767-68 (1973), will help to clarify the term “pervasively religious.” The parochial schools in *Nyquist*, found to be pervasively religious, conformed to the following profile: the schools placed religious restrictions on student admissions and faculty appointments, they enforced obedience to religious dogma, they required attendance at religious services, they required religious or doctrinal study, they were an integral part of the religious mission of the sponsoring church, they had religious indoctrination as a primary purpose, and they imposed religious restrictions on how and what the faculty could teach. The state aid in *Nyquist* was held to be prohibited by the Establishment Clause.

78. See *Witters v. Washington Dep’t. of Servs. for the Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983); *Everson v. Board of Educ.*, 330 U.S. 1 (1947). *But cf.* *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).

79. For commentary on the controversy created when the Kennedy administration’s Peace Corps and the Johnson administration’s anti-poverty programs announced that they would allow religious agencies to participate in these programs, see LEO PFEFFER, *CHURCH, STATE AND FREEDOM 202-05* (rev. ed. 1967); Robert R. Sullivan, *The Politics of Altruism: The American Church-State Conflicts in the Food-for-Peace Program*, 11 J. CHURCH & ST. 47 (1969).

80. 175 U.S. 291 (1899). See generally Ralph L. Block, Comment, *Hospital Aid and the Establishment Clause: Conflict or Accommodation?*, 13 UCLA L. REV. 1100 (1966).

tal ostensibly controlled by or associated with a church. Nevertheless, all of the directors of the hospital and their successors were "composed of members of a monastic order or sisterhood of the Roman Catholic Church,"<sup>81</sup> and title to the real estate on which the hospital buildings were constructed was "vested in the Sisters of Charity of Emmitsburg, Maryland."<sup>82</sup> Federal taxpayers challenged as violative of the Establishment Clause an 1897 congressional appropriation to build on the hospital grounds "an isolating building or ward for the treatment of minor contagious diseases,"<sup>83</sup> that when completed was to be turned over to Providence Hospital. This arrangement, alleged plaintiffs, was an instance where "public funds are being used and pledged for the advancement and support of a private and sectarian corporation."<sup>84</sup> For consideration of only the question before it, the Supreme Court assumed that a capital appropriation to a religious corporation would violate the Establishment Clause. Assuming, *arguendo*, that this was a correct statement of law, the Court said plaintiffs' allegations nonetheless failed to show that Providence Hospital was a religious or sectarian body. Merely because the board of directors was entirely composed of members of the same religion did not make the hospital religious. Without additional evidence, the Court was unwilling to assume that Providence Hospital would act otherwise than in accord with its legal charter, wherein its powers by all appearances were secular, having to do with the care of the injured and infirm. Although plaintiffs alleged that the hospital's business was "conducted under the auspices of the Roman Catholic Church," there was no evidence that management of the business was limited to members of that faith or that the work of the hospital was limited to Roman Catholics.<sup>85</sup> Accordingly, Bradfield turned on the inadequacies of plaintiffs' pleadings and a formalistic view of the importance of separate incorporation through a charter worded in religiously neutral terms, even though the corporation had *de facto* an interlocking directorate with a religious order.

In *Bowen v. Kendrick*,<sup>86</sup> by the narrow margin of 5 to 4, the Court sustained the "facial" constitutionality of The Adolescent Family Life

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81. 175 U.S. at 297.

82. *Id.*

83. *Id.* at 293.

84. *Id.*

85. *Id.* at 298-99. See also *Kentucky Bldg. Comm'n v. Efron*, 220 S.W.2d 836 (Ky. 1949) (holding that state grants to Episcopalian and Catholic hospitals do not violate state or federal constitutions).

86. 487 U.S. 589 (1988).

Act (AFLA).<sup>87</sup> Under the AFLA, the Secretary of Health and Human Services (HHS) authorizes direct cash grants to both public and private nonprofit organizations doing research or providing services in the areas of teenage pregnancy and counseling to adolescents concerning premarital sexual relations. Accordingly, the societal problem addressed by the AFLA is a blend of health, economic, and moral issues surrounding premarital sex and pregnancy out of wedlock. The statute defined an eligible grant recipient as a "public or non-profit private organization or agency," apparently permitting otherwise qualified religious organizations to receive the grants on the same terms as secular agencies.<sup>88</sup> Moreover, language in the act expressly invited participation by religious organizations and required certain secular grantees to take into account involvement of religious organizations along with family and community volunteer groups in addressing the problem of adolescent sexuality.<sup>89</sup> These provisions were written into the law to insure that religious groups be treated in a nondiscriminatory manner when compared with other similarly situated eligible grant recipients. No statutory language specifically barred the use of grant monies for worship, prayer, or other intrinsically religious activities. Finally, other than routine fiscal accountability to ensure that federal funds were not misappropriated, no monitoring or other oversight was entailed in the resulting relationship between HHS and religious organizations.

After describing the broad outlines of the AFLA, the Court utilized the three-prong *Lemon* test for its Establishment Clause analysis.<sup>90</sup> A statute must have, according to the first of the three requirements laid down in *Lemon*, a "secular legislative purpose."<sup>91</sup> The Supreme Court will invalidate legislation under *Lemon's* first prong, only when it can be said that the law's "pre-eminent purpose . . . is plainly religious in nature"<sup>92</sup> or when "it is motivated wholly by an impermissible purpose."<sup>93</sup> The contending parties in *Bowen v. Kendrick* agreed "that, on the whole, religious concerns were not the sole motivation behind the Act."<sup>94</sup> As

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87. 42 U.S.C. § 300z to z-10 (1988).

88. 487 U.S. at 593, 608-09.

89. *Id.* at 595-96, 605-07.

90. *Id.* at 602. See text accompanying *supra* note 30.

91. *Lemon v. Kurtzman*, 401 U.S. 602 (1971); see text accompanying *supra* note 30.

92. *Stone v. Graham*, 449 U.S. 39, 41 (1980) (per curiam); see also *Edwards v. Aguillard*, 482 U.S. 578, 590 (1987) ("preeminent religious purpose"); *id.* at 605 ("interference with the decisions of these authorities [school boards] is warranted only when the purpose for their decisions is clearly religious") (Powell, J., concurring) (emphasis added).

93. *Bowen*, 487 U.S. at 602 (citing *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) ("motivated wholly by religious considerations")).

94. *Id.* at 602-03.

has become normal in its approach,<sup>95</sup> the Court's application of the purpose test was highly deferential to the legislature. Because a plausible, nonreligious purpose appeared on the face of the challenged legislation, the Court was inclined summarily to announce this element of the test satisfied and move quickly on to the second and third factors in *Lemon*.<sup>96</sup>

*Lemon's* second prong requires that the "principal or primary effect" of a law or governmental policy "must be one that neither advances nor inhibits religion."<sup>97</sup> The Supreme Court has sustained the constitutionality of laws that have only an incidental or de minimis effect of advancing religion.<sup>98</sup> When religion is materially advanced by legislation, albeit unintentionally, the effect or impact presumably would be apparent from the day-to-day operation of the act. That is, in a straightforward application of the effect test, the Court requires measurable, palpable evidence tendered by the plaintiff that a religion, or religion generally, has been advanced. However, where the recipient of a governmental benefit is "pervasively sectarian," the Court has been willing to infer or assume that the impact of the benefit program will be to materially advance religion.<sup>99</sup> This, of course, gives the effect prong a preemptive strike capability. Even though no actual advancement of religion has been shown by the evidence, the mere presence of such a hazard is sufficient to strike down the legislation. The Court's definition of a "pervasively sectarian" institution has been stated in general terms, but only church-affiliated primary and secondary schools have ever been found by the Supreme Court to fit the profile. (Presumably, a church, synagogue, or mosque would also be regarded as "pervasively sectarian.")

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95. In addition to the cases cited *supra* notes 92-93, see *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987) (the test is not that a "law's purpose must be unrelated to religion," for that would require government to "show a callous indifference to religious groups" (citation omitted)); *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) ("a statute that is motivated in part by a religious purpose" does not violate the purpose prong).

96. *Bowen*, 487 U.S. at 602-04. The Supreme Court has in most cases easily found a permissible purpose in a statute's language, its legislative history, or simply by exercising common sense. The dissenting Justices acceded to this approach in *Bowen*, *id.* at 634, in which Justice Blackmun stated: "As is often the case, it is the effect of the statute, rather than its purpose, that creates Establishment Clause problems. . . . I have no meaningful disagreement with the majority's discussion of the AFLA's essentially secular purpose."

97. *Lemon*, 403 U.S. at 612; see text accompanying *supra* note 30.

98. See, e.g., *Widmar v. Vincent*, 454 U.S. 263 (1981) (freedom of speech rights require a state university to afford equal access to student religious groups, and such utilization of government facilities has no religious effect other than "incidental").

99. See *School Dist. v. Ball*, 473 U.S. 373, 385, 387 (1985); *Wolman v. Walter*, 433 U.S. 229, 254 (1977); *Meek v. Pittenger*, 421 U.S. 349, 370, 372 (1975); *Levitt v. Committee for Pub. Educ. & Relig. Liberty*, 413 U.S. 472, 480 (1973).

Critical to the result in *Bowen v. Kendrick* was that the majority refused to find that religiously based teenage counseling centers were necessarily "pervasively sectarian."<sup>100</sup> There was nothing "inherently religious," pointed out the Court, about the activities and services provided by the grantees to adolescents with premarital sexuality questions and problems.<sup>101</sup> Simply because the AFLA expressly required that religious organizations be considered among the available grantees and that they be taken into account by secular grantees, did not have the effect of endorsing a religious view of how to solve the problem.<sup>102</sup> The Court saw Congress as neutral with respect to grantee status when Congress simply required that all organizations, secular or religious, be considered on an equal footing. The law did not violate the Establishment Clause merely because religious teachings and the moral values urged by the AFLA overlap.<sup>103</sup> Moreover, that the form of the governmental benefit was a direct cash grant did not, so long as the organization was not "pervasively sectarian," offend the First Amendment.<sup>104</sup> Finally, that the ultimate clientele the act sought to help were impressionable adolescents, did not without more, present an unacceptable risk that the Establishment Clause was violated.<sup>105</sup>

Although the AFLA had no express statutory bar to the use of federal funds for worship, prayer, or other inherently religious activities, the Court did warn that "we have said that the Establishment Clause does 'prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith.'"<sup>106</sup> No such danger existed here, thought the Court, because the grantees were not necessarily "pervasively sectarian."

In evaluating the third prong of *Lemon*, the Court examines whether the statute in question fosters an excessive administrative entanglement between the institutions of religion and the offices of government.<sup>107</sup> The prohibition on excessive entanglement is rooted, *inter alia*, in the duty to safeguard "the freedom of even the adherents of the denomination [supported by the law from being] limited by the governmental intrusion into sacred matters."<sup>108</sup> In *Bowen v. Kendrick*, the

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100. *Bowen*, 487 U.S. at 610-11. See Burgett, *supra* note 58 (critical of Bowen's application of "pervasively sectarian" analysis to social services).

101. *Bowen*, 487 U.S. at 604-05, 613.

102. *Id.* at 605-06.

103. *Id.* at 606-07.

104. *Id.* at 606, 608.

105. *Id.* at 611-12.

106. *Id.* at 611 (quoting *School Dist. v. Ball*, 473 U.S. 373, 385 (1985)).

107. *Lemon*, 403 U.S. at 613; see text accompanying *supra* note 30.

108. *Aguilar v. Felton*, 473 U.S. 402, 410 (1985).

monitoring by HHS of the AFLA grantees was necessary only to ensure that federal money not be misappropriated. There was no requirement that religious grantees follow any federal guidelines concerning the content of the advice given teenagers, not discriminate as to the clientele they served, or otherwise modify their values or program. Because religious grantees were not necessarily “pervasively sectarian,” the majority held that this limited monitoring by HHS could not be said to be unconstitutionally entangling.<sup>109</sup>

Central to the AFLA not being facially unconstitutional was the Court’s finding that religious grantees are not necessarily pervasively sectarian. However, the matter was remanded for a case-by-case analysis concerning each religious grantee.<sup>110</sup> As to each grantee, the AFLA “as applied” might violate the Establishment Clause, and such would be true particularly if the grantee in question matched a pervasively sectarian profile. Dividing the analysis between “facial” and “as applied” places a considerable burden on strict separationists — at least insofar as they rely on the effect and entanglement prongs of *Lemon* — because a strict separationist agenda to halt government aid can be advanced in the courts only on a piecemeal or case-by-case basis. Henceforth, a violation of the effect and entanglement prongs must be buttressed by palpable evidence (not a mere “risk”) that religion is being advanced — the only exception being pervasively sectarian, church-affiliated primary and secondary schools. As a consequence of *Bowen v. Kendrick*, it appears that government aid to social service ministries can be struck down only on an “as applied” basis. In a concurring opinion, however, Justice O’Connor warns that evidence of a pattern or practice of HHS disregard of Establishment Clause concerns would, in her view, be cause for overturning the entire AFLA as the appropriate remedy.<sup>111</sup>

## 2. *Federal Spending Legislation and Social Ministries*

In its language, federal welfare legislation often takes into account that some of the private sector organizations receiving financial assistance will be religious ministries. These provisions may be usefully organized around five types of express terms: (1) statutory restrictions that are a complete bar to benefits going to a religious organization; (2) statutory restrictions on benefits being utilized in a facility that is not a “religiously

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109. *Bowen*, 487 U.S. at 615-17.

110. *Id.* at 620-22. Following remand to proceed with the plaintiffs’ attack on the AFLA “as applied,” the district court denied plaintiffs’ motion for summary judgment because there remained genuine issues of fact for trial. *Kendrick v. Sullivan*, 766 F. Supp. 1180 (D.D.C. 1991).

111. *Bowen*, 487 U.S. at 623-24.

neutral” site; (3) statutory restrictions on benefits being utilized for worship, prayer, or other inherently sectarian purposes; (4) statutory restrictions on recipients discriminating as to their employees; and (5) statutory restrictions on recipients discriminating as to the persons whom the federal welfare program ultimately seeks to help.

The Hill-Burton Act<sup>112</sup> is a federal program designed to improve the standards of medical care in the United States by subsidizing the cost of hospital construction. Both public and private hospitals are eligible recipients, including hospitals that are religiously affiliated. When a hospital has obtained a certificate of need from state authorities indicating that a modernization or expansion of facilities is warranted, the hospital may apply to federal authorities for a construction grant. The construction of buildings is generally restricted to facilities that have a secular use. However, there is provision for a “retiring room” in general hospitals, which would be a room suitable for quiet meditation, worship or prayer.<sup>113</sup> Further, a chapel, altar, and offices for clerics are permitted in mental hospitals.<sup>114</sup> These provisions in the Hill-Burton Act have not been litigated.<sup>115</sup> Nonetheless, the general restriction that construction grants be utilized to build only secular facilities is in line with the Supreme Court cases having to do with aid to institutions of higher education.<sup>116</sup>

Aid to hospital centers for medical education and research conducted outside of the United States, where the facility is founded by or sponsored by United States citizens, is available under the American

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112. The full title of the Hill-Burton Act is the Hospital Survey and Construction Act, 42 U.S.C. §§ 291 to 291o-1 (1988). For commentary concerning the level of religious participation in Hill-Burton grants, see COUGHLIN, *supra* note 15, at 69-74; PFEFFER, *supra* note 79, at 200-02.

113. 42 C.F.R. § 53 App. A, Sec. III B-1 (1949).

114. 42 C.F.R. § 53 App. A, Sec. III B-3.

115. The Hill-Burton Act was amended to give religious hospitals the right to refuse a patient's request for an abortion or sterilization operation. 42 U.S.C. § 300a-7 (1988). Challenges that this provision “favors” religion and is thus violative of the Establishment Clause have been rejected. Taylor v. St. Vincent's Hosp., 523 F.2d 75 (9th Cir. 1975), *cert. denied*, 424 U.S. 948 (1976); Chrisman v. Sisters of St. Joseph of Peace, 506 F.2d 308 (9th Cir. 1974); see Doe v. Bolton, 410 U.S. 179, 197-98 (1973); Doe v. Bellin Memorial Hosp., 479 F.2d 756 (7th Cir. 1973); Allen v. Sisters of St. Joseph, 361 F. Supp. 1212 (N.D. Tex. 1973), *appeal dismissed*, 490 F.2d 81 (5th Cir. 1974); Watkins v. Mercy Medical Center, 364 F. Supp. 799 (D. Idaho 1973).

116. See *supra* notes 76-77; see also Wisconsin *ex rel.* Wisc. Health Facilities Auth. v. Lindner, 280 N.W.2d 773 (Wis. 1979) (wherein a Catholic hospital successfully proved that its operation is not so religiously pervasive that state aid in the form of tax-exempt bonding authority ran afoul of the Establishment Clause); Truitt v. Board of Pub. Works, 221 A.2d 370 (Md. 1966) (Hill-Burton funding of religious hospital not violative of state constitution); Abernathy v. City of Irvine, 355 S.W.2d 159 (Ky. 1961), *cert. denied*, 371 U.S. 831 (1962) (same); Craig v. Mercy Hospital-Street Memorial, 45 So. 2d 809 (Miss. 1950) (same); Kentucky Bldg. Comm'n v. Efron, 220 S.W.2d 836 (Ky. 1949) (same).



Schools and Hospitals Abroad Program (ASHA).<sup>117</sup> The ASHA was designed to assist developing countries acquire funding for schools and medical centers that serve as demonstration projects for American ideas and practices. The program is administered by the Agency for International Development (AID), which awards grants to sponsoring institutions or individuals in the United States. Funds are then transferred by the sponsor to the foreign school or hospital. AID criteria require that the overseas school or hospital be open to all persons without discrimination, and that assistance may not be used to train persons for religious pursuits or to construct facilities for worship.<sup>118</sup> However, the criteria do not bar religiously affiliated schools or hospital from grants.<sup>119</sup>

A recent tangle between Congress and the Department of Housing and Urban Development (HUD) generated one of the more revealing social services funding debates. The Emergency Shelter Grants Program (ESGP) was adopted by Congress in October 1986.<sup>120</sup> The 1986 ESGP authorized HUD to make grants to private, nonprofit organizations for the rehabilitation or conversion of buildings for use as emergency shelters for the homeless, and for the payment of certain operating and social service expenses in connection with the operation of homeless shelters. In December 1986, HUD issued proposed regulations concerning the administration of the grants.<sup>121</sup> Buildings owned by churches and other "primarily religious organizations" were completely prohibited from receiving funds to renovate, rehabilitate, or convert their buildings for homeless shelters.<sup>122</sup>

In early 1987, Congress had before it consideration of the Stewart B. McKinney Homeless Assistance Act, ultimately approved by the President in July 1987.<sup>123</sup> Subtitle B of the McKinney Act modified the

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117. 22 U.S.C. § 2174(b) (1988). The ASHA is part of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. §§ 2151-2429a (1991).

118. 44 Fed. Reg. 67,543, 67,544 (1979).

119. See *Lamont v. Schultz*, 748 F. Supp. 1043 (S.D.N.Y. 1990), *aff'd. sub nom. Lamont v. Woods*, 948 F.2d 825 (2d Cir. 1991). In *Lamont* federal taxpayers challenged the ASHA grant program's funding of 20 overseas schools with religious affiliation as violative of the Establishment Clause. The district court entered an interlocutory order concluding that the ASHA was subject to the three-part *Lemon* test notwithstanding that the schools operated overseas. The order was also certified for interlocutory appeal and later affirmed. *Lamont* did not challenge funding to religious hospital centers overseas. See generally J. BRUCE NICHOLS, *THE UNEASY ALLIANCE: RELIGION, REFUGEE WORK, AND U.S. FOREIGN POLICY* (1988).

120. The 1986 ESGP is found in Part C, Title V of HUD's appropriation for Fiscal Year 1987. Pub. L. No. 99-500, § 10(g) (approved Oct. 18, 1986).

121. 51 Fed. Reg. 45,277 (1986).

122. *Id.* at 45,283.

123. Stewart B. McKinney Homelessness Assistance Act, Pub. L. No. 100-77, 1987 U.S.C.C.A.N. (101 Stat.) 482.

ESGP of the prior year.<sup>124</sup> In considering the 1987 ESGP legislation, Congress sharply criticized HUD's proposed restrictions placed on grants to religious organizations.<sup>125</sup> The committee report in the House of Representatives indicated that HUD was to administer both the 1986 and 1987 ESGP in a manner permitting participation by religious organizations. The committee report stated that federal funds under the 1986 Act should be made available to religious organizational recipients under the following conditions:

—No person applying for funded services shall be discriminated against on the basis of religion.

—No religious instruction or counselling, and no religious worship will be provided in connection with the provision of secular non-religious assistance.

—No sectarian or religious symbols may be used in the portion of the facility used to provide secular services unless such said symbols had been previously permanently affixed to the facility.

—All federal funds must be accounted for separately from all other funds of the institution so that the federal government will not have to monitor the general accounts of the religious organization.

—Any real property that is owned by a religious organization or an organization with religious affiliation and rehabilitated with federal funds must be dedicated solely to secular purposes. . . . If the property reverts to sectarian use, the grant amount must be repaid.<sup>126</sup>

Additionally, Congress indicated that religious grant recipients could discriminate as to their employees to the extent permitted by Section 702 of Title VII of the Civil Rights Act of 1964, as amended.<sup>127</sup> In accordance with this expression of congressional disapproval, HUD did issue final regulations in October 1987 that eased the restrictions on federal grants to religious ministries.<sup>128</sup> The final rules permitted religious organizations to create separate corporate shells that are de jure secular to receive the HUD grants. This creates a formalistic barrier to the receipt of government funds by religion, but it is of questionable utility in terms of church-state separation requirements and may needlessly raise the administrative cost of achieving eligibility status.

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124. The McKinney ESGP is codified at 42 U.S.C. §§ 11371-11378 (Law. Co-op 1989 & Supp. 1991).

125. H.R. REP. NO. 10(I), 100th Cong., 1st Sess. (1987), reprinted in 1987 U.S.C.C.A.N. 362, 369-71.

126. *Id.* at 370.

127. *Id.* at 371.

128. 52 Fed. Reg. 38,863 (1987).

In its definitional section of “private non-profit organizations” eligible to receive grants, the McKinney 1987 ESGP placed additional restrictions on grantees. To be eligible, a private organization has to have Section 501(c) status under the Internal Revenue Code, have an accounting system and voluntary board, and practice nondiscrimination as to the individuals the program ultimately sought to served.<sup>129</sup> The final arrangement between HUD and Congress, then, focused simultaneously on the *de jure* nature of the religious agency serving the needs of the homeless, the type of social problem the program addressed, and the temporal nature of the services provided to the homeless.

The Child and Adult Care Food Program<sup>130</sup> of the National School Lunch Act,<sup>131</sup> authorizes assistance to states who in turn help maintain grants-in-aid and other programs providing nutritious food to child-care centers, after-school-hours care centers, and adult care centers. Centers and programs operated by religious organizations are presumptively eligible to participate. However, any such center must be licensed or approved by the state in which it is operating, meet a plethora of minimal standards touching on health, safety, fire codes, staffing, and staff training, and not discriminate as to the center’s employees or the persons the nutritional program ultimately seeks to serve.<sup>132</sup>

Contrast the regulations governing the Child and Adult Care Food Program, as administered by the U.S. Department of Agriculture (USDA), with HUD’s administration of the Emergency Shelter Grant Program. HUD’s regulations have numerous provisions expressly dealing with the manner in which religious organizations may use the federal grants. HUD imposes few health or safety standards on homeless shelters, however, and only requires that there be no discrimination as to the persons the federal aid ultimately seeks to serve. In contrast, the USDA is silent as to whether any of its grant recipients may be affiliated with religious organizations, nor are there any mandates that monies be spent only for secular purposes. The USDA, however, has a plethora of minimal regulations going far beyond health, fire, and safety — matters usually left to state regulation — and requires nondiscrimination as to both persons served and the employees of any child-care or adult care program. But HUD, unlike the USDA, requires a separate corporate shell, a voluntary board, and a separate accounting system. These very differ-

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129. 42 U.S.C.S. § 11371(5) (Law. Co-op. 1989). See Mark Chopko, *Intentional Values and the Public Interest—A Plea for Consistency in Church/State Relations*, 39 DEPAUL L. REV. 1143, 1179 (1990).

130. 42 U.S.C.A. § 1766, 1766a (West Supp. 1991).

131. 42 U.S.C.A. §§ 1751-1769 (West Supp. 1991).

132. See 7 C.F.R. pt. 226 (1991) (especially § 226.6).

ent approaches can hardly be explained in terms of First Amendment requirements.

The federal government's newest foray into social services is provision of benefits to child day-care facilities. The Child Care and Development Block Grant Act of 1990,<sup>133</sup> provides for both capital improvement grants to eligible facilities and child-care certificates (vouchers) to low-income parents. Concerning capital improvement grants, a "sectarian agency or organization" is ineligible if such monies are to be used for the purchase or improvement of land or for the purchase, construction, or permanent improvement of any building or facility. The only exception is where the grant to the sectarian agency is "necessary to bring the facility . . . into compliance with health and safety requirements."<sup>134</sup>

Notwithstanding the unrestricted use to which a parent may elect to tender a voucher to the child-care facility of his or her choice, including a religiously affiliated one,<sup>135</sup> acceptance of the federal voucher by a child-care facility thereby entails an assurance of compliance with certain federal standards.<sup>136</sup> A child-care facility must be licensed or otherwise registered as required by state law,<sup>137</sup> and state health and safety regulation minimally must assure compliance as to the prevention and control of infectious diseases (including immunization), building and physical premises safety, and minimum health and safety training of the staff as

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133. Child Care and Development Block Grant Act of 1990, Pub. L. No. 508, § 5082, 1990 U.S.C.C.A.N. (104 Stat.) 1388-236 (to be codified at 42 U.S.C. §§ 9858-9858p). The Child Care Act is part of the Omnibus Budget Reconciliation Act of 1990, §§ 5081-5082, Pub. L. No. 508, 1990 U.S.C.C.A.N. (104 Stat.) 1388. On June 6, 1991, the Department of Health and Human Services issued interim final rules concerning the Child Care Act. See 56 Fed. Reg. 26,193-26,240 (1991) (to be codified at 45 C.F.R. pts. 98, 99).

See generally John W. Whitehead, *Accommodation and Equal Treatment of Religion: Federal Funding of Religiously-Affiliated Child Care Facilities*, 26 HARV. J. ON LEGIS. 573 (1989); Greg J. Matis, Comment, *Dilemma in Day Care: The Virtues of Administrative Accommodation*, 57 U. CHI. L. REV. 573 (1990).

134. § 658F(b), 104 Stat. at 1388-240 to -241 (to be codified at 42 U.S.C. 9858d).

135. In stark contrast to capital improvement grants, child-care vouchers available to low-income parents are fairly unrestricted should the parents choose to enroll their child in a religious facility. Section 658P(2), which defines the "child care certificate" or voucher, states that "[n]othing . . . shall preclude the use of such certificates for sectarian child care services if freely chosen by the parent." This is reinforced by section 658M(a) which states: "[n]o financial assistance . . . pursuant to the choice of a parent under section 658E(c)(2)(A)(i)(I) or through any other grant under contract of the State plan, shall be expended for any sectarian purpose or activity, including sectarian worship or instruction." That language is couched in the negative, but its failure to cross-reference a parent's free use of the child-care certificate in section 658E(c)(2)(A)(i)(II) is intentional. See also 56 Fed. Reg. 26,229 (1991) (to be codified at 45 C.F.R. § 98.30). It is thereby clear that there is no limit on the use to which a religious organization can put monies received from a parent tendering a child-care voucher.

136. 55 Fed. Reg. 26,230 (1991) (to be codified at 5 C.F.R. § 98.41(a)).

137. *Id.* at 26,229-30 (to be codified at §§ 98.40, .45).

appropriate to the setting.<sup>138</sup> Moreover, an appropriate state agency must insure that parents have ready access to the center to visit their children and speak with the child's care provider, and the state agency must maintain a record of substantiated parental complaints that is to be available for public inspection.<sup>139</sup>

Most intrusive into the operation of a religious child-care facility, acceptance of federal grants (but not child-care vouchers) requires compliance with rules prohibiting discrimination on the basis of religion both as to the children served by the facility and employees who are working directly with the children.<sup>140</sup> Although the act does not specifically address the matter, acceptance of capital improvements grants (but not child-care vouchers) makes a child-care facility a recipient of "Federal financial assistance" under federal civil rights legislation, thereby invoking nondiscrimination requirements on the basis of race, national origin,

138. Child Care and Development Block Grant of 1990, Pub. L. No. 508, § 658E(c)(2)(F), 104 Stat. at 1388-239 (to be codified at 42 U.S.C. § 9858c). *See also* 56 Fed. Reg. 26,230 (1991) (to be codified at 45 C.F.R. § 98.41).

139. Pub. L. No. 508, § 658E(c)(2)(B) and (C), 104 Stat. at 1388-238 (to be codified at 42 U.S.C. § 9858c). *See also* 56 Fed. Reg. 26,229 (1991) (to be codified at 45 C.F.R. §§ 98.31, -.32).

140. § 658N(a), 104 Stat. at 1388-245 to -246 (to be codified at 42 U.S.C. § 9852). *See also* 56 Stat. Fed. Reg. 26,230-31 (1991) (to be codified at 45 C.F.R. §§ 98.46, -.47). The distinction between block grants and child care certificates or vouchers is intentional, as explained by HHS:

[S]ections 658E(c)(2)(E) and (F) require Grantees to provide assurances concerning any applicable licensing and regulatory requirements and concerning health and safety requirements applicable to child care providers that provide services for which assistance is made available under the Act. This formulation was used to ensure that such requirements were triggered, not only by assistance to providers, i.e., grants and contracts, but also by assistance to parents, i.e., certificates. By contrast, the provisions of section 658N of the Act relating to nondiscrimination in employment and enrollment on the basis of religion apply for the most part to "[a] child care provider \* \* \* that receives assistance under this subchapter." Thus, such requirements are only triggered by assistance to the provider in the form of grants, contracts, and loans.

The above distinction, which we have followed in the structure and terminology of the regulations, reflects the compromise embodied in the Act between licensing and regulatory requirements and health and safety requirements, on the one hand, and religious nondiscrimination and nonsectarian use requirements, on the other. Although the Act requires all providers to comply with the former, providers who accept only certificates need comply with the latter only when 80 percent or more of their operating budget is governmental, as discussed in §§ 98.46 and 98.47. This distinction follows the Act by providing parental choice of sectarian providers, and by protecting the religious autonomy of such providers.

56 Fed. Reg. 26,198 (1991).

There are exceptions to the general rule of nondiscrimination on the basis of religion. Concerning employees, the facility may require compliance with religious teachings and rules forbidding use of drugs and alcohol. § 658N(a)(1)(B), 104 Stat. at 1388-245 (to be codified at 42 U.S.C. § 9858I). Concerning children not funded by vouchers, facilities may favor families that regularly attend the church. § 658N(a)(2)(B).

age, and handicap.<sup>141</sup>

Title VII of the Civil Rights Act of 1964, as amended, and similar legislation at the state level prohibit many forms of employment discrimination by social service ministries. Title VII prohibits employers of 15 or more employees from discriminating in its employment practices on the basis of race, color, religion, sex, or national origin.<sup>142</sup> However, Section 702 of Title VII<sup>143</sup> permits a religious organization to discriminate on the basis of religion with respect to its employees. Religious discrimination is lawful whether or not the particular job in question is one held by a cleric or primarily entails sectarian duties.<sup>144</sup> Note that the employment nondiscrimination provisions of the Child Care and Development Block Grant Act are more restrictive than Title VII, for the child-care legislation prohibits certain forms of employment discrimination even when done on the basis of religion.<sup>145</sup>

Should a religiously affiliated organization choose to accept federal financial assistance, three federal statutes prohibit discrimination in the clientele that the social ministry is ultimately seeking to help. Title VI of the Civil Rights Act of 1964, as amended, prohibits discrimination on the basis of race, color, or national origin.<sup>146</sup> The Age Discrimination Act of 1975, as amended, prohibits discrimination on the basis of age.<sup>147</sup> Finally, Section 504 of the Rehabilitation Act of 1973, as amended, prohibits discrimination against otherwise qualified handicapped individuals.<sup>148</sup> These three statutes were amended by the Civil Rights Restoration Act

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141. See generally H.R. CONF. REP. NO. 964, 101st Cong., 2d Sess. (1991), reprinted in 1991 U.S.C.A.N. 2374, 2626-29. Note that the federal Head Start Program, 42 U.S.C. §§ 2931-2932 (1991), which is presumptively available to child-care facilities operated by religious organizations, by its terms does not differentiate between religious and nonreligious facilities.

142. 42 U.S.C. § 2000e-2(b) (1988).

143. *Id.* § 2000e-1. Nearly all states have human rights legislation that also prohibits discrimination in employment on the same basis as Title VII. The state legislation generally pertains to employers of approximately four or more employees. See *infra* note 161.

144. See *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987).

145. 136 CONG. REC. H12494, §§ 658N(a)(1)(B), (a)(3), 104 Stat. at 1388-245 (to be codified at 42 U.S.C. 9858e). See also 56 Fed. Reg. 26,230-31 (1991) (to be codified at 45 C.F.R. §§ 98.46, -47).

146. 42 U.S.C. § 2000d (1988). Section 604 of Title VI, 42 U.S.C. § 2000d-3, states that this title does not pertain to employment discrimination. Employment discrimination is to be remedied under Title VII.

147. 42 U.S.C. §§ 6101-6107 (1988).

148. 29 U.S.C.A. § 794 (West Supp. 1991). Title IX of the Educational Amendments of 1972, 20 U.S.C. §§ 1681-1686 (1988), prohibits sex discrimination. However, Title IX pertains only to educational institutions and thus is not of interest in this study of social service organizations.

of 1987.<sup>149</sup> Sometimes called the Grove City College Bill (introduced ostensibly to overturn the Supreme Court's decision in *Grove City College v. Bell*<sup>150</sup>), the Restoration Act broadened the scope of the nondiscrimination coverage of all three of these statutes with the following language:

For the purposes of this [statute], the term "program or activity" and the term "program" mean all of the operations of —

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(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship —

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation

.....

any part of which is extended Federal financial assistance.

Subsection 3(A) of the Restoration Act added coverage to each of these three civil rights statutes over the "entire corporation, partnership, or other private organization, or an entire sole proprietorship" if either assistance is given to the entity (including, of course, a social service agency) "as a whole" or the entity is "principally engaged in the business of providing . . . health care, housing, [or] social services" if "any part of [the entity] is extended Federal financial assistance."

Accordingly, there are two ways in which the nondiscrimination requirements could cover a religious social service ministry. First, if the federal grant or other assistance is for a limited purpose, as distinct from a benefit to aid the organization as a whole, the legislation would not cover the entire religious organization. The committee report in the Senate suggests, by way of example, that financial assistance to Chrysler Corporation for the purpose of preventing it from going bankrupt would be assistance to the corporation "as a whole," whereas a grant to a religious organization to enable it to assist refugees would not be assistance to the organization as a whole "if that is only one among a number of

149. Pub. L. No. 557, 100th Cong., 2d sess. (1988) (codified at 20 U.S.C.A. §§ 1687-1688 and amending 29 U.S.C.A. § 794 (West Supp. 1991)).

150. 465 U.S. 555 (1984). Section 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C.A. § 1681(a) (West 1990), prohibits sex discrimination in "any education program or activity receiving Federal financial assistance." Grove City College was a private liberal arts college whose students were receiving Basic Educational Opportunity Grants administered by the U.S. Department of Education. The Court found that the student grants were "Federal financial assistance," *id.* at 563-70, but that the nondiscrimination requirement only extended to the college's financial aid office, *id.* at 570-74. This latter holding was viewed by the civil rights community as too narrow an interpretation of "program or activity." As a consequence there was pressure in Congress to amend the statute so that *inter alia* the nondiscrimination requirement would pertain campus-wide in situations such as Grove City College.

activities of that organization.”<sup>151</sup>

The more likely means whereby a religious social ministry would be covered by these three civil rights statutes is under the “principally engaged” language of Subsection 3(A). When a religious social ministry targets a single, or primarily a single, social problem or cause — for example, a child-care facility or children’s residential care home — then the ministry will be covered by the language of Subsection 3(A)(ii). Conversely, if the federal assistance goes to only one department or ministry within a larger organization, then apparently only the particular program receiving the federal benefit is covered. For example, assume a large church operates a child-care facility as one of its numerous ministries, and the child-care facility comprises only a tenth of the church budget and a fifth of all ministerial time and activity. Presumably the entire church is not covered by the nondiscrimination requirements of these three statutes, albeit the day-care center would be subject to the civil rights acts. Under these three civil rights statutes, “Federal financial assistance” includes grants, loans, and in-kind transfers of goods or services, but does not include tax credits or tax exemptions.<sup>152</sup>

## B. State Legislation and Local Governmental Ordinances

State legislation, as well as municipal and county ordinances, in numerous ways come to bear on social services operated by religious organizations. This subpart will examine the law in three of these areas: comprehensive licensing schemes; child abuse reporting laws and their interaction with the clergy-counselee privilege; and religious preferences in adoption and foster placement agencies. These three subject areas are merely exemplary. However, social service ministries are regulated in numerous other ways: professional and occupational licenses;<sup>153</sup> work-

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151. S. REP. NO. 64, 100th Cong., 2d Sess. 17 (1987), *reprinted in* 1988 U.S.C.C.A.N. 3, 19.

152. *See, e.g.,* *Chaplin v. Consolidated Edison Co.*, 628 F. Supp. 143 (S.D.N.Y. 1986); *Martin v. Delaware Law Sch. of Widener Univ.*, 625 F. Supp. 1288 (D. Del. 1985); *Bachman v. American Soc’y of Clinical Pathologists*, 577 F. Supp. 1257, 1263-64 (D.N.J. 1983).

153. *See* *Northrup v. Superior Court*, 237 Cal. Rptr. 255 (Cal. Ct. App. 1987) (religious beliefs exempted two women from midwifery licensing requirements); *In re Bartha*, 134 Cal. Rptr. 39 (Cal. Ct. App. 1976) (conviction under city ordinance prohibiting fortune telling is sustained because tenets of woman’s religion did not require that she practice fortune telling for a fee); *Duffy v. California State Personnel Bd.*, 283 Cal. Rptr. 622 (Cal. Ct. App. 1991) (priest removed from prison chaplaincy by state board when he failed to obtain approval by Catholic bishop in diocese); *Stetina v. State ex rel. Medical Licensing Bd.*, 477 N.E.2d 322 (Ind. Ct. App. 1985), *appeal following remand*, 513 N.E.2d 1234 (Ind. Ct. App. 1987) (health and nutrition practitioner prohibited from unlicensed practice because there was no showing that treatments were part of tenets of church); Gregory S. Sarno, Annotation, *Regulation of Astrology, Clairvoyancy, Fortunetelling, and the Like*, 91 A.L.R. 3d 766 (1979).



ers' compensation statutes;<sup>154</sup> labor relations;<sup>155</sup> state OSHA and other safety laws;<sup>156</sup> incorporation and registration of foreign business statutes;<sup>157</sup> taxes (use,<sup>158</sup> sales,<sup>159</sup> property,<sup>160</sup> income and business licenses);

154. See *South Ridge Baptist Church v. Industrial Comm'n*, 676 F. Supp. 799 (S.D. Ohio 1987), *aff'd*, 911 F.2d 1203 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 754 (1991) (Free Exercise and Establishment Clauses not violated when church required, against its beliefs, to pay into workers' compensation program); *Victory Baptist Temple v. Industrial Comm'n*, 442 N.E.2d 819 (Ohio Ct. App.), *cert. denied*, 459 U.S. 1086 (1982) (same). Only three states (Arkansas, Mississippi, and North Dakota) expressly exempt religious employers from workers' compensation. 1C LARSON'S WORKMEN'S COMPENSATION LAW § 50.42, at 9-132, 9-135 (1986).

Where statutory language neither includes nor excludes charitable organizations, a majority of courts have held that charitable organizations are not exempt from workers' compensation. *Greenway Baptist Church v. Industrial Comm'n*, 636 P.2d 1264 (Ariz. Ct. App. 1981) (church acting as its own general contractor); *Roman Catholic Archbishop v. Indus. Accident Comm'n*, 230 P. 1 (Cal. 1924) (workman shingling roof of parish church); *Levecque v. Dupuis*, 175 A. 782 (Conn. 1934) (same); *Gardner v. Trustees of Main Street Episcopal Church*, 250 N.W. 740 (Iowa 1933) (church employee killed while excavating church building); *Meyers v. Southwest Region Conf. Ass'n of Seventh Day Adventists*, 79 So. 2d 595 (La. Ct. App. 1955), *rev'd*, 88 So. 2d 381 (La. 1956) (neither state nor federal Constitution prohibited coverage of minister who was injured traveling to church conference); *Schneider v. Salvation Army*, 14 N.W.2d 467 (1944) (laborer employed by "Men's Service Department"). Cf. *Hartford Accident & Indem. Co. v. Industrial Acc. Comm'n*, 34 P.2d 826 (Cal. Ct. App. 1934) (Volunteers of America not within the act, even though injured person receiving charitable aid performed some services); *Hanson v. St. James Hotel*, 254 N.W. 4 (Minn. 1934) (though claimant received some charity aid and performed some services, no employment relation with mission home). A minority of courts have excluded charitable organizations. *Wright v. Fowler*, 459 N.E.2d 386 (Ind. Ct. App. 1984) (non-religious charitable corporation not covered by act as it existed prior to 1983 amendment); *Zoulalian v. New England Sanatorium & Benevolent Ass'n*, 119 N.E. 686 (Mass. 1918) (sanatorium); *Caughman v. Columbia Y.M.C.A.*, 47 S.E.2d 788 (S.C. 1948); *Spokane Methodist Homes, Inc. v. Department of Labor & Indus.*, 483 P.2d 168 (Wash. Ct. App. 1971), *aff'd*, 501 P.2d 589 (Wash. 1972) (no coverage prior to 1971 amendment to act).

155. See *Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch.*, 471 N.W.2d 372 (Minn. Ct. App. 1991) (state's labor relations law violates both state and federal Constitutions when applied to compel collective bargaining between lay teachers and church-related school).

156. Most state occupational safety and health laws are patterned after the federal Occupational Safety and Health Act, 29 U.S.C. §§ 651 *et seq.* (1988). OSHA applies to nonprofit corporations, *id.* § 652, and to all employers "affecting commerce," *id.* § 652(5). The state OSHA laws apply whether or not a religious organization affects interstate commerce.

157. See *Gipson v. Brown*, 706 S.W.2d 369 (Ark. 1986), *appeal following remand*, 295 Ark. 371, 749 S.W.2d 297 (1988), *on writ of prohibition*, *Gipson v. Munson*, 752 S.W.2d 752 (Ark. 1988); Tonia P. Jackson, Note, *Constitutional Law — Religious Freedom — Forced Disclosure of Church Records Pursuant to State Non-Profit Corporation Statute Prohibited*, 12 U. ARK. LITTLE ROCK L.J. 75 (1989) (reviewing *Gipson* decisions).

158. Imposition of state use-taxes on a religious ministry was sustained in *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378 (1990), and *Institute in Basic Youth Conflicts, Inc. v. State Bd. of Equalization*, 213 Cal. Rptr. 98 (Cal. Ct. App. 1985). An exemption for religious organizations from a tax on the use or sale of services was approved in *In re Advisory Opinion to the Governor*, 509 So. 2d 292 (Fla. 1987).

159. In *Kollasch v. Adamany*, 299 N.W.2d 891 (Wis. Ct. App. 1980), *rev'd on other grounds*, 313 N.W.2d 47 (Wis. 1981), fees collected for meals served to business organizations at a retreat center operated by a monastic community of Roman Catholic sisters were held

state human rights acts and city ordinances concerning discrimination in employment and public accommodations;<sup>161</sup> financial solicitation ordi-

subject to a state sales tax. Although finding that the serving of meals to their guests was a religious activity, the court of appeals said that the sales tax was neither a tax on religion nor a burden to the sisters' exercise of religion.

160. In the following cases the courts determined that the real estate held by a religious social ministry was tax exempt: *Maurer v. Young Life*, 779 P.2d 1317 (Colo. 1989) (en banc) (camping properties); *Camp Isabella Freedman, Inc. v. Town of Canaan*, 162 A.2d 700 (Conn. 1960) (camp for economically underprivileged); *Fairview Haven v. Department of Revenue*, 506 N.E.2d 341 (Ill. App. Ct. 1987) (intermediate-care wing of nursing home); *Evangelical Hosp. Ass'n v. Novak*, 465 N.E.2d 986 (Ill. App. Ct. 1984) (administrative and support services for medical facility); *Pentecostal Church of God v. Hughlett*, 737 S.W.2d 728 (Mo. 1987) (en banc) (housing for aged and handicapped); *Salvation Army v. Hoehn*, 188 S.W.2d 826 (Mo. 1945) (en banc) (home for girls and women with low income); *St. John's Lutheran Church v. City of Bloomer*, 347 N.W.2d 619 (Wis. Ct. App. 1984) (retirement center); *Kahal Bnei Emunim v. Town of Fallsberg*, 577 N.E.2d 34 (N.Y. 1991) (summer camp and educational institution).

In the following cases the courts determined that the real estate held by a religious social ministry was not tax exempt: *Salvation Army v. Department of Revenue*, 524 N.E.2d 628, *appeal denied*, 530 N.E.2d 264 (Ill. 1988) (thrift store); *Fairview Haven v. Department of Revenue*, 506 N.E.2d 341 (Ill. App. Ct. 1987) (independent-living wing of nursing home); *Salvation Army v. Board of County Comm'rs*, 777 P.2d 1280 (Kan. Ct. App. 1989) (community center); *Supervisor of Assessments v. Asbury Methodist Home, Inc.*, 547 A.2d 190 (Md. Ct. App. 1986) (senior citizen apartment complex in continuing care community); *Evangelical Retirement Homes, Inc. v. State Tax Comm'n*, 669 S.W.2d 548 (Mo. 1984) (en banc) (retirement homes); *Church Contribution Trust v. Mendham Borough*, 541 A.2d 249 (N.J. Super. Ct. App. Div. 1988) (provider of psychological training and child development); *In re Appeal of Moravian Home*, 382 S.E.2d 772 (N.C. Ct. App.), *review denied and appeal dismissed*, 388 S.E.2d 457 (N.C. 1989) (home for sick and aged); *In re Barham*, 319 S.E.2d 657 (N.C. Ct. App.), *review denied*, 323 S.E.2d 921 (N.C. 1984) (residential retirement center); *G.D.L. Plaza Corp. v. Council Rock Sch. Dist.*, 526 A.2d 1173 (Pa. 1987) (residential facility for elderly and handicapped); *Christian Home for the Aged v. Tennessee Assessment Appeals Comm'n*, 790 S.W.2d 288 (Tenn. Ct. App. 1990) (retirement home); *Earle v. Program Centers of Grace Union Presbytery*, 670 S.W.2d 777 (Tex. Ct. App. 1984) (youth camp).

*See generally* John Witte, Jr., *Tax Exemption of Church Property: Historical Anomaly or Valid Constitutional Practice?*, 64 S. CAL. L. REV. 363 (1991).

161. *See, e.g.*, *Dayton Christian Sch., Inc. v. Ohio Civil Rights Comm'n*, 766 F.2d 932 (6th Cir. 1985) (oversight of parochial school by civil rights commission violates Free Exercise and Establishment Clauses), *rev'd on other grounds*, 477 U.S. 619 (1986); *Dignity Twin Cities v. Newman Center & Chapel*, 472 N.W.2d 355 (Minn. Ct. App. 1991) (campus ministry center need not rent space to homosexual group; state constitution grants free exercise exemption from local ordinance prohibiting discrimination in public accommodations on basis of "affectional preference"); *Black v. Snyder*, 471 N.W.2d 715 (Minn. Ct. App. 1991) (female cleric's sexual harassment claim against former church and her superior is actionable as sex discrimination; but First Amendment precludes claim for wrongful discharge as impermissibly probing matters of church doctrine and religious motive); *St. Louis Christian Home v. Missouri Comm'n on Human Rights*, 634 S.W.2d 508 (Mo. Ct. App. 1982) (state commission on human rights is without jurisdiction over religious children's home); *Speer v. Presbyterian Children's Home & Serv. Agency*, 55 Empl. Prac. Dec. ¶ 40,512 (Tex. Dist. Ct. 1990) (children's home does not waive religious exemption in state law by hiring members of different religious denominations); *Chase v. Redwood Gospel Mission*, No. MCV-97947, 10 Religious Freedom

nances;<sup>162</sup> lobbying and political activity regulation;<sup>163</sup> zoning,<sup>164</sup>

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Rptr. 298 (Mun. Ct. Sonoma Cty., Calif. 1990) (church-operated home for battered women and children exempt from state minimum wage law).

162. The Supreme Court has been active in this subject area. *See, e.g.*, Board of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569 (1987) (rule declaring airport terminal not open to First Amendment activity is unconstitutional on its face); Larson v. Valente, 456 U.S. 228 (1982) (state solicitation law discriminatory on basis of religious groups); Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981) (non-discriminatory restrictions on expression and solicitation at state fair grounds not violative of Free Speech Clause or the Free Exercise Clause).

In another action, the invalidation of a city's charitable solicitation ordinance was summarily affirmed by the Supreme Court in Rusk v. Espinosa, 456 U.S. 951 (1982), *aff'g*, 634 F.2d 477 (10th Cir. 1980). The ordinance prohibited charitable solicitation without a permit. An exemption, however, was provided for certain religious solicitations. The collection of money for religious purposes was defined as solicitation for "evangelical, missionary, or religious but not secular" ends. A secular purpose was defined as "not spiritual or ecclesiastical, but rather relating to affairs of the present world, such as providing food, clothing, and counseling." *Espinosa v. Rusk*, 634 F.2d 477, 479 (10th Cir. 1980). Therefore, a program by the Seventh-Day Adventist Church to solicit funds for the poor required a city permit. Acquiring a permit entailed payment of a fee and completion of an application that required certain information and documents including a current financial statement. *Id.* at 479 n.3. The Supreme Court affirmed the Tenth Circuit Court of Appeals which condemned the ordinance for multiple offenses: (1) it sought to define whether a church program was religious or secular, *id.* at 480-81; (2) a city official was involved in the "continuing necessity for making judgments as to what is or is not religious," using a standard "not susceptible of objective measurement," *id.* at 481-82 (citation omitted); and (3) compliance would require the church to disgorge extensive information about its purposes and finances, *id.* at 479 n.3.

For a case in the lower courts, see *Church of Scientology Flag Services Org., Inc. v. City of Clearwater*, 756 F. Supp. 1498 (M.D. Fla. 1991) (upholding solicitation ordinance).

163. In a decision that troubled numerous religious organizations, the Supreme Court of Tennessee held that the First Amendment did not shield churches participating in an effort to defeat a liquor referendum from registration under a campaign disclosure act. *Bemis Pentecostal Church v. Tennessee*, 731 S.W.2d 897 (Tenn. 1987), *appeal dismissed*, 485 U.S. 930 (1988). *See generally* Glendon Shubert, *Religious Interest-Group Politics in the Constitutional Market Place: From Jeannett to Jonestown*, 2 J.L. & POL. 201 (1985).

164. *See, e.g.*, *First Assembly of God of Naples, Fla. v. Collier County*, 775 F. Supp. 383 (M.D. Fla. 1991) (ordinance preventing operation of homeless shelter on church grounds did not violate First Amendment); *Church of the Saviour v. Zoning Hearing Bd.*, 568 A.2d 1336 (Pa. Commw. Ct. 1989) (counseling center is appropriate use of church); *Congregation Beth Yitzchok, Inc. v. Town of Ramapo*, 593 F. Supp. 655 (S.D.N.Y. 1984) (nursery school subject to zoning); *Holy Spirit Ass'n for Unification of World Christianity v. Town of New Castle*, 480 F. Supp. 1212 (S.D.N.Y. 1979) (order to issue special use permit denied to youth camp); *Encuentros Familiares, Inc. v. Musgrove*, 511 So. 2d 645 (Fla. Dist. Ct. App. 1987) (application for retreat center reinstated); *Lubavitch Chabad House v. City of Evanston*, 445 N.E.2d 343 (Ill. App. Ct. 1982); *cert. denied*, 464 U.S. 992 (1983) (Free Exercise Clause violated when special use permit denied to synagogue in single-family residential area where uses of building include boarding, administrative offices, and counselling services); *Church of God State Camp v. Board of Sedgwick County Comm'rs*, 761 P.2d 1280 (Kan. Ct. App. 1987) (permitting church camp); *Wilkinson v. LaFranz*, 574 So. 2d 403 (La. Ct. App. 1991) (soup kitchen permitted); *Needham Pastoral Counseling Ctr. v. Board of Appeals*, 557 N.E.2d 43 (Mass. App. Ct.), *review denied*, 560 N.E.2d 121 (Mass. 1990) (church counseling center); *City of Richmond Heights v. Richmond Heights Presbyterian Church*, 764 S.W.2d 647 (Mo. 1989) (en

landmarking,<sup>165</sup> and other land use controls; health, sanitation, food handling, and environmental regulation; and building and fire codes.<sup>166</sup>

### 1. *Comprehensive Licensing Schemes*

The most common form of regulation of social services is licensing. Holding a license permits government inspection for the purpose of insuring compliance with rules promulgated by an administrative agency designated to oversee the private-sector activity. Enforcement sanctions typically entail suspension and revocation of the license to operate, along with a criminal misdemeanor charge that can be brought against those operating without the requisite license. Finally, there are usually remedial measures in the event of threats of immediate bodily harm to children or vulnerable adults whereby state authorities can quickly move those in danger to a place of safety.<sup>167</sup> Although there has been some

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banc) (day care center is "accessory use" of church, thus not violative of zoning ordinance); *Christian Retreat Ctr. v. Board of County Comm'rs*, 560 P.2d 1100 (Or. Ct. App. 1977) (special use permit denied retreat center); *City of Rapid City v. Kahler*, 334 N.W.2d 510 (S.D. 1983) (rescue mission and shelter for homeless not exempt from zoning).

165. See *First Covenant Church v. City of Seattle*, 787 P.2d 1352 (Wash. 1990) (en banc) (landmarking of exterior of church violates Free Exercise), *vacated and remanded*, 111 S. Ct. 1097 (1991) (to be reconsidered in light of *Employment Div. v. Smith*, 110 S. Ct. 1595 (1990)); *Rector of St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1103 (1991) (landmarking of building that church would like to tear down to make room for commercial development not unconstitutional); *Society of Jesus v. Boston Landmarks Comm'n*, 564 N.E.2d 571 (Mass. 1990) (state constitution violated by landmarking of interior of church); *Church of St. Paul and St. Andrew v. Barwick*, 496 N.E.2d 183, (N.Y. 1986), *cert. denied*, 479 U.S. 985 (1986) (landmarking of church property not ripe for review); *Lutheran Church in Am. v. City of New York*, 316 N.E.2d 305, (N.Y. 1974) (landmarking of church unconstitutional); Angela C. Carmella, *Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review*, 36 VILL. L. REV. 401 (1991).

166. Courts have upheld more stringent building and fire codes for churches using their facilities for schools during weekdays, in contrast to churches using facilities solely for inherently religious purposes. See, e.g., *Congregation Beth Yitzchok v. Town of Ramapo*, 593 F. Supp. 655 (S.D.N.Y. 1984) (nursery school to teach Jewish laws and customs); *Faith Assembly of God, Inc. v. State Bldg. Code Comm'n*, 416 N.E.2d 228 (Mass. Ct. App. 1981); *Hough v. North Star Baptist Church*, 312 N.W.2d 158 (Mich. Ct. App. 1981); *State Fire Marshall v. Lee*, 300 N.W.2d 748 (Mich. Ct. App. 1980).

For cases sustaining fire code and other standards for gospel rescue missions, see *Salvation Army v. Department of Community Affairs*, 919 F.2d 183 (3d Cir. 1990); *Market St. Mission v. Bureau of Rooming and Boarding House Standards*, 541 A.2d 668 (N.J.), *appeal dismissed*, 488 U.S. 882 (1988).

167. See, e.g., *State v. New Bethany Baptist Church*, 535 So. 2d 1214 (La. Ct. App. 1988) (upholding an *ex parte* order permitting state access to a church-run children's home, but reversing authorization for mental and physical examinations of the children and employees, and the removal of the children); *In the Interest of M.I.*, 519 So. 2d 433 (Miss. 1988) (upholding temporary state takeover of religiously affiliated girls' home and sustaining contempt charges against its operator).

litigation by religious social services resisting comprehensive licensing schemes as too intrusive into the religious beliefs and practices of boarding houses or rescue missions,<sup>168</sup> nursing homes for the aged,<sup>169</sup> homes for the mentally retarded,<sup>170</sup> and denominational hospitals,<sup>171</sup> by far the greater number of cases have concerned the children's ministries of day-care centers and residential care homes.

As with other areas of church-state relations, state administrative agencies charged with oversight of residential children's homes and day-care centers must strike a delicate balance between safeguarding children and not interfering with the liberty of religious social ministries. These state regulators can and must be unobtrusive when it comes to the programmatic affairs of sectarian agencies and still satisfy their proper function of insuring health, safety, and fire code compliance and sanitation safeguards. The basic tenet from these cases is that administrative agencies must not interfere with either the content or methods of the religious program. However, there is a compelling governmental interest in licensure as a means to protect the health and safety of children whose

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168. See, e.g., *Salvation Army v. Department of Community Affairs*, 919 F.2d 183 (3d Cir. 1990) (state Rooming and Boarding House Act not violative of Free Exercise or Establishment Clause as to rescue mission); *Market St. Mission v. Bureau of Rooming and Boarding House Standards*, 524 A.2d 1283 (N.J. Super. Ct. App. Div. 1987), *rev'd*, 541 A.2d 668 (N.J.), *appeal dismissed*, 488 U.S. 882 (1988) (same).

169. See, e.g., *Cabinet for Human Resources v. Provincial Convent of the Good Shepherd, Inc.*, 701 S.W.2d 137 (Ky. Ct. App. 1985) (statutes and regulations governing operation of nursing homes, when applied to religious convalescent home for aged, sick, and infirm nuns, was violative of religious liberty).

170. See, e.g., *Cullum v. Faith Mission Home, Inc.*, 379 S.E.2d 445 (Va. 1989) (Amish home for mentally retarded exempt from licensure because care provided in accord with tenets of church in ministrations to sick and suffering by mental and spiritual means without use of drug or material therapy); *Wood v. Percy*, No. 81-C-1282, 2 Religious Freedom Rptr. 102 (E.D. Wis. 1982) (state Department of Health and Social Services ordered not to interfere with religious practices of home for retarded persons, so long as home complies with regulations to protect health and safety of residents).

171. See, e.g., *St. Agnes Hosp. v. Riddick*, 668 F. Supp. 478 (D. Md. 1987) (motion to dismiss denied), 748 F. Supp. 319 (D. Md. 1990) (judgment in favor of accreditation association), 751 F. Supp. 75 (D. Md. 1990) (hospital not entitled to stay pending appeal). The district court held that: (1) the Free Exercise Clause does not require a hospital accreditation association to exempt a Catholic hospital from its requirement that all obstetrics-gynecology residency programs provide clinical training in family planning procedures; and (2) the action of the association in withdrawing accreditation was not motivated by religious animus and thus was not unlawful. *Id.* at 76-77. See also *Board of Medical Quality Assurance v. Andrews*, 260 Cal. Rptr. 113 (Cal. Ct. App. 1989) (injunction affirmed against Religious School of Natural Hygiene preventing the school from offering prayer, supervised fasting and natural diets as medical practice); *Tulsa Area Hosp. Council, Inc. v. Oral Roberts Univ.*, 626 P.2d 316 (Okla. 1981) (upholding grant of certificate of need for university to construct 294 bed hospital).

parents or guardians have placed them in the care of others.<sup>172</sup>

A federal district court in *Tabernacle Baptist Church v. Conrad*<sup>173</sup> and a state supreme court in *State ex rel. O'Sullivan v. Heart Ministries, Inc.*<sup>174</sup> reached opposite conclusions concerning comprehensive state regulatory schemes affecting residential children's homes. In *Tabernacle Baptist*, a church that operated a children's home brought a suit for declaratory and injunctive relief against the agency administering the state mandatory licensing law.<sup>175</sup> The Child Welfare Agencies Act authorized broad departmental discretion to make and enforce regulations relating to the licensing of child care agencies "as may be necessary to carry out the purposes" of the act.<sup>176</sup> In furtherance of this delegated authority, the department promulgated rules that: (1) required licensing of children's homes; (2) set minimum standards for the homes, including that a home's program be "well rounded" with "appropriate community activities" available; (3) required a home to submit a report that "clearly defined and explained" its purpose and that it met a "demonstrated need"; and (4) allowed inspection by the department.<sup>177</sup> After finding that the religious atmosphere and training in the home was an integral part of its program,<sup>178</sup> the federal court nullified the act and implementing regulations as applied to religious homes. In doing so, the judge pointed the way to a more tightly drawn statutory scheme so as to pass scrutiny under the Establishment Clause, a plan that would nevertheless satisfy the state's interest in the health and safety of the children<sup>179</sup> without entangling itself with the home's religious beliefs, program, or practices.<sup>180</sup> Thus, the federal court in *Tabernacle Baptist* would permit a

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172. While the text examines whether religious liberty is violated by undue government regulation of religious ministries, the opposite side of the same coin is at issue in cases challenging state funding to such religious agencies. For cases on whether the state or federal constitutions prohibit state funding of church-affiliated orphanages, see *Schade v. Allegheny County Institution Dist.*, 126 A.2d 911 (Pa. 1956) (funding violates state, but not federal, constitution); *Dunn v. Chicago Indus. Sch.*, 117 N.E. 735 (Ill. 1917) (funding does not violate state constitution); *Sargent v. Board of Educ.*, 69 N.E. 722 (N.Y. 1904) (same).

173. No. 79-149 (D.S.C. Oct. 27, 1980).

174. 607 P.2d 1102 (Kan.), *appeal dismissed*, *Health Ministries, Inc. v. Kansas*, 449 U.S. 802 (1980).

175. No. 79-149, slip. op. at 5 (D.S.C. Oct. 27, 1980).

176. S.C. CODE § 43-15-30 (1976).

177. No. 79-149, slip op. at 3, 6 (D.S.C. Oct. 27, 1980).

178. *Id.* at 6. The *Tabernacle Baptist Church* was found to be an unincorporated religious association, which as part of its ministry operated a home for neglected and disadvantaged children. An integral part of the home's program was that the children received fundamentalist Christian training and discipline. *Id.*

179. *Id.* at 4. The home did not object to compliance with the local fire and health regulations or to periodic inspection of the facility by the state regulatory department. *Id.*

180. *Id.* at 5-6. In *Tabernacle Baptist*, the court stated:

well-defined licensing scheme consonant with the state's legitimate interest that the children be properly cared for, but not permit those regulatory entanglements that had the potential to submerge the religious character pervading the home's rehabilitation program.<sup>181</sup>

In *Heart Ministries*, the state regulations concerning residential children's homes mixed the legitimate health, safety and sanitation concerns of government with the more troublesome area of program and personnel. For example, the regulations required that the governing board represent a variety of community interests, that the staff be provided state-specified training, and that finances be "sound and adequate."<sup>182</sup> The Kansas Supreme Court upheld the comprehensive regulatory scheme as within the state's police power. Unfortunately, the home did not argue the Establishment Clause defenses<sup>183</sup> available to a children's home with a profile that was apparently "pervasively sectarian."<sup>184</sup>

Two other cases involving residential children's homes gave very cursory consideration to First Amendment objections to state licensure and resolved the issues against the religious ministries. *Darrell Dorminey Children's Home v. Georgia Department of Human Resources*<sup>185</sup> concerned a challenge by a church and its pastor, as operators of an unlicensed children's home, resisting licensing as a "child caring institution"

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Although of the opinion that the application of a licensing provision setting forth certain well-defined health and safety standards and containing a proviso prohibiting the licensing authority from interfering with the Home's religious beliefs or practices would be within the State's power . . . the licensing scheme under consideration is not so limited . . . .

[The regulations are] replete with broadly phrased provisions giving [the state department] virtually unlimited discretion in assessing compliance with its mandates. For example, if the [departmental] representative assigned to visit the Home was to determine that its program of care was not sufficiently "well rounded," or that "appropriate community activities" had not been made available, a license could be denied, despite the fact that what the [departmental] representative considered a well rounded program of care of appropriate community activities would fly in the face of the [church's] religious beliefs.

*Id.* (footnotes omitted).

181. *Id.* at 2. The church was not able to point to any actual constraints on the religious activities of the home at the time of suit because the home had never been licensed and had only recently been pressured by the state into compliance. *Id.* Nevertheless, the court appears to have been correct in issuing the injunction on the basis that there was a "substantial risk" of entanglements in the absence of an injunction. See *supra* note 99 and accompanying text.

182. 607 P.2d 1102, 1106 (Kan. 1980). Quite properly, any ministry would want its board of directors to be of one mind on its religious purposes, thus rendering difficult, if not impossible, fulfillment of a duty to represent a variety of the community's interests.

183. *Id.* at 1107-08.

184. *Id.* at 1104-07. There were religious restrictions on staff selection, enforced obedience to religious dogma, required attendance at worship services, and required religious or doctrinal study. Further, the children's home was an integral part of the religious mission of the sponsors, and religious evangelization was a primary purpose of the home. *Id.*

185. 389 S.E.2d 211 (Ga. 1990).

under state statutes. The state supreme court did not discuss any specific religious beliefs or practices constrained by the licensure statute and summarily affirmed the decision by the trial court that neither the Free Exercise nor Establishment Clauses were violated.

Much the same abbreviated treatment was given by the state court of appeals in *State ex rel. Roberts v. McDonald*.<sup>186</sup> The state Department of Human Services had brought an action to enjoin the continued operation of a boy's ranch affiliated with a church. The trial court had entered summary judgment against the church, finding that neither the Free Exercise nor Establishment Clauses were violated. Again, the court did not discuss the specific religious beliefs or practices that were allegedly burdened by the licensing scheme. This lack of discussion, perhaps due to the summary nature of the proceedings below, is regrettable. As in *Tabernacle Baptist*, at least some of the regulations quoted by the *Roberts* court have serious vagueness problems. The regulatory agency did not have to issue a license until it "is satisfied that such facility will meet known needs for the services proposed" and that minimum standards are met.<sup>187</sup> Concerning the minimum standards, they include "requirements for a constructive program," employees are to be of "good moral character," facilities are to provide "full . . . religious opportunities," and the church facility is to have "good community relationships."<sup>188</sup> Depending on how this statutory authority is made more concrete in the regulations, the application to religious children's homes could well be void-for-vagueness and thus chilling of religious exercise.

A series of three cases in Texas evidence a long-running battle between the Department of Public Welfare and three children's homes. In *Roloff Evangelistic Enterprises, Inc. v. State*,<sup>189</sup> the department brought suit seeking to require compliance with the Child Care Licensing Act as to three homes operated by a religious organization. On motion for summary judgment, the trial court granted the relief requested by the department ordering the homes to secure licenses and to permit inspection by state employees. The trial court had requested evidence of the manner in which the legislation actually conflicted with religious beliefs or practices. Testimony by the pastors operating the homes was two-fold: for the ministry to accept a license from the state implied civil superiority or authority over a Christian ministry, and compliance with state standards implied that the state had a role in the upbringing of children, which was

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186. 787 P.2d 466 (Okla. Ct. App. 1989), *cert. denied*, 111 S. Ct. 60 (1990).

187. 787 P.2d at 468 (quoting regulatory language).

188. *Id.*

189. 556 S.W.2d 856 (Tex. Civ. App. 1977), *appeal dismissed*, 439 U.S. 803 (1978).



inimical to the belief that the primary responsibility rests with parents who had placed the children in the home. Unable to see how these asserted conflicts (assuming they exist) actually impaired religious activities, the Texas Court of Appeals affirmed. In doing so, the court noted that the Licensing Act was addressed solely to the physical and mental well-being of the children. Indeed, the authorizing legislation specifically instructed the state agency not to encroach into areas of religious belief or training.<sup>190</sup>

As with *Roloff*, the case of *Oxford v. Hill*<sup>191</sup> did not present a frontal conflict between the Texas Child Care Licensing Act and religious practices. In *Oxford*, the plaintiff was an employee and director of one of the children's homes operated by Roloff Evangelistic Enterprises. The court below dismissed the action without trial, having found the act constitutional. Because of the lack of a factual record, on appeal no coercive effect on the employee's religious convictions could be cited. The court of appeals affirmed.

In *State v. Corpus Christie People's Baptist Church, Inc.*,<sup>192</sup> one learns that the children's homes at issue in *Roloff* and *Oxford* have been transferred to the ownership and control of a church. Nonetheless, the resistance to state licensure fares no better in *People's Baptist*. The state supreme court, holding that there is a compelling governmental interest in the safeguarding of children, said that the Free Exercise Clause is not violated. Again, the court did not discuss any specific restrictions on religious beliefs or practices. Moreover, the supreme court noted that the licensure statute and regulations promulgated thereunder affected only matters concerning the children's health, safety, and well-being. The regulations specifically prohibited the state agency from regulating or attempting to control "the content or method of any instruction of curriculum of a school sponsored by a religious organization."<sup>193</sup> Finally, the court read the Establishment Clause — mistakenly it seems — as not applicable, stating that the clause protected religious autonomy only in instances of regulations accompanying government aid to a religious organization.<sup>194</sup>

In another early decision reached without a trial involving a church-operated day-care center, a state appellate court in *North Carolina v. Fay-*

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190. 556 S.W.2d at 859.

191. 558 S.W.2d 557 (Tex. Civ. App. 1977).

192. 683 S.W.2d 692 (Tex. 1984), cert. denied, 474 U.S. 801 (1985).

193. 683 S.W.2d at 696 (quoting statutory language).

194. *Id.* at 695.

*etteville Street Christian School*<sup>195</sup> upheld state authority to regulate such facilities for the protection of the children's health, safety, and moral environment.<sup>196</sup> The opinion is at best of persuasive value, however, since the Supreme Court of North Carolina vacated the opinion and remanded to the trial court for further proceedings, holding that the interlocutory appeal was improvidently granted.<sup>197</sup>

In *Fayetteville*, the Child Day-Care Licensing Commission and other state officials sued several church day-care centers and their directors because they refused either to obtain licenses or to renew licenses that had expired. Although refusing to be licensed, the day-care ministries of the churches had agreed to provide the state with evidence of their compliance with fire, health and safety regulations.<sup>198</sup> Soon after the suit was initiated, the parties filed cross motions. The state sought a preliminary injunction to stop operation of the child-care centers until they obtained a license. The child-care centers moved to dismiss, arguing that the licensing statutes violated the free exercise rights of church-owned day-care facilities.<sup>199</sup> No evidentiary hearing was held. The churches filed affidavits stating that the operation of their centers was a ministry of their churches, that the religious and secular activities of the day-care centers were indivisible components, and that state licensing violated their religious liberty. In equally bold and conclusory assertions, the state's affidavits said that the Day-Care Facilities Act's requirements applied only to health and safety, and thus did not interfere with any religious practice or religious education.<sup>200</sup> The trial court denied the churches' motion to dismiss and granted the state's request for preliminary injunction.

The North Carolina Court of Appeals affirmed. The statute grants to the Child Day-Care Licensing Commission the authority to license all day-care facilities meeting health and safety standards, conduct inspections and review inspection reports by other agencies, provide educational and consultation services, and promulgate regulations.<sup>201</sup> The health and safety standards are not determined by the commission, but

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195. 258 S.E.2d 459 (N.C. Ct. App. 1979), *vacated and remanded on other grounds*, 261 S.E.2d 908 (N.C.), *vacated and remanded following rehearing*, 265 S.E.2d 387 (N.C.), *appeal dismissed*, 449 U.S. 807 (1980).

196. 258 S.E.2d at 463-64.

197. 261 S.E.2d 908, 914; 265 S.E.2d 387, 389 (N.C. 1980).

198. 258 S.E.2d at 461.

199. *Id.*

200. *Id.*

201. N.C. GEN. STAT. § 110-88 (1978).

either appear in other sections of the act,<sup>202</sup> are developed by the Commission for Health Services (medical and sanitation) and the State Insurance Department (fire prevention), or are found in the North Carolina Building Code.

Other than the general allegation that their religious liberty was abridged by the act, the only assertion of the day-care centers was the abstract contention that the state may not require a church to obtain a license as a condition precedent to its performing an important part of its ministry. The *Fayetteville* court rejected this assertion with these findings:

- (1) that the wording of the Act in question does not grant to the State any authority to interfere with the religious belief or freedom of defendants;
- (2) that the day care licensing requirements speak only to minimum standards of health and safety and do not interfere with any religious practices or contain any educational requirements for staff or children;
- (3) that all of the defendants have heretofore been licensed by the Commission without any objections; and
- (4) that defendants do not contend or show that it is contrary to their sincere religious belief to seek licenses.<sup>203</sup>

As indicated above, the state supreme court later vacated for procedural reasons.

In *Michigan Department of Social Services v. Emmanuel Baptist Pre-school*,<sup>204</sup> perhaps the leading case concerning licensure of church-based day-care facilities, the Supreme Court of Michigan upheld certain regulatory requirements while striking down others. Notwithstanding the day-care center's abstract claim that to obtain a license implied that its ministry was subordinate to the state, the majority of the supreme court sustained a general licensure requirement. As to specific regulations, the court unanimously upheld a regulation prohibiting corporal punishment.<sup>205</sup> The court was divided, however, on other aspects of the case. The majority struck down a regulation requiring that a day-care facility director have minimal educational credentials from an accredited institution.<sup>206</sup> This was because a church may desire to employ its director with a degree from a religious institution of higher education that chooses not to be state-accredited. Further, a majority of the court

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202. See, e.g., N.C. GEN. STAT. § 110-90.1 (qualifications of staff), § 110-91(6) (space requirements), § 110-91(7) (staff-child ratio), and § 110-91(9) (record keeping) (1978).

203. 258 S.E.2d 459, 463 (N.C. Ct. App. 1979).

204. 455 N.W.2d 1 (Mich. 1990). The state supreme court reversed the Michigan Court of Appeals, 388 N.W.2d 326 (Mich. Ct. App. 1986), which had reversed a trial court decision that had struck down certain regulations and affirmed others. 455 N.W.2d at 3.

205. *Id.* at 3.

206. *Id.* at 3.

struck down as unconstitutionally vague and overbroad a regulation requiring that a day-care center program be one that steered the emotional development of children in the direction of a "positive self-concept."<sup>207</sup> Finally, the church objected to the financial disclosure provisions in the regulations. Because the state had never demanded the financial records of Emmanuel Baptist Preschool, the majority found that issue was not ripe for review.<sup>208</sup> From the majority opinion, and the four separate opinions, it is evident that the balance of the regulations that directly address the health and safety of children would be sustained.

In *North Valley Baptist Church v. McMahon*,<sup>209</sup> a church-operated preschool unsuccessfully challenged the constitutionality of the California Child Care Facilities Act. The act's licensing regulations imposed requirements in the areas of physical structure, nutrition, immunizations, child-staff ratios, record keeping, personnel, and financial disclosure. Following a two-week trial on the merits, only three objectionable statutory requirements remained unresolved: a regulation prohibiting corporal punishment, a requirement that every preschool submit fingerprints of all employees in order that a criminal background records check could be done, and a requirement that each child at a facility "be free to attend religious services or activities of his/her choice and to have visits from a spiritual advisor of his/her choice."<sup>210</sup> The first two regulations were understandably sustained as appropriate health and safety interests of the state. The church-based preschool objected to the religious services/advisor regulation because it would either prevent the offering of a mandatory religious curriculum or would require the preschool to open its door to religious advisors inimical to the beliefs of the church.<sup>211</sup> The state, however, did not interpret the regulation in this manner. It read the reference to "religious choice" as an election to be made by the parent, not the young child. Applied in this manner, the religious services/advisor regulation did not conflict with the beliefs of the church. Indeed, it was the policy of the church-based preschool to fully disclose its religious orientation to parents inquiring about enrolling their children.<sup>212</sup>

Finally, in *Kansas ex rel. Pringle v. Heritage Baptist Temple*,<sup>213</sup> a

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207. *Id.* at 2-3.

208. *Id.* at 3.

209. 696 F. Supp. 518 (E.D. Cal. 1988), *aff'd*, 893 F.2d 1139 (9th Cir. 1990), *cert. denied*, 110 S. Ct. 3215 (1990).

210. 696 F. Supp. at 530-33.

211. *Id.* at 533.

212. *Id.*

213. 693 P.2d 1163 (Kan. 1985).

church that operated an unlicensed day-care center was enjoined from continued operation without first obtaining a license. The church lacked standing to challenge regulations of the Department of Health and Environment prohibiting corporal punishment. There was an administrative remedy under which the church could challenge the rule and perhaps obtain a variance accommodating the church's religious beliefs. The court rejected the church's objection to licensure — that taking a license implies the state is head of the church — with the specious observance that “the operation of a day-care center [is] not . . . the exercise of a religious activity.” Notwithstanding that religious activities may be part of the center's curriculum, said the court, those “activities are not disturbed or burdened by licensure.”<sup>214</sup> The final result reached by the Supreme Court of Kansas is in line with cases elsewhere.<sup>215</sup> But when the opinion states that the church's day-care center is not a religious activity and thus apparently not deserving of First Amendment protection, the court errs both as to fact and law. The facts were not in serious dispute and indicated that the day-care center was founded out of religious motivation and that religious teaching was integral to the program. Moreover, serious legal implications follow from the logic that because many day-care centers are secular, the operation of such a center by a church is therefore not a religious activity. It is common for Christian churches to view all that they do as originating in faith and in furtherance of religious responsibilities.<sup>216</sup> Merely because church-operated

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214. *Id.* at 1167.

215. The most recent decision concerning a church-based day-care facility is *Health Servs. Div. v. Temple Baptist Church*, 814 P.2d 130 (N.M. App.), *cert. denied*, 814 P.2d 103 (N.M. 1991). *Temple Baptist* raised now-familiar issues: (1) the church objected in principle to licensure of its child-care facility arguing that the requirement implied that the ministry was subordinate to the state rather than to Christ; and (2) the prohibition on spanking was contrary to the church's disciplinary practices. The state court of appeals, applying the “generally applicable, religion-neutral” standard for Free Exercise Clause analysis recently adopted in *Employment Div. v. Smith*, 494 U.S. 872, 110 S. Ct. 1595 (1990), upheld the mandatory licensing law and the regulation on corporal punishment. 814 P.2d at 134-35. Apparently no Establishment Clause defense was argued, and the appeals court refused to take up a state constitutional defense because the issue had not been raised earlier in the trial court. *Id.* at 136.

The only other reported decision concerning religious day-care facilities is found in *Texas v. Pampa Baptist Temple*, 4 Religious Freedom Rptr. 148 (Tex. Dist. Ct., 1984) (permanent injunction entered prohibiting Pampa Christian Academy from operating its child-care facility without first obtaining a license from the Texas Department of Human Resources).

216. Many activities that obviously are exercises of religion are not required by conscience or doctrine. Singing in the church choir and saying the Roman Catholic rosary are two common examples. Any activity engaged in by a church as a body is an exercise of religion. This is not to say that all such activities are immune from regulation: there may be a sufficiently strong governmental interest to justify the intrusion. But neither are those activities wholly without constitutional protection. It is not dispositive that an activity is not compelled by the

day-care centers have "secular counterparts" in the general society does not make the activity nonreligious when done by a church. To conclude otherwise is to permit the courts to define for churches what is "secular" and what is "religious" among their activities. It is for the churches to define for themselves which of their practices are "religious," leaving to the civil courts to determine if those putative religious activities are protected from the objected-to government regulation.

Some states exempt religious day-care and residential care homes from full licensure. These exemptions have been challenged as "advancing religion" and thus violating the Establishment Clause. In *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*,<sup>217</sup> the Supreme Court made it clear that a legislative body could, consistent with the Establishment Clause, exempt a religious organization from regulatory burdens shared by secular organizations otherwise similarly situated.<sup>218</sup> The legitimating purpose of such an exemption may be either to provide additional breathing room for the place of religious practice or to reduce entanglements between religious institutions and government. Until *Amos* made the matter clear, litigation in several states challenged religious accommodations and exemptions under state licensure statutes concerning residential children's homes and day-care centers. Some states completely exempt church-affiliated child-care facilities from licensure,<sup>219</sup> whereas other states continue to regulate such facilities but with reduced governmental oversight.<sup>220</sup>

The leading case, *Forest Hills Early Learning Center, Inc. v. Grace Baptist Church*,<sup>221</sup> was a challenge to a Virginia statute that regulated

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official doctrine of a church or the religious conscience of an individual believer. Laycock, *supra* note 28, at 1390-91.

217. 483 U.S. 327 (1987).

218. In *Amos*, the Court sustained the constitutionality of § 702 of the Civil Rights of 1964, as amended, 42 U.S.C. § 2000e-1 (1988). See also *supra* notes 45-51.

219. ALA. CODE § 38-7-3 (1975) (effective Apr. 22, 1981); ILL. ANN. STAT. § 2212.09 (effective Jan. 1, 1983); MISS. CODE ANN. § 43-15-9 (1972) (effective 1946); MO. REV. STAT. § 210.516(5) (1986).

220. ARK. CODE ANN. § 20-78-209 (Michie 1987) (effective 1983); IND. CODE ANN. § 12-3-2-12.7 and -12.8 (West 1982 and Supp. 1991) (effective 1987 & 1988); LA. REV. STAT. ANN. §§ 46:1404 and 46:1405 (West 1982) (effective Sept. 1, 1985); N.C. GEN. STAT. § 131D-1 to 131D-10.4 (1990) (effective 1983); S.C. CODE ANN. §§ 20-7-2700, 20-7-2900 to 20-7-2970 (Law Co-op. 1976) (effective May 19, 1981); VA. CODE ANN. § 63.1-196.3 (Michie 1950 and Supp. 1987) (effective 1979) (amend. will be effective June 1, 1992).

221. 846 F.2d 260 (4th Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989). The earlier litigation history is found in *Forest Hills Early Learning Center v. Lukhard*, 480 F. Supp. 636 (E.D. Va. 1979), and 487 F. Supp. 1378 (E.D. Va. 1980), *vacated and remanded*, 642 F.2d 448 (4th Cir. 1981), *on remand*, 540 F. Supp. 1046 (E.D. Va. 1982) (granting summary judgment), *aff'd in part, vacated in part*, 728 F.2d 230 (4th Cir. 1984), *on remand*, Civ. Action No. 80-0116-R (E.D. Va. Jan. 17, 1985) (unpublished opinion), *appeal after remand*, 789 F.2d 295 (4th Cir.

child-care facilities at reduced intensity if operated by a "religious institution." As opposed to full licensure, a religiously operated facility must give written notice to the state that it is in operation; comply with applicable building, fire, and sanitation codes; allow inspection by officials to assure compliance with these codes and submit proof of the results; provide written notice of the center's unlicensed status to those who are considering using its facilities; comply with minimum staff-child ratios; and permit official investigation should a citizen file a complaint.<sup>222</sup> Relying on *Amos*, the circuit court sustained the constitutionality of the Virginia exemption.<sup>223</sup> Similar results have been reached in Illinois,<sup>224</sup> Missouri,<sup>225</sup> and Florida.<sup>226</sup> The few reported decisions to the contrary were either decided before *Amos*<sup>227</sup> or decided on a theory other than an Establishment Clause violation.<sup>228</sup> Based on litigation recently initiated,

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1986), *on remand*, 661 F. Supp. 300 (E.D. Va. 1987). The federal district court had granted summary judgment against the sectarian day-care centers on the basis that none of the full-licensure regulations directly infringed a sincerely held religious belief. The court had earlier held that the exemption for religious preschools, although not violating the Equal Protection Clause, did violate the Establishment Clause as a provision having the effect of advancing religion. In the course of the prolonged *Forest Hills* litigation, *Amos* was decided by the Supreme Court. Following the *Amos* decision, the Fourth Circuit, 846 F.2d 260, sustained the constitutionality of the Virginia legislation.

222. VA. CODE ANN. § 63.1-196.3 (Michie 1985).

223. *Forest Hills*, 846 F.2d at 261.

224. *Pre-School Owners Ass'n v. Department of Children and Family Servs.*, 518 N.E.2d 1018 (Ill.), *appeal dismissed*, 487 U.S. 1212 (1988). The operators of secular day-care centers had sued alleging that the statutory exemption for religious centers violated the First and Fourteenth Amendments. The court sustained the constitutionality of the exemption finding that the regulation did not violate the Establishment Clause.

225. *Child Day-Care Ass'n v. O'Hara*, 9 Religious Freedom Rptr. 81 (Mo. Cir. Ct., Div. 3, 1989). Secular child-care institutions had sued the state of Missouri because religious facilities were entirely exempt from licensure. The trial court held that the exemption did not violate either the Establishment or Free Exercise Clause, nor was the exemption from licensure a violation of the Equal Protection Clause.

226. *Forte v. Coler*, 725 F. Supp. 488 (M.D. Fla. 1989), *appeal dismissed*, 886 F.2d 1324 (11th Cir. 1989). The federal district court sustained the constitutionality of a Florida statutory exemption of child-care facilities where the centers were an integral part of a church or parochial school.

227. *See Arkansas Day Care Ass'n v. Clinton*, 577 F. Supp. 388 (E.D. Ark. 1983). Recent Arkansas legislation exempted church-operated child-care facilities from formal compliance with licensing standards applicable to secular facilities. However, the statute still required compliance with identical regulations concerning health, safety, and welfare of children in such facilities. The district court went on to state that exempting church-operated facilities from substantially the same regulatory burdens as secular facilities would over-accommodate the church-based centers and thus be unconstitutional. Clearly, *Amos* is to the contrary.

228. *See Cohen v. City of Des Plaines*, 742 F. Supp. 458 (N.D. Ill. 1990). A city ordinance exempted from regulatory and permit requirements child-care providers that operated in buildings used for religious purposes. The court held the ordinance unconstitutional as a violation of equal protection. Additionally, the ordinance was said to be violative of the Establishment Clause because it had the primary effect to advance religion, and that the benefit to

the wrongheaded notion that exemptions from regulation enacted out of a desire to expand religious liberty violate the Establishment Clause is not an idea that easily dies.<sup>229</sup>

## 2. *Privileged Clergy Communications and Abuse Reporting Laws*

At common law there did not exist an evidentiary privilege for communications between priest and penitent or clergy and counselee.<sup>230</sup> The privilege in some form is currently recognized in every state by statute or rule of court,<sup>231</sup> and is recognized in federal courts as a natural adjunct to religious liberty as protected by the First Amendment.<sup>232</sup> Private communications between social workers and their counselees are generally not recognized as privileged in the course of judicial proceedings.<sup>233</sup> Thus, an interesting situation arises when the vocations of social work and cleric come together in a social welfare agency operated under the auspices of a church or other religious organization.

A Presbyterian minister successfully quashed a grand jury subpoena in the case of *In re Verplank*.<sup>234</sup> As one of its ministries, a church located near a college operated a draft counseling center to assist its parishioners and other young men in the community. The director of the draft counseling center was an ordained minister in the church and also held the position of chaplain at the college.<sup>235</sup> A grand jury was investigating wide-spread violations of the selective service laws. A subpoena seeking

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religion was not mandated by the Free Exercise Clause. As to the alternative Establishment Clause holding, clearly *Amos* is to the contrary.

229. See *Porter v. Axelrod*, 11 Religious Freedom Rptr. 56 (N.Y. App. Div., No. 3648-88, filed Nov. 26, 1990). This complaint alleges that the state's recent promulgation of standards for residential health-care facilities accommodating certain religious beliefs violates the Establishment Clause. The plaintiffs are two individuals with AIDS and three AIDS advocacy groups. They brought this action against the Commission of the New York State Department of Health and the Public Health Council of the State of New York. It is alleged that certain administrative rules are "devised to effectuate religious concerns of one [Roman Catholic] provider of health services" by permitting said facility to not provide contraceptives and "safe-sex" counseling. The regulation permits facilities to decline "to perform or implement any service, activity, policy or procedure because of: a) its religious beliefs, or b) sincerely held moral convictions central to the facility's operating principles if off-site provisions of such services is arranged by the Department of Health."

230. JOHN H. WIGMORE, EVIDENCE § 2394 (McNaughton rev. ed. 1961).

231. JOHN C. BUSH & WILLIAM H. TIEMANN, THE RIGHT TO SILENCE: PRIVILEGED CLERGY COMMUNICATION AND THE LAW 223 (3d ed. 1989). See generally LYNN R. BUZZARD & DAN HALL, CLERGY CONFIDENTIALITY: A TIME TO BE SILENT, AND A TIME TO SPEAK (1988); Annotation, *Privileged Communications—Clergymen*, 49 A.L.R.2d 1205 (1973).

232. *In re Grand Jury Investigation*, 918 F.2d 374 (3d Cir. 1990).

233. *In re Wood*, 430 F. Supp. 41, 46 (S.D.N.Y. 1977).

234. 329 F. Supp. 433 (C.D. Cal. 1971).

235. *Id.* at 434.



records of the church-based draft counseling center was quashed, not only as to counselees assisted by the minister but also as to those young men who were assisted by non-ministerial staff of the center working under the direction of clergy.<sup>236</sup> To the same effect is *Rivers v. Rivers*,<sup>237</sup> holding that a marriage counseling service sponsored by a church as part of its "outreach program" was activity under the auspices of the church. Thus, conversations between a pastor and those seeking marital and spiritual advice were privileged. Significantly, the fact that the pastor was in part acting as a therapist and in part as a cleric in his position at the counseling service did not nullify the evidentiary privilege.<sup>238</sup> The court deemed the entire counseling engagement as merged into his capacity as a clergyman, because of the impossibility of sorting out the dual roles and because of potential entanglement should the law seek to divine when the minister was acting solely as a cleric.<sup>239</sup>

As with all evidentiary privileges, it is fundamental that the clergy-counselee privilege extends only to communications given in private so that aid or advice can be rendered. Accordingly, in *In re Wood*<sup>240</sup> the court refused to block a grand jury investigation seeking records in the hands of a bishop of the Episcopal Church. The National Commission on Hispanic Affairs was a ministry of the Episcopal Church designed to address the social, economic, and spiritual needs of Hispanics in the United States. The Federal Bureau of Investigation was looking into whether certain members of the Hispanic Commission or the bishop overseeing the ministry could help the FBI locate certain fugitives from the law. Because the subpoenas did not seek confidential communications between clerics and present or former members of the Hispanic Commission, but only sought to learn what they knew about the whereabouts of certain suspects, the privilege was inapplicable.<sup>241</sup>

The virtual explosion in reported incidents of child abuse<sup>242</sup> and elder abuse,<sup>243</sup> including the sexual molestation of children, has created one of the newest issues of government involvement with church-based social service ministries. Many states have responded to this crisis of

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236. *Id.* at 436.

237. 354 S.E.2d 784 (S.C. Ct. App. 1987).

238. *Id.* at 787-88.

239. The case is similar to *State v. Hodges*, *infra* notes 249-51 and accompanying text, in so far as a cleric is performing duties in two capacities. The court in *Hodges*, reached the opposite result.

240. 430 F. Supp. 41 (S.D.N.Y. 1977).

241. *Id.* at 46.

242. See BUSH & TIEMANN, *supra* note 231, at 249-56 (summarizing child abuse reporting laws in the states).

243. *Id.* at 257-64 (summarizing elder abuse reporting laws in the states).

child and elder abuse by adopting statutes concerning the reporting of suspected abuse. Some of the legislation makes reporting permissive, and other states make reporting mandatory. Making the reporting of suspected abuse permissive abrogates any claim by a counselee against a cleric for breach of privileged communication. Laws making the reporting mandatory are often accompanied by criminal sanctions for failure to report.

Two recent cases in which social workers at religious ministries were convicted of criminal misdemeanors for failure to report suspected child abuse, illustrate the seriousness of this unresolved issue.<sup>244</sup> *In State v. Motherwell*,<sup>245</sup> three counselors employed by a large metropolitan church were convicted because of information they learned in counseling sessions with parishioners. On appeal, two of the convictions were affirmed, and a third was reversed. As to all three defendants, the court rejected the challenge to the mandatory abuse-reporting law as violative of the Free Exercise and Establishment Clauses.<sup>246</sup> The convictions were affirmed as to the two counselors who were not ordained ministers. As a matter of statutory construction, the state supreme court held that the reporting requirement did not apply to clergy, so long as the information is learned when an individual is functioning in the professional capacity as a member of the clergy.<sup>247</sup> Accordingly, the third conviction, of the defendant who was an ordained minister as well as a counselor, was reversed.<sup>248</sup>

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244. See William A. Cole, *Religious Confidentiality and the Reporting of Child Abuse: A Statutory and Constitutional Analysis*, 21 COLUM. J.L. & SOC. PROBS. 1 (1987); Kathryn Keegan, Comment, *The Clergy-Penitent Privilege and the Child Abuse Reporting Statute: Is the Secret Sacred?*, 19 J. MARSHALL L. REV. 1031 (1986); Alexander D. Hill & Chi-Doo Li, *A Current Church-State Battleground: Requiring Clergy to Report Child Abuse*, 32 J. OF CHURCH & ST. 795 (1990); Note, *Constitutional Law—Freedom of Religion—Requiring Reports of Religious Counseling Sessions Under Child Abuse Reporting Statutes Does Not Violate the First Amendment* [State v. Motherwell], 13 U. ARK. LITTLE ROCK L.J. 151 (1990) (disapproving Motherwell decision); Mary Harter Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements versus the Clergy Privilege and Free Exercise of Religion*, 71 MINN. L. REV. 723 (1986).

245. 788 P.2d 1066 (Wash. 1990) (en banc).

246. *Id.* at 1070-74. Concerning the Free Exercise Clause claim, the court noted that the result "might be different if the counselors' religious tenets required them to keep confidential all information learned in counseling sessions, because requiring a report in these circumstances could coerce a direct violation of religious tenets." *Id.* at 1071 n.8.

247. *Id.* at 1069.

248. See also *Forest Hills Early Learning Ctr., Inc. v. Lukhard*, 661 F. Supp. 300 (E.D. Va. 1987), *rev'd on other grounds*, *Forest Hills Early Learning Ctr., Inc. v. Grace Baptist Church*, 846 F.2d 260 (4th Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989) (district court held, *inter alia*, Virginia's regulation requiring that child-care facilities report child abuse did not violate free exercise rights of church-based day-care).

In *State v. Hodges*,<sup>249</sup> two ordained ministers were found guilty of failing to report a stepfather's sexual abuse of a student enrolled in their church-operated school. Notwithstanding that the defendants were clergy and pastors in the church, the information they learned was in their role as administrators of the church-based school. Accordingly, as construed by the trial court there was no exemption from the reporting requirement, and the court declined to grant an exemption because of First Amendment religious liberty concerns.<sup>250</sup> The convicted pastors have appealed.<sup>251</sup>

### 3. *Religious Preferences in Adoption and Foster Home Placements*

Several states have laws requiring that children up for adoption or in foster homes be placed where practicable in a home of the same religion as that of the child. Religiously affiliated adoption and foster home placement agencies also seek to place children under their care into homes that reflect their own religion. The religious liberty law in this area has to accommodate three and sometimes four concerns: the religious agency desires to be faithful to its beliefs and practices; the parent or guardian may desire placement in accordance with his or her religious preference; and the children being placed may have religious preferences of their own, or they may not want to have religion forced on them. In instances where the government is subsidizing the care of the child in placement, there is the additional concern that the state not unconstitutionally advance religion. The few generally reported cases in this area have been remarkably negligent of any regard for the institutional integrity of the religiously affiliated social agency.

In a decision characterized as "shocking" and "unprecedented,"<sup>252</sup>

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249. Nos. F 117153, M 569488 (Mun. Ct. San Diego, May 31, 1989) reported in Nat'l & Int'l Religion Rptr., Vol. 5, Nos. 1 & 7 (Dec. 31, 1990 and Mar. 25, 1991). The two pastors were arrested in 1988 after officials learned that they had failed to disclose that the child at the school told them that her stepfather, a lay minister at the church, had molested her for several years. One of the ministers confronted the stepfather, who confessed and was removed from his church responsibilities and disciplined before the congregation.

250. No. M 569488, Order and Opinion (Mun. Ct. San Diego, May 31, 1989), *aff'd*, 9 Religious Freedom Rptr., 292 (App. Dep't, Mun. Ct. San Diego, Oct. 27, 1989), *writ denied*, No. D011138 (Cal. Ct. App., 4th App. Dist. Nov. 27, 1989), *writ denied*, No. S013147 (Cal. Jan. 18, 1990).

251. No. CR 121291, *statement on appeal* (App. Dep't, Mun. Ct. San Diego, filed July 24, 1991).

252. Marjorie Phillips, *Babylift: Just Look At You Now*, 32 ETERNITY 25 (1981). Dr. W. Stanley Mooneyham's entire statement was:

I risked my life to save those babies from certain death, and I'm not going to remain silent and simply let them be "kidnapped" by the State of California or anyone else. . . . The decision is strange, shocking, unprecedented. If allowed to stand, no

a California-based foster and adoptive home placement agency lost the right to place children exclusively with families who were active members of an evangelical Protestant church. *Scott v. Family Ministries*<sup>253</sup> involved twenty orphans air-lifted from Cambodia on the eve of its fall to the Khmer Rouge in April 1975 and brought to the state-licensed Family Ministries in California for adoptive placement. When the children first arrived in the United States, Dr. Richard Scott was one of the attending physicians. Dr. Scott inquired with Family Ministries about adopting one of the children, but was told that he and his wife were ineligible because they were not members of an evangelical Protestant church. Dr. and Mrs. Scott sued seeking to adopt one of the children and to enjoin Family Ministries from enforcing its religious eligibility requirement in selecting adoptive homes for any of the twenty children.<sup>254</sup>

The trial court required that the state Department of Health be notified as a party in interest having jurisdiction over adoptive placement. However, the department made it clear that it took no position in the matter.<sup>255</sup> Following trial on the merits, the lower court found for the Scotts and granted the requested injunction against Family Ministries.

On appeal the judgment was affirmed. California law, like that of many states, allows religious matching in adoptive placement. Religious matching requires or prefers adoption by parents of the same religious faith as that of a natural parent of the child or of a religion for which the biological parent expresses a preference.<sup>256</sup> This policy arose out of the common-law right of a biological parent to control the religious upbringing of his or her child.<sup>257</sup> The state remains neutral in this religious matter by simply honoring the desires of the parent.

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religious agency will ever be able safely to bring orphaned children into California for adoptive placement.

Mooneyham was President of World Vision, Int'l. World Vision is a nonprofit interdenominational Christian corporation conducting global-wide relief services to third world countries.

253. 135 Cal. Rptr. 430 (1976). World Vision sued in federal district court seeking declaratory and injunctive relief against all the parties to the state suit. *World Vision Int'l v. Superior Court*, No. CV-75-3776 I H (C.D. Cal., filed Nov. 11, 1975). World Vision sought to protect its interest in the children which it had brought to the United States and which had been surrendered to Family Ministries only because World Vision did not hold a license in California to be an adoptive placement agency. The federal district court abstained from interfering in the state's handling of the matter and dismissed the suit.

254. 135 Cal. Rptr. at 434.

255. *Id.* at 434-35.

256. As the court noted, about 95% of the population of Cambodia is Buddhist. However, at the time when World Vision took custody of the children concerned, the parents, if available, were told that the baby might be placed for adoption in a Christian home and were asked to sign a written "relinquishment." *Id.* at 433.

257. *Id.* at 437.

The appellate court ventured farther than ever before in declaring that the state licensing scheme over private adoptive agencies made the actions of private agencies also “state action in the context of the Establishment Clauses.”<sup>258</sup> Thus, the court reasoned, if the state must be neutral in matters of religion, so must private agencies such as Family Ministries! The case is ill-considered because it confuses “state action” for purposes of the Fourteenth Amendment’s Due Process Clause<sup>259</sup> with action that constitutes impermissible state advancement of religion for purposes of the Establishment Clause of the First Amendment.<sup>260</sup> Indeed, more recent pronouncements by the Supreme Court have held that state action for Fourteenth Amendment purposes does not follow simply because a private-sector agency is licensed or pervasively regulated by a state, nor is there state action merely because the operating and capital costs of the private-sector agency is subsidized by a state.<sup>261</sup>

If *Scott v. Family Ministries* were regarded as good law today, the implications would be far-reaching indeed. Family Ministries exists for the very purpose of discriminating in favor of its particular religious persuasion, as do other adoptive agencies sponsored by other faiths. The court of appeals makes no mention of having considered the Free Exercise and Establishment Clause rights of Family Ministries, its employees, and sponsoring churches.<sup>262</sup>

A position advocating operational autonomy for a religious agency is considerably undercut when the agency is supported by government funds. Consider the protracted litigation concerning a state foster-care

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258. *Id.* at 438.

259. State action exists for purposes of the Fourteenth Amendment when the state and a private party maintain a symbiotic relationship (*Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961)); when the state requires, encourages or is otherwise significantly involved in nominally private conduct (*Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972)); and when the private person or entity exercises a traditional state function (*Smith v. Allwright*, 319 U.S. 738 (1943), and *Marsh v. Alabama*, 326 U.S. 501 (1946)).

260. Although one can hope that *Scott v. Family Ministries* is given a quiet burial, the story for the twenty children has a happier ending. In consideration for not appealing the decisions to a higher court, the Los Angeles County Department of Adoptions approved the adoptions of the children by the families chosen by Family Ministries. Phillips, *supra* note 252.

261. See *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (state action not found where 90% of private school’s operating budget provided by public funds); *Blum v. Yaretsky*, 457 U.S. 991 (1982) (state action not present where nursing homes were extensively regulated); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) (no state action despite extensive state regulation).

262. The court did reject the claim by Family Ministries that it stands in the relationship of *in loco parentis* and thus expresses a religious preference on behalf of the natural parents. Under state law an adoptive agency to which the child has been released does not thereby acquire all the rights of a natural parent. 135 Cal. Rptr. at 438-39.

funding program in *Wilder v. Sugarman*<sup>263</sup> (*Wilder I*) and *Wilder v. Bernstein*<sup>264</sup> (*Wilder II & Wilder III*). The State of New York has for many years provided public assistance for the placement of children in private foster-care homes. Moreover, the New York Constitution provides for religious matching in the placement of the children in foster homes.<sup>265</sup> In *Wilder I*, several plaintiffs challenged the religious matching provisions as effectively discriminating on the bases of religion and race. The theory was that in New York City the number of Protestant black children needing placement far exceeded the number of openings in Protestant foster agencies. That was not the case with Roman Catholic and Jewish children desiring placement in homes consonant with their religion. The result was that a disproportionate number of Protestant black children had to go to state-operated shelters and training schools that were significantly less desirable. The court in *Wilder I*, considered only the issue of whether the religious matching provision of the state constitution facially violated the Establishment Clause, and held that it did not.<sup>266</sup>

In *Wilder II*, the taxpayer-plaintiffs were found to have standing to sue, plaintiffs were permitted to amend their complaint, and the suit was certified as a class action.<sup>267</sup> Several years of discovery and other trial preparation ensued. Shortly before trial, the plaintiffs and the defendant-city entered into negotiations for settlement. In mid-1984, these parties arrived at a proposed stipulated settlement, concerning which the court permitted several private-sector child-care agencies to intervene and oppose. Following further proceedings and modification of the proposed settlement, a final stipulation was reached and approved in *Wilder III*.<sup>268</sup>

Not all the religious homes agreed to the settlement. The district court took up several objections by the religious agencies to the stipulated settlement but rejected them all. The most serious objection was by the Roman Catholic and Jewish agencies. The stipulated settlement was

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263. 385 F. Supp. 1013 (S.D.N.Y. 1974).

264. 499 F. Supp. 980 (S.D.N.Y. 1980), and 645 F. Supp. 1292 (S.D.N.Y. 1986), *aff'd*, 848 F.2d 1338 (2d Cir. 1988). See also *Wilder v. Bernstein*, 725 F. Supp. 1324 (S.D.N.Y. 1989) (private child-care agencies that intervened in action were prevailing parties entitled to recover attorney's fees).

265. Article VII, § 32 of the New York Constitution provides that a child "shall be committed or remanded or placed, when practicable, in an institution or agency operated by persons, or in the custody of a person, of the same religious persuasion as the child." For cases concerning the interpretation of such state provisions, see *In re Santos*, 105 N.Y.S.2d 716 (1951), *reargument and appeal denied*, 107 N.Y.S.2d 543 (1951), *appeal dismissed*, 109 N.E.2d 71 (N.Y. 1952); *In re Gally*, 107 N.E.2d 21 (Mass. 1952).

266. 385 F. Supp. at 1021-27.

267. 499 F. Supp. 980 (S.D.N.Y. 1980).

268. 645 F. Supp. 1292 (S.D.N.Y. 1986).

to the effect that children (with some exceptions) in need of placement would be settled on a "first come, first served" basis without regard to the religious preference of the parents. Further, the agencies that received the child would then be responsible for providing the opportunity for religious observance and training in accordance with each child's own religion. If the child was of a religion other than that of the foster home, meeting the needs of the child would often mean transporting the child for religious services, holidays and other occasions to a house of worship of the child's own faith or bringing in a minister of that faith to the foster home.<sup>269</sup> Thus the state continued to rely principally on private-sector agencies of religious affiliation to care for foster children, but the discretion of the religious agencies in selecting the children assigned to them was severely restricted.

A second objection by the religious agencies to the stipulated settlement concerned access of the children to contraception and abortion services. Under the settlement, the city would supply the birth control and abortion services. However, Roman Catholic agencies and others have serious doctrinal objections to the provision of such services. Nonetheless, the court rebuffed these objections.<sup>270</sup>

A third objection by the religious foster agencies divided the panel assigned to hear the appeal before the Second Circuit Court of Appeals.<sup>271</sup> The stipulated settlement placed some restrictions on the display of religious symbols in the foster homes. This was to reduce any coercion or proselytizing of a child placed in a home of a different religious persuasion. For the majority, Judge Ward construed the stipulation narrowly to reach only "where plaintiffs can demonstrate that a religious symbol or aggregation of symbols displayed in the common areas of a child care agency has the effect of impermissibly chilling the Free Exercise Clause rights of children in the agency's care."<sup>272</sup> This narrowing construction, however, did not satisfy the dissent. Judge Cardamone thought the restriction on religious symbolism violated the Establishment Clause prohibition on excessive entanglement between state officials and religious agencies.<sup>273</sup> As evidenced in the *Wilder* litigation, the acceptance of public funds significantly compromises the institutional integrity of a religious social ministry.

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269. *Id.* at 1326-27.

270. *Id.* at 1328.

271. *Wilder v. Bernstein*, 848 F.2d 1338 (2d Cir. 1988).

272. *Id.* at 1349 (quoting 645 F. Supp. at 1329).

273. *Id.* at 1350-52 (dissenting opinion). For an excellent discussion of the *Wilder* litigation, see DEAN KELLEY, PUBLIC FUNDING OF SOCIAL SERVICES RELATED TO RELIGIOUS BODIES 5-11 (1990).

The New York approach of deeply involving the state in placing children needing care with sectarian agencies again caused a loss of religious liberty in *Arneith v. Gross*.<sup>274</sup> In *Arneith*, New York City had placed two teen-aged girls as foster children in the Mission of the Immaculate Virgin, an agency of the Roman Catholic Church. The girls sued the Mission because of the recent enforcement of an internal rule denying foster children contraceptive devices and prescriptions and thus denying them the option of practicing birth control. The Mission sought to enforce the rule for doctrinal reasons.

The plaintiffs would probably have prevailed for Free Exercise Clause reasons, because foster children should not be coerced into a religious practice that they did not share simply because they are placed by the city in a religious foster home. However, the Free Exercise Clause rights of the plaintiffs got no mention. Rather, the court found that the Establishment Clause was implicated because the city's placement of children in a religious home must operate in such a manner that it does not "impermissibly foster" religion.<sup>275</sup> Of course, the Mission, not the government, was enforcing the rule on contraception. Nonetheless, because the Mission was substantially financed with public funds, the court thereby reasoned that "the Mission is engaged in state action under the [F]ourteenth [A]mendment and thus controlled by the said [E]stablishment [C]ause."<sup>276</sup>

The implication that everything the Mission does in its foster home is state action for Fourteenth Amendment purposes is startling. The very reason for the Mission's existence is fundamentally religious. If everything the Mission does is state action because of public funding, then the home cannot operate in any way other than to be devoid of religious teaching and practice. Accordingly, under the court's view, the foster home would have to be secular in all its operations or the Establishment Clause is violated. Indeed, the court so concluded when it said that the operation of the foster home was a "secular branch of its work."<sup>277</sup> One might well inquire, What other branches of the Mission's work are there other than the caring for children? The plaintiffs received the remedy requested when the Mission agreed to stop enforcement of the rule against contraceptives.

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274. 699 F. Supp. 450 (S.D.N.Y. 1988) (interlocutory order, certified for appeal by district court).

275. *Id.* at 452.

276. *Id.* This "state action" holding is contrary to U.S. Supreme Court precedent. See cases cited in *supra* note 261.

277. 699 F. Supp. at 453.



### C. State Common-Law and Case Law Regulation

This subpart focuses on the familiar common-law causes of action that if allowed against social service ministries, can implicate government involvement with religion. Many such claims do not, however, invoke First Amendment concerns. For example, tort claims against a ministry for premises liability, the now-commonplace negligence action arising out of the use of a motor vehicle, and accidents that occur during alleged improper supervision of children are all matters for which social ministries are rightly accountable to the same degree as others.<sup>278</sup> Moreover, this equality of treatment in the law is reflected by the abandonment of charitable immunity, although that defense has not been repealed in all jurisdictions.<sup>279</sup>

The principal religious liberty clashes with the common law occur in four subject areas: torts; contracts; charitable trust law; and undue influence in the consummation of gifts, bequests in wills, and charitable trusts. With all four of these traditional common-law claims, any charitable organization, secular or religious, is understandably concerned with the doctrine of respondeat superior and other forms of vicarious liability. The doctrine of respondeat superior can cause liability to "ascend" from subordinates to jeopardize the assets of the larger organization.<sup>280</sup> Un-

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278. See, e.g., *Edwards v. Mt. Washington Baptist Day Care Ctr.*, 541 N.E.2d 465 (1988) (no basis for a claim of negligent infliction of emotional distress against church day-care center brought by parents of child who learned hours after the fact that their child was temporarily missing from the center).

279. *Rupp v. Brookdale Baptist Church*, 577 A.2d 188 (N.J. App. Div. 1990), held that a claim on behalf of a child suffering personal injury while playing a game at a church-sponsored day camp was barred by the New Jersey Charitable Immunity statute. It made no difference that the child's parents were not members of the church or that they claimed that they were unaware of the day camp's religious purposes. Compare *Parker v. St. Stephen's Urban Dev. Corp.*, 579 A.2d 360 (N.J. App. Div. 1990), in which the same state statute was found not applicable to a personal injury claim brought against a non-profit corporation created by St. Stephen's A.M.E. Zion Church of Asbury Park to develop low-income housing. The court of appeals found that the non-profit corporation was created to serve solely as a conduit for federal funds in conformity with federal regulations and thus was not a "charity" entitled to statutory immunity.

280. Cf. *Doe v. Samaritan Counseling Ctr.*, 791 P.2d 344 (Alaska 1990) (A pastor employed as a counselor at a religious counseling center was sued by a former counselee for sexual misconduct in the course of counseling sessions. The counseling center was also sued as being vicariously liable for the intentional misconduct of its employee perpetrated in the course of employment. The claim against the center was permitted. This decision does not follow the majority of rulings elsewhere that disallow liability under respondeat superior in such situations. However, these other jurisdictions have allowed claims against the organization for negligent hiring, training, and supervision). See generally David Frohlich, Note, *Will Courts Make Change for a Large Denomination?: Problems of Interpretation in an Agency Analysis in Which a Religious Denomination Is Involved in an Ascending Liability Tort Case*, 72 IOWA L. REV. 1377 (1987).

like for-profit businesses, eleemosynary organizations cannot simply raise their prices to account for vicarious liability as an additional cost of doing business, and insurance costs further strain already tight budgets. Social service ministries, however, are distinct from nonreligious benevolent organizations in one regard: religious organizations have the additional concern for structuring their own polity and insisting that the courts honor their ecclesiology, be it hierarchical, connectional or congregational.<sup>281</sup> Personnel relationships within non-hierarchical churches often defy the traditional assumptions inherent in respondeat superior.

Taking into account the degree to which religious social ministries approach the core of a given religion and its beliefs and practices,<sup>282</sup> the law of torts should treat these ministries much the same as houses of worship (churches, synagogues, mosques, or temples) for First Amendment purposes. Tort claims have virtually exploded against clerics and churches under theories of clergy malpractice,<sup>283</sup> breach of confidential communication,<sup>284</sup> sexual seduction and child molestation,<sup>285</sup> alienation of affections,<sup>286</sup> negligent (or intentional) infliction of emotional distress,<sup>287</sup> defamation,<sup>288</sup> invasion of privacy, and negligent hiring, training

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281. In *Barr v. United Methodist Church*, 153 Cal. Rptr. 322, *cert. denied*, 444 U.S. 973 (1979), *reh'g denied*, 444 U.S. 1049 (1980), the defendants adamantly maintained that there was no such ecclesiastical organization as the national "United Methodist Church." Notwithstanding, the court allowed present and former residents of a church-affiliated retirement home to bring an action against the "United Methodist Church" along with the retirement home corporation alleging fraud, breach of contract, and statutory violations. The loose association of churches, said the state court of appeals, was a proper defendant, along with the retirement home corporation that it promoted with its name, under the legal theory of alter ego or agency. Following this decision to permit the suit to go forward, the claim was settled for \$21 million by the association of churches. NAT'L L.J., Dec. 29, 1980, at 10. Concerning the application of respondeat superior being at odds with church polity, see EDWARD M. GAFFNEY & PHILIP C. SORNENSEN, *ASCENDING LIABILITY IN RELIGIOUS AND OTHER NON-PROFIT ORGANIZATIONS* (1984) (discussing *Barr* and other cases).

282. See the heuristic categories at text *supra* notes 10-11.

283. See Carl H. Esbeck, *Tort Claims Against Churches and Ecclesiastical Officers: The First Amendment Considerations*, 89 W. VA. L. REV. 1, 78-84 (1986) (summarizing cases).

284. *Id.* at 84-87 (summarizing cases).

285. *Id.* at 87-88 (summarizing cases).

286. *Id.* at 88-90 (summarizing cases).

287. See, e.g., *Murphy v. I.S.K. Con. of New England*, 571 N.E.2d 340 (Mass.), *cert. denied*, 112 S. Ct. 191 (1991). In *Murphy*, a mother and daughter sued Krishna for torts committed while the daughter was involved with the sect as a minor. The claims alleged were intentional infliction of emotional distress, intentional interference with parental rights, and assault and battery. For religious liberty reasons, the highest court in Massachusetts set aside a verdict for plaintiffs and dismissed the emotional distress counts. The matter was remanded for a new trial on the remaining counts.

288. Esbeck, *supra* note 283, at 104-07 (summarizing cases).

or supervision of employees.<sup>289</sup> In most of these tort cases, the state courts are recognizing First Amendment defenses. Religious social agencies and their officers, however, are unquestionably liable in intentional tort for assault and battery,<sup>290</sup> false imprisonment,<sup>291</sup> and the like, all claims that involve coercive and often violent activity.<sup>292</sup>

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289. See Lee Boothby, *Church Liability Arising Out of Employment Relationship*, in TORT AND RELIGION 1, 20-27 (ABA National Institution on Tort and Religion, Division for Professional Education, June 14-15, 1990).

290. See *Conway v. Carpenter*, 87 N.Y. 428 (1894), in which a pastor had been dismissed by his congregation. When he nonetheless entered the church, occupied the pulpit and refused to leave when requested, he was forcibly ejected. Claim for assault and battery were brought for injuries suffered by the violent ejection. See also *Michigan v. Lewis*, No. 83-S-0450 (Mich. Dist. Ct., Allegan Cty. Oct. 18, 1983); *Michigan v. McGee*, No. 83-S-0452 (Mich. Dist. Ct., Allegan Cty. Oct. 18, 1983). These two cases are prosecutions for criminal assault. Gwendolyn Harris, a member of the House of Judah sect, was struck by the three defendants on at least two occasions from which she sustained serious injury. A written consent signed by her purporting to authorize punishment for wrongdoing, including beating, burning, stoning, and hanging—sanctions said to be based on Old Testament scriptures—were held not to be valid as against public policy. The court also denied the defense that striking Harris was an exercise of religious discipline protected by the Free Exercise Clause.

291. A claim of false imprisonment was dismissed in *Molko v. Holy Spirit Ass'n for the Unification of World Christianity*, 224 Cal. Rptr. 817 (1986), *aff'd in part, rev'd in part*, 252 Cal. Rptr. 122 (1988), *cert. denied*, 490 U.S. 1084 (1989), for the reason that civil courts are barred by the First Amendment from inquiring into the allegedly "mind-control" recruiting techniques of sects, as long as force or the threat of force was not used. There was no evidence that the former members now suing their church had been forced to stay against their will other than the sect's spiritual "hold" on its members. Compare *George v. International Soc'y of Krishna Consciousness*, No. 27-25-65 (Cal. Super. Ct., Orange Co.) (reported in 5 NAT'L L.J. 6 (June 6, 1983)) (suit by ex-Krishna member alleging false imprisonment, civil conspiracy to hide her from parents, libel, invasion of privacy, and intentional infliction of emotional distress; appeal from judgment of \$9.7 million), and *Gallon v. House of Good Shepard*, 122 N.W. 631 (Mich. 1909) (false imprisonment claim lies against parachurch society for reform of wayward girls), with *O'Moore v. Driscoll*, 28 P.2d 438 (Cal. 1933) (false imprisonment claim dismissed as against religious order).

292. *Cantwell v. Connecticut*, 310 U.S. 296 (1940), broadly outlines the limits of First Amendment liberties when dealing with activities that are violent or threaten an immediate breach of the peace. In *Cantwell*, the Court overturned a criminal conviction for breach of the peace of an itinerant preacher. Although the minister had approached members of the public with verbal and written information offensive to many, no violence took place or was likely. In dicta, explaining speech-related conduct that a state could legitimately regulate, the Court said:

The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the state to prevent or punish is obvious. . . .

Like churches, social service ministries can be sued for breach of contract, including claims for wrongful discharges of employees. Accordingly, in *O'Connor Hospital v. Superior Court*,<sup>293</sup> a Roman Catholic priest and former chaplain at a hospital sponsored and operated by a religious order brought an action for wrongful termination. The state court of appeals held that permitting such a claim would infringe on the hospital's right of free exercise of religion, and that granting immunity from such a claim did not violate the Establishment Clause.<sup>294</sup>

At common law the attorney general of a state had standing to bring an action against a charitable trust so as to protect the public interest.<sup>295</sup> Authorization for such claims has presently been codified in most states.<sup>296</sup> In *Abrams v. Temple of the Lost Sheep*,<sup>297</sup> the New York Attorney General sued to compel compliance with his subpoena issued in the course of an investigation against a religious organization that was solic-

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One may . . . be guilty of the offense [of breach of the peace] if he commit[s] acts or make[s] statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended. . . .

We find in the instant case no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse. . . .

The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties, is emphasized by events familiar to all. These and other transgressions of those limits the states appropriately may punish.

*Id.* at 308-10. Although *Cantwell* involved criminal prosecution, the same constitutional limits on the scope of religious liberty would apply to state-created or state-sanctioned tort actions.

293. 240 Cal. Rptr. 766 (6th Dist. 1987) (official report of opinion deleted by order of the state supreme court), *cert. denied*, *Clev. v. O'Connor Hospitals, Inc.*, 486 U.S. 1007 (1988).

294. 240 Cal. Rptr. at 770-74, 775. *But see* *Reardon v. Lemoyne*, 454 A.2d 428 (1982), and *New Orleans Baptist Theological Seminary v. Babcock*, 554 So. 2d 90 (La. Ct. App.), *cert. denied*, 558 So. 2d 607 (La. 1990), *cert. denied*, 111 S. Ct. 214 (1990). In *Reardon* the state supreme court held that four nuns who were discharged from their teaching responsibilities at a Catholic school could sue for breach of contract alleging that the terms of their employment agreement as set out in a policy handbook required that they be given a due process hearing before they could be discharged. In *Babcock*, a seminary upon finding a student morally and spiritually unfit, refused to award him a degree. A state court of appeals overturned that decision. By outlining its policy on divorce and describing its due process procedures in a student handbook, the court held that the seminary was contractually bound and that the First Amendment was not a defense. *See also* *Gillespie v. Elkins So. Baptist Church*, 350 S.E.2d 715 (W. Va. 1986) (dismissing wrongful discharge suit by pastor utilizing neutral principles of law approach); *Black v. Snyder*, 471 N.W.2d 715 (Minn. Ct. App. 1991) (First Amendment prevents wrongful discharge claim of female cleric against former church and her superior; but claim for predischarge sexual harassment actionable); *Curran v. Catholic Univ. of Am.*, No. 1552-87, slip op. (D.C. Super. Ct. Feb. 28, 1989) (denying claim of wrongful discharge as without merit).

295. IVA WILLIAM F. FRATCHER, SCOTT ON TRUSTS 357-60 (4th ed. 1989).

296. *Id.* at 360 n.7, 363 n.21. *See generally* Dallin H. Oaks, *Trust Doctrines in Church Controversies*, 1981 B.Y.U. L. REV. 805.

297. 562 N.Y.S.2d 322 (Sup. Ct. 1990).

iting money from the public. The court permitted the investigation to continue, stating that no credible First Amendment defenses could undermine the Attorney General's authority "to conduct investigations to determine if charitable solicitations are free from fraud and whether charitable assets are being properly used for the benefit of intended beneficiaries."<sup>298</sup> In a related action, *Abrams v. New York Foundation for the Homeless*,<sup>299</sup> the court found that a foundation and shelter for the homeless affiliated with the Temple of the Lost Sheep, Inc., had no valid religious liberty defense to the investigation into alleged fraud and misrepresentation in solicitation of funds. Likewise, *Queen of Angels Hospital v. Younger*<sup>300</sup> upheld a state attorney general's authority to supervise the activities of a nonprofit, religious hospital. Nevertheless, the hospital, operated by a Roman Catholic order, was protected from interference by the attorney general into matters concerning the hospital's operation that implicate religious doctrine or practice.

Perhaps the most widely publicized controversy over regulation of the finances of a religious organization concerned the California State Attorney General's taking over the entire financial operations of the Worldwide Church of God.<sup>301</sup> The attorney general's actions were based on allegations of fiscal irregularities by church officials. The attorney general asserted authority based on the state's interests in charitable trusts, which the attorney general maintained was so broadly defined as to include a church. Accordingly, he argued that status as a church permitted the use of the provisional remedy of receivership to investigate the allegations of fraud. Eventually, the legislature passed a law explicitly denying authority to the attorney general to institute such actions against religious bodies.<sup>302</sup>

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298. *Id.* at 324.

299. 562 N.Y.S.2d 325 (Sup. Ct. 1990) (preliminary injunction against solicitation granted).

See also *Marcus v. Jewish Nat'l Fund*, 557 N.Y.S.2d 886 (1990) (Donors were granted injunctive relief against a fund collecting money for land development projects in Israel. Donors claim was for false advertising and fraud in that fund misled donors into thinking money was used in Israeli occupied territories).

300. 136 Cal. Rptr. 36 (2d Dist. 1977).

301. *People v. Worldwide Church of God*, No. C. 267 607 (Cal. Sup. Ct., filed Jan. 2, 1979), *cert. denied*, 444 U.S. 883 (1979), *cert. denied*, 446 U.S. 987 (1980).

302. CAL. CORP. CODE § 9230 (West 1983). For discussion of the Worldwide Church of God case, see *Whelan, Who Owns the Churches?*, in *GOVERNMENT INTERVENTION IN RELIGIOUS AFFAIRS* 57 (Kelley ed., 1983); Jackson, *Socialized Religion: California's Public Trust Theory*, 16 VAL. U. L. REV. 185 (1981); Sharon L. Worthing, *The State Takes Over a Church*, 446 ANNALS 136 (1979); Giovan H. Venable, Note, *Courts Examine Congregationalism*, 41 STAN. L. REV. 719, 736-37 (1989); Stephen P. Radar, Note, *Government Protection of Church Assets from Fiscal Abuse: The Constitutionality of Attorney General Enforcement Under the Religion Clauses of the First Amendment*, 53 S. CAL. L. REV. 1277 (1980); Darrell R. Shep-

The law of gifts, bequests in wills, and trusts has long policed the relationship between religious authorities and donors, permitting the revocation of property transfers brought about by undue influence or misrepresentation.<sup>303</sup> The long history of such causes of action demonstrates that they can exist alongside religious liberty concerns without serious First Amendment infractions.<sup>304</sup> Such cases have often attracted considerable notoriety. For example, in *In re The Bible Speaks*,<sup>305</sup> the court held that evidence supported a finding that \$5.5 million in donations to a church by the young heiress to the Dayton-Hudson fortune should be rescinded because the gifts were obtained through undue influence. Presumably these same common law rules that apply to churches and ecclesiastics are applicable to social service ministries and their employees.

### Conclusion

Religiously based social service ministries have rightly been praised for their volunteerism, flexibility, efficiency of operation, and heartfelt concern for the persons who receive their charity. Moreover, the trend in favor of church-government partnerships in the delivery of community welfare needs, virtually assures their continued survival. But there are problems, not the least of which is whether the institutional integrity and purity of religious charities can survive too close an embrace by government.

The courts have for the most part sustained the licensure of social service ministries pursuant to state police power. This seems to be a proper view of the First Amendment, so long as the government's interest is in health and safety concerns and thereby eschews crossing over into matters concerning religiously based curriculum, program, method-

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ard, Note, *Receivers, Churches and Nonprofit Corporations: A First Amendment Analysis*, 56 IND. L.J. 175 (1980).

303. See, e.g., *Baumgartner v. First Church of Christ Scientist*, 490 N.E.2d 1319, *cert. denied*, 479 U.S. 915 (1986) (claim of undue influence dismissed for First Amendment reasons); *Tallahassee Bank & Trust Co. v. Brooks*, 200 So. 2d 251 (Fla. App. 1967) (constructive trust imposed where rector induced conveyance to church). See generally Annotation, *Undue Influence in Nontestamentary Gift to Clergyman, Spiritual Advisor, or Church*, 14 A.L.R.2d 649 (1950); RESTATEMENT OF RESTITUTION §§ 167, 184 (1937).

304. See, e.g., *Ambassador College v. Goetzke*, 260 S.E.2d 27 (1979), *cert. denied*, 444 U.S. 1079 (1980); *Ambassador College v. Goetzke*, 675 F.2d 662 (5th Cir.) (related case), *cert. denied*, 459 U.S. 862 (1982); *McElroy v. Ambassador College*, 308 N.W.2d 417 (Wis. Ct. App. 1981); *Nelson v. Dodge*, 68 A.2d 51 (R.I. 1949); *Latham v. Father Divine*, 85 N.E.2d 168 (N.Y. 1949); *Brown v. Father Divine*, 298 N.Y.S. 642 (N.Y. 1937), *aff'd*, 4 N.Y.S.2d 989 (1938).

305. 73 Bankr. 848 (Bankr. D. Mass. 1987), *aff'd*, *The Bible Speaks v. Dovydenas*, 81 Bankr. 750 (D. Mass. 1980), *aff'd in part and rev'd in part*, *In re The Bible Speaks*, 869 F.2d 628 (1st Cir.), *cert. denied*, *The Bible Speaks v. Dorydenas*, 493 U.S. 816 (1989).

ology, or selection of professional personnel. In the few cases where religious organizations have successfully challenged state regulation, it has been because regulations are found void for vagueness and thus violative of procedural due process rights.

The most serious problem of government intervention in religious affairs, and thus the most acute First Amendment concern, arises where public funds bring with them the inevitable regulations that force these ministries to either conform to bureaucratic standards or jettison their faith-centered practices. The new conservative majority on the U.S. Supreme Court has signaled that it will give great deference to the choices by Congress and the states (as reflected in legislation) to both regulate and to fund religiously based social services. Accordingly, so far as the Religion Clauses of the First Amendment are concerned, religious organizations should expect little relief in the federal courts from increased governmental intervention in their ministries.

On the other hand, if Congress or a state legislature grants exemptions for religious organizations, such exemptions would not violate the Establishment Clause. But statutory exemptions are difficult to obtain politically, especially where the regulation is attendant to government funding. Moreover, statutory exemptions are won only by the politically active and by those with sufficient resources to have a presence at the statehouses and the nation's capitol. This is possible on a sustained basis only for the larger churches. And there is danger, as well, any time religion is forced to behave as if it is just another interest group lobbying for special accommodation.

Constitutional relief may be available in certain states because of a resurgence in the application of state bills of rights,<sup>306</sup> but such protection will not be available in every state, will be uneven in the states where it is obtained, and will be secured only after expensive litigation. In summary, there is considerable juridical and political work to be done if the social service ministries of religious organizations are to evade increasing domination by all levels of government.

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306. See G. Alan Tarr, *Church and State in the States*, 64 WASH. L. REV. 73 (1989); Robert F. Utter & Sanford E. Pitler, *Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 IND. L. REV. 635 (1987); Ronald K.L. Collins, et al., *State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey*, 16 PUBLIUS, Summer 1986, at 141; J. Skelly Wright, *In Praise of State Courts: Confessions of a Federal Judge*, 11 HASTINGS CONST. L.Q. 165 (1984); Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980).