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1986 SURVEY OF TRENDS AND DEVELOPMENTS IN RELIGIOUS LIBERTY IN THE COURTS

*Carl H. Esbeck**

The purpose of this survey is to note important caselaw developments in the state and lower federal courts concerning religious liberty. Purposely omitted are the widely reported United States Supreme Court opinions, as well as cases where the high court has granted review during its 1986-87 term. The focus here is to collect significant cases that may otherwise escape broad attention. Only the facts and rationale of each court's decision is recorded. No editorial comment on the merits of these cases is intended.

I. LABOR PRACTICES AND EMPLOYMENT DISCRIMINATION

Minnesota v. Porter Farms, Inc., 382 N.W.2d 543 (Minn. Ct. App. Feb. 25, 1986).

A Minnesota appeals court has upheld an administrative law judge's ruling that an employee was unlawfully discharged because of his marital status. Randy Fitzloff brought suit under the Minnesota Human Rights Act, MINN. STAT. § 363.01 *et seq.*, claiming that he was discharged from his employment as a farm laborer because he was living with a woman to whom he was not married. Suit was brought against Porter Farms and James Sorenson, who was found to be acting as its agent. Fitzloff, who was employed to help Sorenson with the operation of a farm, lived in a trailer near Sorenson's home. After discovering that Fitzloff was not married to the woman, Sorenson informed him that he was "living in sin" and would have to make a major decision within seven days and carry it out within two months. When again confronted, Fitzloff informed Sorenson that he would probably be getting married but not within two months. Sorenson then purportedly told Fitzloff "you're through." Fitzloff interpreted the statement as meaning that he was fired and claimed that Sorenson's act constituted discrimination.

Rejecting Porter Farms' contention that Fitzloff had voluntarily

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quit his employment, the court found that Sorenson's statement and failure to take any subsequent remedial action constituted substantial evidence that Fitzloff was terminated. Further, it found that under the Minnesota Supreme Court's reasoning in *McClure v. Sports and Health Club*, 370 N.W.2d 844 (Minn. 1985), *app. dismissed*, 106 S. Ct. 3315 (1986), the Human Rights Act protects from discrimination unmarried couples who are living together.

The court rejected the defense that the Act, as applied, violated Sorenson's free exercise of religion. Sorenson urged that the court should distinguish this case from *Sports and Health Club*, since the religious and associational freedoms were exercised in his home rather than in the marketplace. In that previous case, it was held that the Act did not violate an employer's speech, associational or free exercise rights either facially or as applied. Sorenson claimed that when the rights were exercised in the home, the state's interest was not sufficiently compelling to justify enforcement of the Act. The court found no basis for a distinction, observing that just because Fitzloff was required to live in a trailer near Sorenson's home as a condition of employment "[did] not alter the prohibition against discrimination in employment." The court also refused to review the Minnesota Supreme Court's determination that the Act covered unmarried couples who are living together. Sorenson had argued that reconsideration was possible because the court's extension of coverage to unmarried couples was made without discussion by the majority.

In re D'Amico, 122 App. Div. 2d 472, 504 N.Y.S.2d 861 (3d Dept. July 24, 1986).

A New York appeals court has upheld the denial of unemployment benefits to Philip J. D'Amico, finding that he voluntarily resigned his position without good cause. D'Amico, "a non-denominational biblical Christian" resigned his position as a respiratory therapist with Green & Kellogg, Inc. in response to an official reprimand for discussing religion with patients. Following a patient's complaint concerning D'Amico's statement that he had cured three people through the laying on of hands, he was asked to sign a warning agreement that he not discuss religion with interested or disinterested patients while working. The agreement provided for immediate dismissal for the next offense. D'Amico refused to sign. Rather, he resigned, stating that his religious convictions required that he "immediately discuss religion with those who would seek such discussion."

The court, citing evidence that D'Amico received prior oral warnings concerning his religious discussion and that he was permitted to discuss religion with patients during nonworking hours, affirmed the denial of benefits. The court found D'Amico's claims distinguishable from those advanced in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Thomas v. Indiana Employment Security Div. Review Bd.*, 450 U.S. 707 (1982), finding this was not a case "where a change in condition of employment rendered the employment itself religiously objectionable." The court also rejected D'Amico's claim that the employer's action violated his free speech rights, noting evidence that his speech interfered with his job performance, and that his employer accommodated his free expression rights by permitting him to speak with patients during nonworking hours.

II. TAXES AND TAX REGULATIONS

Bethel Baptist Church v. United States, 629 F. Supp. 1073 (M.D. Pa. Mar. 6-7, 1986), *aff'd.*, 822 F.2d 1334 (3d Cir. Jun. 30, 1987).

Bethel Baptist Church's challenge to the imposition of social security taxes on its employees was dismissed by a federal district court. The court found that the burdens the tax placed on Bethel's free exercise of religion were permissible in light of the government's compelling interest in maintaining a uniform tax system.

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 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.

Bethel declined to elect out of the program, and instead paid the taxes and filed a claim for a refund which was denied. Fifteen days after the deadline for opting out, the church filed suit challenging the law's constitutionality on establishment, free exercise and equal protection grounds. The church was joined in its action by the pastor, church officers, five employees, and parents of children attending a school operated by the church.

The court found that the employees had standing to sue. In addition, the parent plaintiffs were found to have standing on the basis of their claim that the imposition of the taxes made it financially more difficult to educate their children in religious schools. Quoting *Grove v. Mead School District, No. 354*, 753 F.2d 1528 (9th Cir. 1985), the court observed that the right to control the religious upbringing of one's children was one aspect of the religious freedom of parents. The pastors and officers of the church were dismissed as plaintiffs since they were found to have no interest distinguishable from that of the church.

The court upheld the right of the church to challenge the constitutionality of the statute, rejecting the government's assertion that the suit was barred because the church could have avoided the tax by electing out of participation in the program. The court noted the church's belief that Christians were responsible to provide for their own care, and if they were unable to do so, the church was obligated to provide for them. The church had argued that its ability to carry out its religious mission was burdened because of the money paid for social security. It further indicated that, if the entire tax burden had fallen on its employees, it would have felt a responsibility to increase wages to compensate for social security costs. The court noted that, regardless of the alternative chosen, the church would have less funds available to it. In addition, the court found that the government's argument failed to address the concern advanced by the employees, since they remained subject to the tax regardless of any action taken by the church.

Addressing the merits, the court found the state's interest in securing uniform participation in the social security program sufficiently compelling to override the burden on the free exercise of religion. In reaching its decision, the court rejected the interpretations offered by both sides of the Supreme Court's decision in *United States v. Lee*, 455 U.S. 252 (1982). In *Lee* the Court held that an Amish employer, who employed other Amish individuals in his carpentry shop, was liable for social security taxes notwithstanding his religious objections to the tax. In the government's argument that *Lee* was controlling, it claimed that, by employing "a school administrator, secretary, maintenance man, etc., Bethel enter[ed] into commercial activity." However, the church urged that its employees were not engaged in a commercial function and that the government's argument focused too narrowly on the function being performed. Fur-

thermore, it stressed that the instant case involved a direct tax on a church and its employees.

The court accepted the church's argument that it was not engaged in a secular function. The court commented, "[c]ertainly, viewed in isolation, a secretary's duties would appear to be no different whether performed for a church or a business. Yet when performed for a church, they may be in furtherance of the church's goals and therefore serve a religious purpose." However, the court also found that the church had mischaracterized *Lee* as merely an "attempt to escape taxes on a secular business by resort to a religious belief." It noted the sincerity of the belief at issue in *Lee* and stated, "[i]t is immaterial that the claim was made by a lay person rather than a minister or a church." *Lee* was found controlling because of its emphasis on the government's "overriding interest in maintaining mandatory participation by covered employers and employees." Commenting on the confusion that could result if individuals were permitted to exempt themselves from taxation on the basis of religion, the court concluded that the "government interest at stake [in *Lee*] was not simply maintaining mandatory participation in the social security system by covered employers and employees. Rather, the government's interest was far more fundamental—preserving the integrity of the tax collection system."

Rejecting the contention that the imposition constituted a tax on religious exercise, the court described it as "a nondiscriminatory, uniform tax with a secular purpose." The court concluded that the church's failure to challenge the income tax program demonstrated that "its real complaint is not with the constitutionality of the social security tax but with its novel application to the Church's employees."

The court also dismissed an excessive entanglement claim, in which the church argued that imposition of the program would cause impermissible "governmentally supervised record keeping and surveillance." Finally, the church argued that under the program the employees were treated differently from both the church's pastor and other self-employed individuals. The court rejected both contentions.

Koolau Baptist Church v. Department of Labor & Industrial Relations, 718 P.2d 267 (Haw. Apr. 15, 1986).

The Hawaii Supreme Court has ruled that a church-operated school was obligated to pay unemployment compensation taxes on its

lay employees. The Koolau Baptist Church challenged the tax assessment claiming that the Federal Unemployment Tax Act (FUTA), 26 U.S.C. §§ 3301-3311, preempted the Hawaii Employment Security Law. HAW. REV. STAT. § 383 *et seq.* FUTA exempts ministers but not lay employees.

The court determined that the Supreme Court's reasoning in *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772 (1981), did not invalidate the Hawaii law. In *St. Martin*, the Court found that FUTA did not require church-affiliated schools to pay unemployment tax. The Hawaii court found *St. Martin's* distinguishable. It determined that in enacting FUTA, Congress had not intended preemption with regard to coverage provisions, and that the Supreme Court had not ruled that FUTA's provisions were "to apply uniformly to all state unemployment schemes." Rather, the court characterized FUTA as prescribing only minimum standards which employers must meet to qualify for federal payroll tax credits.

Further, it found that the required contributions did not constitute undue burdens on religious exercise but were only financial burdens "in the same sense that the costs of employing paid workers at all are financial burdens." Because the court found that the program did not result in a substantial burden, there was no need to determine if the government acted pursuant to a compelling state interest.

The court held that the imposition of unemployment taxes did not implicate religious beliefs as such, and that the church had cited no religious tenet in claiming a first amendment exemption. According to the court, the church argued that the function of the faculty and staff was a *per se* religious exercise and then implied that state imposition of any financial burdens infringed religious freedom. Citing *United States v. Lee*, 455 U.S. 252 (1982) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the court found that not all burdens on religious exercise were unconstitutional, and that religious activities could be subject to regulations designed to promote health, safety and welfare. The court determined the focus of the program to be "the economic and social aspect of the employment relation" and the detrimental consequences of unemployment. It stressed that the burden imposed on the church-operated school was religiously neutral.

The court also rejected the church's establishment clause argument. The church claimed that excessive entanglement between church and state could arise in determining benefit eligibility because the need to make "good cause" determinations might implicate matters of religious doctrine. The court found that it was "not in a posi-

tion to rule the process of determining eligibility for benefits under the law fosters excessive entanglement with religion." Further, it did not think dismissals from church schools over matters of religious doctrine were so common as to justify an exemption from the unemployment compensation program. The court rejected the contention that the extensive record keeping required by the program would foster excessive entanglement. The court cited *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985), where the Supreme Court rejected a similar argument with regard to the record-keeping requirements imposed by the Fair Labor Standards Act.

Nampa Christian Schools Foundation, Inc. v. Idaho, 110 Idaho 918, 719 P.2d 1178 (Idaho May 19, 1986).

The Idaho Supreme Court declared the Nampa Christian Schools exempt, on religious grounds, from paying unemployment taxes under Idaho's Employment Security Law (Law), IDAHO LAW § 72 *et seq.* The court held that a religious organization receiving moral support from an "association of churches" qualifies for the religious exemption if "substantial and competent evidence" shows that the organization's existence is contingent upon that support.

When an employee dismissed by the school sought unemployment benefits, Idaho's Industrial Commission declared that § 72-1316A(g)(1) of the law violated the establishment clause. Section 72 is taken verbatim from the Federal Unemployment Tax Act, 26 U.S.C. § 3309(b). The law exempts from coverage services performed: "(1) In the employ of (i) a church . . . or (ii) an organization . . . operated primarily for religious purposes and . . . operated, supervised, controlled, or principally supported by a church, or convention or association of churches."

Noting the judiciary's practice of avoiding constitutional questions, the reviewing court focused exclusively upon the statute. After considering fourteen factors bearing on the definition of "church," the court concluded that the school is not a church for purposes of § 72(1)(i). Applying § 72(1)(ii), however, the court concluded the evidence shows the school is "operated primarily for religious purposes." The court concurred with the Industrial Commission's finding that "[r]eligion pervades every aspect of the [school's] educational program." The school's board members, its teachers, and most students in grades 7-12 must affirm the thirteen statements of belief outlined in the school's statement of faith. According to the school's articles of incorporation, its main purpose is to provide a biblically

based and faith-integrated education for young people. The school does not consider any of the subjects it offers "secular." Teachers are expected to view their employment as a work of faith and attend regular faculty prayer meetings. All students are required to attend weekly chapel services, and high school students must participate in Bible study.

The court construed "association of churches" as "a cooperative undertaking by churches of differing denominations," and concluded Nampa Christian fit the definition. The school is nondenominational and was organized by parents from various churches interested in providing high school students a Christian education.

The record indicates that the school receives less than one percent of its financial support from the churches themselves. However, the court rejected the state's argument that the school is not "principally supported" by these churches. Financial support, it said, is not "the only way in which to support an organization . . . [t]he key is the quality of the support." The court stressed the Commissioner's finding that "*Nampa Christian could not exist as a private school without the moral support of those several churches*" (emphasis by the court). The court held that because "substantial and competent evidence" revealed the school's existence depended upon it, moral support constituted principal support for purposes of § 72(1)(ii).

Tennessee Baptist Children's Homes, Inc. v. United States, 790 F.2d 534 (6th Cir. May 14, 1986).

The Sixth Circuit Court of Appeals has affirmed a federal district court's determination that the Tennessee Baptist Children's Homes, Inc., (TBCH) need not file an informational return (Form 990) with the IRS. The government appealed the district court's refusal to grant a judgment notwithstanding the verdict after a jury decided that the principal activity of the TBCH was exclusively religious. The dispute arose over TBCH's refusal to file informational returns from 1979-1982. TBCH was fined for its noncompliance with IRS regulations which require certain religiously related organizations to file 990 forms. After a 1969 amendment, only "'churches, their integrated auxiliaries, and conventions or associations of churches' [and] certain other organizations" were exempted from filing informational returns. The tax exempt status of TBCH was not in dispute. However, TBCH asserted that it was an "integrated church auxiliary," and therefore, also exempt from filing informational returns. 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) tax exempt, (2) affiliated with a church, and (3) its principal activity is exclusively religious.

The government conceded TBCH's tax exempt status and its affiliation with a church. However, it argued that TBCH's principal activity was not exclusively religious. Under Treas. Reg. § 1.6033-2(g)(5)(ii), "an 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 26 U.S.C. § 501(c)(3)."

The court characterized as erroneous the government's contention that the principal activity of TBCH "was as a matter of law the operation of an orphanage dedicated to the public interest," and therefore not exempt from the filing requirement as an organization whose principal activity was exclusively religious. The court noted that neither the Internal Revenue Code nor the Treasury Regulations defined the term "principal activity." It then observed TBCH's claim that its principal activity was exclusively religious because, "its sole and primary dedication and purpose for maintaining and operating its child care facility" was the "creation of a pervasively Christian environment" in order to convert and/or indoctrinate children. The Sixth Circuit found that no error resulted from submitting the factual question concerning the principal activity of TBCH to the jury.

Church of Pan, Inc. v. Norberg, 507 A.2d 1359 (R.I. May 6, 1986).

The Supreme Court of Rhode Island, reversing a superior court decision, found that the Church of Pan was not a tax exempt organization under R.I. Gen. Laws § 44-18-30(E) (1956) (1980 reenactment). In reaching its decision, the court relied on the "multiple-factual analysis test" established by the Minnesota Supreme Court in *Ideal Life Church of Lake Elmo v. County of Washington*, 304 N.W.2d 308 (Minn. 1981). The test evaluates the organization's actual motives and activities rather than its stated purpose.

The Rhode Island Supreme Court noted that the organization's monthly meetings consisted solely of a discussion of environmental issues. It stated that "no hymns are sung, no prayers are recited, and . . . no scripture [is read]." It pointed out that many members of the church practice different religions. The court concluded that the organization failed to satisfy the definition of "religion, as that term is commonly understood."

Foundation of Human Understanding v. Department of Revenue, State of Oregon, 301 Or. 254, 722 P.2d 1 (July 1, 1986) (*en banc*).

The Oregon Supreme Court has determined that property used by the Foundation of Human Understanding as a meeting facility was entitled to a property tax exemption, except for that portion of the building used as a bookstore. It also found that ranch property not specially assessed as forest land was exempt. However, the court refused to exempt a caretaker's residence or a "parsonage" located twenty miles from the meeting facility.

The Foundation was organized in 1963 as a nonprofit corporation. The incorporation articles were amended in 1972 to reflect the change in its status to a church. The Foundation, recognized as a 26 U.S.C. § 501(c)(3) organization for federal income tax purposes and exempted from California sales tax and Oregon corporate excise tax, sought an exemption under OR. REV. STAT. § 307.140 from Oregon's ad valorem tax for three parcels of property. The statute exempts "houses of public worship" or property used solely for administrative, educational, literary, benevolent, charitable, entertainment and recreational purposes.

Contending that the foundation was not a nonprofit organization, the Oregon Department of Revenue brought suit challenging a tax court decision exempting most of the disputed property. It did not dispute the foundation's status as a religious organization, but argued that the properties were put to commercial as opposed to charitable use.

In ruling on the religious nature/nonprofit question, the court found that the department had failed to rebut the foundation's prima facie evidence of its charitable status established by its articles of incorporation providing that the foundation is "organized and operated exclusively for religious purposes." The court ruled that the department had failed to prove allegations that the foundation founder, Roy Masters, improperly benefitted from the foundation.

The court also rejected the department's charges that due to the sale of books and tapes and the charging of tuition to guests at the ranch, the property was "tainted with impermissible commercial use." Noting that the department had failed to allege that the primary use of any of the properties was the sale of merchandise, the court found that only those portions of the property used for the sale of books or tapes were not entitled to an exemption. Additionally, the court determined that charging fees did not transform a property

from exempt to nonexempt status, provided the fees were used solely for maintaining the charitable institution.

Proceeding to analyze the primary use of the property at issue, the court found a former church building properly exempted, finding that it was "used for educational activities, seminars and weekly group discussions" and purportedly "to promote and to evangelize and to implement [the foundation's] teachings." The court ruled that the building served "many of the functions of more traditional religion," but rejected a foundation contention that an on-premises book store should be exempt because it advanced the aims of the religion, did not make a profit, and did not compete with commercial businesses. The court also refused to exempt an adjacent caretaker's residence, finding that the use of that property was not reasonably necessary to the operation of the church building activities. Similarly, the court refused to exempt a house, located twenty miles from the foundation's ranch property, purportedly serving as a "[p]arsonage and staff quarters; provid[ing] a place to get away from students . . . a retreat from the retreat" Since the property was not used to make counselors available to retreatants, it only indirectly benefitted the organization.

The court also exempted that portion of the foundation ranch property which it found used to further the organization's religious activities including work therapy, counseling, individual spiritual examination, and meditation. However, it refused to exempt the majority of the ranch property which was specially assessed as forest land.

III. PUBLIC SCHOOLS

Mozert v. Hawkins County Public Schools, 647 F. Supp. 1194 (E.D. Tenn. Oct. 24, 1986), *rev'd*, — F.2d — (6th Cir. Aug. 24, 1987).

A federal district court has determined that the first amendment rights of fundamentalist Christian school children and their parents were violated by required exposure to a reading series which conflicted with their religious beliefs. A group of parents filed an action seeking injunctive relief and damages against the Hawkins County Public Schools over the compulsory use of the 1983 edition of the Holt, Rhinehart and Winston basic reading series. The parents contended that many of the ideas presented in the reading series promoted concepts contrary to their religious beliefs. The court characterized the case as juxtapositioning "two of our most essential

constitutional liberties—the right of free exercise of religion and the right to be free from a religion established by the state.”

In September 1983 a group of parents became concerned about the ideas presented in the texts and requested that they be removed from the school system. Additionally, the parents requested alternative reading assignments for their children. However, the school board adopted a resolution requiring teachers “to use only textbooks adopted by the Board of Education as regular classroom textbooks.” Thereafter, several students who had previously been using alternative texts were repeatedly suspended for their refusal to read the Holt series or attend classes in which it was being used.

In 1983 the federal district court granted the school board summary judgment finding that, although the texts might contain some offensive material, they did not violate the plaintiffs’ constitutional rights because they appeared to be neutral with regard to religion. The Sixth Circuit reversed and remanded the case, directing the district court to conduct a trial to determine if the texts unconstitutionally infringed on the parents’ free exercise rights.

Upon remand, the district court determined that requiring students with religious objections to read the Holt series impermissibly burdened their free exercise rights. The court noted the parties’ stipulation that the objections were based on sincerely held religious beliefs. Additionally, it rejected the school’s contention that in order to be entitled to first amendment protection, the court must determine that the beliefs were central to the plaintiffs’ faith. Contrary to the defendants’ contention, neither *Wisconsin v. Yoder*, 406 U.S. 205 (1972), *Sherbert v. Verner*, 374 U.S. 398 (1963), nor various Sixth Circuit cases required a demonstration of centrality, but only that the belief or action in question be “rooted in religion.” On the basis of stipulations in the record, the court found the parents’ beliefs to be sincerely held religious convictions entitled to first amendment protection.

The court further noted the stipulation that the parents found the material in the Holt series offensive, concluding that the major concern with the Holt series was the cumulative impact of its objectionable themes. The court cited the parents’ concern that reading the entire Holt series could cause a child to “adopt the view of a feminist, a humanist, a pacifist, an anti-Christian, a vegetarian, or an advocate of a ‘one-world’ government.” First amendment considerations prohibited the court from finding the parents’ religious objec-

tions to the "repetitive affirmation of those philosophical viewpoints" unreasonable.

Citing *Thomas v. Review Board*, 450 U.S. 707 (1981), the court found that the choice presented, requiring either that the children "read the offensive text or give up their free public education," burdened free exercise rights by conditioning "receipt of an important benefit on conduct proscribed by religious faith, or . . . denying such a benefit because of conduct mandated by religious belief."

The court observed that a burden on free exercise rights could be justified by a demonstration that it was the least restrictive means of achieving a compelling state interest. Although it found the state's interest in providing public education to be "legitimate and overriding," the court determined that mandating the uniform use of the Holt reading series was not essential for the accomplishment of the state's goal. It cited the existence of private schools and home schools, as illustrating the state's acknowledgement that "its interests may be accomplished in other ways and may yield to the parental interest in the child's upbringing." Moreover, while the court acknowledged the state's concern that administration of alternative reading programs would increase managerial problems, it indicated that the state's interest in uniformity was not absolute and that individualized instruction provided often superior educational results.

In response to the educators' contention that permitting the plaintiffs to prevail in this action could lead to similar challenges to other curriculum areas, the court found that the parents' objections were limited to the reading series and that the school board could not justify a burden on free exercise rights on the basis of what might be found objectionable in the future. It also observed that prior to the school board's resolution, alternative reading assignments had been carried out without a substantial disruption in the educational process. Further, the court rejected the contention that permitting alternative assignments in this instance could result in a barrage of similar requests. The court found the homogenous nature of the religious community and the absence of similar objections in the past made such an occurrence unlikely. It concluded that Tennessee's compelling and overriding interest in public education could be accomplished by a less restrictive means than uniform and compulsory use of the Holt reading series.

Addressing the nature of injunctive relief appropriate to accommodate the plaintiffs' free exercise rights, the court concluded that the nature of the parents' religious objections to the curriculum indicated

that no single curriculum could be found that would not present similar problems. Therefore, it found that the plaintiffs' religious beliefs could not be accommodated in the public schools without resulting in a violation of the establishment clause. However, it determined that a reasonable alternative could be fashioned by excusing the children to a study hall during the time in which the objectionable reading program was undertaken and permitting parents to provide a reading program in their homes consistent with the state's home schooling statute. TENN. CODE ANN. § 49-69-3050.

The court ordered the school to permit the students to return to public school and to be excused from reading instruction, contingent upon parental submission of written notice of their intent to provide reading instruction in the home. It further stressed that future determinations regarding other students or additional subject areas were to be made on a case-by-case basis, and that the instant opinion should not be interpreted to require the school district to make other accommodations at this time.

Cooper v. Eugene School District No. 4J., 301 Or. 358, 723 P.2d 298 (July 29, 1986), *appeal dismissed*, 107 S. Ct. 1597 (Mar. 30, 1987). (No. 86-701).

An Oregon school teacher has filed an appeal in the United States Supreme Court challenging her suspension and the revocation of her teaching license for wearing religious garb while teaching. Janet Cooper, a special education teacher in the Eugene public schools, was suspended after she wore the distinctive white garb of her Sikh religion while teaching. State statutes prohibit teachers from teaching in religious dress and require the revocation of teaching certificates of those who violate the statute. The Oregon Supreme Court found the statutes constitutional, primarily under the state constitution. It concluded that a school district could find that teaching in religious dress was incompatible with the role of a school teacher, and reasoned that restrictions on dress would be permissible to avoid the appearance of sectarian influence. Moreover, it stressed that the statute had the valid rationale of "excluding teachers whose dress is a constant and inescapable visual reminder of their religious commitment." Further, it concluded that the statutes respected and contributed "to the child's right to the free exercise and enjoyment of religious opinions or heritage untroubled by being out of step with those of the teacher." It found restrictions placed on the teacher's religious self-expression per-

missible because the teacher could have explained to her class that she had become a Sikh without danger of discharge.

Parents' Association of P.S. 16 v. Quinones, 803 F.2d 1235 (2d Cir. Oct. 3, 1986).

The United States Court of Appeals for the Second Circuit has determined that the New York City School District violated the first and fourteenth amendments by conducting classes for Jewish female students from a Hasidic private school in segregated public school classrooms. The suit was brought by the Parents' Association of P.S. 16 alleging that the school district's program permitting students from Beth Rachel Setmar Hasidic School to receive remedial instruction under Chapter 1 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. § 3801 *et seq.*, in classrooms located in a hallway partitioned off from the school's largely Hispanic population, violated the equal protection and establishment clauses.

The Hasidic faith requires strict separation between both the Hasidim and the rest of society, and between males and females. The public school parents objected to the separation of Beth Rachel and public school students, the provision of Yiddish speaking teachers, and the teaching of English as a second language which was not available to Hispanic students. In addition, they argued that the "enforced physical separation of the two groups gave at least the appearance that the city was endorsing the tenets of the Hasidic religious sect." The school contended that it did not intend its plan to promote racial or religious discrimination, but merely sought to encourage the attendance of Beth Rachel students who would otherwise "refuse to attend under the precepts of their religion."

On the basis of *Wolman v. Walter*, 433 U.S. 229 (1977), a federal district court had determined that the mere allocation of public school classrooms for Hasidic children did not impermissibly advance religion, and that requiring the Hasidic children to attend classes in a co-educational environment would infringe on a sincere religious belief. The lower court characterized the placement of Hasidic students in separate classrooms as an accommodation, "not as [a] symbolic union between church and state."

The Second Circuit overruled the lower court concluding that the program violated the establishment clause. The court, quoting extensively from *Grand Rapids School District v. Ball*, 473 U.S. 375 (1985), examined whether the program created a symbolic union be-

tween the state and the Hasidic sect. The court found that such a link had been created and that it was likely to have "a magnified negative impact" on the students. Citing statements from Hasidim that they desired to keep their children separate because Hispanics were "different" and "not a good influence on the Hasidic girls," the court concluded that "[t]he lengths to which the city has gone to cater to these religious views, which are inherently divisive, are plainly likely to be perceived, by the Hasidim and others, as government support for the separatist tenets of the Hasidic faith." Moreover, it concluded that for school children, "the city's plan may appear to endorse not only the separatism, but the derogatory rationale for separatism expressed by some of the Hasidim."

The Second Circuit rejected the city's contention that the need to encourage participation of parochial school students in remedial education classes necessitated the provision of separate classes. The court concluded that despite the provision of separate classes in other areas, the city did not segregate private school students along lines of sex, assign only bilingual teachers, or build partitions in separate parochial and public school students. Therefore, it stated, "we doubt that the characteristics of the Plan that are most conducive to perception of City endorsement of Hasidic religious tenets are common throughout the city." Furthermore, the court concluded that a finding of the pervasiveness of such conduct would not validate it.

The court also rejected a free exercise clause argument, finding that prevention of an establishment clause violation served as a compelling interest sufficient to override free exercise objections. However, it found that the city should be able to "devise alternatives for making its remedial services available to the Beth Rachel students in a way that neither requires them to disregard their religious beliefs nor appears to endorse those beliefs."

Stein v. Plainwell Community Schools, No. K85-197CA4 (W.D. Mich. May 9, 1986).

A federal district court has refused to enjoin graduation ceremony invocations and benedictions in two Michigan school districts. A suit brought by Bruce Stein and Martha Dahlinger, two Michigan taxpayers, challenged the practice of including the prayers in graduation ceremonies. The court's ruling followed a 1985 decision refusing to preliminarily enjoin the prayers. In its earlier ruling, the court had determined that the practice did not violate the establishment clause of the first amendment.

In rejecting the request for a permanent injunction, the court initially determined that the plaintiffs had standing to bring suit. It relied on the Sixth Circuit's interpretation of taxpayer standing and non-economic injury based standing, in *Hawley v. City of Cleveland*, 773 F.2d 736 (6th Cir. 1985), *cert. denied*, 106 S.Ct. 1266 (1986). There the appeals court found that nonfederal taxpayers could file suit to enjoin "unconstitutional acts affecting public finances." The district court concluded that standing existed for "a resident and taxpayer when suing to prevent public funds from being used to advance religion." In addition, citing *A.C.L.U. v. Rayburn County*, 698 F.2d 1098 (11th Cir. 1983), the court found that noneconomic injury was sufficient to confer standing. Noting that both plaintiffs were likely to attend graduation ceremonies in the future, the court concluded that the plaintiffs had demonstrated noneconomic injury in the impairment of their use and enjoyment of a public facility.

Although finding that the plaintiffs had standing to bring suit, the court held that the inclusion of the graduation prayers did not violate the three-prong test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In evaluating the program under the secular prong of the *Lemon* test, the court said that although the prayers would have a religious meaning to some, for many the invocation and benediction would provide merely a ceremonial opening and closing of the graduation program. Moreover, the court concluded that the inclusion of the prayers did not have the principal or primary effect of advancing religion. In reaching this conclusion, it stressed that (1) neither school district required the prayers, (2) the schools exercised no control over the content of the prayers, nor the decision to include them in the ceremony, (3) the prayers did not result in daily indoctrination, (4) most members of the audience were adults, "presumably not readily susceptible to religious indoctrination," and (5) the graduation programs have an essentially ceremonial nature. It also concluded that no excessive entanglement between church and state was occasioned by the prayer, observing that graduation ceremonies were held only once per year and required only a minimal contact between school officials and local clergy.

Kay v. David Douglas School Dist. No. 40, 79 Or. App. 384, 719 P.2d 875 (May 21, 1986), *rev'd en banc*, 303 Or. 574, 738 P.2d 1389 (July 8, 1987).

An Oregon appeals court has determined that including an invocation in high school commencement ceremonies violates the Oregon

Constitution. In a suit brought by four members of the 1984 graduating class, a state trial court enjoined David Douglas School District No. 40 from including an invocation as part of its commencement activities. The trial court ruled that prayer would violate both federal and state constitutions. The appeals court affirmed the trial court's injunction under the state constitution.

Citing prior Oregon case law, the appeals court found that challenges brought under Art. 1, § 5 of the Oregon Constitution could be evaluated under the tripartite test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and the broader framework of federal constitutional analysis. The court observed that under *Lynch v. Donnelly*, 465 U.S. 668 (1984), not all governmental references to religion were prohibited. It further recognized the significance afforded history and tradition in establishment clause analysis, noting that in "one unique case, *Marsh v. Chambers*, 463 U.S. 783 (1983), the court had employed an exclusively historical analysis."

Furthermore, it noted that there were permissible areas of state involvement with religion, such as recognizing December 25 as a national holiday to accommodate the religious practices of individuals. However, it stressed that accommodation must be distinguished from endorsement or approval. It found the school district's choice of prayer over nonreligious means to create an atmosphere of dignity and solemnity reflected a nonsecular purpose. Moreover, it determined that regardless of the subjective intent of the school board, prayer by its nature was religious and therefore "the purpose for which a prayer is given necessarily must be religious."

In addition, the court found that the decision to include the invocation failed the secular-effect prong of the *Lemon* test by creating the impression that government was sponsoring or endorsing religion. It reasoned that including a religious invocation would have "created an impression that the school district assigned special significance to prayer." That impression, the court found, would be intensified by the school district's intent to have a senior teacher deliver the invocation. The court, citing *Engle v. Vitale*, 370 U.S. 421 (1962), also ruled the voluntary nature of attendance at the event was irrelevant in determining whether an establishment clause violation had occurred.

IV. PRIVATE SCHOOLS AND UNIVERSITIES

EEOC v. Fremont Christian School, 781 F.2d 1362 (9th Cir. Feb. 3, 1986).

The United States Court of Appeals for the Ninth Circuit has affirmed a decision by a federal district court granting summary judgment to the Equal Employment Opportunity Commission (EEOC) against Fremont Christian School, a church-owned and operated private school in California. The school had claimed a religious exemption from Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, when a married woman employee charged that the school unlawfully discriminated against her in denying health insurance benefits while providing it to "heads of households," thus generally excluding married women employees. The school based its defense on constitutional grounds, citing, as the reason for treating women employees differently, their religious belief in the biblical concept of the husband as the head of the household who is required to provide for it. Until 1976, the school had compensated married male employees at a rate higher than similarly-situated female employees. When the determination was made that such disparity could be illegal, the school discontinued the practice. The school now provides uniform pay scales and equal disability and life insurance benefits, regardless of sex or marital status.

In enacting Sec. 702 of Title VII to eradicate discriminatory employment practices, the court determined that Congress provided a narrow, rather than a complete, exemption for religious institutions. The court acknowledged that Sec. 702 prohibited state involvement in ecclesiastical decisions of employment if a religious institution presented "convincing evidence" that an employment practice favored members of one faith or denomination over another, citing *EEOC v. Mississippi College*, 626 F.2d 477, 485 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981). Similarly, religious institutions may base relevant hiring decisions upon religious preferences. Nevertheless, Title VII is applicable to such organizations with regard to race, color, sex or national origin.

The court rejected arguments that the health insurance compensation program was (1) a bona fide occupational qualification (BFOQ), concluding that the BFOQ exception did not apply to the discriminatory provision of benefits; and (2) nonviolative of the Equal Pay Act, 29 U.S.C. § 206(d), because it is based on religious beliefs, noting that the program was based on no other factor than sex.

In its constitutional analysis, the court found a compelling state interest in eradicating sex discrimination and upholding equal employment opportunities. Coupling this with the fact that eliminating the "sexually discriminatory health insurance compensation pro-

gram" would not interfere with religious belief, and "only minimally, if at all, with the practice of religion," the court said the school was barred from raising the religion clauses of the first amendment as a defense.

Bennett v. Department of Fair Employment and Housing, No. C-497 487 (Cal. Sup. Ct., L.A. Cty. Apr. 24, 1986).

The Los Angeles County Superior Court has filed a final ruling granting a motion for summary judgment in a challenge to the exemption afforded religious organizations under California's Fair Employment and Housing Act, CAL. CIV. CODE § 52. Mary Bennett, a Roman Catholic over the age of 40, filed suit claiming religious and age discrimination against the Department of Fair Employment and Housing after she was fired from her position with American Lutheran Church and School. Citing the Act's exemption of nonprofit religious organizations, the department declined to process the complaint. Because the statute's definition of "employer" excluded religious organizations, Bennett argued that it violated the state and federal constitutions by denying equal protection to employees of religious institutions and by violating the establishment clause.

In reaching its decision, the court rejected the Fair Employment and Housing Commission's claim that its jurisdiction over religious organizations was only restricted when a challenged action was "secular in nature." The commission's interpretation of the statute's exclusion of religious organizations as "employers" was based on a decision it reached during the pendency of the lawsuit. The court found it significant that the department and all other defendants had previously observed an interpretation that they lacked jurisdiction over "all complaints of discrimination against religious institutions." The court determined that "no basis in the language of the statute appears for giving [religious organizations] less than a categorical exclusion."

The court cautioned that religious institutions must have some exemption from prohibitions against employment discrimination or the commission could require "female Moslem rabbis in Jewish temples, and married Roman Catholic priests." The court found that given the necessity "to avoid unconstitutional inhibition of religion," the statute was neutral on the question of whether a religious organization had a right to discriminate.

Addressing establishment clause concerns, the court rejected the

plaintiff's contention that the statute had no secular purpose. It determined that the statute's purpose was "to avoid entanglement of an administrative agency in the complexities which would always arise when it became necessary to determine whether practices alleged to be discriminatory were a necessary part of a religious dogma." The court recognized that "the broader the exclusion the less the entanglement."

Pime v. Loyola University of Chicago, 803 F.2d 351 (7th Cir. Oct. 16, 1986).

The Seventh Circuit Court of Appeals has determined that Loyola University did not violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, in reserving three tenure track vacancies in its philosophy department for Jesuits.

The dispute arose after university authorities informed Jerrold S. Pime that there would not be any openings in the philosophy department. The department had determined that of the 31 tenure track positions, the three openings anticipated for the fall of 1979 should be reserved for Jesuits in order to maintain a total of seven Jesuit instructors. Pime, who is Jewish, left Loyola the following spring and filed a discrimination charge with the Equal Employment Opportunity Commission.

The court initially found that there was "no hint of invidious discrimination against Pime on account of his religion," stressing that "[t]he faculty resolution excluded every non-Jesuit from consideration, whether of the Catholic faith or otherwise." However, it concluded that because Pime's faith would preclude him from becoming a Jesuit, he had a claim of religious discrimination.

The court noted that Title VII permits educational institutions to discriminate on the basis of religion if the institution is "owned, supported, controlled or managed by a particular religion or by a particular religious corporation, association, or society." The provision further permits an employer to discriminate on the basis of religion where religion is a bona fide occupational qualification "reasonably necessary to the normal operation of that particular business or enterprise."

The court found that membership in the Jesuit order was a bona fide occupational qualification under the statute. In reaching its conclusion, it noted that a significant Jesuit presence was "important to the successful operation of the university." The court stated, "it ap-

pears to be significant to the educational tradition and character of the institution that students be assured a degree of contact with teachers who have received the training and accepted the obligations which are essential to membership in the Society of Jesus." The court observed that in previous cases evaluating defenses of bona fide occupational qualification, the courts had focused only on the content of the particular job at issue. However, it determined that having a Jesuit presence on the philosophy faculty was reasonably necessary to the normal operation of the university and that "fixing the number as seven out of thirty-one [was] a reasonable determination." It upheld the trial court's determination that the reservation of three positions for Jesuits was made in good faith.

A similar result was reached in *Maguire v. Marquette University*, 627 F.Supp. 1499 (E.D. Wis. Feb. 12, 1986) (Jesuit university may refuse to hire female theology professor).

Miller v. Catholic Diocese of Great Falls, 728 P.2d 794 (Mont. Nov. 20, 1986).

The Supreme Court of Montana has affirmed a trial court's summary judgment order dismissing the wrongful discharge complaint brought by Mary Pat Miller against the Catholic Diocese of Great Falls. Miller brought suit charging breach of an implied covenant of good faith and fair dealing in employment after she was terminated from her position as a fifth and sixth grade teacher from the Catholic school because of her handling of disciplinary problems. The school requested summary judgment, asserting that application of the tort of bad faith would impermissibly interfere with the school's religious liberty.

In concluding that permitting the suit to go forward would violate the religion clauses of the federal and state constitutions, the court noted that it was undisputed that the school played an important role in the religious mission of the Roman Catholic Church. Moreover, it upheld the contention that all aspects of the institution's program, including discipline, were "permeated with the religious mission of the school."

The court also determined that the case was distinct from cases involving wage rates or the application of neutral principles of law to church property disputes, finding that the present claim would require "an analysis of the discipline methods used in teaching various school subjects, including religion itself." The court further found that a ju-

dicial determination on the question of good faith on the part of school administrators would require the court to "examine the school's discipline policy as applied to classroom instruction, covering both religious and nonreligious subjects, and to evaluate [school officials'] interpretation and application of that discipline policy." It reasoned that because discipline was so intertwined with teaching, which was likewise intertwined with religious principles, judicial resolution of the issue would violate the free exercise clause. Applying the standard of *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the court concluded that Miller's claim was not a right "of the highest order and not otherwise served so as to overbalance the defendant's claim to the free exercise of religion."

The court also rejected Miller's claim that a ruling for the school would result in an establishment clause violation. The court evaluated the claim using the test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to determine whether an establishment of religion had occurred. The court noted that the school had a pervasively religious character and purpose, that denial of the tort of bad faith would not result in an intrusion into church affairs, and that the resulting relationship between state and church authority would be negligible because the court's ruling applied only to the instant situation.

V. HOME SCHOOLING

Patzer v. North Dakota, 382 N.W.2d 631 (N.D.) *cert. denied*, 107 S.Ct. 99 (Oct. 6, 1986).

The United States Supreme Court has declined to review the convictions of four sets of North Dakota parents convicted of violating the state's compulsory education law. The parents, who engaged in home schooling, were convicted of violating a provision of the law that requires all teachers, including home school teachers, to be state certified. The parents had argued that the state had failed to demonstrate either a compelling interest in compulsory education or that its certification requirement was the least restrictive means of accomplishing such an interest.

VI. STATE REGULATION OF PARACHURCH MINISTRIES

Department of Social Services v. Emmanuel Baptist Pre-School, 150 Mich. App. 254, 388 N.W.2d 326 (Apr. 7, 1986), *app. granted*, 428 Mich. 907 (June 30, 1987).

The Michigan Court of Appeals has affirmed a lower court's or-

der enjoining a fundamentalist Baptist church from operating a preschool without a license. In addition, the court of appeals reversed that part of the lower court's decision exempting the preschool, on first amendment grounds, from complying with four state rules and regulations. According to the court, the church is not exempt from: Rule 104, prescribing qualifications for the preschool's program director; Rule 106(1)(c), requiring a program which fosters a positive self-concept among children; Rule 107(2), strictly limiting the use of corporal punishment; and a series of rules permitting inspection of the church's financial records. Michigan's child care organizations act, as amended, MICH. COMP. LAWS § 722.111 *et seq.*, requires that child care centers be licensed and empowers the Department of Social Service (DSS) to develop rules regulating their operation. Maintaining that religious education is part of its ministry, the church maintained that the rules and licensing requirement violated its right to religious liberty.

The court reviewed the church's free exercise claim in light of the test set forth in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Sherbert v. Verner*, 374 U.S. 398 (1963). First, the belief, or action motivated by belief, must be religious in nature. Should the claimant show that the regulations under review impose a substantial burden on its exercise of religion, the state succeeds only if the regulation meets a compelling state purpose. The court found the state's interest to prevail, stating: "[W]e are of the opinion that the state's compelling interest in protecting and nurturing its very young children, *Prince v. Massachusetts*, 321 U.S. 158 (1944) . . . and in licensing and regulating day-care facilities for minors, renders any burden on the church's exercise of religion a constitutionally permissible one."

The court analyzed each of the regulations under the test mentioned above. It found that DSS Rule 104 and the licensing requirement imposed an insubstantial burden on the church's free exercise rights. It concluded licensing regulates "the pre-school's secular activities as a pre-school—i.e., the physical care of 2-1/2 to 5 years old in attendance there—[not] the content of the church's fundamentalist teachings." Additionally, it noted that the burden Rule 104 imposed was "constitutionally insignificant," because the church could employ two other state-sanctioned means to avoid its burden. "Moreover," the court continued, the state's compelling interest in protecting its young would "override any burden imposed upon the church in finding teachers from accredited institutions."

The court concluded that Rule 106(1)(c) and the rules authoriz-

ing DSS inspection of the church's financial records impose no burden at all. While citing the church's biblical belief in mankind's "innate depravity apart from Christ," the court relied on DSS testimony that the church doctrinal position and the state's 'positive self-concept' rule for children could co-exist. Furthermore, it stressed that the church had failed to cite any actual infringement upon its religious beliefs. Again, the court emphasized that "even had we found Rule 106 to burden the church's free exercise of religion" the state's compelling interest would take precedence.

The court also determined that the church was not exempt from Rule 107(2) which prohibits spanking day-care children with any instrument other than the open palm of the hand. The church's rationale for the use of a ping-pong paddle is grounded in the biblically-based admonition, "Spare the rod, spoil the child." The court concluded that the burden to the church was outweighed by "the state's interest in protecting its very young . . . children from physical harm by prohibiting potentially abusive forms of discipline."

Additionally, the court rejected the church's claim that the state regulations, particularly Rule 104, constitute excessive governmental entanglement with church affairs in violation of the establishment clause. It stated, "The mandates of the licensure scheme have nothing to do with the establishment of a religion." Lastly, rejecting a claim that the DSS rules were unconstitutionally vague, the court found them "as precise as the subject matter permits."

VII. TORT CLAIMS

Bates v. Kingdom Hall of the Congregation, No. 9510 (Ohio Ct. App. Mar. 6, 1986).

The Ohio Court of Appeals (Second Appellate District) has affirmed in part and reversed in part an order from a trial court dismissing the complaint of a disfellowshipped Jehovah's Witness. Howard Bates brought suit seeking judicial review of the action taken by Church elders. The trial court, relying on *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976), dismissed the case on the pleadings, finding it lacked jurisdiction to decide the issue.

In reaching its decision, the appellate court quoted at length from *Milivojevich* where the Supreme Court held that civil courts lack the competence to review certain decisions of ecclesiastical bodies. The court noted that Bates was claiming that the elders who disfellowshipped him were acting beyond the scope of their authority.

However, it also observed that the elders claimed their action had been affirmed by the Watchtower Tract and Bible Society. The Society is the highest judicatory in that religious body. Applying the command of *Milivojevich*, the appellate court partially affirmed the lower court's dismissal. It held that in all the possible scenarios that could have occurred the court would be deprived of jurisdiction. It reasoned that, if the Watchtower Society did review the elders' action, it either affirmed or ratified the elders' decision, thus judicial review would be foreclosed under *Milivojevich*. It further observed that, regardless of whether the elders exceeded their authority, if the decision had not been appealed, Bates retained an avenue of relief within the church hierarchy and the case was thus not ripe for civil review.

The court refused, however, to dismiss Bates' defamation claim against the church. He charged that " 'inaccuracies' were 'stated' " during the proceedings. The church denied the allegations and advanced affirmative defenses, including: (1) that the statements were privileged; (2) that they were true; (3) that there was no publication of defamatory material; (4) that the statements were invited by Bates; and (5) that they were made pursuant to religious belief. The court concluded that, although resolution of the issues might appear "to be subject to the very same dangers set forth in *Serbian*, we find that that might not necessarily be the case." It further observed that legally cognizable claims for relief had been raised. It found that claims of privilege were limited to those recognized at law and some of the defenses asserted by the church might "be determinable without having to resolve ecclesiastical questions." Therefore, the trial court's dismissal of the slander claim was premature.

Hutchison v. Thomas, 789 F.2d 392 (6th Cir. Apr. 28, 1986) *cert. denied*, 107 S.Ct. 277 (Oct. 14, 1986).

The Supreme Court has denied Rev. Lloyd Hutchison's request for review of the Sixth Circuit's determination that civil courts lacked jurisdiction to review a decision by church authorities. Hutchison, who was forced to retire pursuant to church disciplinary rules, argued that church leaders had acted fraudulently, arbitrarily or collusively in applying the rules. The Sixth Circuit found that the first amendment precluded judicial review of an ecclesiastical determination that the minister was not suitable for a church appointment because of problems with local congregations. Additionally, the court found that even if civil court review were appropriate in cases of fraud or

collusion, Hutchison had failed to make an adequate demonstration of such claims.

Edmondson v. Church of God or Sanctified Church, No. 85-151-II (Tenn. Ct. App. May 16, 1986).

The Tennessee Court of Appeals has affirmed a \$110,000 judgment. The amount was awarded a member of The Church of God or Sanctified Church who sued the church and its general overseer for the publication of defamatory statements.

The dispute arose when Edmondson sought access to church financial records withheld by the general overseer. In response to his suit to compel disclosure of the records, the church circulated a letter characterizing him as an "attempted destroyer of the . . . CHURCH's influence." Edmondson then filed an action charging that the letter, which had been published in *The Truth and Life*, a nationwide church publication, was defamatory.

On appeal, the court rejected the church's contention that the trial court lacked jurisdiction because the suit involved "purely ecclesiastical matters." Reviewing Tennessee case law, the court of appeals found that courts in Tennessee have jurisdiction over ecclesiastical disputes involving civil or property rights. Furthermore, "neither the First Amendment nor Article 1, § 3 of the Tennessee Constitution protect churches or their officials from causes of action alleging tortious conduct." Although defamation is a tort, the court noted that claims for defamation within the religious context are judicially barred if "the communication [between the parties was] intended to further their common interests or enterprise." Indicating that the church's failure to file a timely transcript of the record below required it to "presume that every fact admissible under the pleadings was found or should have been found in [Edmondson's] favor," the court concluded the church's publication was motivated by ill will toward Edmondson.

O'Neil v. Schuckardt, 112 Idaho 472, 733 P.2d 693 (Dec. 12, 1986).

Ruling in a case brought against Fatima Crusade, a fundamentalist sect of the Latin Rite Church, the Idaho Supreme Court has abolished the cause of action for alienation of affections in Idaho. However, the court upheld a jury's award of damages for invasion of privacy. Jerry O'Neil brought suit charging that members of the Cru-

sade alienated his wife Pauline's affections and invaded the marital and family privacy between Jerry and his wife and children.

The dispute arose after Pauline became involved with the Crusade. Prior to her marriage, Pauline was raised in a Roman Catholic family where religion was of primary importance. Jerry was not Catholic, received no instruction prior to the marriage in the Catholic faith, and did not agree to raise children from the marriage as Catholics. The Fatima Crusade adheres to traditional Catholic beliefs and rejects the changes in Catholic practice brought by Vatican Council II. Consequently, they believe that marriages between Catholics and non-Catholics are invalid, unless the non-Catholic spouse has received instruction in the Catholic faith and has agreed to raise any children of the marriage as Catholics. They also reject the current Pope as the head of the Church.

Pauline's mother and sister were active members of the Fatima Crusade. In early 1974, Pauline visited her mother in Coeur d'Alene, Idaho, which was also the headquarters of the church, in order to learn more about the faith. According to court testimony, Pauline came to Coeur d'Alene because she wanted to join the church. She was not seriously contemplating divorce at the time. Additionally, she stated that she was afraid of Jerry when he came to visit because of his unreasonable and violent behavior. While in Coeur d'Alene, Pauline was instructed that she would not be able to live with Jerry as a wife, but could live with him in a brother-sister type relationship. This relationship proved unworkable and the O'Neils were divorced within one and one-half years. The divorce decree granted custody of the children to Jerry and restrained Pauline from imposing the philosophical or religious beliefs of the Fatima Crusade on the children.

In December 1975, Jerry filed suit against various church officials, Pauline's sister and mother, and the corporate entity of the church. Following the trial, the jury awarded approximately \$1 million in damages for alienation of Pauline's affections, invasion of marital privacy, invasion of the children's privacy, and punitive damages. The trial court granted the defendants' motion for a judgment notwithstanding the verdict, determining that Jerry had failed to meet his burden of proving the elements of either alienation of affections or invasion of privacy.

In commenting on the sufficiency of the evidence with regard to the alienation of affections claim, the trial court found that conduct without "justification or excuse, coupled with a purpose or design, to adversely affect the mental attitude of one's spouse to the detriment of

the other is a keystone of wrongful interference with a marital relationship." However, the court concluded that in light of the strong protection given the free exercise of religious belief, which includes the right to criticize and ridicule the religion of one's spouse, such expressions could not form the basis for an action for alienation of affections. Moreover, the court noted that parents had a right to be interested in and to offer advice to their married children with regard to their marital relationships. It found that a presumption existed that parents would exercise such a right with honesty and good intentions. It therefore found that a party alleging alienation of affections against a parent must demonstrate that the parent acted maliciously and with the intent to alienate the affections of the child. The court concluded that where the defendants involved were parents, close relatives, or clergy, there was "a limited privilege to counsel and advise a spouse concerning marital affairs and religious beliefs and that the same are constitutionally protected rights of the exercise of free religion and freedom of speech. To overcome these privileges, the plaintiff must produce evidence that shows specific and malicious intent to interfere with plaintiff's marriage." The court overturned the jury verdict having concluded that Jerry had failed to show that the defendants' conduct was motivated by ill-will or the intent to break up the marriage, rather than by a natural and good faith interest in Pauline's welfare and free exercise of religion.

Finding that an alienation of affections action had many "ill effects" which "outweigh any benefit it may have," the Idaho Supreme Court abolished the cause of action. However, the court found that the trial court erred in granting a judgment for defendants with regard to the invasion of privacy claims.

The court noted that an invasion of privacy claim must be premised on the intentional intrusion into something entitled to be kept private, such as an individual's seclusion or solitude or his private concerns or affairs. The court stressed that such intrusion resulted in liability "if it would be highly offensive to a reasonable person." Citing testimony presented at trial of the church's actions toward Pauline, the court noted that the jury had been told that during his visits to Couer d'Alene, Jerry's family saw him for only a few minutes at a time and only in the presence of a chaperon, that church officials "purposefully kept his family from seeing him," and in one instance hid the family. Further, it noted that the jury heard evidence that Jerry was told he would be required to join the church in order to marry Pauline, while she was told that he need only receive instruc-

tion and agree to raise the children in the faith. Moreover, the court cited evidence that Pauline was told that if she returned to her husband, and found herself "giving in and acting as a wife," it was her duty to leave him. Additional evidence reviewed included testimony from former Fatima Crusade members describing the church's indoctrination techniques.

The court cited the limits on religious free exercise as related to family counseling identified by the Washington Supreme Court in *Carrieri v. Bush*, 419 P.2d 132 (1966). In *Bush* the court identified "good faith and reasonable conduct" as the touchstones of "any qualified privilege that may arise from any invited and religious direct[ed] family counseling, assistance, or advice." Evidence was also reviewed of religious indoctrination of the children following the divorce order, despite the restraining order.

On the basis of such evidence the court found the trial court partially erred in overturning the jury's verdict. It found the evidence presented sufficient to enable the jury to conclude that an invasion of privacy had occurred. Therefore, the Idaho Supreme Court directed the trial court to reinstate the \$250,000 jury award for invasion of the children's privacy. However, noting the difficulty in determining what percentage of the \$250,000 compensatory and \$500,000 punitive damage award to Jerry was attributable to the abolished alienation of affections cause of action, the court ordered a new trial on Jerry's invasion of privacy claim.

Gillespie v. Elkins Southern Baptist Church, 350 S.E.2d 715 (W. Va. Nov. 19, 1986).

The West Virginia Supreme Court of Appeals has reversed¹ a circuit court judgment awarding a discharged pastor \$45,998 in damages for wrongful discharge. James Gillespie brought suit against the Elkins Southern Baptist Church following its vote to dismiss him as pastor in March 1981. Gillespie was called as pastor of the church in the fall of 1978, consistent with the church's constitution and bylaws. However, approximately two years after his assumption of the pastorate, Howard Shumake, chairman of the board of deacons, allegedly began to try to oust Gillespie. Following a failed vote to vacate the pulpit during a business meeting, on the following Sunday Shumake announced to the congregation that there was to be a congregational meeting at 6:30 p.m. to discuss dismissing the pastor. The church membership voted 31 to 25 to discharge the pastor. A jury awarded Gillespie \$53,000. However, the court denied his request for rein-

statement and required that he return approximately \$7,000 of the damage award representing the income he had earned between his dismissal and trial.

The appeals court initially noted the limited nature of judicial review over church controversies. It observed that a civil court could not adjudicate any controversy implicating purely ecclesiastical or spiritual matters, but was entitled to exercise jurisdiction over property and contractual rights even when one of the parties was a church or religious organization. It concluded that Gillespie's claim involved property or contractual rights. However, the court cautioned that had the Elkins Southern Baptist Church been a hierarchical church, Gillespie would have been required to exhaust any internal conflict resolution mechanisms. Because the church was congregational in polity, the court concluded that judicial scrutiny of final actions affecting property rights was appropriate.

The court rejected Gillespie's wrongful discharge claim, noting that he was an at-will employee and had failed to assert that his termination violated "any substantial public policy," or that he "received any definite promise of job security." Additionally, the court stressed that analyzing his claim under either of those theories would "require the civil courts to examine the reasons for the pastor's termination. Almost inevitably, this analysis would require the courts to go beyond completely neutral principles of law to inquire into church doctrine to determine if the termination was arbitrary." Such an analysis was barred by the Supreme Court's interpretation of the first amendment in *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976).

The court also rejected Gillespie's assertions that his discharge was void because the special meeting at which the vote was taken was improperly called. The court noted a provision in the church's constitution providing that special meetings could be called "upon recommendation of pastor and/or a body of deacons." Although there were conflicting arguments regarding whether individuals calling the meeting were serving as deacons at the time and whether "a body of deacons" had agreed in advance to call the meeting, the court refused to address the issue. It concluded that because the church was congregational and held the power to hire and fire the pastor, absent compelling reasons, it would limit its analysis to inquiring whether the congregation met and whether it acted to terminate the pastor's services. The court stressed that there was no claim that any member of the congregation failed to receive actual notice of the meeting, that the meeting was inadequately attended, nor that nonmembers partici-

pated in the vote. It therefore concluded that the congregation acted to terminate Gillespie's services.

Meroni v. Holy Spirit Association for the Unification of World Christianity, 119 App. Div. 2d 200, 506 N.Y.S.2d 174 (Sept. 2, 1986).

A New York appeals court has granted the Unification Church's motion for summary judgment in a suit charging intentional infliction of emotional distress and wrongful death. The suit was brought by Charles Meroni claiming that his son's suicide resulted from his exposure to Unification Church indoctrination techniques. Charles Meroni, Jr., a Columbia University student, entered a church training program in October 1977. He left the organization one month later. In January 1978 he committed suicide.

In denying Meroni's claim for intentional infliction of emotional distress and wrongful death, the appellate court noted that in *Matter of Holy Spirit Assn. for Unification of World Christianity v. Tax Commission of City of N.Y.*, 450 N.Y.S.2d, 435 N.E.2d 662 (1982), the New York Court of Appeals recognized "that the Unification Church has religion as its 'primary' purpose inasmuch as much of its doctrine, dogmas and teachings and a significant part of its activities [are] religious." Therefore, the court concluded that under *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976), the first amendment foreclosed evaluation of the church's beliefs in attempting to impose liability.

The court also rejected Meroni's contention that a suit could be maintained since churches remain liable for intentional torts, notwithstanding religious beliefs. The court found that Meroni had failed "to allege conduct so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." The court found that the challenged activities: fasting, chanting, "forms of hypnotic control," "intensive, heavy and protracted" exercise programs, limited access to media, family and friends, and physical isolation were insufficient to sustain a claim for intentional infliction of emotional distress. Moreover, it characterized such activities as "common and accepted religious proselytizing activities." The court also concluded that allegations that the younger Meroni was brainwashed should be evaluated "as a method of religious indoctrination that is neither extreme nor outrageous when it is considered that the subjects . . . are voluntarily participating . . . and the various activities mentioned above, which allegedly induced the 'mind control' were

not considered by our society to be beyond all possible bounds of decency.”

Additionally, the court said that the charge that the Unification Church recruited Meroni with knowledge that he was “ ‘emotionally disturbed’ and ‘susceptible to forced employment,’ ” did not make the proselytizing conduct extreme or outrageous. The court observed that, “it is not uncommon for those who are confused and depressed to seek guidance from a religion, and to submit themselves to the dictates of that religion to solve their problems.”

The court also cited the absence of evidence indicating false imprisonment, violence or physical or mental torture. The court observed that there was no evidence that Meroni was gravely disabled. Additionally, it said that he had the “personal and individual right to determine for himself whether to associate with the defendant church.”

VIII. INTRACHURCH DISPUTES

Crowder v. Southern Baptist Convention, 637 F.Supp. 478 (N.D. Ga. May 5, 1986).

A federal district court has dismissed a case against the Southern Baptist Convention (SBC) charging parliamentary irregularities at the 1985 SBC annual convention. Three messengers to the 1985 meeting filed suit seeking a declaratory judgment of the proper interpretation of SBC bylaws, an injunction requiring compliance with that interpretation, and an order enjoining certain committee members from serving. The court granted summary judgment to the SBC, finding that the dispute involved “questions of internal church affairs and governance over which [it] has no jurisdiction.” The court accepted the SBC’s claim that adjudicating the dispute would require resolution of an ecclesiastical controversy in violation of the separation of church and state. The court rejected the Crowders’ assertions that civil judicial review was permissible because no interpretation of Baptist doctrine or Christian belief was required. The Crowders urged that the court could apply neutral principles of law in determining whether a violation of Robert’s Rules of Order had occurred at the 1985 meeting.

The court determined that application of neutral principles of law was not relevant in determining whether a court had jurisdiction. Rather, the court observed that a civil judicial body must first determine whether the ecclesiastical dispute before it is one over which it

can legitimately exercise jurisdiction. The district court distinguished the instant case from *Jones v. Wolf*, 443 U.S. 595 (1979), where the Supreme Court determined that a court could apply "neutral principles of law" to adjudicate a church property dispute. The district court observed that in *Wolf*, it was the "state's interest in the peaceful resolution of property disputes" which gave rise to civil jurisdiction. Only after the existence of such a state interest was ascertained could neutral principles of law be applied to resolve the dispute.

The court characterized the Crowders' contention that the suit was a breach of contract claim stemming from an incorrect interpretation of Robert's Rules of Order as an oversimplification of the case. It found the actual issue in the case to be a question of church governance. The court said "[w]hether Reverend Dr. Stanley's rulings were correct or patently incorrect is irrelevant because a decision as to the validity of his rulings would involve this court in the internal affairs of the Southern Baptist Convention."

The court quoted language from *Watson v. Jones*, 80 U.S. (13 Wall.) 670 (1871), where the Supreme Court enunciated limitations on civil review of ecclesiastical decisions. In *Watson*, the Supreme Court affirmed "[t]he right to organize voluntary religious association . . . and to create tribunals for the decision of controverted questions of faith within those associations, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, [as] unquestioned." It further quoted from the *Watson* decision concerning the "implied consent" of the individual to unite with a religious body and to be in submission to it. It was said that the consent would be vain "if any one aggrieved by one of their decisions could appeal to the secular courts and have it redressed." In addition, it noted that the essence of a religious organization's right to establish tribunals for determination of questions was "that those decisions be binding in all cases of ecclesiastical cognizance, subject only to such appeals as to the organism itself provided for."

The district court also cited *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1979), where the Supreme Court rejected an attempt to justify civil court review of a bishop's defrockment on the basis that the ecclesiastical decision was made arbitrarily.

The district court found that the Crowders' suit requested the same type of judicial evaluation of "conflicting testimony concerning internal church procedures and [the rejection of the] interpretations of relevant procedural provisions of [higher church] tribunals that the Supreme Court had rejected in *Milivojevich*."

IX. CHAPLAINCY PROGRAMS

Baz v. Walters, 782 F.2d 701 (7th Cir. Jan. 28, 1986).

The Seventh Circuit has affirmed a federal district court decision that the Veterans Administration's discharge of a chaplain did not violate the Title VII prohibition on religious discrimination or the religion clauses of the first amendment.

The Reverend Franklin Baz, an ordained Assembly of God minister, was discharged during his probationary period from a position at a V.A. medical center having a large population of psychiatric patients. The district court found that although the hospital had cited several incidents indicating that Baz had difficulty in discharging his responsibilities, the "crux of [his] problems lay in his relationship with the patients and with the medical staff and in [his] view of his ministry and his calling to preach the Gospel." Among the incidents that prompted the dismissal was an evening music service, designed as a recreational period for patients, which Baz conducted as a Christian evangelical meeting. The V.A. claimed Baz proselytized among the patients and used inappropriate illustrations in his sermons. Baz purportedly interfered with decisions of the medical staff and entered operating room amphitheaters without approval to pray for patients. The district court observed that Baz "saw himself as an active, evangelistic, charismatic preacher while the chaplain service and the medical staff saw his purpose as a quiescent, passive listener and cautious counselor."

The Seventh Circuit found that the V.A. had not violated the provisions of Title VII requiring an employer to reasonably accommodate the religious beliefs of its employee unless doing so would impose an undue hardship on the employer. Baz claimed that the Title VII analysis differed from that typically applied to the religious practice of an employee hired by a secular employer to do a secular job. Baz asserted that "he was hired so that he might practice his religion in the service of a secular employer, and was fired when his employer did not approve of his doing exactly that." However, the court applied the normal Title VII analysis, observing that Baz was not simply a preacher performing a religious function. Citing the detailed instructions by the V.A. to Baz, the court characterized Baz as a secular employee carrying out duties for which his religious training had qualified him.

The court observed that an employer may not fire an employee because of religious practices unless the employer demonstrates that it

could not accommodate the practice. Baz was found to have satisfied his burden of making a prima facie demonstration that his discharge was based on his religious practice. However, the V.A. had met its burden of demonstrating that it could not accommodate Baz's religious practice. According to the Seventh Circuit, the primary motivation in terminating Baz was the furtherance of the hospital's purpose, which is "the overall well being of the patients." The court ruled that the V.A. had also shown that Baz could not conform to the hospital's multidisciplinary patient care approach, that guidance on how to conform had been offered and that transferring Baz to a non-psychiatric facility would cause an undue burden on the chaplain service and the V.A.

The court also rejected Baz's argument that a prohibition on proselytizing violated the free exercise and establishment clauses of the first amendment. The court noted that public employment could not be conditioned on the surrender of constitutionally protected rights, but observed that the government could use time, place, and manner restrictions in balancing the free exercise right against a valid public interest. The court cited *Pickering v. Board of Education*, 391 U.S. 563 (1968), as requiring that the court strike a balance between the employee's interests and "the interest of the government, as an employer, in promoting the efficiency of the public services it performs through its employees." The court stressed that "First Amendment rights must be applied in light of the special characteristics in a particular case." Since Baz's activities interfered with his therapeutic duties, a limitation on his religious expression was justified.

The court rejected the establishment clause contention, in which Baz argued that the V.A. had established an "institutional theology" which "limit[ed] and restrict[ed] the manner in which [he] could pray with patients, preach and also limited the content of his sermons." The court held that the V.A. had instituted an ecumenical approach to its chaplaincy. The purpose of providing a chaplain at V.A. facilities was to prevent patients from having to choose between care and religious worship. Further, the court remarked that allowing Baz to pursue his religious activities might produce establishment clause problems: "[u]nleashing, a government-paid chaplain who sees his primary role as proselytizing upon a captive audience of patients could do exactly that." The court characterized the staff at the V.A. hospital as "attempting to walk a fine constitutional line while safeguarding the health and well-being of the patients."

Kurtz v. Baker, 630 F. Supp. 850 (D.D.C. Mar. 11, 1986).

A federal district court has refused to issue a permanent injunction prohibiting the chaplains of the United States House of Representatives and Senate from making disparaging remarks concerning the beliefs of nontheists. Dr. Paul Kurtz, a professor of philosophy and self-described secular humanist, brought suit seeking declaratory and injunctive relief against what he characterized as the discriminatory exclusion of nontheists from the Senate's guest chaplain program. In the alternative, he requested termination of federal funding of the congressional chaplaincies. He contended that in opening remarks, Senate Chaplain, Dr. Richard Halverson, had routinely disparaged nontheistic beliefs in violation of the establishment clause.

In an earlier adjudication the court granted the defendant's motion for summary judgment on the allegation that the exclusion of nontheists from the guest chaplain program was discriminatory. Although the Supreme Court had upheld the constitutionality of legislative chaplain programs in *Marsh v. Chambers*, 463 U.S. 783 (1983), it had failed to address the appropriate limits of the chaplain's prayers. Therefore, the court requested further briefing on the allegedly disparaging prayers of the Senate Chaplain. The court noted a caveat in the Supreme Court's decision in *Marsh* which could be understood to prohibit disparaging comments by a legislative chaplain. The Supreme Court had determined that the chaplain's prayers were not problematic in *Marsh* where there was "no indication that the prayer opportunity ha[d] been exploited to proselytize or advance any one, or to disparage any other faith or belief," and therefore that it need not "embark on a sensitive evaluation or . . . apprais[e] the content of a particular prayer."

The court acknowledged the comments identified in the complaint as disparaging to nontheistic beliefs. However, it noted that in the interim between its prior decision and the instant case several actions had occurred which, while not rendering the case constitutionally moot, made it inappropriate for the court to grant Kurtz the relief he sought. Specifically, the court observed that Senate Counsel had difficulty in developing a formal rule detailing the meaning and appropriate parameters of prayer and had suggested that a preferable resolution to the dispute could be obtained by having Dr. Kurtz reach an agreement directly with Dr. Halverson. Following that suggestion, Dr. Halverson and Dr. Kurtz exchanged correspondence which the court characterized as suggesting that "both men have grappled with

the other's concerns with sympathy and in good faith." The court identified a portion of Dr. Halverson's April 24, 1986, letter stating that "disparagement was the farthest thing from my mind I not only regretted that disparagement had been communicated, but have tried subsequently to guard against such a possibility."

In arguing that the exchange of letters reciting his intent to "guard against making further disparaging remarks," rendered the dispute too attenuated for judicial resolution, Halverson cited *Community for Creative Non-Violence v. Hess*, 745 F.2d 697 (D.C. Cir. 1984). In *Hess* the court ruled that a decision by District of Columbia judges to respect the rights of individuals whose religious beliefs prohibited them from rising when a judge entered the room made the "likelihood of recurrent confrontations . . . too small to warrant decision of the issue."

The court found the reasons for withholding injunctive relief here were even more appropriate than in *Hess*, noting that the Chaplain's letters promising to guard against disparagement would be kept on file as a matter of public record, and that Halverson had agreed to "maintain a copy of the correspondence in the Senate Chaplain's office to assure that it would be available to his successor." While the court noted Kurtz's argument that the Chaplain's refusal to adopt an official policy to "avoid remarks which advance or disparage any particular faith or belief," belies "the contention that [future disparagement] 'is much too small to warrant decision of the issue,' " it found that the balance of considerations mandated that the constitutional issue should not be reached at this point. It cited a preference to avoid constitutional resolution when fairly possible, and the importance of Dr. Halverson's sensitivity to Kurtz's objections in addition to his desire to avoid future disparaging comments. Discussing Halverson's actions, the court said that although failing to rise to the level of a rule they gave "every indication of being the product of sincere and deliberate thought and offer hope that Dr. Kurtz will find nothing in Rev. Halverson's future prayers with which to take exception."

The court further noted that Kurtz had failed to seek relief through legislative channels. Although it found that the case was not technically moot, it concluded that equitable relief was inappropriate at this time.

X. RELIGIOUS SYMBOLS

benMiriam v. Office of Personnel Management, 647 F.Supp. 84 (M.D.N.C. Nov. 7, 1986).

A federal district court has dismissed a suit filed by Fagele benMiriam, a clerk-typist at the National Institute of Environmental Health Science, alleging that the use of the abbreviation "A.D." on Appointment Affidavit Form SF-61, requires him to subscribe to a Christian dating system in violation of his free exercise rights. benMiriam, who is Jewish, brought suit challenging the use of the designation on Form SF-61, alleging violation of free exercise and equal protection clauses and Title VII of the Civil Rights Act of 1964. The court concluded that the abbreviation, which stands for the Latin phrase "anno Domini," meaning "year of Our Lord," had been rendered secular and had a negligible impact on religious belief. It noted that the form did not criminalize any religious belief or opinion, nor force anyone to embrace a religious belief or make any statement conflicting with his religious tenets. The court also took judicial notice of the similar phrase, "In the year of Our Lord" in the Constitution. It found that the abbreviation was a constitutionally permissible chronological reference and in SF-61 had a purely secular usage. Furthermore, the court noted that prior Supreme Court cases had analyzed similar terms and phrases under the establishment clause and had found them permissible, in part because their religious significance had been diminished or completely lost.

In analyzing the dating system under the test advanced in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), for determining a violation of the free exercise clause, the court found the designation had a purely secular impact that rendered the burden on benMiriam's religious belief "so minimal as to be non-existent." It therefore found that the government need not advance a compelling state interest nor demonstrate that its interest could not be achieved by a less restrictive means. The court also noted that benMiriam had created his own exemption by simply striking out the offending abbreviation.

XI. SPEECH/POLITICAL ACTIVITIES

Christian Science Reading Room Jointly Maintained v. City of San Francisco, 784 F.2d 1010 (9th Cir. Mar. 14, 1986), *modified*, 792 F.2d 124 (9th Cir. Jun. 16, 1986), *reh'g denied*, 807 F.2d 1466 (9th Cir. Sept. 4, 1986), *cert. denied*, 107 S. Ct. 953 (Jan. 27, 1987), *reh'g denied*, 107 S. Ct. 1361 (Mar. 2, 1987).

The Ninth Circuit has determined that the San Francisco Airport violated the equal protection clause of the United States Constitution by terminating the lease of the Christian Science Reading Room.

The Christian Science Reading Room had rented space at San Francisco's Municipal Airport since 1976. In 1984 the Director of Airports notified the Reading Room that, based on legal advice, it had adopted a policy of not renting to religious organizations. The airport took steps to evict the Reading Room. After proceedings before the Airport's Commission failed to secure revocation of the eviction order, the Reading Room filed suit in federal district court. A permanent injunction was issued ordering the airport to make rental space available to the Reading Room. The airport appealed the injunction and several post trial orders.

The Ninth Circuit found that the airport's action violated the Reading Room's equal protection guarantees because the airport failed to establish a rational relationship between its action and any legitimate governmental purpose. The district court had applied a strict scrutiny test because the airport had treated religious groups in a distinct fashion. The Ninth Circuit determined that it was unclear whether treating religious organizations differently than all others constituted a suspect classification. While it conceded that treating an individual religion in a distinct manner probably constituted a suspect classification, it found the question of "[w]hether all religions together constitute a suspect class . . . a far more complex question that the courts have not previously addressed." However, the court found it unnecessary to resolve the question because the airport's action failed to meet the requirements of a rational basis test.

The airport argued that its decision not to rent space to religious groups was mandated by the establishment clauses of both the federal and state constitutions. Compliance with the dictates of the constitutions was found to constitute a legitimate interest. However, the court determined that the policy did not further that interest, since renting space to religious organizations did not violate either constitution.

The court applied the establishment clause test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1973). It found that the prior airport policy, which permitted rental by religious organizations, had the "purely secular" purpose of obtaining revenue. It also found that the airport's prior policy did not have the effect of advancing religion. It stressed that a governmental policy which incidentally benefits reli-

gion was not precluded by the establishment clause. It found two inquiries relevant to the question of whether government action violates the secular effect prong: (1) Did the state confer any imprimatur of approval on the religious sects or practices? (2) Are the benefits conferred generally available to nonreligious groups or individuals? Addressing the first concern, the court found nothing to indicate that the state "endorsed the religious views and beliefs of the Reading Room." The court observed that airports do not have the same symbolic identification with the state as do other governmental buildings. Secondly, it stressed that the space was equally available to all who wished to rent it. It noted the absence of any suggestion that all religious groups, anti-religious groups, or groups with other social or philosophical views were denied access. Finding that the policy did not violate the excessive entanglement prong, the court said, "the Reading Room did not tell the Airport how to run its business, and the Airport did not tell the Reading Room how to run its operations."

The court further determined, that based on its findings with regard to the federal Constitution, the initial airport policy did not violate the stricter requirements of the California Constitution. It concluded that, because renting to the religious groups did not violate the establishment clause, there was no rational relationship between the airport policy and any legitimate state interest.

United States v. Merkt, 794 F.2d 950 (5th Cir. July 17, 1986), *cert. denied*, 107 S.Ct. 1603 (Mar. 30, 1987).

The Fifth Circuit Court of Appeals has upheld the criminal convictions of Stacey Lynn Merkt and John Elder, who had been convicted of conspiring to assist aliens in illegally entering the country. The appellants challenged their convictions on several grounds, including the first amendment.

The court rejected appellants' argument that their convictions violated their religious rights, since they were religiously motivated to be involved in sanctuary activities for El Salvadorans. Stressing that the immigration laws under which they were convicted were facially neutral on the question of religion, the court found that conduct, rather than belief, was being regulated in a religiously neutral manner.

The court applied the stringent test of *Wisconsin v. Yoder*, 406 U.S. 205 (1972), although it indicated that a stringent test need not be applied in light of the Supreme Court's decision in *Bowen v. Roy*, 106 S.Ct. 2147 (1986), because of the facial neutrality of the statute.

Applying the *Yoder* test, the court concluded that since the statute contained no exclusive prohibition on religious practices or beliefs, but only related to conduct that aided or sheltered illegal aliens, it did not unduly burden appellants' free exercise of religion. The appeals court noted that the trial court had not questioned the sincerity of the appellants, but it did observe that Christian belief does not mandate participation in the sanctuary movement and that other means, short of violating the laws, were available to assist the El Salvadorans.

The court found compelling the government's interests in uniform enforcement of border control laws and the "preservation of our national identity as defined by the immigration laws." With regard to the latter, it noted that illegal immigration upsets the balance achieved in the national-origin quotas established by Congress.

The court, in rejecting the appellants' suggestion of deporting the aliens or confiscating vehicles used in transporting the aliens, ruled that less restrictive alternatives to criminal convictions did not exist. In a separate argument, the appellants claimed that the trial judge should have recused himself because of religious pressure. The court of appeals rejected this argument, finding that the affidavits submitted in support of the motion to have the judge recuse himself were legally insufficient.

Bemis Pentecostal Church v. Tennessee, Madison Equity No. 8 (Tenn. Ct. App. Aug. 21, 1986), *rev'd*, 731 S.W.2d 897 (Tenn. May 26, 1987).

The Tennessee Appeals Court has found that churches contributing money and purchasing advertising in opposition to a referendum permitting the sale of liquor by the drink were political campaign committees under the state's Campaign Financial Disclosure Act, TENN. CODE ANN. § 2-10 *et seq.* However, the court invalidated the Act because it violated the free speech provisions of the first amendment.

Several churches organized in Madison County, Tennessee, filed suit seeking to have the Act declared unconstitutional as applied after they were ordered to comply with its requirements. The churches had either contributed funds to a campaign committee known as "Citizens Against Drugs and Alcohol," or purchased advertisements in a local newspaper in opposition to a 1984 referendum that would have permitted the sale of liquor by the drink within the city limits of Jackson, Tennessee. Following the defeat of the referendum, the Madison County district attorney notified the churches that they would be re-

quired to comply with the provisions of the Act by filing a post campaign financial statement.

Construing the provisions of the Act, the court determined that the churches fell within each of three possible definitions of political campaign committees. It found that a church with two or more members making expenditures to oppose a legal referendum would be included under a definition reaching "a combination of two or more individuals . . . making expenditures . . . to support or oppose . . . a measure." Additionally, it concluded that the churches were clearly "organizations making expenditures . . . to support or oppose a measure" Finally, it determined that any church making a contribution of \$250 or more to defeat the referendum was "a group of persons which receives contributions or makes expenditures to support or oppose any . . . measure during a calendar quarter in an aggregate amount exceeding Two Hundred and Fifty Dollars (\$250)."

In determining that the statute violated the free speech provisions of the first amendment, the court distinguished compelling governmental interests, said to exist in the instant case, from those found sufficient in *Buckley v. Valeo*, 424 U.S. 1 (1976). In *Buckley* the Supreme Court upheld the requirements of the Federal Election Campaign Act of 1974, 88 Stat. 1263, mandating the disclosure of the identities of campaign contributors. The Tennessee court reasoned that the purpose of the disclosure requirement, to identify the candidate's most generous supporters, so that the public might be able to detect any post election special favors, was not applicable in a referendum election.

The court further found the Supreme Court's decision in *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), did not hold that a compelling state interest justified the disclosure of campaign contributions and expenditures in referendum elections, citing *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). Therefore, it declared the Act unconstitutional. In light of its disposition of the case, the court declined to address the churches' free exercise clause and establishment clause arguments.

XII. MEDICAL CARE

Walker v. Superior Court of Sacramento, 185 Cal. App. 3d 266, 222 Cal. Rptr. 87 (Jan. 10, 1986), review granted, 224 Cal. Rptr. 340, 715 P.2d 260 (Mar. 27, 1986).

A mother charged with involuntary manslaughter and child en-

dangerment in the death of her daughter filed a motion to dismiss the charges against her, claiming a lack of probable cause to believe she had committed a crime and inadequate notice that her actions were criminal. The court rejected both her statutory and due process arguments.

Laurie Walker enlisted the aid of two Christian Science practitioners who treated her four year old daughter with prayer in lieu of medical care. The child died of acute purulent meningitis. Walker contended that the "spiritual treatment" exemption to the state child neglect statute, CAL. PENAL CODE § 270, exempts a parent from criminal liability for child endangerment and involuntary manslaughter for treatment of a child with prayer in lieu of medical care.

The court ruled that the statute's language precluded "any inference that a parent [providing] spiritual treatment would be insulated against charges of involuntary manslaughter or child endangerment." The court also rejected the mother's contention that the legislative history of the act evinced an intention to provide a religious treatment defense to the two charges. After analyzing the legislative history of the provision, the court concluded, "[i]t appears clear the Legislature did not intend to extend to parents complete discretion in providing their children with prayer treatment as a substitute to necessary medical care."

Hall v. Indiana, 493 N.E.2d 433 (Ind. May 27, 1986).

The Indiana Supreme Court has affirmed the reckless homicide convictions of Gary and Margaret Hall in the death of their son. However, the court reversed convictions for child neglect, finding that because convictions for that offense required proof of no facts other than those necessary for conviction under the reckless homicide charge, the Halls had been placed in double jeopardy.

Affirming the convictions for reckless homicide, the court rejected the Halls' assertions that the convictions were contrary to law. Joel Hall died of acute bronchial pneumonia after his parents, acting pursuant to their religious beliefs, refused to seek medical care. The parents claimed that their conduct did not constitute "a substantial deviation from acceptable standards of conduct, and therefore [did] not meet the definition of recklessness." The court ruled that the evidence that the Halls did not seek medical treatment for Joel despite awareness of their son's condition demonstrated that the jury's verdict was not contrary to law. It rejected their attempt to analogize their

conduct to that specified as a defense in a child neglect statute in order to demonstrate that the use of prayer in lieu of medical treatment was acceptable. The court, noting that there was no statutory defense to reckless homicide, found that prayer was not a defense "when a caretaker engages in omissive conduct that results in the child's death."

Relying on *Tawney v. State*, 439 N.E.2d 582 (Ind. 1982), the court found that the conviction for child neglect failed under a double jeopardy analysis because it did not require the proof of facts different from those necessary under the reckless homicide charge.

Randolph v. New York, 117 App. Div. 2d 44, 501 N.Y.S.2d 837 (May 8, 1986), *aff'd as modified*, 69 N.Y.2d 844, 514 N.Y.S.2d 705, 507 N.E.2d 298 (Mar. 19, 1987).

In a wrongful death action, a New York appellate court has reversed a \$500,000 jury verdict awarded a Jehovah's Witness who "competently and unequivocally advised" her doctor not to administer a blood transfusion under any circumstances during a caesarean section. Mrs. Randolph's instructions were pursuant to the Jehovah's Witness belief "that blood transfusions are a violation of the law of God, and that transgressors will be punished by God"

Medical complications developed during surgery. Her physician received authorization from the City Corporation Counsel to proceed with a blood transfusion. Notwithstanding his efforts, he was unable to save her life.

Randolph's husband brought suit alleging negligence. Reviewing the expert testimony, the appellate division concluded the blood transfusion given by the physician was not the proximate cause of Mrs. Randolph's death. Experts testified that Randolph's condition had become irreversible prior to her physician's receipt of authorization for the transfusion.

XIII. CHILD CUSTODY

Rogers v. Rogers, 490 So.2d 1017 (Fla. Dist. Ct. App. June 18, 1986).

The Florida District Court of Appeals (First District) has determined that a trial court's parental custody decision impermissibly interfered with a mother's free exercise of religion. Judy Rogers appealed a trial court's decision that conditioned her custody of her minor children on her severing of all ties with The Way International. Following divorce proceedings, Roger's former husband sought cus-

tody of the couples' minor children alleging that The Way "had psychologically brainwashed his wife to the extent that she was physically and mentally incapable of taking proper care of the two children." Several elements of the organization's religious belief-structure were identified by expert witnesses as having a detrimental effect on parental ability, including "ridding oneself of illness through raising the level of spirituality, [beliefs concerning the] satanic possession of certain people, the practice of speaking in tongues, and the rigorous physical discipline of the children."

The trial court awarded custody of the children to the mother on condition that she eliminate all contact with the organization including "any meetings, tapes, visits, telephone or written communications, or financial support." Rogers was also enjoined from "subjecting the children of [the] marriage in any manner whatsoever to the dogmas of The Way International." In reversing the trial court, the appeals court found that a judge could consider a parent's religious beliefs as one of several factors in making a custody award. However, conditioning a custodial award "upon the curtailment of a parent's religious activities or beliefs violated the parent's free exercise of religion rights." It noted that the Alabama Supreme Court had made a similar determination in *Hilley v. Hilley*, 405 So.2d 708 (1981).

XIV. PRISONER RIGHTS

Dettmer v. Landon, 799 F.2d 929 (4th Cir. Sept. 4, 1986), *cert. denied*, 107 S. Ct. 3234 (Jun. 22, 1987).

The Fourth Circuit Court of Appeals has affirmed a district court's determination that the doctrine taught by the Church of Wicca is a religion. However, it reversed an order requiring prison officials to allow Herbert Dettmer, an inmate at Powhatan Correctional Center, access to six objects used in the mediation practice taught by the church. Officials had refused Dettmer's request that he be allowed to possess a hooded white robe, sea salt or sulfur to draw a protective circle on the floor, candles, incense, a kitchen timer to awaken him from short trances, and a small, hollow statute of a god or goddess of the deity to "store spiritual power called down during mediation," to assist him in his worship. The requested items were considered contraband and were deemed to be a threat to the safety and security of the institution.

After the deputy director of the Department of Corrections refused to review his request, Dettmer filed an action contending that

prison officials had deprived him of his freedom of religion. The district court determined that the Church of Wicca was a religion and that Dettmer was entitled to access to the ceremonial objects. The court's order permitted prison officials to retain custody of the items, making them available to Dettmer at reasonable times for worship services which the officials would be permitted to supervise.

The Fourth Circuit upheld the district court's determination that the Church of Wicca was a religion entitled to first amendment protection. Citing *United States v. Seeger*, 380 U.S. 163 (1964), the appeals court found that the district court properly considered "whether the church occupies a place in the life of its members 'held by the orthodox belief in God' in religions more widely accepted in the United States," and found that members of the church "adhered to a fairly complex set of doctrines related to the spiritual aspect of their lives." Additionally, it cited with approval the district court's findings that the church's doctrine concerning worship ceremonies paralleled those of more conventional religions, and noted the long history of witchcraft. It rejected the government's argument that the church was not a religion, but rather a "conglomeration" of "various aspects of the occult, such as faith healing, self-hypnosis, tarot card reading, and spell casting," that would not be considered religious if standing alone. Citing *Thomas v. Review Board*, 450 U.S. 707 (1981), the Fourth Circuit found that a practice need not be logical or internally consistent to warrant a conclusion that it is a religion. The court also rejected the state's contention that because the items Dettmer sought were not required by the Church of Wicca, they were unprotected, noting that under *Thomas*, religious observances need not be uniform to merit first amendment protection.

However, the court ruled that the district court had erred in requiring prison officials to allow Dettmer access to the requested items. The trial court had determined that because suitable substitutes could be found for several of the items and that dangerous items such as candles, incense and salt could be kept in a safe location, denial of access was not the least restrictive means available to accomplish the state's compelling purpose.

The appeals court relying on *Bell v. Wolfish*, 441 U.S. 520 (1979), found the least restrictive means test inapplicable in determining a prisoner's free exercise rights. In *Bell*, the Supreme Court held that although prisoners retained a right to freedom of religion, restrictions on first amendment rights were to be "evaluated in light of the central objective of prison administration, safeguarding institutional secur-

ity." It further found that courts should accord deference to prison administrators' decisions concerning the accommodation of prisoners' rights in light of order and discipline requirements, absent evidence of exaggeration of those needs. The Fourth Circuit found "no substantial evidence indicating that prison officials exaggerate the difficulties in supervising individual inmates' use of contraband articles in religious rites," and that prisoners participating in conventional religious services were not allowed to possess the prohibited items. Thus, it concluded that the refusal to permit Dettmer access to the items he requested was not discriminatory.

XV. JUSTICIABILITY

Americans United for Separation of Church v. Reagan, 786 F.2d 194 (3d Cir. Mar. 21, 1986), *cert. denied*, 107 S.Ct. 314 (Oct. 20, 1986), *reh'g denied*, 107 S.Ct. 660 (Dec. 8, 1986).

A petition has been denied by the United States Supreme Court that sought review of a Third Circuit decision dismissing a case brought by a coalition of religious groups protesting diplomatic recognition of the Vatican. The Third Circuit ruled that the organizations bringing suit lacked standing to challenge diplomatic recognition, citing *Valley Forge Christian College v. Americans United for Separation of Church and State*, 452 U.S. 464 (1982). The circuit court found that if the special recognition accorded Vatican City resulted from the Vatican's unique place in the world community, rather than presidential or congressional action, there was an insufficient injury to justify the suit. Additionally, the Third Circuit rejected the assertion that the groups had standing as taxpayers.

Church of St. Paul and St. Andrew v. Barwick, 67 N.Y.2d 510, 505 N.Y.S.2d 24, 496 N.E.2d 183, (June 5, 1986), *cert. denied*, 107 S.Ct. 574 (Dec. 1, 1986).

The United States Supreme Court has declined to review a decision of the New York Court of Appeals dismissing the Church of St. Paul and St. Andrew's challenge to the designation of its property as a historic landmark. The church argued that subjecting it to the landmark preservation law, ADMIN. CODE OF CITY OF N.Y., ch. 8-A, § 205 - 1.0 *et seq.*, violated the first amendment. The New York Court of Appeals had determined that the case did not present an issue ripe for judicial determination.