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Establishment Clause Limits on Governmental Interference with Religious Organizations

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ESTABLISHMENT CLAUSE LIMITS ON GOVERNMENTAL INTERFERENCE WITH RELIGIOUS ORGANIZATIONS

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I. INTRODUCTION

Despite occasional sharp divisions within the United States Supreme Court, since *Everson v. Board of Education*¹ the Court unwaveringly has construed

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1. 330 U.S. 1 (1947) (5-4 decision upholding reimbursement to parents of fares paid for transportation of their children to parochial schools).

the establishment clause² to place a formidable obstacle before religious groups who seek to use the offices of government to advance their cause. In placing distance between the agencies of government and religious entities, however, the establishment clause also protects these same religious organizations from undue interference by government. The establishment clause should not only check encroachment by the church, but in the seventeenth century perception of Roger Williams, the establishment clause should prevent "worldly corruptions [that] might consume the churches if sturdy fences against the [government] were not maintained."³

In this article it will be argued that the establishment clause, properly viewed, functions as a structural provision regimenting the nature and degree of involvement between government and religious associations.⁴ The degree of involvement should be a limited one, although it is clear that the interrelationship need not nor cannot be eliminated altogether.⁵ Although the degree of desired separation has proven to be a continuing controversy, the goal of separation is not so divisive. The aim of separation of church and government is for each to give the other sufficient breathing space.⁶ The ordering principle is reciprocity in which "both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."⁷ Those who were influential in our nation's history envisioned the churches and the state in a kind of parallelism, with neither subordinate to the other.⁸ Each should be guarded from being co-opted by the other, and each required to forbear from undue entanglement with the instrumentalities of the other.⁹ Importantly, if the clause's structural ordering of these two circles of influence in society is reciprocal, then religious organizations are afforded a high level of protection from governmental interference.

The principle inherent in the establishment clause has come to be called the separation of church and state. The familiar metaphor, "wall of

2. U.S. CONST. amend. I. The establishment and free exercise clauses together read: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." *Id.*

3. M. HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* 6 (1965). See *infra* text accompanying notes 70, 74-77 (discussion of Roger Williams (1603-1683) and his contribution to religious liberty).

4. R. LEE, *A LAWYER LOOKS AT THE CONSTITUTION* 129, 135 (1981); see J. ELY, *DEMOCRACY AND DISTRUST* 94 (1980).

5. *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 213, 225 (1963); *id.* at 306 (Goldberg, J., concurring); *Zorach v. Clauson*, 343 U.S. 306, 315 (1952).

6. J. ELY, *supra* note 4, at 94.

7. *McCullum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948) (disallowing religious instruction in public schools); cf. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §14-3, at 817 (1978).

8. Derr, *The First Amendment As A Guide to Church-State Relations: Theological Illusions, Cultural Fantasies, and Legal Practicalities*, *CHURCH, STATE AND POLITICS* 75, 82 (J. Hensel ed. 1981).

9. See *infra* text accompanying notes 166-70 (manner in which religious organizations are harmed by too close an embrace by government).

separation,"¹⁰ however, is a little misleading.¹¹ Separation severs the formal link between church and government, but it does not disassociate religion from government.¹² In some instances, considerable interaction is not only permitted but constitutionally protected. For example, religious organizations may seek to influence the government's policies through use of speech, press, and petition.¹³ A more apt description of the American arrangement is a limitation on any mutual dependence, "both as the Church might seek to control the organic action of the state, and as the state might affect to interfere with the faith and function of the church."¹⁴ Nevertheless, the separation terminology describing this ideal is so entrenched in the literature and the case law that its use will be continued here.

Although the lower courts are construing the establishment clause as protecting religious groups,¹⁵ the Supreme Court has been timid and has not frontally addressed and developed the protection for religious groups intended by the clause.¹⁶ To be sure, the Court's aggressiveness in preventing

10. The "wall of separation" metaphor is that of Thomas Jefferson appearing in a letter to the Danbury Baptist Association (Jan. 1, 1802), reprinted in S. PADOVER, *THE COMPLETE JEFFERSON* 518-19 (2d ed. 1969). It was first adopted by the Supreme Court in *Reynolds v. United States*, 98 U.S. 145, 164 (1878), and was carried into the modern era by Justice Black in *Everson v. Board of Educ.*, 330 U.S. 1, 16, 18 (1947), and *McCollum v. Board of Educ.*, 333 U.S. 203, 311, 212 (1948). See generally Comment, *Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor*, 1978 B.Y.U.L. REV. 645.

11. Miller, *The American Theory of Religious Liberty*, FREEDOM OF RELIGION IN AMERICA: HISTORICAL ROOTS, PHILOSOPHICAL CONCEPTS AND CONTEMPORARY PROBLEMS 137, 138 (H. Clark ed. 1981). The Supreme Court has not held to the notion of an impregnable wall of separation: "Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense.... [T]he line of separation, far from being a "wall," is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

12. *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963) ("We agree of course that the state may not establish 'a religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.'"); *id.* at 306 (Goldberg, J., concurring); *Zorach v. Clauson*, 343 U.S. 306, 315 (1952) ("We cannot read into the Bill of Rights ... a philosophy of hostility to religion."). See M. BATES, *RELIGIOUS LIBERTY: AN INQUIRY* 321 (1945) ("It is often observed that entire separation does not exist, if religion has any vitality or respect in the community and if the state is favorable to the development of the higher interests of its citizens."); Smith, *Is the Separation of Church and State an Illusion?*, 8 CHRISTENDOM 317 (1943) ("A church separated from the state is not a church removed from society."). See generally H. BERMAN, *THE INTERACTION OF LAW AND RELIGION* 77-105 (1974). Professor Berman develops the thesis that all religions have a concern for social order and social justice which causes them to be concerned with government and law.

13. *Widmar v. Vincent*, 454 U.S. 263, 277 (1981) (state university cannot, consistent with rights of speech and association, deny student religious groups access to facilities provided to other student groups); *Walz v. Tax Comm'n*, 397 U.S. 664, 670 (1970) (dicta) (churches have right to take strong positions on public issues). See Miller, *Organized Religion and Political Affairs*, RELIGION AND THE PUBLIC ORDER 190 (Giannella ed. 1965).

14. S. COBB, *THE RISE OF RELIGIOUS LIBERTY IN AMERICA* 12 (1902).

15. See *infra* text accompanying notes 308-431 (analysis of several lower court cases).

16. See *infra* notes 188-96, 337-40, 348 and accompanying text.

governmental sponsorship of or aid to religion has been important and largely correct, at least in result if not always in rationale, but that is only half the story. If the Supreme Court fails to apprehend the role of the establishment clause in shielding religious communities from governmental excursions, these religious bodies will be deprived of their full First Amendment inheritance.

Cases in which the central issue is the extent to which a church-related agency can forestall governmental intervention are multiplying. After noting that over "the past several years a recurring pattern of U.S. church-state relations has been one of government intrusion into the life of the churches," one observer sees this trend as the "most crucial single issue facing the churches in public affairs" and one which promises to be with them "throughout the 1980s."¹⁷ Another commentator dubbed recent church-government conflicts as "Caesar's Revenge" and lists several disputes between church agencies and federal regulators involving Equal Employment Opportunity Commission enforcement of civil rights legislation, Department of Labor imposition of an unemployment compensation tax and enforcement of minimum wage and hour requirements, Internal Revenue Service determinations of tax exempt status, National Labor Relations Board issuance of bargaining orders on behalf of unions, and Federal Trade Commission oversight of the advertising practices of colleges.¹⁸ Other ongoing disputes include those between churches or their related agencies such as schools and social welfare ministries, and state and local bodies such as municipal zoning authorities,¹⁹ departments of education,²⁰ and bureaus of health and social welfare.²¹ The current situation portends only increasing litigation.

The growing number of church-government conflicts appears to rise from two forces. First, growth in both government and religious agencies has resulted in an overlap of their spheres of influence.²² Simply put, the modern welfare state and the social-conscious church are more than chafing at their jurisdictional boundaries. Second, the winds of a radical individualism,²³ already present

17. J. WOOD, GOVERNMENT INTRUSION INTO RELIGIOUS AFFAIRS 1 (Staff Report No. 1, Mar. 1980).

18. Carlson, *Regulations and Religion: Caesar's Revenge*, REGULATION 27-28 (May - June 1979). See *infra* notes 319-80 and accompanying text (cases involving these federal agencies).

19. Comment, *Zoning Ordinances, Private Religious Conduct, and the Free Exercise of Religion*, 76 NW. U.L. REV. 786 (1981). See also *infra* note 309.

20. W. BALL, LITIGATION IN EDUCATION: IN DEFENSE OF FREEDOM (Inst. for Humane Studies in Educ. No. 5, 1977); Note, *State Regulation of Private Religious Schools and the State's Interest in Education*, 25 ARIZ. L. REV. 123 (1983); Note, *State Regulation of Private Religious Schools in North Carolina — A Model Approach*, 16 WAKE FOREST L. REV. 405 (1980); Comment, *The State and Sectarian Education: Regulation to Deregulation*, 1980 DUKE L. J. 801. See *infra* note 311.

21. Esbeck, *State Regulation of Social Services Ministries of Religious Organizations*, 16 VAL. U.L. REV. 1 (1981); Pickrell & Horwich, "Religion As An Engine of Civil Policy": A Comment on the First Amendment Limitations on the Church-State Partnership on the Social Welfare Field, 44(2) LAW & CONTEMP. PROBS. 111 (1981). See *infra* notes 381-402 and accompanying text (cases involving state regulation of social welfare ministries).

22. See *infra* text accompanying notes 124-45.

23. The term, radical individualism, is that of sociologist Robert N. Bellah. Bellah, *Cultural Pluralism and Religious Particularism*, FREEDOM OF RELIGION IN AMERICA: HISTORICAL ROOTS,

in many corners of society, have provided litigation pressures for the law's growth. Individuals increasingly are demanding recognition by government, generally in the courts, of autonomy from all institutions and the authority they represent, including the church and church-related agencies.²⁴ In the course of establishment clause analysis, the protection of religious liberty is not served simply by considering the power and responsibility of the state and the claims of individuals. Instead, the courts must regard a third factor: the interests of religious organizations.²⁵ Religious organizations should be regarded, not simply as important value-generating and sustaining structures in society,²⁶ but primarily as institutions susceptible of harm to their essential religious character and mission if sullied by a government's heavy handedness.²⁷

Although no bright line can be drawn between the purview of religious organizations and government, reasonably precise distinctions can be made that respect the historical origin of the establishment clause,²⁸ the American experience since the ratification of the clause in 1791,²⁹ and our present circumstances. To this end, the establishment clause concepts of nonentanglement³⁰ and noninterference in intrafaith disputes³¹ should be unified and interpreted toward a general theory permitting only a limited role for

PHILOSOPHICAL CONCEPTS AND CONTEMPORARY PROBLEMS 33, 42-46 (H. Clark ed. 1981). Professor Bellah defines radical individualism as a marked, utilitarian insistence on individual rights, while neglecting the social or communal context which makes such rights possible. *Id.*

24. See, e.g., P. BERGER & R. NEUHAUS, *TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY* 5 (1977).

The concrete particularities of mediating structures [family, church, neighborhood] find an inhospitable soil in the liberal garden. There the great concern is for the individual ("The rights of man") and for a just public order, but anything "in between" is viewed as irrelevant, or even an obstacle, to the rational ordering of society. What lies between is dismissed, to the extent it can be, as superstition, bigotry, or (more recently) cultural lag.

American liberalism has been vigorous in the defense of the private rights of individuals, and has tended to dismiss the argument that private behavior can have public consequences. Private rights are frequently defended *against* mediating structures — children's right against the family, the rights of sexual deviants against neighborhood or small-town sentiment, and so forth. Similarly, American liberals are vitually faultless in their commitment to the religious liberty of individuals. But the liberty to be defended is always that of privatized religion. Supported by a narrow understanding of the separation of church and state, liberals are typically hostile to the claim that institutional religion might have public rights and public functions.

Id.

Religious organizations do not have authority over individuals enforced by the state, which in itself would violate the establishment clause. Rather, the relationship between a church and one of its members is voluntary and should be immune from government regulation. For example, private law actions in tort or breach of contract by individuals against a religious organization essentially concerning religious authority are matters that the civil courts must not entertain. See, e.g., *infra* notes 403-31 and accompanying text.

25. See *infra* text accompanying notes 153-65.

26. See *infra* text accompanying notes 149-50.

27. See *infra* text accompanying notes 166-70 (nature of harm and how it comes about).

28. See *infra* text accompanying notes 96-123.

29. See *infra* text accompanying notes 124-45.

30. See *infra* text accompanying notes 205-50.

31. See *infra* text accompanying notes 251-307.

government in the affairs of religious entities. Establishment clause protection necessarily is stated as one of degree because of the virtually unlimited nature of governmental actions and the many types of religious agencies with which government comes into contact. The factors to be examined in implementing the establishment clause, however, are the character of the religious body concerned, the nature and adverse consequences of the government's intrusion, and the resulting relationship between the religious entity and government.³² In applying these factors, the state must avoid becoming embroiled in the resolution of questions concerning religious doctrine.³³

Part II of this article will review the historical setting of the establishment clause in order to identify objectives and fears which led to its inclusion in the First Amendment, and to discern shifts in American society which underlie current problems to the extent the situation has changed since 1791. Part III will address the theoretical arguments for protecting the identity and integrity of religious organizations from undue governmental interference. Part IV will analyze Supreme Court cases which relate to the question of governmental involvement with religious societies. Attention will be given to the development of the concepts of nonentanglement and the avoidance of civil resolution of intrafaith disputes. Parallels will be drawn between these two concepts and the Court's reluctance to define religion or to probe the centrality of an individual's religious belief. It will be proposed that these somewhat scattered doctrines should be unified into a general theory under the establishment clause limiting the regulation of religious groups by government. Finally, Part V will examine selected church-government litigation in the lower courts with application and eventual defense of the suggested thesis.

II. HISTORY AS AN AID TO UNDERSTANDING

By definition, religious beliefs are the most deeply held by humankind.³⁴ Therefore, the resolution of disputes concerning religion by any authoritative body which necessarily yields "winners" and "losers", is bound to stir emo-

32. See *infra* text accompanying notes 208-10.

33. See *infra* text accompanying notes 251-301.

34. In the lower federal courts, a consensus is developing that "religion", at least for First Amendment purposes, is defined by considering the following factors:

- a. The nature of the ideas should address matters of ultimate concern, such as the meaning of life and death, the origin of humankind, man's role in the universe, and a moral code of what is right and wrong.
- b. The nature of the ideas should comprise a comprehensive belief system, as contrasted with the provision of only isolated answers to ultimate questions.
- c. The claimed religion will often evidence itself by formal, external, or surface signs that may be analogized to recognized religions, e.g., formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, and observation of holidays.

Africa v. Commonwealth of Pennsylvania, 662 F.2d 1025 (3d Cir. 1981), *cert. denied*, 456 U.S. 908 (1982). See *International Soc'y. for Krishna v. Barber*, 650 F.2d 430, 438-41 (2d Cir. 1981); *Malnak v. Yogi*, 592 F.2d 197, 208-09 (3d Cir. 1979) (Adams, J., concurring); *Founding Church of Scientology v. United States*, 409 F.2d 1146, 1160 (D.C. Cir.), *cert. denied*, 396 U.S. 963 (1969).

tions and create sharp debate. The cases decided by the United States Supreme Court concerning the establishment clause have fully attracted the expected outpouring of attention and controversy.

The amendment's terse language, "Congress shall make no law respecting an establishment of religion," affords little help in resolving particular, contemporary conflicts almost two hundred years after its adoption and ratification. At best, the clause yields only the broad outline of a desired structure regulating affairs between government and organized religion. The language "no law" is absolute, but that construction is unworkable when applied to religiously motivated conduct, as contrasted with abstract belief,³⁵ in a nation populated by occasional fanatics such as the Reverend Jimmy Jones.³⁶ Much has been made of the use of the peculiar word "respecting" in the clause³⁷ and the choice of "an" over "the" to precede "establishment" in the amendment's wording.³⁸ Finally, a narrow or broad definition of the critical term "religion", governs the sweep of the clause's injunction.³⁹

Chief Justice Burger observed that the purpose of the establishment clause "was to state an objective, not to write a statute."⁴⁰ Justice Brennan also has counselled against "too literal [a] quest for the advice of the Founding Fathers."⁴¹ In Brennan's view, the more fruitful inquiry is "whether the practices . . . challenged threaten those consequences which the Framers deeply feared."⁴² But what are these objectives and fears and their underlying principles which are so sufficiently enduring and so highly prized that we desire to carry them forward for application in today's controversies?

35. Early cases formulated the belief-conduct dichotomy in the extreme, holding that religiously based conduct could be prohibited or significantly constrained in the face of the government's police power. See *Church of Jesus Christ of Latter Day Saints v. United States*, 136 U.S. 1 (1890) (upholding federal statute which abrogated the territorial charter of the Mormon Church and appropriated some of its property because it employed funds for the unlawful practice of polygamy). The Supreme Court began to shore up the right to practice one's religious beliefs in *Braunfeld v. Brown*, 366 U.S. 599 (1961) (unsuccessful challenge by Sabbatarian merchants to Sunday-closing laws), and gave religiously motivated conduct full status as a fundamental right in *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (Sabbatarian could not be refused unemployment compensation for refusal to accept employment requiring Saturday work). Nevertheless, the belief-conduct distinction is retained by the Court, with the freedom of thought as absolute, but the freedom of action qualified by compelling governmental interests. *Bob Jones University v. United States*, 103 S.Ct. 2017, 2034-35 (1983); *United States v. Lee*, 455 U.S. 252, 258-60 (1982).

36. Rev. Jimmy Jones, the leader of a cultish schism from his former Christian Church (Disciples of Christ), led over 900 followers from California to suicide in Guyana. *N.Y. Times*, Nov. 21, 1978, at 1, col. 6; *N.Y. Times*, Nov. 27, 1978, at 1, col. 6.

37. Compare *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) ("respecting" means "tending to") with M. MALBIN, *RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT 15* (1978) ("respecting" also intended to prohibit Congress from passing laws affecting state churches).

38. M. MALBIN, *supra* note 37, at 14-15.

39. See *supra* note 34; *infra* notes 130, 307.

40. *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970).

41. *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 237 (1963) (Brennan, J., concurring).

42. *Id.* at 236.

A. Colonial Beginnings

The American theory of religious liberty combines the principle of separation, entailing independent churches in a secular state,⁴³ with an accommodation by government of the role of conscience in the individual believer.⁴⁴ America is unique because it was the first country to experiment beyond mere toleration of diverse creeds by placing the principle of separation into its organic law.⁴⁵

This American contribution to freedom did not, of course, spring from any originality of thought by the First Congress assembled in Federal Hall, New York City in 1789, whose deliberations produced the Bill of Rights with its twin religion clauses in the First Amendment.⁴⁶ Like all profound changes in political theory, the concept of separation emerged over several years. In his exhaustive treatment of church-state relations, historian Anson Phelps Stokes spends a considerable portion of his study examining the struggles for separation in the early American states.⁴⁷ The forty to fifty years beginning with the American Revolution were particularly intense. For the "fact is that outside of Rhode Island, where two groups of Independents—Baptist and Quakers—were powerful and where Roger Williams and John Clarke proved great leaders in behalf of entire separation of Church and State, very little was accomplished in the way of religious freedom as distinct from toleration until the period of the American Revolution."⁴⁸

Tangible changes in the positive law of most of the states disestablishing churches were not consummated until during and after the Revolution.⁴⁹ Moreover, ratification of the First Amendment in 1791 had little influence on the ascendancy and ultimate triumph of the separation ideal.⁵⁰ Rather, the

43. P. SCHAFF, *CHURCH AND STATE IN THE UNITED STATES* 9 (1888) ("free church in a free state"); see 1 A. STOKES, *CHURCH AND STATE IN THE UNITED STATES* 37 (1950).

44. The free exercise clause presently protects the religiously informed conscience of the individual, see *infra* note 90, whereas the establishment clause embodies the separation command and the consequences which flow from severing the link between church and state, see *infra* notes 201-202.

45. A. STOKES, *supra* note 43, at 34-39, 47; Miller, *supra* note 11, at 137; S. COBB, *supra* note 14, at 1-3.

46. See *infra* text accompanying notes 96-97.

47. A. STOKES, *supra* note 43, at 153-257, 358-446. See generally S. COBB, *supra* note 14; E. GREENE, *RELIGION AND THE STATE: THE MAKING AND TESTING OF AN AMERICAN TRADITION* 47-69 (1941).

48. A. STOKES & L. PFEFFER, *CHURCH AND STATE IN THE UNITED STATES* 6 (rev. one vol. ed. 1964).

49. At the outbreak of the American Revolution in 1775, there were nine colonies with established churches. A. STOKES & L. PFEFFER, *supra* note 48, at 36-37. The Anglican Church was disestablished in New York and North Carolina during the War. *THE ENCYCLOPEDIA OF AMERICAN HISTORY* 824 (Morris ed. 6th ed. 1982).

50. In 1791, when the First Amendment was ratified, two states had established churches: Connecticut and Massachusetts. *THE ENCYCLOPEDIA OF AMERICAN HISTORY* 824 (Morris ed. 6th ed. 1982). See STOKES, *supra* note 43, at 358-446; W. MARNELL, *THE FIRST AMENDMENT: THE HISTORY OF RELIGIOUS FREEDOM IN AMERICA* xii, 111-13 (1964).

seeds of the modern theory of religious freedom were planted well before the period of harvesting from the 1770's to the 1820's.⁵¹

The roots of the separation principle go back to Europe at least as far as the seventeenth century.⁵² Those who presently fear for the free church should recall that through much of Western Civilization, institutionalized religion and individual civil liberties have not been natural allies.⁵³ Before the rise of democratic states, it was thought that unity in religious matters and thus one national church was necessary for two reasons. First, unity was thought necessary to legitimize the state which claimed a divine commission to rule. Second, unity was believed necessary to ensure the essential commonality of values for identity as one people and one nation.⁵⁴ Painful as it may be for those who today defend the free church, the older tradition was that churches were often a privileged and entrenched institution, standing for the status quo in opposition to a free society.⁵⁵

It is now generally acknowledged that separation was the result of an alliance between two quite diverse schools of thought: one philosophical and the other theological.⁵⁶ The philosophical influence was rationalism which was characterized by the deism and skepticism of the Enlightenment. The religious view arose from new theological perceptions of the church and the necessity to ensure its vitality and integrity by shunning ties with the state.

Certainly Enlightenment rationalism, best epitomized by the writings of John Locke, was a century later a heavy influence on American statesmen such as James Madison, Thomas Jefferson and George Mason.⁵⁷ Locke's *A Letter Concerning Toleration* (1689)⁵⁸ is a classic on religious freedom as a natural or inalienable right of humankind. Locke's arguments were not original for his time but were more of a restatement of the period's thought and an apology for the toleration of some religious diversity in an England weary of sectarian strife.⁵⁹ Locke reasoned that religious belief was a matter of opin-

51. A. STOKES, *supra* note 43, at 364-65. See generally S. COBB, *supra* note 14, at 301-454.

52. Bellah, *supra* note 23, at 36. See G. RUGGIERO, *THE HISTORY OF EUROPEAN LIBERALISM 395-97* (1927) (tracing separation to long delayed but eventual result of Reformation).

53. J. WOOD, *supra* note 17, at 3.

54. Bellah, *supra* note 23, at 33-34; Derr, *supra* note 8, at 77.

55. J. WOOD, *supra* note 17, at 3-4. See generally R. BAINTON, *THE TRAVAIL OF RELIGIOUS LIBERTY* (1950) (biographical studies on religious persecutions).

56. L. PFEFFER, *CHURCH, STATE AND FREEDOM* 103-104 (rev. ed. 1967); E. GREENE, *supra* note 47, at 65; Miller, *supra* note 11, at 138-39; Bellah, *supra* note 23, at 36; Derr, *supra* note 8, at 76-78; Whitson, *American Pluralism: Toleration and Persecution*, 37 *THOUGHT* 492, 506-509 (1962). The alliance was not an overt agreement. Rather, the two schools of thought agreed on the desirability of separation, but for different reasons.

57. Miller, *supra* note 11, at 138; A. STOKES, *supra* note 43, at 141; W. SWEET, *RELIGION IN COLONIAL AMERICA* 338 (1942); see Sandler, *Lockean Ideas in Jefferson's Bill for Establishing Religious Freedom*, 21 *J. OF THE HIST. OF IDEAS* 110 (1960).

58. LOCKE, *A LETTER CONCERNING TOLERATION* (Crowder ed. London 1800) (1st ed. Gouda 1689).

59. R. BAINTON, *supra* note 55, at 237. Locke wrote his letter immediately following the Glorious Revolution and the ascendancy of William and Mary to the English throne. The English Act of Toleration is dated to 1689. A. STOKES, *supra* note 43, at 131.

ion, by nature consigned to the inward persuasion of the mind.⁶⁰ In Locke's words, "the care of souls is not committed to the civil magistrate"⁶¹ because in striking the social compact, the people never conceded religious matters to the state. Locke's argument leads to the recognition of religiously-based conscience as a civil right, requiring toleration by the state.

Locke's writings were influential among the Founding Fathers, but there were differences in how his ideas were received. In part, the differences were due to the extension of Locke's ideas beyond toleration to the goal of disestablishment. For example, Jefferson's view of the separation ideal represents the rationalist's ideas in its purest form.⁶² Although Jefferson sought to disestablish any single church, he did not seek "to divorce religion-in-general from public life."⁶³ In Jefferson's view, common religious beliefs were useful because they unified the body politic around norms essential for the smooth functioning of the nation. According to rationalist thinking, religion established codes of moral conduct and thus fostered the elements of good citizenship. In short, a people who are self-disciplined out of moral persuasion rather than legal compulsion are the glue that unify free society and enable democratic self-government. Religion so viewed by the rationalists became an expediency and its essence became morality or the human search for the immutable principles of right and wrong.⁶⁴ Jefferson's rationalism, however, bred a certain hostility to vying religious sects, for he believed sectarianism impeded human reason.⁶⁵ Jefferson viewed the separation of church and state as a safeguard for the state "against ecclesiastical depredations and incursions."⁶⁶

In the years during the American Revolution and later union, rationalists were few in number,⁶⁷ albeit well-placed, compared to a religious public which sought separation out of quite a different premise. The American story of growing sentiment for a secular state and independent churches is not found in the philosophy of the Enlightenment, but grounded in religion.⁶⁸ The sheer dominance on the American scene of the religiously based push for separation, which transformed this ideal from theory to political reality, made the theological school of thought the stronger partner in its alliance with the rationalists.⁶⁹

60. LOCKE, *supra* note 58, at 14-15, 18.

61. *Id.* at 13.

62. Derr, *supra* note 8, at 78.

63. *Id.* See H. BERMAN, *supra* note 12, at 68; W. SWEET, *supra* note 57, at 336-37.

64. See Derr, *supra* note 8, at 78-79.

65. *Id.* at 79-81; see L. TRIBE, *supra* note 7, at 816-17.

66. M. HOWE, *supra* note 3, at 2.

67. *Id.* at 19; Miller, *supra* note 11, at 138; A. STOKES, *supra* note 43, at 243-44; Derr, *supra* note 8, at 78.

68. W. MARNELL, *supra* note 50, at 99, 101, 102.

69. S. COBB, *supra* note 14, at 484-89.

[In this period just preceding the Revolution, a] most powerful influence on the whole question of Church and State had been making itself felt. This was the influence of Jonathan Edwards, [one of the leaders of the Awakening,] who, more than any other man, settled the principle which fully justified to the American mind the complete

Separatist thinking began in the seventeenth century, when, under the press of religious persecution, the argument developed for a theology of church-state separation to honor the right of human conscience in religious matters. This movement often is identified with Roger Williams, the founder of Rhode Island,⁷⁰ and to a lesser extent with the Quakers in Pennsylvania⁷¹ and the early efforts by Lord Baltimore in Maryland.⁷² The separation movement's successes initially were confined to these select colonies. Later in the eighteenth century, the mass of American opinion throughout all the colonies was shaped by the Great Awakening of 1720-1750.⁷³

Roger Williams' *The Bloody Tenet of Persecution for cause of Conscience* (1644)⁷⁴ is an early expression of the sectarian spirit. For dissenters such as Williams, the case for separation was two-fold. First, it was best for the state because conformity in religious matters was impossible due to its personal

severance of the state from ecclesiastical functions or concern. . . . While Edwards remained silent on the relation of the civil law to the Church, his trumpet gave no uncertain sound as to the divine character of the Church and the absolute necessity for its purity

. . . It is only in the understanding that the principles of Edwards had profoundly affected the minds of his generation, that we can account for the ready and almost universal acceptance of the measures of disestablishment in America.

Id.

Edwards, perhaps far beyond any other man of his time, smote the staggering blow which made ecclesiastical establishments impossible to America. . . .

A. STOKES & L. PFEFFER, *supra* note 48, at 26.

70. A. STOKES, *supra* note 43, at 194-202; R. BAINTON, *supra* note 55, at 214-28; E. GREENE, *supra* note 47, at 47-52; W. SWEET, *supra* note 57, at 326-27; Whitson, *supra* note 56, at 493-500.

71. A. STOKES, *supra* note 43, at 206-208; L. PFEFFER, *supra* note 56, at 88-90; E. GREENE, *supra* note 47, at 56-59; W. SWEET, *supra* note 57, at 326-31.

72. A. STOKES, *supra* note 43, at 189-94; L. PFEFFER, *supra* note 56, at 81-84; E. GREENE, *supra* note 47, at 52-56; W. SWEET, *supra* note 57, at 328-30.

73. See *supra* notes 68, 69; *infra* notes 78, 84. Although the colonial awakenings are broadly viewed as "one great religious contagion sweeping over the colonies like a tidal wave," W. SWEET, *supra* note 57, at 291-92, this historical event is best understood as three movements, each with its own peculiar leaders and characteristics. Professor Sweet describes each as follows:

The New England awakening was confined almost exclusively to established Congregationalism, though the Baptists and Episcopalians profited indirectly. But it gave birth to no new permanent religious force, for Congregationalism continued to be the dominant religious body. The Middle Colony revival was predominantly Scotch-Irish Presbyterian, though others contributed to it, particularly in its beginnings. But here too the old pattern prevailed.

The Southern awakening differed from the Middle Colony and New England awakenings in several respects. In the first place it was more interdenominational in character and requires for its understanding separate treatment in its several denominational aspects. As a whole it bore the stamp of the frontier to a greater degree than did either of the others and more closely presaged the great trans-Allegheny revivals of a generation and a half later. It also forged new and aggressive religious forces in the Baptists and Methodists and started them on their amazing development, which was soon to make them the most numerous religious bodies in the new nation. In other words, it marks the real beginning of the democratizing of religion in America.

W. SWEET, *supra* note 57, at 292.

74. 3 THE COMPLETE WRITING OF ROGER WILLIAMS (Bartlett ed. 1963). See A. STOKES, *supra* note 43, at 196-97 (summary of essay written by Williams).

nature, and state attempts to compel conformity would lead only to repression and civil discord. Second, separation was best for religion because it sealed the church from co-optation by the state and left it free to pursue its mission, however perceived.⁷⁵ Williams believed that the civil government should deal only with temporal affairs, and that the government operated through the consent of the people. Civil government, therefore, must not meddle in church affairs.⁷⁶ Williams' views are most noted for the theological imperative of separation as a means of protecting the religiously informed conscience of the individual and for opening the door to a secular state.⁷⁷

Historians of the pre-Revolutionary period have cited the profound influence of the widespread pietistic revival, the Great Awakening, in several of the colonies as having prepared the American soil for disestablishment.⁷⁸ The leaders of the movement insisted "that the Church should be exalted as a spiritual and not a political institution."⁷⁹ Revivalism produced a religion which was "individualistic, voluntaristic, enthusiastic: the act of faith was a quite particular matter for each individual."⁸⁰ The religion of the Awakening "challenged all notions of hierarchical society and exalted the voluntary church.

75. E. MORGAN, *ROGER WILLIAMS: THE CHURCH AND THE STATE* 115, 118 (1967). Noting that Williams' "principal concern in the separation of church and state was to preserve the church from worldly contamination," Morgan summarizes Williams' view of the church and the state as follows:

The question was not really whether the church of Christ ought to be separated from the state: by its very nature the church *was* separate and ceased to be a church when it accepted state support. Similarly it was not a question whether a state could exist and exercise authority without supporting God's true religion: the fact was that states did exist, did exercise authority, and did prosper where the name of Christ was unknown.

Id. (emphasis in original).

76. A. STOKES, *supra* note 43, at 199.

77. R. BAINTON, *supra* note 55, at 220-23, 226-27; P. MILLER, *ROGER WILLIAMS: HIS CONTRIBUTION TO THE AMERICAN TRADITION* 255-57 (1953).

78. W. SWEET, *supra* note 57, at viii:

The eighteenth century saw American religion more and more democratized and, in the Great Colonial Revivals, for the first time religion reached down to the masses. In the process the old European Church-State relationship was gradually changed, and with independence came the opportunity to a successful completion the century-and-a-half struggle for religious freedom and the separation of the Church and State.

How this, the greatest of all of American contributions both in the realm of religion and politics, was achieved cannot be understood unless the course of colonial religious development is carefully followed.

See also A. STOKES, *supra* note 43, at 240-44; W. GEWEHR, *THE GREAT AWAKENING IN VIRGINIA, 1740-1790, 167-218* (1930); S. COBB, *supra* note 14, at 484-89; Littell, *The Basis of Religious Liberty in Christian Belief*, 6 *J. CHURCH & ST.* 132, 136 (1964); *see generally* W. SWEET, *supra* note 57, at 271-339; T. HALL, *THE RELIGIOUS BACKGROUND OF AMERICAN CULTURE* 147-60 (1930); S. MEAD, *THE LIVELY EXPERIMENT: THE SHAPING OF CHRISTIANITY IN AMERICA* 16-37 (1963); F. LITTELL, *FROM STATE CHURCH TO PLURALISM* 12-28 (1962).

79. A. STOKES, *supra* note 43, at 241.

80. Miller, *supra* note 11, at 139. *See* T. HALL, *supra* note 78, at 154, 159.

Establishment of religion, even a 'general' one, would have been quite anti-theoretical to its spirit."⁸¹

Churches formed as a result of the Awakening quickly acted as a counterpoint to the established churches, and inevitable struggles ensued, first for toleration and later disestablishment.⁸² Importantly, these pietistic churches did not seek establishment themselves, because they believed that union with the state debased the church. These churches saw true religion and the church as thriving only under conditions of free choice, eschewing any compromising liaison with government.⁸³

The Great Awakening and its resulting concern for the purity of religious societies has been trumpeted by several historians as a principal reason that separation was achieved.⁸⁴ The resulting separation was even more amazing because it was completed "without any dead bodies, or any imprisonments,

81. Derr, *supra* note 8, at 76. See W. GEWEHR, *supra* note 78, at 187 ("The alliance of Church and State, the identification of religious with civil institutions, was found to be detrimental to the cause of religion."); T. HALL, *supra* note 78, at 156.

82. W. MARNELL, *supra* note 50, at 93-104; A. STOKES, *supra* note 43, at 241-44.

83. Miller, *supra* note 11, at 139; S. COBB, *supra* note 14, at 487-88. Isaac Backus, a minister profoundly influenced by the Great Awakening into taking a strong and successful advocacy for separation (A. STOKES, *supra* note 43, at 306), asserted quite simply, "True religion is a voluntary obedience unto God." Pamphlet entitled *To The Public* (1778), reprinted in ISAAC BACKUS ON CHURCH, STATE, AND CALVINISM 350, 351 (W. McLoughlin ed. 1968).

James Madison, in a letter written in 1822, observed how the American churches had benefited from separation:

The examples of the colonies, now States, which rejected religious establishments altogether, proved that all sects might be safely and advantageously put on a footing of equal and entire freedom. . . . It is impossible to deny that in Virginia religion prevails with more zeal and a more exemplary priesthood than it ever did when established and patronized by public authority. We are teaching the world the great truth that governments do better without kings and nobles than with them. The merit will be doubled by the other lesson: that religion flourishes in greater purity without than with the aid of government.

Letter from James Madison to Edward Livingston (July 10, 1822), 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON, FOURTH PRESIDENT OF THE UNITED STATES 273, 275-76 (Philadelphia 1865).

A decade later, another keen observer of the American scene noted the same phenomena of separation heightening the "religious atmosphere of the country." 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 337 (Langley 4th ed. 1841). See also Marsh v. Chambers, 51 U.S.L.W. 5162, 5172-73 (1983) (Brennan, J., dissenting) (authorities collected).

84. W. MARNELL, *supra* note 50, at xi-xiii, 91-104; W. GEWEHR, *supra* note 78, at 187-88; S. COBB, *supra* note 14, at 484-89; A. STOKES, *supra* note 43, at 240-44; see generally W. SWEET, THE AMERICAN CHURCHES: AN INTERPRETATION 17-33 (1947); W. SWEET, *supra* note 57, at 301-306, 322-33.

If a study of the rise of dissent in the eighteenth century shows anything, it is the fact that the Great Awakening was one of the secret springs which directed the actions of men. . . .

. . . Perhaps unconsciously, but none the less in reality, the Great Awakening gradually welded the common people into a democracy which in the end was to change inevitably the temper, if not the form, of government.

W. GEWEHR, *supra* note 78, at 187.

and apparently very little serious inconvenience."⁸⁵ No violence occurred because separation conformed to a redefined notion of religion and the role of the church which had gained wide acceptance.⁸⁶ As Professor Howe summarizes the matter, the separation principle is "generally understood to be more the expression of Roger Williams' philosophy than that of Jefferson's."⁸⁷ Separation arose from an "American opinion in 1790 [which] accepted the view that religious truth is identifiable and beneficent." The present view that separation is peculiarly appropriate to safeguard religious truth "from the rough and corrupting hand of government" soon followed.⁸⁸

B. *The Principle is Born*

In general terms the thinking developed along a two-step pattern: first religious toleration and then separation. Moreover, the rate of this evolution was not uniform in the colonies because of differing religious makeup and other factors.⁸⁹ Religious toleration recognized the integrity of the individual conscience and argued for its protection as a natural right. Today the free exercise clause functions to secure this right of free choice in religious matters.⁹⁰

The later development of the separation principle inextricably was linked to a definition of religion which presupposed voluntary adherence to a creed. The natural consequence of religion redefined as voluntaristic was that government had no competence in the matter. Most certainly, then, the state should not become an agent for achieving sectarian propagation and inculcation. Religious groups were left to attract members by force of persuasion and the appeal of their doctrine, not by force of law.

Concomitantly, if churches were to operate in a free market environment, a prerequisite was that churches have independence from governmental control, not just independence from governmental support. If churches were to draw upon their own resources and pursue their calling as they understood it, the government should not unduly impede those efforts. To have voluntaristic churches meant to be free of both government help and hindrance. To be an independent church and to be a voluntaristic church was a unitary concept. One implied the other, and both were derived from the principle of separation.

85. Derr, *supra* note 8, at 78.

86. S. COBB, *supra* note 14, at 489.

87. M. HOWE, *supra* note 3, at 19. See W. MARNELL, *supra* note 50, at xiii.

88. M. HOWE, *supra* note 3, at 19.

89. L. PFEFFER, *supra* note 56, 141-42.

90. See P. KURLAND, RELIGION AND THE LAW OF CHURCH AND STATE AND THE SUPREME COURT 17 (1962). Although the free exercise and establishment clauses both protect religious liberty, they do so by very different approaches. See *infra* notes 201-202 and accompanying text. As construed by the Supreme Court, the free exercise clause, analogous to the First Amendment's guarantees of expressional freedom, has been utilized to protect individual rights by withdrawing from the domain of permissible regulation certain matters—here individual acts of conscience which are religiously based. *Thomas v. Review Bd., Ind. Empl. Sec. Div.*, 450 U.S. 707, 713 (1981); *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972); *Sherbert v. Verner*, 374 U.S. 398, 402-403 (1963); R. LEE, *supra* note 4, at 129, 135.

Volunteerism went beyond mere religious toleration. Volunteerism required the state to be neutral in matters of religious doctrine and practice, even when a nonneutral stance by government did not burden the conscience of individuals in the practice of their religion.⁹¹ From the rationalist's view, volunteerism was desirable because it fostered liberal government by lessening sectarian strife which disrupted the civil peace. The sheer pragmatics of the situation required it, for early America had many diverse sects. From the theological viewpoint, however, volunteerism was mandated by the very understanding of what religion was and the necessity of churches independent of the state to protect their vitality and soundness.⁹²

Some may entertain a certain uneasiness with the proposition that the establishment clause is imbued with theological as well as rationalistic underpinnings. Others, anticipating such discomfiture with history, have pointed to reasons why such uneasiness is unnecessary.⁹³ First, embracing the theological view did not mean that government was bound to assume a role which actively fostered religion. The theological view was to the contrary, because it desired a government that was not significantly involved with religious organizations, albeit, one neither indifferent nor hostile to religion.⁹⁴ Second, the theological view was consistent with the original nature of the Bill of Rights. None of the provisions in the first eight amendments were envisioned as sources for making claims on the government to act. Instead, they were understood as limits on governmental action. The theological view of the establishment clause sees the clause as a shield from undue interference by government in religious affairs and is consistent with the primal character of the Bill of Rights.⁹⁵ A third reason for lack of concern over theological influences on the separation principle is that historical accuracy requires taking into account both the theological and rationalist presuppositions. Should some object that the establishment clause has no interest in seeing to it that religion succeed, the rejoinder is that it is not the business of the clause to prevent it either. Rather, each religious organization should increase or wither on its own merits, unaided and unhindered by government.

C. *The First Congress*

Any appeal to historical fidelity must eventually reckon with the plea for a return to the original intent of the framers. In 1789, the First Congress debated several amendments to the Constitution introduced by James Madison.⁹⁶ Twelve numbered articles eventually were passed and were proposed to the states for ratification. The first two proposed articles were re-

91. See *infra* text accompanying notes 201-202.

92. See *infra* text accompanying notes 162-65 (independence of church is developed in theoretical context).

93. M. HOWE, *supra* note 3, at 15-16.

94. See *supra* note 12 and accompanying text.

95. M. HOWE, *supra* note 3, at 16-19.

96. R. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS, 1776-1791*, 200-17 (1955).

jected, but the remaining ten were ratified by 1791. The ratified articles included the third, now renumbered as the First Amendment with its establishment and free exercise clauses.⁹⁷

The Supreme Court cases of the 1940's, *Everson v. Board of Education*⁹⁸ and *McCullum v. Board of Education*,⁹⁹ drew heavily upon the efforts of Thomas Jefferson and James Madison¹⁰⁰ in Virginia which resulted in the disestablishment of the Anglican Church in 1785-86.¹⁰¹ The implicit assumption by the Court was that Jefferson's and Madison's attitudes correctly reflected the struggle for religious liberty at the level of the national government and thereby were codified into the establishment clause.¹⁰² Recent scholarship has mounted a forceful case that the Supreme Court was wrong. Moreover, it is said that the historical account is reasonably clear,¹⁰³ at least if one accepts that the relevant set of framers are the members of the First Congress. There is simplistic, but nevertheless strong appeal to the argument that the establishment clause should mean what those in Congress who drafted it believed it meant, at least to the extent that the matter can be resolved by reference to the congressional debates and conferences.¹⁰⁴ A second, less satisfactory argument is to give the clause meaning according to how it was applied by the first generation of federal officials bound by it.¹⁰⁵

The dominant view in the First Congress emerging from the debates and conferences is that the establishment clause was meant to accomplish two purposes. First, the clause worked to prevent the national government from establishing any one church or providing aid or preferential treatment to a particular denomination. Second, the clause accounted for the concerns of

97. *Id.* at 214-17.

98. 330 U.S. 1 (1947).

99. 333 U.S. 203 (1948).

100. *McCullum v. Board of Educ.*, 333 U.S. 203, 211 (1948) (majority opinion by Black, J.); *id.* at 214, 216 (Frankfurter, J., concurring); *id.* at 245-48 (Reed, J., dissenting); *Everson v. Board of Educ.*, 330 U.S. 1, 11-13 (1947) (majority opinion by Black, J.); *id.* at 28-29, 31, 33-39 (Rutledge, J., dissenting). See also *Flast v. Cohen*, 392 U.S. 83, 103-104 (1968); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 214, 225 (1963); *Engle v. Vitale*, 370 U.S. 421, 428, 431 nn. 13 & 14, 432 nn. 15 & 16 (1962); *id.* at 444 (Douglas, J., concurring); *McGowan v. Maryland*, 366 U.S. 420, 430, 437-41 (1961).

101. See W. GEWEHR, *supra* note 78, at 167-218 (the role of Great Awakening in assisting disestablishment efforts in Virginia).

102. See Kauper, *Everson v. Board of Educ.; A Product of The Judicial Will*, 15 ARIZ. L. REV. 307, 318-19 (1973) (criticizing exclusive reliance on Madison and Jefferson); Beth, *The Wall of Separation and the Supreme Court*, 38 MINN. L. REV. 215, 218 (1954) (view of First Amendment as embodying Jefferson's view is unprovable, controversial, and poor basis for decision if used exclusively).

103. See, e.g., R. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* (1982); M. MALBIN, *supra* note 37.

104. See C. ANTIEAU, A. DOWNEY & E. ROBERTS, *FREEDOM FROM FEDERAL ESTABLISHMENT* 123-42 (1964) (conclusion that it is impossible to give dogmatic interpretation based on congressional history).

105. *Id.* at 159-88.

federalism so dominant during this period by reserving to the states the authority to deal with established churches and the matter of religion as they saw fit.¹⁰⁶

It can be deduced that the First Congress did not envision the establishment clause as prohibiting nondiscriminatory aid to all religions, assuming the aid was incident to one of the government's powers delegated elsewhere in the Constitution.¹⁰⁷ If this is an accurate reading of the congressional history, the resolution of the matter by the First Congress was consistent with the older notion of church-state relations. The older view held that "because state governments have a responsibility to secure happiness by promoting morality they cannot escape the obligation to aid religion and its enterprises."¹⁰⁸

Although this view of congressional history is not free from dissent,¹⁰⁹ if correct, one still must ask if the members of the First Congress should control the construction of the establishment clause. Of course, the Supreme Court's incorporation of the First Amendment through the Fourteenth to apply to state and local governments¹¹⁰ has erased the federalism feature of the establishment clause.¹¹¹ The construction seemingly permitting nondiscriminatory aid to all religions, however, remains.

It is helpful at this point to juxtapose the two conflicting views in 1789 on the separation principle. The alliance between the rationalists such as Jefferson and those of the theological view stood in opposition to the older tradition. In many states, variations on the older tradition were still predominant; that is, many believed that aid to religion was an appropriate role for the state.¹¹² In the floor and conference debates of the First Congress, the

106. M. MALBIN, *supra* note 37, at 16; R. CORD, *supra* note 103, at 15.

107. M. MALBIN, *supra* note 37, at 39-40; R. CORD, *supra* note 103, at 15.

108. M. HOWE, *supra* note 3, at 27.

109. *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 254-55 (1963) (Brennan, J., concurring); L. PFEFFER, *supra* note 56, at 149-74; Summers, *The Sources and Limits of Religious Freedom*, 41 ILL. L. REV. 53, 55-58 (1946).

110. The free exercise clause was incorporated into the due process clause of the Fourteenth Amendment in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), and the establishment clause incorporated in *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

111. Because the establishment clause does more than protect individual liberties through its principles of separation and volunteerism, *see infra* note 202, Professor Howe has argued that the Supreme Court was mistaken in applying the establishment clause with equal force to the national and state governments. Howe, *The Constitutional Question, RELIGION AND THE FREE SOCIETY* 49, 50-55 (1958).

112. At the time of the adoption of the federal Constitution, the state constitutions revealed the following:

Two out of thirteen, Virginia and Rhode Island, conceded full freedom;

One, New York, gave full freedom except for requiring naturalized citizens to abjure foreign allegiance and subjection in all matters ecclesiastical as well as civil;

Six, New Hampshire, Connecticut, New Jersey, Georgia, North and South Carolina, adhered to religious establishments;

Two, Delaware and Maryland, demanded Christianity;

Four, Pennsylvania, Delaware, North and South Carolina, required assent to the divine inspiration of the Bible;

Two, Pennsylvania and South Carolina, imposed a belief in heaven and hell;

ever-present concerns of federalism were of considerable practical importance.¹¹³ In 1789, several states still had established churches, and all states except Rhode Island and Virginia maintained a plethora of religious privileges and discriminations.¹¹⁴ An amendment that erased all religious dispensations and disabilities would have met sure defeat. To leave the thorny matter of religion to each state, and at the same time to clearly guarantee no jurisdiction in the matter by the national government, was the expedient compromise. The alliance between the rationalists and those of the theological view was left to advocate the logic of separation in those states still retaining established churches. Indeed, this is exactly what did happen. Importantly, disestablishment triumphed without any resort to the First Amendment, since the First Amendment was a restraint on only the national government.¹¹⁵ Although the compromise in Congress left open the possibility that the national government might aid religion on a nondiscriminatory basis, any significant aid was a theoretical possibility at best. The national government as conceived was quite limited in its powers to act in such domestic matters.

Despite the current pressure mounted for the nondiscriminatory-aid view of the establishment clause, in its modern cases the Supreme Court has evidenced little interest in departing from its no-aid view of history.¹¹⁶ Perhaps Justice Brennan has been the most forthright in acknowledging this intransigence. In his extensive concurring opinion in *School Dist. of Abington Township v. Schempp*,¹¹⁷ Justice Brennan explained his counsel against "too literal a quest for the advice of the Founding Fathers"¹¹⁸ as follows:

A more fruitful inquiry . . . is whether the practices here challenged . . . tend to promote the type of interdependence between religion and state which the First Amendment was designed to prevent. Our

Three, New York, Delaware, and South Carolina, excluded ministers from civil office;

Four, Maryland, Virginia, North Carolina, and Georgia, excluded ministers from the legislature;

Two, Pennsylvania and South Carolina, emphasized belief in one eternal God;

One, Delaware, required assent to the doctrine of the Trinity;

Five, New Hampshire, Massachusetts, Connecticut, Maryland and South Carolina, insisted on Protestantism;

One, South Carolina, still referred to religious "toleration".

L. PFEFFER, *supra* note 56, at 118-19.

113. M. MALBIN, *supra* note 37, at 15-16; Howe, *supra* note 111, at 52.

114. *See supra* note 112.

115. L. PFEFFER, *supra* note 56, at 142; *see* *Permoli v. First Municipality*, 44 U.S. (3 How.) 561, 563 (1844) ("The constitution makes no provision for protecting the citizens of the respective States in their religious liberties; this is left to the state constitutions and laws; nor is there any inhibition imposed by the constitution of the United States in this respect on the States.")

116. *But cf.* *Mueller v. Allen*, 51 U.S.L.W. 5050 (1983) (5-4 decision upholding state tax deduction to parents for costs of tuition, textbooks and transportation to public or private schools, including parochial schools).

117. 374 U.S. 203, 230-304 (1963). *See* *Marsh v. Chambers*, 103 S.Ct. 3062, 3070-71 (1983) (Brennan, J., dissenting).

118. 374 U.S. at 237.

task is to translate "the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century . . .".¹¹⁹

The Supreme Court's cases since *Everson v. Board of Education*¹²⁰ demonstrate that the Court does not consider the deliberations of the First Congress the determinative history.¹²¹ In its search for the objectives that underlie the separation principle, the Court instead harks back to the struggle for religious freedom in the States, a development that spans over a hundred years up to the final disestablishment by Massachusetts in 1833.¹²² As Justice Brennan said, to the modern Court the relevant "pattern of liberal government in the eighteenth century" is not the political expediencies of the 1789 Congress, which, concededly, are a mere snapshot of a longer and richer history. Rather, the Court finds the pertinent history to be the slow but steady acceptance of the separation principle in the States. This long span of history has been gathered by the Court and compressed into the establishment clause.¹²³ If the Court has adopted the separation theory held by the rationalists and those of the theological view, logic and consistency entails adopting the presuppositions of both. If the separation of church and state was to inure to their mutual benefit, then governmental regulation of religious organizations should be given the same strict scrutiny as governmental aid to religion.

An interesting inquiry remains. In *Schempp*, Justice Brennan asks what has transpired since the late eighteenth century that presently is troubling the courts in adapting the establishment clause with its separation principle to the "problems of the twentieth century?"

D. *Changing Times*

Nearly two hundred years of constitutional government have witnessed fundamental shifts in American society which underlie the relatively recent church-government clashes. This litigation may be viewed in the context of socioreligious and political developments. Changes in how we view religion, combined with a more embracing role for government in regulating domestic affairs, have complicated the relations between religious organizations and government.

The changes in American religious life have been two-fold: the emergence

119. 374 U.S. at 236.

120. 330 U.S. 1 (1947).

121. Even in the recent legislative chaplain case, *Marsh v. Chambers*, 103 S.Ct. 3062 (1983), which upheld the practice because the "unique history" of the First Congress established a precedent for invocational prayer, the majority took care not to rest its justification on the historical pattern alone. *Id.* at 3071 (Brennan, J., dissenting).

122. L. PFEFFER, *supra* note 56, at 141.

123. No judgment is made here concerning whether this revisionist view of history is an appropriate use of the Supreme Court's power of judicial review. For present purposes, suffice it to acknowledge what the Supreme Court has done, and proceed from there.

of contemporary religious pluralism¹²⁴ and a broadening of the realm of religious ministry into social and economic circles.¹²⁵ On a national level, the United States has always been religiously diverse, initially composed of numerous Christian denominations.¹²⁶ The prospect of establishing one national church was as remote in 1791 when the establishment clause was ratified as it is inconceivable today. Until the first half of the twentieth century, however, there existed a cultural consensus which subscribed to a Judeo-Christian world view, even by those who had made no personal commitment to a Jewish, Protestant, or Roman Catholic faith.¹²⁷ Although the denominations comprised multiple branches, they all claimed a common root.¹²⁸ This is no longer true, and the shift has been both recent and rapid.

Even a cursory sampling of present-day American culture reveals a smorgasbord of religions vying for attention: Theistic, nontheistic, and polytheistic; and with origins both ancient and modern, Eastern and in America itself.¹²⁹ This new religious pluralism has propelled a Supreme Court sensitive toward the religious persuasions of all citizens to adopt a more neutral and thus secular posture.¹³⁰ Occasionally, this secularizing tendency in public institutions such as schools has taken place more quickly than large segments

124. P. KAUPER, RELIGION AND THE CONSTITUTION 6-9 (1964); Buzzard, *America Today, Shaking Foundations*, FREEDOM AND FAITH: THE IMPACT OF LAW ON RELIGIOUS LIBERTY 11, 17-18 (1982).

125. Buzzard, *supra* note 124, at 16-17; Carlson, *supra* note 18, at 29-30.

126. A. STOKES, *supra* note 43, at 272-76.

127. Miller, *supra* note 11, at 140; Eastland, *In Defense of Religious America*, COMMENTARY 39, 39-42 (June 1981); Tocqueville, *supra* note 83, at 331 ("[A]lmost all the sects of the United States are comprised within the great unity of Christianity, and Christian morality is everywhere the same.").

128. Canavan, *The Pluralist Game*, 44(2) LAW & CONTEMP. PROBS. 23, 24-25 (1981).

129. Religions include, for example, Islam, which now claims over 2 million members in the United States. YEARBOOK OF AMERICAN AND CANADIAN CHURCHES 71 (Jacquet ed. 1983). A recent book reports "more than 600 unconventional alternative religious bodies" which compete with nearly 800 Christian denominations for the allegiance of Americans. J. MELTON & R. MOORE, THE CULT EXPERIENCE: RESPONDING TO THE NEW RELIGIOUS PLURALISM 7 (1982). The Native American Church claimed 225,000 members in 1977, the Church of the Tree of Life which uses drugs as sacraments consisted of 1,500 members in 1972, and the National Spiritualist Association of Churches which believes in reincarnation and the after-life was comprised of 160 churches in 1974. 2 THE ENCYCLOPEDIA OF AMERICAN RELIGIONS 98, 196-98 (Melton ed. 1978). *See generally*, G. PARRINDER, DICTIONARY OF NON-CHRISTIAN RELIGIONS (2d ed. 1981). The YEARBOOK OF AMERICAN AND CANADIAN CHURCHES (Jacquet ed. 1983) lists 339,053 denominations with membership of over 138 million representing 59.7% of the United States population. CHURCHES AND CHURCH MEMBERSHIP IN THE UNITED STATES (National Council of Churches, 1980) lists 231,708 denominations with membership of over 112 million representing 49.7% of the population.

130. P. KAUPER, *supra* note 124, at 6-7. Increasing religious pluralism is evident in the Supreme Court's definitional struggle with the meaning of religion in the Constitution. More traditional perceptions of religion in earlier days grounded in theism (*see* *United States v. Macintosh*, 283 U.S. 605, 633-34 (1931) (Hughes, C.J., dissenting); *Davis v. Beason*, 133 U.S. 333, 342 (1890)) have given way to the pluralistic view defining a religious faith as "sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent." *United States v. Seeger*, 300 U.S. 163, 176 (1965). *See also* *Torcaso v. Watkins*, 367 U.S. 488, 495 n. 11 (1961).

of the public were ready to accept.¹³¹ Moreover, neutrality has become less possible because the present multitude of creeds no longer share a common source for moral codes and ultimate values.¹³²

The second change in American religious life is the expansion of religious associations into new arenas. Alexis de Tocqueville, in his chronicle of the United States in the 1830's, observed that compared with Europe, religion in America was more confined to the private side of life, but there its influence was intense. Tocqueville remarked, "It restricts itself to its own resources, but of these none can deprive it; its circle is limited, but it pervades it and holds it under undisputed control."¹³³ Today the circle of religious activity has ballooned.¹³⁴ The types of ministries are myriad and their organizational structures vary widely.¹³⁵ Examples run from the familiar charities, mission societies, schools, and child-care agencies to the recently-formed prison ministries, family-counseling centers, broadcasting networks, and even a few legal-aid clinics.¹³⁶ In this larger community, the religious beliefs of many are expressed and cultivated and find further meaning in corporate acts of service.¹³⁷ These ministries are not simply welfare agencies, distinguishable from nonreligious agencies only because the staff acts out of religious motivation. Many of the ministries combine service with the underlying purpose to pro-

131. Consider, for example, the proposals of the Reagan Administration to permit voluntary prayer in public schools, S.J. Res. 73, 98th Cong., 1st Sess. (1983), contrary to *Engle v. Vitale*, 370 U.S. 421 (1962), and Senator Hatfield's proposal to allow religiously-oriented meetings in high school facilities during noninstructional periods, S. 815, 98th Cong., 1st Sess. (1983), contrary to *Lubbock Civil Liberties Union v. Lubbock Indep. School Dist.*, 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 51 U.S.L.W. 3533 (U.S. Jan. 17, 1983) (No. 82-805). *Cf.* *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam) (striking Kentucky statute requiring posting of Ten Commandments in public school classrooms).

132. Canavan, *supra* note 128, at 24-25.

133. 1 A. DE TOCQUEVILLE, *supra* note 83, at 341.

134. Religious groups opened schools, charities and other social welfare agencies long ago. In social action endeavors, they preceded the government by many years. See Pickrell & Horwich, *supra* note 21, at 112-13. Of course, there has been a general tendency in mid-twentieth century for the state to take over social services which were once the province of the churches. This, however, has been the pattern only within main line Protestantism. Conservative churches are just awakening to social needs. Thus, social welfare activities by all churches have expanded greatly since the beginning of our nation.

135. See Morgan, *The Significance of Church Organizational Structure in Litigation and Government Action*, 16 VAL. U.L. REV. 145 (1981); R. TOMS, WHAT IS A CHURCH? THE DILEMMA OF THE PARACHURCH (1979) (practical introduction to definition of "church" as it relates to church-affiliated organizations and related issues).

136. Social welfare ministries, both new and old, are not to be criticized, indeed, many are commendable. One must, however, acknowledge that their existence and expansion into areas which overlap with the Welfare State create unanticipated problems in church-government relations. For examples of religious broadcasting, see *Faith Center—WHCT Channel 18 v. Local Union 42, Int'l Bhd. of Elec. Workers*, 261 N.L.R.B. 11, 1982 LAB. L. REP. (CCH) ¶ 18,888 (1982), and *Office of Communication of the United Church of Christ v. FCC*, ___ F.2d ___ (D.C. Cir. 1983). For an example of a church-operated legal aid clinic, see J. HEFLEY, THE CHURCH THAT TAKES ON TROUBLE 165-73 (1976).

137. See Pickrell & Horwich, *supra* note 21, at 112 nn. 6-8 (authorities collected).

pagate their particular faith.¹³⁸ With religion expanding into new endeavors, the frequent contact and occasional clash with government, local, state and federal, seems inevitable.

Despite its increase, organized religion has been surpassed by government as the premier growth industry.¹³⁹ If not constrained by limited tax resources, the "Great Society" had aimed to displace much of the private voluntary sector. Not only has tension between big government and religious institutions resulted, but government also has tended to compromise many of those institutions.¹⁴⁰ Because of their own shrinking financial resources and a marked decline in volunteer workers limiting their personnel resources, some religious associations sought and received government aid and services.¹⁴¹ But the proverbial governmental "strings" exacted a price. As one author observed, "[T]he will-o'-the-wisp attractions of governmental money have lured elements of the church community deeper into the bureaucratic quagmire."¹⁴² Ministerial programs have been tailored to fit the parameters of available public grants.¹⁴³

Even religious organizations which shunned public aid have not avoided regulation.¹⁴⁴ Under such elastic doctrines as police power for promoting the general welfare and matters affecting interstate commerce, government often has regulated, licensed, and generally sought to do its version of "good".

138. See R. NEUHAUS, *CHRISTIAN FAITH & PUBLIC POLICY* 125-26 (1977).

139. P. KAUPER, *supra* note 124, at 10-12; Buzzard, *supra* note 124, at 15-16 (1982); Carlson, *supra* note 18, at 30-33. See C. DAWSON, *RELIGION AND THE MODERN STATE* 45-46 (1940). Dawson states that:

[T]he modern State is daily extending its control over a wider area of social life and is taking over functions that were formerly regarded as the province of independent social units, such as the family and the church, or as a sphere for the voluntary activities of private individuals. It is not merely that the State is becoming more centralized but that society and culture are becoming *politicized*. In the old days the statesman was responsible for the preservation of internal order and the defence of the State against its enemies. [Today] he is called upon to deal more and more with questions of a purely sociological character and he may even be expected to transform the whole structure of society and re-fashion the cultural traditions of the people. The abolition of war, the destruction of poverty, the control of the birth-rate, the elimination of the unfit—these are questions which the statesman of the past would no more have dared to meddle with than the course of the seasons or the movements of the stars: yet they are all vital political issues to-day and some of them figure on the agenda of our political parties.

Id.

140. Carlson, *supra* note 18, at 31.

141. *Id.*; see generally WEBER & GILBERT, *PRIVATE CHURCHES AND PUBLIC MONEY* (1981); LARSON & LOWELL, *THE RELIGIOUS EMPIRE* (1976). See Pickrell & Horwich, *supra* note 21, at 111 (recent article that focuses on federal funding and concomitant regulation of church activities in social welfare).

142. Carlson, *supra* note 18, at 30.

143. *Id.* at 31. See R. NEUHAUS, *supra* note 138, at 125-26 (strong statements urging resistance to situations where government sets agenda for which societal needs are responded to by religious community); J. WALTER, *SACRED COWS: EXPLORING CONTEMPORARY IDOLATRY* 167-68 (1979) (same).

144. See Esbeck, *supra* note 21.

Government action has tended to homogenize the mediating structures of society and threatens to absorb them as quasi-governmental agencies.¹⁴⁵

III. INDEPENDENT, VOLUNTARISTIC CHURCHES IN A SECULAR STATE

We have seen that the separation principle, with its attendant implications of independent, voluntaristic churches and a secular state, developed at a time when religion was more narrowly defined and the circle of activity by religious agencies smaller and well understood. The present circumstances demonstrate that much has changed, complicating the work of the courts. Before turning to the particulars of the case law, it is beneficial to examine the problem from a more general perspective. The current arguments for protecting the integrity of religious organizations from undue governmental interference fall into two theories: one sociopolitical and the other based on natural rights.

The sociopolitical view reasons that the ongoing development of a liberal society can thrive only in responsible freedom. Since much of the life of a culture is shaped by its nonpolitical institutions and organizations, a rich source of duty, authority and discipline, government would overly control society if it directed the lives of these associations.¹⁴⁶ Liberal democratic theory, therefore, posits more than the protection of individual rights.¹⁴⁷ It also recognizes the contribution to freedom of socializing institutions, such as voluntary associations and cultural or ethnic subgroups, and thus holds in high regard associational rights.¹⁴⁸ Churches and other religious organizations are among the mediating structures in a culture, occupying the space between the individual and government and serving as loci of responsibility, commitment, and identity for many people.¹⁴⁹

145. P. BERGER & R. NEUHAUS, *supra* note 24, at 28; Carlson, *supra* note 18, at 31.

146. M. ABERNATHY, *THE RIGHT OF ASSEMBLY AND ASSOCIATION* 240, 241 (2d ed. 1981); D. FELLMAN, *THE CONSTITUTIONAL RIGHT OF ASSOCIATION* 37, 104 (1963); R. HORN, *GROUPS AND THE CONSTITUTION* 18, 155-60 (1968); R. NISBET, *COMMUNITY AND POWER* 70 (1962); C. RICE, *FREEDOM OF ASSOCIATION* 54 (1962); Howe, *Foreward: Political Theory and The Nature of Liberty*, 67 *HARV. L. REV.* 91 (1953); Chafee, *The Internal Affairs of Associations Not For Profit*, 43 *HARV. L. REV.* 3, 1021-29 (1930); Note, *Developments in The Law: Judicial Control of Actions of Private Associations*, 76 *HARV. L. REV.* 983, 986-88, 991, 995, 1055 (1963).

147. M. BATES, *supra* note 12, at 398-99.

148. See Healy v. James, 408 U.S. 169 (1972) (college's denial of recognition to student political group violated First Amendment guarantees of expression and association); Brotherhood of Ry. Trainmen v. Virginia State Bar, 377 U.S. 1 (1964) (injunction prohibiting union from advising members and recommending legal counsel held contrary to First Amendment guarantee of freedom of association); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958) (compelled disclosure of membership list constitutes unlawful restraint on freedom of association). See also M. ABERNATHY, *THE RIGHT OF ASSEMBLY AND ASSOCIATION* 239-44 (2d ed. 1981); D. FELLMAN, *THE CONSTITUTIONAL RIGHT OF ASSOCIATION* 2, 34, 104 (1963); R. HORN, *GROUPS AND THE CONSTITUTION* 14-16, 152 (1968); H. LASKI, *FOUNDATIONS OF SOVEREIGNTY* 245-46 (1921).

149. P. BERGER & R. NEUHAUS, *supra* note 24, at 1-8. Sociologist Peter Berger has identified such institutions as family, neighborhood and church as the value-generating and value-maintaining agencies of a society. These structures are poised between the public institutions of modern society and the solitary individual. These intermediate structures, therefore, are situated to be useful

Next to the family, religious organizations¹⁵⁰ comprise the largest single group of societal institutions which generate, mold, and propagate those shared norms essential to a reasonably cohesive society capable to self-government.¹⁵¹ The sociopolitical view argues for the preservation of associational life because of its social utility. Religious groups, therefore, are treated in parity with all other voluntary associations.¹⁵²

to both the political order and the individual.

It is a crisis for the individual who most carry on a balancing act between the demand of the two spheres. It is a political crisis because the megastructures (notably the state) come to be devoid of personal meaning and are therefore viewed as unreal or even malignant. Not everyone experiences this crisis in the same way. Many who handle it more successfully than most have access to insitutions that mediate between the two spheres. Such insitutions have a private face, giving private life a measure of stability, and they have a public face, transferring meaning and value to the megastructures. Thus, mediating structures alleviate each facet of the double crisis of modern society. Their strategic position derives from their reducing both the anomic precariousness of individual existence in isolation from society and the threat of alienation to the public order. . . .

Without institutionally reliable processes of mediation, the political order becomes detached from the values and realities of individual life. Deprived of its moral foundation, the political order is "delegitimated." When that happens, the political order must be secured by coercion rather than by consent. And when that happens, democracy disappears.

Id. at 3.

150. *Id.* at 26-30; R. NEUHAUS, *supra* note 138, at 178; 1 A. DE TOCQUEVILLE, *supra* note 83, at 333-35. See M. BATES, *supra* note 12, at 390-407; See *supra* note 129 (large numbers who identify with religious organizations in America).

151. Two social scientists have described the "individual in crises" as brought on by modern society and exacerbated by the deterioration of mediating structures:

The modern individual's sense of isolation, his so-called spiritual homelessness, his bewilderment in the face of the seemingly impersonal forces of which he feels himself a helpless victim, his weakening sense of values—all these motifs often recur in modern sociological writings. This malaise reflects the stresses imposed on the individual by the profound transformations taking place in our economic and social structure—the replacement of the class of small independent producers by gigantic industrial bureaucracies, the decay of the patriarchal family, the breakdown of primary personal ties between individuals in an increasingly mechanized world, the compartmentalization and atomization of group life, and the substitution of mass culture for traditional pattern.

These objective causes have been operating for a long time with steadily increasing intensity. They are ubiquitous and apparently permanent, yet they are difficult to grasp because they are only indirectly related to specific hardships or frustrations. Their accumulated psychological effect is something akin to a chronic disturbance, an habitual and not clearly defined malaise which seems to acquire a life of its own and which the victim cannot trace to any known source.

On the plane of immediate awareness, the malaise seems to originate in the individual's own depths and is experienced by him as an apparently isolated and purely psychic or spiritual crisis. It enhances his sense of antagonism to the rest of the world.

L. LOWENTHAL & N. GUTERMAN, *PROPHETS OF DECEIT* 15 (2d ed. 1970).

152. That is not to say that sociopolitical arguments for independence of religious organizations should not be made. See, e.g., D. KELLEY, *WHY CHURCHES SHOULD NOT PAY TAXES* 47-48 (1977). The more compelling case, however, is founded upon theological premises. Cf. A. STOKES, *supra* note 43, at 36. The sociopolitical view argues for the preservation of religious societies

As we have seen, however, the principle of separation arose not from the prudential reasoning characteristic of the sociopolitical rationale but from a natural rights view as evidenced in eighteenth century political thought. The natural rights theory argues from higher ground; namely, there are certain inalienable rights which cannot legitimately be denied. The theory holds that religious organizations are different from other communal societies and that this uniqueness is critical to understanding the First Amendment. For example, although the Amendment deals only by implication with associational rights,¹⁵³ the establishment clause takes specific account of religious organizations through the separation requirement. The separation, of course, is of government and religious organizations, not government and individuals holding religious beliefs (the latter being an impossibility).¹⁵⁴ The place of religious institutions, therefore, has long been recognized as a special problem for which the establishment clause makes special provision.

Since the principle of separation arose from an alliance between rationalism and a theological view of the church, it is not surprising that supporters of the natural rights theory divide into two lines of thought concerning the

because of their social utility. Such a foundation for civil rights will erode should the contemporary scene begin to value religion less and less. The danger of relying principally on the sociopolitical view is quite real and perhaps increasing with time, as suggested by two sociologists:

The prevalence of malaise in recent decades is reflected in growing doubt with relation to those universal beliefs that bound western society together. Religion, the central chord of western society, is today often justified even by its most zealous defenders on grounds of expediency. Religion is proposed not as a transcendent revelation of the nature of man and the world, but as a means of weathering the storms of life, or of deepening one's spiritual experience, or of preserving social order, or of warding off anxiety. Its claim to acceptance is that it offers spiritual comfort. . . .

As a result, the old beliefs, even when preserved as ritualistic fetishes, have become so hollow that they cannot serve as spurs to conscience or internalized sources of authority. Now authority stands openly as a coercive force and against it is arrayed a phalanx of repressed impulses that storm the gates of the psyche seeking outlets of gratification.

L. LOWENTHAL & N. GUTERMAN, *supra* note 151, at 18. (footnote omitted).

153. See *supra* note 148 (cases cited).

154. W. MARNELL, *supra* note 50, at xiii-xiv.

The "wall of separation between Church and State" was not and could not be a Chinese Wall to separate the eternal and the temporal. The real relationship between Church and State, in America and in every country where religion is strong, is a thing of the spirit, the infusion of the spirit of religion into the ordering of the affairs of society. A wall of separation which would bar that spirit from making itself felt in secular concerns can never be built, because it would have to bisect the human heart.

Id.

[A]s sharply distinct as they may be, the Church and the body politic cannot live and develop in sheer isolation from and ignorance of one another. This would be simply antinatural. From the very fact that the same human person is simultaneously a member of that society which is the Church and a member of the society which is the body politic, an absolute division between those two societies would mean that the human person must be cut in two.

J. MARITAIN, *MAN AND THE STATE* 153-54 (1951). See G. RUGGIERO, *supra* note 52, at 404.

justification for this position.¹⁵⁵ The rationalists ground their thinking solely in the preeminence of individual conscience.¹⁵⁶ Those of the theological position hold to both the sanctity of conscience and the divine nature of the church.¹⁵⁷ Theologian Thomas Derr expresses the theological view:

Virtually all the historic faiths of the West, Protestant, Catholic, and Jewish, understand themselves as communities of response, called into being by an initiative from the divine.¹⁵⁸

In a most helpful series of lectures, the French philosopher Jacques Maritain approaches this division from the perspective of both the "unbeliever" and the "believer".¹⁵⁹ From the skeptic's view, Maritain explains, there should be independence for religious organizations, not simply on an associational basis at a level with other voluntary organizations, but because of the superior human right of conscience to act on ultimate truth, however understood.¹⁶⁰ The right of the religiously informed conscience is the exercise of those uniquely human qualities of inquiry, reason, will, and choice concerning the ultimate questions of humanity's origin, life's purpose, and its destiny. The exercise of these qualities consistently has led to the formation of churches. A secular state, therefore, can recognize freedom for churches without betraying its own neutrality on matters of ultimate truth. The state must recognize freedom for

155. The division among natural rights theory supporters points out that the alliance between rationalism and the theological view has its limits. Both views agree on the desirability of separation, but these two world views are otherwise antithetical. See E. GREENE, *supra* note 47, at 65.

156. G. RUGGIERO, *supra* note 52, at 396-97, 404-406.

157. J. MARITAIN, *supra* note 154, at 151-54, 161-65, 177-78, 186-87; C. DAWSON, RELIGION AND THE MODERN STATE 113, 144-45, 149 (1940); D. KELLEY, *supra* note 152, at 47-49; Action, *Political Thoughts on the Church*, THE HISTORY OF FREEDOM AND OTHER ESSAYS 188, 203 (rev. ed. 1967).

158. Derr, *supra* note 8, at 84.

159. J. MARITAIN, *supra* note 154 at 150-52. Maritain begins by asking rhetorically what a religious organization is to one professing no religion:

In the eyes of the unbeliever, the Church is, or the Churches are, organized bodies or associations especially concerned with the religious needs and creeds of a number of his fellow-men, that is, with spiritual values to which they have committed themselves, and to which their moral standards are appendant. These spiritual values are part . . . of those supra-temporal goods with respect to which, even in the natural order, the human person transcends . . . political society, and which constitute the moral heritage of mankind, the spiritual common good of civilization or of the community of minds. Even though the unbeliever does not believe in these particular spiritual values, he has to respect them. In his eyes the Church, or the Churches, are in the social community particular bodies which must enjoy that *right to freedom* which is but one, not only with the right to free association naturally belonging to the human person, but with the right freely to believe the truth recognized by one's conscience, that is, with the most basic and inalienable of all human rights. Thus, the unbeliever, from his own point of view . . . acknowledges as a normal and necessary thing the freedom of the Church, or of the churches.

Id. at 150 (emphasis in original). Maritain's "unbeliever", although a skeptic, nonetheless is democratically minded and not hostile to religion in general. *Id.*

160. See G. RUGGIERO, *supra* note 52, at 404-405.

churches if it minds its duty of nonhostility toward religion and takes into account the religious propensities of its citizens.¹⁶¹

For the believer, Maritain sees a different conception of the religious society of which one is a member. To those professing religious belief, the church or churches are institutions, both divine and human, with the calling to profess and teach in accordance with the commands of the truth they claim.¹⁶² To the believer, the freedom of a religious organization is based on its dedication by a deity. By its nature, the deity calls one to a higher allegiance to the church than to the state.¹⁶³

In summary, the rationalist enthrones the individual conscience, whereas the theological view holds that the religious organization represents more than the derivative rights of all individuals who comprise its membership.¹⁶⁴ In either event, whether from the perspective of the believer or the skeptic, there are three parties to consider in matters of religious liberty: the individual, the state, and the religious community.¹⁶⁵ Separation that prevents overreaching by a

161. See *supra* notes 12-13 and accompanying text.

162. J. MARITAIN, *supra* note 154, at 151-52.

163. See H. RICHARD NEIBUHR, *RADICAL MONTHEISM AND WESTERN CULTURE* 70-71 (1960); Littell, *The Basis of Religious Liberty in Christian Belief*, 6 J. CHURCH & ST. 132, 140, 145 (1964). Cf. S. COBB, *supra* note 14, at 485 (teaching of Jonathan Edwards, one of the leaders of the Great Awakening).

[Edwards] introduced into the question an element entirely new to the discussion. Until Edwards' day that discussion [on separation] had known but two parties: the state, asserting control over religious life; and the mind, asserting liberty of thought. Between the two the Church was in constant danger of losing either its freedom or its purity. Edwards lifted up the dignity of the Church itself . . . divinely founded and nourished by divine grace.

Id. See also M. BATES, *supra* note 12, at 300-301.

164. R. NEUHAUS, *supra* note 138, at 30.

165. Some discern an additional reason for juridical recognition of independence for religious groups: to offset the power of the state to the benefit of the individual. D. RUGGIERO, *supra* note 52, at 397-98, 406; L. STURZO, *CHURCH AND STATE* 550 (Carter translation 1962).

This antagonistic position of Church and State is connected with a basic sociological principle, that of the limitation of power. There can be no unlimited power; unlimited power would be not only a social tyranny but an ethical absurdity. The problem raised by the modern State turns precisely on this point. It has denied any external limitation by a principle other than its own, or, as the philosophers say, heteronomous, for laic thought has proclaimed the autonomy of the State. In order to limit its powers, appeal was made to the freedom of the people, and since all liberty resolves itself into power, the whole of power was attributed to the people. But the people could not exert its power actually, possessing it only potentially, by original title, while the actual reality passed to the State as legislative and executive power. Mutual limitation between people and State ended by becoming a formal and organic fact, without ethical substance. This was sought, occasion by occasion, and resolved itself into positivist pragmatism.

This process has been arrested by two forces which were believed extraneous to the State and reduced to impotency: the Church and the popular conscience. The first as the perennial voice of a higher morality, often unheard or seemingly unheard, ignored, despised, contradicted, disparaged by adversaries, falsified or weakened by too compromising friends, followed by but a few of the faithful, and yet an insistent and efficacious voice, for it is the perennial voice of the spirit that is never silent.

Id.

church or other religious organization into the offices of government enhances the religious liberty of all citizens of that state. This is the "no-aid" rationale for separation. Additionally, since separation is for the mutual benefit of both church and state, the state must also be deterred from overreaching into the agencies of the church.

How are religious associations harmed by too close an embrace by government? To answer this question, the state must understand why religious societies exist and just how they perceive themselves.¹⁶⁶ Only in this way can the government know how its actions cause injury to a church. In discussing the establishment clause, therefore, there is simply no evading the theological reasons, in addition to the political ones, which require separation.

Religious belief nearly always is expressed in some sort of communal way.¹⁶⁷ To those who subscribe to a particular creed, religious societies are indispensable communities which are an integral part of each individual's expression of faith while in communion with others who are like-minded. Whether a church, synagogue, temple, or mosque is the house of worship, the religious movement by very definition rests its claim on divine authority or ultimate principles which transcend its view of the state.¹⁶⁸ If a church or other religious organization is unduly involved with the agencies of government, it may become subverted and redirect its programs to meet ends chosen by government. Accordingly, the church becomes compromised in its efforts to act in accord with its higher calling.¹⁶⁹ In the extreme, the church may be so hobbled that its mission is altogether thwarted. Moreover, when a religious society believes it is called to speak prophetically and critique the state, its expression is rendered tepid under the chill of real or apparent threats from the government. When a religious organization is influenced in this way, its spontaneity is dulled and the fervor and allegiance of its members wanes.¹⁷⁰

166. See Derr, *supra* note 8, at 89.

167. See D. KELLEY, *supra* note 152, at 49 ("Religion exists as a functioning reality only to the degree that it is embodied in an ongoing community—a 'church'."); L. TRIBE, *supra* note 7, at 812.

168. See *supra* notes 157, 158, 163 (authorities cited).

169. M. BATES, *supra* note 12, at 549-50.

Association with the State and aid from the State have usually involved near-political services to the State, a political coloring of religion, and some measure of subordination to the State in appointments, organization, and policy.

Id. See *supra* text accompanying notes 142-45.

170. See D. KELLEY, *supra* note 152, at 54-56. In the America he observed in the 1830's, Alexis de Tocqueville noted the separation of church and state causing a measurable increase on the influence of religion on society, and the pitfalls for the churches in the political union of the two:

I perceived that these ministers of the gospel eschewed all parties, with the anxiety attendant upon personal interest. . . . [I]t then became my object to investigate their causes, and to inquire how it happened that the real authority of religion was increased by a state of things which diminished its apparent force: these causes did not long escape my researches. . . .

I am aware that at certain times religion may strengthen this influence, which

At what point has the state so entangled itself with a religious organization that its very identity or vitality is endangered? Given the complexity of our government and religiously pluralistic society, the matter of institutional jurisdiction is so fraught with ambiguities that precise formulation is not possible. Nevertheless, reasonable distinctions must be made for the conflicts have already overtaken us in the form of litigation.¹⁷¹ Concededly, religious organizations alone are competent to define the requirements of fulfilling their calling or mission. The state cannot dictate the work of the church.¹⁷² Every religious organization, however, views its role differently: some insular from society, others very interactive with public life. How does a government act in a manner marked by amicable relations with all religious organizations and carry out its own public policy goals in a nondiscriminatory fashion?¹⁷³

originates in itself, by the artificial power of the laws, and by the support of those temporal institutions which direct society. Religions, intimately united to the governments of the earth, have been known to exercise a sovereign authority derived from the twofold source of terror and of faith; but when a religion contracts an alliance of this nature, I do not hesitate to affirm that it commits the same error, as a man who should sacrifice his future to his present welfare; and in obtaining a power to which it has no claim, it risks that authority which is rightfully its own. . . .

As long as a religion rests upon those sentiments which are the consolation of all affliction, it may attract the affections of mankind. But if it be mixed up with the bitter passions of the world, it may be constrained to defend allies whom its interests, and not the principles of love, have given to it; or to repel as antagonists men who are still attached to its own spirit, however opposed they may be to the powers to which it is allied. The church cannot share the temporal power of the state, without being the object of a portion of that animosity which the latter excites. . . .

The American clergy were the first to perceive this truth, and to act in conformity with it. They saw that they must renounce their religious influence, if they were to strive for political power; and they chose to give up the support of the state, rather than to share its vicissitudes.

1 A. DE TOCQUEVILLE, *supra* note 83, at 338-40.

171. See *infra* notes 309-431 and accompanying text (cases discussed).

172. R. NEUHAUS, *supra* note 138, at 174.

173. See M. BATES, *supra* note 12, at 302. Bates stated:

Obviously the individual or the religious body cannot make a private definition of religious liberty and impose it upon the community. *A fortiori*, the vast variety of societies, states, and moral convictions throughout the world inevitably, and rightly, brings a further relativity into the definition and interpretation of religious liberty.

Id. McGowan v. Maryland, 366 U.S. 420, 461-62 (1961) (Frankfurter, J., sep. op.). Justice Frankfurter said:

Religious beliefs pervade, and religious institutions have traditionally regulated, virtually all human activity. It is a postulate of American life, reflected specifically in the First Amendment to the Constitution but not there alone, that those beliefs and institutions shall continue, as the needs and longings of the people shall inspire them, to exist, to function, to grow, to wither, and to exert with whatever innate strength they may contain their many influences upon men's conduct, free of the dictates and directions of the state. However, this freedom does not and cannot furnish the adherents of religious creeds entire insulation from every civic obligation. As the state's interest in the individual becomes more comprehensive, its concerns and the concerns of religion perforce overlap. State codes and the dictates of faith touch the same activities. Both

Until some new consensus is forged in this most sensitive of constitutional areas, the safer moorings are found in history. Two levels of religious activities can be discerned,¹⁷⁴ although in practice even they defy exactitude. First, we know that in times past the churches were principally about the business of worship and the teaching and propagation of their understanding of ultimate truth. When the principle of separation required that churches be voluntaristic, it was these unique activities that were a matter of voluntary adherence and no government aid. These activities were understood to be central to the very life of a religious organization, and government should have no control over or involvement with them whatsoever, absent compelling reasons of the very highest order.¹⁷⁵

aim at human good, and in their respective views of what is good for man they may concur or they may conflict. No constitutional command which leaves religion free can avoid this quality of interplay.

Id.

174. *Cf.* R. NEUHAUS, *supra* note 138, at 174-75.

175. Compare the formulation in the text with the following three descriptions of essential functions of the religious community:

[T]here are those activities which are clearly constitutive of the church's very life. These involve the right of assembly, public worship, public promulgation of the gospel, witness on questions of social justice, and the like.

R. NEUHAUS, *supra* note 138, at 174. It is not the function of the State either to dominate or to control consciences. The creeds which, in the present state of religious disunity, share souls' allegiance should be free to establish their rights, to preach their teachings, to shape souls, to exercise their apostolate, without the civil authority's mixing into their proper province.

In the Face of the World's Crisis, 36 COMMONWEAL 415, 418-19 (1942).

By the term "church" we designate not only a local congregation but also national, supranational, and ecumenical bodies. With this understanding,

The Religious freedom of the church or congregation includes the following rights:

1. To assemble for unhindered public worship.
2. To organize for the more effective conduct and perpetuation of religious belief, worship and action.
3. To determine its own constitution, polity, and conditions of membership.
4. To determine its own faith and creed—free from imposition by the state or any other group.
5. To determine its own forms of worship—free from imposition by the state or any other group.
6. To encourage and facilitate action by its members in accordance with its belief and worship.
7. To bear witness, preach, teach, persuade, and seek commitment or conversion.
8. To determine the qualifications of its ministers, and to educate, ordain, and maintain an adequate ministry.
9. To educate both children and adults. This affirmation of the right of the church or congregation to educate does not deny or exclude the right of the state to educate.
10. To hold property and secure support for its work.
11. To cooperate or to unite with other churches or congregations.
12. Finally, the principle of religious freedom requires that these rights of the church or congregation be similarly the rights of organized groups of unbelievers or atheists.

Religious Freedom, BIENNIAL REP. 1942 (Federal Council of Churches) 33-34. *See Note, Government Noninvolvement With Religious Institutions*, 59 TEX. L. REV. 921, 925 (1981) ("At the

As an offspring of the first level or core activities, some religious organizations took on tasks of education and social welfare.¹⁷⁶ Government today is engaged heavily in the same tasks, albeit out of notions of general welfare rather than religiously motivated service. Education and social welfare activities are in degree more the outgrowth of truths held by religious faiths than they are centrally dealing with the particulars of one's perception of ultimate truth.¹⁷⁷ In this second tier of religious ministry, some limited governmental interests are proper,¹⁷⁸ even absent powerful reasons of state. The state is not totally incompetent concerning education and social welfare. The state can be, and in America has been, largely a force for positive good in promoting education and welfare.¹⁷⁹ For example, a state may legitimately require that parochial school students perform at minimum achievement levels in math, science or history to become literate, useful citizens. The Supreme Court has condoned such requirements, even though the governmental interest cannot fairly be said to be compelling, only paternalistic.¹⁸⁰ In contrast, government cannot interact

heart of the concept of impermissible involvement should lie involvement with an institution's propagation or inculcation of its religious beliefs or values." See also *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 244 n. 9 (1963) (Brennan, J., concurring) (quoting a provision in Constitution of India concerning government nonintervention in affairs of religious institutions); M. BATES, *supra* note 12, at 301-303.

176. By designating a second level of religious activity, it is not intended to imply that education and social welfare by the churches are of lesser priority or value. Cf. R. NEUHAUS, *supra* note 138, at 30. Neuhaus stated:

Inherent in, and not incidental to, this task are such enterprises as education, social welfare, and witness on public policy. In short, loving service is inseparable from the church's authentic existence.

Id. The classification also is not an attempt to define for religious organizations what their ministry is or should be. Cf. Ball, *Secularism: Tidal Wave of Repression*, FREEDOM AND FAITH: THE IMPACT OF LAW ON RELIGIOUS LIBERTY 49, 53 (Buzzard ed. 1982) (beware play confining religious liberty to "religion under the steeple"); P. BERGER & R. NEUHAUS, *supra* note 24, at 30.

The danger today is not that the churches or any one church will take over the state. The much more real danger is that the state will take over the functions of the church, except for the most narrowly construed definition of religion limited to worship and religious instruction.

Id. Accordingly, wariness must be exercised lest a classification of the activities of religious organizations into "core" functions and those of education and social welfare facilitate the government in co-opting the latter. *But see infra* note 181.

177. Indeed, it is only because education and social welfare are widely held to have large secular components that government can engage in such activities at all. If education and social welfare were largely and essentially religious, the establishment clause would prohibit the state from engaging in them. Additionally, it cannot be argued that separation of church and state reserves an exclusive role for religious organizations in the education or social welfare fields protected from competition with government-run programs. This is the case, however, when it comes to matters of worship or religious propagation, which deal directly with ultimate truth. See *Bob Jones Univ. v. United States*, 103 S.Ct. 2017, 2035 nn. 29 & 32 (1983) (Supreme Court characterized religious schools as not "purely religious" unlike churches).

178. Cf. R. NEUHAUS, *supra* note 138, at 174-75.

179. *Id.* at 31-32.

180. Compare *Board of Educ. v. Allen*, 392 U.S. 236, 245-46 (1968) (dicta) ("[A] substantial body of case law has confirmed the power of the States to insist that attendance at private

with the more axial matters of worship or religious inculcation without acting on the very tenets of ultimate truth. The government has no competence in such matters.¹⁸¹

Nevertheless, the government should have a healthy sensitivity to the religious distinctiveness of this second level of ministry. The state cannot simply treat a religious school or social welfare agency like its secular counterpart.¹⁸² A special wariness should characterize the relationship so as not to inhibit fulfillment of the agencies' purpose. The relationship should avoid entanglements that in time may tend to absorb these agencies as quasi-governmental appendages for the promotion of state policies. In addition to the nature of the religious practices concerned, factors to be weighed are the substantiality of the entanglements and the duration of the church-state relationship.¹⁸³ The boundary terminating the government's purview should be drawn far sooner than the actual denial or coercion of sincerely held religious convictions. The entanglement with government becomes excessive well before the religious agency must choose either to obey the state or follow its own religious tenets.¹⁸⁴ Importantly, the government has no authority over the content of the program or curriculum of these educational and social welfare agencies when the content concerns worship and the teaching and propagation of religious beliefs.

Some object to religious groups being treated differently from others

schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction") and *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923) (government has strong interest in literacy of students in English language, but means chosen to accomplish that task violated due process) with *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972) (Old Order Amish excluded from compulsory attendance laws by free exercise clause).

181. Although there is danger to religious freedom in breaking down religious activities into "core" functions and those which in degree are more their offspring, see *supra* note 176, there is greater danger in not doing so. Unless religious organizations are willing to concede the government some limited oversight of educational and social welfare activities, sharp and perhaps polarizing confrontations will follow. The harvest of these clashes may be bitter fruit in the form of legal precedent permitting governmental intervention into even the very central matters of inculcation and propagation. Religious bodies must be sensitive to large elements of the public who are already overly cynical about the role of religion, conditioned by highly publicized frauds and other excesses by mail-order "ministries" and "mind-control cults". Limited government regulation can curb many of these abuses and thereby yield an environment of public goodwill which actually enhances the free play for religious beliefs.

182. Cf. Ball, *Secularism: Tidal Wave of Repression*, FREEDOM AND FAITH: THE IMPACT OF LAW ON RELIGIOUS LIBERTY 49, 56 (Buzzard ed. 1982); R. NEUHAUS, *supra* note 138, at 126. Neuhaus stated:

In responding to need, church social agencies should respond to the whole person, including their spiritual needs. Any exercise of governmental control that limits the Christian distinctiveness of that response is evil, is to be resisted, and, if possible, changed.

Id.

183. See *infra* text accompanying notes 209-10 (similar list of factors drawn by Supreme Court).

184. The coercion of conscience is a matter prohibited by the free exercise clause; whereas excessive entanglements are prohibited by the establishment clause before the point of coercion of religious beliefs is reached. See *infra* notes 201-202 and accompanying text.

because they see it as privilege. That objection is due to an incomplete understanding. The key principle of social order at work in separation is reciprocity.¹⁸⁵ A religious organization may be specially privileged through exemption from general legislation. Reciprocally, it is specially burdened by disqualification from general state aid.

Because of their very temporality, churches and other religious organizations are not immune from wrongdoing. Their activities, as opposed to beliefs, therefore, cannot be totally autonomous from the state when it comes to matters of high order, such as health and safety. The state must have the power to intervene in such exigent matters, even when it means overriding sincerely held religious beliefs.¹⁸⁶

IV. THE CASE LAW IN THE SUPREME COURT

The wall of separation erected by the establishment clause, although not impermeable, should exclude interference from both sides. In theory it does. Supreme Court opinions are replete with statements, albeit *obiter dicta*, that the establishment clause filters out improper involvement traveling in either direction.¹⁸⁷

185. L. FULLER, *THE MORALITY OF LAW* 19-27 (1964). Professor Fuller has identified reciprocity as one of the precepts undergirding our view of the nature of law. *Id.*

186. M. BATES, *supra* note 12, at 301. Bates stated:

[U]pon occasion individuals and religious bodies alike have erred grievously against the moral sense or the felt need of solidarity in the community. . . . The state as the authority of the organized community has continually abused the argument of solidarity and even that of moral standards. . . . But it is difficult to see how any other authority than the State, inspired and checked by the convictions and sentiment of the whole community, can carry this necessary responsibility of guarding society and its other members against the eccentricities—if they are seriously harmful—of one or a body.

Hence, the right of religious liberty is not absolute in extent but is subject to definition and interpretation by the community, at costly risk, in the State and its laws. *Id.* Cf. *Bob Jones Univ. v. United States*, 103 S. Ct. 2017 (1983) (racial discrimination in education); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (child-labor laws); *Davis v. Beason*, 133 U.S. 333 (1890) (Mormon polygamy).

187. Consider, for example:

[T]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances *nor inhibits religion*.

Abington School Dist. v. Schempp, 374 U.S. 203, 222 (1963) (emphasis added).

[T]he purposes underlying the Establishment Clause go much further than [preventing coercive pressure on religious minorities]. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government *and to degrade religion*.

Engel v. Vitale, 370 U.S. 421, 431 (1962) (emphasis added).

The objective is to prevent, as far as possible, the intrusion of either [state or religion] into the precincts of the other.

Lemon v. Kurtzman, 403 U.S. 602, 614 (1971).

The purposes of the First Amendment guarantees relating to religion were twofold: *to foreclose state interference with the practice of religious faiths*, and to foreclose the establishment of a state religion familiar in other Eighteenth Century systems. Religion and government each insulated from the other, could then co-exist.

Larkin v. Grendel's Den, Inc., 103 S.Ct. 505, 510 (1982) (emphasis added). *See also* *Walz v.*

The Supreme Court has been active in establishment clause cases that determine impermissible state aid to religion, but seemingly has avoided cases that have offered the Court the opportunity squarely to hold that the clause cuts both ways, thus prohibiting governmental intrusion into the concerns of religious associations as well.¹⁸⁸ In *NLRB v. Catholic Bishop of Chicago*,¹⁸⁹ the Supreme Court came closest to affording establishment clause protection from governmental regulation, but the Court dodged a determination of whether or not the government's actions constituted excessive entanglement.¹⁹⁰ Although the broad language in the National Labor Relations Act clearly included religious schools within its scope, the Court conceived a new rule of construction, holding that it would not assume that Congress intended to regulate parochial schools unless it had expressed so specifically. The constitutional question, therefore, never was reached. Nevertheless, *Catholic Bishop* stands for the proposition that the prospect of National Labor Relations Board (NLRB) jurisdiction over lay parochial school teachers raises "difficult and sensitive questions" and a "significant risk" that the separation principle would be infringed.¹⁹¹ The First Amendment problems the *Catholic Bishop* Court anticipated concerned entanglement. The majority opinion discussed two examples. The first was an unfair labor practice charge defended on the basis that the practice was required by religious faith. The charge would involve the NLRB in a determination of the good faith of the defense and its relationship to the religious mission of the school.¹⁹² Second, the National Labor Relations Act makes all terms and conditions of employment subject to mandatory collective bargaining. The all-inclusive scope of the Act necessarily "implicate[s] sensitive issues that open the door to conflicts" between organized religion and government.¹⁹³ Since the Roman Catholic schools resisting federal regulation in *Catholic Bishop* were the very entities the Court deemed too religious to be proper recipients of state aid in numerous cases from *Lemon v.*

Tax Comm'n, 397 U.S. 664, 669-70 (1970) (emphasis added):

[R]igidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and *none inhibited* ... [W]e will not tolerate either governmentally established religion or *governmental interference with religion* ... [T]here is room for ... a benevolent neutrality which will permit religious exercise to exist without sponsorship and *without interference*.

Each value judgment . . . must . . . turn on whether particular acts in question are intended to establish or *interfere with* religious beliefs and practices or have the effect of doing so. Adherence to the policy of neutrality . . . has prevented the kind of involvement that would tip the balance toward *government control of churches or governmental restraint on religious practices*.

188. See *infra* notes 337-40, 348.

189. 440 U.S. 490 (1979). See generally Durso & Brice, *NLRB v. Catholic Bishop of Chicago: Government Regulation Versus First Amendment Religious Freedom*, 24 St. Louis U.L.J. 295 (1980); Pfeffer, *Unionization of Parochial School Teachers*, 24 St. Louis U.L.J. 273 (1980).

190. 440 U.S. at 502.

191. *Id.* at 502, 507.

192. *Id.* at 502.

193. *Id.* at 502-503.

*Kurtzman*¹⁹⁴ to *Byrne v. Public Funds for Public Schools of New Jersey*,¹⁹⁵ it is understandable that the Court not be so double-minded as to permit parochial schools to be regulated by the NLRB. Nevertheless, the hesitancy to ground the holding squarely on the establishment clause is puzzling.¹⁹⁶

Although nonentanglement, which first emerged in *Walz v. Tax Commission*,¹⁹⁷ and the avoidance of the civil resolution of intrafaith disputes, first announced by the Supreme Court in *Watson v. Jones*,¹⁹⁸ are often viewed as distinct doctrinal developments, they spring from the same underlying principle: government must avoid any involvement with religious societies that may touch upon the matters central to their religious identity and mission. These matters are so highly reactive when placed in contact with public authority that religious liberty requires any appreciable risk¹⁹⁹ of involvement be avoided. The claimant need not demonstrate any showing of prejudice to the concerns of a religious organization, only a material risk of harm in this sensitive constitutional area.²⁰⁰ This standard of proof is necessary if the Court remains consistent with its rule that coercion is not a requisite for a violation of the establishment clause.²⁰¹ The establishment clause, therefore, can be

194. 403 U.S. 602 (1971).

195. 590 F.2d 514 (3d Cir.), *aff'd*, 442 U.S. 907 (1979).

196. The innovation by the slim majority in fashioning a new rule of construction is pointed out by the four dissenting justices:

[The majority's] construction is plainly wrong in light of the Act's language, its legislative history, and this Court's precedents. It is justified solely on the basis of a canon of statutory construction seemingly invented by the Court for the purpose of deciding this case.

440 U.S. at 508 (Brennan, J., dissenting). See also *St. Martin Lutheran Church v. South Dakota*, 451 U.S. 772, 788 (1981). In *St. Martin*, a more orthodox canon of construction was utilized to circumvent the establishment clause questions which would arise if unemployment taxes were assessed against church-affiliated schools. *Id.*

197. 397 U.S. 664, 674 (1970). See *infra* text accompanying notes 214-15.

198. 80 U.S. (13 Wall.) 679 (1871). See *infra* notes 254-63 and accompanying text.

199. The term "appreciable risk" was adopted from *Committee for Pub. Educ. and Religious Liberty v. Regan*, 444 U.S. 646, 662 (1980), where the Court noted that certain state aid to parochial schools did not result in any "appreciable risk" of government entanglement in the school's ability to inculcate its religious values. See *infra* note 239 (discussion of *Regan*).

200. The Court has been quite consistent in the rule that the establishment clause is violated when there is only a risk of church-state conflict. See, e.g., *Levitt v. Committee for Pub. Educ.*, 413 U.S. 472, 480 (1973) ("the potential for conflict inheres in this situation."). See also *Larkin v. Grendel's Den, Inc.*, 103 S.Ct. 505, 511 (1982).

201. See, e.g., *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963) (striking down Bible reading and recital of Lord's prayer in public schools as violative of establishment clause even though any coercion was obviated by having individual students excused from attending). In *Schempp*, the Supreme Court distinguished the free exercise clause:

Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion. The distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended.

Id. at 223. This distinction was stated by the Court in *Schempp* because the school authorities

violated even if the governmental intervention does not press the religious organization into the "cruel choice" of either violating its tenets or obeying the government's regulation.²⁰²

In a third line of cases to be reviewed in this part, the Supreme Court counseled public officials to studiously avoid examining an individual's religious beliefs beyond the minimal inquiry of sincerity.²⁰³ This reflects the same attentiveness to reserving a circle of religious practice independent of public regulation and authority.

The doctrines of nonentanglement and the avoidance of judicial resolution of intrafaith disputes are best unified,²⁰⁴ because their separate treatment simply obscures their common theme. Moreover, their development into a cardinal rule supportive of the principle of independent, voluntaristic churches is facilitated by treating these two doctrines as a single concept.

A. *The Nonentanglement Requirement*

The final element in the tripartite test in *Lemon v. Kurtzman*²⁰⁵ is the injunction against excessive entanglement between religious organizations and

challenged the parents' and students' standing to sue. No coercion had been shown as a result of the Bible reading and prayer. Nevertheless, the Court stated:

[T]he requirements for standing to challenge state action under the Establishment Clause, unlike those relating to the Free Exercise Clause, *do not include proof that particular religious freedoms are infringed.*

Id. at 244 n. 9 (emphasis added). It was sufficient for standing purposes that the challengers, students and parents, were assigned to the schools involved if the claim was under the establishment clause—a clause which does more than protect individual religious freedoms. See *supra* text accompanying notes 153-65.

202. Since aid to religion is prohibited even apart from any showing of coercion, *supra* note 201, then, logically, government interference with a religious organization is a violation of the establishment clause as well. Moreover, the violation may be proven without the church showing that it is significantly burdened or placed in the position where the "cruel choice" between civil disobedience and obedience to the law in violation of conscience must be made. The separation principle of voluntaristic, independent churches, therefore, is violated even absent a violation of individual religious freedom. See *supra* notes 182-84 and accompanying text. Accordingly, the establishment clause goes beyond protection of individual liberty and imposes a disability upon "government to adopt laws with respect to establishments whether or not their consequence would be to infringe individual rights of conscience." Howe, *supra* note 111, at 51.

"[T]he fact that some legislative enactments ... affect most remotely, if at all, the personal rights of religious liberty," will not save the law from trespassing upon the establishment clause requirement of separating the two "powers" of church and state. Howe, *supra* note 111, at 55. Cf. *Flast v. Cohen*, 392 U.S. 83 (1968) (standing to sue based on establishment clause notwithstanding federal taxpayer's monetary support of religion was minute and indeterminable).

203. See *infra* text accompanying notes 302-307.

204. The Supreme Court in two opinions, *New York v. Cathedral Academy*, 434 U.S. 125, 133 (1977), and *Gillette v. United States*, 401 U.S. 437, 457-58 (1971), has implicitly acknowledged the interrelationship between the two doctrines by its reliance on *Presbyterian Church v. Mary Elizabeth Blue Hull Church*, 393 U.S. 440 (1969). Further, *Jones v. Wolf*, 443 U.S. 595, 604 (1979), refers to the "promise of nonentanglement" in an intrafaith property dispute.

205. 403 U.S. 602 (1971). The entire *Lemon* test is framed as follows:

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our

government.²⁰⁶ An entanglement analysis is necessarily a balancing of interests. As the Supreme Court stated in *Roemer v. Board of Public Works*:

There is no exact science in gauging the entanglement of church and state. The wording of the test . . . itself makes that clear. The relevant factors we have identified are to be considered "cumulatively" in judging the degree of entanglement.²⁰⁷

There are three factors to which the Court has directed attention.²⁰⁸ Each factor was fashioned in public aid cases, but is logically applicable in a claim of undue interference with religious faith. The first factor concerns the purposes of the organization which is benefitted or inhibited. If the religious organization is "pervasively religious,"²⁰⁹ it is unlikely that the governmental

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

Id. at 612-13 (citations omitted). In a recent case, the "unique history" supportive of legislative invocational prayers caused the Court to depart from the three-part test. *Marsh v. Chambers*, 103 S.Ct. 3062 (1983).

206. The problem of "political divisiveness" is occasionally combined with nonentanglement principles in the Court's discussion. Assessing "[p]olitical fragmentation ... on religious lines," *Lemon v. Kurtzman*, 403 U.S. at 623, dictates examining whether the community served is local or widely dispersed, the intrusion involves primarily religious bodies or those of no religious affiliation, and the degree of autonomy from the sponsoring church. *Roemer v. Board of Public Works*, 426 U.S. 736, 765-766 (1976) (plurality opinion); *Tilton v. Richardson*, 403 U.S. 672, 688-89 (1971). The aim is to avoid what is loosely described by the Court as the "risk of politicizing religion." *Larson v. Valente*, 456 U.S. 228, 254 (1982).

The political divisiveness test has been severely criticized. *See, e.g.*, Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U.L.J. 205 (1980); Ball, *What is Religion?*, 8 THE CHRISTIAN LAWYER 7, 12-13 (1979).

If taken literally, the political divisiveness test runs counter to the freedom of speech and other secular bodies and private citizens, may vigorously assert its ideas in American culture and government. As suggested by *Walz*, religious organizations cannot be excluded from common discourse where organized religion along with others articulate their values, visions, and hopes. The premise that religion should be excluded because it is controversial or opinions about religion are not held mildly is an anomaly. Of course, religion is controversial; so is the economy, so is abortion, so is nuclear arms control, so is pornography.

Broadly applied, the divisiveness test amounts to censorship by precluding public debate on certain subjects by the religious community. With the exception of *Larson*, the Court has applied the divisiveness test to legislative programs that are subject to periodic renewal and, therefore, are likely to be of recurring political debate and controversy. The divisiveness test should not of itself be grounds for invalidation of legislative programs, but perhaps as Justice Powell has suggested, the test calls for closer judicial scrutiny than otherwise would be appropriate. *Committee for Public Educ. v. Nyquist*, 413 U.S. 756, 797-98 (1973); *see* *McDaniel v. Paty*, 435 U.S. at 641 and n. 25 (Brennan, J., concurring).

207. 426 U.S. 736, 766 (1976) (plurality opinion).

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

209. *Roemer v. Board of Public Works*, 426 U.S. 736, 758 (1976) (plurality opinion). In *Roemer*, the Supreme Court turned back a challenge to the constitutionality of a state funding program

contact is permissible. Second, courts examine the nature of the aid provided or the regulations imposed by the government. If the regulation provides the public official with sufficient discretion to trespass upon sectarian concerns, the involvement is likely prohibited. Third, the Court has focused on the resulting relationship between government and the religious authority. If that relationship is one requiring continued surveillance by public officials, the entanglement is likely excessive.

Concerning all three elements, the overriding principle is to avoid governmental involvement where there is an "appreciable risk" that the aid or regulation will be "used to transmit or teach [or inhibit] religious views."²¹⁰ The Supreme Court's entanglement discussions evidence a sensitivity to the harm that results to religious organizations when (1) government becomes entangled

which afforded noncategorical grants to eligible colleges and universities, including sectarian institutions that awarded more than just seminarian or theological degrees. In discussion focused on the fostering of religion, but equally applicable to the inhibition of religion, the Supreme Court said:

[T]he primary-effect question is the substantive one of what private educational activities, by whatever procedure, may be supported by state funds. *Hunt v. McNair*, 413 U.S. 734 (1973)] requires (1) that no state aid at all go to institutions that are so "pervasively sectarian" that secular activities cannot be separated from sectarian ones, and (2) that if secular activities *can* be separated out, they alone may be funded. 426 U.S. at 755 (emphasis in original).

The Baptist college in *Hunt* and the Roman Catholic colleges in *Roemer* were held not to be "pervasively religious". The record in *Roemer* supported findings that the institutions employed chaplains who held worship services on campus, taught mandatory religious classes, and started some classes with prayer. In addition, there was a high degree of autonomy from the Roman Catholic Church, the faculty was not hired on a religious basis and had complete academic freedom except in religious classes, and students were chosen without regard to their religion.

The challenged state aid in *Hunt* was for the construction of secular college facilities. The legislation granted the authority to issue revenue bonds. The Court upheld the legislation, commenting on the primary-effect test:

Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise secular setting. 413 U.S. at 743.

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

Although the foregoing pervasively religious analysis was in the context of the primary-effect prong of the *Lemon* test, the primary-effect and nonentanglement tests often require study of the same facts and relationships. *Roemer*, *supra* at 768-69 (White, J., dissenting). The distinction is that the primary-effect test keys on whether sectarian interests are advanced or inhibited to a measurable degree. Nonentanglement focuses on the resulting interrelationships or structure between government and church. *Id.* at 754-55.

210. *Committee for Pub. Educ. v. Regan*, 444 U.S. 646, 662 (1980).

in difficult classifications of what is or is not "religious," "correct doctrine," or "worship," (2) government becomes entangled in a prolonged monitoring, or oversight of religious personnel, resulting in alteration of or prejudice to religious duties,²¹¹ (3) government officials become entangled in substantive evaluations of religious programs, prejudicing the teaching or propagation of religious faith,²¹² and (4) government becomes entangled in fiscal matters, including use of resources by the church or religious organization. With each of these concerns, the compromise of the religious association is exacerbated when the government agency has increased discretion.²¹³

The exemption for churches from the payment of real estate taxes was upheld in *Walz v. Tax Commission*²¹⁴ in part because exemption occasioned a lesser degree of entanglement between government and religion than imposition of the tax. Elimination of the exemption would necessitate property valuation, tax liens, and nonpayment foreclosures. Importantly, the Court was unwilling to justify the exemption on the *quid pro quo* of the church's providing social welfare services to the community. The *quid pro quo* requirement would have caused "governmental evaluation and standards as to the worth of particular social welfare programs, thus producing a continuing day-to-day relationship" which is undesirable.²¹⁵

*Gillette v. United States*²¹⁶ presented a classic example of the entanglement concept used to avoid the involvement of government in difficult classifications of religious concerns. The petitioners in *Gillette* claimed that limiting the statutory exemption from conscription to those who objected to all wars violated the establishment clause because it discriminated against religious faiths which permitted service in only "just wars". The Court rejected the claim, noting that "petitioners ask for greater 'entanglement' by judicial expansion of the exemption to cover objectors to particular wars."²¹⁷

"[T]he more discriminating and complicated the basis of classification for an exemption . . . the greater the potential for state involvement" in determining the character of persons' beliefs and affiliations, thus "entangl[ing] government in difficult classifications of what is or is not religious," or what is or is not conscientious.²¹⁸

211. *Cf.* *Holy Trinity Church v. United States*, 143 U.S. 457 (1982) (upholding right of church to employ its minister, including nonresident alien, in face of federal immigration legislation).

212. *Cf.* *First Unitarian Church v. Los Angeles*, 357 U.S. 545 (1958) (struck down loyalty oath requirement for churches to obtain property tax exemption for procedural due process reasons). The First Unitarian Court did not reach the First Amendment questions. *Id.*

213. *Cf.* *Larkin v. Grendel's Den, Inc.*, _____ U.S. _____, 103 S. Ct. 505, 511 (1983) (striking down ordinance giving churches veto power over liquor licenses within the vicinity of their building, in part because exercise of such power by churches was without guiding standards).

214. 397 U.S. 664, 674-76 (1970).

215. *Id.* at 674.

216. 401 U.S. 437 (1971).

217. *Id.* at 450.

218. *Id.* at 457 (citations omitted). "While the danger of erratic decisionmaking unfortunately exists in any system of conscription that takes individual differences into account, no doubt the dangers would be enhanced if a conscientious objection of indeterminate scope were honored in theory." *Id.* at 458.

In *Lemon v. Kurtzman*,²¹⁹ the Supreme Court first stated the nonentanglement concept as a facet of the Court's establishment clause test separate from the legislative purpose and primary-effect elements. The state programs to aid religious schools in *Lemon* had erected several regulatory controls to ensure that funds and state services did not aid sectarian activities. The regulatory bulwark, however, ran afoul of the entanglement test. *Lemon* involved statutes of both Rhode Island and Pennsylvania. The Rhode Island program affected only Roman Catholic schools which were found to engage in substantial religious activity and to have as a purpose inculcation of the Catholic faith.²²⁰ The legislation supplemented the salaries of teachers who were under religious authority and control, and who had responsibilities which "hover on the border between secular and religious orientation" of pupils.²²¹ No actual advancement of religion was shown; just the presence of this hazard was sufficient. To prevent aiding religion, Rhode Island had provided for "comprehensive, discriminating, and continuing state surveillance" over the activities of qualified teachers.²²² The textbooks and other materials had to be those used in the public schools. In certain events, the statute called for examination of school records to determine amounts spent on secular as opposed to religious education, causing state evaluation of the religious content of a church-related program.²²³ The Pennsylvania statute shared the entanglement problems of Rhode Island's. Additionally, it provided direct monetary aid to parochial schools with the attendant postaudit inquiries to ensure that no cash was spent on "subjects of religion, morals, or forms of worship."²²⁴

In *Tilton v. Richardson*,²²⁵ decided the same day as *Lemon*, the Supreme Court upheld public construction grants for college and university facilities. Although the colleges assisted by the grants were church-affiliated, the *Tilton* Court found no impermissible entanglement. The Court distinguished *Tilton* from *Lemon*, holding that the type of aid, capital improvements, was religiously neutral, therefore not requiring surveillance to prevent diversion to sectarian use. Further, the grant was a one-time, single-purpose event, which engendered

219. 403 U.S. 602, 612-13 (1971). See generally Ripple, *The Entanglement Test of the Religion Clauses—A Ten Year Assessment*, 27 UCLA L. REV. 1195 (1980).

220. 403 U.S. at 615-16.

221. *Id.* at 618.

222. *Id.* at 619.

223. *Id.* at 619-20. The *Lemon* Court also expressed concern over disagreements that may arise between teachers and the religious authorities over the meaning of regulatory restrictions. *Id.*

224. *Id.* at 620-21. The Pennsylvania statutory scheme again came before the Court in *Lemon v. Kurtzman*, 411 U.S. 192 (1973). The issue presented was the retroactive application of the Court's 1971 decision to expenses already incurred by parochial schools in reliance on the state legislation. A majority held that the 1971 ruling striking the programs should not be retroactively applied, thus releasing a payment of some \$24 million to church schools. Payment of the disputed sum would compel no further state oversight of the instructional processes. Only a single post-audit was required, entailing no continuing relationship, and any payments would not reoccur. *Id.* at 201-202.

225. 403 U.S. 672 (1971).

no continuing relationship.²²⁶ Finally, the institutions involved were considerably less permeated with sectarian purpose.²²⁷

In companion parochial-aid cases, *Levitt v. Committee for Public Education*²²⁸ and *Committee for Public Education v. Nyquist*,²²⁹ the Supreme Court invalidated several provisions of New York law. The *Levitt* Court held unconstitutional the reimbursement of the costs of state-required testing and record keeping. No attempt was made in the statute to ensure that the teacher-prepared tests were free of religious instruction and inculcation of religious precepts, and none could be constitutionally fashioned which would not become entangling.²³⁰ In *Nyquist*, the Supreme Court reaffirmed the constitutional validity of loaning secular textbooks, but disallowed state reimbursement for building maintenance, tuition reimbursement, and income tax benefits to parents paying tuition.²³¹ Nothing in the statute in *Nyquist* barred a school from using the funds it received for maintenance for a religious purpose, and no restrictions were possible without violating the entanglement criteria.²³² To ensure nonsectarian use of the funds, the state would have had to conduct frequent audits and make other incursions into a church school's financial matters.²³³

226. *Id.* at 687-88.

227. *Id.* at 681-82, 685-87.

228. 413 U.S. 472 (1973).

229. 413 U.S. 756 (1973).

230. 413 U.S. at 479-80. The *Levitt* Court made no finding that the funds were actually used to teach religion, but found a "substantial risk" sufficient. *Id.* at 480.

In a sequel to *Levitt*, the case of *New York v. Cathedral Academy*, 434 U.S. 125 (1977), turned back an attempt to reimburse parochial schools for testing and record-keeping expenses incurred between the time of the enactment of a state-aid statute and the time it was struck down in *Levitt*. The prospect of even a one-time audit to determine if the expenditures were utilized for sectarian purposes would entangle the state and the civil courts in an "essentially religious dispute." In essence, the audit would compel the state auditors to pry into possible religious content of classroom examinations written by parochial school teachers. *Id.* at 132-33.

231. In a recent parochial-aid decision, *Mueller v. Allen*, 103 S.Ct. 3062 (1983), the Court upheld a Minnesota tax deduction for parents who incurred expenses for tuition, textbooks, and transportation on behalf of their children attending elementary or secondary schools. *Nyquist* was distinguished on the basis that the Minnesota statute provided the deduction to all parents whether their children attended public or private schools. *Id.* at 5053. There was no entanglement between Minnesota and the religious schools because any benefits to the schools came only as "a result of numerous, private choices of individual parents of school-age children." *Id.* The *Mueller* Court also held that the "political divisiveness" aspect of the entanglement test, *see supra* note 216, was not violated and "must be regarded as confined to cases where direct financial subsidies are paid to parochial schools or teachers in parochial schools." *Id.* at 5054 n.11.

232. 413 U.S. at 774. In *Nyquist*, the tuition tax and reimbursement schemes were found to violate the primary-effect test. *Id.* at 780, 794.

233. In *Meek v. Pittenger*, 421 U.S. 349 (1975), a state law providing aid to church-related schools was again before the Court. The Court continued to uphold the lending of secular textbooks, but it rejected the provision of counseling, remedial classes, and therapy by public school professional staff on the parochial school campus. Surveillance would be required to ensure that religious instruction not become part of the professionals' activity, and such surveillance would constitute impermissible entanglement. *Id.* at 369-72. The *Meek* Court also noted the potential for conflict between the public employees and religious authorities. *Id.* at 372 n. 22.

The Supreme Court found that South Carolina's program to assist church-related colleges through the issuance of revenue bonds bordered on excessive entanglement in *Hunt v. McNair*.²³⁴ Since the benefitted institution was a Baptist college, it closely approximated those schools discussed in *Tilton*. The Court, however, was concerned that the legislation enabled the administering agency to "become deeply involved in the day-to-day financial and policy decisions of the college."²³⁵ The South Carolina Supreme Court had defused the problem by giving the legislation a narrow interpretation restricting the agency's power unless there was a default on the bonds by the college.²³⁶ The state administrators, therefore, exercised no discretion over the college's operations or fiscal policy absent the unlikely event of a default.

In *Roemer v. Board of Public Works*,²³⁷ the Court continued its practice of permitting aid to church-related colleges, upholding noncategorical grants in the form of annual subsidies. A plurality of the Court held that the aid did not foster an entanglement with religion because the colleges in question performed essentially secular educational functions, the annual payment did not alone implicate excessive entanglement, and the possibility of occasional audits was not likely to be more entangling than inspections and audits involved in the course of normal college accreditations by the state.²³⁸ The case draws a sharp distinction between the "pervasively sectarian" primary and secondary schools such as those in *Lemon*, and the church-affiliated colleges in *Tilton*, *Hunt*, and *Roemer*.²³⁹

The recurring themes of avoiding governmental involvement in the task of classifying religious practices and of avoiding the monitoring of religious ministries were brought together in *Widmar v. Vincent*.²⁴⁰ Although permitting the use of state buildings and other facilities by student groups, the state university in *Widmar* sought to justify prohibiting use by student religious

234. 413 U.S. 734 (1973).

235. *Id.* at 747. The concern of over-involvement was not that it might actually happened, but that there was a "realistic likelihood" that it could happen. *Id.*

236. *Id.* at 747-48.

237. 426 U.S. 736 (1976) (plurality opinion).

238. *Id.* at 762-65.

239. In more recent pronouncements by the Supreme Court on the continuing parochial-aid controversy, the church-related schools were more successful. In *Wolman v. Walter*, 433 U.S. 229 (1971), the Court upheld therapeutic, remedial, and guidance counseling held at sites away from the parochial school campus, diagnostic services provided at the parochial school campus, and standardized tests and test scoring provided by nearby public schools. The Court rejected as unconstitutional the financing of field trips and the provision of classroom educational equipment. In *Committee for Pub. Educ. v. Regan*, 444 U.S. 646 (1980), the Court upheld state reimbursement of the costs for the administration by parochial schools of state-prepared tests and the keeping of official records. In *Regan*, the state had avoided the entanglement pitfalls by directing its aid to secular services which are "discrete and clearly identifiable" so as to permit straightforward and routine reimbursement with little danger of excessive entanglement. *Id.* at 660-61. In *Wolman*, the services for which the Court prohibited state aid could be diverted to sectarian use. Any administrative controls to prevent improper use of the aid would be too entangling. 433 U.S. at 254.

240. 454 U.S. 263 (1981).

groups. On the basis of speech and associational freedoms, the Supreme Court upheld the right of student groups with religious concerns to use the university facilities on an equal basis with all other student groups.²⁴¹ The lone dissenter, Justice White, argued that the establishment clause permitted the university to prevent the use of public facilities for "religious worship," although he agreed "religious speech" could not be excluded based on the Court's precedents prohibiting content-based censorship.²⁴² The majority rejected the suggested distinction between "worship" and "religious speech" for entanglement reasons. The Court pointed out that the distinction would (1) compel the state university "to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith,"²⁴³ and (2) foster "a continuing need to monitor group meetings to ensure compliance with the rule."²⁴⁴

In another Supreme Court action concerning the admonition against entanglement, the invalidation of a city's charitable solicitation ordinance was summarily affirmed in *Rusk v. Espinosa*.²⁴⁵ The ordinance prohibited solicitation without a permit. An exemption, however, was provided for certain religious solicitations. The collection of money for religious purposes was defined as solicitation for "evangelical, missionary, or religious but not secular" ends. A secular purpose was defined as "not spiritual or ecclesiastical, but rather relating to affairs of the present world, such as providing food, clothing, and counseling."²⁴⁶ A program by the Seventh-day Adventist Church to solicit funds for the poor, therefore, required a city permit. Acquiring a permit entailed payment of a fee and completion of an application which required certain information and documents including a current financial statement.²⁴⁷ The Supreme Court affirmed the Tenth Circuit Court of Appeals which condemned the ordinance for multiple offenses: (1) it sought to define whether a church program was religious or secular;²⁴⁸ (2) a city official was involved in the "continuing necessity for making judgments as to what is or is not religious," using a standard "not susceptible of objective measurement;"²⁴⁹ and (3) compliance would require the church to disclose extensive information about its purposes and finances.²⁵⁰

241. *Id.* at 268-69.

242. *Id.* at 283-84 (White, J., dissenting).

243. *Id.* at 269 n. 6. *See also id.* at 271 n. 9, 272 n. 11.

244. *Id.* at 272 n. 11.

245. 456 U.S. 951 (1982), *aff'g*, 634 F.2d 477 (10th Cir. 1980).

246. *Espinosa v. Rusk*, 634 F.2d 477, 479 (10th Cir. 1980).

247. *Id.* at 479-80 n. 3.

248. *Id.* at 480-81.

249. *Id.* at 481-82, *quoting* *Keyishian v. Board of Regents*, 385 U.S. 589, 603-604 (1967). *See* *Bob Jones University v. United States*, 103 S.Ct. 2017, 2035 n. 30 (1983) ("[T]he uniform application of the rule [denying tax exemptions] to all religiously operated schools [that racially discriminate] avoids the necessity for a potentially entangling inquiry into whether a racially restrictive practice is the result of sincere religious belief.").

250. 634 F.2d at 479 n. 3. *See* *Larson v. Valente*, 456 U.S. 228, 253 n. 29 (1982) ("The registration statement required by [the solicitation ordinance] calls for the provision of a substantial amount of information, much of which penetrates deeply into the internal affairs of the

B. *Avoiding Intrafaith Disputes*

As with other voluntary associations, occasionally divisions arise within the membership or employees of churches and other religious associations. Considering their professed purpose, religious organizations are seldom placed in a more unfavorable light than when one of the factions files suit in civil court to resolve a schism. Although the civil courts have little choice but to accept jurisdiction, their role is constrained by the First Amendment's "promise of nonentanglement and neutrality"²⁵¹ which compels the avoidance of questions "made to turn on the resolution . . . of controversies over religious doctrine and practice."²⁵² Thus, the Supreme Court's cases dealing with intrafaith disputes are congeneric with the nonentanglement concerns discussed earlier: the avoidance of involvement in doctrinal and other religious questions, the prevention of civil authorities directing religious programs and personnel, and a reluctance to delve into financial matters of religious organizations.²⁵³

A useful division of the Court's pronouncements is to separate those religious disputes that concern primarily ecclesiastical matters, such as appointment of clergy or the discipline of a member for misconduct, from those disputes that are before the civil courts principally to declare the present ownership of property between two rival factions. Clearly, there is a greater governmental interest in the resolution of matters concerning title to property. Questions concerning who may hold a church office, the discipline of an allegedly deviant member, or an alleged departure from doctrine, however, are wholly outside of civil competence. The contrariety of views within the Supreme Court exists only concerning the limited role of civil courts in intrafaith disputes over property. In disputes which do not concern the control of property, the Court consistently has held that civil authorities have no jurisdiction.

In *Watson v. Jones*,²⁵⁴ the Supreme Court established the first broad prin-

registering organization."').

In the unusual situation where governmental power was delegated to religious bodies, an ordinance giving churches veto authority over the granting of liquor licenses within a 500-foot radius of the church building was found to be an entanglement which "enmeshes churches in the process of government." *Larkin v. Grendel's Den, Inc.*, 103 S.Ct. 505, 512 (1982). The *Larkin* Court struck down the ordinance because (1) the churches' power under the ordinance was without adequate standards, *id.* at 511, and (2) even if standards were present to control the decision making of the churches, for entanglement reasons the legislative body must make licensing decisions, *id.* at 512, and cannot simply review determinations by the churches, *id.* at 511 n. 9.

251. *Jones v. Wolf*, 443 U.S. 595, 604 (1979).

252. *Presbyterian Church v. Mary Elizabeth Blue Hull Church*, 393 U.S. 440, 449 (1969).

253. Government involvement in what are essentially religious disputes or acts of religious discipline may arise in several ways. For example, governmental involvement may arise in (1) disputes concerning the terms and conditions of employment, including discrimination; (2) the discipline or discharge of an employee; (3) the discipline of an individual served by a ministry, including suspension or withholding of services to the individual; (4) complaints from members of the public to government officials concerning a ministry's refusal to admit them or otherwise offer its services on a nondiscriminatory basis; and (5) disputes within the governing board over a ministry's policies and direction.

254. 80 U.S. (13 Wall.) 679 (1871).

ciples of judicial deference to the internal decision-making unit of religious bodies in intrafaith disputes. The federal court had diversity jurisdiction in the case, and the rule of decision was based on federal common law.²⁵⁵ *Watson* involved a struggle between two factions of a local Presbyterian Church for control of the church building. Title to the property was in the name of the trustees of the local church. The deed and charter of the local church, however, "subjected both property and trustees alike to the operation [of the general church's] fundamental laws."²⁵⁶ The general church was the Presbyterian Church of the United States. Its governing body was called the General Assembly. The ecclesiastical rules of the General Assembly stated that the assembly possessed "the power of deciding in all controversies respecting doctrine and discipline."²⁵⁷

Following the Civil War, the General Assembly ordered the members of all local congregations who believed in the divine character of slavery to "repent and forsake these sins."²⁵⁸ A majority of the local church was willing to comply with the directive. A minority faction, however, deemed the resolution of the assembly a departure from the doctrine held at the time the local church first joined with the general church. The minority's theory was that the general church held an interest in the property of the local church, subject to an implied trust in favor of the doctrine to which the original church was devoted. Any departure from doctrine by the general church meant a forfeiture of its interest in the property occupied by the local church. Thus, the minority faction claimed that the majority relinquished any right to control the property when it repudiated the original, pro-slavery doctrine. The minority alleged that they were the true church, and should control the church grounds.²⁵⁹

The implied trust theory, with its origin in English law,²⁶⁰ was rejected by the Supreme Court because its departure-from-doctrine feature required the civil resolution of a religious question. The *Watson* Court gave three reasons: (1) civil judges are incompetent to resolve questions concerning religious doctrine;²⁶¹ (2) members of a hierarchical church have voluntarily joined the general church body, thus giving implied consent to its internal governance;²⁶² and (3) the structure of our political system requires limited

255. Since *Watson* was decided prior to *Erie Ry. Co. v. Tompkins*, 304 U.S. 64 (1938), the federal courts in following *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), did not hesitate to deviate from state substantive law. Further, the First Amendment religion clauses had not yet been applied to the states. See *supra* note 110.

256. 80 U.S. at 683.

257. *Id.* at 682.

258. *Id.* at 691.

259. *Id.* at 691-94.

260. *Id.* at 727-28. Apparently the English cases have their genesis in the acceptance of a church established by the state.

261. *Id.* at 729, 730 and 732. For example the *Watson* Court said:

It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to one which is less so.

Id. at 729.

262. *Id.* at 729.

involvement by government in the affairs of religious bodies to secure religious liberty.²⁶³

Judicial deference to church authority enunciated in *Watson*, if strictly applied in conjunction with the principle of implied consent by church members, would allow a hierarchical church judicatory almost unlimited power over its local churches. Reflecting this concern, subsequent decisions of the Court have wrestled with how best to balance the religious liberty value of governmental noninterference with concern for individuals arbitrarily or even oppressively treated by a religious hierarchy.²⁶⁴ Most important to the inquiry, however, is that the Court's qualifications of the judicial deference rule have all related to the civil disposition of property.²⁶⁵ The *Watson* rule remains uncompromised on matters of doctrine, church discipline, religious office, religious belief, and religious practice.²⁶⁶

263. *Id.* at 728-29, 730. Quoting with approval from *John's Island Church Case*, 2 Richardson's Equity 215, the Court said:

The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority.

Id. at 730. The Supreme Court used words which were later to be read into the First Amendment. *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713-14 (1976); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 113 (1952); *cf. Presbyterian Church v. Mary Elizabeth Blue Hull Church*, 393 U.S. 440, 446 (1969). The *Watson* Court delineated those matters which were not to be penetrated by secular authority:

[W]henver the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them. . . .

[I]t is a very different thing where a subject matter of dispute, strictly and purely ecclesiastical in its character . . . — a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them — becomes the subject of its action. . . . But it is easy to see that if the civil courts are to inquire into all these matters, the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination may, and must, be examined into with minuteness and care, for they would become, in almost every case, the *criteria* by which the validity of the ecclesiastical decree would be determined in the civil court.

80 U.S. at 727, 733 (emphasis in original). *Cf. Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892) (holding that religious societies have complete discretion in picking their own minister, including choice of alien residing outside United States).

264. See L. TRIBE, *supra* note 7, at 882-83.

265. Kauper, *Church Autonomy and the First Amendment: The Presbyterian Church Case*, 1969 SUP. CT. REV. 347, 353.

266. In dictum written by Justice Brandeis, the Supreme Court in *Gonzales v. Archbishop* said that the judicial deference rule would not be binding in instances of "fraud, collusion, or arbitrariness" by a church tribunal. 280 U.S. 1, 16 (1929). *Gonzales* involved an appeal from the Supreme Court of the Philippine Islands. The United States Supreme Court affirmed the lower court which had declined to overturn a decision by a Roman Catholic Archbishop that the petitioner was not qualified for appointment to an ecclesiastical office. As Justice Brandeis noted, the petitioner's main interest appeared to be the substantial money from a trust which accompanied the desired appointment. *Id.* at 18.

Watson v. Jones was elevated to a rule of First Amendment stature in *Kedroff v. St. Nicholas Cathedral*.²⁶⁷ The *Kedroff* Court perceived in *Watson* a rule which "radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."²⁶⁸ In *Kedroff*, the Supreme Court struck down a New York statute that displaced the control of the Russian Orthodox Churches from the central governing hierarchy located in Moscow, U.S.S.R., with a church organization limited to the diocese of North America. The perceived need to transfer the control of ecclesiastical polity was linked to the Revolution of 1917 and doubt concerning whether Moscow had "a true central organization of the Russian Orthodox Church capable of functioning as the head of a free international religious body."²⁶⁹ Because the statute did more than just "permit the trustees of the Cathedral [in New York City] to use it for services consistent with the desires of its members," and transferred by legislative fiat the entire control over local churches,²⁷⁰ the Court held that the statute violated the "rule of separation between church and state."²⁷¹

The *Watson* Court repudiated the implied trust rule used to sanction the departure-from-doctrine standard, but only as a matter of federal common law. A number of states continued to follow the departure-from-doctrine standard or English rule as a matter of state common law.²⁷² *Kedroff*, however, clearly foreshadowed the adoption of *Watson* as a limitation upon the states by force of the Fourteenth Amendment. In *Presbyterian Church v. Mary Elizabeth Blue Hull Church*,²⁷³ *Watson* was applied to the states. *Presbyterian Church* presented a hierarchical church dispute between a general church and two of its local member churches over the right to control the local churches' property. The controversy began when the local churches claimed that the general church had violated the organization's constitution and had departed from accepted doctrine and practice.²⁷⁴ Georgia followed the implied trust doc-

267. 344 U.S. 94 (1952).

268. *Id.* at 116.

269. *Id.* at 106. The specific dispute in *Kedroff* concerned which religious body had the authority to make a clerical appointment to St. Nicholas Cathedral in New York City. The Court's review, however, necessarily drew into the dispute the entire statutory scheme. *Id.*

270. *Id.* at 119.

271. *Id.* at 110. In *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190 (1960) (per curiam), the decision in *Kedroff*, invalidating legislative action, was extended to a later state court judgment which sought to accomplish the same transfer of ecclesiastical control.

272. Kauper, *Church Autonomy and the First Amendment: The Presbyterian Church Case*, 1969 SUP. CT. REV. 347, 350-51.

273. 393 U.S. 440 (1969).

274. *Id.* at 442 n.1. The *Presbyterian Church* Court quoted from the opinion of the Supreme Court of Georgia, summarizing the alleged departures from doctrine by the general church:

"ordaining of women as ministers and ruling elders, making pronouncements and recommendations concerning civil, economic, social and political matters, giving support to the removal of Bible reading and prayers by children in the public schools, adopting certain Sunday School literature and teaching neo-orthodoxy alien to the Confession of Faith and Catechisms, as originally adopted by the general church, and causing

trine with its departure-from-doctrine element. On the basis of a jury finding that the general church had abandoned its original doctrines, the Georgia courts entered judgment for the local congregations.

On appeal, the Supreme Court recognized that states have a legitimate interest in church property disputes, and thus courts properly may take subject matter jurisdiction.²⁷⁵ The First Amendment, however, does not permit the departure-from-doctrine standard as a substantive rule of decision. The "American concept of the relationship between church and state"²⁷⁶ "leaves the civil courts *no* role in determining ecclesiastical questions in the process of resolving property disputes."²⁷⁷ Notably, without spelling out in detail a legal standard which would withstand First Amendment scrutiny, the Court advised that "there are neutral principles of law, developed for use in all property disputes, which can be applied"²⁷⁸ without determining underlying questions of religious doctrine and practice.²⁷⁹ With these instructions, the Court reversed and remanded for further proceedings.

In a dispute similar to the ecclesiastical differences presented in *Kedroff*, the Supreme Court in *Serbian E. Orthodox Diocese v. Milivojevich*²⁸⁰ rejected a bishop's resistance to the reorganization of the American-Canadian diocese

all members to remain in the National Council of Churches of Christ and willingly accepting its leadership which advocated named practices, such as the subverting of parental authority, civil disobedience and intermeddling in civil affairs"; also "that the general church has . . . made pronouncements in matters involving international issues such as the Vietnam conflict and has disseminated publications denying the Holy Trinity and violating the moral and ethical standards of the faith."

Id.

275. *Id.* at 445.

276. *Id.* at 445-46.

277. *Id.* at 447 (emphasis in original).

278. *Id.* at 449. The *Presbyterian Church* Court recalled the narrower procedural review suggested by the dictum in *Gonzalez v. Archbishop*, 280 U.S. 1, 16 (1929) (*see supra* note 266; *infra* note 285), that a decision by church authorities could not stand if found to be the result of "fraud, collusion, or arbitrariness," as possibly meeting the neutral principles requirement. 393 U.S. at 451.

279. The term following *Presbyterian Church*, the Court dismissed an appeal in a similar case from a decision of the Maryland Court of Appeals for lack of a substantial federal question. *Maryland & Virginia Churches v. Sharpsburg Church*, 396 U.S. 367 (1970) (*per curiam*). In the Court's view, the property dispute was resolved by the Maryland courts without inquiry into religious doctrine. In a concurring opinion, Justice Brennan stated that the Court's decision in *Presbyterian Church* permitted a state to "adopt any one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith." *Id.* at 368. Brennan then went on to broadly outline three such approaches. First, is the *Watson* approach of judicial deference to the decision of the highest governing church authority. Where the identification of this governing authority "is a matter of substantial controversy," the civil courts cannot, consistent with the First Amendment, "probe deeply enough into the allocation of power within a church so as to decide where religious law places control." *Id.* at 369. Second, is the "formal title" doctrine, used by the Maryland Court of Appeals, requiring study of the local church deed and the church's organic law — charter, constitution, and bylaws. *Id.* at 370. Third, is the enactment of a statutory approach, carefully drawn to avoid interference in doctrine. *Id.* at 370.

280. 426 U.S. 696 (1976).

of the Serbian Orthodox Church and his removal from office. Unlike *Presbyterian Church*, essentially a suit over the control of church real estate, *Serbian E. Orthodox Diocese* involved primarily the religious concerns of church administration and clerical appointments, matters more insulated from civil review under the First Amendment.²⁸¹

In *Serbian E. Orthodox Diocese*, there was no dispute between the parties that the Serbian Orthodox Church was a hierarchical church and that the sole power to remove clerics rested with the governing body that had decided the bishop's case.²⁸² Nor was there any question that the matter at issue was a religious dispute of ecclesiastical cognizance.²⁸³ The Illinois Supreme Court agreed with these stipulations. Nevertheless, the court decided in favor of the defrocked bishop because, in its view, the church's adjudicatory procedures had been applied in an arbitrary manner.²⁸⁴ On appeal, the Supreme Court rejected the "arbitrariness" exception to the judicial deference rule of *Watson* when the question concerns church polity or church administration.²⁸⁵ When the issue is primarily religious, rather than principally over the control of property, there may be no examination by civil courts into whether the church judicatory body properly followed its own rules of procedure.²⁸⁶ The reasons for this injunction are three-fold. First, civil courts cannot delve into canon or ecclesiastical law.²⁸⁷ These matters are too sensitive to permit any civil probing because inquiry may prove too entangling. Second, civil judges have no training in canonical law.²⁸⁸ Finally, the "[c]onstitutional concepts of due process, involving secular notions of 'fundamental fairness'" cannot be borrowed from civil law and impressed upon internal church governance consistent with church-government separation.²⁸⁹

The Supreme Court also reversed the state court's disapproval of the diocesan reorganization, holding that the Illinois Supreme Court had relied impermissibly on its "delv[ing] into the various church constitutional provisions" relevant to "a matter of internal church government, an issue at the core of ecclesiastical affairs."²⁹⁰ The enforcement of terms in controlling church documents could not be accomplished "without engaging in a searching and therefore impermissible inquiry into church polity."²⁹¹

Linking its decision to the establishment clause's "promise of nonentangle-

281. *Id.* at 709, 713, 720, 721. In *Serbian E.*, the resolution of the claim concerning the clerical office would determine any incidental property questions. *Id.*

282. *Id.* at 715.

283. *Id.* at 709.

284. See *Serbian E. Orthodox Diocese v. Milivojevich*, 60 Ill. 2d 477, 328 N.E.2d 268, 281-82 (1975), *rev'd*, 426 U.S. 696 (1976).

285. 426 U.S. at 712-13. The "arbitrariness" exception had been established by the dictum in *Gonzalez v. Archbishop*, 280 U.S. 1, 18 (1929). See *supra* notes 266, 278.

286. 426 U.S. at 713.

287. *Id.* at 713.

288. *Id.* at 714 n. 8.

289. *Id.* at 714-15.

290. *Id.* at 721.

291. *Id.* at 723.

ment", the Supreme Court in *Jones v. Wolf*²⁹² attempted to delineate more precisely the nature of the neutral-principles-of-law approach suggested in *Presbyterian Church*. *Jones v. Wolf* presented a typical hierarchical church property dispute between a local church, represented by a majority of its congregation, and the general church allied in the lawsuit with a minority faction of the local congregation. A majority of the local congregation adopted a resolution to separate from the general church and then affiliated with a different denomination. The majority faction retained possession of the property and assets of the local church and excluded the minority faction from its affairs. The general church responded by appointing an administrative commission which issued a judgment declaring the minority faction the "true church". Further, the commission's ruling purported to retract all of the majority faction's privileges in continued use of the local property.²⁹³

Applying a neutral-principles-of-law approach, the Georgia courts reviewed the state statutes on implied trusts, the deeds to the disputed property, and the organic law of the church, the corporate charter to the local church and the constitution of the general church (Book of Church Order).²⁹⁴ The state court found nothing implying a trust in favor of the general church. The deeds gave legal title to the local church and its trustees. Without further analysis, the state court awarded title to the property to the majority faction,²⁹⁵ implying that the Georgia courts presume the majority faction constitutes the "true local congregation" when there is no evidence to the contrary.²⁹⁶

On appeal to the Supreme Court, the minority faction challenged the Georgia presumption in favor of majority rule. The minority faction argued that at least as to a hierarchical church, the state could not adopt a legal presumption which contradicted a ruling by the general church commission concerning the "true congregation".²⁹⁷ The Supreme Court, however, approved a majority-rule presumption as part of a neutral-principles-of-law approach, since a "majority faction can be identified without resolving any question of religious doctrine or polity."²⁹⁸ The presumption must be rebuttable, however, in the face of evidence by the minority faction that the relevant documents and state statutes place title to the property elsewhere.²⁹⁹

The *Jones v. Wolf* Court made clear that the neutral-principles approach was not mandated by the First Amendment, but was an alternative to the judicial deference rule of *Watson*.³⁰⁰ Moreover, when applying the neutral-

292. 443 U.S. 595, 604 (1979).

293. *Id.* at 598-99.

294. *Id.* at 601.

295. *Id.*

296. *Id.* at 607.

297. *Id.*

298. *Id.* The *Jones v. Wolf* Court noted that problems may occur when the identity of enrolled members, presence of a quorum, or the tally on the final vote are disputed. *Id.*

299. *Id.* at 607, 608 n. 5. Since the nature of the presumption in *Jones v. Wolf* was unclear, *id.* at 608, and also whether Georgia law instead required application of the *Watson* judicial deference rule, *id.* at 608-609, the Court remanded for further proceedings consistent with its opinion. *Id.* at 608-609.

300. *Id.* at 602.

principles rule, if a judicial body examines church documents and finds that they incorporate "religious concepts in the provisions relating to the ownership of property," the courts must defer to the interpretation of the documents by the authoritative ecclesiastical body.³⁰¹

In short, civil authorities must always forego questions which are essentially religious as a matter of noninterference in the affairs of religious associations. Included in such matters are doctrine, discipline, appointment of religious personnel, church polity, internal administration, and religious practice. In disputes principally over control of property, however, states may adopt a neutral-principles-of-law approach so long as civil authorities do not become entangled in questions essentially religious in the course of the rule's application.

C. The "Fervency Test"

A useful parallel may be drawn between the concern that government not unduly involve itself with organized religion and the Supreme Court's treatment of a matter under the free exercise clause. As a threshold inquiry in every free exercise case, the claimant must show that his religiously based conduct is sincere.³⁰² Some objective evidence of sincerity is required, lest a free exercise claim become a basis for fraud or an excuse for avoiding many unwanted obligations. Nevertheless, the sincerity requirement is necessarily a truncated inquiry because of the injunction against civil authorities testing the truth of one's faith.³⁰³ The Court has said that only claims "so bizarre, so clearly nonreligious in motivation" should be denied free exercise credence.³⁰⁴ Stated differently, sincerity is not so much a test of what a person believes, but whether one really believes it, a "fervency test."

The Court has stated that the First Amendment does not permit public officials to become embroiled in substantive assessments of religious matters. For example, in *United States v. Lee*,³⁰⁵ the government conceded that the claimant, a member of the Old Order Amish sect, objected on religious grounds to payment of social security taxes on behalf of his employees. No challenge was made to the sincerity of Mr. Lee's beliefs. The government, however, sought to challenge the centrality of this conviction, that is, the importance the Amish faith placed on the belief that they should provide for their own elderly and needy and, therefore, their opposition to the national social security system. The *Lee* Court said:

301. *Id.* at 604. In *Jones v. Wolf*, the dissenting justices argued that only the *Watson* judicial deference rule was permitted by the First Amendment when disputes arose in hierarchical churches. *Id.* at 616-18 (Powell, J., dissenting).

302. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972) (compulsory school attendance claimed "at odds with fundamental tenets of their religious beliefs"); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (not working on Saturday claimed "a cardinal principle of her religious beliefs").

303. *United States v. Seegar*, 380 U.S. 163, 185 (1965); *United States v. Ballard*, 322 U.S. 78, 86-87 (1944).

304. *Thomas v. Review Bd., Ind. Empl. Sec. Div.*, 450 U.S. 707, 714-15 (1981).

305. 455 U.S. 252 (1982).

[T]he government [contends] that payment of social security taxes will not threaten the integrity of the Amish religious belief or observance. It is not within "the judicial function and judicial competence," however, to determine whether [Lee] or the government has the proper interpretation of the Amish faith; "[courts] are not arbiters of scriptural interpretation."³⁰⁶

The Supreme Court's reluctance to delve into the truth of religious doctrine or even its centrality to a claimant's system of belief is further evidence of the importance the Court places in the separation of government from the activities of worship, doctrinal teaching, or propagation of the tenets of faith held by religious associations.³⁰⁷

V. THE CASE LAW IN THE LOWER COURTS

This section examines the extent to which the concepts of nonentanglement and the avoidance of intrafaith disputes have been applied in lower federal and state courts in a manner supportive of the establishment clause principle of independent, voluntaristic churches.³⁰⁸ Generally, government regulation of zoning³⁰⁹ and other land use controls, such as building and fire

306. *Id.* at 257 (citations omitted). Until *Thomas*, it was thought that the Court also required the claimant to show that his belief was central to his faith. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963); L. TRIBE, *supra* note 7, at 859-65. It is now clear, however, that centrality is not required. *United States v. Lee*, 455 U.S. 252, 257 (1982); *Thomas v. Review Bd., Ind. Empl. Sec. Div.*, 450 U.S. 707, 715-16 (1981). With centrality apparently abandoned as a requirement, and sincerity being a truncated inquiry at best, the threshold for free exercise analysis is minimal. This tends to shift the more searching judicial analysis to the compelling governmental interest facet of the free exercise test, and arguably causes a less weighty governmental purpose before overcoming the religious practice. *See United States v. Lee*, 455 U.S. at 262-63 (Stevens, J., concurring).

307. *See generally* Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L.F. 579; Worthing, *"Religion" and "Religious Institutions" Under the First Amendment*, 7 PEPPERDINE L. REV. 313 (1980); Ball, *What is Religion?*, 8 THE CHRISTIAN LAWYER 7 (1979); Whelan, *Governmental Attempts to Define Church and Religion*, 446 THE ANNALS, AAPSS 32 (Nov. 1979); Whelan, *"Church" in the Internal Revenue Code: The Definitional Problems*, 45 FORDHAM L. REV. 885 (1977).

308. There has been considerable litigation in the lower courts concerning doctrinal and church property disputes. Since these courts are constrained to follow the Supreme Court's principles concerning the avoidance of civil resolution of doctrinal controversy and the alternative use of neutral-principles-of-law for disputes over real estate, the application of these cases in the lower courts will not be further explicated here. *See supra* notes 293-301 and accompanying text.

309. Zoning and land use controls have been found to be of sufficient public interest to deny special use permits to religious retreat centers and youth camps. *Holy Spirit Ass'n v. Town of New Castle*, 480 F. Supp. 1212 (S.D.N.Y. 1979); *Christian Retreat Center v. Board of City Comm'rs*, 28 Or. App. 673, 560 P.2d 1100 (1977). Additional cases have sustained the requirement that a church obtain a special use permit before operating a school in the church building during weekdays. *Damascus Community Church v. Clackamas County*, 45 Or. App. 1065, 610 P.2d 273 (1980), *appeal dismissed*, 450 U.S. 902 (1981); *but see City of Sumner v. First Baptist Church*, 97 Wash. 2d 1, 639 P.2d 1358 (1982) (court reversed and remanded for determination of whether uncompromising application of city zoning and building code ordinances to church-school were necessary). *See also Lutheran Church in Am. v. City of New York*, 35 N.Y. 2d

codes,³¹⁰ have not proven problematic, so long as the ordinances are enforced in a nondiscriminatory manner. In contrast, there have been several church-government clashes over state accreditation of religious schools,³¹¹ tax exemptions³¹² and tax investigations,³¹³ the regulation of church finances³¹⁴

121, 316 N.E.2d 305, 359 N.Y.S. 2d 7 (1974) (landmark preservation law unconstitutional when applied to church building); *American Friends of the Soc'y of St. Pius v. Schwab*, No. _____ (N.Y. Sup. Ct., Nassau Cty.) (unpublished opinion reported in the N.Y.L.J., Feb. 2, 1983, at 15, col. 3) (overturning zoning law requiring site plan conditioned on village approval of who may attend, when services may be conducted, and church payment for certain public services). See generally Note, *Zoning Ordinances, Private Religious Conduct, and the Free Exercise of Religion*, 76 Nw. U.L. REV. 786 (1981); Annot., *Zoning Regulations as Affecting Churches*, 74 A.L.R. 2d 377 (1960).

310. Courts have upheld more stringent building and fire codes for churches using their facilities for schools during weekdays, in contrast to churches using facilities solely for religious purposes. See, e.g., *Hough v. North Star Baptist Church*, 109 Mich. App. 780, 312 N.W.2d 158 (1981); *State Fire Marshall v. Lee*, 101 Mich. App. 829, 300 N.W.2d 748 (1980); *Faith Assembly of God of South Dennis and Hyannis, Inc. v. State Bldg. Code Comm'n*, 81 Mass. App. Ct. 297, 416 N.E.2d 228 (1981).

311. State accreditation and regulation of primary and secondary religious schools was successfully resisted in *State v. Whisner*, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976), and *State ex. rel. Nagle v. Olin*, 64 Ohio St. 2d 341, 415 N.E.2d 279 (1980). The states have prevailed in *State ex. rel. Douglas v. Faith Baptist Church*, 207 Neb. 802, 301 N.W.2d 571, appeal dismissed, 454 U.S. 803 (1981), and *State v. Shaver*, 294 N.W.2d 883 (N.D. 1980). See *supra* note 20 (sampling of articles concerning state accreditation). On the post-secondary level, Shelton College, a Presbyterian school, unsuccessfully resisted state-mandated regulation in *New Jersey State Bd. of Higher Educ. v. Board of Directors of Shelton College*, 90 N.J. 470, 448 A.2d 988 (1982).

312. Holy Spirits Ass'n for the Unification of World Christianity v. Tax Comm'n, 55 N.Y.2d 512, 435 N.E.2d 662, 450 N.Y.S. 2d 292 (1982) (holding that church was "primarily religious" for tax exempt purposes where significant part of its activities were asserted to be religious and claim for exemption appeared to be "made in good faith and is not a sham").

313. The courts have consistently upheld the authority of the Internal Revenue Service to investigate church books of account to determine the initial and continuing qualifications of a religious organization for tax exempt status and to examine taxable unrelated business income. See *United States v. Coates*, 692 F.2d 629 (9th Cir. 1982); *United States v. Dykema*, 666 F.2d 1096 (7th Cir.), cert. denied, 456 U.S. 983 (1982); *United States v. Grayson County State Bank*, 656 F.2d 1070 (5th Cir. 1981) (church records held by third party); *United States v. Life Science Church of Am.*, 636 F.2d 221 (8th Cir. 1980); *United States v. Freedom Church*, 613 F.2d 316 (1st Cir. 1979). The courts have been quite supportive of IRS efforts to ferret out mail-order ministries and other ruses. See *Carr Enterprises, Inc. v. United States*, 698 F. 2d 952 (8th Cir. 1983); *United States v. Norcutt*, 680 F. 2d 54 (8th Cir. 1982); *Loving Saviour Church v. United States*, 556 F. Supp. 688 (D. S.D. 1983); *Life Science Church v. Internal Revenue Serv.*, 525 F. Supp. 399 (N.D. Cal. 1981); but see *Baldwin v. Comm'r*, 648 F.2d 483 (8th Cir. 1981) (per curiam) (discovery overbroad); *United States v. Holmes*, 614 F. 2d 985 (5th Cir. 1980) (per curiam) (summons overbroad). See generally Beebe, *Tax Problems Posed by Pseudo-Religious Movements*, 446 THE ANNALS 91 (1979); Weithorn & Turkel, *Frontier Issues of Tax Exemption for Religious Organizations*, GOVERNMENT INTERVENTION IN RELIGIOUS AFFAIRS 64 (Kelley ed. 1982).

314. See *Scott v. Rosenberg*, 702 F.2d 1263 (9th Cir. 1983) (upholding authority of Federal Communications Commission to investigate charges that church's television and radio stations had made fraudulent solicitation requests and committed other fiscal irregularities); *Hardy & Secrest, Religious Freedom and the Federal Communications Commission*, 16 VAL. U.L. REV. 57 (1981) (regulation of religious broadcasting).

See *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981) (charitable solicitation legislation affecting religious organizations); *Rusk v. Espinosa*, 456 U.S. 951 (1982), *aff'g*, 634

and activities having commercial consequences,³¹⁵ and restrictions on lobbying and other political activity.³¹⁶ Selected principal cases in each of three areas bearing upon the independence of religious groups from government are examined here: labor and equal employment legislation, state regulation of social welfare agencies, and private law actions for religious fraud and other torts.

A. Labor and Equal Employment Laws

Religious organizations have unsuccessfully resisted federal minimum wage and overtime compensation laws.³¹⁷ Further, they are not exempt from oc-

F.2d 477 (10th Cir. 1980) (discussed *supra* at text accompanying notes 245-50).

Perhaps the most controversy over regulation of church finances concerned an incident in California when the state Attorney General took over the entire financial operations of the World Wide Church of God based on allegations of fiscal irregularities by church officials. *People v. World Wide Church of God*, No. C 267 607 (Cal. Supr. Ct., filed Jan. 2, 1979), *cert. denied*, 444 U.S. 883 (1979), *cert. denied*, 446 U.S. 987 (1980). The Attorney General asserted authority based upon the state's interest in charitable trusts, which the Attorney General maintained was the legal status of a church, thus permitting the use of the provisional remedy of receivership to investigate internal fraud. Eventually, the legislature passed a law denying the authority to institute such actions against religious bodies. CAL. CORP. CODE § 9230 (West 1983). See Whelan, *Who Owns the Churches?*, GOVERNMENT INTERVENTION IN RELIGIOUS AFFAIRS 57 (Kelley ed. 1982); Jackson, *Socialized Religion: California's Public Trust Theory*, 16 VAL. U.L. REV. 185 (1981); Worthing, *The State Takes Over A Church*, 446 THE ANNALS 136 (1979); Note, *Government Protection of Church Assets From Fiscal Abuse: The Constitutionality of Attorney General Enforcement Under the Religion Clauses of the First Amendment*, 53 S. CAL. L. REV. 1277 (1980); Note, *Receivers, Churches and Nonprofit Corporations: A First Amendment Analysis*, 56 IND. L.J. 175 (1980). See generally Taylor, *Diversion of Church Funds to Personal Use: State, Federal and Private Sanctions*, 73 J. CRIM. L. & CRIMINOLOGY 1204 (1982); Oaks, *Trust Doctrines in Church Controversies*, 1981 B.Y.U.L. REV. 805.

315. See *Cuesnongle v. Ramos*, 713 F.2d 881 (1st Cir. 1983) (holding that Roman Catholic university was not so "pervasively sectarian" as to be exempt from regulation by Puerto Rico Department of Consumer Affairs). Note, *Religion-Based Antitrust Exemptions: A Religious Motivation Test*, 57 NOTRE DAME LAW. 828 (1982) (discussion of antitrust implications of acts by religious bodies); Note, *Sherman Act Liability for a Religiously Motivated Boycott*, 17 VAL. U.L. REV. 515 (1983) (same).

Federal security law exempts religious, educational, and charitable organizations from disclosure and registration requirements. 15 U.S.C. § 77c(a)(4) (1976). Quite apart from the registration requirements, however, it is unlawful for any person during the offer or sale of a security to employ a fraudulent scheme or device, to obtain money or property by means of an untrue statement of a material fact or any omission of fact, or to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon the purchaser. 15 U.S.C. § 77q(a)(1)-(3) (1976). These provisions apply to all securities, including those issued by religious organizations. *SEC v. World Radio Mission, Inc.*, 544 F.2d 535 (1st Cir. 1976) (securities laws applicable to religious organizations). *Cf. SEC v. Knopfler*, 658 F.2d 25 (2d Cir. 1981) (*per curiam*) (religious harassment unsuccessfully alleged as defense to SEC subpoena in connection with possible securities violation).

316. See Caron, Dessingé & Liekweg, *Government Restraint on Political Activities of Religious Bodies*, GOVERNMENT INTERVENTION IN RELIGIOUS AFFAIRS 151 (Kelley ed. 1982); Wogaman, *The Churches and Legislative Activity*, 446 THE ANNALS 52 (1979); Note, *Religion and Political Campaigns: A Proposal to Revise Section 501(c)(3) of the Internal Revenue Code*, 49 FORDHAM L. REV. 536 (1981).

317. See *Mitchell v. Pilgrim Holiness Church Corp.*, 210 F.2d 879 (7th Cir.), *cert. denied*, 347 U.S. 1013 (1954) (minimum wage and overtime provisions of Fair Labor Standards Act,

cupational safety and health acts.³¹⁸ Greater discord, however, has occasioned the assertion of jurisdiction by the National Labor Relations Board over nonclerics and the application of equal employment opportunity laws to non-pastoral employees of religious organizations. A third area of tension has been the attempted application of federal unemployment compensation tax legislation to religious groups.

Since the Supreme Court in *NLRB v. Catholic Bishop of Chicago*³¹⁹ rebuffed attempts by the NLRB to assert jurisdiction over lay faculty employed by parochial schools,³²⁰ even religious schools that are not controlled directly by any church or denomination have successfully fended off union organizing attempts for establishment clause reasons.³²¹ The focus has now shifted to

29 U.S.C. §§ 201 *et seq.*, do not violate free exercise rights of religious corporation operating office building, printing plant, mail order office, book store, and church treasury); *Donovan v. Alamo Foundation*, 722 F.2d 397 (8th Cir. 1983), 96 Lab Cas. (CCH) ¶ 34,326 (W.D. Ark. 1983) (religious charity is subject to FLSA as to voluntary workers performing commercial work for profit); *Donovan v. Shenandoah Baptist Church*, _____ F. Supp. _____, Civ. Act. No. 78-0115 (W.D. Va. 1983) (FLSA applies to church-operated schools); *Marshall v. First Baptist Church*, 23 Wage & Hour Cas. 386 (BNA) (D.S.C. 1977) (application of FLSA to church preschool and kindergarten employees does not violate First Amendment); *but cf.* Op. Letter of Employ. Std. Admin., No. 1240, LAB. L. REP. (CCH) ¶ 30,826 (Dec. 27, 1972) (exempting from FLSA individuals such as nuns, priests, lay brothers, ministers, deacons, and other members of religious orders who serve pursuant to religious obligations in preschools, schools, hospitals, or other institutions operated by their church or religious order).

318. The Occupational Safety and Health Act, 29 U.S.C. §§ 651 *et seq.* (1976), applies to nonprofit corporations, *id.* § 652, and to all employers "affecting commerce," *id.* § 652(5), which evidences an intent to assert jurisdiction to the fullest extent permitted by the commerce clause. Presumably, the Act applies to religious organizations that are interstate in the scope of their ministry.

319. 440 U.S. 490 (1979). See *supra* text accompanying notes 189-96 (discussion of *Catholic Bishop*). See generally Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981); Durso & Brice, *NLRB v. Catholic Bishop of Chicago: Government Regulation Versus First Amendment Religious Freedoms*, 24 ST. LOUIS U.L.J. 295 (1980). Comment, *Labor Relations in Parochial Schools: Should Lay Teachers Be Denied Protection of the General Laws?*, 17 SAN DIEGO L. REV. 1093 (1979); Note, *Labor Law — Jurisdiction of the National Labor Relations Board Over Parochial Schools*, 54 TUL. L. REV. 786 (1980).

320. The Seventh Circuit Court of Appeal's opinion affirmed in *Catholic Bishop* is reported at 559 F.2d 1112 (1977). Unlike the timidity of the Supreme Court, the circuit court was pointed when it said that the NLRB's assertion of power "is cruelly whip-sawing [the parochial] schools by holding that institutions too religious to receive governmental assistance are not religious enough to be excluded from its regulation." *Id.* at 1119. The mission of the school integrating religious and secular education, and the attempted interposition of the union and regulatory board between teacher and ecclesiastical superior, was held to violate separation of church and state. *Id.* at 1119-31. Even before the Supreme Court's decision in *Catholic Bishop*, other lower courts had found NLRB jurisdiction over parochial schools incompatible with the establishment clause. See, e.g., *Caulfield v. Hirsch*, 95 L.R.R.M. (BNA) 3164 (E.D. Pa. 1977), *cert. denied*, 436 U.S. 957 (1978).

321. *NLRB v. Bishop Ford Central Catholic High School*, 623 F.2d 818 (2d Cir. 1980), *cert. denied*, 450 U.S. 996 (1981) (control in board of lay trustees rather than Catholic diocese); *Catholic High School Ass'n of Archdioceses of New York v. Culvert*, _____ F. Supp. _____, No. 82 Civ. 396 (S.D.N.Y. 1983) (state labor law's assertion of jurisdiction over association of parochial schools violated establishment clause).

NLRB jurisdiction over children's homes,³²² nursing homes for the elderly,³²³ hospitals,³²⁴ and even broadcasting stations³²⁵ and convention centers³²⁶ operated by religious corporations.

In assessing these cases, the Supreme Court developed criteria that draw our attention to three factors: the religious character of the organization, the intensity of the church-state entanglements, and the resulting relationship between the religious body and government.³²⁷ Clearly, the greater the involvement of the proposed bargaining unit employees with core religious activities, such as teaching and propagation of religious beliefs, the greater the likelihood of prohibitive entanglements. Although a parochial school teacher is directly and frequently engaged in teaching religious beliefs,³²⁸ a hospital nurse³²⁹ and a nursing home physiotherapy assistant³³⁰ are engaged primarily in medical care. Likewise, the maintenance and storeroom employees of the church-affiliated residential treatment center for abused children in *NLRB v. St. Louis Christian Home*³³¹ were not assigned religious duties, therefore rendering NLRB oversight inoffensive. However, it would not be unusual for child-care workers in a church-affiliated children's home to have substantial religious duties necessary to conduct a rehabilitative program imbued with religious content.³³² Nevertheless, this was not the case with the child-care employees in *St. Louis Christian Home*. For example, the home's criteria for employment did not

322. See *NLRB v. St. Louis Christian Home*, 663 F.2d 60 (8th Cir. 1981) (upholding NLRB jurisdiction); cf. *NLRB v. Children's Baptist Home, Inc.*, 576 F.2d 256 (9th Cir. 1979) (First Amendment defenses never raised by children's home).

323. See *Tressler Lutheran Home v. NLRB*, 677 F.2d 302 (3d Cir. 1982); *Mid American Health Servs., Inc.*, 227 N.L.R.B. 752 (1980). Both cases uphold NLRB jurisdiction.

324. See *St. Elizabeth Community Hospital v. NLRB*, 708 F.2d 1436 (1983); 626 F.2d 123 (9th Cir. 1980) (affirming NLRB jurisdiction); *Bon Secours Hospital, Inc.*, 448 N.L.R.B. 115 (1980) (affirming jurisdiction over bargaining unit of dietetic assistants).

325. See *Faith Center — WHCT Channel 18 v. Local Union 42, Int'l Bhd. Elec. Workers, LAB L. REP. (CCH) ¶ 18,888* (1982) (NLRB refused to assert jurisdiction over church-operated television station); *Lutheran Church, Missouri Synod*, 109 N.L.R.B. 859 (1954) (NLRB refused to assert jurisdiction over religious radio station). Cf. *NLRB v. Christian Bd. of Publication*, 113 F.2d 678 (8th Cir. 1940) (upholding NLRB jurisdiction over religious publishing house operated on commercial basis).

326. See *NLRB v. World Evangelism, Inc.*, 656 F.2d 1349 (9th Cir. 1981) (upholding jurisdiction of NLRB over maintenance engineers employed by motel and convention center complex owned by religious body but operated on commercial basis, and bargaining unit employees engaged in nonreligious activities).

327. See *supra* text accompanying notes 208-209.

328. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979); *Caulfield v. Hirsch*, 95 L.R.R.M. (BNA) 3164, 3172 (E.D. Pa. 1977), cert. denied, 436 U.S. 957 (1978).

329. *St. Elizabeth Community Hospital v. NLRB*, 708 F.2d 1436, (9th Cir. 1983). Other employees in the proposed bargaining unit were service and maintenance personnel, three head nurses, and a supply superintendent.

330. *Tressler Lutheran Home v. NLRB*, 677 F.2d 302, 304 (3d Cir. 1982). Other employees in the proposed bargaining unit were service and maintenance personnel, clerks, orderlies, and dietary, housekeeping, and laundry employees.

331. 663 F.2d. 60 (8th Cir. 1981).

332. See *infra* notes 389-98 and accompanying text (cases discussed).

require any religious affiliation or training, and the employee's duties in the home entailed no religious tasks.³³³

The material difference between the overall character of a parochial school in contrast to a hospital, nursing home, or convention center, all open to the general public, is that a primary purpose for the school's existence is the propagation and inculcation of faith.³³⁴ Since a parochial school interweaves its secular and religious functions,³³⁵ the NLRB cannot avoid excessive entanglements by certifying only a selected bargaining unit of nonclerics. Any concession of jurisdiction to the government necessarily would entangle the board in activity that touches the very heart of religious exercise. Although a religious children's home is often comparable to a parochial school in its mission, the facility in *St. Louis Christian Home* was exceptional because it had become so secularized that the court found that it not longer was a "religious enterprise", nor did it "devote itself to the propagation of religion," and that it received substantial governmental funding and voluntarily submitted to state licensing.³³⁶ The decision in *St. Louis Christian Home* points out an important distinction. The test does not turn on whether the regulated organization is a nursing home, children's home, or school. Rather, in each case the issue is whether the particular institution in question is in fact operated on a pervasively religious basis.

In *St. Martin Lutheran Church v. South Dakota*,³³⁷ the Supreme Court construed the Federal Unemployment Tax Act (FUTA)³³⁸ to exempt schools that are part of the corporate structure of a church or association of churches (designated Category I schools).³³⁹ The Court did not have before it the issue of the unemployment compensation tax status of schools separately incorporated by a church (Category II) or those religious schools unaffiliated with any church or denomination (Category III).³⁴⁰ Following the rationale in *St. Martin*, the Secretary of Labor ruled that Category II schools were also exempt by the language of the act.³⁴¹ The Secretary, however, maintains that Category

333. 663 F.2d at 62, 64.

334. *Lemon v. Kurtzman*, 403 U.S. 602, 617 (1971) ("the *raison d'être* of public schools is the propagation of religious faith").

335. See *supra* note 209.

336. 663 F.2d at 61-64. Contrast the *St. Louis Christian Home* with the pervasively religious child-care facilities discussed *infra* at text accompanying notes 389-98.

337. 451 U.S. 772 (1981).

338. 26 U.S.C. §3301 *et seq.* (1976).

339. 451 U.S. at 782-83. See also *Alabama v. Marshall*, 626 F.2d 366 (5th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981) (decided before *St. Martin*, holding in favor of religious schools).

340. 451 U.S. at 782 n. 12 ("Our holding today concerns only schools that have no legal identity separate from a church.").

341. Brief for the United States at 8 (decided with *California v. Grace Brethren Church*, 457 U.S. 393 (1982)). In a state court ruling, six church-operated but separately incorporated schools were entitled to exemption from the unemployment tax. *Community Lutheran School v. Iowa Dep't of Job Serv.*, 326 N.W.2d 286 (1982). The trial court had held that the schools were not entitled to exemption because they were operated primarily for educational rather than religious purposes.

III schools are subject to the unemployment tax, and the matter currently is at issue in several ongoing suits.³⁴² Moreover, the litigation has spilled over into disputes concerning the applicability of the tax to mission societies³⁴³ and youth ministries³⁴⁴ that are substantially religious but operate independent of any church or denomination.³⁴⁵

Statutory exemptions based on the distinction of whether a religious organization is church-affiliated or an independent, nondenominational ministry discriminate in a manner contrary to the establishment clause.³⁴⁶ Clearly, a FUTA exemption which excludes Category III schools on the basis of corporate organization or religious polity is unconstitutionally discriminatory because the exemption tends to "establish" Category I and II schools while burdening the religious practices of Category III schools.³⁴⁷

342. See, e.g., *California v. Grace Brethren Church*, No. CV 79-93 MRP (S.D. Cal. Apr. 6, 1981) (unpublished opinion, reproduced at United States Jurisdictional Statement and Appendix A, filed in No. 81-228), *remanded on jurisdictional grounds*, 457 U.S. 393 (1982); *Salem College & Academy v. Employment Div.*, 61 Or. App. 616, 659 P.2d 415 (1983); *Employment Sec. Admin. v. Baltimore Lutheran High School Ass'n*, 291 Md. 750, 436 A.2d 481 (1981); *Christian School Ass'n v. Commonwealth*, 55 Pa. Commw. 555, 423 A.2d 1340 (1980).

343. *Christian Jew Found. v. Texas*, 653 S.W.2d 607 (Tex. Civ. App. 1983) (mission society not affiliated with church not subject to tax). Cf. *Arkansas Empl. Sec. Div. v. National Baptist Convention*, 275 Ark. 374, 630 S.W.2d 31 (1982) (National Baptist Convention not required to pay state employment security tax on payroll at convention's hotel and bathhouse).

344. *Young Life v. Division of Employment & Training*, _____ Colo. _____, 650 P.2d 515 (1982) (youth ministry not affiliated with church subject to tax).

345. See generally Note, *Unemployment Benefits and The Religion Clauses: A Recurring Conflict*, 36 U. MIAAMI L. REV. 585 (1982); Note, *Redemption Through Exemption: Unemployment Compensation Taxes*, 55 N.Y.U.L. REV. 242 (1980); Comment, *Bringing Christian Schools Within the Scope of the Unemployment Compensation Laws: Statutory and Free Exercise Issues*, 25 VILL. L. REV. 69 (1980).

346. *Larson v. Valente*, 456 U.S. 228 (1982) (overturning charitable solicitation law which had effect of discriminating against new, minority sects); cf. *Gillette v. United States*, 401 U.S. 437 (1971) (upholding selective service classification for conscientious objection which differentiated on basis of religious belief, not by membership in denomination or sect). See *Marsh v. Chambers*, 103 S.Ct. 3062, 3067 n.11 (1983) (Brennan, J., dissenting). In *Christian Jew Found. v. Texas*, 653 S.W.2d 607 (Tex. Civ. App. 1983), the court concluded that a state statutory exemption for "churches" in the unemployment tax act had to be broadly construed to prevent discrimination enjoined by the establishment clause. The word "churches", therefore, was said to include "any religious organization which, as the whole of its activities, advocates and teaches its particular spiritual beliefs before others with a purpose of gaining adherents to those beliefs and instructing them in the doctrine which those beliefs comprise." *Id.* at 617. Although the Christian Jew Foundation conducted no worship services, was nondenominational, and was not a church in the ordinary understanding of that term, it was exempt from the tax.

347. *Accord California v. Grace Brethren Church*, No. CV 79-93 (S.D. Cal. Apr. 6, 1981) (unpublished opinion, reproduced at United States Jurisdictional Statement and Appendix 74a-76a), *remanded on jurisdictional grounds*, 457 U.S. 393 (1982). The analysis of a FUTA exemption is much like the strict scrutiny test of the equal protection clause, see *Larson v. Valente*, 456 U.S. 228, 247 (1982), in which only a compelling governmental interest can save the discriminatory classification. Accordingly, cases such as *Young Life v. Division of Employment and Training*, _____ Colo. _____, 650 P.2d 515 (1982), are plainly wrong and should be reversed. The *Young Life* court held that the exemption of traditional churches from taxation and no exemption of a nondenominational, evangelical youth ministry which was pervasively religious in purpose and

If the FUTA is applied to all bodies that are pervasively religious, without organizational distinctions, the tax still would violate the principle of separation of church and state. The federal district court in *California v. Grace Brethren Church*³⁴⁸ held that the imposition of the unemployment tax to Category III schools violated the nonentanglement requirement in two respects. First, the benefit eligibility investigation and hearing process involved the state in the resolution of religious issues in circumstances where the school had discharged an employee for misconduct or good cause.³⁴⁹ Second, the applica-

practice, did not unconstitutionally prefer or advance some religious bodies over those with more unorthodox structures. The issue was handled in *Young Life Campaign v. Patino*, 122 Cal. App. 3d 559, 176 Cal. Rptr. 23 (1981) (broad construction of word "church" in tax statute to include parachurch organization, thus avoiding First Amendment entanglements).

348. *California v. Grace Brethren Church*, No. CV 79-93 MRP (S.D. Cal. Apr. 6, 1981) (unpublished opinion reproduced at United States Jurisdictional Statement and Appendix A), *remanded on jurisdictional grounds*, 457 U.S. 393 (1982).

349. *Id.* at Jurisdictional Statement and Appendix 88a. The brief on behalf of Grace Brethren Church summarizes the testimony of the government witnesses disclosing a hopelessly entangling situation during the administration eligibility process initiated by a discharged employee filing a claim for benefits:

(a) The state claims [the] determination agency entertains and passes upon conflicting claims as to whether the employee of a religious body was discharged because of violation of that body's articles of faith.

(b) The religious body which is the employer is made to bear the burden of proof that (a) the particular doctrine was part of an agreement between itself and the discharged employee and (b) that the employee breached that agreement.

(c) Where the religious body discharges the employee due to its judgment that the employee has shown a decline in religious fervor, the state agent must declare this not to be misconduct unless it has caused harm to the religious body, and the state is the judge of whether "harm" has in fact taken place.

(d) The agent of the state must become familiar with religious doctrine in order to be able to determine not merely whether there has occurred a violation of an express rule of the religious body, but also to determine the issue of whether there has occurred a violation of an implied rule of that body.

(e) Within the state's jurisdiction to determine religious reasons for discharge is also jurisdiction to weigh and determine moral reasons for discharge.

(f) Whether or not an employee of a religious body, who was discharged on account of incompetence, was incompetent to communicate the doctrine of the religious body is a matter to be determined by the state, and if this incompetence was not willful, it would not be construed as misconduct.

(g) The state determines whether the religious body need have given express warning to its employee, and whether that warning was reasonable or needed.

(h) The state determines whether a particular rule of the religious body is an important one.

(i) The state makes "a determination of the effect [of the employee's conduct] on the religion or the church".

(j) The state may determine whether a religious body is a church, and whether a particular employee of that body is a minister.

(k) Where a religious body and its discharged employee dispute the reasonableness of the rule of the religious body which that body claims the employee violated, the state will determine the issue of reasonableness.

(l) In the case wherein there appears to have been a misunderstanding over whether a doctrinal point had been agreed upon by the religious body and its employee, the

tion of the state unemployment insurance code to religious schools involved sustained and detailed relationships between government and the schools,³⁵⁰ contrary to the Supreme Court's warning against recurring audits, surveillance, and inspections.³⁵¹ The compensation tax, therefore, is the paradigm of a prohibitive church-state relation that is both qualitatively intense and indeterminately enduring.

Although the FUTA and its intrusive administration surely exceeds that point of having "the mere potential"³⁵² for excessive entanglement, another labor-related statute affecting religious employers may not (at least on its face) cross the line between permissible and prohibitive entanglement. In *Victory Baptist Temple v. Industrial Commission of Ohio*,³⁵³ a state appellate court upheld the application of a worker's compensation statute that covered

state must find in favor of the employee.

(m) Where the religious body and its employee disagree upon a point of doctrine, "that situation would lend itself to a decision in favor of the employee".

Brief for Grace Brethren Church *et al.*, Nos. 81-31, 81-228, 81-455 at 7-8 (references to transcript omitted).

350. *Grace Brethren*, *supra* note 347, at Jurisdictional Statement and Appendix 89a. The California Unemployment Insurance Code, if applied to religious schools, would authorize the California Employment Development Department to:

(a) make investigations to determine whether a religious school, or employee thereof, is covered by the Code. *See* Section 1953 *and* Hill v. Brisbane, 66 Cal. App. 2d 15, 151 P.2d 518 (1944);

(b) issue subpoenas to compel the attendance of witnesses and the production of books, papers, correspondence, memoranda and other records of religious institutions (Section 1953);

(c) make an assessment, including a penalty of 10%, upon a religious school which fails to make returns, and to do so on the basis of an estimate arrived at according to whatever information may be in the Department's hands (Section 1126);

(d) assess a penalty of 25% on administrators of religious schools who, as a matter of religious conscience, willfully fail to comply with the requirement to file returns (Section 1128);

(e) obtain imposition of a lien on all religious property for failure to pay contributions (Section 1703);

(f) charge administrators or others who are responsible for religious affairs with personal liability for amounts of contributions due (Section 1735);

(g) obtain a summary judgment against a religious school for failure to pay contributions (Section 1815); and

(h) bring legal actions, in the courts of California or the United States, against religious schools and administrators to collect the amount of any delinquent employer or worker contributions, together with penalties and interest (Section 1852).

Brief for Grace Brethren Church, *et al.*, Nos. 81-31, 81-228, 81-455 at 19-20.

351. *See supra* text accompanying notes 219-39 (Supreme Court's parochial aid cases). *See also* Surinach v. Pesquera de Busquets, 604 F.2d 73 (1st Cir. 1979) (nonentanglement required invalidation of actions of Puerto Rico Department of Consumer Affairs in subpoenaing documents of parochial schools to investigate inflationary trends in private education).

352. *Meek v. Pittenger*, 421 U.S. 349, 371-72 (1975); *Lemon v. Kurtzman*, 403 U.S. 602, 619-20 (1971); *Catholic Bishop of Chicago v. NLRB*, 559 F.2d 1112, 1126 (7th Cir. 1977), *aff'd*, 440 U.S. 490, 502 (1979).

353. 2 Ohio App. 3d 418, 442 N.E.2d 819, *cert. denied*, 103 S.Ct. 568 (1982).

employees of a church and its school.³⁵⁴ In a worker's compensation claim, the issues typically disputed are the existence of an injury or its severity, whether the mishap occurred while in the scope of employment, and whether the claimant was an employee or independent contractor. The nature of these issues is less entangling in comparison to the unemployment compensation claim of an employee terminated for cause.³⁵⁵ For example, the nature of an injury is wholly a medical question to be assessed by an impartial physician. It is hard to imagine a case where religious concerns could be drawn into the matter. A civil court determining issues of fact and law is not unlike the well-accepted circumstance where a church is sued in common-law tort for injuries it is alleged to have caused. In the Ohio statute, however, there are some features which call for careful attention in administration lest the separation principle be violated. For example, the statute empowers an administrative agency to command a religious organization to submit its payroll reports,³⁵⁶ a matter which could lead to involuntary and unnecessarily probing audits of church finances.³⁵⁷ Further, should a church refuse to comply with the agency's demands, the state may commence enforcement proceedings.³⁵⁸ Fortunately, these proceedings would be conducted under the auspices of the courts which are more attuned to First Amendment concerns.³⁵⁹

354. *Id.* at 420, 442 N.E.2d at 821. The church raised only free exercise objections to the workmen's compensation law, maintaining that it was contrary to their religious beliefs to pay to the state money that had been contributed by church members solely for religious purposes. As might be expected, even if the court had found that the conviction was sincerely held, it would have been of no avail. *See United States v. Lee*, 455 U.S. 252 (1982). Since the church did not argue the establishment clause doctrine of separation and nonentanglement, one can only speculate on how the court would have ruled on that defense.

355. *See supra* note 349.

356. OHIO REV. CODE ANN. §§ 4121.15, 4123.23, 4123.37 (1980).

357. *Committee for Pub. Educ. v. Regan*, 444 U.S. 646, 659-60 (1980) (permitted state audit of parochial schools voluntarily participating in a program involving reimbursement for purchase of secular textbooks). In *Regan*, any audit would have been discrete and confined to the voluntary program. *See Lemon v. Kurtzman*, 411 U.S. 192, 201-202 (1973) (permitting one-time audit).

358. OHIO REV. CODE ANN. § 4123.37 (1980). An employer may opt to self-insure but then must comply with additional disclosure requirements. OHIO REV. CODE ANN. §§ 4123.35, 4123.416 (1980).

359. The Ohio Workmen's Compensation Act is much like the Social Security Act Amendments of 1983, Pub. L. No. 98-21, which requires all nonprofit organizations, including churches and other religious bodies, to participate in the federal social security program. Prior law made participation the option of the religious organization. In extreme cases, these programs can lead to church-state entanglement. *See, e.g., Calvary Baptist Church v. United States*, Civ. No. S-82-193 MLS (E.D. Cal. Mar. 10, 1982) (unpublished opinion denying TRO). In *Calvary Baptist*, the IRS was about to execute on a levy against church bank accounts and enforce a lien against the church real estate to recover some \$16,000 in back social security taxes. *Id.* Foreclosure actions of this sort are entanglements warned against in *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970). *See also Myer, The Church Plan Under Recent Pension Legislation*, 27 CATH. LAW. 185 (1982); Tracy, *Church Plans*, 60 TAXES 33 (1982). Both Myer and Tracy concern the applicability of the Employees Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.* (1976) to religious organizations.

With increasing frequency, nondiscrimination laws involving the handicapped³⁶⁰ and litigation concerning employment discrimination on the basis of out-of-wedlock pregnancy,³⁶¹ religion,³⁶² and sexual preference³⁶³ affect religious organizations. The courts are divided on whether the First Amendment permits suits against churches by disgruntled employees on a theory of breach of employment contract.³⁶⁴ The most frequent litigation, however, concerns allegations of sex discrimination brought under Title VII of the Civil Rights Act of 1964³⁶⁵ and the Equal Pay Act of 1963.³⁶⁶

In *EEOC v. Southwestern Baptist Theological Seminary*,³⁶⁷ the Equal

360. See Grosch, *Church-Related Schools and the Section 504 Mandate of Nondiscrimination in Employment on the Basis of Handicap*, 31 DE PAUL L. REV. 69 (1981).

361. For cases concerning women terminated for becoming pregnant out-of-wedlock, compare *Harvey v. YWCA*, 533 F.Supp. 949 (W.D. N.C. 1982) (upholding dismissal of staff person who was role model for young girls) with *Dolter v. Wahlert High School*, 483 F.Supp. 266 (N.D. Iowa 1980) (prohibiting dismissal of teacher at parochial school).

362. See *Feldstein v. Christian Science Monitor*, 555 F.Supp. 974 (D. Mass. 1983) (upholding that publication of newspaper is religious activity, therefore, limiting applicants to members of controlling church permitted); *Larson v. Kirkham*, 499 F.Supp. 960 (D. Utah 1980), *aff'd*, 32 Empl. Prac. Dec. (CCH) ¶ 33,827 (10th Cir. 1982), *cert. denied*, 104 S.Ct. 157 (1983) (Mormon business college may dismiss teacher because she is no longer active in church); *Seman v. Christian Corps, Inc.*, Civ. Act. No. 3-82-505 (D. Minn. July 13, 1983) (unpublished opinion) (religious vocational school for missionaries may discriminate in hiring on religious basis). *Cf. Fike v. United Methodist Children's Home*, 547 F.Supp. 286 (E.D. Va. 1982), *aff'd on other grounds*, 709 F.2d 284 (4th Cir. 1983) (children's home that had abandoned its religious purpose could not discriminate on basis of religion).

363. See *Gay Rights Coalition v. Georgetown Univ.*, No. 89-5863 (D.C. Super. 1983) (Roman Catholic university need not recognize homosexual student organization notwithstanding ban against such discrimination in District of Columbia); *Walker v. First Orthodox Presbyterian Church of San Francisco*, 23 Empl. Prac. Dec. (CCH) ¶ 31,006, 22 Fair Empl. Prac. Cas. (BNA) 762 (Cal. Super. Apr. 3, 1980) (church may dismiss homosexual for religious reasons notwithstanding city ordinance prohibiting discrimination).

364. Compare *Kaufman v. Sheehan*, 707 F.2d 355 (8th Cir. 1983) (suit by parish priest raising questions concerning his employment status and church discipline not cognizable in civil court for First Amendment reasons) with *Gipe v. Worldwide Church of God*, No. AP-3260 (Cal. Super. Orange Ct. June 22, 1982) (unpublished opinion), *writ denied*, Civ. No. 29210 (Cal. App. 4th Div. Aug. 26, 1982), *appeal denied*, No. 29210 (Cal. Sup. Ct. Oct. 21, 1982), *cert. denied*, 103 S.Ct. 1772 (1983) (courts may apply neutral-principles-of-law to contract action for severance pay by former minister discharged for doctrinal reasons) and *Reardon v. Lemoine*, 122 N.H. 1042, 454 A.2d 428 (1982) (courts may apply neutral-principles-of-law to contract action by nuns employed as parochial teachers discharged by church officials).

365. 42 U.S.C. §§ 2000e to -17 (1976 & Supp. V 1981). See generally Note, *Recent Developments: Freedom of Religion As a Defense to Employment Discrimination Charges Under Title VII*, 5 AM. J. TRIAL ADVOC. 154 (1982); Note, *E.E.O.C. v. Mississippi College: The Applicability of Title VII to Sectarian Schools*, 33 BAYLOR L. REV. 380 (1981); Note, *The Boundaries of a Church's First Amendment Rights as an Employer*, 31 CASE W. RES. L. REV. 363 (1981).

366. 29 U.S.C. § 206(d) (1976) (amending Fair Labor Standards Act of 1938); 29 U.S.C. §§ 201 *et seq.* (1976 & Supp. V 1981). See *Russell v. Belmont College*, 30 Fair Empl. Prac. Cas. (BNA) 1111 (M.D. Tenn. 1982), 554 F. Supp. 667 (D. Md. 1982) (holding act does not violate First Amendment when applied to Baptist college insofar as it pertains to charge by lay female faculty member); *Ritter v. Mount St. Mary's College*, 495 F.Supp. 724 (D. Md. 1980).

367. 485 F.Supp. 255 (N.D. Tex. 1980), *aff'd in part and rev'd in part*, 651 F.2d 277 (5th Cir 1981), *cert. denied*, 456 U.S. 905 (1982). See Wood, *A Baptist Seminary Resists the Equal*

Employment Opportunity Commission brought suit to compel a seminary to file a Higher Education Staff Information Report (form EEO-6).³⁶⁸ The federal district court refused to order filing of the EEO-6 because of the substantially religious purpose and nature of the seminary.³⁶⁹ Reversing in part, the circuit court held that the seminary need only comply with the EEO-6 filing requirement as to nonministerial support staff, thus exempting faculty and administration.³⁷⁰

The principle of independent, voluntaristic religious organizations calls for the application of two considerations applied by the district and circuit courts. First, as to organizations which are "pervasively religious,"³⁷¹ the religious body should be entirely exempt from equal employment legislation,³⁷² because any regulation by the EEOC³⁷³ necessarily would affect the core religious functions of worship and the teaching and propagation of religious beliefs.³⁷⁴ The district court in *Southwestern Baptist*, therefore, was correct in affording an institution-wide exemption to what all parties admitted was a pervasively religious school.³⁷⁵ The pervasively religious test permits exemptions for parochial schools, but not hospitals,³⁷⁶ nursing homes,³⁷⁷ and many

Employment Opportunity Commission, GOVERNMENT INTERVENTION IN RELIGIOUS AFFAIRS 97 (Kelley ed. 1982).

368. The EEO-6 form requires all institutions of higher education, public and private, to file annually with the EEOC the information on percentage of employees by ethnic group and sex, categorized by position, tenure status and salary. 40 Fed. Reg. 25,189 (1975).

369. 485 F.Supp. at 263.

370. 651 F.2d at 283-85.

371. See *supra* note 209 ("pervasively religious" defined by Supreme Court in context of aid to religious schools).

372. R. NEUHAUS, *supra* note 138, at 126. Organizations which are pervasively religious should not treat this exemption as license to discriminate. Out of self-discipline and respect for people, one would expect these religious organizations to have in mind fairness and the welfare of their employees. Moreover, discrimination would generally not be in their self-interest for public relations purposes.

373. Title VII empowers the EEOC with substantial rule making, investigatory, and adjudicatory powers which could involve church-state entanglements of significant intensity and long duration. See 42 U.S.C. § 2000e-5 (1976 & Supp. V 1981).

374. Recall the indivisible nature of a "pervasively religious" institution, which, for example, prohibits the government from funding or aiding capital improvements to parochial schools because it has the effect of advancing religious inculcation. See *supra* text accompanying note 209.

375. 485 F.Supp. at 258-59. The findings of fact by the district court include: (a) enrollment was not open to the public in general or to Baptists, but is limited to persons who have experienced a "divine call" into the ministry; (b) the religious environment of the seminary was calculated to be part of the program of shaping the attitudes of students; (c) daily chapel was mandatory for students and employees; (d) religious discipline and mores extended into personal life; (e) membership in the Baptist church was required for faculty employment; (f) recruitment of new faculty and administrators was viewed as a divinely guided "spiritual quest"; and (g) even support staff were encouraged and expected to consider their work as a religious calling, and no amount of job competence by staff could override a deficiency in attitude inconsistent with the ideals and responsibilities of the seminary. *Id.*

376. Cf. *supra* note 224 (cases cited).

377. Cf. *supra* note 323 (cases cited).

church-related colleges³⁷⁸ operated by religious entities that provide secular services to the general public without regard to religious affiliation.

The circuit court applied a test which focused on the ministerial nature of particular jobs and would be appropriate where the organization concerned is not pervasively religious. At religiously-affiliated hospitals, nursing homes, and colleges there are many employees that are not selected on religious criteria and, therefore, are not significantly involved in matters central to the organization's distinctively religious character.³⁷⁹ Accordingly, the circuit court's approach based upon the job responsibilities of particular employees would have been consistent with nonentanglement requirements *only* if the school had not been pervasively religious, which is certainly not the case with a seminary. Courts must also exercise care that ministerial employees are not defined too narrowly. Employees other than ordained clergy may be ministerial. Instead, the proper inquiry is whether the employee is selected on the basis of religious criteria; specifically, does the employee have duties materially related to the teaching or propagation of religious faith? If so, then that particular position should be exempt from EEOC regulation, even in an organization that is not pervasively religious.³⁸⁰

B. Regulation of Religious Social Welfare Agencies

As noted earlier, perhaps the largest expansion of activities by churches and other religious bodies has been into social welfare endeavors.³⁸¹ Some of these organizations are tightly integrated into a church or synagogue, while others exist as lay religious corporations or parachurch groups with clearly

378. Cf. *supra* notes 225-39 (cases cited). Of course, some colleges will be able to show that they are "pervasively religious". See, e.g., *New Jersey Bd. of Higher Educ. v. Board of Directors of Shelton College*, 90 N.J. 470, 448 A. 2d 988, 989-90 (1982) (description of Shelton College).

379. See Comment, *Government Noninvolvement With Religious Institutions*, 59 TEX. L. REV. 921, 962 (1981).

380. Since the seminary was "pervasively religious" the circuit court's test also causes the courts to become entangled in religious classifications of who is a "minister" and who is not at the seminary, an engagement the Supreme Court has warned against. See *infra* text accompanying notes 216-18, 243-44.

Other Title VII cases of interest are *EEOC v. Pacific Press Pub. Ass'n*, 676 F.2d 1272 (9th Cir. 1982) (upholding EEOC investigation of nonprofit publishing house affiliated with Seventh Day Adventist Church based on sex discrimination charge by employee in staff support position); *EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981) (holding that EEOC could subpoena records of Baptist college based on sex discrimination complaint filed by female who sought faculty appointment in psychology department); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972) (holding that First Amendment precludes application of Title VII to sex discrimination charge brought by female minister); *Shenandoah Bible Church v. EEOC*, Civ. Act. No. 82-31-M (N.D. W.Va. Feb. 10, 1983) (unpublished opinion), *appeal docketed*, No. 83-1368 (4th Cir. 1983) (holding that church-related school was exempt from EEOC subpoena served as result of sex discrimination complaint filed by teachers). See generally Parmenter, *EEOC Jurisdiction Over Churches: How Far Does It Go?*, 28 LOY. L. REV. 332 (1982).

381. See *supra* text accompanying notes 133-38.

identifiable religious purposes but no affiliation or institutional ties to a particular denomination.³⁸² The federal government has not imposed regulations concerning the activities of private social welfare agencies except when government-funded programs are involved.³⁸³ The more vexing litigation, therefore, has involved state and local governments. The principle cases challenge comprehensive licensing and regulatory schemes directed at children's homes and orphanages, child-care and day-care programs, and foster home and adoption placement agencies.³⁸⁴

A poignant example of state regulation interfering with the distinctive religious purpose of a social ministry is found in *Scott v. Family Ministries*.³⁸⁵ In *Scott*, a California-based foster and adoptive home placement agency, Family Ministries, lost the right to place children exclusively with families of the same religious faith. California law required all adoptive home agencies to be licensed. The court declared that the state licensing scheme over private adoptive agencies made the actions of corporations such as Family Ministries "state action in the context of the establishment clause."³⁸⁶ The court reasoned that if the state must be neutral in matters of religion, so must private agencies licensed by the state, even religious agencies!³⁸⁷ The implications are crippling. Family Ministries exists for the very purpose of discriminating in favor of a particular religious persuasion, as do other adoptive agencies sponsored by other faiths.³⁸⁸

382. It is helpful to group ministries into one of the following classifications: (1) children's homes and orphanages; (2) child-care, day-care, and preschool programs; (3) foster home and adoption-placement agencies; (4) charities, such as storehouses for food and used household goods, and places for temporary meals and lodging; (5) alcohol and drug treatment programs; (6) counseling and chaplaincy services; (7) youth recreational programs, camps, and retreat centers; (8) maternity shelters for expectant unwed mothers; (9) hospitals and medical clinics; (10) prison ministries and halfway houses for criminals; (11) nursing and invalid homes for the elderly; and (12) centers for the handicapped, retarded, or mentally ill.

383. Where federal monies are concerned there are restrictions of the use of the funds. Government-church involvement, therefore, would cease if the ministry declined the funding. See Pickrell & Horwich, *supra* note 21 (recent article that focuses on federal funding and concomitant regulation of religious activities in social services).

Although regulated by the state and receiving federal funds, the right of Roman Catholic hospitals to refuse patients who requested abortions and sterilization operations has been upheld. *Taylor v. St. Vincent's Hosp.*, 523 F.2d 75 (9th Cir. 1975), *cert. denied*, 424 U.S. 948 (1976); *Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308 (9th Cir. 1974).

384. The discussion in this subpart is condensed from a more extensive article found at Esbeck, *State Regulation of Social Services Ministries of Religious Organizations*, 16 VAL. U.L. REV. 1 (1981).

385. 65 Cal.App. 3d 492, 135 Cal. Rptr. 430 (1976).

386. *Id.* at 506, 135 Cal. Rptr. at 438.

387. Analytically, *Scott* is poorly reasoned because it confuses "state action" for purpose of the Fourteenth Amendment due process clause, which incorporates the establishment clause and makes it applicable to the states (*see supra* note 110), with impermissible state sponsorship of religion or non-neutrality for purposes of the establishment clause.

388. P. BERGER & R. NEUHAUS, *supra* note 24, at 31. Berger and Neuhaus have pointed out three "cruel and dehumanizing consequences" of the *Scott* policy: the natural parent is denied the ability to control in what religion the child is raised, the religious motivation for the ministry and its workers is undercut severely, and the child may be deprived of any religious training. *Id.*

If other courts follow the rationale of *Scott* and apply *Scott* to state-licensed or certified social welfare ministries of religious bodies, then the religious activities of these organizations will be hopelessly frustrated. A ministry could not discriminate on a religious basis in choosing the people it wants to help. Moreover, religious propagation and counseling in accord with its beliefs and tenets would be prohibited altogether under this court's debilitating notion of "neutrality."

A federal district court in *Tabernacle Baptist Church v. Conrad*³⁸⁹ and a state supreme court in *Kansas v. Heart Ministries, Inc.*³⁹⁰ reached opposite conclusions concerning comprehensive state regulatory schemes affecting religious children's homes. The suit in *Tabernacle Baptist* was brought by a church which operated a children's home seeking declaratory and injunctive relief against the agency administering the state mandatory licensing law.³⁹¹ After finding that the religious atmosphere and training in the home was an integral part of its program,³⁹² the federal court nullified the act and implementing regulations as applied to religious homes. In doing so, the federal judge pointed the way to a more tightly-drawn statutory scheme to pass muster under the establishment clause, a plan which would satisfy the state's interest in the health and safety of the children³⁹³ without entangling itself with the home's religious beliefs, program or practices.³⁹⁴ Thus, the federal court in *Tabernacle Baptist* would permit a well-defined licensing scheme consonant with the state's legitimate interest that the children be properly cared for, while not permitting those regulatory entanglements that had the potential to

389. Civ. No. 79-149 (D. S.C. Oct. 27, 28, 1980) (unpublished opinion).

390. 227 Kan. 244, 607 P.2d 1102, *appeal dismissed*, 449 U.S. 802 (1980).

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

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

393. *Id.* at 4. In *Tabernacle Baptist*, the home did not object to compliance with the local fire and health regulations or to periodic inspection of the facility by the state regulatory department. *Id.*

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

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

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

submerge the religious character which pervaded the home's program of rehaolitation.³⁹⁵

In *Heart Ministries*, the state regulations concerning residential children's homes mixed the legitimate health, safety and sanitation concerns of government with the more troublesome area of program and personnel. For example, the regulations required that the governing board represent a variety of community interests and that the staff satisfy qualifications specified by the state regulatory agency.³⁹⁶ The Kansas Supreme Court upheld the comprehensive regulatory scheme as within the state's police power. Unfortunately, the home did not argue the establishment clause defenses³⁹⁷ available to a children's home with a profile which was apparently pervasively religious.³⁹⁸

As with other areas of church-state separation, state regulatory agencies like those in *Tabernacle Baptist* and *Heart Ministries* have not always demonstrated the sensitivity requisite to achieve the balance sought in the separation principle of independent, voluntaristic churches. The states can and should be less intrusive into religious affairs and still satisfy their proper function of ensuring health, fire, safety, and sanitation safeguards.³⁹⁹ As two keen social critics have stated, the all-encompassing embrace by state bureaucrats, who are presumptuous about knowing "what's best" in program content,⁴⁰⁰

395. *Id.* at 2. In *Tabernacle Baptist*, the church was not able to point to any actual constraints on the religious activities of the home at the time of suit because the home had never been licensed and had only recently been pressured by the state into compliance. *Id.* Nevertheless, the court was correct in issuing the injunction on the basis that there was a "substantial risk" of entanglements without an injunction. *See supra* notes 230, 233, 235.

396. 227 Kan. at 248-49, 607 P.2d at 1106. Quite properly, any ministry would want its board of directors to be of one mind on its religious purpose, thus rendering impossible fulfillment of a duty to represent a variety of the community's interests.

397. *Id.* at 251-52, 607 P.2d at 1107-108.

398. *Id.* at 245-50, 607 P.2d at 1104-107. In *Heart Ministries*, there were religious restrictions of staff selection, enforced obedience to religious dogma, required attendance at worship services, and required religious or doctrinal study. Further, the children's home was an integral part of the religious mission of the sponsors, and religious evangelization was a primary purpose of the home. *Id.*

399. Fortunately, several states recently have enacted special statutes, striking the balance more in harmony with the establishment clause. *See* ALA. CODE § 38-7-3 (Supp. 1981) (registration of religious preschool programs); 1983 Ark. Acts 245, 331 (registration of religious child-care facilities); ILL. ANN. STAT. ch. 23, § 2212.09 (Smith-Hurd Supp. 1983) (religious day-care centers exempt from licensing); IND. CODE ANN. § 12-3-2-12.7 (Burns 1981) (registration of religious day nurseries); LA. REV. STAT. ANN. § 46:14104 (West Supp. 1981) (registration of child-welfare agencies receiving no public funds); MISS. CODE ANN. § 43-15-9 (1981) (religious orphan's homes, child-caring agencies and children's home societies exempt from licensing); MO. REV. STAT. § 210.516(5) (1983) (religious foster homes, residential care facilities and child placement agencies exempt from licensing); 1983 N.C. Sess. Laws 283 (ratified May 9, 1983) (registration of religious day-care centers); S.C. CODE ANN. §§ 2-7-2700, 20-7-2900 to 20-7-2990 (Law Co-op Supp. 1981) (registration of religious day-care centers and group day-care homes); VA. CODE § 63.1-196.3 (1980) (registration of religious child-care centers).

400. William Bently Ball, an active litigator, noted the strands of arrogance and condescension among some social service professionals toward the struggle with the state for breathing

has a tendency to squeeze out of society values derived from the various religious traditions which comprise a pluralistic America.⁴⁰¹ They conclude that without the balance of separation, "the result is that the state has an unchallenged monopoly on the generation and maintenance of values. Needless to say, we would find this a very unhappy condition indeed."⁴⁰²

C. *Private Law Actions for Religious Fraud & Other Torts*

Unlike those conflicts involving federal and state regulation of the activities of religious organizations, the only governmental involvement in tort actions is through the civil courts.⁴⁰³ Nonetheless, the line of cases concerning noninterference in intrafaith disputes starting with *Watson v. Jones*⁴⁰⁴ demonstrates that in many circumstances, even the involvement of the civil courts in resolving a dispute can violate a church's independence. Lawsuits against religious associations for tortious conduct that raise concerns of church-state separation fall into four categories: (1) acts of church discipline alleged to have injured a member or cleric;⁴⁰⁵ (2) the application of matrimonial canon

space. Ball, *Between Persons and the State*, 4 CHRISTIAN LEGAL SCI. Q. 5 (Iss. 1 1983).

When I speak of the governmental "attack" on mediating structures existing in the health, educational, and charitable fields, I do not mean to suggest that state authorities manifest a conscious design to single out and penalize or obliterate these structures. The governmental endeavors usually originate in a totally innocent presumption of total governmental competency. Hostility usually sets in only when the assumption of superiority is questioned.

Such questioning is depicted as a demonstration of both ignorance and disobedience. It is also seen as a threat to the industry—the industry of regulating (the same industry being the source of the income, security, perquisites, and social rank of the government administrator). In addition there are, of course, some mendacious public servants, nor should it be denied that there are movements within government that deliberately push for ideological goals suppressive of the freedom that mediating structures support. Obviously it is a mixed picture.

Id.

401. P. BERGER & R. NEUHAUS, *supra* note 24, at 28.

In the public policy areas most relevant to this discussion—health, social welfare, education, and so on—the historical development of programs, ideas, and institutions is inseparable from the church. In some parts of the country, notably in the older cities of the Northeast, the great bulk of social welfare services function under religious auspices. . . . [T]he religious character of these service agencies is being fast eroded. Where government agencies are not directly taking over areas previously serviced by religious institutions, such institutions are being turned into quasi-governmental agencies through the powers of funding, certification, licensing, and the like. The loss of religious and cultural distinctiveness is abetted also by the dynamics of professionalization within the religious institutions and by the failure of the churches either to support their agencies or to insist that public policy respect their distinctiveness.

Id.

402. *Id.* at 31.

403. Private law actions against religious organizations for breach of contract are also increasing. See, e.g., *supra* note 364 (cases cited).

404. 80 U.S. (13 Wall.) 679 (1871) (discussed *infra* text accompanying notes 254-63).

405. See *Chavis v. Rowe*, 93 N.J. 103, 459 A.2d 674 (1983) (discussed in text); *Guinn v. Church of Christ of Collinsville, Okla.*, No. CT-81-929 (Tulsa, Okla. Dist. Ct. Jan. 7, 1983)

law alleged to have caused injury to a nonmember;⁴⁰⁶ (3) clergy counselling or spiritual guidance alleged to have caused injury to the counsellee or a related third party;⁴⁰⁷ and (4) suits against alleged "mind control" sects by an ex-member for fraud, emotional distress, or other injury.⁴⁰⁸

The Supreme Court's decision in *Serbian E. Orthodox Diocese v.*

(unpublished order) (state trial court refused to dismiss action by church member for invasion of privacy suit arising out of church disciplinary proceeding), *appeal denied*, No. 59,623 (Okla. Sup. Ct. Mar. 1, 1983) (unpublished order), *cert. denied sub nom.* Church of Christ of Collinsville v. Graham, 104 S.Ct. 85 (1983), *on remand*, No. CT-81-929 (Tulsa, Okla. Dist. Ct. Mar. 15, 1984) (\$390,000 actual and punitive damages awarded), *appeal docketed*, No. 62,154 (Okla. Sup. Ct. Apr. 16, 1984); Sinai Temple v. Superior Court of California for the County of Los Angeles (Smotrich, real party in interest), Civ. No. 64348 (Cal. App. 2d Mar. 12, 1982) (unpublished opinion), *stay denied*, Civ. No. 64348 (Cal. Sup. Ct. May 20, 1983) (unpublished opinion), *cert. denied*, 51 U.S.L.W. 3256 (U.S. Oct. 4, 1982) (No. 82-96) (discovery permitted into synagogue's termination decision of rabbi in suit by former member of congregation).

406. See *Korening v. Archdiocese of Milwaukee*, No. 82-295 (Wis. Ct. App. Dist. 1 Nov. 16, 1982) (unpublished opinion), *appeal denied*, 110 Wis. 2d 749, 331 N.W.2d 391 (1983), *cert. denied*, 51 U.S.L.W. 3857 (U.S. May 31, 1983) (No. 82-1717) (court refused jurisdiction over suit for emotional distress resulting when Roman Catholic Church annulled plaintiff's prior Lutheran marriage to Ex-husband); cf. *Avitzur v. Avitzur*, 58 N.Y.2d 108, 446 N.E.2d 136 (1983), *cert. denied*, 104 S. Ct. 76 (1983) (court applies neutral-principles-of-law approach to enforcement of Jewish marriage contract, thus requiring ex-husband to appear before rabbinical tribunal to be divorced according to ecclesiastical law).

407. See *Washington v. Hill*, No. 80-423 (Ark. Ct. App. Mar. 4, 1982) (unpublished opinion) (discussed in text); *Nally v. Grace Community Church of the Valley*, No. NCC 18668 B (Cal. Super. Ct. Los Angeles Cty. Oct. 2, 1981) (unpublished opinion) (dismissing clergy malpractice suit by parents of suicide victim who had been obtaining counselling from church staff); *Anderson v. Diocese of Diluth*, No. 159581 (D. Ct. St. Louis Cty., Minn., filed Mar. 30, 1983) (reported in NAT'L L. J. 3, (May 16, 1983)) (suit against Roman Catholic diocese for injury resulting from homosexual assault on minor; church officials allegedly failed to act on information obtained by priest during confessional); see generally Funston, *Made Out of Whole Cloth? A Constitutional Analysis of the Clergy Malpractice Concept*, 19 CAL. W.L. REV. 507 (1983); Hotz, *Diocesan Liability for Negligence of a Priest*, 26 CATH. LAW. 228 (1981); Bergman, *Is the Cloth Unrevealing? A First Look at Clergy Malpractice*, 9 SAN. FERN. V.L. REV. 47 (1981); Ericsson, *Clergyman Malpractice: Ramifications of a New Theory*, 16 VAL. U.L. REV. 163 (1981).

408. See *Christofferson v. Church of Scientology of Portland*, 57 Or. App. 203, 644 P.2d 577 (1982), *appeal dismissed*, 293 Or. 456, 650 P.2d 928 (1982), *cert. denied*, 103 S. Ct. 1196 (1983), 103 S. Ct. 1234 (1983); *Van Schaick v. Church of Scientology of Cal.*, 535 F. Supp. 1125 (D. Mass. 1982); *Molko v. Holy Spirit Ass'n for the Unification of World Christianity*, No. 769-529 (Cal. Super. Ct. San Francisco Cty. Oct. 20, 1983) (summary judgement in favor of church in suit by two ex-members on claims of fraud, false imprisonment, intentional infliction of emotional harm, and restitution of gift); *George v. Int'l Soc'y of Krishna Consciousness*, No. 27-75-65 (Cal. Super. Ct. Aug. 10, 1983), 4 Civ. 30863 (Cal. Ct. App. Sept. 23, 1983) (reported in NAT'L L.J. 6 (June 6, 1983)) (suit by ex-Krishna member alleging civil conspiracy to hide her from parents); see generally Heins, "Other People's Faiths:" *The Scientology Litigation and the Justiciability of Religious Fraud*, 9 HASTINGS CONST. L.Q. 153 (1981).

In related cases in which the church is not a party, young people who have joined new religious movements have sued their parents and others who have taken drastic action to "deprogram" them. See, e.g., *Ward v. Connor*, 657 F.2d 45 (4th Cir. 1981); *cert. denied sub. nom.* Mandelkorn v. Ward, 455 U.S. 907 (1982); *Peterson v. Sorlien*, 299 N.W.2d 123 (Minn. 1980), *cert. denied*, 450 U.S. 1031 (1981). In order to abate these suits against "deprogrammers", one individual has in turn sued a church for malicious prosecution and abuse of process. *Alexander v. Unification Church of Am.*, 634 F.2d 673 (2d Cir. 1980).

*Milivojevich*⁴⁰⁹ clearly controls tortious suits that arise out of incidents of church discipline and clergy counselling. For example, in *Chavis v. Rowe*,⁴¹⁰ a deacon of a Baptist church was removed from his post apparently because he had fallen into disfavor with the pastor. The deacon and his wife sued for injunctive relief and damages maintaining that the removal process had not been in accord with established procedures. Although the court denied an injunction, a jury trial produced a verdict totalling 8,000 dollars for the plaintiffs. The Supreme Court of New Jersey held that the trial court should not have taken jurisdiction of the case because the inherent nature of the church disciplinary dispute required an impermissible excursion into matters of doctrine and church polity.⁴¹¹ Unlike a dispute concerning control of church real estate, where a neutral-principles-of-law approach is possible, a neutral-principles rule is never an option in quarrels over matters of doctrine and polity.⁴¹² The principle of independent, voluntaristic churches requires resort to the *Watson* rule of judicial deference to the decision of the highest ecclesiastical authority.⁴¹³

In *Washington v. Hill*,⁴¹⁴ the plaintiff brought suit against a pastor whose preaching allegedly caused an alienation of affection between husband and wife. Since neutrality requires that "[t]he law knows no heresy,"⁴¹⁵ injury said to be attributable to religious teaching cannot be regarded as an actionable tort or breach of duty short of "some substantial threat to public safety, peace or order."⁴¹⁶ The complaint in *Washington* was brought against the Reverend Hill, minister of the church the plaintiff's wife attended. Hill's teachings were alleged to have resulted in the breakup of the marriage. Ironically, the trial court entertained the action which resulted in a jury verdict for Hill.⁴¹⁷ For reasons of separation of church and state, the action should have been dismissed when first initiated.⁴¹⁸

409. 426 U.S. 696 (1976) (discussed *infra* text accompanying notes 280-91).

410. 93 N.J. 103, _____, 459 A.2d 674, 675 (1983).

411. *Id.* at _____, 459 A.2d at 678.

412. *Maryland & Virginia Eldership v. Church of God at Sharpsburg*, 396 U.S. 367, 369 (1970) (Brennan, J., concurring) ("[G]eneral principles of property law may not be relied upon if their application requires civil courts to resolve doctrinal issues.")

413. *Id.* at 368-69.

414. No. 80-423 (Ark. Ct. App. Mar. 4, 1981) (unreported decision).

415. *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728 (1872).

416. *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (citing as examples, *Cleveland v. Unites States*, 329 U.S. 14 (1946) (criminal prosecution of Mormon for transporting a woman across state lines for polygamous practices); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (criminal prosecution for violation of child-labor laws); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (criminal prosecution for refusal to obtain smallpox vaccination); *Reynolds v. United States*, 98 U.S. 145 (1878) (criminal prosecution of a Mormon for polygamy)). The *Sherbert* Court stated:

It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitations."

Sherbert v. Verner, 374 U.S. at 406, quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945) (regulation of labor union activities struck down in face of free speech and assembly challenge). The regulatory means utilized by the state must by the least restrictive to achieve its goals. *Sherbert v. Verner*, 374 U.S. at 407.

417. *Washington v. Hill*, No. CA 80-423, slip. op. at 1 (Ark. Ct. App. Mar. 4, 1981).

The difficulty of honoring the integrity of religious groups and at the same time recognizing the socially destructive consequences to other values such as parent-child relationships, is posed by the rash of recent tort litigation involving new religious movements.⁴¹⁹ Some of these emerging groups are said to have intertwined religious teaching with wholly secular and fraudulent ideas. Moreover, it is often young people who have been affected, and their parents have aligned themselves in opposition to the religious sect. *Christofferson v. Church of Scientology*⁴²⁰ and *Van Schaick v. Church of Scientology*⁴²¹ are two examples.

Of course, religious organizations are not immune from criminal prosecution⁴²² nor are they exempt from civil suits where acts such as false imprisonment have caused personal injury.⁴²³ The claims of religious fraud and intentional infliction of emotional distress allegedly caused by the purveying of false religious doctrine are more problematic. In *United States v. Ballard*,⁴²⁴ the Supreme Court held that the judicial system could never place the burden on a party to prove the truth or falsity of religious beliefs.⁴²⁵ The elements

418. A suit similar to *Washington* presently is pending in *Waites v. Watchtower Bible and Tract Soc'y of Pennsylvania*, No. CV 80-24401 (Mo. Cir. Ct., Jackson Cty., filed Nov. 6, 1980) (suit by husband for alienation of affection against national church, local congregation, and certain church members).

419. See generally Robbins & Anthony, *Cults, Brainwashing and Counter-Subversion*, 446 THE ANNALS 78 (1979).

420. 57 Or. App. 203, 644 P.2d 577 (1982), *appeal dismissed*, 293 Or. 456, 650 P.2d 928 (1982), *cert. denied*, 103 S. Ct. 1196 (1983), 103 S. Ct. 1234 (1983).

421. 535 F.Supp. 1125 (D. Mass. 1982).

422. See, e.g., *United States v. Heldt*, 668 F.2d 1238 (D.C. Cir. 1981), *cert. denied sub nom. Hubbard v. United States*, 456 U.S. 926 (1982) (alleged criminal violations of theft of Department of Justice Documents); cf. *Founding Church of Scientology v. United States*, 409 F.2d 1146 (D.C. Cir.), *cert. denied*, 396 U.S. 963 (1969) (attempted condemnation of religious artifact and literature for false and misleading labeling pursuant to Food, Drug and Cosmetic Act).

423. See, e.g., *George v. International Soc'y of Krishna Consciousness*, No. 27-75-65 (Super. Ct., Orange Cty., Cal.) (reported in NAT'L L. J. 6 (June 6, 1983)) (civil suit alleging "brainwashing and false imprisonment").

424. 322 U.S. 78 (1944).

425. 322 U.S. at 86-87. Justice Douglas, writing for the Court in *Ballard*, sounded a ringing tribute to freedom of thought:

Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. *Board of Education v. Barnette*, 319 U.S. 624. It embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one

of a claim for fraud include proof that a defendant knowingly made a statement which was false. Proof of these two elements (that it was false and that the person knew it was false when made) run counter to *Ballard* when the statements said to be false relate to religious belief. The plaintiffs in both *Christofferson* and *Van Schaick* sought to circumvent the holding in *Ballard* by sifting out the secular representations from the religious and founding their claim of fraud on only the secular.⁴²⁶ The First Amendment problem soon catches up with this distinction, however, because many of the representations involved cannot easily be categorized as religious or secular. Common sense, of course, dictates that certain representations are clearly secular or clearly religious.⁴²⁷ Thus, not every promise by a religious organization is immune from legal process. As to those representations that are quasi-religious, however, attempts to adhere to the *Ballard* rule have resulted in two approaches. In one approach, a determination is made initially by the finder of fact, who sorts out and dismisses those representations stemming from religious belief and tries the rest. In the second approach, the court refuses to engage in such delicate probing because either the inquiry is impossible or so fraught with the likelihood of error that more harm than good will result.

The court in *Christofferson* chose the first approach entailing the necessary divination to segment the secular promises from the sacred. Moreover, the court compounded the First Amendment problems by permitting this fact-finding to be done by a jury.⁴²⁸ The separation of church and state clearly indicates the second approach. When a representation is arguably religious, the matter is not actionable in fraud for First Amendment reasons.⁴²⁹ This accords with the Supreme Court's repeated warnings to avoid engaging in the classification of religious conduct.⁴³⁰ Necessarily, this means that certain wrongs

could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom. The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain.

Id.

426. *Christofferson*, 57 Or. App. at _____, 644 P.2d at 597-600; *Van Schaick*, 535 F.Supp. at 1141.

427. *Christofferson*, 57 Or. App. at 644 P.2d at 597 n. 22.

428. 57 Or. App. _____, 644 P.2d at 599-605. In *Christofferson*, the court treated the First Amendment as an affirmative defense, thus placing the burden of producing evidence concerning the religious nature of each representation alleged to be wrongful on the church. *Id.* at _____; 644 P.2d at 605.

429. See L. TRIBE, *supra* note 7, at 828. Cf. *Thomas v. Review Bd.*, 450 U.S. 707, 715 (1981) (only religious claims which are "bizarre" are without protection under the First Amendment).

430. *Widmar v. Vincent*, 454 U.S. 263, 269 n. 6, 272 n. 11 (1981).

will go without a remedy, but with the high purpose of not doing even greater harm to constitutional freedoms.⁴³¹

VI. CONCLUSION

Given these two complex realities, church and state, a continuous dialogue must proceed to make the adjustments in their interrelationship to meet changing situations. The dialectic is often disharmonious and proceeds with denials and affirmations, charges and recriminations, reconstructions and compromises. Neither church nor state will come to a resting place that will not provoke a new rejoinder. Yet it is possible to discern some order in this multiplicity, to stop the dialogue, as it were, at certain formative points in history, and to say this is what we as a society have chosen. For America, this formative period came as the states slowly shifted from mere religious toleration to separation, with its unitary concept of independent, voluntaristic churches in a secular state.

Initially, it must appear perplexing, devout believers making common-cause with the exponents of a secularized society, together urging separation of the church from state. But as must now be apparent, both groups' motives for doing so were widely divergent: the rationalists wanting to prevent overreaching by the church into affairs of state and the devotees desiring to protect the integrity and vitality of their religious community. Moreover, this alliance which brought separation from theory into political reality has its limits. For example, those who today would defend the free church are most insistent that a separated church is not a silent church. They are adamant that the full rights of speech and press are held by religious bodies, as others enjoy these rights, and that this expression may either affirm or criticize the state. Free expression does not transgress the separation principle.

As with any attempt to relate the abstract to specific policy, the general

431. The words of Justice Jackson, on the side taken by the First Amendment concerning this Hobson's choice, cannot be improved upon:

The chief wrong which false prophets do to their following is not financial. The collections aggregate a tempting total, but individual payments are not ruinous. I doubt if the vigilance of the law is equal to making money stick by over-credulous people. But the real harm is on the mental and spiritual plane. There are those who hunger and thirst after higher values which they feel wanting in their humdrum lives. They live in mental confusion or moral anarchy and seek vaguely for truth and beauty and moral support. When they are deluded and then disillusioned, cynicism and confusion follow. The wrong of these things, as I see it, is not in the money the victims part with half so much as in the mental and spiritual poison they get. But that is precisely the thing the Constitution put beyond the reach of the prosecutor, for the price of freedom of religion or of speech or of the press is that we must put up with, and even pay for, a good deal of rubbish.

Prosecutions of this character easily could degenerate into religious persecution. I do not doubt that religious leaders may be convicted of fraud for making false representations on matters other than faith or experience, as for example if one represents that funds are being used to construct a church when in fact they are being used for personal purposes. But this is not this case, which reaches into wholly dangerous ground. *United States v. Ballard*, 322 U.S. 78, 94-95 (1944) (Jackson, J., dissenting).

theory of independent, voluntaristic churches is not a bright line test mechanically yielding answers to particular problems such as those with the NLRB, the EEOC, and new religious movements. These are the proverbial "hard cases", which after all is where litigation congregates. In these instances, the line between independence and servitude for religious organizations is blurred and indistinct. Moreover, one wrong decision will not send the churches reeling. It is only when church-state entanglements are permitted to mount and multiply through neglect or misunderstanding or ignorance that the free church is threatened.

To prevent this attrition, this article has urged that the concepts of nonentanglement and noninterference in intrafaith disputes, be unified and shouldered to the task of permitting government only a minimal role in the affairs of religious entities. The unlimited nature of governmental actions and the many types of religious bodies make formulation difficult. The three factors which go into the Supreme Court's nonentanglement test are the place to begin. Importantly, governmental involvement should be prohibited when there is a measurable risk that worship, the religious teaching and propagation of the beliefs of the religious association, or the moral discipline of its members would be inhibited. This protection would embrace the educational and social welfare ministries of a given religion insofar as the ministry is engaged in essential religious functions of the faith. Governmental action also should be prohibited when there is a measurable risk that control over the organizational polity, the organization's own allocation of its financial resources, or the administration and discipline of personnel selected on the basis of religious criteria would be compromised.

There is danger in overconfident assertions concerning subtle and complicated matters, especially concerning as ancient a problem as church-state relations. So it is with the suggestion in this article to adhere to a separation of church and state which is historically true, where the religious organization is safeguarded to the same degree as the state against interference by the other. One observation can safely be made. The oft-lamented tensions between government and the religious communities are not all bad. Rather, the presence of tension is symptomatic of something healthy. Each "power" is sharpening and offsetting the other. For those who would defend the free church, this tension is evidence that the churches are neither so worldly as to be indistinguishable from the aims of state nor so withdrawn from the world as to be irrelevant to it.