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DEFINING "CHURCH" IN AMERICAN LAW

MICHAEL ARIENS

I. INTRODUCTION

The broad-ranging autonomy granted in American law to "churches" and "religious organizations" from the state stems largely from constitutional considerations. The First Amendment to the United States Constitution states in part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof". The Supremacy Clause of the Constitution, Art. VI, provides that all constitutional provisions are superior to all nonconstitutional laws, whether adopted by the federal government or one of the state (or local) governments. As a result, all labor, property, tax, education or other laws are subject to constitutional constraints.

The religion clause of the First Amendment has sparked extraordinary debate among American judges and scholars during the past half century. The numerous interpretations given to "establishment" and "free exercise" have varied greatly in the past half century. Despite the vigorous and thoroughgoing disagreement among current and past members of the judiciary concerning the proper interpretation of this provision, there remains some room for agreement regarding the signposts of religious liberty. Whatever else the religion clause stands for, it is an effort to promote religious freedom. Close connections between religion and the state inhibits religious freedom by favoring one sect (or several sects) over others. Limitations on religious belief and worship also inhibit religious freedom, and thus often (though not always) are impermissible. A minimal command

of the religion clause, then, is that the state is prevented from favoring one religion over another, or disfavoring some religion or religious belief.

This minimal command of neutrality is beguiling, and has attracted many supporters. The difficulty with the command of neutrality is in determining, in the administrative state, what constitutes neutral action and what constitutes forbidden support or hostility? Is it neutral for the state to provide texts (for reading, or mathematics) to children who attend religious schools? Other instructional materials? Is it neutral for the state to exempt property owned by churches and other religious organizations from taxation? Or to exempt a religious publisher from sales tax? Is it neutral for the state to provide an interpreter to a deaf child if that child attends a religious high school? Is it neutral to regulate the employment relation between a religious organization and its employees?

Each of the above questions has been the subject of a decision by the Supreme Court of the United States, and many of those questions, as well as others, have been decided by a deeply divided Court. The result of this division is that the course of the Court's jurisprudence concerning religious liberty has been anything but smooth. Part of the reason for that difficulty is that ascertaining a neutral point concerning the relation of law, government and religion is no simple task. In addition, the ideal of neutrality competes with ideals of separation (which attempts to distance government and religion) and voluntarism or accommodationism (which attempts to acknowledge the existence and importance of religion in the lives of many Americans). It has been nearly impossible for the Supreme Court of the United States to issue coherent decisions using merely the ideal of neutrality. The addition of competing ideals may make that difficult task impossible.

II. DEFINING RELIGION

The disputes among judges and scholars concerning the religion clause usually revolve around the definitional breadth of the phrases "respecting an establishment of religion" „or prohibiting the free exercise thereof". Books (including one I have co-authored with Professor Robert A. Destro, *Religious Liberty in a Pluralistic Society*) detailing the course of the interpretations of that language are numerous. So, too, are the cases decided by the Supreme Court of the United States, the (nearly) final arbiter of the language of the Constitution. What may surprise comparativists is that this tremendous intellectual output has not resulted in a clear definition of the word "religion".

The earliest definitions of religion were theistic in nature. One of the most important documents contributing to understanding the American experiment regarding religious freedom is James Madison's *Memorial and Remonstrance*. Madison wrote his *Memorial and Remonstrance* in late 1784 in opposition to a proposed law in the Virginia legislature to compensate "teachers of the Christian religion". Madison begins his *Memorial and Remonstrance* by quoting Article 16 of the Virginia Declaration of Rights: "Because we hold it for a fundamental and undeniable truth, 'that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not be force or violence'." Madison's declaration united opposition to the proposed law, and it was not adopted. In 1787, Madison and over fifty other delegates traveled to Philadelphia and wrote the Constitution of the United States. In 1789, the first Congress (consisting of two Houses, a House of Representatives and a Senate) was elected. James Madison was elected a Representative from Virginia, in part because he promised to draft a series of amendments (for the states to ratify) to the Constitution. These initial amendments, ten in all, became known as the Bill of Rights. One of those amendments was the First Amendment, quoted in pertinent part above.

The Supreme Court first had occasion to interpret the religion clause of the First Amendment in 1879 in *Reynolds v. United States*, 98 U.S. 145. In *Reynolds*, the United States criminally prosecuted the Reynolds, a member of the Church of Jesus Christ of Latter-day Saints (known as Mormons) for engaging in polygamy. Reynolds claimed a Free Exercise right to engage in plural marriages, a claim dismissed by the Court. The Court based its interpretation of the Free Exercise Clause in large part on the experience in Virginia between 1776 and 1786 concerning the relation of religion and government, of which Madison's *Memorial and Remonstrance* played a major role. More than a decade later, the Supreme Court, in another case involving members of the Mormon church, defined the word "religion". Following the theistic definition set forth by Madison, the Court stated: "The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose or reverence for his being and character, and of obedience to his will. It is confounded with the cultus or form of worship of a particular sect, but is distinguishable from the latter." *Davis v. Beason*, 133 U.S. 333, 342 (1890). The definition in Davis is notable in two respects: First, it adopts the definition of religion provided in Madison's *Memorial and Remonstrance*, a theistic definition of religion. Second, the Court attempts to place some boundaries on its definition, distinguishing "religion" from "cultus, or form of worship of a particular sect".

The subsequent necessity of defining religion arose relatively infrequently. When it did, the Supreme Court simply rephrased the definition given

decades earlier. In 1931, the Chief Justice of the United States, Charles Evans Hughes, wrote, "The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation". *United States v. Macintosh*, 283 U.S. 605, 633-34 (1931). However, by the mid-twentieth century, courts, influenced by the work of several Protestant theologians, including Paul Tillich, departed from content-based definitions in favor of an analogical definition. These cases arose in the context of interpreting federal law granting conscientious objector status to those men drafted who refused induction based on religious beliefs.

When the United States entered World War I in 1917, conscientious objector status was granted by statute to those men who were affiliated with a "well-recognized religious sect or organization organized and existing and whose existing creed or principles [forbid] its members to participate in war in any form". A constitutional challenge to this statute was rejected by the Supreme Court in 1918. In 1940, before the United States entered World War II, Congress adopted the Selective Training and Service Act, which modified much of the 1917 draft law. The act no longer required the conscientious objector claimant to belong to a pacifist religious sect. Instead, the claimant was eligible for conscientious objector status if his opposition to war was based on "religious training and belief". Between 1940 and 1948, two federal courts of appeals held that the language "religious training and belief" did not include beliefs based on philosophy or social or political policy. In 1948, Congress amended the 1940 act, declaring that the phrase "religious training and belief" was to be defined as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code". As opposition to America's involvement in the Vietnam War intensified, the Supreme Court decided two cases interpreting this statutory language.

In *United States v. Seeger*, 380 U.S. 163 (1965), the Supreme Court held that "religious training and belief", which Congress had defined as a "belief in a relation to a Supreme Being involving the duties superior to those arising from any human relation" was to be interpreted to mean "[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption within the statutory definition". Five years later, the Court held that "[t]he two groups of registrants that obviously do fall within these exclusions from the exemption are those whose beliefs are not deeply held and those whose objection to war does not rest at all upon moral, ethical or religious principle but instead rests solely upon considerations of policy, pragmatism or expediency". *Welsh v. United States*, 398 U.S. 333 (1970).

One consequence of *Seeger* and *Welsh* was the abandonment by the Supreme Court of a theistic definition of religion for purposes of interpreting the statute. Since the Court's decisions interpreting the Selective Training and Service Act, the Court has adverted to a constitutional definition of religion in only one case. In *Wisconsin v. Yoder*, 406 U.S. 215 (1972), the Court held that the Free Exercise Clause barred the State of Wisconsin from charging Jonas Yoder and others with the crime of violating the state's compulsory school-attendance law. Yoder was a member of the Old Order Amish religion, and pursuant to his religious beliefs, refused to send his child to school beyond the eighth grade (age 14 or 15). The state required all children to attend school until reaching age 16, and a parent's failure to send his child to school until that age made him subject to minor criminal penalties. In declaring that the Free Exercise Clause barred any such prosecution by the state, the Court noted that the liberty granted in this case was limited to religious claimants:

[I]f the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.

Id. at 216. This is the last word from the Supreme Court about the definition of religion. Although the Court has not further defined "religion", a large number of issues of religious autonomy and regulation have arisen. Even when the Court is not called upon to define the meaning of "religion" in the First Amendment, it often must create distinctions among what is considered secular, and what is considered religious.

III. REGULATION OF RELIGIOUS ORGANIZATIONS

The dual federalism of American government creates a multiplicity of regulations on private entities. Tax laws exists on the federal, state and local level. The employer-employee relation is regulated by complex federal and state laws and agencies. Property law is a creature of state law, and states may allow local governments (cities and counties) some flexibility in the manner of regulating private property. Although education is a function of the state government, that authority is often parceled out to local governments (*e.g.*, school districts). Monies for the support of public education are regularly raised through local property taxes. Some statewide assessments are also used for education and the federal government pays some money for certain kinds of educational benefits. In addition, the United

States Constitution grants to parents some rights regarding the education of their children.

The following is a survey of some of the tensions between religion and government in American law.

1. LABOR LAW

From the late 19th century until relatively recently, the employment relationship between private parties was governed largely by the law of contract. The governing ideology of contract law during the last third of the 19th century was to maximize individual liberty. The liberty of freedom of contract mandated an absence of restraint on the rights of parties to contract as they saw fit. One consequence of this ideology was that if an employee did not have a written or oral contract guaranteeing him employment for a stated period of time, that employee was considered an at-will employee. The at-will employee's employment was subject to the will (or agreement) of the employer. An at-will employee could be fired for any reason, or for no reason at all, because the contract between the employee and employer existed only as long as both agreed to continued their relationship. Although several states (as well as the federal government) attempted to modify the at-will doctrine in the early decades of the 20th century, those efforts were blocked by the Supreme Court's interpretation of the Constitution. During the 1930s, however, President Franklin Delano Roosevelt proposed, and Congress adopted, the National Labor Relations Act (NLRA), which regulated the employee-employer relation in the labor context. The NLRA permitted employees who so chose to organize and to engage in collective bargaining over the terms of their employment relationship, and also prohibited direct and indirect intimidation of employees. The NLRA applies to "any person engaged in commerce or in an industry affecting commerce", broad language that has extended the applicability of the NLRA to most businesses in the United States. The Supreme Court held the NLRA constitutional in 1937. The Act created an administrative agency, the National Labor Relations Board (NLRB), which was given jurisdiction to resolve disputes between employers engaged in commerce and their organized employees.

During the 1970s, the NLRB ordered union elections at religious high schools. The result of several of those elections was the certification of a collective bargaining agent for lay teachers employed at those religious high schools. One high school, owned by the Archdiocese of Chicago, refused to bargain with the bargaining agent. The NLRB held the Archdiocese in violation of the NLRA. On petition for a writ of certiorari to the Supreme

Court, the Court held that the NLRA did not confer jurisdiction over schools operated by a church. Because there was no "affirmative intention" on the part of Congress to extend the jurisdiction of the NLRB to church-operated schools, the NLRB was not permitted to make any orders with regard to those schools. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). Four of the nine members of the Court dissented from this conclusion. The Court's decision made it unnecessary to address the constitutional issue, that is, whether the government is constitutionally permitted to assert jurisdiction over religious or religiously-affiliated organizations. To date, the Court has not revisited this issue.

Although the result in *Catholic Bishop of Chicago* has not been disturbed, lower courts have refused to interpret the case beyond its facts. Instead, those courts have permitted the assertion of jurisdiction by the NLRB and state labor agencies in three different settings:

1. *Where the situation presents no significant First Amendment risk*: Where the courts find no significant risk that the First Amendment will be implicated by the assertion of jurisdiction, courts will find that the holding in *Catholic Bishop of Chicago* that jurisdiction is not appropriate absent a clear expression of congressional intent should not be followed;

2. *Where state labor boards assert jurisdiction*: When state (rather than the federal NLRB) labor boards assert jurisdiction over religious organizations, courts have refused to intervene on Religion Clause grounds; and

3. *Where a "clear expression" of congressional intent to regulate the affairs of a religious organization is found*: Some courts have found a clear expression of congressional intent to expand the NLRB's jurisdiction in the 1974 amendments to the NLRA.

In *NLRB v. Salvation Army of Massachusetts, Dorchester Day Care Center*, 763 F.2d 1 (1st Cir. 1985), the federal appeals court held that the exercise of jurisdiction by the NLRB over the collective bargaining between the Salvation Army and employees of its day care center did not present any significant risk that religious liberty protected by the First Amendment would be infringed. The same year, the United States Court of Appeals for the Second Circuit, in *Catholic High School Association of the Archdiocese of New York v. Culvert*, 753 F.2d 1161 (2d Cir. 1985), held that the assertion of jurisdiction by the New York State Labor Board over the collective bargaining between the Catholic High School Association and its lay employees, including teachers, did not violate the Religion Clause of the First Amendment. The court noted that the Clause barred excessive

entanglement between religion and government, but held that the mere assertion of jurisdiction by the Board in this case did not rise to that impermissible level of entanglement. In addition, the court rejected the claim by the Association that assertion of jurisdiction by the Board would violate the free exercise claims of the Association. In 1974, Congress amended the NLRA to provide for jurisdiction over religious hospitals and nursing homes. In *Tressler Lutheran Home for Children v. NLRB*, 677 F.2d 302 (3d Cir. 1982), the court held that the extension of jurisdiction to those institutions did not violate the Religion Clause.

One of the reasons given by the Court for its decision in *Catholic Bishop of Chicago* was that compelling negotiations concerning the ordinary subjects of bargaining would require a church to place the commitments of its faith on the bargaining table. Cases decided since *Catholic Bishop of Chicago* (although none have been decided by the Supreme Court) have rejected both the reasoning and result of that case. Instead, there has been an effort to create a formal distinction allowing jurisdiction to exist for subjects ancillary to the central purpose of the religious organizations and barring the exercise of jurisdiction over "core" religious issues. The objection to this distinction is, of course, that efforts by a governmental agency (or court) to differentiate between "core" and "ancillary" religious functions is to permit those agencies to define what is religious, in violation of the central notion of religious autonomy found in the Constitution.

In 1964, Congress passed the Civil Rights Act. As presently written, Title VII of the Act regulates the employee-employer relation by it an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2.

Title VII is more complicated than the NLRA, for it provides both an immunity and an exemption to some religious organizations. Title VII does not apply to a religious organization or society "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such [organization] of its activities". 42

U.S.C. § 2000e-1(a)(also known as § 702 of Title VII). Thus, the selection, hiring, firing, assignment of duties and payments to ministers of a religious organization are not subject to Title VII. In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987), the constitutionality of this statute was challenged. Mayson was a janitor at the Deseret Gymnasium, a nonprofit facility run by the Corporation of the Presiding Bishop. He had worked at the Gymnasium for 16 years. (The named party, Amos, was an employee at a clothing mill known as Beehive Clothing, which manufactures and distributes garments and temple clothing and is owned by the Corporation of the President of The Church of Jesus Christ of Latter-Day Saints.) Mayson was fired because he failed to obtain a temple recommend, a certificate that he is a member of the church and is eligible to attend its temples. Mayson claimed his firing violated Title VII, because it was impermissibly based on religious discrimination. The Corporation of the Presiding Bishop defended on the ground that § 702 of Title VII exempted religious organizations from the ban on religious discrimination. Mayson in turn claimed that § 702 violated the Religion Clause, because, as applied to secular activity (*i.e.*, the work of janitors rather than the work of ministers), the statute impermissibly distinguished between religious and non-religious organizations. This legislative favoritism toward religious organizations, Mayson argued, violated the constitutional command of neutrality regarding religion. The Supreme Court held that the statute was constitutional, at least as it applied to nonprofit activities of religious employers. Thus, religious organizations are statutorily granted autonomy from governmental regulation of the employer-employee relationship if the dismissed employee was working in connection "with the carrying on by such [organization] of its activities", and the employee alleges religious discrimination by the employer. As long as these are activities undertaken by the church or its affiliated non-profit entities, a Title VII action will not lie.

In *Little v. Wuerl*, 929 F.2d 944 (3d Cir. 1991), a Catholic high school refused to renew the teaching contract of a non-Catholic teacher at the school who had entered into a second marriage not recognized by the Catholic Church. The court noted that "[t]his exemption clearly makes Title VII inapplicable to Catholic schools when they discriminate by hiring and retaining Catholics in preference to non-Catholics. But this case raises the more difficult question of whether Title VII applies to a Catholic school that discriminates against a non-Catholic because her conduct does not conform to Catholic mores. Because applying Title VII in these circumstances would raise substantial constitutional questions and because Congress did not affirmatively indicate that Title VII should apply in situations of this kind,

we interpret the exemption broadly and conclude that Title VII does not apply."

This reasoning, however, has not been accepted by all courts that have addressed the issue. In an earlier case decided by a federal district court, a teacher at a Catholic school was fired because she of her sexual conduct. (The school learned that the teacher, although not married, was pregnant.) The court held that even though the school had a moral conduct standard applicable to all teachers based on Catholic teachings, the Constitution did not preclude the court from making its own determination whether the standard was equally applied to male as well as female teachers. Other cases decided after *Little* have held Title VII applicable to such "mixed motive" claims against religious employers.

Although not specifically raised in *Little*, the court also commented on the applicability of Title VII, as well as the exemption of § 702 to discrimination by the religious employer based on race, color, sex or national origin: "The language and the legislative history of § 702 compel the conclusion that Congress did not intend that a religious organization be exempted from liability for discriminating against its employees on the basis of race, color, sex or national origin with respect to their compensation, terms, conditions or privileges of employment."

The language of Title VII requires courts to ascertain whether the employer is religious or secular. If the employer is religious, then the court will undertake the analysis discussed above. If the employer is secular, no Religion Clause concerns exist. The difficulty of making a claim when the employer is religious has led to several cases in which the parties to the lawsuit argue about the religious nature of the organization. The most well known case concerning this issue is *EEOC v. Kamehameha Schools*, 990 F.2d 458 (9th Cir. 1993). The Equal Employment Opportunity Commission (EEOC) is a federal agency created by the Civil Rights Act of 1964. One of its major functions is investigating complaints of employment discrimination. The Kamehameha School was created through the will of Bernice Bishop, the last descendant of Hawaiian King Kamehameha. Two schools were created, one for boys, and one for girls, and the will stated that "the teachers of said schools shall forever be persons of the Protestant religion". Teachers were not required to be members of any particular sect of Protestantism. A non-Protestant applicant was denied a position at the School, and she filed a religious discrimination complaint with the EEOC. The EEOC sued, alleging that the School had violated Title VII. The Ninth Circuit Court of Appeals held that a determination whether an organization was religious or secular depended on an analysis of the facts to determine whether the organization was predominantly secular or predominantly religious. The court held that Kamehameha School was predominantly

secular. Although there were scheduled prayers and religious services, quotations from the Bible in school publications and courses in comparative religious studies, as well as the employment of Protestants to teach secular subjects, these facts did not make the School a religious organization. The School also claimed that it was permitted to hire Protestants only as teachers because religion was a bona fide occupational requirement (BFOQ). The court held that because the School's mandate was the broad mission to help native Hawaiians "participate in contemporary society for a rewarding and productive life", as well as to help students „define a system of values," the religious requirement was "largely irrelevant to this mission".

The decision in *Kamehameha Schools* is difficult to understand in part because the existence of school-mandated prayers and religious services, as well as the use of quotations from the Bible in school publications, would not be permitted in public schools. That is, the command of neutrality (joined by the ideal of separation) bars school-sponsored prayers and religious services in the public schools. The ideal of religious liberty, however, grants to parents the right to send their children to religious schools, at which religious and secular training will be integrated. The court in *Kamehameha Schools* also downplays the mission of the School to "define a system of values". If that is a reference to Protestant values, the Constitution does not permit the government to determine that those values can only be taught in religion class. The school is constitutionally granted the autonomy to teach those values in putatively secular subjects like mathematics or reading.

The cases discussed above largely concern the autonomy of religious organizations concerning the employment from governmental regulation through the NLRA and Title VII. If the employer is deemed secular, and meets relatively minimal requirements in terms of numbers of employees, that employer may be subject to a charge of religious discrimination in its treatment of an employee. As noted above, Title VII prohibits religious discrimination by private employers. When it amended the Civil Rights Act in 1972, Congress offered the following definition of religion:

> The term 'religion' includes all aspects of religious observance and practices, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. § 2000e(j) (§ 701(j) of Title VII). In *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), the Supreme Court held this language did not require the employer to bear more than a *de minimis* cost. To require more constituted an "undue hardship". In a later decision, *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986), the Supreme Court held that the

employer need only provide a reasonable accommodation. It need not provide the employee's suggested reasonable accommodation, even if that alternative creates no greater undue hardship on the employer. Once the employer offers a reasonable accommodation, its duty is at an end.

2. REGULATING CHURCH-OWNED PROPERTY

Religious organizations buy and sell land, run day care centers and food kitchens, raise (and borrow) money, commit torts, and enter into contracts. The government has an interest in regulating these transactions and interactions between religious organizations and other members of society. To what extent does the Constitution affect the regulation of these activities by religious organizations?

When a church or religious organization devolves into two or more factions, one of the issues facing a civil court is to determine which faction is the rightful owner of the property owned by the church. The Supreme Court has declared that state laws that attempt to resolve such church property disputes may do so through a "neutral principles" approach. The "neutral principles" approach examines the title to the deed to the property, state statutes regulating implied trusts, the corporate charter (religious organizations have First Amendment rights whether organized as a corporation or other legal entity) and any religious works that detail ownership of the property. One idea of "neutral principles", an idea not always achieved in the cases decided by courts, is that the court must defer to the appropriate religious authority if that authority has spoken on the matter of the ownership of the property.

Church property may be subject to zoning and historic preservation laws. Zoning regulations, which limit the use of private property, were held constitutional by the Supreme Court in 1926. Because zoning ordinances can limit the use of land to residences, the permissible extent of zoning regulation of church buildings is disputed. The Supreme Court of the United States has not spoken on the issue. However, a number of state courts have held that zoning regulations that exclude churches violate constitutional protections of religious liberty. Other courts have disagreed, hold exclusionary zoning regulations constitutionally permissible. Insofar as it can be determined, the trend appears to favor the latter view. Claims that religious liberty values ought to bar exclusionary zoning may be rejected in part because the Supreme Court has recently restricted the applicability of the Free Exercise Clause to neutral and generally applicable governmental regulations. Most exclusionary zoning regulations are written as neutral and generally applicable. The regulations do not exclude merely churches, but businesses and other entities that may "disturb" the neighborhood. Such

exclusionary zoning regulations will not be upheld, however, if the state is not able to provide any reason justifying the exclusion of a church from zoned property. Relatedly, some courts have deferred to governmental regulations that exempt church-related activities (like operating a day care center) from zoning regulations that may apply to similarly situated but non-religious organizations. They have not been as solicitous of efforts by churches to operate food banks for the homeless when such operations are otherwise impermissible uses of property.

In addition to the problem of the constitutionality of exclusionary zoning, the application of historic preservation laws to church property has raised constitutional issues. Cities and other governmental entities are granted the power to declare buildings and other structures as historic places, which limits the owner's ability to tear down or otherwise alter that building. Is the application of such laws to churches a violation of the religious liberty interests of those institutions? As in the zoning cases, different courts have answered this question differently. The cost of the historic preservation ordinance on the church is twofold: first, the ordinance requires the church to seek the approval of a governmental body before it can alter the exterior of its house of worship, even if the reason for the alteration is religious in nature. Second, the ordinance can harm the church financially, by reducing its value, which may have consequences for the church's ability to fulfill its mission.

A related issue is the constitutionality of laws that bar discrimination by those renting housing. A major issue before a number of state and federal courts is the constitutionality of that legislation when applied to the following case. A landlord refuses to rent to an unmarried couple because his religious beliefs forbid countenancing cohabitation without the benefit of marriage. The couple then complains to the local anti-discrimination housing board, which declares that the landlord has discriminated on the basis of "marital status". The landlord then sues in court, asking that the determination of the housing board be set aside as an unconstitutional infringement of his religious liberty. To date, about a dozen cases have been decided on this issue throughout the United States. The courts are nearly evenly split. Half have held that the anti-discrimination law does not infringe the religious liberty rights of the landlord, and half have held the opposite. Resolution of this issue is not expected until the Supreme Court decides it, which may be some time in coming.

When a religious organization engages in action that causes injury to another, American tort law requires the organization to pay as if a nonreligious organization. However, if the harmful action (tort) is committed by one affiliated with the religious organization, difficult questions of ascending liability arise. In general, the organization is held liable for the

tortious actions of another if the actor was acting primarily for the benefit of the religious organization. In addition, the religious organization may be held liable for the actions of a third party if the organization controls the actions of the third party. The difficulty with this approach is that religious organizations are not organized with the same clear lines of authority as for-profit organizations. Not only do religious organizations use many volunteers, but issues of control exists with regard to employees like priests and ministers. If a church attempts to define the work of its ministers in such a way as to grant them extensive autonomy from hierarchical supervision, must civil authorities defer to that judgment, or may they impose vicarious liability in any event? Clearly, most larger religious organizations are likely to have more assets than the priests or ministers who serve those organizations. In such cases, the incentive to affix liability upon the religious organization rather than the minister or priest is strong.

Lastly, how should a state respond when allegations are made that those charged with the duty of administering church affairs are guilty of fraud, malfeasance, or other actions inconsistent with their fiduciary duties? One of the vestiges of the American law of charitable trusts that applies to nonprofit and charitable organizations (including religious organizations) is oversight and supervision by the state Attorney General. Of course, an investigatory demand by the Attorney General that the religious organization turn over its financial records can be used to harass an unpopular faith. In 1981, the Attorney General for the State of California obtained *ex parte* court orders empowering a receiver "to take possession forthwith of all of the funds, assets and property, and all of the books and records" of the Worldwide Church of God, its College and Foundation, and enjoined the defendants and others from interfering with the receiver's efforts to obtain control of the Church's funds, property and other assets. Despite the fact that the order was later overturned, the case brought into focus the power of Attorneys General to oversee religious organizations once claims of financial mismanagement are alleged. Although a Puerto Rican court declared unconstitutional an oversight law in Puerto Rico, most states have such laws.

3. TAX LAWS

3.1 TAX-EXEMPT ORGANIZATIONS GENERALLY

Section 501(c)(3) of the Internal Revenue Code provides tax-exempt status for those organizations organized and operated exclusively for religious purposes. *See* I.R.C. § 501(c)(3) (1999) (stating that "[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively

for religious... purposes" are exempt from taxation). Section 501(c)(3) also confers exempt status on those charitable organizations with the purpose of advancement of religion. However, neither the Code nor the Regulations define the types of activities that qualify as religious for the purposes of Section 501(c)(3).

As noted earlier, the lack of a solid working definition of what constitutes a religious organization stems from constitutional considerations. Because of this prohibition, courts and the Internal Revenue Service (IRS) have been reluctant to delineate what types of activities and rituals an organization can engage in and still maintain its exempt status. However, there are three types of religious organizations specifically mentioned in the Internal Revenue Code: Churches, Integrated Auxiliaries of Churches, and Charitable Organizations. *See* I.R.C. § 501(c)(3).

3.1.1 CHURCH

Despite the existence of such constitutional concerns, Congress and the Treasury Department have recognized that the IRS needs the ability to designate which organizations should receive special treatment and protection under the Code and the Regulations. Therefore, the term "church" is defined in Treasury Regulation § 1.511-2(a)(3)(ii) (1999). A church "includes a religious order or a religious organization if such order or organization (a) is an integral part of a church, and (b) is engaged in carrying out the functions of a church, whether as a civil law corporation or otherwise". In ascertaining whether a religious order or organization is an integral part of a church, the IRS will consider the degree with which the organization is connected with and controlled by such church. A religious organization carries out the functions of a church "if its duties include the ministration of sacerdotal functions and the conduct of religious worship [which is to be determined based upon] the tenets and practices of a particular religious body constituting a church".

To clarify this circular definition, the IRS has promulgated fourteen factors to aid in determining whether an organization is in fact a church. *See Lutheran Soc. Serv. of Min.. v. United States*, 758 F.2d 1283, 1286-87 (8th Cir. 1984) (citing Speech of Jerome Kurtz, IRS Commissioner, at PLI Seventh Biennial Conference in Tax Planning, Jan. 9, 1978, *reprinted in* Fed. Taxes [P-H] 54,820 [1978]). These factors include:

- a distinct legal existence;
- a recognized creed and form of worship;

- a definite and distinct ecclesiastical government;
- a formal code of doctrine and discipline;
- a distinct religious history;
- a membership not associated with any other church or denomination;
- an organization of ordained ministers;
- ordained ministers selected after completing prescribed studies;
- a literature of its own;
- established places of worship;
- regular congregations;
- regular religious services;
- Sunday schools for religious instruction of the young;
- schools for the preparation of ministers.

Of the criteria listed, those in italics are "of central importance". *See American Guidance Found., Inc. v. Untied States*, 490 F. Supp. 304, 306 (D.D.C. 1980), *aff'd without opinion*, (D.C. Cir. 1981). Furthermore, the Tax Court has acknowledged that the above criteria is helpful in determining whether an organization qualifies as a church, although it is not dispositive. *See Foundation of Human Understanding v. Commissioner*, 88 T.C. 1341, 1350 (1987).

For example, in *Foundation of Human Understanding*, the Tax Court applied the fourteen-part test in concluding that the organization was a church, even though it did not exhibit all the criteria. The court focused on the regularity of the Foundation's meetings and places of worship in reaching its conclusion. Other factors that were influential to the court's decision were that religious services were open to the public and conducted by ordained ministers. Furthermore, many followers considered the Foundation to be their only church. Some factors, however, were problematic for the Foundation. Not only did the organization have a short religious history, it lacked both a definite ecclesiastical government and a formal code of doctrine and discipline. Additionally, the Foundation's emphasis on emotional self-control through meditation set it apart from other more traditional forms of religion. Despite these problems, the Tax

Court found the Foundation to be a church, declaring that "[i]t possess[es] associational aspects that are much more than incidental".

The Tax Court has issued several decisions dealing with the definition of a church in the context of tax-exempt status. In *Vaughn v. Chapman*, the Tax Court determined that Congress intended the word "church" to have a more precise definition than the term "religious organization". *Vaughn v. Chapman*, 48 T.C. 358, 363 (1967). Specifically, the court stated that although "every church may be a religious organization, every religious organization is not per se a church". In another case, the court found that an organization is not a church simply because it retains religious purposes; the means by which its religious purposes are accomplished are equally important. *See Church of Eternal Life and Liberty, Inc. v. Commissioner*, 86 T.C. 916, 924 (1986). In reaching its conclusion, the court defined a church as "a coherent group of individuals and families that join together to accomplish the religious purposes of mutually held beliefs. In other words, a church's principal means of accomplishing its religious purposes must be to assemble regularly a group of individuals related by common worship and faith". *Id*. However, in *American Guidance Foundation, Inc. v. United States*, a husband and wife who conducted regularly worship services in their home neither constituted a "congregation" nor a "church" under the Internal Revenue Code. *See American Guidance Foundation*, 490 F. Supp. at 307.

One of the major benefits of qualifying as a "church" is the protection a church receives from federal law from audits by the IRS. The Church Audit Procedures Act, 26 U.S.C. § 7611, states:

(a) Restrictions on inquiries. –

(1) In general. –

the Secretary may begin a church tax inquiry only if –

(A) the reasonable belief requirements of paragraph (2), and

(B) the notice requirements of paragraph (3), have been met.

(2) reasonable belief requirements. – The requirements of this paragraph are met with respect to any church tax inquiry if an appropriate high-level Treasury official reasonably believes (on the basis of facts and circumstances recorded in writing) that the church –

(A) may not be exempt, by reason of its status as a church, from tax under section 501 (a), or

(B) may be carrying on an unrelated trade or business (within the meaning of section 513) or otherwise engaged in activities subject to taxation under this title.

Recently, a United States District Court upheld the IRS's decision to revoke the tax exempt status of a church that bought an advertisement in a newspaper opposing then-Presidential candidate Bill Clinton's run for office. The IRS's decision was that the church had violated the "no partisan political activity" rule, and was not based on any determination whether the church was not a *bona fide* church.

3.1.2 INTEGRATED AUXILIARIES OF CHURCHES

An integrated auxiliary of a church is exempted from filing an annual return. I.R.C. § 6033(a)(2)(i) (1999). Prior to 1994, an integrated auxiliary of a church was defined as an organization that is: "(1) exempt from taxation as an organization described in section 504(c)(3); (2) affiliated with a church (within the meaning of § 1.6033-2(g)(t)(iii)); and (3) engaged in a principal that is 'exclusively religious'." Department of the Treasury, *Exempt Organizations Not Required to File Annual Returns: Integrated Auxiliaries of Churches*, (visited Apr. 8, 1999) <ftp://ftp.fedworld.gov/pub/irs-regs/td8640.txt>. An organization's activities were not considered exclusively religious if they were educational, literary, charitable, or of another nature that would serve as a basis for exemption under Section 501(c)(3).

In 1994, the IRS revised regulations §§ 1.6033-2 and 1.508-1 with respect to sections 6033(a)(2)(i) which adopted the prior definition of an integrated auxiliary of a church as set forth in Rev. Proc. 86-23. Under these regulations, to be an integrated auxiliary of a church, the organization must first be one listed in section 501(c)(3) and section 509(a)(1), (2), or (3). Such an organization must also be affiliated with and internally supported by a church. An organization is internally supported if it either:

(1) does not offer admissions, goods, services, or facilities for sale, other than on an incidental basis, to the general public;

(2) offers admissions, goods, services, or facilities for sale, other than on an incidental basis, to the general public and not more than 50 percent of its support comes form a combination of governmental sources, public solicitation or contributions, and receipts other than those from an unrelated trade or business.

Id.

3.1.3 CHARITABLE ORGANIZATIONS

As previously stated, Section 501(c)(3) exempts from taxation those organizations operated for charitable purposes. To be considered a charitable organization, the organization "must show that it is organized and operated for purposes that are beneficial to the public interest". *Tax Exempt Status for Your*
Organization: Other 501(c)(3) Organizations, (visited Apr. 8, 1999) <http://www.irs.ustreas.gov/prod/forms_pubs/pubs/p5570306.htm>.
Organizations included within this category include:

- Relief of the poor, the distressed, or the underprivileged,
- Advancement of religion,
- Advancement of education or science;
- Erection or maintenance of public buildings, monuments or works;
- Lessening the burdens of government;
- Lessening of neighborhood tensions;
- Elimination of prejudice and discrimination;
- Defense of human and civil rights secured by law; and
- Combating community deterioration and juvenile delinquency.

Id.

3.1.4 RELIGIOUS ORGANIZATIONS

Although a religious organization may not be a church, charitable entity or an integrated auxiliary of a church, that organization might still qualify for tax-exempt status if its is "organized and operated exclusively for religious purposes". *See* § 501(c)(3). The IRS adopted the two-part test developed in *United States v. Seeger*, 380 U.S. 163 (1965) as an appropriate standard for administrative determinations of whether an organization is religious for purposes of Section 501(c)(3). The test first requires that the religious beliefs must be "sincere and meaningful" and that the "must occupy in the lives of the individuals holding them a place parallel to that filled by the belief in God of traditional religious". *Id.* In adopting this test, the IRS did acknowledge that it was precluded under the First Amendment from considering the context or sources of a doctrine that purported to be a

religion. *Id.* However, it concluded that it was not "prohibited from requiring the organization to offer some evidence that its members had a sincere and meaningful belief in the organization's doctrine and that the believe occupied in the lives of those members a place parallel to that filled by the belief of God of traditional religions". *Id.*

In 1970, the Supreme Court was asked to declare unconstitutional a law granting property tax exemptions to religious organizations for religious properties used solely for religious worship. Although the Court acknowledged that "[g]ranting tax exemptions to churches necessarily operates to afford an indirect economic benefit" to those churches, this was a „lesser involvement than taxing them". Consequently, such property tax exemptions were constitutional. However, not all tax exemptions granted to religious organizations have met the requirements of the First Amendment. In *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), the Court held that an exemption from Texas sales tax provided to "periodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religious faith" was unconstitutional. Because the exemption was available just to religious organizations, the law unfairly favored religious entities compared with secular publishers. As noted by the dissent, however, the constitutionality of exemptions from income of parsonages raises the same issues, which the dissent suggested required a different result in *Bullock*.

4. EDUCATION

In 1925, the Supreme Court declared unconstitutional an Oregon law barring parents from sending their children to religious or other private schools. Although parents have the right to send their children to religious schools, the assistance they can obtain from the state to effectuate that choice is limited. The Supreme Court has decided a number of cases involving both the extent of religious symbolism and accommodation in the public schools and the extent of aid to religious schools and the students attending those schools. Parents can obtain reimbursement of transportation costs to and from religious schools, but not the costs of bus transportation on field trips. The government is permitted to loan secular textbooks to students at those schools, but not other instructional materials, like maps, globes and audio-visual equipment. The government may provide diagnostic equipment and remedial services to students at religious schools, but a religious school may not be reimbursed the per capita cost of state-mandated service expenses. The Court's decisions concerning aid to students attending religious schools are a mess.

Continuing concern about the state of public education in the United States has led to private and government efforts to provide tuition vouchers to poor schoolchildren. The State of Wisconsin adopted a tuition reimbursement program for schoolchildren whose parents earned a limited income. Although the program first excluded children choosing to attend a religious school, the Wisconsin legislature amended the program after several years to allow reimbursement for children attending either secular or religious private schools. In 1998, the Wisconsin Supreme Court held the program constitutional. Less than a year later, the Supreme Court of Maine held a tuition voucher program that explicitly excludes religious schools from receipt of state funds does not violate the United States or Maine constitutions. In April 1999, the State of Florida adopted a tuition voucher program for poor students, a program that will be challenged as an unconstitutional establishment of religion even before it is implemented.

5. OTHER STATUTES ADDRESSING SPECIFIC RELIGIOUS CONCERNS

Although the United States does not have a national health care system, the government provides extensive funding of health care facilities. A number of hospitals in the United States are religiously-affiliated. In the aftermath of the Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), the question arose whether religiously-affiliated hospitals could be ordered to perform abortions or sterilizations. Similar concerns have been raised in the past decade or so due to heightened awareness regarding such issues as assisted suicide and euthanasia.

Recently, Congress adopted a statute codified at 42 U.S.C. § 300a-7. This statute provides some protection for those institutions and persons who, because of their participation in federally funded programs, may be coerced into conforming their views on abortion to those of the administrators of the program. In part, those statutes read:

> (d) Individual rights respecting certain requirements contrary to religious beliefs or moral convictions. No individual shall be required to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered by the Secretary of [Health and Human Services], if his performance or assistance in the performance of such part of such program or activity would be contrary to is religious beliefs or moral convictions.
>
> (e) No entity which receives, after the date of enactment of this paragraph, any grant, contract, loan, loan guarantee, or interest subsidy under the Public Health Service Act ... may deny admission or otherwise discriminate against any applicant ... for training or study because of the applicant's reluctance, or willingness, to counsel, suggest, recommend, assist, or in any way participate in

> the performance of abortion or sterilizations contrary to or consistent with the applicant's religious beliefs or moral convictions.

In addition to these federal provisions, some states have passed laws granting to hospitals and to persons working in hospitals the right to refuse "to participate in the termination of a pregnancy".

IV. CONCLUSION

In all of these cases, the justification for granting autonomy to the religious organization, either by statute or by constitutional mandate, is because, as the Supreme Court has stated,

> For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals. Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself. Solicitude for a church's ability to do so reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.

Although American law zealously guards the autonomy of religious organizations, it does not grant those organizations the right to be a law unto themselves. Some regulatory laws are applied to religious organizations in the same way they are applied to secular organizations. On other occasions, as suggested by the brief overview of laws that regulate labor, property, tax, and education, the government exempts religious organizations from otherwise generally applicable laws. Congress ordinarily does so in light of the constitutional command protecting religious freedom. Deciding the extent of such constitutionally and statutorily based autonomy remains both a difficult and hotly contested issue.