D. CHURCH EMPLOYEES

At least as important as the issue of church membership is the ability of a religious body to select, train, control, discipline and discharge its core personnel, its staff, its full-time employees. These terms are meant to be interchangeable, since they point to variant aspects of a special group of members that virtually every religious body has, though it may characterize their roles in different ways: the *clergy*. In some groups these persons are set apart from the rank and file, the "laity," as by ordination, while in others the differences between "career" practitioners and those who must earn their living in nonreligious occupations is sought to be minimized. But there are unavoidable *functional* differences between the two elements in the religious body, whether those differences are formally signalized by ordination or not. A few members are going to be active at the center of the religious enterprise full time, something most members cannot be. The former will have the "inside track" on whatever is going on; the others will not. Whether the former group is ordained, whether given special training or deference, whether paid salaries or not, is secondary. They are *there* all the time. They "run the show," as it were, however much that eventuality may be disguised or resisted.

In addition, some religious bodies hire clerks or other specialized functionaries, who may not even be members, or not very zealous members, yet who, because of their full-time occupational responsibilities for the religious group, may exert more influence on its life than the most zealous members who must pursue secular occupations outside the religious group. In addition, there may be lay volunteers, who, though members, are not specially trained, selected or ordained, but because of their interest and free time, spend as many hours working in and for the religious group as some "clergy." All of these more-than-avocational personnel, to the degree that they shape the life of the religious group, need to be amenable to its direction and control if it is to determine its own nature and destiny,[1] and all are the subject of this section. Yet all are not in the same category with respect to church autonomy. A developmental chronology may clarify the situation.

A religious movement usually begins with one or a few inspired, "charismatic" leaders, such as Martin Luther (Lutherans) or John Calvin (Calvinists), John and Charles Wesley (Methodists), George Fox (Quakers), Alexander Campbell (Disciples), Joseph Smith and his successor, Brigham Young (Mormons), Mary

1. See analysis of this issue by Laycock, D., "Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy," 81 *Columbia L.Rev.* 1373 (1981), quoted at § 3 below.

Baker Eddy (Christian Science), Mother Ann Lee (Shakers), and so on. These persons are the "founders" of the movement. As they attract more and more followers, they may appoint or recognize a handful of close associates upon whom they can rely for capable and comprehending assistance. These could be called the "elders" of the movement. To this point at least, the leadership role is "from the top down," autocratic rather than democratic, for the simple reason that the "founder" defines the movement and its direction, and the followers follow where he or she leads. The "elders" are chosen and retained by the founder to assist in mediating his or her leadership.[2]

As time passes, however, the first generation of leaders dies out, and new ones succeed, by one path or another, to the leadership positions thus vacated. At some point in this process, the group itself begins to take responsibility for its character and direction rather than simply receiving these from the founder and elders and their successors. It then gains and exercises a will to conserve and control its own being, and to select leaders who will serve that end rather than diverging from it in idiosyncratic ways. In time it sets up more or less elaborate mechanisms for training, selecting and controlling its leadership at all levels, including theological seminaries, examiners for ordination, ecclesiastical supervision, disciplinary procedures, and sanctions of demotion or defrockment.

Thus the function of leadership becomes institutionalized and subjected to the will of the movement as a whole. (It may still be reposed in an individual prelate, pope or patriarch, but the selection of that individual is institutionalized.) It is an important aspect of the collective exercise of religious liberty that a religious movement be permitted to be the kind of organizations it wants to be, and a central element of that liberty is the ability to select, train, discipline, control and discharge its own leaders and lesser functionaries in accordance with its own understanding of its nature and purpose, arrived at by the means and methods it has chosen for itself, whether by divine inspiration, democratic vote or the casting of lots.[3]

Of course, the higher the level of responsibility of the leadership, the more important is the ability of the religious body to insure that the leadership is amenable in key respects to the essential character and policy-determination of the body. At the lowest levels, it is sometimes argued, that amenability may be attenuated by other considerations. The law in this area has accorded autonomy to religious bodies in these matters more readily at the upper levels, but recognition has gradually been extended to autonomy interests at lower levels as well. The point where those interests begin to be outweighed by other values such as nondiscrimination in employment has been the fulcrum of change in this area of the law, and is discussed at § 2, The Clergy-Laity Distinction below.

2. Cf. Exodus 18:21ff. (Moses' choice of subleadership).

3. Cf. Acts of the Apostles 1:26.

1. Some Early Cases

As was noted earlier, one of the side effects of the Supreme Court's decision in *Bouldin v. Alexander*, 1872, was to displace the leadership of the Rev. Mr. Bouldin, or at least to discountenance his effort to "turn out" his opponents.[4] That may inevitably be true whenever a lawsuit arises in which clergy are involved—as plaintiffs or defendants—and in which they lose, and the courts are certainly not obliged to stay their hand merely because one or more of the parties is ordained. But there are three venerable and nearly forgotten cases in which the Supreme Court acted to affect the ability of ordained persons to carry out the tasks involved in their holy calling—in one case to abstain, and in the others to vindicate—the right to function as clergy in the sight of the law. The question in the first two of these nineteenth-century cases was not whether the church could select certain persons as clergy or control and discipline them in that function but whether, once the church had ordained them and set them at work, the civil law could intrude to prevent their work.

a. *Permoli v. New Orleans* (1845). First and foremost among the activities that are central to the internal autonomy and the very integrity of a religious body are those that constitute the cultic practice of the religion itself, characterized in Christian circles as the *preaching of the Word and administration of the sacraments*. These have usually been immune from interference by the state—at least in the United States—but not always. Indeed there is the general impression that no such interference has ever been attempted in this country, but such is not the case. Since—fortunately—such attempts have been rare and occurred in the early and primitive periods in the development of the law of church and state, they serve more as an introduction and a cautionary lesson in contrast to more fully developed areas of the law. But they do reveal fascinating facets in the evolving of the law of church and state.

In 1842 the First Municipality of the City of New Orleans adopted an ordinance (or revised a similar ordinance of 1827) requiring that all (Roman) Catholic funerals should be performed at the obituary chapel on Rampart Street, and providing a fine of $50 to be assessed against anyone who should carry a body to, or expose it in, or celebrate a funeral over it at, any of the (other) Catholic churches of the municipality. A few days later another ordinance was adopted by the Municipality rescinding the fine against those transporting or exposing the body and leaving it in effect only against "any priest who shall officiate at any funerals made in any other church than the obituary chapel."

Two days later a warrant was issued by the Municipality against the Reverend Bernard Permoli, a Catholic priest, for officiating at a funeral in the church of St. Augustin contrary to the ordinance, and he was fined $50. Father Permoli responded through legal counsel that he had indeed so officiated at the funeral of the body of one

4. See § C3 above.

Louis LeRoy, "by blessing it, by reciting on it all the other funeral prayers and solemnity, all the usual funeral ceremonies prescribed by the rites of the Roman Catholic religion... assisted by two other priests, and by the chanters or singers of said church." Furthermore, he insisted, "that in so doing he was warranted by the Constitution and laws of the United States, which prevent the enactment of any law prohibiting the free exercise of any religion."[5]

The judge hearing the case decided in Permoli's favor, but was overruled by the City Court, from whence an appeal was taken to the U.S. Supreme Court. Arguments of learned counsel were set forth in the record at some length, as was the custom through most of the nineteenth century, from which the following considerations can be gleaned:

For Father Permoli (by William G. Read):

1. The Northwest Ordinance, adopted by Congress in 1787 under the Articles of Confederation for the purpose of "extending the fundamental principles of civil and religious liberty" that prevailed in the thirteen original states to the new states coming into the Union, contains the following guarantee:

> Art. 1st. No person demeaning himself in a peaceable and orderly manner shall ever be molested on account of his mode of worship or religious sentiments, in the said territory.

When Louisiana was recognized by Congress in 1805 as a territory (of Orleans), its people became entitled to "all the rights, privileges, and advantages secured by said ordinance," and when it was admitted to the Union as a State in 1812 the same conditions and terms were extended in perpetuity.

2. In a recent case, *Wardens of Church of St. Louis v. Bishop Blanc*, the Supreme Court of Louisiana had held (1844) that the state constitution contained no specific restriction on legislative power with respect to religion because it was thought unnecessary.

> It had already been settled, by solemn and inviolable compact, that religious freedom, in its broadest sense, should form the basis of all laws, constitutions and governments, which should forever after be formed in the territory.... In the opinion of the court, no man can be molested, so long as he demeans himself in a peaceable and orderly manner, on account of his mode of worship, his religious opinions and professions, and the religious functions he may choose to perform, according to the rites, doctrines and discipline of the church or sect to which he may belong. And this absolute immunity extends to all religions, and to every sect.

3. The ordinances are directed only against Catholics.

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5. *Bernard Permoli v. Municipality No. 1 of the City of New Orleans*, 3 Howard 589 (1845).

> Their bearing upon only one denomination of worshippers establishes their tyrannical character. Equality before the law is of the very essence of liberty, whether civil or religious. The performance of funeral obsequies, in buildings consecrated to public adoration of the deity, is not confined to Catholics, but is practiced by many other religious societies.

4. As amended November 9, 1842, they make criminal only the acts of priests, and only those acts that are by their very nature indisputably religious.

> They punish the performance of a religious function by individuals acting in their religious capacity or character, "according to the rites, doctrine, and discipline of the church to which they belong." They legislate for the priest as priest, and only as priest... as the ordained celebrant of the office for the dead.

Counsel traced the funeral custom through prior ages and divergent rites (in language of such pious, ecclesiastical and orotund richness that it is hard to believe one is reading from the records of the Supreme Court rather than from a work on liturgy) to show that in holding funerals in the sanctuary of the church itself "the Catholic unites with the Nestorian and the Copt, and the separated Greek, and every liturgist before the sixteenth century," but adding that, even if it were "the last novelty of the day," confined to a single contemporary band of believers, it would still be protected from governmental interference by the promise of the Northwest Ordinance.

5. The judge below had characterized the practice of "praying for the dead in churches, with the body there present" as "merely a disciplinary observance" (citing the testimony of Bishop Blanc himself) and therefore susceptible to be "regulated or controlled by the legislature, without violating religious liberty." To this the defendant's counsel replied:

> Now if there be aught characteristic of religious liberty, it is the exemption of ecclesiastical discipline (defined by the learned Hooker, "church order") from secular control; and this, because the external forms and practices of religion are all that temporal power can directly invade. Faith, doctrine, are beyond its reach.... And it may be safely asserted, that there never was an arbitrary change introduced by government into the religious opinions of a community, which was not masked by a pretended reform of exterior observances. What distinguishes the most numerous sect of Christians in our country [Methodists], from the many who agree with them on doctrinal points, but their method; the practical methods established by the founders of their peculiar system of church polity? In fact, they have taken their name from it. Yet what is "method" but another word for "discipline"? And would a member of that society consider himself in the enjoyment of religious liberty, if told "believe what you please of the divinity, the incarnation, the atonement, the influences of the

> Holy Spirit, baptism; but hold no class-meeting—hold no camp-meeting. These, though perhaps edifying and consolatory to you, are only matters of discipline, and amenable, therefore, to the municipal police?"

No better articulation of the thesis of this section has been made in courts of law than this argument by William G. Read in 1845. But what lay back of the ordinance and the dispute? One explanation was suggested by the defendant.

6. The court below had explained that "in the year 1842, the late lamented and venerable revered Abbe Moni, curate of the parish of St. Louis, having departed this life, some misunderstanding took place between his successor and the church-wardens. The new curate and assistant clergy abandoned the cathedral, and commenced to celebrate funeral ceremonies in other churches than the obituary chapel, this chapel being under the administration of the said wardens." The counsel for Father Permoli characterized the situation in this way:

> [T]he judge below contends that the Catholic office for the dead is not prohibited; inasmuch as it is permitted in the "obituary chapel." That is to say, religion is free, though its observances may be limited to a building in the possession of notorious schismatics who might tax them to virtual prohibition, or apply the proceeds, at their own discretion, to the subversion of religion itself.

Arguments made for the Municipality by one Barton included the following:

1. The ordinances had nothing to do with ecclesiastical practices or disputes, but were purely public health measures.

> The parochial church of St. Louis is the principal Catholic cathedral in the city, and, like the church of St. Augustin, is situated within the square of the city, where all the streets are very narrow.
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> New Orleans is visited annually with the yellow fever, in either the sporadic or endemic form, and strong sanitory [*sic*] measures are deemed indispensable there to check the range and prevalence of the pestilence when it comes.
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> [If the ordinance] had its origin in the mere purpose of infringing upon, and discriminating, to the prejudice of the religious rights of one denomination of Christians, it is not to be defended; but if designed merely as a regulation of sanitory [*sic*] police, for the preservation of the public health, then the law of necessity pleads in its behalf; and all arbitrary rites and ceremonials which tend to frustrate its objects, or impair its efficacy, must yield to the supremacy of the common good.
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> [T]he circumstances strongly repel all inferences that the First Municipality council could have designed any infringement upon, or impairment of, the privileges of Catholics.... [T]o the present day, a majority, and very frequently the whole, of that council, are such as have

> been reared up in the Catholic faith, and have continued in that religious persuasion. Hence, if the ordinance complained of abridges the privileges of Catholics, it abridges to a like extent the privileges of those who enacted it....

2. The ordinances do not invade the rights and privileges of Catholics because the bishop himself had testified that "the dogmas of the Roman Catholic religion did not require that the dead be brought to a church, in order that the funeral ceremonies should be performed over them.... These ceremonies might be celebrated at the house where the dead person expired, or at any other place designated by the bishop."

> The place, then, for the mortuary ceremonials not being sacramental, how is the faith or conscience of Catholics assailed, by designating a few places in which they could be performed? The essence of the right consists in the thing that is to be done, not in the place of the performance. If the thing itself were forbidden, then might have been drawn in question the power to forbid, coupled with the further inquiry, how far religious, as well as civil rights and privileges, may be constrained to give way to the public necessities and the common good?

3. The federal law does not really concern itself with this issue, since the Northwest Ordinance expired with respect to the people of Louisiana when it ceased to be a territory and became a state, and the federal constitution does not apply, "because no provision thereof forbids the enactment of law or ordinance, under state authority, in reference to religion. The limitation of power in the first amendment of the Constitution is upon Congress, and not the states."

Mr. Barton did not explain exactly how the ordinances in question were designed to accomplish their "sanitory" purpose other than to note that Rampart Street was as broad as Pennsylvania Avenue, whereas the streets on which the churches in question fronted were "narrow." How that would prevent the spread of yellow fever from bodies "exposed" *within* the obituary chapel *or* the churches is not clear. (The bishop appears to have been trying to walk a narrow line between two warring factions within his diocese, if one can judge by Mr. Read's reference to "notorious schismatics" in contrast to Mr. Barton's reference to the lawsuit between the bishop and the church wardens, "instituted for the legal adjustment of certain differences between them in relation to church affairs,... which that court's judgment happily put an end to"—except for a raging battle over where to hold funerals!)

The opinion of the Supreme Court was delivered by Justice John Catron, to which no dissent was recorded.

> 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.

The argument from the ordinance for the Northwest Territories was dismissed by saying "it had no further force [as regards Louisiana] after the adoption of the state constitution." Therefore, the U.S. Supreme Court held that it had no jurisdiction in the matter and left standing the criminal conviction of Father Permoli and his fine of $50. This doctrine of federal nonintervention in the treatment of religion under the several states prevailed generally during the first century-and-a-half of the nation's history, and is the main reason why more than three-quarters of the law of church and state in the United States (at least as articulated by the Supreme Court) has developed in the most recent one-quarter of its two centuries' existence.[6]

b. *Cummings v. Missouri* (1866). One of the lesser-known religion cases of the Supreme Court was decided in 1866, having to do with the attempt of the state of Missouri to restrict to persons willing to take an oath incorporated in the state constitution the right to preach as a minister of the Gospel. The case arose when a Roman Catholic priest named Cummings was indicted, convicted and fined $500 for "the crime of teaching and preaching... without first having taken the oath prescribed by the constitution." That constitution had been adopted only a few months before by vote of the people of that state (June 1865) and bore the marks of a long and deadly struggle for control of the state between the sympathizers with the Union and those of the Confederacy. One of those marks was a lengthy provision designed to secure all positions of official responsibility and nonofficial influence in the state to persons who had been loyal to the Union. An oath was prescribed to be taken by all such persons before they could assume or retain their offices, functions or activities, swearing that they had never done anything to support the Confederacy.[7]

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6. See Introduction, *supra*. Only with the 1940 decision in *Cantwell v. Connecticut* was the free exercise clause applied to the states through the due process clause of the Fourteenth Amendment, and the no-establishment clause in 1943 in *Everson v. Board of Education*. Prior to that time, only a few cases involving religious liberty reached the U.S. Supreme Court via other juridical routes: *Reynolds v. U.S.* (1878) and *Davis v. Beason* (1890) in U.S. territories; *Terrett v. Taylor* (1815) and *Watson v. Jones* (1872) by diversity of citizenship (citizens of different states seeking a common forum for litigation); *Bouldin v. Alexander* (1872) and *Bradfield v. Roberts* (1899) by federal jurisdiction over the District of Columbia; *Pierce v. Society of Sisters* (1925) by "impairment of contract;" *Cummings v. Missouri* (1866) by "bill of attainder" and "*ex post facto* laws"; and *Church of the Holy Trinity v. U.S.* (1892) under immigration law.

7. The oath required was very detailed. The testator swore that he had never: 1. Been "in armed hostility to the United States, or to the lawful authorities thereof, or to the government of this State; 2. ...given aid, comfort, countenance, or support to persons engaged in any such hostility; 3. ...adhered to the enemies... of the United States, either by contributing to them, or by unlawfully sending within their lines, money, goods, letters, or information; 4. ... disloyally held communication with such enemies; 5. ... advised or aided any person to enter the service of such enemies; 6. ... manifested, by act or word... adherence to the cause of such enemies, or... desire for their triumph over the arms of the United States, or... sympathy with those engaged in exciting or carrying on rebellion against the United States; 7. ... submitted, except under overwhelming compulsion, to the authority, or been in the service, of the so-called `Confederate States of America;' 8. ... left this State, and gone within the lines of the armies of the so-called `Confederate States of America' with the purpose of adhering to said

Anyone failing to take the required oath was to be incapable "of holding in this State any office of honor, trust, or profit..., or of being an officer, councilman, director, trustee, or other manager of any corporation, public or private... or of acting as a professor or teacher in any educational institution, or in any common or other school; or of holding any real estate or other property in trust for the use of any church, religious society, or congregation."

No one who had not taken the oath was to be "permitted to practice as an attorney or counsellor at law; *nor... shall any person be competent as a bishop, priest, deacon, minister, elder, or other clergyman of any religious persuasion, sect, or denomination, to teach, or preach, or solemnize marriage*, unless such person shall have first taken, subscribed, and filed said oath."[8]

Anyone found holding office, practicing law, functioning as clergy or acting in any of the other named capacities without taking the requisite oath "shall, on conviction thereof, be punished by fine, not less than five hundred dollars, or by imprisonment in the county jail not less than six months, or by both such fine and imprisonment." And what if a person did take the oath but was later proved to have taken it falsely? He was to be convicted of perjury and imprisoned "in the penitentiary not less than two years." (It is indicative of the punitive spirit of this enactment that it specified, not maximum penalties, as is normally the case, but *minimum* ones.) Given the tempestuous history of Missouri during the preceding several years, when control of whatever passed for state government swung from one side to the other and back, and towns and neighborhoods and even families were split in their allegiances, some doubt may be entertained as to whether there was anyone in the whole state who could have taken the oath without fear of prosecution for perjury!

Father Cummings was represented by David Dudley Field, brother of Justice Stephen J. Field, who was sitting on the other side of the bench! His main points in behalf of Father Cummings were that the "test oath" of the Missouri Constitution was invalid both as an "*ex post facto* law" and as a "bill of attainder" forbidden to the states by the tenth section of the first article of the federal constitution. (Since these acts were forbidden the states by the federal Constitution, Cummings was able to bring his appeal to the federal Supreme Court.)

States or armies; 9. ... been a member of, or connected with, any order, society, or organization, inimical to the government of the United States, or to the government of this State; 10. ... been engaged in guerilla warfare against loyal inhabitants of the United States, or in that description of marauding commonly known as `bushwhacking;' 11. ... knowingly or willingly harbored, aided, or countenanced any person so engaged; 12. ... come into or left this State, for the purpose of avoiding enrollment for or draft into the military service of the United States; 13. ... enrolled himself, or authorized himself to be enrolled, by or before any officer, as disloyal, or was a southern sympathizer, or in any other terms indicating his disaffection to the Government of the United States in its contest with rebellion," Art. II, Sec. 6, 1865 Constitution of Missouri, from *Cummings v. Missouri*, 4 Wall. 277, 280-281 (1866).

8. Ibid., Section 9, p. 281, emphasis added.

Mr. G.P. Strong argued for the State. He contended that the sections of the state constitution were neither bills of attainder nor *ex post facto* laws, but provisions "designed to regulate the `municipal affairs' of the State. That is, to prescribe who shall be voters, who shall hold office, who shall exercise the profession of the law, and who shall mould the character of the people by becoming their public teachers." Mr. J.B. Henderson carried on the argument for the State by contending that the challenged provision did not impose any "punishment."

The opinion of the Supreme Court was delivered by Justice Stephen J. Field and is notable—among other things—for being the first application of the "bill of attainder" clause.[9]

> The oath prescribed by the [state] constitution... embraces more than thirty distinct affirmations or tests. Some of the acts, against which it is directed, constitute offences of the highest grade, to which... heavy penalties are attached. Some of the acts have never been classed as offences in the laws of any State, and some of the acts, under many circumstances, would not even be blameworthy.
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> The oath thus required is, for its severity, without any precedent that we can discover. In the first place, it is retrospective; it embraces all the past from this day; and, if taken years hence, it will also cover all the intervening period.... In the second place, the oath is directed not merely against overt and visible acts of hostility to the government, but is intended to reach words, desires and sympathies, also. And, in the third place, it allows no distinction between acts springing from malignant enmity and acts which may have been prompted by charity, or affection, or relationship. If one has ever expressed sympathy with any who were drawn into the Rebellion, even if the recipient of that sympathy were connected by the closest ties of blood, he is as unable to subscribe to the oath as the most active and the most cruel of the rebels....
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> [A]mong the rights reserved to the States is the right of each State to determine the qualifications for office, and the conditions upon which its citizens may exercise their various callings and pursuits within its jurisdiction.... But it by no means follows that, under the form of creating a qualification or attaching a condition, the States can in effect inflict a punishment for a past act which was not punishable at the time it was committed. The question is not as to the existence of the power of the State over matters of internal police, but whether that power has been made in the present case an instrument for the infliction of punishment against the inhibition of the Constitution.

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9. Tribe, L., *American Constitutional Law*, 1st ed. (Mineola, N.Y.: Fndn. Press, 1978), § 10-4, p. 485. (In the 2d edition, this case was cited as being among the earliest direct applications of the bill of attainder clause. Tribe, L., *American Constitutional Law,* 2d ed., § 10-4, p. 647.)

> Qualifications relate to the fitness or capacity of the party for a particular pursuit or profession.... It is evident from the nature of the pursuits and professions of the parties, placed under disabilities by the constitution of Missouri, that many of the acts, from the taint of which they must purge themselves, have no possible relations to their fitness for those pursuits and professions. There can be no connection between the fact that Mr. Cummings entered or left the State of Missouri to avoid enrollment or draft in the military service of the United States and his fitness to teach the doctrines or administer the sacraments of his church; nor can a fact of this kind or the expression of words of sympathy with some of the persons drawn into the Rebellion constitute any evidence of the unfitness of the attorney or counsellor to practice his profession, or of the professor to teach the ordinary branches of education, or of the want of business knowledge or business capacity in the manager of a corporation, or in any director or trustee.... The oath could not, therefore, have been required as a means of ascertaining whether parties were qualified or not for their respective callings or the trusts with which they were charged. It was required in order to reach the person, not the calling. It was exacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought that the several acts deserved punishment, and that for many of them there was no way to inflict punishment except by depriving the parties, who had committed them, of some of the rights and privileges of the citizen.
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> The disabilities created by the constitution of Missouri must be regarded as penalties; they constitute punishment.... The deprivation of any rights, civil or political, previously enjoyed, may be punishment.... Disqualification from the pursuits of a lawful avocation [*sic*], or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator, or guardian, may also [be] and often has been, imposed as punishment. By statute 9 and 10 William III... if any person educated in or having made a profession of the Christian religion, did, "by writing, printing, teaching, or advised speaking," deny the truth of the religion, or the divine authority of the Scriptures, he was for the first offense rendered incapable to hold any office or place of trust; and for the second he was rendered incapable of bringing any action, being guardian, executor, legatee, or purchaser of lands, besides being subjected to three years' imprisonment without bail.[10]
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> The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law. Any deprivation or

10. See Blackstone, *Commentaries on the Laws of England*, IV, 4, i. Other examples from British and French law were also adduced.

suspension of any of these rights for past conduct is punishment, and can be in no other wise defined.

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The counsel for Missouri closed his argument in this case by presenting a striking picture of the struggle for ascendancy in that State during the recent Rebellion between the friends and the enemies of the Union, and of the fierce passions which that struggle aroused.... It would have been strange, therefore, had [their constitution, framed in that struggle] not exhibited in its provisions some traces of the excitement amidst which the convention held its deliberations.

It was against the excited action of the States, under such influences as these, that the framers of the Federal Constitution intended to guard. In *Fletcher v. Peck*[11] Mr. Chief Justice Marshall... uses this language "Whatever respect might have been felt for the State sovereignties, it is not to be disguised that the framers of the Constitution viewed with some apprehension the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the States are obviously founded in this sentiment; and *the Constitution of the United States contains what may be deemed a bill of rights for the people of each State*."[12]

"No State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." A bill of attainder is a legislative act which inflicts punishment without a judicial trial.... In these cases the legislative body, in addition to its legitimate functions, exercises the powers and office of judge; it assumes... judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense.

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If the... constitution of Missouri...had in terms declared that Mr. Cummings was guilty... of having been in armed hostility to the United States... and, therefore, should be deprived of the right to preach as a priest of the Catholic Church... there would be no question that [such] clauses would constitute a bill of attainder within the meaning of the Federal Constitution. If these clauses, instead of mentioning his name, had

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11. 6 Cranch 137 (1810), an important decision holding invalid as an *ex post facto* law the repossession of a large land grant by the legislature of Georgia because of supposed corruption in the previous legislature that had granted it—a clear application of the *ex post facto* principle to *civil* action, not just criminal action. See Tribe, *American Constitutional Law*, 2d ed., § 10-2, pp. 633-634.

12. Emphasis added. This was a remarkable dictum uttered in 1810, which if followed in later decisions (such as *Permoli v. First Municipality of New Orleans*, discussed at § D1a above) would have obviated all the controversy over whether various clauses of the federal Bill of Rights are "incorporated" in the 14th Amendment (see discussion at Autonomy § 6 or IIA2a).

> declared that all priests and clergymen within the State of Missouri were guilty of these acts... and hence be subjected to the like deprivation, the clauses would be equally open to objection. And, further, if these clauses had declared that all such priests and clergymen should be so held guilty, and be thus deprived, provided they did not, by a day designated, do certain specific acts, they would be no less within the inhibition of the Federal Constitution.

The court examined the second clause of "what Chief Justice Marshall terms a bill of rights for the people of each state—the clause which inhibits the passage of an *ex post facto* law."

> By an *ex post facto* law is meant one which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required.[13]
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> * * *
>
> The clauses in the Missouri constitution, which are the subject of consideration, do not, in terms, define any crimes, or declare that any punishment shall be inflicted, but they produce the same effect upon the parties, against whom they are directed, as though the crimes were defined and the punishment was declared. They assume that there are persons in Missouri who are guilty of some of the acts designated. They would have no meaning in the constitution were not such the fact. They are aimed at past acts, and not future acts.... [T]hey were intended to operate by depriving such persons of the right to hold certain offices and trusts, and to pursue their ordinary and regular avocations. This deprivation is punishment; nor is it any less so because a way is opened for escape from it by the expurgatory oath. The framers of the constitution of Missouri knew at the time that whole classes of individuals would be unable to take the oath prescribed. To them there is no escape provided; to them the deprivation was intended to be, and is, absolute and perpetual. To make the enjoyment of a right dependent upon an impossible condition is equivalent to an absolute denial of the right under any condition, and such denial, enforced for a past act, is nothing less than punishment imposed for that act....
>
> Now, some of the acts to which the expurgatory oath is directed were not offences at the time they were committed.... Clauses which prescribe a penalty for an act of this nature are within the terms of the definition of an *ex post facto* law — "they impose a punishment for an act not punishable at the time it was committed...."

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13. These elements are drawn from the first Supreme Court decision to consider the *ex post facto* clause, *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), Tribe, *American Constitutional Law*, 2d ed., § 10-2, p. 632.

> And this is not all. The clauses in question subvert the presumptions of innocence, and alter the rules of evidence.... They assume that the parties are guilty; they call upon the parties to establish their innocence; and they declare that such innocence—can be shown in only one way—by an inquisition, in the form of an expurgatory oath, into the consciences of the parties.

The court thought of a further hypothetical case:

> [S]uppose that, in the progress of events, persons now in the minority in the State should obtain the ascendancy, and secure the control of the government; nothing could prevent, if the [federal] constitutional prohibition can be evaded, the enactment of a provision requiring every person, as a condition of holding any position of honor or trust, or of pursuing any avocation in the State, to take an oath that he had never advocated or advised or supported the imposition of the present expurgatory oath. Under this form of legislation the most flagrant invasion of private rights, in periods of excitement, may be enacted, and individuals, and even whole classes, may be deprived of political and civil rights.
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> * * *
>
> The judgment of the Supreme Court of Missouri must be reversed, and the cause remanded, with directions to enter a judgment reversing the judgment of the Circuit Court, and directing that court to discharge the defendant from imprisonment, and suffer him to depart....[14]

From this judgment Chief Justice Salmon P. Chase and Justices Noah H. Swayne, David Davis and Samuel F. Miller (all Lincoln appointees) dissented, their dissent being delivered by Justice Miller and attached to a closely related case announced the same day, *Ex parte Garland*.[15] That case involved an oath of office composed by Congress in 1862 for all persons "elected or appointed to any office of honor or profit under the government of the United States" and including the assertion that such persons "have voluntarily given no aid, countenance, or encouragement to persons engaged in armed hostility" to the United States, nor held "any office whatever, under any authority or pretended authority in hostility to the United States." In 1865 Congress made that oath obligatory on all attorneys serving the courts of the United States. One A.H. Garland, Esq., in 1860 was admitted to practice in the courts of the United States, and did practice until the outbreak of the Civil War, when he withdrew and returned to Arkansas, whence he was elected to serve in the Congress of the Confederacy. After the war, in July 1865, he was given a full pardon by the President of the United States for any offenses arising from his "participation... in the said Rebellion." He refused to take the oath on the ground that

14. *Cummings v. Missouri*, 4 Wall. 277 (1866).
15. 4 Wall. 335 (1866).

it was unconstitutional and his pardon freed him from it, and petitioned to be allowed to continue in practice in the court without it. The Supreme Court, in an opinion also by Justice Field, held that Congress could not, by the imposition of an expurgatory oath, defeat the power of the president to pardon.

It is curious to note that these decisions were reached by a narrow 5-4 majority. Five of the judges were appointed by Lincoln. Four of them dissented. The "swing" vote was Field's, who had been appointed by Lincoln but voted with the "opposition," giving them a bare majority.[16] Could it have been because his brother represented Father Cummings?

Justice Miller expressed the dissent of four of the justices to both decisions, *Cummings v. Missouri* and *Ex parte Garland*, in general accepting the views of the government(s) involved. With respect to *Cummings*, the dissent said the following:

> [A]llusions have been made in the course of argument to the sanctity of the ministerial office, and to the inviolability of religious freedom in this country.
>
> But no attempt has been made to show that the Constitution of the United States interposes any such protections between the state governments and their own citizens. Nor can anything of the kind be shown. The Federal Constitution contains but two provisions on this subject. One of these forbids Congress to make any law respecting the establishment of religion, or prohibiting the free exercise thereof. The other is, that no religious test shall ever be required as a qualification to any office or public trust under the United States.
>
> No restraint is placed by that instrument on the action of the States.... If there ever was a case calling upon this court to exercise all the power on this subject which properly belongs to it, it was the case of the Rev. B. Permoli....[17] In that case an ordinance of a mere local corporation forbid a priest, loyal to his government, from performing what he believed to be the necessary rites of his church over the body of his departed friend. This court said it could give him no relief.
>
> In this case the constitution of the State of Missouri, the fundamental law of the people of that State, adopted by their popular vote, declares that no priest of any church shall exercise his ministerial functions, unless he will show, by his own oath, that he has borne a true allegiance to his government. This court now holds this constitutional provision void, on the ground that the federal Constitution forbids it. I leave the two cases to speak for themselves.[18]

Of course, *Cummings v. Missouri* was not decided on the basis of Article VI (the religious test clause) or the First Amendment (the religion clauses), but on the attainder and *ex post facto* clauses of Article I, section 10, which do apply to the

16. Tribe, L., *God Save This Honorable Court* (New York: Random House, 1985) pp. 59-60.
17. 3 Howard 589 (1845), discussed immediately above.
18. *Ex parte Garland*, pp. 397-398, Miller dissent.

states. In that sense, it was not a "church-state" case, technically speaking, but from the standpoint of religious liberty it *was* a crucial church-state issue, regardless of which clause of the Constitution was relied on to resolve it.

c. *Church of the Holy Trinity* (1892). Another of the early church-state cases of the U.S. Supreme Court dealt with the question of a church's right to select its clergy. A church in New York had contracted with a clergyman in England to come to the United States and become its pastor, but a federal law prohibiting the importation of foreigners "under contract or agreement to perform labor in the United States" was thought to prevent his employment. The Supreme Court held it did not, since the law was designed to prevent the undercutting of American wages by the importation of cheap unskilled labor, but was not intended to apply to the hiring of individual professional persons such as the clergy. Although that would seem to have been sufficient to dispose of the case, the court indulged in an extensive flight of dicta that has sometimes been cited as an indication that more recent decisions curtailing government sponsorship of religious practices in public places are misguided; after citing references running from the commission to Christopher Columbus ("by God's assistance") through the Declaration of Independence (reference to "Creator," "Divine Providence" and "Supreme Judge of the World"), the court concluded:

> If we pass beyond these matters to a view of American life as expressed by its laws, its business, its customs and its society, we find everywhere a recognition of the same truth. Among other matters note the following: the form of oath universally prevailing, concluding with an appeal to the Almighty; the custom of opening sessions of all deliberative bodies and most conventions with prayers; the prefatory words of all wills, "In the name of God, amen"; the laws respecting the observance of the Sabbath; with the general cessation of all secular business, and the closing of courts, legislatures, and other similar public assemblies on that day; the churches and church organizations which abound in every city, town and hamlet; the multitude of charitable organizations existing everywhere under Christian auspices; the gigantic missionary associations, with general support, and aiming to establish Christian missions in every quarter of the globe. These, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that *this is a Christian nation*. In the face of all these, shall it be believed that a Congress of the United States intended to make it a misdemeanor for a church of this country to contract for the services of a Christian minister residing in another nation?[19]

"Pat" Robertson, popular television preacher and candidate for the presidency in 1988—and an attorney, who should know better—has quoted the assertion that "this is a Christian nation" and insisted that, since the Supreme Court has never overruled this 1892 dictum in *Church of the Holy Trinity*, it is still the "law of the

19. *Church of the Holy Trinity v. U.S.*, 143 U.S. 266 (1892), emphasis added.

land."[20] Of course, since it was not necessary—or even very pertinent—to the outcome, it is not the "law" of anything, but merely a passing observation, not rising to the level of visibility requiring overruling. Suffice it to note that the court was sure that Congress had not intended to intervene in a church's choice of clergy.

This conclusion has been questioned by three more recent members of the Supreme Court, who criticized the *Holy Trinity* court's willingness to supersede the plain language of the statute. Justice Kennedy, joined by Chief Justice Rehnquist and Justice O'Connor, opined that

> Notwithstanding the fact that this agreement [to hire a clergyman from abroad] fell within the plain language of the statute.., the Court overrode the plain language, drawing instead on the background and purposes of the statute to conclude that Congress did not intend its broad prohibition to cover the importation of Christian ministers. The central support for the Court's ultimate conclusion... is its lengthy review of the "mass of organic utterances" establishing that "this is a Christian nation," and which were taken to prove that it could not "be believed that a Congress of the United States intended to make it a misdemeanor for a church of this country to contract for the services of a Christian minister from another nation." I should think the potential of this doctrine to allow judges to substitute their personal predelictions for the will of the Congress is so self-evident from the case which spawned it as to require no further discussion of its susceptibility to abuse.[21]

Nevertheless, the majority opinion, written by Justice Brennan, had quoted *Holy Trinity* with approval, and its holding remains valid with respect to governmental abstention from managing a church's choice of clergy.

d. *Gonzalez v. Archbishop* (1929). Mention has been made of the case in which a ten-year old boy claimed the right to be appointed to a chaplaincy created by the will of an ancestor. The Supreme Court upheld the decision of the Roman Catholic Archbishop in whose authority the appointment lay to refuse to appoint the boy because he did not qualify for the post under the law of the church then in effect.[22]

e. *Serbian Eastern Orthodox Diocese* (1975). Another case described earlier[23] involved not only church property, but who should control it. The Supreme Court upheld the removal of Bishop Dionisije Milivojevich by the Holy Synod in Belgrade and the transfer of his authority to three appointees approved by the Synod, holding that the civil courts could not second-guess the ecclesiastical tribunal to determine whether the procedure used by it was "arbitrary" with reference to church law, since the Holy Synod was also the final authority on the application of church law.

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20. Robertson, "Pat," Address to Virginia State Council of Churches, Richmond, Va., 1980.

21. *Public Citizen v. U.S. Dept. of Justice*, 491 U.S. 440 (1989).

22. *Gonzalez v. Archbishop*, 280 U.S. 1, 1929, discussed at § B2 above.

23. *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 1975, discussed at § B7 above.

These are the only decisions of the U.S. Supreme Court to date dealing with the autonomy of a religious body in choosing, refusing or removing its clergy, and in each instance that autonomy was upheld. Several circuit court decisions, however, suggest a significant limitation to this principle as it applies to nonclergy employees, and they lead into the next stage of the discussion: the autonomy of religious bodies with respect to *lay* employees. These cases suggest a significant legal distinction (whether theologically valid or not) between clergy and laity, that in its turn has become overborne by other considerations.

2. The Clergy-Laity Distinction

Recent developments in civil rights law with respect to employment discrimination become pertinent at this point.

a. The Civil Rights Act of 1964, Amended in 1972; Title VII. Private employers were forbidden by the Civil Rights Act of 1964 to discriminate in employment on the basis of "race, color, religion, gender or national origin."[24] In its original form the law provided a blanket exemption for religious groups: "This subchapter shall not apply to... a religious corporation, association or society." But on the floor Senator Hubert Humphrey succeeded in adding an amendment that restricted the exemption in two ways: (1) the religious body could discriminate only on the basis of "a particular religion" (presumably its own); and (2) only with respect to "the carrying on... of its religious activities."

In 1972, when the Act was amended, Senator Sam Ervin tried to restore it to its original form, so that "the Equal Employment Opportunities Commission would have no jurisdiction at all over religious institutions." But his effort was rejected by a vote of 25 to 55. He did succeed, however, in getting the word "religious" deleted as a modifier of "activities," so that the section as amended then read:

> Section 702. This title shall not apply... to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution or society of its [ ] activities.[25]

One appellate court commented that this exemption probably violated the Establishment Clause (as being a special privilege for religion) and the equal protection guarantee of the Fifth Amendment as well, but its view was of no legal effect since the Civil Rights Act was not before it.[26] In any event, the Supreme Court eventually addressed that question directly in 1987, in *Corporation of the Presiding*

24. Section 703, Civil Rights Act of 1964.
25. 42 U.S.C. 2000 e-1.
26. *King's Garden v. FCC*, 498 F.2d 51 n. 7 (D.C. Cir., 1974).

Bishop v. Amos.[27] But in the year of the Ervin Amendment, the question was already being contested in the case law.

b. *McClure v. Salvation Army* (1972). A woman commissioned officer of the Salvation Army (the equivalent of an ordained clergyperson of a church) objected to the lower pay afforded women officers compared to men officers of the same rank in the Salvation Army, and after failing to obtain any relief within the organization, she took her complaint to the (federal) Equal Employment Opportunity Commission, whereupon the Salvation Army terminated her employment, whereupon she went to court. The district court held that she had been performing religious duties for a religious body and thus was not covered by the Civil Rights Act (which had not then been amended). The circuit court did not agree, holding that religious groups are permitted by the Act to discriminate only on the basis of religion, not gender, thus seeming about to vindicate the plaintiff, Mrs. McClure. But the court then went on to say that in so legislating, Congress would be interfering in the internal affairs of a church, which it had no power to do. So to avoid finding the law unconstitutional, the court concluded that "Congress did not intend... to regulate the employment relationships between church and minister," thus leaving Ms. McClure out of a job.[28]

c. *Equal Employment Opportunity Commission v. Southwestern Baptist Theological Seminary* (1981). In the mid-1970s, the Equal Employment Opportunity Commission (EEOC) sought information from institutions of higher education on the number and duties of seven categories of employees, their compensation, tenure, race, gender and national origin. Beginning in 1975, the six theological seminaries of the Southern Baptist Convention decided that they would not file Form EEO-6 giving such information because they believed that the EEOC did not have jurisdiction over them, and Southwestern Baptist Theological Seminary (SWBTS) in Fort Worth agreed to serve as the test case for all. The seminary contended that, as a wholly owned and controlled subsidiary of the Southern Baptist Convention whose sole function was to train clergy for the church, it was an integral operation of the church exclusively religious in nature, and therefore any governmental inquiry into its employment practices would be a state intrusion into the internal affairs of a church.

The governmental agency contended that it was authorized by the Civil Rights Act of 1964 to collect employment information from *all* employers, public and private, over a certain size, and no exception from the reporting requirements was provided for religious institutions. The seminary contended that it did not discriminate on the basis of race, gender or national origin, but that it did expect and require all of its employees to conform to Baptist standards of conduct, and its faculty and administrators were all affiliated with the Southern Baptist Convention and required

27. See § 4b below.

28. *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir., 1972), cert. denied as untimely filed, 409 U.S. 896 (1972).

to sign statements upholding Baptist doctrines. At trial the seminary brought to the stand witnesses from every class of employees, including maintenance staff, who testified that they felt their work was inseparable from the cultivation of a spiritual atmosphere in the seminary and the fulfillment of its religious mission.

The trial court ruled that the EEOC had no jurisdiction over the seminary, either to collect employment data or to enforce nondiscrimination rules.

> The risk of unseemly governmental entanglement increases exponentially as the function of any institution becomes more fundamentally and pervasively religious.... The operation of a seminary is an ultimate religious activity entitled to the highest degree of first amendment protection.[29]

The Fifth Circuit Court of Appeals affirmed that the seminary was a wholly religious institution in the same legal category as a church, but it said that *only teaching members of the faculty or those who supervise teaching* were to be considered *ministers* and thus beyond the jurisdiction of the EEOC. Therefore, the circuit court reversed and remanded with respect to the seminary's employees who were not "ministers" according to its definition, i.e., secretaries, cooks, janitors, etc. The seminary was thereafter obliged to file employment data with EEOC with respect to them, but not with respect to its "ministers" (those connected with teaching, whether or not ordained).[30] The Supreme Court declined to hear the case.

3. Church Autonomy and Labor Law

Because of the public policy to protect the rights of employees to organize and to bargain collectively with their employers, religious bodies have encountered some autonomy problems in the area of labor law. These difficult questions have been helpfully sorted out in theory by Professor Douglas Laycock in his seminal law review article on church labor relations.

> Underlying much of the debate over church labor relations are unexamined assumptions about how employees should be classified. In all the litigation that has arisen, employees have been cast as outsiders. Modern labor legislation is designed to aid the worker in the adversary aspect of his relationship with his employer. But there is another aspect to the relationship. Every employee is a fiduciary for his employer. He has agreed to carry out his employer's business, to faithfully perform the tasks assigned him, and to always act in his employer's interest. He may resign at any time, but as long as he stays, he owes a duty of undivided loyalty to his employer....

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29. *Equal Employment Opportunitiy Commission v. Southwestern Baptist Theological Seminary*, 485 F. Supp. 255 (1980).

30. *EEOC v. SWBTS*, 651 F.2d. 277 (1981), cert. denied, 456 U.S. 905 (1982).

> Tension between the adversary and fiduciary aspects of the relationship inheres in all cases of principal and agent. This tension is easy to resolve in theory: the prospective employee is free to deal at arm's length in negotiating terms of employment and in deciding whether to become or remain an employee, but once he begins to act as an employee, he is a fiduciary until he resigns....
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> * * *
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> Both common law and statutory labor law offer models for considering whether church employees should be considered as insiders or outsiders in church autonomy cases. But neither is controlling; the question is one of constitutional law. The free exercise of religion includes the right to run large religious institutions—certainly churches, seminaries, and schools, and I would add hospitals, orphanages, and other charitable institutions as well. Such institutions can only be run through employees. It follows at the very least that the free exercise of religion includes the right of churches to hire employees. It surely also follows that the churches are entitled to insist on undivided loyalty from those employees.
>
> The employee accepts responsibility to carry out part of the religious mission. He enters into a continuing relationship with the church in a way that independent sellers of goods and services usually do not. In so doing, he becomes a part of the church. He is not part of the church in the same way as a member, but in some ways he is more important. If an ordinary member deviates from the faith, or fails to comply with some matter of church practice, the church itself may suffer little or no harm. Most churches have many marginal members, and no one relies on them. But churches rely on employees to do the work of the church and to do it in accord with church teaching. When an employee agrees to do the work of the church, he must be held to submit to church authority in much the same way as a member.
>
> It follows that church labor relations are internal affairs, and the state's interest in interfering to protect employees must be judged accordingly. The state may not intervene to protect employees from treatment that is merely arbitrary or unfair; the remedy for that is to resign or renegotiate the terms of employment. Modern labor legislation may have deprived secular employers of the fiduciary duty once owed them by their rank and file employees, but to deprive churches of that duty would be to interfere with an interest protected by the free exercise clause.[31]

The courts have wrestled with these issues in several significant decisions.

a. *NLRB v. Catholic Bishop of Chicago* (1979). A very important decision of the U.S. Supreme Court bearing on the autonomy of religious bodies with respect to control of lay employees actually preceded *EEOC v. SWBTS*, but was not thought inconsistent with it by the circuit court. The case arose when the National Labor

31. Laycock, D., "Towards a General Theory of the Religion Clauses," *supra*, 1373, 1407-9 *passim*; citations omitted.

Relations Board (NLRB) decided to extend the exercise of its jurisdiction over labor-management relations to the parochial schools of the Roman Catholic Church. As those schools had come to employ fewer clergy and "religious" teachers (nuns and priests and the brothers of "lay" religious orders such as the Christian Brothers) and therefore more lay teachers (who usually had families to support), the latter began to consider organizing for better pay. When they applied to the National Labor Relations Board to supervise elections for union representation, the NLRB agreed to do so. But the bishops of several dioceses refused to recognize the jurisdiction of the NLRB, and so the matter went to court.

One circuit court noted that parochial schools were being "cruelly whip-saw[ed]" by the NLRB's "holding that institutions too religious to receive governmental assistance[32] are not religious enough to be excluded from its regulation."[33] The Supreme Court contented itself with construing the statute in such a way as to avoid finding it unconstitutional. The opinion was written by Chief Justice Burger, joined by Justices Stewart, Powell, Rehnquist and Stevens.

> The Board argues that it can avoid excessive entanglement since it will resolve only factual issues such as whether an anti-union animus motivated an employer's action. But at this stage of our consideration we are not compelled to determine whether the entanglement is excessive as we would were we considering the constitutional issue. Rather, we make a narrow inquiry whether the exercise of the Board's jurisdiction presents a significant risk that the First Amendment will be infringed.... It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.
>
> The Board's exercise of jurisdiction will have at least one other impact on church-operated schools. The Board will be called upon to decide what are "terms and conditions" of employment and therefore mandatory subjects of bargaining....
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> * * *
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> The church-teacher relationship in a church-operated school differs from the employment relationship in a public or other non religious school. We see no escape from conflicts flowing from the Board's exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions that would follow. We therefore turn to an examination of the National Labor Relations Act to decide whether it must be read to confer jurisdiction that would in turn require a decision on the constitutional claims....
>
> There is no clear expression of an affirmative intention of Congress that teachers in church-operated schools should be covered by the Act.
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> * * *

32. *Lemon v. Kurtzman*, 402 U.S. 602 (1971), discussed at IIID5.

33. *Catholic Bishop of Chicago v. NLRB*, 559 F.2d 1112, 1119 (7th Cir. 1977).

> The absence of an "affirmative intention of the Congress clearly expressed" fortifies our conclusion that Congress did not contemplate that the Board would require church-operated schools to grant recognition to unions as bargaining agents for their teachers.[34]

Therefore the court resolved the issue by construing the statute in such a way that the constitutional question was avoided. That treatment did not satisfy the other four members of the court. Justice Brennan wrote a dissent that was joined by Justices White, Marshall and Blackmun.

> [T]he Act covers all employers not within the eight express exceptions. The court today substitutes amendment for construction to insert one more exception—for church-operated schools. This is a particularly transparent violation of the judicial role: the legislative history reveals that Congress itself considered and rejected a very similar amendment.
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> * * *
>
> Under my view that the NLRA includes within its coverage lay teachers employed by church-operated schools, the constitutional questions presented would have been reached. I do not now do so only because the Court does not.... [W]hile the resolution of the constitutional question is not without difficulty, it is irresponsible to avoid it by a cavalier exercise in statutory interpretation which succeeds only in defying congressional intent.[35]

In this instance we see the curious phenomenon of the supposedly "activist" wing of the court chiding the supposed "strict constructionists" for playing fast and loose with congressional intent!

The court envisioned at least two possibilities that persuaded it that the NLRB ought not to have jurisdiction over labor relations involving parochial school teachers: (1) if a teacher were to be discharged for failure to comply with expectations that the school contended were required by its religious doctrine, the NLRB would be unavoidably involved in determining the good faith (no pun intended) of that defense and its relation to the mission of the school; (2) under the National Labor Relations Act, all terms and conditions of employment are subject to mandatory collective bargaining, and such a broad scope necessarily would "implicate sensitive issues that open the door to conflicts" between the NLRB and the church that is the employer.[36]

As may be seen, it was the *teaching* function that was especially sensitive in this matter. The Roman Catholic Church has long upheld the right of workers to organize and the obligation of employers to bargain, and has raised no (legal) objections to the unionization of its nonteaching (and, of course, *nonclergy*) employees, such as grave diggers. But when a governmental agency undertook to supervise the unionization of

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34. *National Labor Relations Board v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

35. Ibid., Brennan dissent.

36. Ibid., pp. 502-503.

its teachers and their collective bargaining with the church over matters that could involve the content and practice of the faith, the church drew the line—and the Supreme Court agreed. (Interestingly, in this area there has been deliberate and determined resistance to the dictates of federal agencies—EEOC and NLRB—by two of the largest religious bodies in the nation, groups that could hardly be described as "radical"—the Southern Baptist Convention and the Roman Catholic Church! And there will be more to review before this section is concluded.)

b. *Catholic High School Association v. Culvert* (1985). The force of *NLRB v. Catholic Bishop* was blunted, if not almost nullified, by a subsequent ruling of the Second Circuit Court of Appeals to the effect that the federal legislation (National Labor Relations Act) had not preempted the jurisdiction of *state* labor relations boards over teachers in parochial schools. It further held that a *state* labor relations board's supervision of collective bargaining by such teachers with the employing church would not violate the Establishment or Free Exercise Clauses, seemingly in effect contradicting the Supreme Court's analysis in *NLRB v. Catholic Bishop*, *supra*.

The New York State Labor Relations Act was amended by the legislature in 1968 to include employees of charitable, educational and *religious* organizations. Thus the Second Circuit did not enjoy the luxury of the dodge employed by the Supreme Court in *Catholic Bishop* of finding that the legislative branch had not expressly intended to subject religious organizations to the jurisdiction of the labor relations board. Therefore, the court had to go on to the step that Justice Brennan in dissent had reproached the majority for not taking—reaching the constitutional issues. That task thus fell to a panel of the Second Circuit, composed of Judges Cardamone, Pratt and Friedman. Because Judge Friedman apparently sided with Judge Cardamone rather than with Judge Pratt, the opinion was announced by Judge Cardamone, no enthusiast for church-state separation.

> This appeal presents delicate issues involving the relationship between church and state. Since the drafting of the Bill of Rights, government regulation has become increasingly expansive. The wall of the First Amendment delineates the permissible degree of this government intrusion into the sphere reserved for religion. This parchment barrier must be constantly manned, the Founding Fathers believed, lest there be a union between church and state that will first degrade and eventually destroy both. The issue in this case is whether the Religion Clauses of the first Amendment made applicable to the states by the Fourteenth Amendment prohibit the New York State Labor Relations Board from exercising jurisdiction over the labor relations between parochial schools and their lay teachers. This "difficult and sensitive" question, expressly left open by the Supreme Court in *NLRB v. Catholic Bishop*[37], is one of first

37. 440 U.S. 490 (1979), discussed immediately above.

> impression in this Circuit. Our task is to determine whether there is a principled basis upon which to limit state intrusion to secular aims.[38]

Having enunciated a possibly overexpansive characterization of the "Founding Fathers'" intention, Judge Cardamone then proceeded to underapply it by seeking a "principled" way for the state agency to intrude upon the autonomy of the religious entity only to the extent of regulating "secular" matters—a fine and fuzzy kind of distinction in enterprises of "mixed" character (combining religion and education) that the Supreme Court had repeatedly characterized as so "pervasively sectarian" that the religious and secular elements could not be separated for purposes of aiding the latter, but not the former, with public funds. But apparently Judge Cardamone was confident that the two elements could be parted for purposes of regulation by a state agency. He pointed to the fact that the agreement between the Association and the Union stipulated that "religious" faculty were not included, that only "secular" terms of employment were subject to negotiation, and that the agreement had functioned for over ten years without complaint of religious infringement by the schools.

The state board and the union asserted that there was no "case or controversy" required by Article III of the Constitution to give federal courts jurisdiction over the complaint because the plaintiff Association could point to no instance in which its religious prerogatives had actually been infringed by the labor board's operation or the negotiation process—a version of the "Don't Holler `Til You're Hurt" thesis. The district court had rejected that contention, and the circuit court agreed.

> The Association asserts that the Seventh Circuit considered and properly dismissed the argument... when it stated:
>
> > The whole tenor of the Religion Clauses cases involving state aid to schools is that there does not have to be an actual trial run to determine whether the aid can be segregated, received and retained as to secular activities but it is sufficient to strike the aid down that a reasonable likelihood or possibility of entanglement exists.[39]
>
> We agree with the Association. The Supreme Court, affirming the Seventh Circuit on other grounds..., commented that "the record affords abundant evidence that the Board's exercise of jurisdiction over teachers in church-operated schools would implicate the guarantees of the Religion Clauses."[40]... Moreover, in *Felton v. Secretary of Education*, we struck down a provision that gave parochial schools in disadvantaged areas the services of public school teachers. Under the facts of that case we could find no principled basis to limit the state intrusion to secular aims. We considered that case although there was no record evidence that the aid fostered religion, and explained:

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38. *Catholic High School Association of the Archdiocese of New York v. Culvert*, 753 F.2d 1161 (1985).

39. *Catholic Bishop*, 559 F.2d at 1126.

40. *Catholic Bishop*, 440 U.S. at 507.

> In our view, the Court has been wise in relying upon its reasoned apprehension of potentials rather than sanctioning case-by-case determinations of the precise level of risk of fostering religion, since such an empirical approach would inevitably lead to increased litigation in an area where some degree of certainty is needed to prevent constant controversy.[41]
>
> For the same reasons a justiciable controversy exists in this case. If we allow the camel to stick its nose into the constitutionally protected tent of religion, what will follow may not always be controlled. Thus, we must now turn to the question of whether the camel can be kept firmly tethered outside.

Despite this brave approach, the court marvelously found that the state board's intervention could and would be confined to secular concerns, and that no threat was to be perceived to the parochial schools' religious autonomy. It distinguished the Supreme Court's finding of "excessive entanglement" in monitoring the use of state funds in parochial schools by saying that those cases were "quite unlike the situation here where the State Board's supervision over the collective bargaining process is neither comprehensive nor continuing."[42] The court offered four reasons why state labor board supervision did not constitute "ongoing interference" with the schools' religious practices.[43]

> First, an employer's good faith is put in issue only if a union or individual brings a charge; the State Board itself cannot initiate an unfair labor practice proceeding. In this case, the record demonstrates that the Union had not brought a charge during a decade of collective bargaining. Second, the ten unfair labor practices specified in... the Act are entirely secular. Third, a labor relations examiner must limit investigations to those issues that pertain directly to the unfair labor practices set forth in the charge. The Administrative Law Judge must similarly limit the inquiry if there is a hearing. Finally, an order issued by the State Board is not self-enforcing. A "church-operated" school believing itself aggrieved by such an order may refuse to comply and raise a First Amendment defense when and if the Board seeks judicial [enforcement of its order].

These reasons could be cold consolation to a religious school finding itself in the toils of the governmental processes that construed its religiously motivated decisions as "secular" and encountered a court review as trusting in the forbearance of bureaucrats and judges as this one.

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41. *Felton*, 739 F.2d 48; later affirmed, *sub nomine Aguilar v. Felton*, 473 U.S. 402 (1985), discussed at IIID7m.

42. Ibid. at 1167.

43. Citing *EEOC v. Mississippi College*, 626 F.2d 477, 487-488 (CA5 1980).

> The Association relies, as did the Seventh Circuit in *Catholic Bishop*, on a passage from an article on collective bargaining in colleges and universities:
>
> > Once a bargaining agent has the weight of statutory certification behind it, a familiar process comes into play. First, the matter of salaries is linked to the matter of workload; workload is then related directly to class size, class size to range of [course] offerings, and range of offerings, to curricular policy .... This transmutation of academic policy into employment terms is not inevitable, but it is quite likely to occur.[44]
>
> We decline to follow the Seventh Circuit down this slippery slope. Although this passage may accurately describe the bargaining process, the conclusion that the state is inevitably forced to become involved in all of these issues misconceives the State's role in that process. It is a fundamental tenet of the regulation of collective bargaining that government brings private parties to the bargaining table and then leaves them alone to work through their problems. The government cannot compel the parties to agree on specific terms. All it can do is order an employer who refuses to bargain in good faith to return and bargain on the mandatory bargaining subjects, all of which are secular.... Thus, the duty to bargain does not involve excessive entanglement between church and state.

The reader will have to consult experience with governmental enforcement of statutory prohibition of "unfair labor practices" to discern whether the quoted "slippery slope" scenario is more likely of occurrence or the sanitized abstention role envisioned by the court. But more wrestling with the Religion Clauses was to follow.

> The second ground for the district court's finding of excessive administrative entanglement was that the State Board's jurisdiction would require it to determine the validity of asserted religious motives as part of church doctrine. Thus, were a teacher who marries a non-Catholic to refuse to agree to raise her children Catholic and later be fired, the Board, in determining whether the asserted reason for discharge was pretextual, would have to decide whether requiring such an agreement was part of church dogma. The Board and Union urge that the Board would have no reason to inquire into the content or validity of church doctrine. They argue that courts and administrative agencies often have been called upon to determine whether religious beliefs are sincere.[45]...
>
> In the present case it is not the inquiry into whether a belief is sincerely held by an individual that is at issue. Rather, it is the possibility of recurrent questioning of whether a particular church actually holds a particular belief. We agree with the Seventh Circuit that in order to demonstrate the sincerity of the belief held, "the bishop... would have to

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44. Brown, "Collective Bargaining in Higher Education," 67 *Mich. L. Rev.* 1067, 1075 (1969).

45. Citing *U.S. v. Seeger*, 380 U.S. 163 (1965), a Selective Service case discussed at IVA5h.

> eliminate the pretextual aspect of claimed justification which would involve the matter of showing the validity [as part of church doctrine] of the claimed doctrinal position advanced."[46] Inevitably this would lead to the degradation of religion. One of the primary purposes of the Establishment Clause of the First Amendment prohibits the State Board from inquiring into an asserted religious motive to determine whether it is pretextual.

Apparently, it was not individual but institutional sincerity of belief in a religious doctrine that was at issue, and the court seemed to find the prospect of a prelate's being examined on this subject abhorrent under the Establishment Clause, thus presaging rejection of the government's case. But that was not the direction in which the court's reasoning moved.

> The question remains whether this limitation of the State Board's powers should preclude it from asserting jurisdiction. We think not. The Board does not become "a toothless tiger" because of this rein on its powers. It is still free to determine, using a dual motive analysis, whether the religious motive was in fact the cause of the discharge.... The Seventh Circuit considered and rejected such an accommodation stating:
>
> > "[T]he rule is well established that although ample valid grounds may exist for the discharge of an employee, that discharge will violate [the law] if it was in fact motivated, even partially, by the employee's union activity."
> >
> > * * *
> >
> > We fail to comprehend the real possibility of accommodation in the present context without someone's constitutional rights being violated which in turn would seem to preclude the possibility of accommodation as an answer to the obviation of the religious entanglement problem.[47]
>
> We agree with the Seventh Circuit that in cases involving lay faculty the Board should not be allowed to find a violation simply because anti-union animus motivated the discharge in part. Nonetheless, we adopt the accommodation that the Seventh Circuit rejected. It is clear that the Supreme Court seeks to accommodate apparently irreconcilable interests in the labor area where possible. [citations omitted] Such an accommodation is possible in this case. The Board may—consistent with the First Amendment—protect teachers from unlawful discharge by limiting its finding of a violation of the collective bargaining agreement to those cases in which the teacher would not have been discharged "but for" the unlawful motivation. A parochial school might be forced to reinstate a teacher it otherwise would have fired for religious reasons simply because the school administration was also partly motivated by anti-union animus. To avoid this unconstitutional result, the Board may order reinstatement

46. *Catholic Bishop, supra,* 559 F.2d at 1129.

47. Ibid. at 1130, quoting *NLRB v. Pembeck Oil Corp.*, 404 F.2d 105, 109 (CA2 1968).

> of a lay teacher at a parochial school only if he or she would not have been fired otherwise for asserted religious reasons.
>
> Where a principled basis exists, as it does here, to limit state aid to or regulation of parochial schools, an attempt should be made to accommodate the interests of church and state under the Establishment Clause. Such accommodation firmly tethers the State Board's jurisdiction outside the constitutional tent that protects the Association's First Amendment rights.

Evidently the court thought it had resolved the problem of church/state relations in the labor/management field by restricting the state labor relations board in two respects: (1) the Board could not "inquire into an asserted religious motive to determine whether it was pretextual"; and (2) it could not reinstate a lay teacher discharged for "asserted religious reasons"—an accommodation that seemed to be largely at the expense of the governmental agency. The religious school had but to assert a plausible religious reason for discharging a lay faculty member, and the state labor relations board could neither question the bona fides of the religious reason nor discover whether there were nonreligious reasons in whole or in part motivating the discharge. That does not seem to be a great improvement over the no-accommodation stance of the Seventh Circuit so far as the state's interests are concerned.

Still, there would remain a wide scope for mischief along the lines suggested by the passage on collective bargaining quoted by the Seventh Circuit.

Having wrestled with the Establishment Clause, Judge Cardamone turned to the Free Exercise Clause.

> The Association, quoting the Seventh Circuit in *Catholic Bishop*, first argues that "the very threshold act of certification of the union necessarily alters and impinges upon the religious character of all parochial schools." Support for such an absolute view is found neither in case law nor the history of the First Amendment. The First Amendment guarantees that all are free to believe and free to act in the exercise of their religious convictions. Freedom to believe is absolute. Freedom to act is not.[48]
>
> A determination of whether state regulation of the way the Association acts in its relations with its lay teachers violates free exercise requires a balancing test. The burden the state imposes on the Association's exercise of its religious beliefs must be weighed against the State's interests in enforcing the Act....
>
> We first turn to whether the claims presented here are religious and not secular. Courts have long upheld regulation that merely causes economic hardship or inconvenience.[49] Many matters that pertain to private schools

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48. Citing *Cantwell v. Connecticut*, 310 U.S. 296, 303-304 (1940) for this truism, which is not the thrust of ***Cantwell*** at all, as pointed out in the Introduction, *supra,* at text between nn. 13 and 14.

49. Citing *Braunfeld v. Brown*, 366 U.S. 599 (1961) (Pennsylvania's Sunday closing laws did not violate free exercise of Orthodox Jewish merchant), discussed at IVA7b. Later decision reaching the same conclusion include *Tony and Susan Alamo Fndn. v. Secretary of Labor*, 471 U.S. 290 (1985),

> are already subject to governmental regulation. The Association must meet state requirements for fire inspections, building and zoning regulations and compulsory school attendance laws, all of which regulate the conduct of the Association's schools.
>
> Nor may the claim that any interference by the state in church affairs violates First Amendment rights be grounded on the history of the Amendment. Rummaging about in the attic of First Amendment history is not always helpful. The religious concerns of the drafters of the Bill of Rights and those faced today are over two hundred years apart. Nonetheless, a brief look back reveals that the two Founding Fathers most closely identified with the Religion Clauses focused not on regulation of conduct, but on separation of church and state and the unalienable right to freedom of religious belief. Their concern was more to prevent the establishment of an authoritarian state church like, for example, the Church of England, than it was with state regulation.

This was an interesting exercise in "rummaging about in the attic of First Amendment history." Judge Cardamone was correct that two hundred years had intervened between the Founders' day and his, but perhaps he drew a false conclusion from that gap. The Founders did not envision governmental regulation of religion because they designed and experienced a government of carefully limited powers that wouldn't regulate much of anything. The Regulatory State of the late twentieth century would probably have appalled them in many ways, not the least of which would be the government's regulation of relations between employers and employees. Far more inconceivable would be the prospect of the government's regulating relations between *religious* employers and their employees!

Judge Cardamone pointed out that the Association could hardly claim that "collective bargaining is contrary to the beliefs of the Catholic Church" because the church had long been a champion of collective bargaining (—for *other* employers, at least, and for its own nonteaching employees such as grave diggers).

> We have already addressed both the claim that Board jurisdiction might require reinstatement of an individual who otherwise would have been fired for religious reasons, and the claim that the duty to bargain over the secular terms and conditions of employment imposes a burden on the Church. For the reasons discussed above..., and because of the restrictions we have placed on the Board's power, these claims do not burden freedom of religious exercise.[50]

This opinion has been excerpted at some length, not for its lucidity or its felicity, but to illustrate how lip service can be given to "separation of church and state"—

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and *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378 (1990), discussed at § D3e below and at VC6b(5), respectively.

50. *Catholic High School Association v. Culvert*, 753 F.2d 1161 (1985).

replete with camel's noses and slippery slopes—and yet thoroughly muddle the issue to the advantage of no one. One would not envy either the state labor relations board, the union or the parochial schools the task of trying to decode, let alone comply with, what this opinion decided. The church was doubtless reassured that if it didn't like any ruling of the labor relations board, it could always disobey the ruling and contest it in court—with the prospect of suffering punitive sanctions if it guessed wrong.

Judge George C. Pratt agreed with the majority only on the preemption issue, but dissented on the constitutional issues for reasons set forth by Judge Lasker in the court below and by the Seventh Circuit in *Catholic Bishop*.[51] The Supreme Court declined to hear the case.

c. *St. Martin's Evangelical Lutheran Church v. South Dakota* (1981). A case involving exemption of a parochial school from federal unemployment tax has implications confirming the decisions just discussed. In this instance, the Secretary of Labor decided that a 1976 amendment to the Federal Unemployment Tax Act required collection of that tax for employees of church-related elementary and secondary schools, and so notified the states, which collect the tax. Two schools in South Dakota, one at St. Martin's Evangelical Lutheran Church, and the Northwestern Lutheran Academy, contended they were exempt from the tax with respect to their school employees. A state court agreed, but the Supreme Court of South Dakota reversed.

The U.S. Supreme Court in turn reversed the state supreme court and upheld the claimed exemption. It noted that the two schools were not separately incorporated and were viewed by the church as a central part of its religious activity. The court examined the statute and the amendment that supposedly made it applicable to parochial schools and found that it did not reach employees of schools that do not have a legal existence separate from the church.[52] Although the court did not mention the fact, the statute provided for review by a state agency of decisions to terminate an employee to determine whether the termination was for "good cause." In the case of the firing of a teacher at a church school, the agency might find itself scrutinizing disputes over whether the teacher had violated requirements of the church and, if so, whether those requirements were appropriate conditions of employment—the same kind of scrutiny that the court had sought to avoid in *NLRB v. Catholic Bishop*, so that decision may have played a part in this case, even though not mentioned.

(Both schools in this case belonged to the Wisconsin Synod, a small Lutheran body more conservative than the Lutheran Church—Missouri Synod, another instance of resistance to government interference, not by the "liberal," but by the most "conservative" of religious bodies in the nation!)

d. *California v. Grace Brethren Church* (1982). As little more than a footnote to the preceding, the Supreme Court in 1982 labored for twenty-five pages and brought

51. 573 F.Supp. 1550 (S.D.N.Y. 1983) and 559 F.2d 1112 (CA7 197), respectively.

52. *St. Martin's Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772 (1981).

forth a mouse. The question before it was the one left unresolved in *St. Martin*, *supra*, *viz*., whether unemployment taxes are collectible from religious schools that are *not* affiliated with a church. The federal district court agreed with the plaintiffs that the tax could not be collected from such schools. The Supreme Court held that the Tax Injunction Act (18 U.S.C. §1341) deprived federal courts of jurisdiction over the collection of state taxes, and since the Federal Unemployment Tax Act (FUTA) is a curious amalgam of federal and state powers, the court concluded that the issue should be determined by the state courts without federal intervention—a result that had been rejected by the trial court and was dissented from by Justice Stevens, joined by Justice Blackmun. While this decision may have something to teach about the Tax Injunction Act and FUTA, it has very little to offer on the law of church and state.

e. *Tony and Susan Alamo Foundation v. Secretary of Labor* (1985). A singular case involving the minimum wage evoked clarification of the concept of "employee" as applied to religious organizations. It arose in connection with a unique religious movement calling itself the Tony and Susan Alamo Foundation, which began as an evangelistic program in California. Much of its work was devoted to reclaiming drug addicts, drifters and criminals by conversion to Christianity and rehabilitation through work in the Foundation's various commercial enterprises, which included clothing design and manufacture, gasoline service stations, retail clothing and grocery stores, hog farms, roofing and electrical construction firms, a motel and candy manufacture, most of them located in Arkansas, where this case originated. In 1977 the Secretary of Labor charged the Foundation with failure to pay its 300 employees the minimum wage as required by the Fair Labor Standards Act.[53]

The Alamo Foundation defended on the grounds that the persons in question—its "associates"—were not "employees" but volunteers, and several of them testified at trial that they objected to payment of wages since they worked for evangelical reasons. One of them protested, "And no one ever expected any kind of compensation, and the thought is totally vexing to my soul. It would defeat my whole purpose." Another said, "I believe it would be offensive to me to even be considered to be forced to take a wage.... I believe it offends my right to worship God as I choose."[54] The associates were provided food, clothing, shelter and other benefits by the Foundation, often for months or years. The district court found that the associates were wholly dependent upon the Foundation and, while they did not expect compensation in wages, they did expect the Foundation to supply their subsistence needs; therefore, they were in actuality *employees* of the Foundation. It also found that the Foundation, though incorporated as a nonprofit religious organization, was an "enterprise...engaged in ordinary commercial activities in competition with other commercial businesses" and was therefore subject to the

53. 29 U.S.C. §§ 206(b), 207(a), 211(c), 215(a)(2), (a)(5).

54. *Alamo Fndn. v. Secy. of Labor*, 471 U.S. 290 (1985), Testimony of Ann Elmore and Bill Levy, n. 27.

minimum wage requirement.[55] The Eighth Circuit Court of Appeals agreed, commenting,

> It would be difficult to conclude that the extensive commercial enterprise operated and controlled by the foundation was nothing but a religious liturgy engaged in bringing good news to a pagan world. By entering the economic arena and trafficking in the marketplace, the foundation has subjected itself to the standards Congress has prescribed for the benefit of employees. The requirements of the Fair Labor Standards Act apply to its laborers.[56]

The Supreme Court granted *certiorari*, and Justice White wrote the opinion for a unanimous court.

> In order for the Foundation's commercial activities to be subject to the Fair Labor Standards Act, two conditions must be satisfied. First, the Foundation's businesses must constitute an "[e]nterprise engaged in commerce or in the production of goods for commerce." Second, the associates must be "employees" within the meaning of the Act.... An individual who, "without promise or expectation of compensation, but solely for his personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure or profit," is outside the sweep of the Act.... The [minimum wage] statute contains no express or implied exception for commercial activities conducted by religious or other nonprofit organizations, and the agency charged with its enforcement has consistently interpreted the statute to reach such businesses.... There was...broad congressional consensus that ordinary commercial businesses should not be exempted from the Act simply because they happened to be owned by religious or other non-profit organizations.
>
> Petitioners further contend that the various businesses they operate differ from "ordinary" commercial businesses because they are infused with a religious purpose. The businesses minister to the needs of the associates, they contend, both by providing rehabilitation and by providing them with food, clothing and shelter. In addition, petitioners argue, the businesses function as "churches in disguise"—vehicles for preaching and spreading the gospel to the public. The characterization of petitioner's businesses, however, is a factual question resolved against petitioners by both courts below...[which] clearly took account of the religious aspects of the Foundation's endeavors, and...found that the Foundation's businesses serve the general public in competition with ordinary commercial enterprises, and the payment of substandard wages would undoubtedly give petitioners and similar organizations an advantage over their competitors. It is exactly this kind of "unfair method

55. 567 F. Supp. 556 (1983).
56. 722 F.2d 397 (1984), quoted by the Supreme Court.

> of competition" that the Act was intended to prevent, and the admixture of religious motivations does not alter a business's effect on commerce.[57]

There remained the question whether the associates were "employees" within the meaning of the Act, and the court found the holdings of the lower courts on that score "not clearly erroneous"—the test for overturning the judgments below.

> That the associates themselves vehemently protest coverage under the Act makes this case unusual, but the purposes of the Act require that it be applied even to those who would decline its protections. If an exception to the Act were carved out for employees willing to testify that they performed work "voluntarily," employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act. Such exceptions to coverage would affect many more people than those workers directly at issue in this case and would be likely to exert a general downward pressure on wages in competing businesses....
>
> Petitioners further contend that application of the Act infringes on rights protected by the Religion Clauses of the First Amendment. Specifically, they argue that imposition of the minimum wage and recordkeeping requirements will violate the rights of the associates to freely exercise their religion and the right of the Foundation to be free of excessive government entanglement in its affairs. Neither of these contentions has merit.
>
> It is virtually self-evident that the Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights. Petitioners claim that the receipt of "wages" would violate the religious convictions of the associates. The Act, however, does not require the payment of cash wages. Section 203(m) defines "wage" to include "the reasonable cost...of furnishing [an] employee with board, lodging, or other facilities." Since the associates currently receive such benefits in exchange for working in the Foundation's businesses, application of the Act will work little or no change in their situation: the associates may simply continue to be paid in the form of benefits. The religious objection does not appear to be to receiving any specified *amount* of wages. Indeed, petitioners and the associates assert that the associates' standard of living far exceeds the minimum. Even if the Foundation were to pay wages in cash, or if the associates' beliefs precluded them from accepting the statutory amount, there is nothing in the Act to prevent the associates from returning the amounts to the Foundation, provided they do so voluntarily. We therefore

57. *Alamo Fndn. v. Secy. of Labor*, *supra*. With respect to this issue, see *EEOC v. Townley Engineering & Mfgr. Co*., 859 F.2d 610 (CA9, 1988), holding that a commercial enterprise could not also be a religious organization for purposes of Section 702 of the Civil Rights Act of 1964.

> fail to perceive how application of the Act would interfere with the associates' right to freely exercise their religious beliefs.[58]

4. Recognition of Autonomy in Employment

Two decisions signaled a more general recognition of the autonomy of religious bodies with respect to (most) employees.

a. *Rayburn v. Seventh-day Adventists* (1985). Carole Rayburn was a Seventh-day Adventist woman who earned a Master of Divinity degree from Andrews University in Berrien Springs, Michigan, the theological seminary of the church, and a Ph.D. in psychology from Catholic University. With these strong credentials she applied for an internship as an Associate in Pastoral Care with the Potomac Conference of the Seventh-day Adventist church. She also applied for a vacancy on the pastoral staff of the Sligo Church, one of the largest congregations in the denomination, with a membership of five thousand, a staff of seven pastors, and a location near the church's world headquarters (at that time) in Takoma Park, a community on the northern edge of Washington, D.C. Although women were not eligible for ordination in the Seventh-day Adventist Church, she was eligible for the position of "associate in pastoral care."

The internship and the vacancy at the Sligo Church were awarded to another woman. When she learned of her rejection, Carole Rayburn filed a complaint under Title VII of the Civil Rights Act of 1964 with the Equal Employment Opportunity Commission alleging that she had been discriminated against because of her gender and her association with black persons. She received a right-to-sue letter from EEOC and brought suit in the federal District of Maryland against various persons and entities in the church. The district court granted summary judgment to the church on the ground that a Title VII action against it was barred by the religion clauses of the First Amendment. Rayburn appealed, and the United States Court of Appeals for the Fourth Circuit ruled on September 23, 1985, in an opinion written by Judge J. Harvie Wilkinson III for himself, Chief Judge Winter and Judge James M. Sprouse.

The court first considered whether Title VII was in conflict with the First Amendment and concluded that it was.

> The application of Title VII to the employment relationship before us would definitely "give rise to serious constitutional questions."[59] Although we would prefer to avoid these questions, we do not believe that such a course is open to us. The language and the legislative history of Title VII both indicate that the statute exempts religious institutions only to a

58. *Alamo Fndn., supra.*

59. Citing *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976), *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952), and *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir., 1972), *supra*.

narrow extent. Section 702 of Title VII, as amended, 42 U.S.C.§2000e-1 (1982), provides:

> This subchapter shall not apply...to a religious corporation, association, educational institution, or society with respect to the employment of individuals *of a particular religion* to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities. (emphasis supplied [by the court]).

The wording of §702 may fairly be construed to prohibit some forms of state involvement in ecclesiastical decisions of employment....

While the language of §702 makes clear that religious institutions may base relevant hiring decisions upon religious preference, Title VII does not confer upon religious organizations a license to make those same decisions on the basis of race, sex or national origin. [Footnote 2: Here, of course, one member of the Seventh-day Adventist Church was selected over another of that same faith for reasons appellant allege [*sic*] pertain to race and sex.] The statutory exemption applies to one particular reason for employment decision—that based upon religious preference. It was open to Congress to exempt from Title VII the religious employer, not simply one basis of employment, and Congress plainly did not....

We cannot impose upon a statute a limiting construction where to do so would strain congressional intent. Given the wording of the statute and the history behind it, we conclude that Title VII, by "the affirmative intention of Congress, clearly expressed," applies to the employment decision in this case. We must turn, therefore, to the constitutional questions.[60]

The court undertook a brief review of the Supreme Court's rulings on the religion clauses as they applied to the case before it and concluded:

> Tensions have developed between our cardinal Constitutional principles of freedom of religion, on the one hand, and our national attempt to eradicate all forms of discrimination, on the other.
>
> Each person's right to believe as he wishes and to practice that belief according to the dictates of his conscience so long as he does not violate the personal rights of others, is fundamental to our system. This basic freedom is guaranteed not only to individuals but also to churches in their collective capacities, which must have "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[61] Ecclesiastical decisions are generally inviolate; "civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law."[62] The

60. *Rayburn v. General Conference of Seventh-day Adventists*, 722 F.2d 1164 (4th Cir., 1985).

61. Quoting ***Kedroff v. St. Nicholas Cathedral***, 344 U.S. 94, 116 (1952), discussed at § B3 above.

62. Quoting *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713 (1976), discussed at § B7 and § D1e above.

> right to choose ministers without government restriction underlies the well-being of religious community, for perpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrines both to its own membership and to the world at large.

At this point the court inserted a cogent footnote worthy of inclusion in the main text:

> 5. The free exercise rights of an organized church may appear, upon occasion, to infringe upon the religious liberties of individual members. We discern no such litigable conflict here, however, for the Court in *Kedroff* and *Milivojevich* has warned of the dangers of interposing government between church and believer. No member of a church may claim, under the First Amendment, an enforceable right to be considered or accepted by the church hierarchy as a minister. The dissident or dissatisfied must, under *Milivojevich*, generally look elsewhere for resolution of such grievances.

Continuing with the text in chief:

> Any attempt by government to restrict a church's free choice of its leaders thus constitutes a burden on the church's free exercise rights. We next inquire whether "there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." It would, of course, be difficult to exaggerate the magnitude of the state's interest in assuring equal employment opportunities for all, regardless of race, sex, or national origin. There remains, then, for examination the decisive criterion developed by the Court in *Wisconsin v. Yoder*. To resolve a free exercise question: a balancing of the burden on free exercise against the "impediment to... [the state's] objectives that would flow from recognizing the claimed...exemption."[63]
>
> Here that balance weighs in favor of free exercise of religion. The role of an associate in pastoral care is so significant in the expression and realization of Seventh-day Adventist beliefs that state intervention in the appointment process would excessively inhibit religious liberty. The associate in pastoral care at Sligo Church is, according to undisputed evidence, pastoral advisor to the Sabbath School that introduces children to the life of the church. She also leads small congregational groups in Bible study. As counselor and as pastor to the singles group, the associate in pastoral care is once again a liaison between the church as an institution and those whom it would touch with its message. Such counseling requires sensitivity both to the human problems of the congregation and to the church's message of comfort in the face of these problems. Never are people more in need of spiritual leadership than when they turn to a pastor for help in dealing with their most difficult moments. Finally, the

63. *Wisconsin v. Yoder*, 406 U.S. 205 (1972), discussed at IIIB2.

selection of the associate in pastoral care to stand on the platform during services, to lead out the congregation during the church's solemn rites, and to preach occasionally from the pulpit places the imprimatur of the church upon that person as a worthy spiritual leader to whom members may look for consultation, example and guidance in their own lives and in the life of the congregation as a corporate body.

Any one of these functions so embodies the basic purpose of the religious institution that state scrutiny of the process for filling the position would raise constitutional problems; when all functions are combined, the burden of potential interference becomes extraordinary. This burden is not diminished by the fact that lay church members may on appropriate occasions be called upon to participate in one or more of these activities or to serve in similar capacities in teaching and counseling each other. Lay ministries, even in leadership roles, do not compare to the institutional selection for hire of one member with special theological training to lead others.

The fact that an associate in pastoral care can never be an ordained minister in her church is likewise immaterial. The "ministerial exception" to Title VII first articulated in *McClure v. Salvation Army*,[64] does not depend upon ordination but upon the function of the position.[65] "As a general rule, if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, he or she should be considered `clergy'."[66] This approach necessarily requires a court to determine whether a position is important to the spiritual and pastoral mission of the church.... In the instance before us, the evidence is simply overwhelming that it is.

While it is our duty to determine whether the position of associate in pastoral care is important to the spiritual mission of the Seventh-day Adventist Church, we may not then inquire whether the reason for Rayburn's rejection had some explicit grounding in theological belief. Emphasis on the role of an associate in pastoral care rather than the reasons for Rayburn's rejection underscores our constitutional concern for the unfettered right of the church to resolve certain questions. The fact that the Seventh-day Adventist church does not ordain women, the asserted scriptural basis for that practice, and the influence or lack thereof of this restriction in Rayburn's case do not influence our analysis. In "quintessentially religious" matters, the free exercise clause of the First Amendment protects the act of a decision rather than a motivation behind it. In these sensitive areas, the state may no more require a minimum basis in doctrinal reasoning than it may supervise doctrinal content.

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64. 460 F.2d 553 (5th Cir., 1972), *cert.* denied, 409 U.S. 896 (1972), discussed at § 2b above.

65. Citing *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir., 1981), *cert.* denied, 456 U.S. 905 (1982).

66. Quoting Bagni, "Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations," 79 *Columbia L. Rev.* 1514, 1545 (1979).

* * *

To subject church employment decisions of the nature we consider today to Title VII scrutiny would also give rise to "excessive government entanglement" with religious institutions prohibited by the establishment clause of the First Amendment.

* * *

The application of Title VII to employment decisions of this nature would result in an intolerably close relationship between church and state both on a substantive and procedural level. On a substantive level, the unrefuted evidence from appellee Potomac Conference emphasized the importance of "spirituality" as an attribute of an associate in pastoral care and stated that in making an appointment, "the guidance of the Holy Spirit is always sought so that the one chosen can be God's appointed, as well as the one who has the support of his/her fellow church members." It is axiomatic that the guidance of the state cannot substitute for that of the Holy Spirit and that a courtroom is not the place to review a church's determination of "God's appointed."

Moreover, the goals of a church in the selection of its spiritual leaders and of a governmental agency in the performance of its statutory mandate may not be the same. The Equal Employment Opportunity Commission may or may not share the values of any given church, whose highest priority is simply one of fidelity to its own beliefs and practices. The danger is that choices of clergy which conform to the preferences of public agencies may be favored over those which are neutral or opposed. The church's selection may at times result from preferences wholly impermissible in the secular sphere. Where goals differ, the temptation for state intrusion becomes apparent. But "[e]ven if government policy and church doctrine endorse the same broad goal, the church has a legitimate claim to autonomy in the elaboration and pursuit of that goal."[67] Where the values of state and church clash or where there is a different emphasis among priorities or as to means in an employment decision of a theological nature, the church is entitled to pursue its own path without concession to the views of a federal agency or commission. Bureaucratic suggestion in employment decisions of a pastoral character, in contravention of a church's own perception of its needs and purposes, would constitute unprecedented entanglement with religious authority and compromise the premise "that both religion and government can best work to achieve their lofty aims if each is left free of the other within its respective sphere."[68]

On a procedural level, entanglement might also result from a protracted legal process pitting church and state as adversaries in disregard of *NLRB v. Catholic Bishop of Chicago*....[69] A Title VII action is potentially a lengthy proceeding, involving state agencies and commissions, the EEOC, the

67. Quoting Laycock, "Towards a General Theory of the Religion Clauses," *supra*, at 1399.

68. Quoting *McCollum v. Board of Education*, 333 U.S. 203, 212 (1948).

69. 440 U.S. 490 (1979), discussed at § 3a above.

> federal trial courts and courts of appeal. Church personnel and records would inevitably become subject to subpoena, discovery, cross-examination, the full panoply of legal process designed to probe the mind of the church in the selection of its ministers. The remedies that a district court may impose... may be far-reaching in their impact upon religious organizations. Even after entry of judgment, questions of compliance may result in continued court surveillance of the church's policies and decisions. In *Catholic Bishop*, the Supreme Court... noted that "It is not only the conclusions that may be reached by the Board which may infringe on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions."[70] The same is true here. There is the danger that churches, wary of EEOC or judicial review of their decisions, might make them with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal and doctrinal assessment of who would best serve the pastoral needs of their members.
>
> Of course churches are not—and should not be—above the law. Like any other person or organization, they may be held liable for their torts and upon their valid contracts. Their employment decisions may be subject to Title VII scrutiny, where the decision does not involve the church's spiritual functions.... [W]e hold that the Constitution requires that civil authorities decline to review either the procedures for selection or the qualifications of those chosen or rejected here.[71]

This decision thus recognized the right of a church to choose its ministers (or licensed laypersons for pastoral roles) without regard to the strictures of Title VII as to alleged discrimination with respect to gender or race. Since both candidates for the post were white women, the allegation of discrimination may have seemed weak on its face. If the person hired had been white or male and the disappointed applicant black or a woman (or both), the case might have been stronger, but one would like to think the result would have been the same. The Supreme Court declined to hear the case, but two years later accepted a challenge to the constitutionality of the exemption in Section 702 permitting a church to hire members of its own faith for arguably *non*-religious jobs.

b. ***Corporation of the Presiding Bishop v. Amos*** **(1987).** The constitutionality of Section 702 of the Civil Rights Act of 1964 (discussed in the preceding section) came before the U.S. Supreme Court in 1987 in a case arising against the Mormon Church in Utah. Several lay employees of various nonprofit enterprises carried on by the church were discharged in 1981 because, although they were Mormons, they failed to qualify for a certification by their respective bishops that they met the standards of the church to participate in ceremonies at the Mormon Temple. Such standards

70. Ibid. at 502.
71. *Rayburn*, *supra*.

included "regular church attendance, tithing, and abstinence from coffee, tea, alcohol and tobacco."[72]

The church had notified its employees in these enterprises some time before that only those who qualified for a "temple recommend" could continue to work for the church, and some had failed to heed that warning and so were discharged. Some of them then sued the church for discriminating against them in employment. The church responded that its employment policies were shielded from liability by the exemption of Section 702. Plaintiffs contended that such an exemption would violate the Establishment Clause because it would represent a special privilege for religion. They did not contest the exemption as applied to *religious* occupations, but insisted that their occupations were *non*religious.

The district court agreed that the exemption provided by Section 702 was unconstitutional and ordered the discharged employees reinstated with back pay. Since a federal statute had been held unconstitutional, the church appealed directly to the Supreme Court, which ruled in an opinion written by Justice White.

> "This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause...."[73] At some point, accommodation may devolve into an "unlawful fostering of religion," but this is not such a case, in our view.
>
> The [church] contend[s] that we should not apply the three-part *Lemon*[74] approach... [because] an exemption statute will always have the effect of advancing religion.... In any event, we need not reexamine *Lemon* as applied in this context, for the exemption involved here is in no way questionable under the *Lemon* analysis.
>
> *Lemon* requires first that the law at issue serve a "secular legislative purpose." This does not mean that the law's purpose must be unrelated to religion— that would amount to a requirement "that the government show a callous indifference to religious groups,"[75] and the Establishment Clause has never been so interpreted. Rather, *Lemon*'s "purpose" requirement aims at preventing the relevant governmental decisionmaker—in this case, Congress—from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters.
>
> Under the *Lemon* analysis, it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions. Appellees

72. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987), n. 4.

73. Ibid., quoting *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 135 (1987), discussed at IVA7i.

74. The test of establishment outlined in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), discussed at IIID5, had been used by the district court in holding the statute unconstitutional.

75. Quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952), discussed at IIIC1b.

> argue that there is no such purpose here because §702 provided adequate protection for religious employers prior to the 1972 amendment,[76] when it exempted only the religious activities of such employers from the statutory ban on religious discrimination. We may assume for the sake of argument that the pre-1972 exemption was adequate in the sense that the Free Exercise Clause required no more. Nonetheless, it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.[77]

In the margin the court noted that "the present case is illustrative of the difficulties" encountered in trying to persuade a judge that certain activities are religious, since the district court had ruled that some of the church's enterprises (Deseret Industries, which ran a sheltered workshop) were religious, while others (such as the Deseret Gymnasium and the Beehive Clothing Mills, which made "temple garments") were not. The church had contended that they were all religious, though other—commercial and taxpaying—enterprises owned and operated by the church were not considered by it to be religious, and it did not impose or enforce any religious requirements upon employees in those (nonreligious) undertakings.[78] The court did not refer to that argument. Only former employees of the Gymnasium were involved in this appeal, of whom Christine Amos, oddly enough, was not one. The appeal was taken on behalf of a janitor at the Gymnasium named Mayson, but it was Ms. Amos' name that was immortalized in the *U.S. Reports*.

> After a detailed examination of the legislative history of the 1972 amendment, the District Court concluded that Congress' purpose was to minimize governmental "interfer[ence] with the decision-making process in religions." We agree with the District Court that this purpose does not violate the Establishment Clause.
>
> The second requirement under *Lemon* is that the law in question have "a principal or primary effect... that neither advances nor inhibits religion." Undoubtedly, religious organizations are better able now to advance their purposes than they were prior to the 1972 amendment.... But religious groups have been better able to advance their purposes on account of many laws that have passed constitutional muster, for example, the property tax exemption at issue in *Walz v. Tax Comm'n*,[79] or the loans of

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76. Discussed in § D2a above and in the section immediately preceding this one.

77. *Corporation of the Presiding Bishop v. Amos, supra.*

78. Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment, April 15, 1985, Par. D13, p. 25.

79. 397 U.S. 664 (1970), discussed at VC6b(3).

school books to school children, including parochial school students, upheld in *Board of Education v. Allen*.[80] A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden "effects" under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence. As the Court observed in *Walz*, "[F]or the men who wrote the Religion Clauses of the First Amendment, the `establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity."

The District Court appeared to fear that sustaining the exemption would permit churches with financial resources impermissibly to extend their influence and propagate their faith by entering the commercial profit-making world. The case before us, however, involves a nonprofit activity instituted over 75 years ago in the hope that "all who assemble here, and who come for the benefit of their health, and for physical blessings, [may] feel that they are in a house dedicated to the Lord." Dedicatory Prayer for the Gymnasium. This case therefore does not implicate the apparent concerns of the District Court. Moreover, we find no persuasive evidence in the record before us that the Church's ability to propagate its religious doctrine through the Gymnasium is any greater now than it was prior to the passage of the Civil Rights Act in 1964. In such circumstances, we do not see how any advancement of religion achieved by the Gymnasium can be fairly attributed to the Government, as opposed to the Church.

We find unpersuasive the District Court's reliance on the fact that §702 singles out religious entities for a benefit. Although the Court has given weight to this consideration in its past decisions, it has never indicated that statutes that give special consideration to religious groups are *per se*, invalid. That would run contrary to the teaching of our cases that there is ample room for accommodation of religion under the Establishment Clause. Where, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities....

Appellees argue that §702 offends equal protection principles by giving less protection to the employees of religious employers than to the employees of secular employers. Appellees rely on *Larson v. Valente*[81] for the proposition that a law drawing distinctions on religious grounds must be strictly scrutinized. But *Larson* indicates that laws discriminating *among* religions are subject to strict scrutiny, and that laws "affording a uniform benefit to *all* religions" should be analyzed under *Lemon*. In a case such as this, where a statute is neutral on its face and motivated by a permissible purpose of limiting governmental interference with the exercise of religion, we see no justification for applying strict scrutiny to a statute that passes the *Lemon* test. The proper inquiry is whether Congress has chosen

80. 392 U.S. 236 (1968), discussed at IIID3.

81. 456 U.S. 228, 246 (1982), discussed at IIC5c.

> a rational classification to further a legitimate end. We have already indicated that Congress acted with a legitimate purpose in expanding the §702 exemption to cover all activities of religious employers. To dispose of appellees' Equal Protection argument, it suffices to hold—as we now do—that as applied to the nonprofit activities of religious employers, §702 is rationally related to the legitimate purpose of alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions.
>
> It cannot be seriously contended that §702 impermissibly entangles church and state [the third element of the *Lemon* test]; the statute effectuates a more complete separation of the two and avoids the kind of intrusive inquiry into religious belief that the District Court engaged in in this case. The statute easily passes muster under the third part of the *Lemon* test.
>
> The judgment of the District Court is reversed, and the case is remanded for further proceedings consistent with this opinion.[82]

This opinion was joined by Chief Justice Rehnquist and Associate Justices Powell, Stevens and Scalia, a majority of five representing the conservative wing of the court, which was inclined in most matters to defer to the judgment of the legislative branch. What did the more liberal members do, who often upheld—against legislative accommodations—the principles of no-establishment and nondiscrimination? Justice Brennan wrote an opinion in which Justice Marshall joined, concurring in the judgment:

> I write separately to emphasize that my concurrence in the judgment rests on the fact that this case involves a challenge to the application of §702's categorical exemption to the activities of a *nonprofit* organization. I believe that the particular character of nonprofit activity makes inappropriate a case-by-case determination whether its nature is religious or secular.
>
> This case represents a confrontation between the rights of religious organizations and those of individuals. Any exemption from Title VII's proscription on religious discrimination necessarily has the effect of burdening the religious liberty of prospective and current employees. An exemption says that a person may be put to the choice of either conforming to certain religious tenets or losing a job opportunity, a promotion, or, as in this case, employment itself. The potential for coercion created by such a provision is in serious tension with our commitment to individual freedom of conscience in matters of religious belief.
>
> At the same time, religious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to:
>
> "select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions. Religion includes important communal elements for most believers. They exercise their religion

82. *Corporation of Presiding Bishop v. Amos, supra.*

> through religious organizations, and these organizations must be protected by the [Free exercise] [C]lause."[83]

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 freedoms as well.

The authority to engage in this process of self-definition inevitably involves what we normally regard as infringement on Free Exercise rights, since a religious organization is able to condition employment in certain activities on subscription to particular religious tenets. We are willing to countenance the imposition of such a condition because we deem it vital that, if certain activities constitute part of a religious community's practice, then a religious organization should be able to require that only members of its community perform those activities.

This rationale suggests that, ideally, religious organizations should be able to discriminate on the basis of religion *only* with respect to religious activities, so that a determination should be made in each case whether an activity is religious or secular. This is because the infringement on religious liberty that results from conditioning performance of *secular* activity upon religious belief cannot be defended as necessary for the community's self-definition. Furthermore, the authorization of discrimination in such circumstances is not an accommodation that simply enables a church to gain members by the normal means of prescribing the terms of membership for those who seek to participate in furthering the mission of the community. Rather, it puts at the disposal of religion the added advantage of economic leverage in the secular realm. As a result, the authorization of religious discrimination with respect to nonreligious activities goes beyond reasonable accommodation, and has the effect of furthering religion in violation of the Establishment Clause.

What makes the application of a religious-secular distinction difficult is that the character of an activity is not self-evident. As a result, determining whether an activity is religious or secular requires a searching case-by-case analysis. This results in considerable ongoing government entanglement in religious affairs. Furthermore, this prospect of government intrusion raises concern that a religious organization may be chilled in its Free

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83. Laycock, "Toward a General Theory of the Religion Clauses," at 1389. The opinion also cited *Serbian Eastern Orthodox Diocese v. Milivojevich* (church has interest in effecting binding resolution of internal governance disputes); *Kedroff v. Saint Nicholas Cathedral*, (state statute purporting to transfer administrative control from one church to another violates Free Exercise Clause).

> Exercise activity. While a church may regard the conduct of certain functions as integral to its mission, a court may disagree. A religious organization therefore would have an incentive to characterize as religious only those activities about which there likely would be no dispute, even if it genuinely believed that religious commitment was important in performing other tasks as well. As a result, the community's process of self-definition would be shaped in part by the prospects of litigation. A case-by-case analysis for all activities therefore would both produce excessive government entanglement with religion and create the danger of chilling religious activity.
>
> The risk of chilling religious organizations is most likely to arise with respect to *nonprofit* activities. The fact that an operation is not organized as a profit-making commercial enterprise makes colorable a claim that it is not purely secular in orientation. In contrast to a for-profit corporation, a nonprofit organization must utilize its earnings to finance the continued provision of the goods or services it furnishes and may not distribute any surplus to the owners. This makes plausible a church's contention that an entity is not operated simply in order to generate revenues for the church, but that the activities themselves are infused with a religious purpose. Furthermore, unlike for-profit corporations, nonprofits historically have been organized specifically to provide certain community services, not simply to engage in commerce. Churches often regard the provision of such services as a means of fulfilling religious duty and of providing an example of the way of life a church seeks to foster.
>
> Nonprofit activities therefore are most likely to present cases in which characterization of the activity as religious or secular will be a close question. If there is a danger that a religious organization will be deterred from classifying as religious those activities it actually regards as religious, it is likely to be in this domain. This substantial potential for chilling religious activity makes inappropriate a case-by-case determination of the character of a nonprofit organization, and justifies a categorical exemption for nonprofit activities. Such an exemption demarcates a sphere of deference with respect to those activities most likely to be religious. It permits infringement on employee Free Exercise rights in those instances in which discrimination is most likely to reflect a religious community's self-definition. While every nonprofit activity may not be operated for religious purposes, the likelihood that many are makes a categorical rule a suitable means to avoid chilling the exercise of religion.[84]

Thus did Justice Brennan wrestle with the conflict between his devotion to individual religious liberty (and nondiscrimination in employment) and his concern for the autonomy of corporate religious bodies, finding in the nonprofit character of the employers at issue a median resting place (that is *not* specified in the statute). Whereas the majority was content to defer to the wisdom of the legislature in this

84. *Corporation of the Presiding Bishop v. Amos, supra*, Brennan concurrence, emphasis in original.

matter, Justice Brennan had to convince himself that the legislature has been truly wise. In so doing, he sailed much closer to the wind of finding the exemption unconstitutional than did the majority, even warning in a footnote that if churches started using nonprofit status to evade Title VII "I would find it necessary to reconsider the judgment in this case."[85] As usual, Justice Brennan explored the issues more clearly and more sensitively than did the majority opinion, which often has to gloss over ambiguities in order to attract five votes.

Justice O'Connor, too, was not satisfied with the majority's rationale and wrote a separate concurrence.

> Although I agree with the judgment of the Court, I write separately to note that this action once again illustrates certain difficulties inherent in the Court's use of the test articulated in *Lemon v. Kurtzman*....[86]
>
> In *Wallace v. Jaffree*,[87] I noted a tension in the Court's use of the *Lemon* test to evaluate an Establishment Clause challenge to government efforts to accommodate the free exercise of religion:
>
> > "On the one hand, a rigid application of the *Lemon* test would invalidate legislation exempting religious observers from generally applicable government obligations. By definition, such legislation has a religious purpose and effect in promoting the free exercise of religion. On the other hand, judicial deference to all legislation that purports to facilitate the free exercise of religion would completely vitiate the Establishment Clause. Any statute pertaining to religion can be viewed as an `accommodation' of free exercise rights."[88]
>
> In my view, the opinion of the Court leans toward the second of the two unacceptable options described above. While acknowledging that "[u]ndoubtedly, religious organizations are better able now to advance their purposes than they were prior to the 1972 amendment to §702," the Court seems to suggest that the "effects" prong of the *Lemon* test is not at all implicated as long as the government action can be characterized as "allowing" religious organizations to advance religion, in contrast to government action directly advancing religion. This distinction seems to me to obscure far more than to enlighten. Almost any government benefit to religion could be recharacterized as simply "allowing" a religion to better advance itself, unless perhaps it involved actual proselytization by government agents. In nearly every case of a government benefit to religion, the religious mission would not be advanced if the religion did not take advantage of the benefit; even a direct financial subsidy to a religious organization would not advance religion if for some reason the organization failed to make use of the funds. It is for this same reason that there is little significance to the Court's observation that it was the Church

85. Ibid., n. 4.

86. 403 U.S. 602 (1971), discussed at IIID5.

87. 472 U.S. 38 (1985), discussed at IIIC2d(8).

88. *Wallace v. Jaffree, supra,* O'Connor, J., concurring in the judgment.

rather than the government that penalized [the employee's] refusal to adhere to Church doctrine. The Church had the power to put [the employee] to a choice of qualifying for a temple recommend or losing his job because *the government* had lifted from religious organizations the general regulatory burden imposed by §702.

The necessary first step in evaluating an Establishment Clause challenge to a government action lifting from religious organizations a generally applicable regulatory burden is to recognize that such government action *does* have the effect of advancing religion. The necessary second step is to separate those benefits to religion that constitutionally accommodate the free exercise of religion from those that provide unjustifiable awards of assistance to religious organizations. As I have suggested in earlier opinions, the inquiry framed by the *Lemon* test should be "whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement."[89] To ascertain whether the statute conveys a message of endorsement, the relevant issue is how it would be perceived by an objective observer, acquainted with the text, legislative history, and implementation of the statute. Of course, in order to perceive the government action as a permissible accommodation of religion, there must in fact be an identifiable burden on *the exercise of religion* that can be said to be lifted by the government action. The determination of whether the objective observer will perceive any endorsement of religion "is not a question of simply historical fact. Although evidentiary submissions may help answer it, the question is, like the question whether racial or sex-based classifications communicate an invidious message, in large part a legal question to be answered on the basis of judicial interpretation of social facts."[90]

The above framework, I believe, helps clarify why the amended §702 raises different questions as it is applied to nonprofit and for-profit organizations. As Justice Brennan observes in his concurrence, "The fact that an operation is not organized as a profit-making commercial enterprise makes colorable a claim that it is not purely secular in orientation." This case involves a government decision to lift from a nonprofit activity of a religious organization the burden of demonstrating that the particular nonprofit activity is religious as well as the burden of refraining from discriminating on the basis of religion. Because there is a probability that a nonprofit activity of a religious organization will itself be involved in the organization's religious mission, in my view the objective observer should perceive the government action as an accommodation of the exercise of religion rather than as a government endorsement of religion.

It is not clear, however, that activities conducted by religious organizations solely as profit-making enterprises will be as likely to be directly involved in the religious mission of the organization. While I

89. Ibid., at 69.

90. *Lynch v. Donnelly*, 465 U.S., at 693-694, discussed at VE2d.

> express no opinion on the issue, I emphasize that under the holding of the Court, and under my view of the appropriate Establishment Clause analysis, the question of the constitutionality of the §702 exemption as applied to for-profit activities of religious organizations remains open.[91]

Justice Blackmun concurred in the judgment in a brief paragraph expressing agreement with Justice O'Connor's view of the defects of the majority opinion and the limitation of the court's holding to nonprofit activities only.

The court's encounter with *Amos* effectively put to rest the murmurings that permitting churches to give preference to their own members in employment—even in ancillary agencies— was an establishment of religion. All nine justices agreed that it was not. Those who did not join the majority opinion merely wished to fine-tune the rationale and to limit it to nonprofit activities (which limitaton the majority had accepted).

Curiously, neither the statute nor the court contemplated the possibility that a church might use its exemption to limit hiring to a broader (or other?) category than its own membership, as by hiring Protestants only or Christians only, which would seem perfectly legal under the wording of the statute, but would not fit the court's rationale, and probably was not what Congress intended.

To recapitulate in brief the teachings adduced in this section:

1. Congress did not violate the Establishment Clause when it provided that a church may hire its own members in preference to others, even for nonreligious (nonprofit) jobs [at least if privately financed; a different rule may apply if governmentally funded]—*Corporation of the Presiding Bishop v. Amos*.

2. A church may hire its ministers (or laypersons serving in spiritual roles) without regard to rules against discrimination on basis of race, gender, national origin, etc.—*Rayburn v. Seventh-day Adventists* (4th Circuit).

3. Congress did not authorize the National Labor Relations Board to supervise the employment relationship between churches and their (lay) teaching employees (though state legislatures may do so)—*NLRB v. Catholic Bishop*, modified by *Catholic High School Assn. v. Culvert*.

4. A church need not pay unemployment insurance tax for employees of a parish school that is not separately incorporated—*St. Martin's Church v. South Dakota*.

5. A religious organization must pay its "employees" engaged in secular occupations the minimum wage—*Alamo Fndn. v. Secy. of Labor*.

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91. *Corporation of the Presiding Bishop v. Amos, supra*, O'Connor concurrence.