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# "Religion"and "Religious Institutions" Under the First Amendment

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*The power to define is the power to control; therefore the author believes governmental definitions of religion are to be avoided as inherently violative of the first amendment. While the meaning of religion must be construed when dealing with cases arising under the first amendment and statutes concerning religion, there is danger in adopting any specific definition that may result in the static recognition of existing norms, thus tacitly establishing existing religions against developing religions. Further, the inquiry necessarily involved in determining if an institution meets a particular definition may itself result in unconstitutional entanglement. What is "religion" and what regulation thereof is permissible is first examined in cases involving the religion clauses of the first amendment. The free exercise and establishment clauses are examined in light of several important cases including those concerning religiously prescribed polygamy and transcendental meditation. The cases demonstrate the refusal of federal courts to adopt explicit criteria defining religion, and recognize that the protected exercise of religion is broader than activities strictly religious in nature. This theme is reinforced by a discussion of federal, state, and local legislation involving such diverse areas as the selective service, employment, property tax exemption, and zoning. Discussion then shifts*

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*to what the author perceives as a dangerous trend toward rigid definition of "church," and functional categorization of "religious institutions." This trend is most visible in Internal Revenue statutes and regulations. Criteria adopted by the IRS to determine if an organization is a "church" tend to unconstitutionally establish religion by specifying the structure necessary to obtain the protection afforded to "churches." Such criteria inevitably result in legal force being given to the government's perception of religion. Development of governmentally created categories of religious organizations, such as "integrated auxiliaries," places the government in the unconstitutional role of deciding the nature of the proper function of the church. Such categorization also runs contrary to established principles which recognize that first amendment protection is not limited to purely religious acts.*

## I. INTRODUCTION

The first amendment begins, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." But what is "religion" under the first amendment? What does the first amendment mean for religious institutions which perform certain secular functions? How religious must an organization be before it is entitled to first amendment protections, and are there any gradations with respect to such protections? What definitional lines can be drawn around the term "church" which are consistent with the first amendment? These issues arise in the interpretation of the first amendment and of statutes which contain special provisions for religion or religious institutions.

The "definitional problem" is becoming more acute as a result of the increasing wordage in our statutes and regulations, and the desire to express requirements in closely defined terms, part of the more general move away from a common or case law system and towards a civil or codified system. Another factor which serves to exacerbate the definitional problem is the tendency to limit to a particular class of religious organizations exemptions which once applied generally to religious organizations. Thus, a number of categories of religious organizations have been established legislatively which may or may not correspond to categories that churches recognize.[1]

An understanding of what constitutes "religion" or "church" is essential to decision-making where religion and religious institutions are concerned. A very different issue is posed, however, by government definition of religion or religious institutions. Our law presumes that government officials are not qualified to make judgments in the area of religion which are enforceable against the public. If officials—either elected or appointed—are permitted to construct definitions in those areas where they are forbidden to

1. *See* notes 114-23 *infra*, and accompanying text.

discriminate, they may impose by definitional form that which they are forbidden to impose by direct decree. This article will examine the legal interpretation as to what constitute religion and religious institutions, and will review governmental efforts to define them. It will attempt to reach an understanding—not a definition—of "religion" under the first amendment in both its individual and institutional expression.

## II. WHAT IS "RELIGION"?

There is a tale about a woman attending the Sunday service of a fashionable Episcopalian church. Her frequent exclamations of "Hallelujah!" and "Amen, brother!" caused an usher to approach her. Peering over his glasses, he inquired, "Is anything wrong?" "Why," she replied, "I've got religion!" "But Madam," the startled gentleman responded, "This is an Episcopal church. *This* is no place to have religion," whereupon the usher escorted her out of the church. Religion clearly means different things to different people—including people who consider themselves religious.

### *A. Religion Under the First Amendment*

The question of what constitutes religion under the first amendment has arisen in cases applying the establishment clause, the free exercise clause, or both, to governmental actions. These proscriptions against the federal government are applicable to state governments through the fourteenth amendment.[2]

#### 1. The Free Exercise Clause

The term "free exercise" necessarily implies action, not merely thought processes. Thus, the first amendment mandates protection for action which springs from religious belief as well as protection for belief itself.

There are two kinds of governmental action which can be detrimental to religious practice. The first is action directed specifically against a particular religion, such as a law prohibiting the conducting of public worship services on Saturday. Such a law would obviously have only one purpose—the inhibition of religious worship by sects which observe a Saturday Sabbath. This would clearly violate the free exercise clause. The second type of

2. Cantwell v. Connecticut, 310 U.S. 296 (1940).

governmental action does not have as its purpose the infringement of religious freedom of particular sects, but the furtherance of a state interest. However, it would either require action which is forbidden by the tenets of a particular religion, or would mandate action proscribed by a religion. Such a law is not "religious" for purposes of the establishment clause, *i.e.*, state requirements in that area do not constitute an establishment of religion. Nevertheless, the free exercise clause may require the state to exempt the believer from the enforcement of that law.[3] Of course, laws can be passed which purport to regulate areas within the police power of the state for secular reasons, but are, in fact, aimed at suppressing a particular religion.[4]

It seems unlikely that a law wholly within category one, aimed explicitly against the worship of certain sects, could be held constitutional.[5] As a result of our nation's proud tradition of religious freedom and a generally felt requirement that legislation at least appear religiously neutral, most free exercise cases have arisen under the second category of law—laws which effectuate a state interest, but run contrary to certain religious teachings. In these cases, courts must draw the line between action which is protected under the free exercise clause, and that which can legiti-

3. *E.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (Amish cannot be required to send their children to high school contrary to their religious beliefs); Teterud v. Gillman, 385 F. Supp. 153 (S.D. Iowa 1974), *aff'd*, 522 F.2d 357 (8th Cir. 1975) (state prison regulation on hair length cannot be enforced in the face of an Indian's free exercise claim); People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) (*en banc*) (state law against possession of peyote cannot be enforced against Navajo members of the Native American Church who use peyote in religious worship). Although free exercise claims were upheld in these areas, it is extremely unlikely that the state could be prevented from imposing requirements regarding compulsory school attendance, hair length in prisons, or possession of hallucinogens on the grounds that an unconstitutional establishment of religion resulted.

4. *See, e.g.*, Mormon Church v. United States, 136 U.S. 1, 9 (1890) (act of Congress limiting the value of the real estate which could be held by a religious or charitable corporation in any territory). *See also* Davis v. Beason, 133 U.S. 333, 334 (1890) (territorial statute requiring persons registering to vote to swear that they did not belong to any organization which counselled its members to commit bigamy, polygamy, or any other crime). These cases are discussed in the text accompanying notes 22-32 *infra*.

5. Where a practice associated with a particular form of religious worship is considered highly dangerous, however, it has been held that the state may forbid the practice specifically in the context of worship. In Lawson v. Commonwealth, 291 Ky. 437, 164 S.W.2d 972 (1942), the court held constitutional a statute which made it a misdemeanor for any person to "display, handle or use any kind of snake or reptile in connection with any religious service or gathering." *Id.* at 438, 164 S.W.2d at 972. *See also* Hill v. State, 38 Ala. App. 404, 88 So. 2d 880 (1956); Harden v. State, 188 Tenn. 17, 216 S.W.2d 708 (1948). These cases upheld, against a free exercise claim, the enforcement of statutes forbidding the handling of dangerous snakes so as to endanger the health of another. The dangers associated with snake handling are so evident, however, that this cannot really be considered a prohibition specifically against worship, even if it appears in this context.

mately be regulated. As the Supreme Court has stated, the first amendment "embraces two concepts,—freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second cannot be."[6] Tests which have been used to determine where the line falls between protected and unprotected conduct are "compelling state interest"[7] and "the gravest abuses, endangering paramount interests."[8] The approach adopted by the Supreme Court in *Sherbert v. Verner*[9] was to examine whether state action burdened the free exercise of religion; and, if so, to weigh the infringement against any compelling state interest effectuated by the state's action.[10]

The free exercise clause has been held to prevent enforcement of state prison regulations against long hair,[11] state statutes forbidding possession of peyote,[12] and state laws requiring high school attendance.[13] Laws which have been enforced despite a free exercise objection include laws against polygamy,[14] Sunday closing laws,[15] and child labor laws.[16] Courts have split on the issue of whether a blood transfusion can be administered contrary to an individual's religious beliefs.[17]

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6. Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).

7. Sherbert v. Verner, 374 U.S. 398, 403 (1963); Surinach v. Pesquera de Busquets, 604 F.2d 73, 79 (1st Cir. 1979); People v. Woody, 61 Cal. 2d 716, 722, 394 P.2d 813, 818, 40 Cal. Rptr. 69, 74 (1964) (*en banc*); Katz v. Superior Court, 73 Cal. App. 3d 952, 988, 141 Cal. Rptr. 234, 256 (1977); *see* Wisconsin v. Yoder, 406 U.S. 205, 221-29 (1972); NAACP v. Button, 371 U.S. 415, 438 (1963); International Soc'y for Krishna Consciousness v. Bowen, 600 F.2d 667, 670 (7th Cir. 1979).

8. Sherbert v. Verner, 374 U.S. 398, 406 (1963) (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

9. 374 U.S. 398 (1963).

10. *Id.* at 403-09.

11. Teterud v. Gillman, 385 F. Supp. 153 (S.D. Iowa 1974), *aff'd*, 522 F.2d 357 (8th Cir. 1975). *But see* New Rider v. Board of Educ. of Independent School Dist. No. 1, 480 F.2d 693 (10th Cir. 1973). In *New Rider*, the court refused to require that minor Pawnee Indian students be exempted, on free exercise and other grounds, from a school hair regulation, stating: "The judiciary is not designed to operate and manage school systems." *Id.* at 700.

12. People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) (*en banc*).

13. Wisconsin v. Yoder, 406 U.S. 205 (1972).

14. Reynolds v. United States, 98 U.S. 145 (1879).

15. Braunfeld v. Brown, 366 U.S. 599 (1961). *See also* McGowan v. Maryland, 366 U.S. 420 (1961) (Maryland Sunday closing law not unconstitutional under the establishment clause).

16. Prince v. Massachusetts, 321 U.S. 158 (1944).

17. *Compare In re* President & Directors of Georgetown College, Inc., 331 F.2d 1000, 1007-10 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964), *with In re* Estate of Brooks, 32 Ill. 2d 361, 372-73, 205 N.E.2d 435, 441-42 (1965). *See* Byrn, *Compulsory*

The first major line of cases interpreting the free exercise clause involved the nineteenth century Mormons, who held that it was a religious duty, circumstances permitting, to practice polygamy. In *Reynolds v. United States*,[18] the Supreme Court held that it was not error for a court to refuse to charge a jury that if the defendant believed he was married in accordance with a religious duty, he must be found not guilty of bigamy. The Court stated: "The word 'religion' is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning . . . ."[19] After reviewing statements made by Jefferson and Madison, the Court concluded that under the first amendment "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."[20] To excuse polygamy on religious grounds would "make the professed doctrine of religious belief superior to the law of the land, and in effect . . . permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."[21]

A decade later the Court upheld a statute of Idaho, then a territory, which required individuals registering to vote to swear that they did not belong to an organization which taught or encouraged polygamy.[22] Defendant, a Mormon, asserted that the statute violated the free exercise clause. The Court reaffirmed its position in *Reynolds*: "Whilst legislation for the establishment of a religion is forbidden, and its free exercise permitted, it does not follow that everything which may be so called can be tolerated. Crime is not the less odious because sanctioned by what any particular sect may designate as religion."[23] The first amendment provides no protection, the Court stated, for "acts inimical to the peace, good order and morals of society."[24]

Finally, the Supreme Court upheld an act of Congress dissolving the Church of Jesus Christ of Latter-Day Saints (the Mormon Church) as a Utah corporation.[25] The act required the United States Attorney General to institute escheat proceedings against the real property of the dissolved corporation acquired after 1862, to the extent that the total real property held exceeded $50,000 in

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*Lifesaving Treatment for the Competent Adult*, 44 FORDHAM L. REV. 1, 10-13, 17-19 (1975).

18. 98 U.S. 145 (1879).
19. *Id.* at 162.
20. *Id.* at 164.
21. *Id.* at 166-67.
22. Davis v. Beason, 133 U.S. 333 (1890).
23. *Id.* at 345.
24. *Id.* at 342.
25. Mormon Church v. United States, 136 U.S. 1 (1890).

value. Property used exclusively for religious worship, as a parsonage, or as a burial ground, was exempted from forfeiture. The proceeds of the escheated property were to be used for the common schools in the territory where the property was located.[26] At the time the case was decided, the property of the dissolved corporation was in the custody of a receiver pending final disposition.[27] Church members alleged, and the United States did not deny, that the receiver held over $750,000 worth of real and personal property which had belonged to the corporation, exclusive of Temple Block.[28]

> The question, therefore, is whether the promotion of such a nefarious system and practice [polygamy], so repugnant to our laws and to the principles of our civilization, is to be allowed to continue by the sanction of the government itself; and whether the funds accumulated for that purpose shall be restored to the same unlawful uses as heretofore, to the detriment of the true interest of civil society.[29]

The answer was no. The Court upheld the dissolution of the Church as a corporation.

The dissent stated that although Congress could suppress crime in the territories, even though the crime was allegedly sanctioned by religious belief, Congress exceeded its delegated powers by ordering the Church's property to be arbitrarily disposed of by "judicial legislation."[30]

> Congress has the power to extirpate polygamy in any of the Territories, by the enactment of a criminal code directed to that end; but it is not authorized under the cover of that power to seize and confiscate the property of persons, individuals, or corporations, without office found, because they may have been guilty of criminal practices.[31]

Today's observer can conclude that in the long struggle between the Mormon Church and the United States, each side had a partial victory: The Mormon Church survived, but it abandoned its advocacy of polygamy.[32]

It appears, then, that the real question in free exercise cases is not generally whether the free exercise is sought on behalf of what qualifies as a "religion"—the Mormons, Jehovah's Wit-

26. *Id.* at 5-8.
27. *Id.* at 66.
28. *Id.* at 14-19.
29. *Id.* at 49.
30. *Id.* at 67-68.
31. *Id.* at 67.
32. For a lengthier treatment of this subject, see Linford, *The Mormons and the Law: The Polygamy Cases* (pts. 1 & 2), 9 UTAH L. REV. 308, 543 (1964-1965).

nesses,[33] Amish,[34] Orthodox Jews,[35] members of the Native American Church,[36] and Seventh-day Adventists[37] certainly meet this criterion—but the extent of the deviation from established norms which society is willing to accept when a religion *is* involved. The practices sought to be protected are not in themselves "religious acts," or government would be precluded from legislation in that area by the establishment clause. The term which is actually the source of the dispute is not "religion" but "free exercise."

It has been urged that for free exercise purposes, "religion" should be defined as an individual's "ultimate concern," a phrase developed by Paul Tillich.[38] The following statement by Judge Augustus Hand is quoted to support this position: "Religious belief . . . is a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets."[39] Reasons advocated for the "ultimate concern" definition are that because it focuses on function, not content, it does not prejudice free exercise by imposing unnecessary preconceptions; it is adequately limited because it excludes beliefs capable of compromise; and it is consistent with the preferred status given to religious freedom under the first amendment because of the importance which the law should attach to the ultimate concerns of individuals.[40]

There are several problems with the "ultimate concern" approach. First of all, it essentially defines religion out of existence by defining religion solely in terms of psychology. One discipline is thus put in the position of defining another—presumably, only a psychologist could determine what was an individual's ultimate concern. A federal district court rejected a similar approach in an establishment clause context,[41] considering it unworkable:

> The only inquiry left to the courts would be into the sincerity with which the proponents hold their systems of classification. "Religion" under the first amendment would take on a different meaning in each case, and similar or virtually identical practices would be religious or not religious under

33. *See* notes 16-17 *supra*, and accompanying text.
34. *See* text accompanying note 13 *supra*.
35. *See* text accompanying note 15 *supra*.
36. *See* text accompanying note 12 *supra*.
37. *See* text accompanying notes 9-10 *supra*.
38. Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1075 (1978).
39. United States v. Kauten, 133 F.2d 703, 708 (2d Cir. 1943), *quoted in* Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1061, 1075 n.108 (1978).
40. Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1075 (1978).
41. Malnak v. Yogi, 440 F. Supp. 1284, 1319 (D.N.J. 1977), *aff'd per curiam*, 592 F.2d 197 (3d Cir. 1979).

the first amendment depending on the classification system of a particular proponent.[42]

Another problem with this definition is that it defines the *nature* of the concern solely in terms of the *intensity* with which the concern is held. These two things can be related, but they need not be. Although some individuals may feel very intensely about religious matters, most probably do not. An ultimate concern is said to involve "an act of the total personality."[43] Does this standard apply to the Christmas and Easter churchgoer? Should not this individual's right of religious free exercise be protected?

Imposing a "martyrdom" standard as a condition for religious free exercise is a dubious proposition indeed. Such a standard invites inquisitorial methods as a test of individual sincerity. Furthermore, it is totally unwarranted by the Constitution, which guarantees religious freedom without imposing any requirements on the individual who wishes to exercise that freedom. Should other first amendment guarantees—freedom of speech, freedom of the press, and the rights to assemble and to petition for redress—be limited only to those brave individuals who are willing to die for them? Obviously, a society free only for would-be martyrs is not a free society. It is the more timid soul who has a more urgent need for the first amendment's protection.

Hence, although the "ultimate concern" definition may have some immediate appeal, in actuality it is anti-libertarian. What it attempts to do, at best, is to recast the first amendment to prohibit infringements of the "rights of conscience." An early draft of the first amendment did just this,[44] but this language was not adopted.

2. The Establishment Clause

As with the free exercise clause, the central question in establishment clause cases has not generally been whether government involvement was with a "religion," but whether the nature of the involvement compromised the establishment clause. Establishment clause cases have dealt primarily with state financial aid to religious institutions,[45] religious instruction or worship in

42. 440 F. Supp. at 1318.

43. Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1076 n.110 (1978).

44. L. PFEFFER, CHURCH STATE AND FREEDOM 130 (rev. ed. 1967).

45. *E.g.*, Wolman v. Walter, 433 U.S. 229 (1977); Roemer v. Board of Pub. Works, 426 U.S. 736 (1976); Meek v. Pittenger, 421 U.S. 349 (1975); Committee for

public schools,[46] state participation in religious holiday observances,[47] state resolution of ecclesiastical controversies,[48] and religious tests for public office.[49]

A recent case focusing on the meaning of "religion," rather than "establishment," under the establishment clause is *Malnak v. Yogi*.[50] This case dealt with the constitutionality of offering elective courses in the "Science of Creative Intelligence," including Transcendental Meditation, in New Jersey public high schools. If the teaching was religious, the violation of the establishment clause was clear.[51]

Defendants argued that the teaching was not religious for purposes of the establishment clause. They said that although religion should be broadly defined for free exercise purposes, for establishment clause purposes a narrower "substantive and contextual" approach should be used.[52] Defendants urged the court to develop a definition of religion for establishment clause purposes which would exclude theories or practices (1) not associated with attributes such as houses of worship, priests, doctrines on after-life and salvation, and symbols, and (2) not considered by adherents to be religious.[53]

In discussing the scope of "religion" under the establishment clause, the court stated:

> Defendants point out that none of the above-discussed decisions explicitly defined religion within the meaning of the first amendment. The lack of a precise definition is not surprising in light of the fact that a constitutional provision is involved. This court knows of no decision defining press or speech within the meaning of the first amendment. The meaning of these terms, and many other constitutional terms, have expanded with the passage of time and the development of the nation. . . . New religions appear in this country frequently and they cannot stand outside the first amendment merely because they did not exist when the Bill of Rights was drafted.[54]

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Pub. Educ. v. Nyquist, 413 U.S. 756 (1973); Tilton v. Richardson, 403 U.S. 672 (1971); Lemon v. Kurtzman, 403 U.S. 602 (1971).

46. *E.g.*, Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962); McCollum v. Board of Educ., 333 U.S. 203 (1948); *see* Epperson v. Arkansas, 393 U.S. 97 (1968); Zorach v. Clauson, 343 U.S. 306 (1952).

47. *E.g.*, Allen v. Morton, 495 F.2d 65 (D.C. Cir. 1973); Curran v. Lee, 484 F.2d 1348 (2d Cir. 1973).

48. *E.g.*, Jones v. Wolf, 440 U.S. 903 (1979); Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976), *noted in* 45 FORDHAM L. REV. 992 (1977); Presbyterian Church v. Hull Mem. Presbyterian Church, 393 U.S. 440 (1969); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952); Watson v. Jones, 80 U.S. (13 Wall.) 679 (1872).

49. *E.g.*, Torcaso v. Watkins, 367 U.S. 488 (1961).

50. 440 F. Supp. 1284 (D.N.J. 1977), *aff'd per curiam*, 592 F.2d 197 (3d Cir. 1979).

51. 440 F. Supp. at 1323-24.

52. *Id.* at 1315-17 & n.20.

53. *Id.* at 1326.

54. *Id.* at 1315.

The court found it "unnecessary to improvise an unprecedented definition of religion under the first amendment,"[55] stating that "the underlying teachings fall well within the concepts which courts previously have found to be religious."[56]

The court also rejected the dual definition of religion for establishment and free exercise purposes advocated by the defendants, quoting Mr. Justice Rutledge:

> "Religion" appears only once in the [First] Amendment. But the word governs two prohibitions and governs them alike. "Thereof" brings down "religion" with its entire and exact content, no more and no less, from the first into the second guaranty, so that Congress and now the states are as broadly restricted concerning the one as they are regarding the other.[57]

The rejection of the dual approach would automatically eliminate the "ultimate concern" definition of religion under the free exercise clause since, as its proponents have recognized,[58] such a definition would be totally unworkable under the establishment clause.

The *Malnak* court did not accept defendants' contention that religion under the establishment clause should be construed in narrow, institutional terms: "In implementing the establishment clause, the Supreme Court has made clear that an activity may be religious even though it is neither part of nor derives from a societally recognized religious sect."[59] The Supreme Court had earlier interpreted religion under the establishment clause in broad, non-institutional terms. In *Engel v. Vitale*,[60] the Court dealt with the New York "Regents' prayer," composed by state officials and recommended for recitation by public school students at the beginning of the school day.[61] Although institutional religion was not an issue, the Supreme Court held that the prayer involved religious activity, and that use of the public school system to promote recitation of such a governmentally prescribed prayer violated the establishment clause.[62] In *Torcaso v. Watkins*,[63] the

55. *Id.* at 1320.
56. *Id.* at 1325.
57. *Id.* at 1316 n.20. Dissenting Justice Rutledge was joined by three justices in Everson v. Board of Educ., 330 U.S. 1 (1947), but on this point he was not in disagreement with the opinion of the Court.
58. Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1084 (1978).
59. 440 F. Supp. at 1313.
60. 370 U.S. 421 (1962).
61. *Id.* at 422-23.
62. *Id.* at 424.
63. 367 U.S. 488 (1961).

Court had rejected, as unconstitutional, a state requirement that appointees to state offices affirm a belief in God to obtain their commissions.[64] Although, as in *Engel*, no particular religious sect was involved, federal or state government could not use religious tests to limit public offices to officials advocating a "particular kind of religious concept."[65] Such an approach would bar members of nontheistic religions from holding office, as well as nonreligious people.

The *Malnak* defendants' second proposed requirement for a teaching or practice to be held religious under the establishment clause, that it be characterized by its proponents as religious, was likewise rejected by the court. The court felt that to place determinative weight on such a subjective element would introduce a variable precluding a "fair and uniform standard," and would overemphasize the court's assessment of individual sincerity. It would also be inappropriate where the proponents of the beliefs and practices under scrutiny had enlisted government aid to support these practices.[66] Although the characterization by proponents was relevant, they could not receive state aid to promulgate concepts recognized by society to be religious merely because they viewed these concepts as secular.[67]

The *Malnak* court found that the course in the Science of Creative Intelligence was "religious" under the establishment clause in two significant respects. First, the textbook described an ultimate reality "which in its various forms is given the name 'god' in common usage."[68] Second, the court found that the puja chant, sung to a dead human being, was a prayer.[69] The fact that prayer is religious in nature has been recognized by a number of courts.[70]

Consequently, a judicial determination was reached without the aid of a definition of religion for first amendment or for establish-

64. *Id.* at 496.
65. *Id.* at 494.
66. 440 F. Supp. at 1318-20.
67. Though the subjective characterization of a practice as "religious" is necessary in free exercise cases, because otherwise the question of state infringement against protected religious activity would never arise, it is of much lesser significance in establishment clause cases. In the latter, the violation is considered to be against a broad societal grouping—such as taxpayers—rather than against the particular individuals involved. *See* Flast v. Cohen, 392 U.S. 83 (1968). The fact that an involved individual does not consider a government-funded activity religious does not mitigate the violation if the mass of taxpayers do consider it religious.
68. 440 F. Supp. at 1320.
69. *Id.* at 1323.
70. *Id.*, citing Engel v. Vitale, 370 U.S. 421 (1962), and DeSpain v. DeKalb Community School Dist. 428, 384 F.2d 836 (7th Cir. 1967), *cert. denied*, 390 U.S. 906 (1968).

ment clause purposes. In fact, the court explicitly refrained from the adoption of any definitive criteria, noting that courts had "avoided the establishment of explicit criteria, the possession of which indelibly identifies an activity as religious for purposes of the first amendment."[71]

### *B. Statutory Definitions*

#### 1. Federal Law

In some matters, Congress, seeking to promote the values of the first amendment, has historically enacted statutory exemptions or accommodations for religious belief and practice, even though not required to do so by the free exercise clause. When such an exemption or accommodation exists, the question of the "religion" entitled to it arises. Religion under a statute need not mean the same thing as religion under the first amendment, but they tend to influence one another.

In 1931, the Supreme Court stated, in dictum, that a native-born American has no constitutional right to exemption from the compulsory bearing of military arms.[72] Forty years later, the Court said prior decisions had "suggested" that conscientious objection was not a constitutional right.[73] Nevertheless, Congress provided an exemption for religious objectors in the selective draft acts of 1864 and 1917.[74] In 1940, the exemption was no longer limited to a member of a "well-recognized religious sect or organization" with appropriate beliefs, but applied to any person "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."[75]

At the time the Supreme Court interpreted the conscientious objector provision in *United States v. Seeger*,[76] the statute provided:

> Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those

71. 440 F. Supp. at 1312.
72. United States v. Macintosh, 283 U.S. 605, 623-24 (1931).
73. Gillette v. United States, 401 U.S. 437, 461 n.23 (1971).
74. Act of Feb. 24, 1864, ch. 13, § 17, 13 Stat. 9; Act of May 18, 1917, ch. 15, § 4, 40 Stat. 78 (current version at 50 U.S.C. app. § 456(j) (1976)).
75. Selective Training and Service Act of 1940, ch. 720, § 5(g), 54 Stat. 889 (current version at 50 U.S.C. app. § 456(j) (1976)). The "well-recognized religious sect or organization" restriction was contained in Act of May 18, 1917, ch. 15, § 4, 40 Stat. 78 (current version at 50 U.S.C. app. § 456(j) (1976)).
76. 380 U.S. 163 (1965).

> arising from any human relation, but does not include essentially political, sociological or philosophical views or a merely personal moral code.[77]

The Court, confronted by claims of conscientious objector status by individuals who did not assert a belief in God, stated:

> We have concluded that Congress, in using the expression "Supreme Being" rather than the designation "God," was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views [and that] the test of belief "in a relation to a Supreme Being" is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption.[78]

Thus, the claimed status was granted.

Congress subsequently amended the statute to eliminate the "Supreme Being" requirement.[79] Yet in *Welsh v. United States*,[80] the Court was faced with a conscientious objection claim by an individual who initially refused to categorize his objection as religious. In a letter to his Appeal Board, he clarified his position by saying that his beliefs "were certainly religious in the ethical sense of the word."[81] The Court again enlarged the apparent scope of the statute, and held:

> If an individual deeply and sincerely holds beliefs which are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual "a place parallel to that filled by . . . God" in traditional religious persons.[82]

The Court stated that the statute was intended to bar objector status to those whose beliefs rested "solely upon considerations of policy, pragmatism, or expediency."[83]

Another federal statutory area where the term "religion" must be interpreted is that of employment discrimination. Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer, employment agency, or labor union to discriminate against an individual on account of his race, color, religion, sex, or national origin.[84] Although private parties are not covered by constitutional

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77. Selective Service Act of 1948, ch. 625, § 6(j), 62 Stat. 612 (current version at 50 U.S.C. app. § 456(j) (1976)). The "Supreme Being" language was added after the decision in Berman v. United States, 156 F.2d 377 (9th Cir.), *cert. denied*, 329 U.S. 795 (1946), in which objector status was denied to a socialist who opposed war as morally wrong. The nature of the religious belief required for draft exemption was also discussed in United States *ex rel.* Phillips v. Downer, 135 F.2d 521 (2d Cir. 1943), and United States v. Kauten, 133 F.2d 703 (2d Cir. 1943).

78. 380 U.S. at 165-66.

79. Military Selective Service Act of 1967, Pub. L. No. 90-40, § 1(7), 81 Stat. 104 (current version at 50 U.S.C. app. § 456(j) (1976)).

80. 398 U.S. 333 (1970).

81. *Id.* at 341.

82. *Id.* at 340.

83. *Id.* at 343.

84. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a) to (c), 78 Stat. 255-56 (current version at 42 U.S.C. § 2000e-2(a) to (c) (1976)).

proscriptions against governmental activity,[85] the inclusion of religion in Title VII represents another congressional effort to promote the first amendment value of religious freedom.

A proposed revision of its Guidelines on Discrimination Because of Religion recently issued by the Equal Employment Opportunity Commission (EEOC) states the following:

> [T]he Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. . . . The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee.[86]

The Proposed Guidelines state that the Commission has consistently used the *Seeger* and *Welsh* standard in its decisions.[87]

2. State and Local Law

Two primary areas in which the term "religion" has been at issue in state and local law are those of real property tax exemption and zoning restrictions.

The law of New York State provides some helpful illustrations in this regard. The New York State Constitution provides:

> Exemptions from taxation may be granted only by general laws. Exemptions may be altered or repealed except those exempting real or personal property used exclusively for religious, educational or charitable purposes as defined by law and owned by any corporation or association organized or conducted exclusively for one or more of such purposes and not operating for profit.[88]

In *People ex rel. Watchtower Bible and Tract Society, Inc. v. Haring*,[89] the New York Court of Appeals had to determine whether a farm owned by the Watchtower Bible and Tract Society, Inc., the governing body of the Jehovah's Witnesses, qualified for exemption. Almost all the farm's produce was used to feed employees at the headquarters of the Society or at a Bible school conducted by it. In determining whether the farm met the pertinent statutory requirements for exemption—ownership by a religious, Bible, or

85. *See, e.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 171-73 (1972).

86. Proposed Guidelines on Discrimination Because of Religion, 44 Fed. Reg. 53706, 53706-07 (1979) (would amend 29 C.F.R. § 1605), citing Welsh v. United States, 398 U.S. 333 (1970), and United States v. Seeger, 380 U.S. 163 (1965).

87. 44 Fed. Reg. 53706, 53707 (1979).

88. N.Y. CONST. art. XVI, § 1 (McKinney 1969).

89. 8 N.Y.2d 350, 170 N.E.2d 677, 207 N.Y.S.2d 673 (1960).

tract corporation and use exclusively for such purposes[90]—the court stated: "Historically and in reason, the only test is whether the farm operation is reasonably incident to the major purpose of its owner. There can be no doubt about that here."[91] Thus, the exemption was won.

In 1971, the New York Real Property Tax Law was amended. Mandatory exemptions were still provided for property owned by charitable, religious, or educational corporations.[92] Municipalities, however, were authorized to remove by local law exemptions for organizations established not for the mandatorily exempt purposes, but for other uses, including Bible, tract, and missionary purposes.[93] Pursuant to this authority, New York City removed all exemptions which were not mandatory,[94] and considerable litigation ensued.[95]

Two major cases dealing with the rather ingenious distinction between "religious purposes" and "Bible, tract, and missionary purposes" are *Watchtower Bible and Tract Society, Inc. v. Lewisohn*[96] and *American Bible Society v. Lewisohn*.[97] In the *Watchtower* case, the court held that the state taxing authority must not only prove that the corporate owner of the property was organized exclusively for Bible and tract purposes, but also that it was *not* organized or conducted exclusively for religious purposes. It concluded that the state failed to meet the latter requirement. The court noted that the Society was the governing body of a recognized religious denomination, and that the house-to-house preaching of the Jehovah's Witnesses—which included the distribution of religious literature published by the Society—had been recognized by the courts to be a religious activity. Thus, the court held that the Society was organized and conducted ex-

90. Ch. 959, § 420(1), 1958 N.Y. Laws 1396 (current version at N.Y. REAL PROP. TAX LAW § 421(1) (McKinney 1972)).

91. 8 N.Y.2d at 358, 170 N.E.2d at 681, 207 N.Y.S.2d at 678.

92. Mandatory exemptions were also retained for corporations with hospital or cometary purposes. Ch. 414, § 2, 1971 N.Y. Laws 598 (current version at N.Y. REAL PROP. TAX LAW § 421(1)(a) (McKinney 1972)). Although this amendment eliminated the moral or mental improvement of men and women as an exempt category, this exemption was subsequently reenacted. Ch. 529, § 1, 1972 N.Y. Laws 1066-67 (current version at N.Y. REAL PROP. TAX LAW § 421(1)(a) (McKinney 1972)).

93. Ch. 414, § 2, 1971 N.Y. Laws 598 (current version at N.Y. REAL PROP. TAX LAW § 421(1)(b) (McKinney 1972)).

94. New York City Local Law No. 46, CITY ADMIN. CODE § J51-3.0 (1975).

95. For a discussion of this litigation, particularly in regard to religious organizations, see Note, *Real Property Tax Exemption in New York: When Is a Bible Society Not Religious?*, 45 FORDHAM L. REV. 949 (1977).

96. 35 N.Y.2d 92, 315 N.E.2d 801, 358 N.Y.S.2d 757 (1974).

97. 48 App. Div. 2d 308, 369 N.Y.S.2d 725 (1975), *aff'd*, 40 N.Y.2d 78, 351 N.E.2d 697, 386 N.Y.S.2d 49 (1976).

clusively for religious purposes under the statute; consequently, exemption of its property used for such purposes was required.

In the *American Bible Society* case, the Appellate Division held that the Bible Society's main purpose was the distribution of Bibles and thus it was a Bible society, not a religious organization. Those "incidentally" derived benefits from the primary activity, be they religious, educational, or moral or mental improvement, were insufficient to require exemption under a mandatory category. The court also held that the distinction thus drawn was consistent with the New York State Constitution. The dissenting opinion stated that to be consistent with the *Watchtower* case, a finding that a primary purpose of the Bible Society was the distribution of Bibles should not mean the promotion of religion was merely incidental. The dissent would have held that the Bible Society's primary purpose was the promotion of religion by distributing Bibles on a nonprofit basis. Nevertheless, the denial of the exemption was affirmed by the Court of Appeals.[98]

Another problem under real property tax exemption provisions is posed by organizations with a structure similar to that of traditional churches, but which do not advocate belief in a Supreme Being. The issue of whether such organizations' property was used for "religious worship" was posed in *Fellowship of Humanity v. County of Alameda*[99] and *Washington Ethical Society v. District of Columbia*,[100] both decided in 1957.

In *Fellowship of Humanity*, after discussing draft exemption and other cases, the court concluded that it would be arbitrary in light of our country's tradition of religious tolerance to limit "religion" to theistic beliefs, and stated that distinctions between types of religious belief based on content would violate the first amendment. Thus, whether or not an organization advocated belief in a Supreme Being could not be made a factor in determin-

98. 40 N.Y.2d 78, 351 N.E.2d 697, 386 N.Y.S.2d 49 (1976). A primary reason for the Court of Appeals' affirmance was the fact that the American Bible Society was not "directly associated with an organized religious denomination or with an organization having as its avowed purpose the furthering of a recognized religion." *Id.* at 81, 351 N.E.2d at 698, 386 N.Y.S.2d at 50. Despite the trend towards restricting religious exemptions, it was subsequently held that property owned by a religious order, kept in its natural state, and intended for use as a religious retreat qualified for the religious exemption. Order Minor Conventuals v. Lee, 64 App. Div. 2d 227, 409 N.Y.S.2d 667 (1978).

99. 153 Cal. App. 2d 673, 315 P.2d 394 (1957).

100. 249 F.2d 127 (D.C. Cir. 1957).

ing whether its property qualified for exemption.[101] Using a formulation later adopted in *Seeger* and *Welsh*, the court stated:

> Thus the only inquiry in such a case is the objective one of whether or not the belief occupies the same place in the lives of its holders that the orthodox beliefs occupy in the lives of believing majorities, and whether a given group that claims the exemption conducts itself the way groups conceded to be religious conduct themselves.[102]

In seeking general characteristics of religion not based on the content of religious beliefs, the court concluded:

> Religion simply includes: (1) a belief, not necessarily referring to supernatural powers; (2) a cult, involving a gregarious association openly expressing the belief; (3) a system of moral practice directly resulting from an adherence to the belief; and (4) an organization within the cult designed to observe the tenets of belief.[103]

In an effort to prevent the state from providing what the court considered to be an indirect subsidy to religious worship in the form of a tax-exemption, the court decided that exemption for churches was based not on a church's *religious* functions, but on "the many other things all churches do" such as welfare, charitable, educational, and moral improvement activities.[104] In light of this perceived requirement, the court stated:

> The real question is whether the activities of the Fellowship of Humanity

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101. 153 Cal. App. 2d at 691-92, 315 P.2d at 405-06. This argument actually assumes what it is trying to prove, *i.e.*, that a belief which does not include belief in a Supreme Being is religious, and is therefore entitled to first amendment protection.

102. *Id.* at 692, 315 P.2d at 406.

103. *Id.* at 693, 315 P.2d at 406. Even this seemingly broad definition is somewhat deficient. Need members openly express their belief for it to qualify as a religion? Furthermore, in Malnak v. Yogi, 440 F. Supp. 1284 (D.N.J. 1977), *aff'd per curiam*, 592 F.2d 197 (3d Cir. 1979), although the defendants asserted that no system of moral practice was associated with their teachings, the court held that this did not mean that they were not propagating religion.

104. 153 Cal. App. 2d at 696-97, 315 P.2d at 409. The Supreme Court explicitly refused to justify religious real property tax exemptions on such grounds in the later case of Walz v. Tax Comm'n, 397 U.S. 664 (1970), in which the Court held such exemptions constitutional. The Court stated:

> We find it unnecessary to justify the tax exemption on the social welfare services or "good works" that some churches perform for parishioners and others—family counselling, aid to the elderly and the infirm, and to children. Churches vary substantially in the scope of such services; programs expand or contract according to resources and need. As public-sponsored programs enlarge, private aid from the church sector may diminish. The extent of social services may vary, depending on whether the church serves an urban or rural, a rich or poor constituency. To give emphasis to so variable an aspect of the work of religious bodies would introduce an element of governmental evaluation and standards as to the worth of particular social welfare programs, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize. Hence, the use of a social welfare yardstick as a significant element to qualify for tax exemption could conceivably give rise to confrontations that could escalate to constitutional dimensions.

*Id.* at 674. For a thorough study of reasons for tax exemption of nonprofit institutions, see Bittker & Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299 (1976).

> which in the above sense are "nonreligious," and which include all the Fellowship's activities, are analogous to the activities, serve the same place in the lives of its members, and occupy the same place in society, as the activities of the theistic churches.[105]

Because this standard was met, the court determined that the Fellowship of Humanity was entitled to the exemption. The court also held that incidental use of the property for dinners, dances, and miscellaneous meetings did not mean it was not used "solely and exclusively" for religious worship under the statute.[106]

The dissent pointed out the intrinsic contradiction in the majority opinion: While an organization must use its property solely for religious purposes in order to qualify for the statutory exemption, the exemption is granted on account of the social, cultural, and moral purposes the organization serves.[107] What the majority opinion did, in effect, was to eliminate religion as a basis of tax exemption, and to allow these organizations—but not other types of organizations—to obtain exemption on the basis of auxiliary activities and effects rather than their primary purpose. The dissent would have limited the exemption to religious worship centered on a Supreme Being.[108]

The same issue was considered in *Washington Ethical Society v. District of Columbia*,[109] decided only weeks after *Fellowship of Humanity*. The court here stated that because statutory exemption was granted to many types of nonprofit corporations, constitutional issues might be raised if religious exemptions were denied to organizations with unorthodox or minority forms of worship, while granted to the religious majority. The court noted that "Leaders" of the Washington Ethical Society were authorized to perform marriages as individuals designated by a "church or religious society."[110] Thus, the exemption was granted.

As in tax-exemption cases, zoning cases may require a determi-

105. 153 Cal. App. 2d at 698, 315 P.2d at 409-10.

106. *Id.* at 698-99, 315 P.2d at 410.

107. *Id.* at 703, 315 P.2d at 413 (Bray, J., dissenting).

108. *Id.* at 705, 315 P.2d at 414. In so limiting the exemption, the dissent was out of harmony with subsequent decisions, in which the trend has been to include within the bounds of "religion" beliefs outside the monotheistic tradition. *See* text accompanying notes 77-83 *supra*, and note 110 *infra*. Had the majority not been forced into its intrinsically contradictory position by its efforts to justify tax exemption on nonreligious grounds, a justification explicitly rejected by the Supreme Court (*see* note 104 *supra*), it would have been solidly in line with subsequent trends.

109. 249 F.2d 127 (D.C. Cir. 1957) (opinion by Warren Burger, J.).

110. *Id.* at 128.

nation as to what constitutes a "religious use." Such cases have generally given a fairly broad interpretation to this term, such as the following from *In re Community Synagogue v. Bates*:

> A church is more than merely an edifice affording people the opportunity to worship God. Strictly religious uses and activities are more than prayer and sacrifice and all churches recognize that the area of their responsibility is broader than leading the congregation in prayer. Churches have always developed social groups for adults and youth . . . . To limit a church to being merely a house of prayer and sacrifice would, in a large degree, be depriving the church of the opportunity of enlarging, perpetuating and strengthening itself and the congregation.[111]

The *Bates* court held that use of synagogue property where public worship was conducted for study, fellowship among adherents, and community service, such as Red Cross and Scouting work, did not remove it from the category of "strictly religious uses."[112]

In summary, "religion" under federal and state statutes has been held to encompass nontheistic beliefs which occupy a place in the lives of their possessors parallel to that occupied by belief in God in persons with traditional religious faith. Religious activities or uses have been held to include incidental social, charitable, and maintenance activities (for both persons and property) as well as religious worship.

## III. Religious Institutions

The first amendment necessarily applies to religious institutions as well as to individuals. Establishment has historically occurred through powerful, well-funded church institutions. Furthermore, since religion is almost always a corporate phenomenon, not a purely individual one, the right of free exercise inevitably entails the right to form and operate religious institutions.[113] Some basic questions to be resolved are: What is a religious institution for purposes of the first amendment? What do first amendment protections and restrictions mean for religious institutions? Are there gradations of "religiosity" within religious institutions which, in turn, require gradations of first amendment protection? To what extent can government get involved in the business of defining religious institutions before that involvement results in unconstitutional excessive entanglement between government and religion?

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111. 1 N.Y.2d 445, 453, 136 N.E.2d 488, 493, 154 N.Y.S.2d 15, 21-22 (1956).

112. *Id.* at 452-53, 136 N.E.2d at 492-93, 154 N.Y.S.2d at 21.

113. For a discussion of the applicability of the first amendment to religious institutions, see Worthing, *The State Takes Over a Church*, Annals of Am. Acad. of Pol. & Soc. Sci., Nov. 1979, at 136.

### *A. Types of Religious Institutions*

An educated American, asked to name different types of religious institutions, might well list the following categories: (1) churches; (2) charitable entities connected with churches, such as schools, hospitals, and cemeteries; (3) religious publishing houses, broadcasters or similar enterprises which may or may not be run on a nonprofit basis; (4) missionary organizations; (5) group ventures which serve constituent religious organizations; and (6) religious orders. It is apparent that while all these organizations should be considered religious, there are certain real differences among them, and some varying legal treatment is warranted.

Consider the following selection of categories of religious organizations from the Internal Revenue Code. These categories may or may not be overlapping: "a religious organization described in section 501(c)(3)";[114] "a church or a convention or association of churches";[115] "religious order";[116] "exclusively religious activities of any religious order";[117] "religious or apostolic associations or corporations";[118] "church agency";[119] "an integrated auxiliary of a church";[120] a section 501(c)(3) organization "operated, supervised, or controlled by or in connection with a religious organization described in" section 501(c)(3);[121] and an organization "operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches."[122] Section 501(c)(3) lists the organizations broadly categorized as "charitable" which are exempt from federal income tax, including religious organizations.

114. I.R.C. §§ 3121(b)(8)(B), 3303(e), 3306(c)(8), 6033(a)(2)(C)(i).

115. *Id.* §§ 170(b)(1)(A)(i), 410(d)(1), 414(e)(1)(A) and (3)(A), 501(h)(5)(B), 508(c)(1)(A), 512(b)(14), 514(b)(3)(E), 3309(b)(1), 6033(a)(2)(A)(i), 6043(b)(1), 7605(c).

116. *Id.* §§ 512(b)(12) and (15), 6033(a)(2)(A)(iii). The phrase "religious order" also appears in conjunction with "member" in sections 1402(a)(8), (c), and (e)(1), 3121(b)(8)(A), (i)(4), (r)(1) and (2), 3309(b)(2), and 3401(a)(9).

117. *Id.* § 6033(a)(2)(A)(iii).

118. *Id.* § 501(d).

119. *Id.* § 414(e)(3).

120. *Id.* §§ 501(h)(5)(B), 508(c)(1)(A), 6033(a)(2)(A)(i), 6043(b)(1).

121. *Id.* § 6033(a)(2)(C)(iv).

122. *Id.* § 3309(b)(1)(B). These and other categories are discussed in more detail in Whelan, *"Church" in the Internal Revenue Code: The Definitional Problem*, 45 FORDHAM L. REV. 885 (1977).

A section 501(c)(3) organization is subject to the following restrictions:

> [N]o part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, (except as otherwise provided . . .), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.[123]

It is apparent that some of these definitional categories are far from obvious, and require rather fine distinctions and the development of legal interpretations which are substantially unrelated to the religious organizations' perception of themselves.

The Code's "integrated auxiliary" category is used to determine whether or not an organization which is not a "church" or otherwise exempted is (1) permitted to make the special election with regard to expenditures to influence legislation;[124] (2) required to notify the Secretary of the Treasury that it is applying for recognition of exempt status;[125] (3) required to file annual returns of financial information with the Internal Revenue Service;[126] and (4) required to file a return with the Service upon dissolution.[127]

An "integrated auxiliary" of a church is defined in Treasury Regulations as an organization exempt from tax under section 501(c)(3) which is affiliated with a church and whose "principal activity is exclusively religious."[128] Examples are given which exclude church-related hospitals, elementary grade schools, old age homes, and orphanages from the "integrated auxiliary" category, but include seminaries, men's fellowship associations, and reli-

123. It is noteworthy that by far the greater portion of the restrictive language in this description deals with political activity. The matter of political activity by religious organizations is a hotly contested issue. In Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1973), revocation of Christian Echoes' tax-exempt status on account of its political activities was upheld by the court of appeals. Christian Echoes conducted radio and television broadcasts, issued publications, and held evangelistic meetings. Dr. Hargis, president of the organization, in his "battle against Communism, socialism, and political liberalism," attacked President Kennedy, President Johnson, and Senator Humphrey. 470 F.2d at 852, 856. Although IRS agents, after examining the activities and financial affairs of Christian Echoes at the request of the National Office, recommended no change in the organization's exempt status, the National Office subsequently recommended that tax exemption be revoked. *Id.* at 852. There are bills pending in Congress which would greatly increase government supervision over lobbying activities. Churches and other religious organizations exempted from the information return requirement have been exempted from coverage in recent versions of such legislation, however. S. 2160, 96th Cong., 1st Sess., § 4(c)(2) (1979); H.R. 4395, 96th Cong., 1st Sess., § 3(b)(2) (1979) (amended version).

124. I.R.C. § 501(h)(5)(B).

125. *Id.* § 508(c)(1)(A).

126. *Id.* § 6033(a)(2)(A)(i).

127. *Id.* § 6043(b)(1).

128. Treas. Reg. § 1.6033-2(g) (1976).

gious youth organizations.[129] Proposed regulations substituted the following language for the "principal activity" test: "[an organization] (*a*) whose primary purpose is to carry out the tenets, functions, and principles of faith of the church with which it is affiliated, and (*b*) whose operations in implementing such primary purpose directly promote religious activity among the members of the church."[130] The examples of "integrated auxiliaries" and non-"integrated auxiliaries" were the same in the proposed and final regulations.[131]

American churches displayed almost uniform opposition to the proposed and final Treasury regulation defining "integrated auxiliary."[132] A basic reason for the objection was a feeling that the Service was imposing its own conception of religious mission upon the churches, and that conception excluded the traditional charitable, educational, and social welfare activities of churches.[133] This is contrary to the approach taken in the zoning and real property tax exemption cases, where it has generally been held that charitable and even recreational activities were within the scope of church functions.[134]

American churches felt that they, not the Internal Revenue Service, were entitled to decide what constituted a function integral to their mission.[135] A Baptist spokesman commenting on the proposed regulation asserted that an activity need not be "religious" in the traditional sense to be integral to a church's mis-

129. *Id.*

130. Proposed Treas. Reg. § 1.6033-2(g)(5)(i), 41 Fed. Reg. 6073 (1976).

131. The Preamble to the final regulation announced, however, that church-related educational organizations below the college level would be excepted from the information return requirement pursuant to exercise of the Secretary's discretionary authority. T.D. 7454, 1977-1 C.B. 366, 367. For a fuller treatment of the integrated auxiliary question, see Note, *The Internal Revenue Service as a Monitor of Church Institutions: The Excessive Entanglement Problem*, 45 FORDHAM L. REV. 929 (1977).

132. Whelan, *"Church" in the Internal Revenue Code: The Definitional Problem*, 45 FORDHAM L. REV. 885, 895 (1977).

133. So integral are these activities to an American understanding of the role of churches that they have been said to constitute the basis for church property tax exemption (*see* text accompanying note 104 *supra*), though the Supreme Court did not so hold. *See* note 104 *supra*.

134. *See* notes 88-91, 104-06, 111-12 *supra*, and accompanying text.

135. *E.g.*, Statement of James E. Wood, Jr., Executive Director, Baptist Joint Comm. on Pub. Affairs, at Internal Revenue Service Hearing on the Proposed Regulations Under Section 6033 of the Internal Revenue Code Relating to Definition of Integrated Auxiliaries of a Church, Washington, D.C. (June 7, 1976), at 7.

sion.[136] Of course, the final "exclusively religious" language imposes an even more rigorous test. The final regulation provides: "An organization's principal activity will not be considered to be exclusively religious if that activity is educational, literary, charitable, or of another nature (other than religious) that would serve as a basis for exemption under section 501(c)(3)."[137] As Charles Whelan has observed: "The churches are sure to insist that they themselves are not 'exclusively religious' in the sense that the final regulations require of their 'integrated auxiliaries.' "[138]

A strict application of this definition of integrated auxiliary would defeat even examples which the final regulation lists as integrated auxiliaries. Many church youth groups could qualify as section 501(c)(3) organizations without any church affiliation, and consequently could be excluded from the integrated auxiliary category.[139] Is the principal purpose of a men's fellowship association "exclusively religious," or is it social with religious overtones? Is a men's fellowship association really more "religious" than a parochial elementary school staffed by nuns with a heavy emphasis on religious training?

It appears that, with the exception of seminaries, which obviously have the closest possible relationship to the religious functions of churches, what the Service did in its final regulation was to exclude from the category of integrated auxiliary those classes of organizations which have substantial economic weight, thus requiring them to file returns of financial information (unless excused in the exercise of the Secretary's discretion). The Service included in this category organizations which usually have small budgets and would have little to report in any case. Although the definitional language in the proposed and final regulation varied, the examples remained unchanged, showing where the true line had been drawn.

The observation that an activity can be integral to a church's mission without being "exclusively religious"—or even "religious"—is consistent with judicial interpretation of the free exercise clause, which has required protection for various activities which are not in themselves religious, but which spring from religious belief.[140] Refraining from work on the Sabbath is not in itself "religious," yet it is undeniably a central element in the

136. *Id.* at 5-6.
137. Treas. Reg. § 1.6033-2(g)(5)(ii) (1976).
138. Whelan, *"Church" in the Internal Revenue Code: The Definitional Problem*, 45 FORDHAM L. REV. 885, 899 (1977).
139. *Id.*
140. *See* notes 3, 11-13 *supra*, and accompanying text.

teachings of certain religions. Thus, to define the functions of certain church-related organizations in "exclusively religious" terms, and to exclude from the category of "religious" anything which might be perceived as charitable, educational, welfare, etc., is to fail to understand the breadth of religious teachings. They encompass activities between man and man as well as man and God. Churches and their organizations have historically not been "exclusively religious" as perceived by the Service. This fact has been recognized in the interpretation of other areas of law.[141]

The Executive Director of the Baptist Joint Committee on Public Affairs, James E. Wood, Jr., asserted that the term "integrated auxiliary" was meant to assess the *relationship* of an organization to a church, not its degree of religiosity: "Congress intended that there be a determination of a relationship. This the Treasury is competent to do. Congress did not intend that the Treasury either assess activities or determine whether those activities are integral to a church's religious mission. Only a church itself can perform that task."[142] Dr. Wood proposed that Treasury either adopt the dictionary definitions of "integrated" and "auxiliary" and apply them when the relationship between a church and auxiliary organizations was at issue, or that Treasury allow churches to certify which organizations they considered integral to their religious missions.[143] A similar certification procedure is presently used in the granting of group exemption letters for purposes of federal income tax exemption.[144]

Another type of religious organization mentioned in the Internal Revenue Code is a section 501(c)(3) organization "which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches."[145] Such an organization, described in section 3309(b)(1)(B), is not required to be covered by state unemployment tax laws in order for private employers in

141. *See* notes 88-91, 104-06, 111-12 *supra*, and accompanying text.
142. Statement of James E. Wood, Jr., Executive Director, Baptist Joint Comm. on Pub. Affairs, at Internal Revenue Service Hearing on the Proposed Regulations Under Section 6033 of the Internal Revenue Code Relating to Definition of Integrated Auxiliaries of a Church, Washington, D.C. (June 7, 1976), at 5.
143. *Id.* at 6-7.
144. *See* 26 C.F.R. § 601.201(n)(8)(i)(a) (1979).
145. I.R.C. § 3309(b)(1)(B).

the state to receive the 90% credit against federal tax.[146]

If churches were created by statute, such a complex, three-part definition might make sense. In fact, Congress has not gone from reality to the Code, but has attempted to impose Code concepts on reality. Then governmental agencies apply Code concepts in a way that slices religious organizations into units that fit the Code—whether or not the organizations naturally fall into such units. Thus, government description of religious categories is leading subtly, but powerfully, towards statutory delineation of churches.

There is currently a dispute as to whether a parochial school qualifies as a section 3309(b)(1)(B) organization. Church officials have asserted that it does; the Secretary of Labor says that it does not. In a letter to the General Secretary of the United States Catholic Conference, Secretary of Labor Ray Marshall stated that the Department believed Congress "clearly" intended to require state coverage of employees of church-related schools when it repealed the statute's exemption for service performed for nonprofit schools, effective in 1978.[147] He concluded that in light of this repeal, the only services in parochial schools covered by the exemption for church institutions were "those strictly church duties performed by church employees pursuant to their religious responsibilities within the schools."[148]

A letter sent out by the Department of Labor to all state employment security agencies announced the Secretary's "decision" in this matter, and stated: "The exclusion contained in section 3309(b)(1)(B) applies only to services performed for organizations, *other than educational institutions*, that are church operated, supervised, controlled, or principally supported *and whose employees are primarily engaged in religious activities*."[149] Such statutory construction might more appropriately be termed statutory design. What type of organization's employees are "primarily engaged in religious activities"? Does this description apply to church janitors and maintenance workers, secretaries who answer telephones, type letters, and arrange for meetings,

146. *Id.* §§ 3302, 3304(a)(6)(A), 3309(a)(1)(A). Churches need not be covered either. *Id.* § 3309(b)(1)(A).

147. Letter from Ray Marshall to Thomas Kelly (April 18, 1978). Secretary Marshall noted that more than 80% of the employees of nonprofit schools are employed in church-related schools. *Id.*

148. *Id.* This statute also exempts services performed by a minister in the exercise of his ministry or by a member of a religious order in the exercise of duties required by the order. I.R.C. § 3309(b)(2). This exemption was not affected by the interpretation.

149. Lawrence W. Rogers, Unemployment Insurance Program Letter No. 39-78, at 2-3 (May 30, 1978) (emphasis added).

youth directors who schedule events? Indeed, it is probably a fair generalization that the majority of the employees of most churches are not "primarily engaged in religious activities." If churches do not meet this description, what type of organization will do so?[150]

### *B. Definition of "Church"*

It is generally considered that "a church or a convention or association of churches" is the most religious of organizations, and thus, usually receives the maximum protection given to religious organizations. But what is "a church or a convention or association of churches"?

In 1971, the Treasury proposed a regulation which would answer this question for the purpose of ascertaining the deductibility of charitable contributions. The language of the proposed regulation was substantially taken from a prior regulation dealing with the term "church" for determining the tax on unrelated business income.[151] The proposed regulation provided: "Generally, religious organizations, . . . if not themselves churches or associations or conventions of churches, . . . are not churches . . . ." The same was true of "all other organizations which are organized or operated under church auspices."[152] In other words, if an organization is not a church, it is not a church.

The next part of the proposed definition was a bit more demanding. Despite the preceding portion, a religious organization would qualify as a church if it were "an integral part of a church" and were "engaged primarily in carrying out the religious functions of a church." In determining whether an organization met the latter criterion, the IRS would consider whether its duties included "the ministration of sacerdotal functions and the conduct of religious worship" within the tenets of a religious body which did constitute a church.[153] The IRS withdrew this proposed defi-

150. Some states have taken issue with the Secretary's interpretation. The Attorney General of Michigan stated that where a church-related school had no separate legal identity, so that employees who worked in the school were actually employees of the church, not the school, the statutory exemption for church institutions would apply. If, however, the schools had a separate legal existence apart from church institutions exempt under the statute, they would not be exempt from unemployment tax. OP. MICH. ATT'Y GEN. No. 5434, at 6 (Jan. 19, 1979).

151. *See* note 160 *infra*, and accompanying text.

152. Proposed Treas. Reg. § 1.170A-9(a), 36 Fed. Reg. 9298 (1971).

153. *Id.*

nition after receiving extensive protest from American churches,[154] and merely specified that "a church or a convention or association of churches" was "a church or a convention or association of churches."[155]

The emphasis on "sacerdotal functions" resulted primarily from a distinction developed for purposes of the tax on unrelated business income. When this tax was initially imposed on nonprofit organizations in 1950, the statute exempted "a church, a convention or association of churches."[156] It was not clear whether or not religious orders were within this exemption.[157] When the phrase "a church or a convention or association of churches" was inserted in section 170 of the Code,[158] pertaining to the deductibility of charitable contributions, the staff of the Joint Committee stated: "The term 'church' is intended to include religious orders as well as other organizations which, as integral parts of the church, are engaged in carrying out the functions of the church, whether as separate corporations or otherwise."[159]

A Treasury regulation issued in 1958 explained the term "church"[160] for purposes of section 511, which imposes tax on un-

154. Whelan, *"Church" in the Internal Revenue Code: The Definitional Problem*, 45 FORDHAM L. REV. 885, 917 (1977).

155. Treas. Reg. § 1.170A-9(a) (1973).

156. Revenue Act of 1950, ch. 994, § 301(a), 64 Stat. 948 (amended, formerly codified at Int. Rev. Code of 1939, § 421(b)(1)(A)). This language was incorporated in the Int. Rev. Code of 1954, ch. 736, § 511(a)(2)(A), 68A Stat. 169, where it remained until removed by the Tax Reform Act of 1969, Pub. L. No. 91-172, § 121(a)(1), 83 Stat. 536 (codified at I.R.C. § 511(a)(2)(A)).

157. *See* Whelan, *"Church" in the Internal Revenue Code: The Definitional Problem*, 45 FORDHAM L. REV. 885, 906-07 (1977).

158. Int. Rev. Code of 1954, ch. 736, § 170(b)(1)(A)(i), 68A Stat. 58, *amended by* Tax Reform Act of 1969, Pub. L. No. 91-172, § 201(a)(1)(B), 83 Stat. 550 (codified at I.R.C. § 170(b)(1)(A)(i)).

159. STAFF OF THE JOINT COMM. ON INT. REV. TAXATION, 84TH CONG., 1ST SESS., SUMMARY OF THE NEW PROVISIONS OF THE INTERNAL REVENUE CODE OF 1954 (H.R. 8300) AS AGREED TO BY THE CONFEREES (PUBLIC LAW 591, 83D CONG.) 19 (Comm. Print 1955).

160. Treas. Reg. § 1.511-2(a)(3), T.D. 6301, 1958-2 C.B. 197, 222-23. A relevant portion of the regulation read as follows:

> (ii) The term "church" includes a religious order or a religious organization if such order or organization (*a*) is an integral part of a church, and (*b*) is engaged in carrying out the functions of a church, whether as a civil law corporation or otherwise. . . . A religious order or organization shall be considered to be engaged in carrying out the functions of a church if its duties include the ministration of sacerdotal functions and the conduct of religious worship. If . . . an order or organization is not authorized to carry out the functions of a church (ministration of sacerdotal functions and conduct of religious worship) then it is subject to the tax imposed by section 511 whether or not it engages in religious, educational, or charitable activities approved by a church. What constitutes the conduct of religious worship depends on the tenets and practices of a particular religious body constituting a church. If a religious order or organization can fully meet the requirements stated in this subdivision, exemption from the tax imposed by section 511 will apply to all its activities, including those

related business income. The regulation stated that "church" included a religious order or organization which was "an integral part of a church" and was "engaged in carrying out the functions of a church." For a religious order or organization to meet the latter criterion, its duties had to include "the ministration of sacerdotal functions and the conduct of religious worship" within the tenets of an organization which constituted a church. Religious, charitable, or educational activities approved by a church would not qualify a religious order or organization as a church for purposes of this regulation. Once a religious order or organization had fully met the requirements of the regulation, the exemption from tax on unrelated business income applied to entities which it wholly owned, provided they were not primarily operated as a trade or business for profit.

The regulation's distinction between "religious activities" and "the ministration of sacerdotal functions and the conduct of religious worship" was very useful for the Treasury. It enabled the IRS to tax the wine and brandy business of the Christian Brothers, who are not ordained as priests, but to exempt the income of a particular commercial television station operated by a Jesuit university, because some Jesuits *are* ordained as priests. The university was highly regarded by key congressional figures,[161] and its station obtained special protective legislation in the Tax Reform Act of 1969.[162] The Christian Brothers lacked similar po-

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which it conducts through a separate corporation (other than a corporation described in section 501(c)(2)) or other separate entity which it wholly owns and which is not operated for the primary purpose of carrying on a trade or business for profit.

161. Whelan, *"Church" in the Internal Revenue Code: The Definitional Problem*, 45 FORDHAM L. REV. 885, 910-11 (1977). The station, WWL-TV, was operated by Loyola University in New Orleans, which was highly regarded by a powerful member of the House Ways and Means Committee, Representative Hale Boggs, Jr., and of the Senate Finance Committee, Senator Russell Long. *Id.*

162. When this Act subjected churches to the tax on unrelated business income, a special provision was added to the Internal Revenue Code which, though not naming the television station, described it in very specific terms, and allowed it to maintain its exempt status. Pub. L. No. 91-172, § 121(b)(2)(C), 83 Stat. 540 (current version at I.R.C. § 512(b)(15)). I.R.C. § 512(b)(15) reads as follows:

> Except as provided in paragraph (4) [pertaining to debt-financed property], in the case of a trade or business—(A) which consists of providing services under license issued by a Federal regulatory agency, (B) which is carried on by a religious order or by an educational organization described in section 170(b)(1)(A)(ii) maintained by such religious order, and which was so carried on before May 27, 1959, and (C) less than 10 percent of the net income of which for each taxable year is used for activities which are not related to the purpose constituting the basis for the religious order's

litical protection.

When a corporation, De La Salle Institute, whose members were all members of the Christian Brothers Order, challenged the assessment of tax on the unrelated business income from its wine and brandy business, the court upheld the imposition of tax.[163] The court tacitly accepted the essentiality of sacerdotal functions to church functions by observing that Christian Brothers did not perform sacerdotal functions, stating: "The functions of the Christian Brothers Order are educational and religious. These functions are not 'church' functions in the sense intended in the statutory language."[164] Since the statute used the term "church" and not "religious organization," the court concluded that a more restrictive meaning was necessarily required. Mere religious functions were insufficient to qualify an organization for the preferred tax status.[165]

A regulation, written to deal with a particular set of facts, applies far more generally thereafter. One wonders how the regulation would have been written had the Christian Brothers been ordained as priests, or had a lucrative wine and brandy business been run by Humanists who claimed exemption from the unrelated business income tax as a church.

The definition of "a church or a convention or association of churches" was discussed for purposes of section 170(b)(1)(A)(i), pertaining to the deductibility of charitable contributions, in *Chapman v. Commissioner*.[166] The Tax Court stated: "We are not here concerned with the question as to what constitutes a 'religion' within the purview of the first amendment of the Constitution; we are solely concerned with divining what Congress intended when it granted an additional 10-percent allowance for a special class of charitable contributions."[167] The court determined that although the organization in question, the Missionary Dentist, was clearly a religious organization, it did not qualify as "a church or a convention or association of churches." It interpreted this phrase as corresponding to the terms "denomination" or "sect." Because the Missionary Dentist was interdenominational, it did not meet this test.[168]

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exemption, there shall be excluded all gross income derived from such trade or business . . . .

Continued exclusion depends on the organization's charging rates competitive with those charged by nonexempt organizations.

163. De La Salle Institute v. United States, 195 F. Supp. 891 (N.D. Cal. 1961).

164. *Id.* at 905.

165. *Id.* at 898.

166. 48 T.C. 358 (1967).

167. *Id.* at 361.

168. *Id.* at 363-64. *See* note 98 *supra.*

One concurring opinion, in which two judges joined, stated that the Missionary Dentist was not a church because it did not meet the requirements imposed by the regulations under section 511, dealing with unrelated business income. There was no proof that the members of the organization ministered sacerdotal functions. Furthermore, religious services conducted by the evangelical teams sent out by the organization were not conducted "according to the 'tenets and practices of a particular religious body' " because they were interdenominational.[169] A second concurring opinion, in which another judge joined, stated that the Missionary Dentist was not a church because "the critical element of spiritual togetherness is missing." Because of the general nature of the testimony regarding the organization's religious services, the importance of those services in the totality of the organization's activities could not be determined.[170] There was no dissent.

What all these opinions had in common, though they used different legal reasoning, was, of course, that an organization known as the Missionary Dentist was not a "church." The average individual would probably reach this conclusion without the aid of any legal reasoning.

The attempts to define a church's function have tended to limit governmental perception of this function to the Catholic mass, presumably including communion in Protestant services, and other functions such as baptisms. This is understandable in light of controlling political factors which dictated taxation of unrelated business income of Christian Brothers, but not Jesuit, institutions. This does not, however, make it acceptable under the establishment clause.

The categories which have emerged from the interpretations discussed can be described as: sacerdotal, religious, and nonreligious. A church must have the first of these as a primary purpose. Here the problem of "incidental functions" begins to arise. As the court stated in *De La Salle Institute v. United States*, "The tail cannot be permitted to wag the dog. The incidental activities of plaintiff cannot make plaintiff a church."[171] What if a Presbyterian church only serves communion once a month, over a period of half an hour? Can this be said to be other than an incidental function? To prove that it is not, are courts entitled to examine

169. *Id.* at 366-67 (Dawson, J., concurring).
170. *Id.* at 368 (Tannenwald, J., concurring).
171. 195 F. Supp. 891, 901 (N.D. Cal. 1961).

church law to determine the importance of the communion ceremony within the church's theology? What if they should decide that it is not very important? What if church members testify that church sacraments are not an important reason for their membership in the church?

Then, of course, there is the problem presented by churches where the only activities which might be termed sacerdotal are weddings, funerals, and perhaps a naming ceremony.[172] Are not these functions incidental in the truest sense? Yet can the government assert that an organization is not a church because it lacks a sufficiently priestly character? Churches, as we have seen, are not even "religious" in a substantial part of their activities, let alone "sacerdotal."

Early in 1978, Jerome Kurtz, Commissioner of the Internal Revenue Service, said that of all the difficult judgments IRS must make, one of the most difficult concerns questions of religion. He said that in recent years there had been an attempt to isolate and distill from cases criteria which would determine whether an organization was a church, but that beliefs and practices varied so widely that IRS had been unable to come up with a single definition.[173]

The criteria which the IRS National Office has developed for determining whether an organization is a church are these, though an organization need not meet all criteria:

> (1) a distinct legal existence, (2) a recognized creed and form of worship, (3) a definite and distinct ecclesiastical government, (4) a formal code of doctrine and discipline, (5) a distinct religious history, (6) a membership not associated with any other church or denomination, (7) a complete organization of ordained ministers ministering to their congregations and selected after completing prescribed courses of study, (8) a literature of its own, (9) established places of worship, (10) regular congregations, (11) regular religious services, (12) Sunday schools for the religious instruction of the young, and (13) schools for the preparation of its ministers.[174]

These criteria tend to require an organization to be a developed denomination according to the pattern reflected in the most accepted mainline churches. They do not recognize the substantial departure from this structure among a number of religious organizations which have long been recognized as American

172. *E.g.*, Washington Ethical Soc'y v. District of Columbia, 249 F.2d 127, 128 (D.C. Cir. 1957). There are a number of recognized religious denominations which do not specially train and ordain priests or ministers, such as Christian Science and certain assemblies of Quakers.

173. Address by Jerome Kurtz, Practising Law Institute Seventh Biennial Conference: Tax Planning for Foundations, Tax-Exempt Status and Charitable Contributions (Jan. 9, 1978), *reproduced in* DAILY EXECUTIVES REP. (BNA) J-8 to J-10 (Jan. 11, 1978).

174. B. HOPKINS, THE LAW OF TAX-EXEMPT ORGANIZATIONS 134 (3d ed. 1979).

churches.[175] Furthermore, over more than the last decade, there has been the development of "house churches" among Protestants, Catholics, and some Jews, who seek community, less structure, and hopefully, more authentic spirituality. Few could argue that these churches do not embody the religion of most of those who belong, yet such churches may not meet many of the criteria established by the IRS National Office.

Christ and His band of disciples certainly did not meet these criteria. An examination of the relevant references indicates that the Biblical church which was in the home of Priscilla and Aquila[176] would not qualify for tax exemption under these tests. It is perhaps never wise to define a religion based on its developed state, since its early state is not only its most fluid, but usually its most delicate and important. It is precisely then, in this larval stage, that a particular religion needs to have the benefits of religious protections.

These criteria provide the basis for an unconstitutional establishment of religion. They do not establish a particular creed, to be sure, but they establish a finely specified structure as a requirement for the protections afforded to churches. There seems to be no constitutionally compelling argument that organizations with this structure should receive religious protections while other less organized "churches"—as that word is commonly understood—are denied them. What these criteria tend to do is limit the religious scene to the denominations already in existence, in violation of the establishment clause.

A definition of "church" by any government agency is fraught with constitutional dangers. More than 150 years ago, Chief Justice Marshall issued the memorable words, "That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create . . . are propositions not to be denied."[177] The same is true of the power to define. If government can define what is a "church," it can also define what is not a church, and can do so in a manner which excludes religions which are not favored by government officials. The very

175. *E.g.*, Quakers and Christian Scientists. *See* Whelan, *"Church" in the Internal Revenue Code: The Definitional Problem*, 45 FORDHAM L. REV. 885, 925-26 (1977).

176. *See* 1 *Corinthians* 16:19.

177. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819).

existence of such a power would be unconstitutional under the establishment clause.

In testimony submitted to the Senate Finance Committee in 1954, Mr. Eugene Butler of the National Catholic Welfare Conference stated that a particular classification in the Internal Revenue Code would result in "a legislative determination of what is or is not a church. This the Congress has never done. This would be a dangerous precedent."[178] The Treasury regulation which delineated certain boundaries for the term "church" was substantially designed to please those who held political power.[179] It is not to be supposed that a more far-reaching definition would be any less subject to such pressures. If our nation has managed to get along without a government definition of "church" until now, it seems that it should be able to continue to do so.

### C. *The Impact of the First Amendment upon the Characterizations Developed by Government*

In some areas, the manner of categorizing various types of religious institutions has not been perceived as raising constitutional issues, because constitutional rights or prohibitions have not been at stake. This was true in *Chapman v. Commissioner*,[180] in which the court stated that it was not trying to determine the scope of "religion" under the first amendment, but merely attempting to construe a statute regarding charitable contributions.[181] The allowance or disallowance of an additional 10% of a taxpayer's contribution base as a charitable contribution does not seem to be a matter of constitutional import. The author of one concurring opinion stated: "I recognize that my emphasis on spiritual togetherness as a characteristic of a 'church' might well present problems if we were dealing with a constitutional question . . . ."[182]

The tax on unrelated business income is another area where constitutional requirements have not been involved. At the time churches were exempt from this tax, the term "church" was described in corresponding Treasury regulations.[183] The fact that the National Council of Churches and the United States Catholic

178. *Hearings on H.R. 8300 Before the Senate Comm. on Finance*, 83d Cong., 2d Sess. 1028 (1954).

179. *See* notes 160-62 *supra*, and accompanying text.

180. 48 T.C. 358 (1967).

181. *See* text accompanying note 167 *supra*.

182. Chapman v. Commissioner, 48 T.C. 358, 368 (1967) (Tannenwald, J., concurring).

183. *See* note 160 *supra*, and accompanying text.

Conference requested that this exemption be removed[184] makes it appear unlikely that a challenge to the constitutionality of this tax would be successful. In such a case, the manner of classifying religious institutions does not appear as crucial as where a constitutional issue is involved.

Yet the distinctions in the regulations under the unrelated business income tax illustrate how an establishment clause problem can develop even in a matter which is not one of intrinsic constitutional import. Under the regulations, the tax was imposed on religious orders without ordained priests, but not on those with ordained priests. The court in *De La Salle Institute v. United States* rejected the first amendment challenge raised by the plaintiffs, who asserted that an unconstitutional requirement of orthodoxy had been imposed. The court basically said that the line had to be drawn somewhere, and that it would not hold unconstitutional the line which had been drawn.[185] Both the taxed and the exempted orders involved were Roman Catholic. Had the regulation been drawn so as to exempt Protestant organizations but not Catholic organizations, an establishment clause problem would have been created. Furthermore, there is a tendency for categorizations which have developed in nonconstitutional areas to carry over into constitutional areas, thus giving these categorizations a certain amount of inevitable constitutional impact.

In other areas, constitutional requirements or prohibitions are directly at issue when statutes are applied to religious institutions. This is the case in the current dispute over the definition of "integrated auxiliary." As discussed,[186] a church-related organization included in this category need not file an annual return of financial information with the Internal Revenue Service. A church-related organization, other than a church, which is outside the integrated auxiliary category must generally file such returns.

In maintaining the exemption from this requirement for churches, the Senate stated that churches were exempt "in view of the traditional separation of church and state."[187] This implies that the Senate felt constitutional issues of church-state separa-

184. Whelan, *Government and the Church*, 139 AMERICA 450 (1978).

185. De La Salle Institute v. United States, 195 F. Supp. 891, 904-05 (N.D. Cal. 1961).

186. *See* notes 124-44 *supra*, and accompanying text.

187. SENATE COMM. ON FINANCE, 91ST CONG., 1ST SESS., TAX REFORM ACT OF 1969, COMPILATION OF DECISIONS REACHED IN EXECUTIVE SESS. 53 (Comm. Print 1969).

tion would be raised if churches were required to file annual financial returns with the government.

The issue of financial oversight has been judicially considered primarily in cases involving government's dealings with church-related schools and colleges. In *Lemon v. Kurtzman*, the Supreme Court held unconstitutional an arrangement which would, in some cases, require the government to examine the expenditures of parochial schools and determine which were secular and which were religious.[188] In *Tilton v. Richardson*,[189] on the other hand, a program of federal construction grants which included church-related colleges was held constitutional. In evaluating such grants under the excessive entanglement test, the Supreme Court stated: "There are no continuing financial relationships or dependencies, no annual audits, and no government analysis of an institution's expenditures on secular as distinguished from religious activities. Inspection as to use is a minimal contact."[190] A recent First Circuit decision barred the Secretary of Consumer Affairs of Puerto Rico from obtaining information from Roman Catholic schools as part of an investigation of costs of private schools.[191]

The Court in *Lemon* recognized that Catholic elementary schools are "an integral part of the religious mission of the Catholic Church."[192] If the Constitution restricts governmental examination of the financial records of church schools in conjunction with funding programs or investigations of costs, it is true a fortiori that government is restricted in examining the financial affairs of churches pursuant to an information return requirement. This limitation is based not only on the free exercise clause,[193] but also on the establishment clause, which precludes excessive entanglement between government and religion.[194]

Because the Secretary has exempted parochial schools from the filing requirement, litigation of the constitutionality of this requirement for parochial schools is precluded. Nevertheless, the school aid cases clearly show that institutions affiliated with churches may be "an integral part of the religious mission" of a particular church, and may be religious institutions for purposes of the first amendment, even though their principal purpose is not

188. 403 U.S. 602, 620 (1971).
189. 403 U.S. 672 (1971).
190. *Id.* at 688.
191. Surinach v. Pesquera de Busquets, 604 F.2d 73 (1st Cir. 1979).
192. 403 U.S. at 616 (quoting the district court in the same matter, DiCenso v. Robinson, 316 F. Supp. 112, 117 (D.R.I. 1970), *aff'd sub nom.* Lemon v. Kurtzman, 403 U.S. 602 (1971)).
193. Surinach v. Pesquera de Busquets, 604 F.2d 73, 79 (1st Cir. 1979).
194. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

"exclusively religious" as specified in the regulation defining integrated auxiliary. The question then arises as to when a church-related institution is a religious institution for purposes of the first amendment, *i.e.*, an institution with which government cannot deal except within the parameters established by the religion clauses.

The free exercise clause has been held to embrace actions which are not "religious" for purposes of the establishment clause, but which spring from religious belief.[195] It is submitted that the charitable, welfare, educational, and similar enterprises traditionally carried on by churches and their affiliated institutions should be held to constitute protected activities within the purview of the religion clauses. This approach is consistent with judicial interpretation of the free exercise clause; and with the positions taken in real property tax exemption and zoning cases, which recognize the true breadth of church activities.[196]

The status of such institutions under the establishment clause cannot be as readily generalized. Without passing on what the law *should* be, it is sufficient to note that it is well established in case law that church-related colleges[197] and hospitals[198] do not fall under the same prohibitions against government aid as do parochial schools, though of course no institution may receive aid for religious purposes. Though "religion" must logically mean the same thing in both religion clauses, the Supreme Court has recognized a kind of distinction between establishment and free exercise: "The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself."[199]

It is further submitted that the elaborate definitional process in which the government determines whether a church-related organization is "operated primarily for religious purposes" or is "exclusively religious"—and defines "religious" as excluding the categories of charitable, educational, or literary—constitutes excessive entanglement between government and religion. It thus

195. *See* notes 3, 11-13 *supra*, and accompanying text.
196. *See* notes 88-91, 104-06, 111-12 *supra*, and accompanying text.
197. *See, e.g.*, Roemer v. Board of Pub. Works, 426 U.S. 736 (1976); Tilton v. Richardson, 403 U.S. 672 (1971).
198. *See, e.g.*, Bradfield v. Roberts, 175 U.S. 291 (1899).
199. Walz v. Tax Comm'n, 397 U.S. 664, 673 (1970).

violates the establishment clause. The Supreme Court in *Lemon* refused to allow a state government to examine a parochial school's expenditures and determine which were secular and which were religious, based upon considerations of entanglement.[200] Are state officials more competent to judge the religious nature of activities than they are to judge the religious nature of expenditures? A limitation in the expenditure area mandates a limitation in the area of activities. Furthermore, government definitions of religion or religious institutions presuppose that government is empowered to impose upon society its conceptions in this area, contrary to our basic principles of religious liberty.[201]

Once it is established that the free exercise clause applies to church institutions which are not strictly "religious," such as social welfare organizations, it is clear that governmental action may work to infringe upon these organizations' free exercise rights. The tests which have been developed under the free exercise clause,[202] such as a compelling state interest, can then be applied to see if the infringement is justified. For instance, a court would probably hold that there is a compelling state interest in assuring that hospital patients receive adequate care. Thus, a church-related hospital could presumably be subject to governmental regulation in this area, even though it was recognized as a religious institution for purposes of the free exercise clause.

On the other hand, it seems quite likely that no compelling state interest would be found to justify requiring church-related hospitals to submit annual returns of financial information to the federal government. In a recent First Circuit decision which rejected a governmental attempt to obtain information from a parochial school, the court stated: "[A]s has long been recognized, 'compelled disclosure has the potential for substantially infring-

200. 403 U.S. at 620. The Court said: "This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches." *Id.*

201. Thomas Paine, in his influential pamphlet *Common Sense*, wrote: "As to religion, I hold it to be the indispensable duty of government to protect all conscientious professors thereof, and I know of no other business which government hath to do therewith." L. PFEFFER, RELIGIOUS FREEDOM 13 (1977). Isaac Backus, a Baptist minister who wrote in 1774 against a Massachusetts tax to support the Congregationalist Church, stated:

> The free exercises of private judgment, and the unalienable rights of conscience, are of too high a rank and dignity to be submitted to the decrees of council, or the imperfect laws of fallible legislators . . . religion is a concern between God and the soul with which no human authority can intermeddle.

*Id.*

202. *See* notes 7-10 *supra*, and accompanying text.

ing the exercise of First Amendment rights.' "[203] The court commented that the governmental agency seeking the information did "not even claim, nor could it, in our opinion, that the general interests which the Department serves rise to the level of those which have been found to outweigh First Amendment religious freedoms."[204]

## IV. CONCLUSION

The free exercise clause of the first amendment has been held to embrace actions which, though not religious in themselves, spring from religious belief. Not every action which may be considered mandated by religious belief is protected. In order to limit such action, however, the state has been required to demonstrate a "compelling state interest" sufficient to outweigh the state's very great interest in preserving first amendment freedoms. The establishment clause is considered to encompass religious matters which are not associated with formal institutional religion, as well as those which are. Although there is a difference between the scope of practices covered by the establishment and free exercise clauses, this difference may be seen as a difference between the terms "establishment" and "free exercise," rather than between "religion" in the two clauses. No formal definition of "religion" under the first amendment has been developed; instead, specific criteria have been avoided to prevent a limitation on the first amendment which would, in itself, be unconstitutional.

The core religious institution, a "church," also has not been precisely defined. Nevertheless, criteria have been developed which tend to require a complex structure before an organization can qualify as a "church" under the Internal Revenue Code. In addition, numerous religious categories have been developed which tend to limit the definition of "church" since they separately define various church-related organizations.

To allow the government to define "church" would pave the way for an unconstitutional establishment of religion, by giving legal force to government's religious perceptions. Such a definition does not appear useful in defending against fraud; a person who

203. Surinach v. Pesquera de Busquets, 604 F.2d 73, 78 (1st Cir. 1979) (quoting Buckley v. Valeo, 424 U.S. 1, 66 (1976)).
204. 604 F.2d at 80.

was clever enough might be able to meet even a carefully constructed definition. Instead of proving that an organization is *not* a church, based on application of a particular definition, the Internal Revenue Service should prove, for example, that it *is* a fraud.[205] Tax fraud is a matter with which the Service must perpetually deal in numerous areas, and the doctrine of looking to the substance of a transaction, not merely its form,[206] is well established for tax purposes.

Furthermore, the tendency to narrow governmental understanding of "church functions" to "sacerdotal functions"—by defining organizations which do not perform "sacerdotal functions" as not being churches—is one which should be resisted. This tendency serves to place the government in the unconstitutional position of determining what are, and what are not, the proper religious functions of churches. To be consistent with judicial interpretation of the free exercise clause, and with cases interpreting zoning and real property tax exemption statutes, the functions of churches should be understood to encompass many activities which are not even religious, not to mention sacerdotal.

Thus, the free exercise clause should be considered to apply to the institutions formed by churches to carry on their traditional charitable, educational, welfare, and other activities. For government to decide that because an institution's principal purpose is not "exclusively religious," the institution does not qualify for free exercise protection, is contrary to the basic and well-established principle that free exercise is not limited to "religious acts." Furthermore, statutes which create detailed classifications of religious institutions in accordance with a perceived degree of "religiosity" run the risk of excessive government entanglement with religion. A government which is precluded on entanglement grounds from separating the religious and nonreligious expenditures of a church-related institution[207] should also be precluded from determining which institutions are integral to a church's religious mission.[208]

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205. The utility of such an approach was recognized in Founding Church of Scientology v. United States, 409 F.2d 1146 (D.C. Cir.), *cert. denied*, 396 U.S. 963 (1969). There the court stated, in dictum:

> Any *prima facie* case made out for religious status is subject to contradiction by a showing that the beliefs asserted to be religious are not held in good faith by those asserting them, and that forms of religious organization were erected for the sole purpose of cloaking a secular enterprise with the legal protections of religion.

409 F.2d at 1162.

206. *See, e.g.*, Weiss v. Stearn, 265 U.S. 242, 254 (1924).

207. Lemon v. Kurtzman, 403 U.S. 602, 620 (1971).

208. *Accord*, Statement of James E. Wood, Jr., Executive Director, Baptist Joint Comm. on Pub. Affairs, at Internal Revenue Service Hearing on the Proposed Reg-

The above principles, combined with common sense, should serve to promote a constitutional understanding of "religion" and "religious institutions" for purposes of the first amendment without the aid of a ready-made, pocket definition of "religion" or "church." Such a definition would ultimately disserve the first amendment interests it was allegedly designed to advance.

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ulations Under Section 6033 of the Internal Revenue Code Relating to Definition of Integrated Auxiliaries of a Church, Washington, D.C. (June 7, 1976), at 5:

> Congress [in using the term "integrated auxiliary"] intended that there be a determination of a relationship. This the Treasury is competent to do. Congress did not intend that the Treasury either assess activities or determine whether those activities are integral to a church's religious mission. Only a church itself can perform that task.