CHAPTER TWELVE

SOCIAL REGULATION

Americans today are forgetting their cultural traditions and losing their moral consensus. The problem is both religious and political, not simply one or the other. A key assumption of constitutional government is that self-governing individuals will fulfill their civic responsibilities in cooperative service. This assumption rests upon the Christian concept of vocation: "And whatsoever ye do, do it heartily, as to the Lord . . ." (Col. 3:23). The social consequence of the faithful application of this sense of calling to all areas of life is the growth of a plurality of authoritative institutions: civil, ecclesiastical, familial, educational, industrial, commercial, and professional.

As R. J. Rushdoony has noted as a matter of historical reality: "No society can allow its central dogma to be threatened."¹ The American constitutional system is founded on the Reformation ideal of individual self-government. It is expressed in the cherished rights of free speech, religious liberty, and private property. But the center of American life has been shifting so dramatically that many of the old customs of local self-government, like the town meeting, are becoming cultural artifacts fit only for display. Relics of the dimly remembered past become grist for the cultural pulp mills. Any standard of value other than an ultimately hedonistic utilitarianism is apt to be rejected as an intolerable imposition.² The gain in sociability seems to involve
a corresponding loss of independent moral judgment and conviction.

The success of a pluralistic constitution depends on the strong self-motivation and, as Justice Jackson suggested in 1943, a respect for the faith of the people. Even a minority of self-governing individuals can provide the necessary leadership to maintain free institutions. But authority is too often associated in the public mind with decisions handed down from on high. The quest for certainty can lead to a proliferation of regulations and a growing fatalism that destroys personal initiative. One of Franz Kafka's parables is instructive in this regard:

They were offered the choice between becoming kings or the couriers of kings. The way children would, they all wanted to be couriers. Therefore there are only couriers who hurry about the world, shouting to each other--since there are no kings--messages that have become meaningless. They would like to put an end to this miserable life of theirs but they dare not because of their oaths of service.

By contrast, the theology that built American social institutions on a foundation of civil liberty regards every believer as a prophet, a priest, and a king directly accountable to God. It is a very different attitude and it sustains a very different life.

The alternative to institutional pluralism is elite rule of some sort. Its emergence has been fought every step of the way throughout American history, as an illustration by Max Weber helps confirm:

The opportunities for democracy and individualism would look very bad today were we to rely upon the lawful effects of material interests for their development. For the development of material interests points, as distinctly as possible, in the opposite direction: in the American "benevolent feudalism," in the so-called "welfare institutions" of Germany, in the Russian factory constitution . . . everywhere the house is ready-made for a new servitude. It only waits for the tempo of technical economic "progress" to slow down and for rent to triumph over profit. The latter victory, joined with the exhaustion of the remaining free
soil and free market, will make the masses docile. Then man will move into the house of servitude. At the same time, the increasing complexity of the economy, the partial governmentalization of economic activities, the territorial expansion of the population—these processes create ever-new work for the clerks, an ever-new specialization of functions, and expert vocational training and administration. All this means caste.

Those American workers who were against the "Civil Service Reform" knew what they were about. They wished to be governed by parvenus of doubtful morals rather than by a certified caste of mandarins. But their protest was in vain.

James Madison was particularly astute in his analysis of the dynamics of political power and its tendency to be concentrated in official hands:

It has been remarked that there is a tendency in all Governments to an augmentation of power at the expense of liberty. But the remark as usually understood does not appear to me well founded. Power when it has attained a certain degree of energy and independence goes on generally to further degrees of relaxation, until the abuses of liberty beget a sudden transition to an undue degree of power.

Those who refuse to govern themselves and to participate in public affairs invariably leave that responsibility to others. Public apathy on any appreciable scale undercuts the basis for consensus and cooperation. But no basis for national excellence has ever been discovered that can substitute for the personal character of its citizens. The abuse of liberty appears to be a major catalyst for the augmentation of power but, as Madison intimated, beyond a critical point the power will tend to become self-augmenting.

Churches must live in this new political and social environment which is, to a large degree, both the effect and the cause of a multiplication of fiscal and social regulations. This chapter is devoted to an exploration of some of the problems and conflicts that have resulted as both church and state have sought to reconstitute their
programs in terms of new political, social, economic, and religious conditions. The variety of regulations and points of conflict is immense: fund-raising rules, lobbying disclosure laws, collective bargaining, detachment of auxiliary ministries, curriculum content, teaching qualifications, unemployment compensation, dormitory and off-campus residence policies, hygiene instruction, coeducational sports requirements, minority enrollment quotas, employment and admissions statistics reporting requirements, sampling surveys of churches and church agencies by the Bureau of the Census that require voluminous information, grand jury interrogation of church workers about internal church affairs, use of clergy and missionaries as informants by intelligence agencies, subpoenas of church records in civil and criminal suits, conservatorship orders affecting adult members of religious groups, withholding of tax exemptions from churches for failure to comply with public policy, and various definitions of what constitutes a ministry for various purposes. The list is far from comprehensive but the central problem is well stated by Allan C. Carlson:

Religious organizations are seeing their activities and autonomy compromised indirectly by governmental definitions that confine unrestricted "church activity" to an ever smaller circle. . . . Joining most other private institutions, the churches are facing for the first time the discomfiting adjustments demanded by a bureaucratic state pursuing a set of abstract policy goals. Social regulation has spread far beyond its once limited domain. The government's commitment to an "affirmative" vision of individual and group equality and to augmented collective security, together with state protection of a new set of "rights" unknown several decades ago, is altering the religious community.

Church Polity and Doctrines

Courts have generally intervened into internal church affairs for
one or more of the following reasons: disputes over the use or disposition of church property, allegations of force or fraud, or specific health and safety concerns.

The role of the judiciary as an arbiter between the social regulatory policies of the state and the free exercise of church doctrine is not a new one. What is new is the growth of affirmative as well as prohibitive rules directly affecting churches. To their credit, many courts have resisted this trend and have frequently dismissed suits brought against churches by public agencies simply for what William Ball has called "hasty overbreadth in regulating."^8 But demands for church files, special permits, and employment statistics frequently lead to a hardening of battle lines. Typically, confrontations may be the result of mistakes, ignorance, suspicion, or alarm on either side. But many disagreements appear to arise from the sometimes different logic by which church and state pursue their professed goals.

The major precedent for judicial intervention into church property disputes, the Watson case of 1871, involved issues that anticipated the more recent social conflicts which have helped define new areas of social regulation. As Leo Pfeffer has noted:

In 1861, at the outset of the Civil War, the General Assembly of the Presbyterian Church, reversing a responsa of 1845 that slavery was not sinful, became an articulate advocate of the Union cause; Southern and border state members objected vainly that it was violating an article of the Confession of Faith that "Synods and councils are to handle or conclude nothing but that which is ecclesiastical, and are not to intermeddle with civil affairs which concern the Commonwealth."^9

Following the Civil War, ministers and missionaries from Southern and border states were interrogated about their views on slavery as a stipulation for continued employment. Several property disputes grew
out of schisms in some of the border states. In its Watson ruling, the Court held that the decision of the highest ecclesiastical court in a denomination should be considered binding by the civil courts. This represented an attempt to do justice to the differences of church polities, of which there are three basic varieties: episcopal, presbyterian, and congregational.

But the courts must first determine the nature of the governing hierarchy before they can defer to the highest church authority. In some cases, there may be a genuine disagreement concerning the true locus of authority in any strictly legal sense. Even where there is no such confusion, injustices may still result. In many cases the dispute is the result of a capture of the church hierarchy by a particular faction, as in Watson and Dedham cases, or by a political body allegedly hostile to church doctrine, as in the Kedroff and Kreshik cases.

Out of dissatisfaction with the Watson approach, other solutions have been tried or suggested, the most recent of which is the neutral-principles doctrine announced in the Hull Church case and amplified in [Jones v. Wolf, 443 U.S. 595 (1979)]. As a result of the latter decision, courts may examine documentary evidence to determine whether the property of a local congregation in expressly held in trust for the parent church. But it is an area in which the law is far from settled. 10

Fraud is another area which the courts handle gingerly. The Ballard decision of 1944 established that courts may not question the validity of articles of faith. Religious teachings per se may not be examined in a court of law. But common law fraud still covers cases
that involve misrepresentation of material facts. But what cannot be
done is to require prior approval for religious appeals. The best
advice is still caveat emptor.11

The multiplication of new religious cults has done more than
anything to stimulate efforts to regulate religious practices, just as
religious tax exemptions have been discredited by fraudulent uses. Over
the years, the press has tended to concentrate on the horror stories
with accounts of how one or another cult has endeavored to control the
ancestral waters of Gloucester fishermen, capture political power in a
major city, incorporate its own city, place poisonous snakes in the
mailboxes of opponents, raid the files of government agencies, obtain
new converts by using sophisticated brainwashing techniques, conduct
ritual sacrifices, or embezzle millions of dollars from unsuspecting
banks, airlines, and ordinary investors. The stories are often based on
unimpeachable sources and may be supplemented by countless similar ones
that never reach the headlines. Reactions to the Jonestown tragedy
epitomized the helpless outrage shared by the general public but it is
difficult any longer to know where to point the finger of blame in a day
when mass murder is a regular part of the evening news. Religion is so
much at the center of so many conflicts that it is easy to blame
religion. But one may as well blame politics or human nature. The
destructiveness pent up in the human soul is being treated more as an
elemental force of nature than as an expressions of culpable moral
depravity. The definition of human nature or—for that matter—religion
has passed beyond any meaningful set of distinctives.

Anti-conversion legislation, deprogramming, and court-appointed
guardians for adult members of various religious groups have caused
closternation among civil libertarians. New York Governor Hugh Carey
has twice vetoed bills that would have authorized state courts to
appoint temporary guardians for adults who showed signs of
"psychological deterioration" after exposure to a religious cult.\textsuperscript{12} But
it is difficult to make the earlier distinction between religion and
\textit{cultus} when the one has come to include the other in the Court's most
recent definitions. In the absence of an accepted standard of religious
practice, the legislatures, law enforcement agencies, and courts have
had to grope for a working definition by trial and error. A likely
consequence of this inclusion of such a variety of beliefs and practices
under the rubric of religion is to further encourage "hasty overbreadth
in regulation" and efforts to extend applications of the police power
through test cases. Like the "intractable problem of pornography,"
demands for the suppression of cultic activity have challenged the
ingenuity of civil authorities.

Despite attempts by some state agencies to regulate the financial
transactions of churches, the courts have generally resisted such
encroachments of state power into internal church affairs.\textsuperscript{13} In
\textit{Surinach v. Pesquera de Busquets}, 604 F.2d 73 (1st Cir. 1979), a federal
court of appeals rejected an attempt by the Department of Consumer
Affairs in Puerto Rico to subpoena documents of the Roman Catholic
Church during an investigation of the operating costs of parochial
schools.

Meanwhile, churches themselves have been developing ways to police
each other as a response to some well-publicized cases involving
One result was the formation of the Evangelical Council for Financial Accountability in 1979.\textsuperscript{15}

Business and Political Activity

Business uses of church property and unrelated business income of churches are now subject to taxation, although some loopholes remain.\textsuperscript{16} Churches which are involved in business activities are advised to distinguish their business records from other records that relate to the avowedly religious mission of the church. Disputes over whether a particular activity—such as a regular bingo night, a special fundraising dinner, or a publishing operation—generates "unrelated business income" is a source of much litigation. Some alleged churches have been held to be commercial enterprises. On the other hand, some acknowledged churches have had their tax exemptions revoked for indulging in too many activities deemed secular in nature.\textsuperscript{17} Communal religious organizations, particularly those which endeavor to be self-sustaining, have run afoul various regulations, including restrictive zoning codes, minimum wage laws, and income tax requirements.\textsuperscript{18} As in many other areas of constitutional law, the scope of free exercise protections and lawful prohibitions or requirements is being determined virtually on a case by case basis.

Some restrictions on political activities by churches have a long history, perhaps in part because of the important role churches played during the War for Independence and the partisan politics of the period immediately afterward. At the time the Constitution was adopted, four
states—Maryland, Virginia, North Carolina, and Georgia—excluded ministers from the legislature. This custom persisted in Tennessee until 1978, when the Supreme Court invalidated the restriction in a split opinion in McDaniel v. Paty, 435 U.S. 618 (1978). Chief Justice Burger considered the exclusion an unconstitutional restraint on religious conduct. Justice Brennan instead invoked the Torcaso rule by treating the exclusion as a restraint on religious belief. But the problem of distinguishing between belief and conduct—and determining the bounds of the latter—remains largely unresolved.

Lobbying and electioneering restrictions also remain points of controversy. Religious organizations are not currently permitted to directly intervene in political campaigns. They may not endorse, oppose, compare, or rate candidates and may not publish or distribute voter education guides that indicate a bias regarding certain candidates or issues. On the other hand, they may speak out on public issues where religious principles are involved and engage in lobbying where their tax status or existence is at stake. But the rules are very fluid. An Internal Revenue Service ruling of October 14, 1980 amplified its earlier rule against publication of congressional voting records by churches and other §501(c)(3) organizations as follows: "Certain 'voter' education' activities conducted in a non-partisan manner may not constitute prohibited political activities. . . ." 20

The vagueness of such rules tends to have a chilling effect which just as effectively silences many churches as an outright prohibition against addressing public issues. The involvement of churches in voter registration drives during the Civil Rights Movement of the 1960s may
have inspired an administrative tightening of the rules but a new level of political activism among Christian fundamentalists is likely to keep the political divisiveness issue alive.21

A coalition of public charities successfully induced Congress to pass the Tax Reform Act of 1976, which attempted to clarify the limits of permissible lobbying. But recently, the Supreme Court denied in Regan v. Taxation With Representation, 103 S.Ct. 1997 (1983), that a nonprofit organization enjoying a §501(c)(3) exemption has any constitutional right to lobby, despite the fact that veterans organizations under the same classification are permitted to do so. There is still confusion about the extent to which churches may be involved in political activities under the Internal Revenue Code rules. But the Supreme Court itself has lent some support to free expression by churches in its Walz decision:

Adherents of particular faiths and individual churches frequently take strong positions on public issues including, as this case reveals in the several briefs amici, vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right (397 U.S. 664, 670).

Subsequent lower court rulings, however, have cast some doubt on the extent and nature of this right. In Christian Echoes National Ministry v. United States, 470 F.2d 849 (10th Cir. 1972), cert. denied, 414 U.S. 864 (1973), a federal court revoked that ministry's tax exemption because of alleged lobbying and electioneering:

In light of the fact that tax exemption is a privilege, a matter of grace rather than right, we hold that the limitations contained in Section 501(c)(3) ... do not deprive Christian Echoes of its constitutionally guaranteed right of free speech. The taxpayer may engage in all such activities without restraint, subject, however, to withholding of the exemption, or, in the alternative, the taxpayer may refrain from such exemptions and obtain the privilege of exemption.
Whether or not Congress or the Supreme Court ever intended religious tax exemptions to be treated as a matter of grace, this view has effectively become the determining one. Since churches are not liable for taxes, they are not required to apply for an exemption. But their status as churches may be challenged and church records subpoenaed. The treatment of a tax exemption as a privilege raises establishment clause concerns despite the availability of alternative classifications if a religious organization fails to be recognized under a particular one.

Even if exemptions are regarded merely as an "act of grace," however, stipulations regarding political activity by churches, for instance, do entail First Amendment issues of the kind the Court has yet to specifically address. But as Justice Brennan remarked in the Sherbert case: "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege" (374 U.S. 398, 404). It seems highly inappropriate for a government agency to be able to dangle an exemption before a church as an enticement. Like entrapment, the practice suffers from a serious lack of perspective about the proper role of government in the lives of its citizens. The realm of religious free expression and civil liberty in general is a vulnerable one if the enjoyment of lawful freedoms can be impeded by such stipulations.

Auxiliary Ministries

Two axioms may be said to govern American church law. The first is that congregational polities tend to be favored. The second is that the
The scope of the church's religious mission tends to be minimized. Historically, this represents the dominance of theological nominalism, a tendency that characterized the English dissenting tradition and assisted in the birth of modern western law. The coexistence of congregational and hierarchical church polities in America, however, has necessitated the development of special rules to help offset this natural legal bias. Much of the tension in tax laws and social regulations grows out of this religious variety, making any neat distinction between sacred and secular matters difficult to take for granted.

As a result, some ministries are incorporated separately from the parent churches in order to enjoy full advantage of the law. But along with the special difficulties naturally entailed by exceptions and exemptions, the compartmentalization of church functions often creates new problems, as many churches have found in regard to their so-called auxiliary ministries. When the Treasury Department proposed new regulations for integrated auxiliaries in 1976, church-related hospitals, orphanages, old age homes, and elementary schools were excluded from the list of qualifying ministries. Churches united in opposition and hearings were held. Some adjustments in the rules were made, summarized as follows by Charles M. Whelan:

The final regulations explicitly recognize that, to be an integrated auxiliary of a church, a church-related organization must first possess a legal identity in its own right as a section 501(c)(3) organization. Thus, an organization directly owned and operated by a church is not an integrated auxiliary but a "part" of the church. Secondly, the final regulations abandon the "purpose and function" test stated in the proposed regulations and substitute a new "principal activity" test. Under the proposed regulations, the primary function of an integrated auxiliary had to be to carry out the tenets, functions and principles of faith of a
church, and the organization's activities had to directly promote religious activity among the members of the church. Under the final regulations, these criteria do not apply, but the "principal activity" of the organizations must be "exclusively religious." Thirdly, the final regulations exempt all church-related elementary and secondary schools from filing annual information returns.

Despite these adjustments, anomalies remain and the application of the rules is being tested in the courts on a case by case basis. In addition, the assumption that auxiliary ministries are somehow incidental to and thus detachable from regular church functions makes them a source of perplexity even to the taxing authorities. Section 6033(a)(2)(A)(i) of the Internal Revenue Code provides a mandatory exception to the general tax filing requirement only for churches, their integrated auxiliaries, and conventions or associations of churches. Religious organizations that fail to qualify under one of these exceptions are for that reason also apt to be subjected to additional taxation and regulation at all levels of government.

Perceptions vary as to what kinds of ministries qualify as integrated auxiliaries or as parts of churches. Physical proximity to the main church sanctuary is not a determinant. Some ministries may encompass physical facilities that are located in different cities and states. This adds to the complexity of the problem.

The historic withdrawal of many, if not most, churches from these areas of ministry in deference to comparable state-operated programs appears to be behind the problem. As Lynn Buzzard and Samuel Ericsson contend:

Up until the twentieth century, American churches provided most of the assistance to the vulnerable in our society. But with the growth of the welfare state, many churches shifted the costs of such programs to the broader tax base so they could serve more "spiritual" needs. This trend has been reversed in the past
decade. Many churches are once again providing for the poor, the needy, the elderly. But now the church is caught in a tension between God's mandate and a government perspective that seeks to confine the church to a "building with a steeple." The causes are more complex than any brief summary can suggest, but the withdrawal of churches from many social welfare ministries and the involvement of the state in those ministries may be attributed in part to specific theological crosscurrents during the late nineteenth and early twentieth centuries. One segment of the religious community actively sought a growing involvement by the state in programs of social reconstruction. Another segment reacted against the doctrinal innovations of the former and chose to place a renewed emphasis on the fundamentals of the faith. Both tended to lose sight of the comprehensiveness of the faith. The religious community, which at times has achieved results through cooperative enterprises, became further fragmented.

Once started, new programs and organizations tend to acquire a life of their own. Often they survive the loss of their original purpose and clientele by filling some other niche, much like holding companies. Even in a free marketplace, it is difficult to recover a market once a competitor achieves a commanding position unless the market conditions change or the competitor fails to keep pace. This is doubly true if the competitor is a tax-supported institution with a vested interest in maintaining its advantage. Few organizations deliberately seek to put their employees out of work. On the contrary, they may be expected to maximize their advantage by supporting a high degree of regulation.

The courts are ill-equipped to redress any but the most egregious examples of political intrusion under the guise of the public interest.
Regulations may increase even as the capacity to enforce them decreases. The courts, as a result, have become overburdened with litigation. Under the Equal Access to Justice Act of 1981, litigants may now recover the legal costs they incur if the courts find that a federal agency has acted against them without substantial justification. By 1983, according to the Washington law firm of Gammon and Grange, "only about 100 litigants have applied for reimbursement since the act went into effect even though Uncle Sam lost an estimated 12,000 civil lawsuits last year alone."25 Lack of publicity about the law was said to blame.

In the absence of clear guidelines, the courts have shown little consistency in dealing with such ministries as hospitals, homes for unwed mothers, and children's homes. The most publicized case of this sort was the successful ten year court battle by the late Rev. Lester Roloff over licensure of his church's homes for delinquent children. Rev. Roloff lost an early round in 1979 after the Department of Public Welfare in Texas brought suit to force him to comply with the Child-Care Licensing Act. He refused to do so for two stated reasons: first, licensure placed the state in authority over a Christian ministry and, second, it implied state responsibility for the upbringing of children. After an unfavorable ruling in Roloff Evangelistic Enterprises, Inc. v. State, 556 S.W.2d 856 (Tex. Civ. App. 1977), appeal dismissed, 99 S. Ct. 58, 601 (1978), the homes were brought directly under the control of Corpus Christi People's Baptist Church. The State of Texas brought suit against the church in State v. Corpus Christi People's Baptist Church, Inc., Cause No. 297,248 (200th Jud. Dist. Ct. 1981). In a memorandum dated April 17, 1981, Judge Charles D. Mathews, after noting the
longevity and great expense of the continuing controversy, concluded that the sole issue was the constitutionality of the law as applied to the facilities and operations of that church. He ruled in favor of the defendants. No further rulings have been made in this case since that date but the case is by no means concluded.26

The lack of a clear pattern is apparent in related cases that have been decided elsewhere. A South Carolina court rejected as vague a state child welfare requirement covering programs and community activities as it had been applied to a religious children's home. But the Kansas Supreme Court ruled against a minister who operated an unlicensed home for unwed mothers and upheld the state's power to require disclosure of records and to enforce rules regarding discipline and finances.27

The licensing of day care centers, often so broadly defined as to include church nurseries, is another point of contention. The North Carolina Supreme Court refused an appeal by several churches regarding the licensing of their day care facilities in Fayetteville Street Christian School v. North Carolina, 299 N.C. 351, 261 S.E. 2d 908 (1980). Other states have adopted similar regulations:

Recently, the Ohio Department of Public Welfare published a new set of "proposed Rules Governing Licensure of Day Care Centers." These rules purpose to license and control all church nurseries, Sunday Schools, Vacation Bible Schools, "church-operated" day cares, and "church-operated" preschools. These rules would make the Welfare Department the governing Board over all these church activities.28

On the other hand, Arkansas exempts religious child care facilities from its general licensing requirement.

The reasons given for these new regulations are usually plausible. The desire to reduce litigation for negligence, to restrain rising
insurance costs, or to prevent the recurrence of well-publicized misfortunes is difficult to gainsay. Yet other values are also at stake. The question that must be addressed is whether limits on these regulations can be set and enforced for the sake of civil and religious liberty. Negligence and fraud, for example, are punishable offenses. Elaborate regulations designed to prevent their occurrence may be highly intrusive. The issue is not simply one of finding a balance between competing public and private goods. Such regulations create entanglements that raises the question whether the concept of limited government—something limited by guarantees more concrete than the will of a temporary legislative, judicial, or popular majority—has gone by the boards. If so, is there any security that a beneficent system of social regulations will not become self-serving? If the law is nothing but the prevailing standards of the community, what is to prevent the continual redefinition of those standards in favor a new coalition of interests? These are some of the concerns that have motivated some churches and pastors to resist what may on the surface appear to be inconsequential intrusions or minor inconveniences. They perceive that the power to define the ministry of the church involves the power to establish, restrict, or regulate it.

Police Powers and Public Services

The jurisdictional controversy between church and state in regard to social regulations turns on the proper nature and scope of the police power. The interest of the state in the health, safety, and morals of its citizens is well-established in law. Ernst Freund, who wrote an
early treatise on the police power, recommended that two factors be weighed in determining the validity of specific regulations as applied to religious organizations: whether an element of discrimination is involved and whether arbitrary discretion is vested in administrative officials.\textsuperscript{29} He also believed it "to be the constitutional duty of public authorities to reconcile, as far as their discretion allows, civic and religious obligation."\textsuperscript{30} While he did not believe that conflicts between civic and religious duties need always be decided in favor of religion, Freund minimized the potential for conflict: "The constitutions provide that religious freedom shall not excuse practices inconsistent with the peace or safety of the state; but such a provision does not cover cases where the peace and safety of the state are not concerned, and where the conduct complained of is not a positive practice, but an omission to act."\textsuperscript{31}

Police functions were originally vested in local governments, particularly counties. As James Willard Hurst observed, the law assumed an active character in the nineteenth century and served as an instrument for the release of energy. Chief Justice Roger Taney regarded the police power as an attribute of sovereignty and equated the two at each level of government. But Judge Learned Hand later commented that, so understood, the police power was--by its very lack of definition--unbounded.\textsuperscript{32}

The perennial problem in regard to regulation is to divine where the interests of the state outweigh the interests of specific groups or individuals. The Constitution allowed ample liberty for various interests--social, individual, political, religious, economic, national,
and local—to adjust to each other. The founders sought to preserve liberty by placing definite constitutional limits on the sphere of national and state activity. In the event that changes should prove necessary, constitutional remedies were provided. But a passage in the Farewell Address of President George Washington speaks directly to this issue and carries with it a warning:

If, in the opinion of the People, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the constitution designates.—But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed.—The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield.—

American political history may be profitably studied as a practical commentary on the hazards of "change through usurpation." Ideological and practical considerations have been equally prominent in bringing these changes to pass. Francis J. Powers, for example, later noted the impact of a changing philosophy of law on American jurisprudence and traced its roots:

While Montesquieu is acknowledged as the intellectual forerunner of sociological jurisprudence, its greatest practical impetus was provided by the German pioneer, Rudolph von Ihering whose thesis was that the protection of individual rights was dictated primarily by social considerations and that rights were essentially nothing more than legally protected social interests. Individual welfare, in his thought, was never an end in itself, but was recognized only because it aided in the securing of the larger social welfare.

Such a view has consequences that eventually diverge from a view that lays the strongest emphasis on individual welfare. In a day of electronic banking and sophisticated computer crime, direct surveillance and the monitoring of communications systems, for example, may be not only technically feasible but also be politically acceptable if the sole
consideration is the larger social welfare as policy-makers define it. Although the preference by public officials for individual privacy and personal liberty does not need to be doubted, new technological circumstances have greatly magnified the costs of both negligence and criminal activity. A desire to take precautionary measures against potential abuses is understandable. But the remedy provided under a limited constitution is to punish violators of the law rather than to monitor people’s daily activities to ensure their compliance with it.

Health and Safety

Traditionally, police powers took the form of outright prohibitions rather than detailed regulations. They dealt with matters of urgent public concern, such as the preservation of public health, safety, welfare, morals, and peace.

Health and safety considerations, for example, are typically viewed under the aspect of compelling state interest. Contagious diseases pose such a clear and present danger to the community that the courts have disregarded religious objections to inoculations. Conscientious issues have also been raised about blood transfusions and extraordinary life-preserving techniques, usually to little avail.\textsuperscript{35} But the state’s insistence that its police powers be extended to questions of social policy, such as hiring practices, classroom discipline, and various antidiscrimination laws, have led to doubts in some religious circles that religious liberty is adequately protected under the First Amendment.

The most publicized health and safety issues affecting religious
liberty—such as snake handling, faith healing, and sacramental uses of drugs—should not be considered most representative. The courts have uniformly ruled the first as a public nuisance, upheld the second only when a threat to life was not involved, and upheld the third only in the case of traditional Native American rites. But when the state insists that a church maintain health records, or that a church school require inoculations of its students, does it cross the line into impermissible intrusion? Few churches voice any objection to complying with building and fire codes but confusion may result when standards applied to a building during Sunday worship services are held to be inadequate for weekday school sessions.

Zoning

Another application of police powers is through zoning ordinances and land use planning laws, which have become major policy-making tools in recent decades. Not unlike the restrictive covenants of a bygone era, exclusive residential zoning has at times been used to keep out or otherwise restrict churches and religious communes. At other times, some congregations have been excluded because of neighborhood plans that deliberately restrict the number of churches and allow them to be built only on a "first come, first served" basis. This device was used, for example, to prevent the newly formed First Orthodox Presbyterian Church of Portland, Oregon from remaining in its original neighborhood. The church was required to move. Its old property was converted into a filling station.

Zoning is also used to restrict ministries that are conducted by
churches on their own property. Sometimes a variance or re-zoning must be sought, along with a special license, if a church opens a day care facility.\(^{39}\) But so far, the most serious problems to develop have involved churches seeking to use their facilities during the week for a school. Many churches believe that education is a proper ministry of the church and should be treated as such. In \textit{City of Concord v. New Testament Baptist,} 382 A.2d 377 (1977), the New Hampshire Supreme Court ruled in favor of the church on this matter.

But the New Hampshire decision was not accepted as a precedent by the Court of Appeals in Oregon in a similar case in Damascus, Oregon. The issues in this case revolved around the meaning of the original conditional use permit the church obtained in 1967. In the fall of 1975, a complaint brought to the attention of the Clackamas Planning Commission the fact that a school had been started on the church premises. The commission told the church that an additional conditional use permit was required for the operation of a school. The church submitted an application, but was turned down because a minimum 12½ acres of property was required. The case went through a series of appeals until it reached the Oregon Court of Appeals in the fall of 1977. The Court ruled in favor of the church on the acreage question and on another issue relating to sewage and traffic, but it upheld the Commission in denying the additional conditional use permit. The case went back to the Clackamas County Circuit Court, which determined in January of 1979 that the "the Damascus Christian School is an integral and inseparable part of the Damascus Community Church and, further, that Damascus Community Church's original and current conditional use permit
is sufficient to encompass its school operation." The Board of County Commissioners appealed to the Court of Appeals, which reversed this decision in April of the following year. After the United States Supreme Court declined to take up the case, the church applied for and this time was granted a conditional use permit. The six years of litigation settled nothing, but it did demonstrate the vulnerability of churches when land use regulations are involved.

Churches that meet in private residences have been taken to court, although a young congregation typically gets started this way. Even home Bible studies and prayer sessions have been challenged. In Los Angeles, a supervisor for the Department of Building and Safety "stated that it will be the Department's policy to issue cease and desist orders against any religious meeting in a private home not zoned for church use even if 'just one' non-resident is present." This matter was later resolved through a letter to the mayor's office. Similar restrictions have been reported elsewhere. These may be isolated cases but they have created considerable consternation within church circles. The question is whether these conflicts are the natural outcome of an increasing emphasis on detailed land use planning. The possible social consequences have long been a matter of controversy.

Religious Uses of Public Property

The use of public property for religious activities raises other issues. A number of earlier court decisions that have prohibited the use of public property for religious meetings and Christmas displays may have to be reversed in light of Widmar v. Vincent, 454 U.S. 263 (1981),
and Lynch v. Donnelly, 104 S.Ct. 1355 (1984). But some practices have yet to be challenged. For example, many churches rent in state-owned facilities, including public schools, for their worship services. This has been made an issue in some places.

Public activities that survive court challenges are usually those that have come to be recognized as cultural artifacts despite their religious origins. But the disestablishment of state churches has not necessarily meant the disestablishment of religion. In effect, religion has come to be secularized. The new meaning of religion is illustrated by a comment in a 1982 issue of Time: "Christmas trees, for example, are generally considered secular because of their origin in pagan rituals. Public school Christmas pageants have won court approval as long as the cultural significance outweighed the religious."44 There are numerous logical difficulties with this position, not the least of which are the semantic ones. If a religious practice is acceptable because it is pagan, does it not thereby gain an advantage over the religious practice of a recognized religion? The entire history of the Christian Church could be studied in terms of its struggle to root out paganism from its midst. If paganism can return through the back door because of its cultural value, then it would seem to enjoy all the advantages of free exercise and none of the restrictions of the free exercise clause.

But the confusion over what is a sectarian as opposed to a secular practice appears to reach into the Court itself. In Lynch v. Donnelly, 104 S.Ct. 1355 (1984), Chief Justice Burger denied the implication that by upholding the public display of a Christmas manger scene the Court was seeking to explain away its religious significance or equating "the
creche with a Santa's house or a talking wishing well." Justice Brennan, however, wrote in his dissent that "it is plainly contrary to the purposes and values of the Establishment Clause to pretend, as the Court does, that the otherwise secular setting of Pawtucket's nativity scene dilutes in some fashion the creche's singular religiosity, or that the City's display reflects nothing more than an 'acknowledgment' of our shared national heritage" (104 S.Ct. 135, 1373).

Neither side really came to grips with the public role that religion may play in an officially secular society. It is not clear whether this single case represents more than a momentary weathervane or whether it signals a definite trend away from the Lemon test. But as long as the Court continues to pay lip service to the idea of a high and impregnable wall of separation, litigation may be expected to cover the entire range of possible entanglements. If the Court ever decided that the separationist principle dictates that religious activities must be banished from public property, then a long line of rulings, including Niemotko, Poulos, and Widmar cases, would be affected.

It is difficult to gather from the Court's rulings, however, what principles govern its most recent actions. For example, it is unclear why the religious display in the Lynch case might be more objectionable to some of the justices than the practice of renting booths at county and states fairs to religious organizations. In Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981), the Court upheld a Minnesota State Fair rule previously struck down by the Minnesota Supreme Court that governed the distribution of merchandise and held that members of the sect may be restricted to their
booths while distributing or selling their religious literature. Justices Brennan, Marshall, Stevens, and Blackmun dissented with respect to the distribution of literature, and later dissented together in the Lynch case, but were also willing to accept reasonable regulations in the interests of crowd control and concurred with the Court's decision. They joined in the Widmar ruling which upheld the right of student religious groups to meet on a university campus. Later, they were joined by Justice Powell in a charitable solicitation case, Larsen v. Valente, 102 S.Ct. 1673 (1982), in which they stipulated that regulations may not be based on any preference for one religious denomination over another. The dissenters objected that the requirements for standing had not been met and that the identity of the Unification Church as a religious organization had not been established.

These decisions illustrate the weaknesses that are increasingly evident in both the separationist and the accommodationist positions. Separationists appear to be willing to uphold a secular regulation that circumscribes the free exercise of religion particularly in order to avoid the appearance of an establishment of religion but are unwilling to permit an official preference of one religion over another and appear to be unwilling to permit an official determination of the character or claims of a religion. Accommodationists appear to be less concerned about the appearance of an establishment of religion so long as neutrality is respected but are generally willing to permit the examination and supervision of a religious organization involved in a general regulation or subsidy.

To date, the Court has proven unwilling to banish religious
activities from public property altogether. Although it has not prohibited religious activities by public school students on school premises, lower court decisions have gone both ways on the issue. Equal access legislation has been introduced into Congress that would cut off federal grants unless schools permit voluntary student religious meetings. Yet uncertainties remain because of the tension between the separationist rhetoric and the generally accommodationist effect of the Court's decisions. Issues of religious liberty has consequently became even more highly politicized in the absence of a clear constitutional standard. One result is that conflicts between religious liberty and compelling state interest are reduced to a balancing act. Should the Court's rulings ever match its rhetoric, however, the results could be far reaching. Public property represents a vast domain that is effectively enlarged through land use planning and the power of eminent domain. Restrictions on religious uses of public and private property would raise constitutional of the first magnitude. The separationist and accommodationist positions might be strengthened by a careful study of the means by which religious liberty has been lost in other places as well as other times. In both Mexico and the Soviet Union, church property is owned by the state and can be withheld from religious uses or otherwise regulated to suit its purposes.

Employment

Four major categories of issues relating to employment are the provision of unemployment benefits, the payment of unemployment taxes, the supervision of union elections, and the prohibition of various types
of discrimination, which is treated in a separate section. Judicial doctrine regarding unemployment benefits is fairly well settled in favor of accommodating those who lose their jobs or refuse to take jobs because of religious scruples. In Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707 (1981), the Supreme Court awarded unemployment benefits to a member of the Jehovah's Witnesses who was denied benefits because he quit his job after being transferred to a department that fabricated turrets for military tanks. Basing the Court's decision on the Sherbert and Yoder precedents, Chief Justice Burger limited the application of the compelling state interest: "The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest" (450 U.S. 707, 718). So far, however, the Court has applied this rationale only in cases involving unemployment benefits and compulsory school attendance.

Under the Federal Unemployment Tax Act (FUTA), religious organizations are exempt from any liability to pay unemployment taxes. After the Department of Labor extended coverage to church-affiliated schools and even supported state legislation to that affect, the Court held in St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772 (1981), that this exemption also applies to schools that do not have a separate legal existence from a church. But in California v. Grace Brethren Church, 102 S.Ct. 2498 (1982), the Court vacated and remanded a lower court ruling that FUTA was unconstitutional as applied to religious schools unaffiliated with churches on the grounds that the state, which administers this cooperative federal-state program, had
jurisdiction under the Tax Injunction Act.

The Court has also accommodated religious organizations by rejecting the extension of collective bargaining requirements to church-affiliated schools. In *National Labor Relations Board v. Catholic Bishop of Chicago*, 99 S.Ct. 1313 (1979), and again in *National Labor Relations Board v. Yeshiva University*, 100 S.Ct. 856 (1980), the Court narrowly construed the scope of the National Labor Relations Act of 1935 and refused to uphold the petitioner's claim that it exercised jurisdiction over the lay faculty members of church-operated schools, who had voted to unionize under elections supervised by the board.

Chief Justice Burger noted in the Catholic Bishop case that the National Labor Relations Board (NLRB) did not assert jurisdiction over private schools until 1970, when it "pointed to what it saw as an increased involvement in commerce by educational institutions and concluded that this required a different position on jurisdiction" (99 S.Ct. 1313, 1317). Justice Brennan, who wrote for the dissenters, replied that it is not the place of the Court to remake a law in order to save it from conflict with a constitutional limitation and concluded that "while the resolution of the constitutional question is not without difficulty, it is irresponsible to avoid it by a cavalier exercise in statutory interpretation which succeeds only in defying congressional intent" (99 S.Ct. 1313, 1328). Although he declined to address the religious liberty question, Justice Brennan indicated the probable outcome of a decision on that ground by citing *Associated Press v. National Labor Relations Board*, 301 U.S. 103 (1937). The majority in the earlier case had construed the act to cover the employees of a nonprofit
news-gathering organization despite First Amendment objections. Justice Sutherland wrote a memorable dissent in that case:

Do the people of this land—in the providence of God, favored, as they sometimes boast, above all others in the plenitude of their liberties—desire to preserve those so carefully protected by the First Amendment: liberty of religious worship, freedom of speech and of the press, and the right as free men peaceably to assemble and petition their government for a redress of grievances? If so, let them withstand all beginnings of encroachment. For the saddest epitaph which can be carved in memory of a ravished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time (301 U.S. 103, 141).

**Discrimination**

In an avowedly egalitarian society, perhaps the greatest conflicts may be found where competing demands for social consensus and social pluralism converge. Until recently, education and proselytism were nearly alone in being the most sensitive areas of judicial concern because they raised or stood in for fundamental doctrinal issues. Regulations that restrict religious liberty by making the expression of faith or dissent more difficult tend to be regarded as encroachments into a private domain. Although the frontiers between church, state, and family are poorly marked in places, they appear to be heavily patrolled.

But a third issue, social discrimination, is quickly coming to equal the other two in sensitivity and potential for mischief. In fact, it may prove to be the most intractable issue of all. The reason for this is that, as yet, the power of Congress to legislate in this domain has been virtually unlimited. Twenty years ago Congress passed the first of a series of broad civil rights reforms that addressed various forms of public and private discrimination. In *Heart of Atlanta Motel*
v. United States, 379 U.S. 241 (1964), and Katzenbach v. McClung, 379 U.S. 294 (1964), the Court ruled that the Congress was free to seek to eliminate racial discrimination through the use of its plenary power to regulate interstate commerce. But commerce was defined so broadly that the effect of the ruling was to extend this power even over arguably private activities.

Since then, other forms of social discrimination have come under attack through a variety of federal employment, housing, and education laws. Although churches have sometimes been granted exemptions where concerns about religious liberty have been raised, these exemptions are exceptional and often conditional. One area of special concern to churches is any social classification based on religion or creed, whether for the purposes of discrimination or eliminating discrimination.

Employment Opportunity

The Equal Employment Opportunity Act (EEOA), which is Title VII of the Civil Rights Act of 1964, prohibits employment discrimination on the basis of "race, color, religion, sex, or national origin." Religious organizations are exempted from full compliance with the EEOA only "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." An amendment in 1972 broadened the exemption to include all activities of a religious organization, not just those which are identified as religious. Jeanmarie S. Brock and Harvey G. Brown, Jr., however, have
pointed out that Senator John Williams, who was a spokesman for the 1972 amendment, wished to restrict this exemption with respect to "religious corporations and associations, such as hospitals, that provide purely secular services to the general public without regard to religious affiliation." The question of the constitutionality of this restriction as applied to religious organizations has yet to be addressed by the Court.

Cases involving charges of sex and race discrimination have occasionally gone unfavorably against religious organizations, although no definitive ruling has been made to date. Racial discrimination has regarded least favorably of all but in instances where discrimination on any basis other than race has been charged, the courts have ruled either way.

In Equal Employment Opportunity Commission v. Mississippi College, 626 F.2d (5th Cir. 1980), the court vacated a lower court's finding of fact and held that the EEOC lacks jurisdiction over religious discrimination. The case involved a female, Presbyterian clinical psychologist who was employed part-time by the college as an assistant professor and sued the college after the full-time faculty position for which she had applied was filled by a male, Baptist experimental psychologist. The school had a written policy favoring the hiring of active Baptists as full-time faculty members. Another court ruled in favor of a church which had fired the congregation's recently hired organist when it learned that he was a practicing homosexual who refused to repent.  

But in Dolter v. Wahlert High School, 483 F.Supp. 266 (N.D. Iowa
1980), the court upheld the jurisdiction of EEOC when an unmarried teacher who had become pregnant was fired by a Roman Catholic high school, allegedly only because she was pregnant. It held that even if the school's code of moral conduct constitutes a "bona fide occupational qualification," it may not be applied unequally to male and female lay teachers. In effect, it ruled that the sexes must be treated identically by religious organizations as well as by secular ones.\textsuperscript{51} In \textit{King's Garden v. Federal Communications Commission}, 498 F.2d 51 (D.C.Cir.), \textit{cert. denied}, 419 U.S. 996 (1974), the court upheld a ruling by the FCC that radio stations operated by the licensee, a Christian ministry, discriminated on religious grounds in its employment practices. It asserted that the 1972 amendment to the EEOA exempting religious discrimination by sectarian employers was of doubtful constitutionality.

The potential of such regulations for interference with religious liberty, even if they are construed narrowly, is unimaginable because their applications are often unpredictable. Speaking of a Christian school case involving discrimination charges, William Ball criticized for overbreadth the Ohio statute in question, which made it an "unlawful discriminatory practice" for any employer "... because of the ... religion [or] sex ... of any person to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment."\textsuperscript{52} Under the terms of this law, he noted that a Lutheran congregation could not refuse to hire as a pastor someone from a different faith and a seminary for the Catholic
priesthood could not refuse to hire a woman as an instructor. Far from being remote possibilities, however, all that legally stands in the way of such requirements is the absence of a definitive ruling on the constitutionality of religion-based exemptions.

The Bob Jones University Case

So far, the sharpest line that has been drawn is over racial discrimination by tax-exempt organizations, including religious ones. The stir that was raised over alleged discrimination by President Jimmy Carter's home church in Plains, Georgia brought national attention to focus on the problem of racial exclusivism in churches.

By that time, the Supreme Court had already addressed the issue in the Norwood case and first of two decisions involving Bob Jones University of Greenville, South Carolina. Like the Americans United case, which was decided the same day, *Bob Jones University v. Simon*, 416 U.S. 725 (1974), was a suit "for the purpose of restraining the assessment or collection of any tax" which, according to the terms of the Anti-Injunction Act of the Internal Revenue Code of 1954, was expressly prohibited. The university had been founded in 1927, originally in Florida, for the purpose of teaching and propagating fundamentalist religious beliefs. One of its distinctive beliefs is that the Bible forbids miscegenation. "On pain of expulsion students are prohibited from interracial dating, and petitioner believes that it would be impossible to enforce this prohibition absent the exclusion of Negroes" (416 U.S. 725, 735). In 1970, the IRS announced that it would no longer allow §501(c)(3) status for private schools maintaining
racially discriminatory admissions policies. After the university stated it had no intention of altering its policy of excluding nonwhites, the IRS began taking steps to revoke its §501(c)(3) ruling letter. The Court unanimously upheld the lower court's refusal to issue an injunction. But Justice Powell, who wrote for the Court, also called attention to the severity of the current revocation procedure:

A former Commissioner of the Internal Revenue Service has sharply criticized the system applicable to such organizations. The degree of bureaucratic control that, practically speaking, has been placed in the Service over those in petitioner's position is susceptible of abuse, regardless of how conscientiously the Service may attempt to carry out its responsibilities. Specific treatment of not-for-profit organizations to allow them to seek pre-enforcement review may well merit consideration. But this matter is for Congress. . ." (416 U.S. 725, 749-50).

The university meanwhile had taken steps, beginning in 1971, to admit Negroes married within their race. A month after IRS notified it of the proposed revocation of its tax-exempt status, the university began permitting unmarried Negroes to enroll but still prohibited interracial dating and marriage. In January of the following year, its tax exemption was officially revoked effective as of December 1, 1970, the day after the university was formally notified of the change in IRS policy. The university filed an unemployment tax return, paid a nominal sum of $21.00, requested a refund, and brought suit after the refund was refused. The government brought a countersuit for $489,675.59 plus interest for unpaid federal unemployment taxes.

A federal district court ruled in favor of the university in Bob Jones University v. United States, 468 F.Supp. 890 (1978) on the grounds that the exemption applies generally to religious organizations:

The fact that plaintiff is not affiliated with any denomination, yet, at the same time, is totally guided by its fundamentalist
beliefs, attests that plaintiff is a distinct religious organization in and of itself. Plaintiff is not an educational appendage of a recognized church that may allude in its educational processes to the beliefs of the parent religious order. Instead, the organizational source of plaintiff's religious beliefs is the university. The convictions of plaintiff's faith do not merely guide its curriculum but, more importantly, dictate for it the truth therein. Bob Jones University cannot be termed a sectarian school, for it composes its own religious order (468 F.Supp. 890, 895).

The district judge criticized the argument used by two other district courts "that tax exemptions were not intended to be granted to organizations which violate public policy" (468 F.Supp. 890, 902).

This argument was based on the Supreme Court's opinion in Tank Truck Rentals v. Commissioner, 356 U.S. 30 (1978), which disallowed the deduction of fines as a business expense because it would "encourage violation of declared public policy." But in the Bob Jones case, the court held that "the judicially created 'public policy' limitation is much restricted and not applicable to situations . . . where the relationship between the tax benefit and the proscribed conduct is tenuous." Such a rule renders the exemption itself equally tenuous and disrupts fundraising:

According to defendant's application of the public policy limitation expressed in Tank Truck, exempt status would be denied to any church that somehow committed a violation of a federal statute, a recognized expression of declared federal policy, because defendant's theory requires no showing of any relation between conferral of the exemption and frustration of the federal policy (468 F.Supp. 890, 903-04).

The United States Court of Appeals, Fourth Circuit, reversed this decision and upheld two others against the university in Bob Jones University v. United States, 639 F.2d 147 (4th Cir. 1980) in a split decision. The majority cited several earlier Supreme Court decisions, including the Norwood case and Runyon v. McCrory, 427 U.S. 160 (1975),
which held that the equal right to contract prohibits racial
discrimination in nonpublic school admissions policies. It also applied
the public policy limitation to assure "that Americans will not be
providing indirect support for any educational organization that
discriminates on the basis of race. . . . The fact that the religious
belief is sincere, and the policy immutable in this case does not
obviate the need for a prophylactic rule to prevent such support" (639
F.2d 147, 152-53). The dissenting judge, however, maintained that a tax
exemption "has not only the protection of the First Amendment, but its
authorization" and cited the Walz case to the effect that the "grant of
a tax exemption is not sponsorship" (397 U.S. 664, 675). He disagreed
with the majority's analysis:

... we are dealing in this case not with the right of the
government to interfere in the internal affairs of a school
operated by a church, but with the internal affairs of the church
itself. There is no difference in this case between the
government's right to take away Bob Jones' tax exemption and the
government's right to take away the exemption of a church which has
a rule of its internal doctrine or discipline based on race,
although that church may not operate a school at all. In this
opinion, I speak not to the abstract wisdom or rightness of such a
rule, but to the right of a church to enforce that rule, although
it may be repugnant to most of the population, if the rule is a
part of its religious doctrine or discipline" (639 F.2d 147, 156).

Noting that discriminatory racial and sexual practices by some of the
oldest and largest churches were implicated under this interpretation,
he implicitly criticized the IRS for not choosing to attack the problem
from a broader angle "so as to get it settled for the whole country."
He also disagreed that Congress had meant to invoke the law of
charitable trusts when it designated "charitable" as one of several
categories of exempt organizations under §501(c)(3).

The numerous law review articles split on the issue. Karla Simon
wrote that "it has become increasingly apparent that segregated sectarian schools are a major inhibiting factor in the growth of fully integrated educational systems throughout the nation" and concluded that an exemption for religious schools would violate the establishment clause. David Anderson contended that Congress had already endorsed the rationale for denying tax exemptions to racially discriminatory schools. He criticized the numerous bills that had been introduced to prohibit a final issuance of the new revenue procedures of August 22, 1978 but also expressed concern over "the injury which the IRS could do to private religious education if the procedures it has proposed were used improvidently." Thomas Neuberger and Thomas Crumplar recommended that Congress take the task of enforcing public policy out of the hands of administrative agencies, specify that exemptions constitute federal financial assistance in the limited case of discriminatory educational institutions, and "establish a method by which the discriminatory admissions policies of private schools could be challenged in judicial, rather than administrative, proceedings."

The case became a major public issue when the Reagan Administration first tried to end the public policy limitation, then tried to have it formalized by Congress. Lobbying on both sides of the issue was intense. The controversy settled down within a couple of months after the Supreme Court agreed to take up the case. More than a year later it upheld the public policy limitation in Bob Jones University v. United States and a companion case, Goldsboro Christian Schools, Inc. v. United States, 103 S.Ct. 2017 (1983).

Chief Justice Burger, who wrote for the Court, drew heavily on the
common law of charitable trusts where a gift is devoted to public charitable uses. He urged the same public benefit theory regarding tax exemption that he rejected earlier in the Walz case, although he did not repudiate that decision:

When the Government grants exemptions or allows deductions all taxpayers are affected; the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious "donors." Charitable exemptions are justified on the basis that the exempt entity confers a public benefit—a benefit which the society or the community may not itself choose or be able to provide, or which supplements and advances the work of public institutions already supported by tax revenues" (103 S.Ct. 2017, 2028).

But he qualified this ruling by stating in a footnote: "We deal here only with religious schools—not with churches or other purely religious institutions; here, the governmental interest is in denying public support to racial discrimination in education" (103 S.Ct. 2017, 2035 n29).

Justice Powell, who concurred, was "troubled by the broader implications of the Court's opinion" with regard to the authority of IRS and found it inappropriate "to leave the IRS 'on the cutting edge of developing national policy'" (103 S.Ct. 2017, 2039). He agreed with Justice Rehnquist, who dissented, that the language of the Internal Revenue Code itself does not require a refusal of tax exemption on the grounds cited but concluded that recent history had in effect created a precedent. He disagreed particularly with the public benefit argument and found it impossible to believe that all exempt organizations could demonstrate that they serve and are in harmony with the public interest. He was also unwilling to say that the university "necessarily contributed nothing of benefit to the community." But he directed his
strongest argument against the implication that an exempt organization is meant to serve as an agent of the state:

The Court asserts that an exempt organization must "demonstrably serve and be in harmony with the public interest," must have a purpose that comports with "the common community conscience," and must not act in a manner "affirmatively at odds with [the] declared position of the whole government." Taken together, these passages suggest that the primary function of a tax-exempt organization is to act on behalf of the Government in carrying out governmentally approved policies. In my opinion, such a view of §501(c)(3) ignores the important role played by tax exemptions in encouraging diverse, indeed often sharply conflicting, activities and viewpoints (103 S.Ct. 2017, 2038).

Unfortunately for this view, however, the Court had already used pluralism as an argument for restricting exemptions in the Lee case and had determined that exemptions are subsidies in the Taxation With Representation case. As long as an exemption is regarded as a subsidy or an act of grace, rather than as an immunity, its tendency is to create an establishment of religion—whether through consensus or pluralism—either by sustaining a "common community conscience" or by "encouraging diverse . . . activities and viewpoints." If the establishment implications of tax exemption are unavoidable, however, then the nature of the preferred establishment must be forthrightly addressed.

Justice Rehnquist simply maintained that this was a matter for Congress itself to decide. He rejected the public policy requirement and cited with approval the statement of Congressman Ashbrook, whose amendment denied IRS the authority to create a national policy respecting denial of tax exemptions to private schools: "There exists but a single responsibility which is proper for the Internal Revenue Service: 'To serve as tax collector'" (103 S.Ct. 2017, 2044).
A month after the Bob Jones decision, a federal district court granted a summary judgment for the plaintiffs in a case involving the tax-exempt status of church-related schools in Mississippi. An earlier injunction setting up guidelines to ensure compliance with a ruling against racial discrimination was challenged by a church which objected to the requirement that private schools recruit students and faculty from minority groups. Four months later, the Superior Court for the District of Columbia held that the District's human rights act could not be used to compel Georgetown University to recognize two homosexual student organizations in the absence of a state interest of sufficient magnitude to justify a burden on the free exercise of religion. But it also pointed out that, unlike racial discrimination, a firm national policy with regard to sexual orientation was lacking.

As for Bob Jones University itself, it has acquiesced in the ruling and does not anticipate further litigation. It now has the distinction of being the only college in the country that is not exempt from taxes.

Conclusion

Even assuming that religious exemptions are ultimately upheld, at least in principle, religious organizations are likely to continue to bear the onus of proving that they are acting in good faith. When a religious group must be exempted from innumerable laws of general application, including various taxes, licenses, and laws against discrimination, it is quite possible that this signifies not so much its privileged position as its isolation from the normal commerce of daily life. The position of a mendicant is always tenuous. When religion is
placed in that position, its place in society is far from assured. If the history of Indian treaties and the breakup of Indian reservations are any indication, the consequent isolation and powerlessness do not have to be deliberately sought out by a social group. A special status can be a means of subjugation when it does not carry with it effective political power. The privileges, such as they are, can be effectively choked off in the tangle of additional amendments, interpretations, and exceptions.

It is not only restrictions but the exemptions themselves that may be described as as "prophylactic." They may represent the political equivalent of a quarantine against practices the lawmakers have chosen to condemn. Law does not persuade; it compels. Where it does not integrate, it tends to isolate. Therein lies much of its power. The historical movement of the law from relationships based on status to contract seems to have been diverted into new status channels. Laws that are not generally applicable are inherently discriminatory. The awarding or denying of exemptions may be temporarily expedient but they do little if anything to resolve the contradictions they conceal.

The same question faces both church and state: By what standard are they to be governed? Until this issue is settled and a common ground is reached, the power of the state to regulate is likely to dominate the relationship. But the balancing of irreconcilable political and religious interpretations of constitutional values is a phenomenon that is most characteristic of transitions. Sooner or later the hard choices between them must be made and will be enforced.
Notes


11 "Fraud" was the basis of a successful lawsuit against the Church of Scientology in Portland, Oregon. Christopherson v. Church of Scientology of Portland, 644 P.2d 577 (Or. Ct. App. 1982), cert. denied,


15 Ibid., p. 18. Buzzard and Ericsson, Battle, pp. 249-57, gives examples of efforts to regulate solicitation by religious organizations through licensing, registration, and disclosure statutes.


17 Some of the cases exude a spirit of hilarity, such as the suit by the town of Wells, Maine against a local tavern fronting as a church called the Temple of Bacchus. One mail order "ministry," the Universal Life Church, was acknowledged by its founder to have as its sole purpose, as Charles Whelan has noted, "to discredit religion and to bring about the abolition of all religious tax exemptions." Yet the exemptions of some of its churches have been upheld. Charles M. Whelan, "Governmental Attempts to Define Church and Religion," Annals, 446 (November 1979): 37. As Richard Hammar has commented, "standards that are comprehensive enough to deal effectively with the abuses of mail order churches may be sufficiently broad to negatively affect some legitimate churches." Hammar, Pastor, p. 353. One such case involves Robert Schuller's Crystal Cathedral, which lost its exemption because of its use for ostensibly commercial purposes, including concerts. Lloyd Billingsley, "Crystal Cathedral Loses Property Tax Exemption," Christianity Today, January 21, 1983, pp. 22-23.

18 City of Chula Vista v. Kenneth Pagard, 97 Cal.App.3d 627 (1979);


23 Buzzard and Ericsson, Battle, p. 238.


26 See "Lester Roloff Battles for Separation of Church and State Over Government Licensing of Church Schools," Roloff Evangelistic Enterprises, Corpus Christi, Texas, April, 1981. Judge Matthews presided over the District Court for Travis County at Austin.


30. Ibid., p. 500.

31. Ibid., p. 499.


37. See Shelley v. Kraemer, 334 U.S. 1, 13 (1948), in which the Court ruled that restrictive covenants may not be enforced in a state court but "the restrictive agreements standing alone cannot be regarded as violative of any rights...".


40. Transcript of Damascus Community Church v. Clackamas County, No. 78-10-182, which was heard before Judge Charles A. Sams on January 18, 1979. Judge Sams cited the Concord case as a precedent. See "Church
Takes School Appeal to County," Gresham (Ore.) Outlook, 4 June 1981, p. 9A.


43See Chapter Ten, note 57 above.


49Ibid., p. 959.

50See Buzzard and Ericsson, Battle, pp. 262-63.

51The judge in this case wrote: "Defendant argues that since plaintiff was a teacher at its school, she was also intricately involved in its religious pedagogical mission. As such, defendant contends that it was entitled to impose upon its teachers a code of religious moral conduct and to expect them to follow, in their personal life and behavior, the recognized moral precepts of the Catholic Church. It contends, therefore, that such code and precepts constitute a bona fide occupational qualification that plaintiff had to meet for continued employment as a teacher. . . . The court has no substantive quarrel with the possible merits of defendant's contention that it may be entitled to impose a code of moral conduct as a bfoq. However, the court notes that
defendant asserted bfoq appears relate to more religious and/or moral qualifications that to sexual qualifications. To that extent, even where such code of conduct truly constitutes a legitimate religious bfoq, the law nonetheless requires that it not be applied discriminatorily on the basis of sex; that is, unequally to defendant's male and female lay teacher employees" (483 F.Supp. 266 (1980)).


58 Green v. Regan, Civ.Act.No. 1355-69 (D.D.C. June 22, 1983). See Religious Freedom Reporter, 3 (September 1983): 252; Life and Liberty Letter, 1 May 1984, p. 2. The school which has been targeted in this case is, according to Attorney William Ball, open to children of any race but its appeal is effectively limited to those parents and children who are willing to "step into a distinct religious culture, accept fundamentalist morality, Calvinist discipline, and intense Bible-centered indoctrination." Comparable cases include "the Amish..."