THE STRUGGLE OVER DEREGULATION OF RELIGIOUSLY-AFFILIATED INSTITUTIONS: A CLASSIC INTERNAL FIRST AMENDMENT CONFLICT

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> [W]e don't want approval [of church-run schools], because we feel it's a matter of state control . . . . We believe that the head of the Church is Jesus Christ, and if I let the State become head of the Church, then I will be removing the Lord from His position. . . .[1]

In the past decade, many religious leaders have mounted an attack against government regulation of certain institutions which are operated by religious groups. These institutions include day-care centers, private schools, nursing homes, and television stations. In several dramatic instances, religious objectors to government regulations have gone to prison or closed down their schools or day-care centers rather than comply with state licensing, accreditation, or other regulatory standards.[2] They claim that any recognition of these standards on their part implies acceptance of the state's authority over their religion and that the first amendment guarantee of freedom of religion mandates removal of any regulations applicable to institutions operated by their church.[3]

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1. State v. Shaver, 294 N.W.2d 833, 887 (N.D. 1980). The quoted official of the church additionally was asked by the State's Attorney: "Would it actually be against your religious principles to seek state approval of the school?" Answer: "Yes it would." *Id.* at 887.

2. In Nebraska, for example, operators of private religious schools refused to seek state accreditation for their schools or to close the schools and, consequently, were imprisoned. They argued that "[s]ubmitting to state approval . . . would in principle give the state the power to control the schools and their churches." One religious leader noted: "I don't regard my actions as wilful disobedience to the state, but as wilful obedience to my Father. If we give up our convictions, we give up our consciences." CHRISTIANITY TODAY, Feb. 17, 1984, at 37. *See* State v. Faith Baptist Church, 207 Neb. 802, 301 N.W.2d 571 (upholding Nebraska's compulsory education requirements), *appeal dismissed*, 454 U.S. 803 (1981). For a discussion of this case, see Note, State v. Faith Baptist Church: State Regulation of Religious Education, 15 CREIGHTON L. REV. 183 (1981).

3. *See infra* notes 24-29 and accompanying text for a more detailed discussion of these arguments.

Most courts have rejected these broad freedom of religion arguments and ordered the religious leaders to obey state laws.[4] However, advocates of religious-institutions "deregulation" have met with considerable success in the legislative arena in their efforts to exempt themselves from otherwise uniform regulation. For example, in the states of Virginia,[5] Missouri,[6] Florida,[7] and Indiana,[8] all child-care centers operated by religiously-affiliated institutions are exempt from mandatory state licensing requirements.[9]

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4. *E.g.*, Kings Garden, Inc. v. FCC, 498 F.2d 51 (D.C. Cir.) (Federal Commission regulations regarding equal opportunity employment applied to religious broadcasters), *cert. denied*, 419 U.S. 996 (1974); State v. Fayetteville St. Christian School, 42 N.C. App. 665, 258 S.E.2d 459 (1979) (rejection of free exercise challenge to uniform day care center licensing), *vacated as premature from an interlocutory order*, 261 S.E.2d 908 (N.C. 1980); State v. Shaver, 294 N.W.2d 833 (N.D. 1980) (rejection of challenge to regulation of private religious school). Specific challenges to specific regulations have been upheld. These challenges are outside of the scope of this Article. *See infra* note 28 and accompanying text.

5. VA. CODE § 63.1 - 196.3 (1950), states "[n]otwithstanding any other provisions of this chapter, a child-care center operated or conducted under the auspices of a religious institution shall be exempt from licensure as required by Section 63.1-196." Operators of the secular day centers have challenged the Virginia regulations as an establishment clause violation. The Fourth Circuit Court of Appeals has determined that "under the establishment clause, the challenged exemption is fatally overbroad as a permissible accommodation for any free exercise rights of the sectarian operators at child care centers." Forest Hills Early Learning Center, Inc. v. Lukhard, 728 F2d 230 (4th Cir. 1984). However, it additionally decided that the lower court did not give full consideration to the merits of the free exercise issue, in part since the religious day-care center operators did not participate in the case. Therefore, it vacated and remanded the district court opinion, 540 F.Supp. 1046 (E.D. Va. 1982), to allow the sectarian operators a chance to present their case. *See also* Forest Hills Early Learning Center v. Lukhard, 487 F. Supp. 1378 (E.D. Va. 1979) (holding plaintiff day-care centers lacked standing) and 642 F.2d 448 (4th Cir. 1981) (vacating and remanding consideration of the standing issue). The Virginia statute and the others discussed in this Article are only examples. At least ten other states, as of October 1, 1984, have similar exemptions regarding day-care centers.

6. Missouri licensing regulations for child day-care facilities provide the following exemptions from otherwise mandatory licensing: parents and guardians of children, persons taking children in for brief periods of time, government agencies, schools operated in "good faith" "for the benefit of the children" and "any well-known religious order." MO. ANN. STAT. § 210.211 (Vernon 1982).

7. The Florida Code regarding licensing of day care centers makes the following exception:

> (1) The provisions of this act shall not apply to a childcare facility which is an integral part of church or parochial schools conducting regularly scheduled classes, courses of study, or educational programs accredited by, or by a member of, an organization which publishes and requires compliance with its standards for health, safety and sanitation. However, such facilities shall meet minimum requirements of the applicable governing body as to health, sanitation, and safety.

FLA. STAT. ANN. § 402.316 (West Supp. 1983).

8. Indiana law states: "Exemption of certain day nurseries from licensing—Registration and inspections—Fees—Notice to parents.—(a) Notwithstanding section 1 [12-3-2-1] of this chapter, a day nursery that is operated by a religious organization exempt from federal income taxation under section 501 of the Internal Revenue Code [26 U.S.C. § 501], is exempt from licensing under this chapter. IND. CODE ANN. § 12-2-12.7 (Burns Supp. 1983).

9. At present, day-care centers seem to be the most pervasively deregulated institutions, but there are numerous examples of other similarly exempt entities. The state of North Carolina exempts all church-run private schools from accreditation requirements. N.C. GEN. STAT. § 115C-547 to 554 (1983). Title VII exempts all activities of religious groups from its general prohibition of religious discrimination in employment. 42 U.S.C.A. § 2000e-1 (West Supp. 1984).

Many other states have rejected attempts to exempt religiously-affiliated institutes from licensing. *See, e.g.*, Senate Bill 649, Oklahoma Senate, *An Act Relating to Children*, which would have amended OKLA. STAT. ANN. tit. 10, § 403 (West 1966) by adding an exemption for certain church-owned and operated facilities to the Oklahoma Child Care Facilities Licensing Act. The provisions of the Act would have exempted "church-owned and operated facilities, which shall consist of residential religious homes and of church camps." *Id.* The bill was vetoed on April 20, 1982 by the governor who stated that "to exempt religious congregations from the licensing provi-

These exemptions raise a classic conflict between the religion clauses of the first amendment:[10] on the one hand, removal of state[11] or federal regulations applicable to religiously-affiliated institutions may be mandated by the freedom of religion clause, on the other hand it may be forbidden by the establishment clause.

The inherent tension between these clauses has been acknowledged and discussed at length by courts[12] and commentators.[13] Although both clauses are united by common goals of separation of church and state and preservation of religious liberty, they are divided by opposing underlying concerns. The religious freedom clause was designed to prevent government from encroaching upon individual religious liberty[14] and the establishment clause to prevent a powerful church from becoming, in effect, an arm of the government[15] and imposing its beliefs and values upon mem-

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sions for child-care centers and camps is to surrender the interest of the state in the welfare of its children." Tulsa World, Apr. 16, 1982, at A8, col. 1.

10. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I.

11. The freedom of religion clause of the first amendment was applied to the states in Cantwell v. Connecticut, 310 U.S. 296 (1940) and the establishment clause applied to the states in Everson v. Bd. of Educ., 330 U.S. 1 (1947).

12. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 220-21 (1972) ("The Court must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause, but that danger cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise."); Walz v Tax Comm'n of New York, 397 U.S. 664, 672 (1970) ("We have been able to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion. This is a 'tight rope' and one we have successfully trasversed."); Sherbert v. Verner, 374 U.S. 398, 414 (1963) (Stewart, J., concurring) ("[T]here are many situations where legitimate claims under the Free Exercise Clause will run into head-on collisions with the Court's insensitive and sterile construction of the Establishment Clause.").

13. *E.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW 812 (1978) ("The religion clauses which for the framers represented relatively clear statements of highly compatible goals, have taken on new and varied meanings that frequently appear to conflict."). *See also*, Buchanan, *Accommodation of Religion in the Public Schools: A Plea for Careful Balancing of Competing Constitutional Values*, 28 UCLA L. REV. 1000 (1981); Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980); Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development: Part II, the Nonestablishment Principle*, 81 HARV. L. REV. 513 (1968); Galanter, *Religious Freedoms in the United States: A Turning Point?*, 1966 WIS. L. REV. 217 (1966).

14. This country was founded primarily by members of minority religions who had left England and Spain to escape religious persecution. However, even in the early days of the country, laws restricting religious freedom were common. For example, in 1700 a province of New York enacted a law which forbade Catholics to teach their doctrine or practice rituals. In pre-revolutionary Virginia an individual could be imprisoned for denying the existence of the trinity. Therefore, the concern regarding government laws which infringe on religion was paramount in the minds of Framers. In his Bill for Establishing Religious Freedom, Thomas Jefferson wrote, "[T]he opinions of men are not the object of civil government, nor under its jurisdiction; that to suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous fallacy, which at once destroys all religious liberty." MCGRATH, CHURCH AND STATE IN AMERICAN LAW: CASES AND MATERIALS 388 (1962) (citing BOYD, THE PAPERS OF THOMAS JEFFERSON 545 (1950)). For a comprehensive description of the religious atmosphere in colonial times, *see* L. PFEFFER, CHURCH, STATE, AND FREEDOM 63-109 (1st ed. 1953); [hereinafter cited as L. PFEFFER]. *See also* M. HOWE, THE GARDEN AND THE WILDERNESS 5-11 (1965); W. KATZ, RELIGION AND AMERICAN CONSTITUTIONS 9 (1964); R. BUTTS, THE AMERICAN TRADITION IN RELIGION AND EDUCATION 11-68 (1950).

15. This description of the establishment clause's purpose represents primarily the views of Jefferson and Madison. Roger Williams, another leading advocate of separation of church and

bers of other religions and nonbelievers. Any government action which removes or fails to place a burden on religion and thus satisfies the religious freedom clause can also be viewed as conferring a benefit upon the unburdened religion, thus violating the establishment clause.[16]

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state viewed the establishment clause as designed to protect the church. *See infra* notes 166-70 and accompanying text.

The history of organized religion offers countless examples of a powerful church's infringement of the freedom of non-believers—The Catholic Inquisition is perhaps most notorious. *See* L. PFEFFER, *supra* note 14, at 3-27 for an extensive discussion of the abuses of established religion.

In the colonial days of the United States, many members of various religions (often, ironically, those fleeing to America because of religious persecution), attempted to establish an official state church and to exclude from the state those with other religious beliefs. The Puritans in Massachusetts enacted laws which punished the "cursed sects of heretics which are commonly called the Quakers" by imprisonment. E. PFEFFER, *supra* note 14 at 67. At various times, the Anglican religion was an official religion in Virginia; the Dutch Reformed Church, the state church of New York; and the Catholic Church, the church of Maryland. Therefore, the concern over the abuses of an "established" religion was very real and important to the Framers. James Madison, in speaking out against a proposed bill establishing "a provision for Teacher of the Christian Religion," argued fervently "[t]he proposed establishment . . . will destroy that moderation and harmony which the forebearance of our laws to intermeddle with Religion, had produced among its several sects. Torrents of blood have been spilt in the old world, by vain attempts of the secular arm to extinguish religious discord, by proscribing all difference of religious opinions." J. MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS 299 (Padover ed. 1953). (Madison also believed that an "established" religion tends to become corrupt and that separation of church and state is therefore necessary to protect the church as well as the individual, a view shared by Williams).

16. A classic example of the conflict between the two clauses occurs in Sherbert v. Verner, 374 U.S. 398 (1963), in which the Supreme Court considered the claim of a Seventh Day Adventist, whose religion forbid her to work on Saturday, that a denial of unemployment benefits due to her refusal to be available for Saturday work infringed upon her freedom of religion rights. In a 7-2 decision the Court agreed that the freedom of religion clause required the state to carve out an exception to its availability-for-work-at-all-times requirements based on the religious beliefs of Ms. Verner. *Id.* at 406. *Accord,* Thomas v. Review Bd. Ind. Empl. Sec. Div., 450 U.S. 707 (1981) (invalidating a state's denial of unemployment benefits to a Jehovah's Witness who quit a job in which he was required to manufacture weapons in conflict with his religious beliefs).

After considering the religious freedom issue, the *Sherbert* Court then had to face an additional issue: does a special exemption for members of religions that forbid Saturday work constitute an establishment of religion? The majority concluded it did not, that it was merely a reflection of the "governmental obligation of neutrality in the face of religious differences," *Sherbert,* 374 U.S. at 409. Justice Stewart's concurrence argues that "[t]his case represents a double-barreled dilemma, which in all candor I think the Court's opinion has not succeeded in papering over." *Sherbert,* 374 U.S. at 413.

Of course, all laws affecting religion do not present this conflict and it is easy to imagine examples of laws which would violate both or neither of the clauses. Thus, a law which requires that all citizens become Catholics would be the ultimate establishment of the Catholic religion and would just as clearly offend the religious freedom of all non-Catholics. Repeal of such a law would be in conformance with both the religious clauses. In comparison, a law requiring that a public forum must be open to speakers from all religions and groups espousing agnosticism and atheism on an equal time basis would conform with both clauses.

The Supreme Court's attempt to steer a course free of the "Scylla and Charybdis" of these clauses has become increasingly difficult due to two phenomena: the increased role the powerful "welfare state" government plays in the lives of all individuals and institutions and the increased tendency of religious groups to own and operate institutions other than churches. The Court has repeatedly recognized that "[a] system of government that makes itself felt as pervasively as ours could hardly be expected never to cross paths with the church. In fact, our State and Federal Governments impose certain burdens upon, and imparts certain benefits to, virtually all our activities, and religious activity is not an exception." Roemer v. Bd. of Pub. Works, 426 U.S. 736, 745 (1976). Professor Giannella argues that "[e]ven Madison might have changed some of his absolutist notions of separation to accord with twentieth century realities" and uses "the expanding role of government" as a basis for his thesis "[t]hat the no-aid aspects of the separation principle should be relaxed in direct proportion to the extent of government regulation. . . ." Giannella, *supra* note 13, at 522. Giannella's argument is based on the premise that because the government

Part I of this Article examines the free exercise arguments of church-run institutions. It concludes that the arguments are valid, but will be outweighed by compelling state interests in health and safety, welfare of children, and uniform regulation. Part II discusses the proposition that the exemptions given primarily to religious groups constitute a forbidden establishment of religion. It demonstrates that the exemptions give these groups symbolic support, which has the effect of aiding religion. Therefore, this Article concludes that religiously-affiliated institutional "deregulation" presents a significant threat to the "wall of separation between church and State"[17] and must be removed.

I. THE FREE EXERCISE CLAUSE AND STATE REGULATION OF RELIGIOUSLY-AFFILIATED INSTITUTIONS

A. *Introduction*

At the outset of this discussion, it is important to note that the majority[18] of the organizations and leaders who oppose state licensing and regu-

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is responsible for the issuance of many essential benefits to the individual and since a totally strict no-aid policy would mean the church could not receive these benefits, the church would be at a substantial disadvantage. However, this problem would be solved by the concept that the establishment clause requires only neutrality toward religion. Moreover, Giannella does not consider the opposite reaction that Madison might have to 20th century government. Since the government is indeed more powerful and pervasive today, the spectre of a government-established church is even more frightening than it was in Madison's time and therefore Madison might very well argue for even stronger attention to establishment-clause values.

A classic example of a "welfare state" issue never contemplated by the Framers occurs in the cases regarding state and federal unemployment benefit regulations which conflict with religious beliefs. The importance of such benefits is acknowledged in Goldberg v. Kelly, 397 U.S. 254 (1970), and their denial to members of a given religion will be subject to careful examination. *See* Casenote, *Unemployment Benefits and the Religion Clauses: A Recurring Conflict*, 36 U. MIAMI L. REV. 585 (1982).

17. The metaphor of the "wall of separation between church and State" first appeared in Jefferson's writings and was adopted by the Court in Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) and has been used repeatedly since. *See infra* note 165.

18. The non-empirical statement that proponents of state licensing exemptions are primarily fundamentalists can be supported by an examination of the legislative history of bills which would exempt religious institutions (e.g., in Virginia, a "deeply committed religious minority argued exclusively for the day care center exemption," Payne, *Capital Hill Perspective*, Virginia Advocate, Feb. 22, 1979, at A1; in Oklahoma an eventually-defeated bill which would have exempted church-owned children's homes and camps from state licensing, *see supra* note 9, was supported "primarily by some independent Baptist and Church of Christ ministers" (Tulsa World, Apr. 16, 1982, at A8, col. 1), by the statements of many fundamentalist leaders, and most significantly, by the fact that the vast majority of the litigants in challenges to state regulation are members of fundamentalist groups. *See, e.g.*, Attorney General v. Bailey, 436 N.E.2d 139 (Mass. 1982) (plaintiffs Grace Bible Church); State v. Riddle, 285 S.E.2d 359, 361 (W. Va. 1981) (plaintiffs described as "'Biblical Christians' who belong to a Methodist sect, the Wesley, which separated from the mainstream Methodist communion before the war between the states and remained resolutely unchanging."); State v. Shaver, 294 N.W.2d 883, 885 (N.D. 1980) (plaintiffs described as fundamental Baptists). In Roloff Evangelistic Enter. v. State, 556 S.W.2d 856 (Tex. Ct. App. 1977), *appeal dismissed*, 439 U.S. 803 (1978), the appellant day-care centers challenging an exemption for religious-affiliated institutions from uniform licensing statutes stated in their brief that: "Preachers from around the country have testified that they themselves, along with thousands of Christian believers, share the conviction that the State cannot control the Christian upbringing of children in a ministry such as the Enterprises. . . ." *Id.* at 857. The named plaintiff in the case was the Reverend Lester Roloff, a fundamentalist minister. *See also* COMMISSION ON LAW AND SOCIAL ACT REPORTS, AMERICAN JEWISH CONGRESS, BACKGROUND MEMORANDUM ON REGULATION OF CHURCH SCHOOLS, 1982 (on file in the ARIZONA LAW REVIEW office) which states: "For a variety

lations applied to their institutions are members of a broadly based religious movement often described as Fundamentalism.[19] To be fully understood, the freedom of religion arguments of "deregulation" proponents must be considered in the context of this religion. It is, of course, impossible to describe all of the specific religious tenets of individual churches in the context of a broad category such as fundamentalism; however, there are several general beliefs or values that the majority of fundamentalists share: (1) a desire to return to basic religion as practiced in the past and a rejection of liberal religious thought,[20] (2) a belief that the Bible is the word of God,[21] (3) a desire to restore "God in government" through prayer in the public schools, among other things,[22] and, (4) a belief that "secular humanism" has permeated the public school system and influenced many governmental leaders.[23]

The fundamentalists' challenges to state laws which affect institutions

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of reasons, the challenges to state authority over religious schools come almost exclusively from the fundamentalist schools." *Id.* at 10.

19. "Fundamentalist" is a broad definitional category generally considered to include such religious denominations as certain independent Baptist sects and the Church of Christ. It is often described as "born again" Christianity; however, born again Christians are not necessarily fundamentalists. While it is impossible to reach a definite definition of a category which means different things to different people, "fundamentalist" will be used in this Article to describe individuals and church members who subscribe, among other things, to the principles discussed in the text and footnotes 20-23 *infra*. *See* A. PIEPKORN, PROFILES IN BELIEF: EVANGELICAL FUNDAMENTALISM, AND OTHER CHRISTIAN BODIES (1979) for a description and survey of the movement.

20. According to Judge Overton of the Eastern District of Arkansas, the "religious movement known as Fundamentalism began in nineteenth century America as part of evangelical Protestantism's response to social changes, new religious thought and Darwinism." McLean v. Arkansas Bd. of Educ., 529 F.Supp. 1255, 1258 (E.D. Ark. 1982). The opinion, which struck Arkansas' "creationism" law as establishment of religion, *see infra* note 202, is worth reading for its discussion of the power of fundamentalist legislative efforts in the state.

21. "The various manifestations of Fundamentalism have had a number of common characteristics, but a central premise has always been a literal interpretation of the Bible and a belief in the inerrancy of the Scriptures." McLean v. Arkansas Bd. of Educ., 529 F.Supp. 1255, 1259 (E.D. Ark. 1982).

22. A Constitutional amendment which would allow prayer in the public schools was introduced in 1966, four years after the Court's decision in Engel v. Vitale, 370 U.S. 421 (1962). Similar proposals, supported by President Reagan, are pending before Congress. One proposed amendment would override the Court's decision by providing that nothing in the Constitution prohibits "individual or group prayer." *See* 41 CONG. QUAR. WEEKLY REPORT, May 28, 1983, at 1051-52. The movement to restore school prayer is strongly backed by "[g]roups such as the Moral Majority and the Christian Broadcasting Network, as well as a number of television evangelists." Tulsa World, June 26, 1983, at A5, col. 3. The movement to require "creationism science" as a public school subject represents a similar attempt to put God into government, *see infra* note 207.

23. The argument that "secular humanism" pervades today's world and raises freedom of religion and establishment issues is made in Bird, *Freedom from Establishment and Unneutrality in Public School Instruction and Religious School Regulation*, 2 HARV. J.L. & PUB. POL'Y 125 (1979) [hereinafter cited as Bird] and Whitehead and Conland, *The Establishment of the Religion of Secular Humanism and Its First Amendment Implications*, 10 TEX. TECH. L. REV. 1 (1978). Whitehead and Conland define the term as follows: "Secular Humanism is a religion whose doctrine worships Man as the source of all knowledge and truth, whereas theism worships God as the source of all knowledge and truth. *Id.* at 29-31 (cities omitted)." Whitehead argues that this religion has "taken hold of the present cultural matrix," *id.* at 1, and that "to prevent an imposed state order, Secular Humanism must be finally recognized as a religious ideology and its unconstitutional establishment within our governmental organs must be prohibited." *Id.* at 65. The Article advocates a "return to traditional theism and tenets." *Id.* For an incisive criticism of Whitehead's arguments see Davidow, *"Secular Humanism" as an "Established Religion": A Response to Whitehead and Conland*, 11 TEX. TECH. L. REV. 51 (1979) (Davidow argues that the Whitehead and

operated by religious groups generally have a single theme: government regulation is an unconstitutional infringement upon the religious belief that the government has no power over the church. As one advocate puts it: "[l]icensing is objectionable in the Christian school context because it presupposes that the State may prohibit—as well as authorize—this form of religious exercise. Christian schools and supporting parents believe that God has already licensed Christian education."[24]

This proposition represents a marked departure from traditional claims of state infringement upon religious freedom. In the past, conflicts between the power of the church and that of the state have generally been cast in terms of a specific law or laws which conflict with specific beliefs;[25] for example, laws prohibiting polygamy conflict with the belief that multiple marriage is mandated by God.[26] In contrast, the basic freedom of religion claim promulgated by "deregulation" advocates does not rest upon specific religious tenets; it embraces *all* seemingly secular regulations[27] which conflict with the general proposition that the state has no power over the church. Although several of the legal challenges to government regulations have raised secondary objections to specific provisions, such as detailed curriculum requirements in the context of private schools,[28] the

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Conland Article embodies an incomplete analysis of Supreme Court cases, and exhibits sloppy scholarship as reflected by factual inaccuracies and ill-founded assumptions).

Bird also discusses the pervasiveness of the religion of secular humanism, primarily in the context of abortion and instruction in the public schools and argues that teaching evolution "is part of the tenets of Theological Liberation, Religious Humanism, Secular Humanism and Other Religions," and thus constitutes an establishment clause violation. Bird, *supra*, at 199-204.

24. Comment, *State Regulation of Private Religious Schools in North Carolina - A Model Approach*, 16 WAKE FOREST L. REV. 405, 434-35 (1980).

25. U.S. v. Seeger, 380 U.S. 163 (1965) (mandatory draft in conflict with belief against participating in war); Sherbert v. Verner, 374 U.S. 398 (1963) (unemployment compensation requirement that plaintiff must be available to work on Saturday in conflict with belief that Saturday is a holy day of rest).

26. Reynolds v. U.S., 98 U.S. 145 (1879).

27. The principal Virgina child care licensing requirements, for example, are limited to matters such as child-space ratios, basic health and safety requirements, and child-teacher ratios. The regulations do not in any manner prescribe content of programs or restrict religious teaching. The provisions regarding food preparation standards specifically refer to religious considerations in allowing food to be brought from home. VA. DEPT. OF WELFARE, MINIMUM STANDARDS FOR LICENSED CHILD-CARE CENTERS 42 (July, 1976). The only provision that arguably could conflict with a specific religious practice is the guideline which suggests limited television viewing. Conceivably, this guideline could limit the ability of day-care center operators to expose children to television evangelism. This argument is surely farfetched and was not, to this Author's knowledge, raised during the legislative history of the exemption. *See* Forest Hills Early Learning Center, Inc. v. Lukhard, 728 F.2d 230, 234 n.4 (4th Cir. 1984), for a listing of the requirements.

28. Most of these specific objections arise in the context of requirements for state accreditation of private schools, particularly in states which have some form of mandatory curriculum requirements or teacher accreditation requirements. *See, e.g.*, Kentucky State Bd. for Elementary and Secondary Educ. v. Rudasill, 589 S.W.2d 877 (Ky. 1979), *cert. denied*, 446 U.S. 938 (1980); State v. Columbus Christian Academy, No. 78 CVS 1678 (Wade County Super. Ct. N.C. Sept. 1, 1978), *vacated as moot and dismissed*, (N.C. May 4, 1976); State v. Whisner, 47 Ohio St.2d 181, 351 N.E.2d 750 (1976). For a comprehensive discussion of these cases, see Comment, *The State and Sectarian Education: Regulation to Deregulation*, 1980 DUKE L.J. 801, (1980). *See also* Note, *State First Baptist Church: State Regulation of Religious Education*, 15 CREIGHTON L. REV. 183 (1981); Drake, *Attempted Control of the Religious School: Congress shall make no law Inhibiting the Free Exercise of Religion?*, 7 Ohio N.U.L. Rev. 954 (1980); Comment, *Regulation of Fundamentalist Christian Schools: Free Exercise of Religion v. State's Interest in Quality Education*, 67 KY. L. J. 415 (1978-1979); Comment, *Separation of Church and State: Education and Religion in Kentucy*, 6 N. KY. L. REV. 125 (1979); COMMISSION ON LAW AND SOCIAL ACT REPORTS, AMERICAN JEWISH

more general argument is the "heart of the battle,"[29] and consequently discussion in this Article will be limited to the broader freedom of religion claim.

B. Religious Beliefs v. Personal, Philosophical or Political Opinions

> The Supreme Court has recognized that:
> [a]lthough a determination of what is a "religious" belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.[30]

Therefore, if opposition to government regulation per se cannot be classified as religious, it cannot be protected. The "delicate question" posed by Chief Justice Burger is not an easy one to resolve. Throughout history, religious tenets and political beliefs have been intrinsically intertwined and virtually inseparable.[31] Many of the controversial issues facing the courts and the country raise both religious and political overtones. In the 1960s and early 1970s, it was common, and, indeed, almost mandatory for "liberal" church leaders to oppose the war in Vietnam.[32] The rise of fundamentalism in the late 1970s and early 1980s has been coupled with a tendency for fundamentalist religious leaders to speak out on matters traditionally thought to be purely political.[33] Many fundamentalist groups,

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CONGRESS, BACKGROUND MEMORANDUM ON REGULATION OF CHURCH SCHOOLS (1982) (on file in the ARIZONA LAW REVIEW office). State regulation of private schools often raises specific objections to specific regulations, in addition to the general proposition that the government has no authority to require accreditation at all. The merit of specific objections to specific regulations is beyond the scope of this Article and cases regarding private schools will be noted only in the context of the general opposition to government regulation.

29. The Rev. Lester Roloff, in testimony challenging the right of Texas to license his day-care centers, stated that "the very heart of the battle" is that "[the government] doesn't have any leadership over my church." Roloff Evangelists Enter. v. State, 556 S.W.2d 856, 857 (Tex. Civ. App. 1977), *appeal dismissed*, 439 U.S. 803 (1978).

30. Wisconsin v. Yoder, 406 U.S. 205, 215, 215-16 (1972).

31. English history alone—from the establishment of the Church of England to the civil war between the Parliamentarians and the Royalists provides innumerable instances of the interplay between politics and religion. *See generally* L. PFEFFER, *supra* note 14, at 24-25, 45-47.

32. *See, e.g., A Peace Tree in Brooklyn*, AMERICAN, Aug. 19, 1972, at 96 (describing Catholic bishop opposition to Vietnam War); *Clergy/Lay Group Denounces Bombing of North Vietnam*, CHRISTIAN CENTURY, Dec. 9, 1970, at 1475 (describing statement of Clergy and Laymen Concerned About Vietnam, a 34,000 member interreligious antiwar group, condemning the bombing of North Vietnam); *The Taking of Father Dan*, NEWSWEEK, Aug. 24, 1970, at 37 (describing the arrest of fugitive Jesuit priest Daniel Berrigan). For a general description of the anti-war movement in the 1960s, *see* VIORST, FIRE IN THE STREETS, 381-421 (1978).

33. For a discussion of fundamentalism beliefs, *see supra* notes 19-23 and accompanying text. According to TIME magazine "Protestant Evangelicals have generally judged politics to be the devil's playground. This year they are plunging in too, borrowing methods and single-issue zeal

such as the Moral Majority, share political views with the right wing of the Republican party.[34] Therefore, just as it was difficult for the courts to separate the political and religious elements of opposition to the Vietnam War, it will be equally difficult to distinguish the political from the religious elements of the fundamentalist's views.

One approach to these difficulties might be to simply accept the individual's characterization of a particular belief as religious without question. The Supreme Court has never explicitly defined religion[35] and has stated that it will not make value judgments as to the validity of religious beliefs.[36] However, almost all conduct of a deeply religious person could be linked to a religious belief;[37] yet all everyday decisions cannot be characterized as religious for constitutional purposes. Therefore, the approach of automatic acceptance of a belief as religious has been rejected.

There are two categories of cases which require the court to distin-

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that religious and secular liberals have applied to racial equality, women's rights, the environment, and the Vietnam War. Their booming religious TV and radio circuit provides a bully pulpit for exploring moral issues." *Born Again at the Ballot Box*, TIME, Apr. 14, 1980, at 94. Among the issues considered important to fundamentalists are opposition to homosexuality, to abortion, to school busing, to the Panama Canal treaty, to the equal rights amendment, and to sex education in public schools; and support for strong national defense, continued aid to Israel, and stricter prosecution of criminals. *See generally Politics From the Pulpit*, TIME, Oct. 13, 1980, at 28.

34. For a general discussion of the coalition between the Moral Majority and conservative Republicans, see *Morality Banner*, N.Y. Times, Feb. 28, 1982, at 23.

35. The meaning of "religion" has been greatly broadened in the last century to include nontraditional religions such as the Black Muslims. Fullwood v. Clemmer, 206 F.Supp. 370 (D.D.C. 1962). *See* Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579 (1982). *See also* Galanter, *Religious Freedoms in the United States: A Turning Point?*, 1966 WIS. L. REV. 217, 255-65.

36. In United States v. Ballard, 322 U.S. 78 (1944), Justice Douglas set the present standard for the Court as follows:

> Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. . . . . Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom. The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. . . . The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain. The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position. . . ."

Id. at 86-87.

37. Thus a Catholic who follows the teachings of Father Teilhard de Chardin and his concept of a Noosphere, "the thinking envelope woven about the earth, above the biosphere, and made up by the totality of mankind" (JEAN-PIERRE DEMOULIN, LET ME EXPLAIN PIERRE TEILHARD DE CHARDIN, 17-18 (English Translation, 1970)), could well believe, as does de Chardin, that "eating, drinking, working, seeking, creating truth or beauty or happiness" merge together "like the countless shades that combine in nature to produce a single white light" and become a cohesive forum of "love, the higher, universal, and synthesized form of spiritual energy. . . ." Therefore, to Teilhard and his follower, one "can be divinely united to the divine center by his very actions, *no matter what form it may take*." *Id.* at 122-123 (emphasis added).

guish between religious beliefs and political, personal, or philosophical beliefs. The first type of case presents relatively little difficulty: it is a case in which the sincerity[38] of an individual's use of religion to claim constitutional protection for an action is seriously questionable. Thus a federal district court easily dismissed an assertion that an individual's religion requires him to eat Kozy Kitten cat food.[39] Courts have also rejected several transparent attempts by marijuana smokers to characterize their use of the drug as a religious belief.[40] In these cases, it is obvious the so-called religious belief represents a personal, philosophical or political choice and its proponents could not claim free-exercise protection.

The second series of cases are those in which the courts concede a belief is sincere, but question whether it can properly be classified as religious. The Supreme Court has not given firm guidelines for classification. A proposed nexus approach, which would focus on the link between the individual's belief and the tenets of the individual's religion, would clarify the seemingly contradictory results in this area. The draft resistance cases can be analyzed under this approach.

In *Gillette v. United States*,[41] the Court concluded that under the terms of the Selective Service Act of 1967 an individual whose Catholic religion allows him to fight only in a "just" war could not be considered a conscientious objector.[42] In contrast, the Court in *United States v. Seeger*[43] and *Welsh v. United States*[44] allowed conscientious objector status for persons whose religion was personal, rather than connected with an organized church,[45] if their beliefs forbade them to fight in *all* wars.[46] Since the

38. The requirement of "sincerity" in and of itself is actually another test a religious belief must pass to claim constitutional protection. *See infra* notes 70-73 and accompanying text. However, lack of sincerity is also viewed as evidence that a belief that an individual may try to characterize as "religious" is actually political.

39. Brown v. Pena, 441 F.Supp. 1382 (S.D. Fla 1977), *aff'd*, 589 F2d 1113 (5th Cir. 1979).

40. The District of Columbia District Court refused to recognize the 20,000 member "Neo-American" church as a religion. United States v. Kuch, 288 F.Supp. 439 (D.D.C. 1968), *aff'd*, 598 F2d 1113 (1968). The Church's "religious" tenets advocated the use of mind-expanding drugs such as LSD, its leaders were known as Chief Boo Hoos and one of its theme songs was "Puff, the Magic Dragon." Not too surprisingly, Judge Gesell concluded that the "membership is mocking established institutions, playing with words, and [is] totally irreverent in any sense of the term. *Id.* at 444. He scolded the members for "adopting religious nomenclature and cynically using it as a shield to protect them when engaging in antisocial conduct that otherwise stands condemned." *Id.* at 443. *Accord*, State v. Bullard, 267 N.C. 599, 148 S.E.2d 565 (1966) (upholding conviction of Neo-American Church member for peyote and marijuana). *See infra* note 78.

41. 401 U.S. 437 (1971). For an analysis of this case, *see* Greenawalt, *All or Nothing at All: The Defeat of Selective Conscientious Objection*, 1971 SUP. CT. REV. 31 (1971).

42. The actual decision in *Gillette* was based upon a narrow question of statutory analysis. Section 6(j) of the Military Selective Service Act of 1967, 50 U.S.C. App., § 456(j) (1964 ed. Supp. V.) which provides an exemption from draft laws for a person "who, by reason of religious training and belief, is conscientiously opposed to participation in war *in any form*." 401 U.S. at 441 (emphasis added). The court construed the plain language of the statute to exclude selective objectors and emphasized that "[t]he question here is not whether these petitioners' beliefs concerning war are 'religious' in nature. . . . Nor do we decide that conscientious objection to a particular war necessarily falls within § 6(j)'s expressly excluded class of 'essentially political, sociological or philosophical views, or a merely moral code.'" *Id.* at 447 (footnote cite omitted).

43. 380 U.S. 163 (1965).

44. 398 U.S. 333 (1970).

45. *Seeger's* conclusion that a person need not acknowledge the existence of a "Supreme Being" to be considered religious is consistent with the Court's increasing willingness to define "religion" in a broad sense and to include non-traditional groups. *See supra* note 35.

Gillette Court conceded there was no question of the sincerity of the Catholic objectors,[47] the distinction between the beliefs of the selective conscientious objector and the objector who refuses to fight in any war can best be analyzed by focusing on the relationship of the conscientious objectors' beliefs to the tenets of their regligion.

"Thou shalt not kill," one of the Ten Commandments,[48] is undisputably a religious tenet, and the opposition to war which may stem from this belief can therefore be easily characterized as religion. But the individual whose religion allows him to kill in some wars, but not in others, must make an additional value judgment as to which wars are just and which are unjust. This judgment may be based primarily on political considerations. Since wars are no longer conveniently labeled "crusades," it is indeed difficult to see how the "just"/"unjust" distinction can be made without incorporating some political values.[49] If, for example, one believes

46. Justice Black's majority opinion in *Welsh*, 398 U.S. 333 (1970), appears to almost totally abolish the lines drawn by the Selective Service Act between religious beliefs and personal philosophical, or political beliefs. He argues that Section 6(j)'s exclusion of these persons with "essentially political, sociological or philosophical views or a purely moral code" does not exclude those whose objections to war "is founded to a substantial extent upon consideration of public policy" and that the only individuals properly excluded are those who are not sincere or "those whose objection to war does not rest *at all* upon moral, ethical or religious principle but instead rests *solely* upon considerations of policy, pragmatism or expediency." *Id.* at 342-3 (emphasis added). This blurring, or perhaps abolition, of the lines between political, personal or philosophical beliefs and religious beliefs was characterized by Justice Harlan as "a remarkable feat of judicial surgery." 398 U.S. at 351 (Harlan, J. concurring). However, as the subsequent opinion in *Gillette* indicates, the Court has not in effect abandoned its efforts to distinguish religious beliefs from others.

47. Justice Marshall's opinion in *Gillette*, 401 U.S. 437 (1971), begins with a statement that "no question is raised as to the sincerity or the religious quality of this petitioner's views" and acknowledges that he "believes it is his duty as a faithful Catholic to discriminate between 'unjust' and 'just' wars," *Id.* at 441. But later in the opinion, by arguing that most reasons for opposition to a particular war may be political, Marshall seems to imply that petitioner's beliefs could be characterized as political. Id. at 445. Thus, since *Gillette* was decided on narrow statutory grounds, *see supra* note 42, it appears almost impossible to determine whether *Gillette* stands for the proposition that opposition to an "unjust" war is political or for the proposition that it is religious. In United States v. Hauten, 133 F.2d 703, 708 (2d Cir. 1943), Judge Augustus Hand of the Second Circuit addressed the issue squarely and concluded that "[t]here is a distinction between a course of reasoning resulting in a conviction that a particular war is inexpedient or disastrous and a conscientious objection to participation in any war under any circumstance" and that "[t]he former is usually a political objection, while the latter [is religious]." *Id.* at 708. Professor Greenawalt, *supra* note 41, characterizes Judge Hand's conclusion as "misconceived," because "[o]bjection to participation in a particular war can be as much the production of traditional faith as pacifism."

48. The example of the Ten Commandments is drawn from the prevailing Judeo-Christian religious beliefs, but many other religions similarly teach that killing is wrong.

49. The Court recognized this in *Gillette*, 401 U.S. 437 (1971): "A virtually limitless variety of beliefs are subsumable under the rubric, 'objection to a particular war.' "

> Matters relevant to such an objection, as the papers in these cases show, are whether the purposes of the war are thought ultimately defensive and pacific, or otherwise; whether the conflict is legal, or its prosecution decided upon by legal means; whether the implements of war are used humanely, or whether certain weapons should be used at all. A war may be thought "just" or not depending on one's assessment of these factors and many more: the character of the foe, or of allies; the place the war is fought; the likelihood that a military clash will issue in benefits of various kinds, enough to override the inevitable costs of the conflict. And so on.

Id. at 455 n.21.

Professor Greenawalt, *supra* note 41, also recognized that selective objection is "typically grounded in judgments based on the same kinds of factors that the government has considered in

that World War II which was fought in opposition to Nazism was a "just" war and that the Vietnam War which was labeled as fight against Communism was "unjust," one is making this distinction partially on beliefs about the relative evils of Nazism and Communism. This judgment takes the selective objector one step further away from the basic underlying religious belief against killing than does a simple decision not to fight in any war at all.[50]

Two other examples illustrate how the nexus approach[51] would work in analyzing the religious nature of a given belief. Opposition to the Panama Canal Treaty[52] can be linked to a religious tenet as follows: 1) It is the duty of every believer in Christianity to fight against evil; 2) Godless communism is an evil; 3) The United States is the country best suited to fight communism; 4) Therefore, the United States must be strong militarily; 5) The Panama Canal Treaty weakens the strength of the United States; 6) Therefore, the Panama Canal Treaty is wrong. At some point along this chain, certainly at step five and probably earlier, the judgment becomes so highly political that the link with a religious tenet becomes too tenuous and opposition to the treaty cannot be characterized as religious.[53] On the other hand, opposition to abortion can be linked to a religious belief as follows: 1) Killing is wrong; 2) Life begins at the moment of conception (a basic tenet of Catholicism and many fundamentalist religions);[54] 3) Therefore, abortion, which "kills" live beings, is wrong.

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developing its policy. The general objector focuses on the great questions of man and society, the selective objector may ask who stated this war, what kind of weapons and tactics are now being used, what government would be good for Vietnam, how does my society treat the minority group of which I am a member." Greenawalt, *supra* note 41, at 54. Although Greenawalt rejects the idea that there is not a strong religious element to the decision whether or not to fight in an unjust war, he concludes that "the selective objector's conclusion may properly be thought more 'political' than that of the general objector." *Id.* at 54.

50. This analysis is not meant to imply that if squarely confronted with the issue, *see supra* note 42, the Court should conclude that an objection to a particular war is not religious; but to illustrate that nexus between the belief against killing and the decision not to fight in a given war is not as strong as the nexus between the no-killing principle and opposition to all wars. It may, however, be strong enough for a conclusion that opposition to an unjust war is religious.

51. This approach is suggested as a means of analyzing apparently inconsistent "religious definition" cases, but has never been explicitly used by the Court. It is one which does present several troubling aspects—primarily the need to presuppose a concrete religious tenet with which to link a given belief.

52. Many fundamentalist leaders including Rev. Falwell, have opposed the Panama Canal Treaty. *See supra* note 33.

53. The support of a religious leader or leaders for a proposal does not necessarily establish a proposition as "religious." If a fundamentalist minister tells his followers to vote for President Reagan or a Catholic priest suggests that Catholics should vote for a Catholic president, he is making a political statement, not manifesting a religious belief. It is, to be sure, a political statement based on the perception that Reagan or a Catholic president would implement policies which would be consistent with the leader's religion, and therefore it can be linked to an actual religious belief, but it is primarily political nevertheless. A Catholic who chooses not to vote for a Catholic president does not fear that he is committing soul-endangering sin, as does a Catholic who has an abortion.

54. In Roe v. Wade, 410 U.S. 113, 160-61 (1973) (striking law prohibiting abortion) Justice Blackmum, writing for the majority, acknowledged the belief of the Catholic Church that life begins at conception, but declined to resolve the "difficult question of when life begins." He argued that "[w]hen those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in any position to speculate as to the answer." *Id.* at 159.

The link between the religious beliefs in steps one and three is so clear and free of any significant political judgment that it is proper to classify opposition to abortion[55] as a religious belief.[56]

At first glance, opposition to government regulation of church-run institutions appears more political than religious. If this opposition is phrased solely in terms of an even broader opposition to too much government regulation over any institution, then it is certainly primarily political. Even in the narrower context of opposition to regulation of religiously-affiliated institutions, it appears initially a difficult matter to determine how compliance with a law requiring 50 feet of space per child in a day care center conflicts with anyone's religious sensibilities. The Fourth Circuit Court of Appeals concluded in *Forest Hills Early Learning Center v. Lukhard*[57] that "on no possible view could the requirement that child care centers contain a minimum area of space per child, that they provide suitably spaced and covered cots and cribs and that they provide nutritious meals, be held to impinge upon any currently known or practiced religious belief under free exercise protection."[58]

However, if the compliance issue is whether the church must acknowledge the higher authority of the state, then the religious element of "deregulation" becomes clearer. The vast majority of religions believe that God's authority over humanity in the area of religious issues is a stronger authority than the state.[59] Most of these religions are willing to obey a fundamental principle of separation of church and state embodied in the teaching of Jesus: "Render unto Caesar that which is Caesar's, and unto God that which is God's."[60] But when Caesar's laws conflict with God's laws, the truly religious person cannot obey them and may choose to go to

55. Abortion is, of course, an issue loaded with both religious and political implications. Professor Tribe acknowledges that "views of organized religious groups have continued to play a pervasive role in [the] entire subject's legislative consideration for reasons intrinsic to the subject matter," but argues that the religious nature of opinions on the abortion issue should not disqualify legislative action. Tribe, *Toward a Model of Rule in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973). For a general discussion of the religious and moral value of the abortion issues, *see* Perry, *Abortion, the Public Morals, and the Public Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. REV. 689 (1976).

56. As a general proposition, if it is difficult to determine whether the links between religion and a belief which on its face appears to be personal, political or philosophical are sufficiently close, the courts will lean toward the religious classification. Professor Tribe agrees with the analysis, suggesting that "[f]or the free exercise clause, a dichotomy can usefully be drawn between things 'arguably religious' and things not even arguably having a religious character; anything that is *arguably religious* should be considered religious in a free exercise analysis. For the establishment clause an analogous dichotomy distinguishes all as that is 'arguably non-religious' from all that is clearly religious; as long as the activity is arguably *not* religious, the establishment clause has not been violated by its facilitation." L. TRIBE, *supra* note 13, at 828.

57. 728 F.2d 230 (4th Cir. 1984). In *Forest Hills*, secular day care operators were challenging the Virginia exemption for religiously-affiliated centers. *See supra* note 5.

58. 728 F.2d at 244. The Court did, however, remand the case so that the sectarian day-care center operators (not a party to the case) could have an opportunity to assert their free exercise claims.

59. The Supreme Court recognizes the principle that only the Church has dominion in the area of religion by its consistent refusal to interfere with internal ecclesiastical disputes. The leading case expressing the proposition that the Court has no authority to decide religious issues as a matter of law is Serbian Eastern Orthodox Church v. Milivojevich, 426 U.S. 696 (1976), in which the Court struck an Illinois Supreme Court decision which had set aside a Bishop's disfrockment.

60. *Matthew* 22:21 (New Testament).

jail or even die rather than do so.[61]

If the fundamentalists are correct in their perception that state licensing requires them to acknowledge the state as a higher authority than God, then the belief against regulation is in fact closely connected with the basic tenets of not only their religion, but also many other religions. Using the nexus approach, a fundamentalist could argue: 1) God's law is superior to state law; 2) Licensing gives the state authority over religious matters; 3) Therefore licensing is wrong.[62] The fallacy in this argument should be evident in the second premise. While many religious leaders would certainly agree with the fundamentalist that the government does not have the authority to tell them what to teach or not to teach in their private institutions, they would argue that mere recognition of government authority is simply acknowledgment of the secular authority of Caesar over purely secular matters. As a matter of well-settled principles of constitutional law, the fundamentalists are simply wrong when they claim that government licensing allows the government to dictate the content of their classes in day-care centers or of their speech on licensed radio and television stations.[63] Nevertheless, since many fundamentalist religious leaders genuinely believe that licensing implies subordinating God to the state, opposition to this subordination can be characterized as religious.[64]

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61. A classic example is the Catholic martyr, Sir Thomas More, who chose to die rather than take an oath which would have acknowledged that the King of England is a higher authority than the Pope. In a dramatization of his story, More explains his beliefs: "The indictment is grounded in an Act of Parliament which is directly repugnant to the Law of God. The King and Parliament cannot bestow the Supremacy of the Church because it is a Spiritual Supremacy!" BOLT, A MAN FOR ALL SEASONS 2 (1960).

This belief in the ultimate authority of God may require liberal religious leaders to counsel their followers to disobey draft laws or fundamentalists to counsel their followers that the ultimate law of the land in this country, the Supreme Court, is wrong on the school prayer issue and should not be obeyed.

62. In an analogous case, the Jehovah's Witnesses, who argued that compulsory recitation of the Pledge of Allegiance required their acknowledgement of the authority of the state over their lives, were successful in their constitutional claim, although the Court did not expressly decide that opposition to governmental authority was in fact religious. In Board of Education v. Barnette, 319 U.S. 624 (1943), the Court decided that a member of the Jehovah's Witness religion could not be compelled to salute the flag, but found that since the broader right of freedom of religion compelled removal of a compulsory salute, it was not necessary to resolve the narrow issue as to whether the opposition to the salute was in fact religion. *Cf.* Wooley v. Maynard, 430 U.S. 705 (1977) (Court decided members of Jehovah's Witnesses could not be compelled to exhibit the motto "Live Free or Die" on their license plates on freedom of speech grounds).

63. To some degree the Federal Communications Commission does regulate the speech of radio and television broadcasters, the most striking example being the "Fairness Doctrine" which requires a broadcaster to present both sides of controversial issues of public importance. *See* Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969). However, this restriction does not affect religious broadcaster's rights to promulgate their view on the airways, and in fact the Commission has expressly excluded religious issues from the Fairness Doctrine, Davey Johnson v. Station KMEP, 54 F.C.C. 923, 924 (1975), and has provided other exemptions from their regulations for religious broadcasters. For an argument that these exemptions violate the establishment clause, *see* Lacey, *The Electric Church: An FCC Established Institution?*, 31 FED. COMM. L. J. 235 (1979). For an argument that F.C.C. restrictions on religious broadcasters *do* violate freedom of religion based on specific objections to specific regulations and not F.C.C. licensing per se, *see* Hardy and Secrest, *Religious Freedom and the Federal Communications Commission*, 16 VAL. U.L. REV. 57, 59 (1981).

64. The counter-arguments to the fundamentalists views are relevant not only to the examination as to whether these views are political or religious, but also as to whether government regulation places a substantial burden on a central religious belief. *See infra* notes 76-77 and accompanying text.

An additional argument can be made for the religious characterization of opposition to regulation when one considers the fundamentalist philosophy that the government today embodies the doctrine and beliefs of "secular humanism."[65] Many religions believe in a conceptual devil whom one obeys only at peril to one's soul. To many fundamentalists, secular humanists are indeed devils.[66] If an individual honestly believes the government is controlled by devils, then it is irrelevant whether state licensing is viewed as accepting the government as an equal or a higher authority. *Any* acknowledgment of the devil's authority runs contrary to the tenets of many religions and, again, opposition to that acknowledgment can be seen as having a primarily religious character.

In conclusion, even if it is based on beliefs that mainstream religious leaders or lawyers might characterize as incorrect, opposition to uniform government licensing or other types of regulation can be validly characterized as religious, not political,[67] when viewed in the context of fundamentalist thought.

C. *The Substantial Burden on a Sincere, Central Belief Test*

In order to merit constitutional protection, a belief must not only be religious but also sincere and central to the religion.[68] Moreover, the challenged regulation must place a substantial burden on that belief.[69] The sincerity standard was established in *United States v. Ballard*,[70] in which defendant faith-healers claimed to be messengers from God. The Court decided that while the truth of defendants' religious beliefs could not be submitted to a jury, the defendants' sincerity was subject to scrutiny.[71]

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65. *See supra* note 23 and accompanying text.

66. The basic fundamentalist view of "liberalism," which they regard as synonomous with "secular humanism" was expressed by a spokesman as follows: "Men who believe in nothing beyond themselves and their ability to perfect the world are liberals by definition. It is inevitable that Christians should be in conflict with them. That is not because Christians necessarily are conservatives, but because liberalism is a sin." Potter, *Christian America*, N.Y. Times, Oct. 15, 1981, at A31, col. 1.

67. Generally, courts have not explicitly considered the religious issue in evaluating the merits of various types of opposition to governmental authority, although it can be argued that their determination that no religious belief is at stake might stem from an underlying unstated assumption that the belief is really political. State v. Kasuboski, 87 Wis.2d 904, 275 N.W.2d 101 (Ct. App. 1978), in which the Wisconsin Court of Appeals rejected a challenge to Wisconsin's compulsory attendance laws, represents an unusual instance in which the distinction was made. The court considered the arguments of two members and ministers of the Life Science Church that their "church opposed racial integration and the teaching of humanism, racial equality, and one-world government," *id.* at 103, and that the public schools taught these subjects. It concluded that they "removed their children from the public schools on the basis of ideological or philosophical beliefs rather than fundamentally religious beliefs." *Id.* at 106.

Defendant's challenge in *Kasuboski* was more specific than the general opposition to government regulation discussed in this Article. The decision is certainly open to criticism; it seems to totally ignore the well-established religious aspects of opposition to "humanism" in the public schools discussed *supra* note 23.

68. L. TRIBE, *supra* note 13, at 859-65. This is to be distinguished from the type of lack of sincerity discussed in Section I, B, in which defendants used religion as a front for beliefs which are actually political, personal, or philosophical.

69. L. TRIBE, *supra* note 13, at 862-65. The centrality test does not apply at all in many religious cases; the substantial burden test is fairly uniform.

70. 322 U.S. 78 (1944).

71. *Id.* at 87-88. The determination that it is not up to the court to determine the truth or

The question of sincerity seldom arises in major free exercise litigation, and it is common for the state to stipulate to the religious person's or group's sincerity.[72] During the Vietnam era, draft boards often relied upon lack of sincerity as a ground for refusing conscientious objector status,[73] but in recent years the sincerity inquiry has been limited to rare fact situations where a person's actions blatantly contradict his purported beliefs.[74] The sincerity of fundamentalist beliefs has never been questioned in deregulation litigation and it appears that in general the religious deregulation advocates would easily pass the sincerity test, particularly in light of the fact that many fundamentalist leaders have risked going to jail or have actually closed down their operations to avoid licensing.[75]

D. *The Centrality Test*

A more significant stumbling block to the free exercise claims of regulation opponents is the requirement that a protected belief must be central to the religion.[76] According to Professor Tribe, "[c]learly a conflict which threatens the very survival of a religion or the core values of a faith poses more serious free exercise problems then does a conflict which merely inconveniences the faithful."[77] In *People v. Woody*,[78] the fact that use of the hallucinogenic substance, peyote, was *central* to the Navajo religion was the principal reason for the court's determination that a law outlawing peyote use was unconstitutional.[79] Similarly, in *Wisconsin v. Yoder*,[80] the Supreme Court concluded that the Amish religion would be severely bur-

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merits of a particular religious view is consistent with the long-established rule that courts will not interfere with internal ecclesiastical disputes. *See supra* note 59.

72. *E.g.*, Wisconsin v. Yoder, 406 U.S. 205, 209 (1971).

73. *See* Smith and Ball, *The Objector Program—a Search for Sincerity*, 19 U. PITT. L. REV. 695 (1968); Rabin, *Do you Believe in Supreme Being—the Administration of the Conscientious Objector Exemption*, 1967 WISC. L. REV. 642, 657-71 n.62..

74. *See, e.g.*, United States v. Ballard, 322 U.S. 78 (1944) (defendants allegedly composed letters from nonexistent "cured" persons); Dobkin v. District of Columbia, 194 A.2d 657(D.C. Ct. App. 1963) (man asserting Sabbatarian beliefs routinely conducted business on Saturday). It could be argued that there is a certain internal contradiction in the position of many fundamentalists which is evidence of lack of sincerity: although they vigorously argue for "separation of church and state" in the context of "deregulation" of their privately-owned institutions, they also generally support Bible readings and prayers in the public schools, *see supra* note 22, a position at odds with strict separationist principles. This contradiction, however, is consistent with their overriding belief that the church is superior to government and therefore would probably not be accepted, without more concrete evidence, as an indication of lack of sincerity.

75. *See supra* note 2.

76. L. TRIBE, *supra* note 13, at 862-65.

77. *Id.* at 862.

78. 61 Cal. 2d 716, 394 P.2d 813 (1964). This case represents a departure from the prevailing view that religious claims will not excuse violation of drug laws. *See, e.g.*, Leary v. United States, 383 F.2d 851 (5th Cir. 1967) (review concerned other issues of the case); State v. Bullard, 267 N.C. 599, 148 S.E. 2d (1966); Lewellyn v. State, 489 P.2d 511 (Okla. 1971).

79. *Id.* at 818. The Court argued that "prohibition of the use of peyote results in a virtual inhibition of the practice of defendant's religion. To forbid the use of peyote is to remove the theological heart of Peyotism." *See also* Sequoyah v. T.V.A., 620 F.2d 1159 (6th Cir. 1980) (Indians' attempt to block construction of Tellico Dam, which would remove many of their traditional religious sites, was lacking as to centrality claim); Frank v. Alaska, 604 P.2d 1068 (Alaska 1979) (funeral feast was the "most important institution" of an Indian religion and food served at that feast was therefore "the cornerstone of the religion.")

80. 406 U.S. 205 (1972) (Court's opinion included lengthy discussion of the history and practices of the Amish religion).

dened by a law requiring children past eighth grade to attend school since the need to raise children without "worldly" influence was a "basic religious tenet and practice" of the religion.[81]

A lack of proof that government licensing requirements burdened a central religious belief was fatal to the case of Reverend Lester Roloff, an operator of unlicensed Baptist day-care centers in Texas.[82] Roloff contended that licensing per se was contrary to his religion.[83] The federal district court conceded that he was sincere,[84] but determined that licensing requirements did not regulate the content of religious instruction. It concluded the licensing requirements were simply designed "to protect the physical and mental well-being of the children"[85] and therefore "do not in any way conflict with the appellee's beliefs, nor do they restrict the exercise of their belief in any way."[86] Roloff's testimony as to the existence of a conflict between the regulations and his religion was characterized as "nothing more than a bold conclusion entirely unsupported by any factual evidence from which a jury could draw a differing conclusion."[87]

The *Roloff* court apparently interpreted the centrality of belief test very literally in reaching its conclusion. Only regulations which conflicted with a specific religious practice would be viewed as placing a substantial burden on a central belief; a conflict with general religious principles would not be considered such a burden. Similar challenges to regulation of regliously-affiliated institutions have been rejected due to an absence of the regulation's impact on specific beliefs or practices.[88]

This approach misunderstands the actual nature of the fundamentalists' anti-government-authority principles. The very act of submitting to the state offends their beliefs because submission is seen as contrary to the tenet that God's authority is higher than man's.[89] It is not necessary for a regulation to conflict with a specific practice to offend this general belief.

Recognition of the strength of general opposition to state regulation

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81. *Id.* at 222-29, 235-36.

82. Roloff Evangelistic Enter. v. State, 556 S.W.2d 856 (Tex. Civ. App. 1977), *appeal dismissed*, 438 U.S. 803 (1978).

83. Roloff stated: "We cannot comply with this standard, since we are not responsible to the State in the matter of raising children. . .but to God and the parents who have placed with us the sole responsibility to raise these children in a Godly manner." *Id.* at 857.

84. Roloff, *supra* note 81, at 859. *See supra* notes 68-74 and accompanying text for a discussion of the sincerity requirement.

85. Roloff, *supra* note 81, at 858.

86. Roloff, *supra* note 81, at 859.

87. Roloff, *supra* note 82, at 859. The court thus refused to characterize the case as presenting a conflict between the free exercise clause and the state interest.

88. In a challenge to day-care center licensing quite similar to *Roloff*, a North Carolina appellate court found that "the license in question did not relate to defendant's ministry in any manner, but to the condition of its physical facility." State v. Fayetteville St. Christian School, 42 N.C. App. 665, 258 S.E. 2d 459 (1979) *vacated as premature from an interlocutory order*, 261 S.E.2d 908 (N.C. 1980). Similarly in State v. Shaver, 294 N.W.2d 883 (N.D. 1980), pastors of a Baptist church operating private schools objected to state licensing. The Court stated that it could not see how any burden on their first amendment rights was imposed by the regulations, which were purely secular in nature, and noted that the parents did not show how specific requirements conflicted with specific religious tenets. 294 N.W.2d 833, 835-36 (N.D. 1980). It did, however, eventually assume for the sake of argument that such a burden did exist. *Id.* at 836.

89. *See supra* note 59-62 and accompanying text.

would not necessarily compel the conclusion that state regulation places a substantial burden on a central religious belief. Arguably, any regulation which requires a church to relinquish authority over religious matters to the state is burdensome. In the minds of the fundamentalists, the conflict between church and state is real; however, it may be possible for a court to determine that a purely neutral regulation does not conflict with even general opposition to governmental authority over religious matters. In this context, a regulation's lack of conflict with specific religious practices, although not dispositive, would be relevant to a conclusion that the regulation does not require a religiously-affiliated institution to submit to the church in religious matters.[90] This approach, although plausible, is troubling since it arguably requires courts to make a judgment as to whether a religious belief is mistaken. This the Supreme Court has explicitly refused to do.[91] However, if the court's conclusion is characterized as a legal interpretation of the challenged regulation, as opposed to an interpretation of the asserted religious belief, it may be acceptable.

The alternative theory as to why belief in deregulation is closely connected to a central religious tenet is the argument that if the secular humanist government is the devil, *any* regulation of church-run institutions requires it leaders to obey the devil, which their religion tells them they cannot do.[92] This argument is in theory more difficult to refute, since it is not possible for a court to rule as a matter of law that a secular humanist government is not the devil. Nevertheless, it seems a court might take a common sense view of the matter and reject this argument as simply too farfetched.

The ultimate question is whether the substantial burden test is objective or subjective. There is little doubt that in the minds of many fundamentalists, any government regulation is a burden on their religious beliefs. But, if a regulation is neutral and does not conflict with specific religious practices, then objectively it may not fail the substantial burden test. However the courts choose to interpret the test, the religious nature of general opposition to state regulation deserves more careful interpretation than it has received in the past.[93]

E. *Freedom of Religion and State Interest in Regulation*

1. *The Balancing of Religious Rights with State Interests*

A state can never regulate or restrict religious belief in its purest form;

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90. *See supra* note 27 and accompanying text.

91. *See supra* note 36.

92. *See supra* note 66 and accompanying text.

93. The approach taken in Windsor Park Baptist Church, Inc. v. Arkansas Activities Ass'n, 658 F.2d 618 (8th Cir. 1981) is typical. Plaintiff church objected to its exclusion from interscholastic athletics because of its refusal to apply for state accreditation, stating that it was a tenet of their religion "that religious matters (including education) are subject to divine governance only." *Id.* at 620. The court rejected this argument, stating that the state's requirements were neutral and secular and characterizing plaintiff's position as a "wholesale rejection of any regulatory authority on the part of the state" and concluded that while "plaintiff urges that it is unable to serve two masters . . . [t]his argument has no support in the case law." *Id.* at 621, 624.

it can, however, restrict conduct which stems from a religious belief.[94] Thus, a state could not require a child-care center operator to swear an oath stating he believes in the desirability of government regulation,[95] but under appropriate circumstances it can regulate the conduct of operators of the center.[96] In practice, the belief/conduct distinction is a rather meaningless one and the Supreme Court has recognized this fact in recent decisions.[97] The current approach to free exercise of religion problems is a two-part balancing process, contrasting the strength of an individual's free-exercise rights with the state's interest in restricting these rights.[98] First, the Court will ask whether a regulation places a substantial burden on a religious belief, second it will ask whether the regulation is justified by an overriding or compelling government interest.[99] This Article examines the free exercise claims of "deregulation" proponents and has concluded that a strong case can be made that opposition to government regulation is a sincere, central religious belief of many fundamentalist religions and that requiring submission to state laws places a substantial burden on that belief.[100] If this contention is correct, then there must be a compelling state interest in regulation which outweighs the religious liberty interest.

2. *The State Interest in Health and Safety Regulation*

Many of the challenged state regulations are designed to protect the health and safety of citizens. This health concern is generally accepted as strong enough to outweigh an individual's constitutional rights.[101] Thus, extremely dangerous practices such as snake-handling in church may be prohibited.[102]

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94. This distinction was first articulated in Reynolds v. United States, 98 U.S. 145 (1879), in which the Court said: "Laws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices." *Id.* at 166.

95. *See* Torcaso v. Watkins, 367 U.S. 488 (1961) (striking an oath requiring belief in God as prerequisite for holding public office).

96. *See infra* note 113 and accompanying text.

97. For example, does a law forbidding ministers to hold public office regulate the minister's belief or conduct? In McDaniel v. Paty, 435 U.S. 618 (1978), the Court struck a Tennessee law preventing ministers from serving as delegates to a constitutional convention, but disagreed as to whether the statute regulated belief or conduct. A plurality argued that the law referred to a "status," which was "defined in terms of conduct and activity"; the concurrence determined that the law directly burdened pure belief. *Id.* at 626-27.

98. In Wisconsin v. Yoder, 406 U.S. 205 (1972), Chief Justice Burger recognized that "belief and action cannot be neatly confined in logic-tight compartments." *Id.* at 220.

99. *Id.* at 215; *see, e.g.*, McDaniel v. Paty, 435 U.S. 618 (1978); Braunfeld v. Brown, 366 U.S. 599 (1961).

100. *See supra* notes 88-93 and accompanying text.

101. For an extensive discussion of public health and safety and religious liberty, see Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development*, 80 HARV. L. REV. 1381 (1967).

102. Hill v. State, 38 Ala. App. 404, 88 So.2d 880 (1956) (holding that a statute prohibiting the display of or handling of snakes in a manner which endangers life did not violate the constitutional guarantees of religious freedom); Lawson v. Commonwealth, 291 Ky. 437, 439, 164 S.W.2d 972, 974 (1942) ("it is apparent that the Federal Constitution does not preclude a state from enacting a law prohibiting the practice of a religious rite which endangers the lives, health or safety of the participants, or other persons."); Harden v. State, 188 Tenn. 17, 20, 216 S.W.2d 708, 711 (1949) ("[r]easonable minds must agree that the aforementioned practice of so handling poisonous snakes as part of the religious services of this Church is dangerous to the life and health of people. . . .[Therefore] the Tennessee Statute which forbids such a practice does not appear to vio-

The courts are split on whether they will order life-saving treatment of an adult patient who does not believe in medical techniques,[103] but there is widespread agreement that compulsory vaccination is constitutional[104] because it is necessary to protect the health not only of the individual, but also of the community. When licensing regulations are similarly linked to health or safety, they represent a traditionally important interest. Laws regulating church-operated hospitals, for example, protect the patients in the hospital, who may or may not share the religious belief of the hospital's operators. Similarly, fire regulations protect not only the buildings subject to regulation, but also the surrounding area. As a result, most courts have rejected challenges to regulation of religiously-affiliated institutions when the states' interest in regulation can be linked to a health or safety concern.[105]

3. *The State Interest in Welfare of Children*

When the regulated religiously-affiliated institution is responsible for the care of children—the principal examples being day-care centers and private schools—there is an additional state interest at stake. The state has a broad right to protect the welfare of its children which may go beyond protecting their health and safety. In *Prince v. Massachusetts*,[106] the Supreme Court upheld the conviction of a Jehovah's Witness who allowed a minor to sell religious literature in violation of a child labor law[107] despite the fact that the law infringed upon the child's freedom of religion[108]

late those provisions of the Federal Constitution with reference to the individual's freedom of worship.")

103. *Compare In re* Brooks, 32 Ill. 361, 205 N.E.2d 435 (1965) (sustaining right of a Jehovah's Witness to refuse a blood transfusion) with Kennedy Memorial Hosp. v. Heston, 58 N.J. 576, 279 A.2d 670 (1971) (medical treatment ordered by court despite individual religious freedom claim).

104. Jacobson v. Massachusetts, 197 U.S. 11 (1905); *see, e.g.*, Wright V. DeWitt School District, 238 Ark. 906, 385 S.W.2d 644 (1965); McCarthy v. Austin, 57 Misc. 525, 293 N.Y.S. 2d 188 (N.Y. 1968).

105. *E.g.*, Faith Assembly of God v. State Bldg. Code Comm'n, 416 N.E. 2d 228 (Mass. 1981) (rejecting challenge to fire and safety regulations on grounds that they do not restrict any religious practices, but simply "operates to make the use of the building as a school safer."); Hough v. North Star Baptist Church, 109 Mich. App. 780, 783-84, 312 N.W.2d 158, 159-60 (1981) (per curiam); Antrim Faith Baptist Church v. Commonwealth, 75 Pa. Comm. 61, 67, 460 A.2d 1228, 1230-31 (1983). *Contra* City of Sumner v. First Baptist Church, 97 Wash. 2d 1, 639 P.2d 1358 (1982). The *Sumner* case may be viewed as forbidding only hypertechnical building code regulations. *See infra* note 145 and accompanying text. *Accord* Allendale Congregation of Jehovah's Witnesses v. Grosman, 30 Mich. 273, 152 A.2d 569 (1969); *see also* Church of Scientology of Cal. v. Richardson, 437 F.2d 214 (1971) (religious freedom does not permit violation of Food, Drug, and Cosmetic Act). The Florida, Virginia and Indiana statutes do require that unlicensed day-care centers must comply with local fire and safety regulations, but they do not require compliance with other safety and health regulations such as child/space ratios.

106. 321 U.S. 158 (1944).

107. *Id.* at 167.

108. The case presented issues regarding both the rights of the parent, who wished her children to sell the literature, and of the fourteen- and fifteen-year-old children, who stated that their religious belief required them to sell the literature. It does not, therefore, raise the potential of parent/child conflict discussed in note 122 *infra*. The Court drew an analogy to the state's interest in health and safety regulation and compulsory school attendance: "Acting to guard the general interest in youth's well-being, the state as *parens patiae* may restrict the parent's control by requiring school attendance . . . . [T]he right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." *Id.* at 166-7.

and freedom of speech.[109] However, the state's authority in the broad area of child welfare protection is not unlimited. In *Pierce v. Society of Sisters*,[110] the state's interest in providing universal education for its children was outweighed by the right of parents to send their children to private religious schools.[111] In *Wisconsin v. Yoder*,[112] the Court went even further and determined that the state could not compel Amish children above the eighth-grade level to attend any school at all.

The fundamentalists have relied heavily upon *Yoder* in challenging the right of the state to regulate those church-run institutions which educate or take care of children.[113] This reliance may be somewhat misplaced. *Yoder* is a decision with no real consensus and even the majority opinion takes pains to limit the case to its facts, emphasizing that "probably few other religious groups or sects" could equal the "convincing showing" of religious conviction mandating its results.[114] In the subsequent case of *United States v. Lee*,[115] the Supreme Court resisted efforts to extend *Yoder* beyond its carefully-drawn boundaries, holding that an Amish employer could not refuse to make Social Security payments for his employees, despite the Court's recognition of the firmly-established opposition to Social Security among the Amish.[116]

Most lower courts have rejected analogies to *Yoder* in general challenges to state regulation.[117] The approach taken by the West Virginia

109. Freedom of speech first amendment rights are also limited when the interests of children are at stake. In the "Seven Dirty Words" case, FCC v. Pacifica Foundation, 438 U.S. 726 (1978), the court found that "indecent," although not "obscene," material could be restricted during hours when children were likely to be in the audience. Justice Stevens, writing for the majority, was troubled by the fact that "broadcastng is uniquely accessible to children, even those too young to read. . . . Pacifica's broadcast could have enlarged a child's vocabulary in an instant" and stated that "[o]ther forms of offensive expression may be withheld from the young without restricting the expression at its source." Id. at 748-750. *See* Comment, *Morality and Broadcasting*: FCC *Regulation of "Indecent" Material Following Pacifica*, 31 FED. COM. L. J. 145 (1978). *See also* Ginsberg v. New York, 390 U.S. 629 (1968) (upholding laws forbidding sale of obscenity to juveniles).

110. 268 U.S. 510 (1925).

111. *Id.* at 518. The *Pierce* court did expressly recognize the right of the state to "inspect, supervise, and examine" the private schools. Id. at 534. It is also worth noting that the private schools in the *Pierce* case were accredited, and no allegations were made that they did note provide children with a sound education. Therefore, *Pierce* does not stand for the proposition that parents have a constitutional right to send their children to unaccredited private schools. *See e.g.*, State v. Shaver, 294 N.W. 2d 883 (N.D. 1980); State v. Kasuboski, 87 Wis.2d 904, 275 N.W. 2d 101 (Ct. App. 1978); Meyerkorth v. State, 173 Neb. 839, 115 N.W. 2d 585 (1962) *appeal dismissed*, 372 U.S. 705 (1963).

112. 406 U.S. 205 (1972).

113. *E.g.*, Roloff Evangelistic Enter. v. State, 556 S.W.2d 856 (Tex. Ct. App. 1977), *appeal dismissed*, 439 U.S. 803 (1978); State v. Riddle, 285 S.E.2d 359 (W. Va. App. 1981); State v. Shaver, 294 N.W. 2d 883 (N.D. 1980).

114. 406 U.S. 205, 235-36 (1972). Yoder's discussion of the Amish beliefs does provide support for the proposition that a desire to be free of the authority of the state constitutes a central religious belief. Chief Justice Burger acknowledged that "the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living. . . . [The Amish life] is in response to their literal interpretation of the Biblical injunction from the Epistle of Paul and the Romans, 'be not conformed to this world.' This command is fundamental to the Amish faith." *Id.* at 216.

115. 455 U.S. 252 (1982).

116. *Id.* at 259, 60.

117. Most of these lower court decisions have been within the context of compulsory school attendance laws. *See, e.g.*, State of Riddle, 285 S.E.2d 359 (W.Va. 1981), State v. Shaver, 294 N.W. 2d 883 (N.D. 1980), State v. Kasuboski, 87 Wis. 904, 775 N.W.2d 101 (Ct. App. 1978).

Supreme Court of Appeals in *State v. Riddle*[118] is typical.

The *Riddle* court noted that the *Yoder* compulsory school attendance law applied only to children over 16 and argued that when younger children are involved the state's interest in compulsory education is stronger. Therefore, "[w]hile in *Yoder*, dealing as it did with near-adults, the balance tipped slightly in the direction of free exercise, in the case before us the balance is decidedly the other way."[119]

Additionally, in *Yoder*, testimony indicated that the law directly infringed upon the religious beliefs of these children themselves, not just their parents. As a result, there was no conflict with the right of a child who might wish to attend public school.[120] Regulations which affect child welfare may infringe upon religious beliefs of operators of day-care centers[121] or upon beliefs of parents who wish to send their children to an unlicensed center, but they do not necessarily infringe upon the religious beliefs of the four- and five-year-olds in that center.[122] These children have a separate right to state protection that the Amish sixteen-year-olds did not assert.

Even if the day-care center children were to assert a religious belief against regulation, it is well settled that a court may impose greater freedom of religion restraints on a child than on an adult. Thus, courts will often require parents who object on religious grounds to seek medical care for children in a serious medical crisis, although they might may not require medical care for the adults.[123] If there are valid child-welfare reasons for day-care center or private-school regulation, then this interest should be judged to be compelling. "Children in a school need the protection of fire and safety codes. That they burn and hurt like anybody else and that they need to be protected does not suddenly become less just because a church is operating the school and the protections of the First Amendment is asserted. The great right of freedom of religion should not

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Yoder has been used successfully in certain challenges to specific elements of regulation, outside of the scope of this Article. *See, e.g.*, Kentucky State Bd. for Elementary and Secondary Educ. v. Rudasill, 589 S.W. 2d 877 (Ky. 1979), *cert. denied*, 446 U.S. 938 (1980); State v. Whisner, 47 Ohio State 2d 181, 351 N.E. 2d 750 (1976). *See supra* note 28.

118. 285 S.E. 2d 359 (W. Va. 1981).

119. *Id.* at 362.

120. Justice Douglas' partial dissent disagreed with this characterization of the children's wishes, stating that only one child had testified that her religious views opposed public school attendance. Wisconsin v. Yoder, 406 U.S. 205, 242 (1972) (Douglas, J. dissenting in part).

121. Many day-care center's licensing regulations do exempt situations where a parent takes care of his own child and perhaps a few neighboring children in his own home. However, most of the fundamentalist day-care centers are large institutions which advertise heavily to attract a large number of customers. Thus, the demands for "deregulation" by the fundamentalists differ from those of the Amish who desired small-scale exemptions for their own children.

122. As Douglas points out in *Yoder*, "no analysis of religious liberty claims can take place in a vacuum. If the parents in this care are allowed a religious exemption, the inevitable effect is to impose the parents' notions of religious duty upon their children. When the child is mature enough to express potentially conflicting desires, it would be an invasion of the child's rights to permit such an imposition without canvassing his views." 406 U.S. 205, 242 (Douglas, J., dissenting in part).

123. *See, e.g.*, People ex. rel. Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769 *cert. denied*, 344 U.S. 824 (1952); Jehovah's Witness v. King County Hosp., 278 F.Supp 488 (W.D. Wash. 1976), *aff'd*, 309 U.S. 598 (1968); State v. Perricone, 37 N.J. 463, 181 A.2d 751 (1962).

be mocked."[124]

4. *The State Interest in Non-Protective Regulation*

Many non-protective regulations, such as employment discrimination laws or labor regulations, are designed to implement basic policy decisions on the part of the government. Others are passed to insure that an industry is operated in the best interest of the public—for example, the Communications Act empowers the Federal Communications Commission (FCC) to allocate licensing frequencies so that the airways do not become a "Tower of Babel."[125] There is generally a strong state interest in these types of regulations, but they are more susceptible to challenges on religious grounds than health and safety or child welfare regulations.

One of the earliest cases regarding non-protective state regulation of religious beliefs is *Reynolds v. United States*[126] in which the Court upheld anti-polygamy criminal laws. Although it was easily established that "failing or refusing to practice polygamy when circumstances would admit, would be punished, and that the penalty for such a failure or refusal would be damnation in the life to come";[127] nevertheless, the right of government to "reach actions which were in violation of social duties or subversive of good order"[128] was paramount.[129] The polygamy cases appear to give the government wide latitude in regulating religious conduct, but it is important to note that the state's interest in making monogamous marriage universal also had a strong religious undertone.[130] The case can be best understood as representing a conflict of two religious viewpoints with the accepted majority view prevailing.[131]

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124. City of Sumner First Baptist Church, 97 Wash. 2d 1, 21, 639 P.2d 1358, 1369 (Wash. 1982). *Accord* State v. Fayetteville St. Christian School, 42 N.C. App. 665, 258 S.E. 2d 459 (1980): "The stated purpose of the Act is to protect the 'physical safety and moral environment' of children who use such facilities. . . . This is a compelling State interest in the regulation of a subject within the state's constitutional power to regulate." Id. at 463.

125. Communications Act of 1934, 47 U.S.C. § 301 (1978). *See* Nat'l Broadcasting Co. v. United States, 319 U.S. 190 (1943) (discussing scarcity rationale and affirming broad powers of F.C.C. to require broadcasters to operate in the "public interest"). The phrase "Tower of Babel" is taken from the title of an excellent book on the history of broadcasting, E. BARNOUW, A TOWER IN BABEL, A HISTORY OF BROADCASTING IN THE UNITED STATES (1966).

126. 98 U.S. 145 (1878). *See also* Davis v. Beason, 133 U.S. 333 (1890); Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890). Justice Douglas has suggested that *Reynolds* would be overruled today, *see* Wisconsin v. Yoder, 406 U.S. 205, 247 (J. Douglas, dissenting). *Cf.* Cleveland v. United States, 329 U.S. 14 (1946) (belief in polygamy is no defense to Mann Act violation).

127. 98 U.S. 145, 161 (1878).

128. *Id.* at 164.

129. *Id.* at 166-67.

130. Many "mainstream" religions consider that monogamy and fidelity to marriage vows is commanded by the Bible. Reynolds v. United States, 98 U.S. 145, 164 (1879).

131. The Court also relied upon historical precedent, noting that "[p]olygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and African people." 98 U.S. at 164. Many commentators have suggested that the *Reynolds* decision can best be understood as a study in anti-Mormanism and the above language certainly supports that conclusion. Similarly many critics have charged that the underlying motive of anti-establishment proponents is anti-Catholicism, particularly in the context of aid to private schools, which are predominently Catholic. *See* Hitchcock, The *Supreme Court and Religion: Historical Overview and Future Prognosis*, 24 ST. LOUIS U.L.J. 128, 193-201 (1980).

In contrast, *Sherbert v. Verner*[132] represents the modern Court's willingness to strike seemingly neutral non-protective state laws which affect religious conduct. The *Sherbert* Court held that a Seventh Day Adventist whose religion forbade her to work on Saturday must be given an exemption from unemployment regulations which required her to be available for work at all times.[133] The state interests of administrative efficiency and need to avoid "free-loaders" in the unemployment system was not sufficiently compelling to outweigh the restriction on religious conduct.

The regulation in *Sherbert* clearly conflicted with a specific religious belief. In contrast, in *National Labor Relations Board v. Catholic Bishop of Chicago*,[134] the Supreme Court considered a general challenge to the jurisdiction of the National Labor Relation Board (NLRB) over non-Catholic teachers in Catholic schools. It concluded that "certifying a union as the bargaining agent for the teachers interferes with freedom of church authorities to shape and direct teaching in accord with the requirements of their religion."[135]

The actual holding of *Catholic Bishop* was narrowly based upon the Court's inability to find any legislative-history support for the proposition that the Labor Board was intended to have jurisdiction over private schools.[136] As a result, lower federal courts have declined to apply *Catholic Bishop* to institutions other than private schools.[137] For example, in *Tressler Lutheran Home v. National Labor Relations Board*[138] a challenge to NLRB jurisdiction over nursing homes was rejected. The federal district court distinguished private schools, which are primarily devoted to religious education, and nursing homes, whose primary function is "the care of the elderly and the infirm."[139] The court also noted that "no specific religion-based conflicts have emerged as yet"[140] and rejected the general argument that NLRB jurisdiction would mean that the nursing home would lose its "autonomy in the management and operation of the

132. 374 U.S. 398 (1963).

133. *Id.* at 403-04.

134. 440 U.S. 490 (1979). *See* Laycock, *Toward a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981), for an argument that the decision in NLRB was correct and should be applied to other types of religiously-affiliated institutions.

135. 440 U.S. 490, 496 (1979).

136. *Id.* at 504-07.

137. *E.g.*, NLRB v. St. Louis Christian Home, 663 F.2d 60 (8th Cir. 1981); NLRB v. World Evangelism, Inc., 656 F.2d 1349 (9th Cir. 1981). *See also* Mitchell v. Pilgrim Holiness Church Corp., 210 F.2d 879 (7th Cir. 1954), *cert. denied*, 347 U.S. 1013 (1954) (upholding application of Fair Labor Standards Act to church operations including printing company); SEC v. World Mission Radio, Inc., 544 F.2d 535 (1st Cir. 1976) (SEC laws apply to religious groups); *In Re* Rabbinical Seminary, 450 F. Supp. 1078 (E.D.N.Y. 1978) (seminary subject to subpoena for its records). *But cf.* Surinach v. Pesqvera de Busquets, 604 F.2d 73 (1st Cir. 1979) (Catholic Church need not answer questionnaire submitted by Puerto Rico Department of Consumer Affairs).

138. 677 F.2d 302 (3d Cir. 1982). *Accord* Mid-American Health Services, Inc., 247 N.L.R.B. 752 (1980); Bon Secours Hospital, Inc., 248 N.L.R.B. 115 (1980). *See* Note, *The Boundaries of a Church's First Amendment Rights as an Employer*, 31 CASE W. RES. 363 (1981).

139. 677 F.2d at 305. The court recognized "that the religious atmosphere and motivation at the Tressler home are beneficial to the well-being of the patients, but the actual physical care given is comparable to that furnished by secular facilities. In that sense the religious atmosphere is secondary to that of direct patient care." *Id.*

140. *Id.* at 306.

institution."[141]

If *Catholic Bishop* is indeed limited to private schools, it should have no significant impact on continued government regulation of institutions such as day-care centers or television stations. Even if the decision can be read as applicable in other contexts, it does not necessarily represent the proposition that any form of non-protective government regulation over church-run institutions is inappropriate. The type of regulation at stake in *Catholic Bishop* was uniquely intrusive as it allowed a third party—the Labor Relations Board—to directly interfere with the operation of the Catholic schools. Additionally, the inconclusive legislative history did not provide strong policy reasons for the asserted jurisdiction. In contrast, in *United States v. Lee*,[142] the Court determined that the recognized need for a uniform Social Security law was sufficiently compelling to outweigh the religious-liberty rights of the Amish employer. Similarly, the strong interest in a non-discrimination policy has outbalanced religious liberty in challenges to employment discrimination laws.[143] Therefore, laws which implement an important state purpose—such as insuring that an industry operates in the best interest of the public—should continue to survive freedom-of-religion attacks.

A difficult problem is posed by state regulations which can be justified only by administrative convenience. As the *Sherbert* case indicates, administrative convenience is generally not regarded as a compelling interest when balanced against a valid assertion of a constitutional right.[144] In *City*

141. *Id.* This argument, of course, strikes a familiar chord, echoing claims of opponents to other types of licensing. *See supra* notes 29 and 61 and accompanying text.

142. 455 U.S. 252 (1982).

143. EEOC v. Pacific Press Publishing Ass'n, 676 F.2d 1272 (9th Cir. 1982) (sustaining application of Title VII prohibition against sex discrimination to religious publishing house); EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981) (sustaining application of Title VII to sectarian school); Kings Garden, Inc. v. FCC, 498 F.2d 51 (D.C. Cir. 1974) (sustaining application of FCC employment standards to religious licensees) *cert. denied*, 419 U.S. 996 (1974).

Title VII explicitly allows religious employers to discriminate on the basis of religion with respect to purely "religious activities." Section 3 of the Equal Opportunities Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (amending § 702 of Title VII, 78 stat. 255, 42 U.S.C. § 2000 e-1 (Supp. 1972)). Judge Bazelon argued in his concurrence in *King's Garden, supra*, that this exemption constitutes an establishment of religion, but the matter has never been conclusively settled.

It seems that the legislative history of Title VII indicates a willingness to make an exemption from nondiscrimination laws when there is a potential for conflict with a specific religious belief—it is obvious that to force a Catholic Church to hire Protestants to administer internal church affairs would create such a conflict. However, the history can be viewed as a rejection of a more generalized opposition to government authority to prohibit sex or race discrimination by church-run institutions. *See* EEOC v. Pacific Press Publishing Ass'n, *supra*, at 1276-77 for a discussion of the legislative history of the Civil Right's Act as applied to religious groups. *See generally*, Comment, *Religious Discrimination in Employment—the Undoing of Title VII's Reasonable Accommodation Standard*, 44 BROOKLYN L. REV. 598 (1978); Comment, *Title VII and Religious Discrimination: Is Any Accommodation Reasonable Under the Constitution*? 9 LOYOLA L.J. 413 (1978); Note, *Can the Government Require Accommodation of Religion at the Private Job Site*? 62 VA. L. REV. 237 (1976).

144. *E.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973) (administrative convenience in classification of only females as military dependents outweighed by right to equal protection); Shapiro v. Thompson, 394 U.S. 618 (1969) (administrative convenience in welfare system outweighed by right to travel); Sherbert v. Verner, 374 U.S. 398 (1963) (administrative convenience in unemployment benefits outweighed by right to religious freedom).

of Sumner v. Baptist Church,[145] a church argued that compliance with state building codes would necessitate the shut-down of its Bible School. The appellate court remanded the case on the grounds that the lower court had not been sufficiently sympathetic to petitioner's claims or considered the possibility of alternative regulations.[146] While acknowledging the need for building standards, it cautioned that "*[h]ypertechnical* or *unreasonable* fire and safety standards, however, cannot be utilized to inhibit the appellants' church-operated school activities or to discourage the practice of their religious beliefs."[147] This language, if applied in the religious-affiliated-institutions context, seems to imply that if a particular regulation is in fact a piece of bureaucratic silliness, it may not be necessary for the church-run institution to comply with it. Nevertheless, this Article contends that even if a day-care regulation requires that all reports from operators must be written on pink paper, for example, it is not unconstitutional unless a religion can assert that the regulation conflicts with a religious tenet which forbids use of pink paper.[148] The due process clauses protect secular and religious institutions alike from wholly unreasonable regulation, but if a regulation can survive a due process challenge, it should also survive a *general* freedom of religion challenge.

The real state interest at stake regarding uniform regulation is not the bureaucratic justification of a particular apparently meaningless rule, but the interest the state has in protecting the integrity of its legal system. In a democracy, laws must apply to everyone or those who are not exempted from the law will protest and eventually insure that the unfair law (which may have been passed to embody a very important state interest) will be removed. In Virginia, for example, many of the nonexempt day-care centers argue that the way to neutralize the competitive advantages the exemption gives a religiously-affiliated day-care center is to eliminate day-care licensing altogether.[149]

Since it has been acknowledged that the regulations were enacted to "insure that the pressures of a competitive marketplace did not intrude upon the well-being of children,"[150] this result would be unconscionable. It may be true that even neutral regulation places at least a subjective burden on the religious belief of the regulated. However, if regulations do not conflict with specific religious policies, the right of the state to insure that its laws apply to everyone is sufficiently compelling to outweigh this burden. In the words of Chief Justice Burger, "[r]eligious beliefs can be accommodated, . . . but there is a point at which accommodation would

145. 97 Wash.2d 1, 639 P.2d 1358 (Wash. 1982).

146. *Id.* at 1365.

147. *Id.* at 1367 (Williams, J., concurring). The case can also be read as a wholesale rejection of any application of building or zoning laws to religiously-affiliated institutions. If that is its meaning, then it is clearly incorrect. For an incisive criticism of the decision, *see* Note, *Constitutional Review of Building Codes and Zoning Ordinances Applied to Public Parochial Schools: City of Sumner v. First Baptist Church*, 7 U. PUGET SOUND L. REV. 607 (1984).

148. *See supra* note 28 and accompanying text.

149. Forest Hills Early Learning Center v. Lukhard, 728 F.2d 230, 234 (1984).

150. *Id.* at 234. Additionally, general challenges to state regulation threaten establishment clause values. *See infra* notes 220-27 and accompanying text.

'radically restrict the operating latitude of the legislature'."[151]

If this conclusion appears troubling, it is important to remember that these licensing restrictions on institutions other than churches apply only to religious groups who have chosen to move into the secular world.[152] As Judge Leventhal of the District of Columbia Court of Appeals acknowledged in upholding application of F.C.C. regulations which prohibited employment discrimination to religious television and radio stations:[153] "A religious group, like any other, may buy and operate a licensed radio or television station. But, like any other group, a religious sect takes its franchise burdened by enforceable public obligations."[154]

II. THE ESTABLISHMENT CLAUSE AND STATE REGULATORY EXEMPTIONS FOR RELIGIOUSLY-AFFILIATED INSTITUTIONS

A. *Introduction*

The first part of this Article focuses on the free exercise of religion claims asserted by opponents of government regulation. It concludes that the majority of courts have correctly rejected these claims when based upon a generalized opposition to state authority[155] and that the Constitution does not *require* that a state grant across-the-board licensing or other regulatory exemptions to religiously-operated institutions. However, as the licensing exemptions previously discussed illustrate, deregulation advocates' efforts have met with considerably more success in the legislative arena.[156] This indicates that powerful religious lobbies will continue to introduce bills exempting their institutions from government control.[157] These voluntary state exemptions present the other side of the tension between first amendment religion clauses: if the Constitution does not require licensing exemptions due to freedom-of-religion concerns, does it also affirmatively forbid such exemptions as constituting an establishment of religion?

It is a well-settled proposition that a state may travel further in the direction of aid to religion than the freedom of religion clause dictates it must go.[158] There are limits, however. At a certain point, voluntary state

151. 455 U.S. 252, 259 (1982), citing Braunfield v. Brown, 366 U.S. 599, 605 (1961).

152. This limitation on voluntary activity of religious groups was acknowledged by Chief Justice Burger in United States v. Lee, 455 U.S. 252, 261 (1982): "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." Justice Stevens in his concurrence would go even further and require the person objecting to a regulation to "shoulder the burden of demonstrating that there is a unique reason for allowing him a special exemption from a valid law of general applicability." *Id.* at 262. *See generally* United States v. Kissinger, 250 F.2d 940 (3rd Cir. 1958); State v. King Colony Ranch, 350 P.2d 841 (Mont. 1960); Muhammed Temple of Islam-Shreveport v. City of Shreveport, 387 F.Supp. 1129 (W.D. La. 1974), *aff'd*, 517 F.2d 922 (5th Cir. 1975) (requiring that a church obtain a license to sell fish).

153. King's Garden v. FCC, 498 F.2d 51, 60 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974).

154. *Id.* at 60.

155. *See supra* notes 148-50 and accompanying text.

156. *See supra* notes 5-9 and accompanying text.

157. *See supra* notes 5-9 and accompanying text.

158. *See* Walz v. Tax Comm'n of New York, 397 U.S. 664 (1970) (state may exempt churches from real property tax, although not compelled to do so by freedom of religion clause); Selective

action accommodating religion must come to a halt at the metaphorical wall between church and state:[159] "[t]he Free Exercise Clause . . . does not offer a sword to cut through the strictures of the Establishment Clause."[160] This Article concludes that states which grant licensing or other regulatory exemptions exclusively or primarily to religiously operated institutions venture too far beyond that wall.

B. *Background*

1. *The Framers' Intent*

In the first major establishment clause case, *Everson v. Board of Education*,[161] Justice Black discussed at great length the history of the clause, drawing heavily from the writings of Thomas Jefferson and James Madison.[162] Using Jefferson's figure of speech, he announced: "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."[163] This has become the classic statement of the establishment clause principle.[164] However, the Court's continued use of the "wall" metaphor and its underlying Jeffersonian theories has been severely criticized.[165] In *The Garden and the Wilderness*,[166] Professor Mark Howe presents evidence that Jefferson's ideas were by no means universal at the time of the framing of the Constitution. Howe is "persuaded that if the First Amendment codified a figure of speech it embraced the believing affirmations of Roger Williams and his heirs no less firmly than it did the questioning doubts of Thomas Jefferson and the Enlightenment."[167] Williams, although agreeing with Jefferson and Madison on the need for division between religion and government, disagreed significantly as to the reason why such a division is necessary. Jefferson and Madison considered the metaphorical "wall" a necessity to prevent the undermining of

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Draft Law Cases, 245 U.S. 366 (1918) (Congress may exempt religious objectors from military duty, although not compelled to do so by freedom of religion clause). For a discussion expressing approval of the must/may distinction, see Buchanan, *Accommodation of Religion in the Public Schools: A Plea for Careful Balancing of Constitutional Values*, 28 UCLA L. REV. 1000, 1011-17 (1981).

159. *See, e.g.*, Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) (striking zoning law allowing churches to object to liquor licensing of nearby institutions); Larson v. Valente, 456 U.S. 228 (1982) (state may not exempt from charitable-contribution reporting and registering laws only religious institutions whose members contribute more than half of the institution's income); Stone v. Graham, 449 U.S. 39 (1980) (state may not require posting of Ten Commandments on public classroom walls).

160. Cummins v. Parker Seal Co, 516 F.2d 544, 557 (6th Cir. 1975), *vacated*, 433 U.S. 903 (1976).

161. 330 U.S. 1 (1947).

162. *Id.* at 8-16.

163. *Id.* at 18.

164. *See, e.g.* Larkin v. Grendel's Den, Inc. 459 U.S. 116 (1982); Committee for Public Educ. v. Nyquist, 413 U.S. 756, 770 (1973); Flast v. Cohen, 392 U.S. 83, 103-4 (1968).

165. In McCollum v. Board of Educ., 333 U.S. 203, 247 (1948), Justice Reed cautioned the Court that "[a] rule of law should not be drawn from a figure of speech," referring to the metaphorical Jeffersonian wall.

166. M. HOWE, THE GARDEN AND THE WILDERNESS, (1965).

167. *Id.* at 9.

government functions by the church.[168] Williams, on the other hand, feared that, absent separation, the powers of the state would corrupt and eventually destroy the church. He envisioned the wall as shielding a religious "garden" from a secular wilderness and as protecting the purity of the church from outside influences.[169]

Obviously, the Supreme Court's choice between the Jefferson/Madison analysis and the Williams analysis of the concerns underlying the anti-establishment prohibitions could determine the outcome of many cases. In the context of the issues raised in this Article, state exemptions for religiously-affiliated institutions directly conflict with the Jefferson/Madison analysis, since they give additional power to religious groups and undermine the authority of the state. However, they also serve to isolate the institutions from the government and thus serve the purpose of Williams' goals.

Howe and other critics have charged that the Court has adopted the Jefferson mode exclusively.[170] But although the Court's language may be Jeffersonian, in many instances its results and underlying assumptions can be classified as Williamsonian. *Wisconsin v. Yoder*[171] can best be explained in terms of Williams' goals for church/state separation. The lifestyle of the Amish, isolated from "worldly" influences, is a model of Williams' idyllic garden and is described in language that seems to acknowledge the corrupting nature of the state.[172]

Yoder is, of course, a case decided on free exercise grounds; but several establishment-clause cases seem also to follow Williams' principles and to reject the Jeffersonian view. It is difficult to reconcile the cases

168. In the *Virginia Declaration of Rights*, Jefferson warns "that religious establishments are highly injurious to the temporal concerns of any community, without insisting upon the ambition and the arbitrary practices of those who are favored by government or the intriguing, seditious spirit which is commonly excited by this, as well as any other kind of oppression, such establishments greatly retard population, and consequently the progress of arts, sciences, and manufactures." L. PFEFFER, *supra* note 14, at 27.

169. Williams wrote: "The faithful labors of many witnesses of Jesus Christ, extant to the world, abundantly proving that the church of the Jews under the Old Testament in the type, and the church of the Christians under the New Testament in the antitype, were both separate from the world; and that when they opened a gap in the hedge or wall of separation between the garden of the church and the wilderness of the world, God hath ever broke down the wall itself, removed the candlestick and made His garden a wilderness, as at this day. And that therefore if He will ever please to restore His garden and paradise again, it must of necessity be walled in peculiarly unto Himself from the world; and that all that shall be saved out of the world are to be transplanted out of the wilderness of the world, and added unto his church or garden." M. HOWE, *supra* note 166, at 5-6, quoting P. MILLER, ROGER WILLIAMS: HIS CONTRIBUTION TO THE AMERICAN TRADITION 89, 98 (1953).

170. "The basic error which I see in the Court's ways derives not from its failure to give a theological reading to the Amendment but from its pretension that the framers spoke in a wholly Jeffersonian dialect and that those who ratified it fully understood that style of speech." M. HOWE, *supra* note 166, at 10.

171. 406 U.S. 205 (1972).

172. According to Chief Justice Burger: "Amish society emphasizes informal learning-through-doing; a life of 'goodness' rather than a life of intellect; wisdom, rather than technical knowledge; community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society." 406 U.S. at 211. He concedes that "compulsory high school attendance could not only result in great psychological harm to the Amish children, because of the conflicts it would produce, but would also . . . ultimately result in the destruction of the Old Order Amish . . . community." *Id.* at 212.

upholding limited forms of aid to private religious schools with Jefferson's concern over a powerful church.[173] On the other hand, this type of aid, which allows children to attend a school isolated from the secular world, coincides with Williams' visions. Even more significantly, the requirement that government aid must avoid entanglement with the church seems to stem more from Williams' fears of powerful government encroaching upon the church than it does from Jefferson's concerns regarding a too-powerful church.[174] Finally, the Court's consistent refusal to interfere in the internal affairs of a church[175] would meet with Williams' approval. Therefore, it appears that the Court does consider both viewpoints and has recognized that the Framers' intent is not always conclusive in resolving religious cases.

2. *The Establishment Clause Test*

The majority opinion in *Everson*[176] proclaims: "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."[177]This is strong language indeed, language which the Court has consistently declined to extend to its broadest implications. Instead, it has balanced the boldness of *Everson* with disclaimers along the lines of Justice Douglas' admonition in *Zorach v. Clauson*:[178]

> The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which, there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly.[179]

Indeed, in the *Everson* case itself, the majority concluded that the establishment clause would permit state funding of transportation to private schools, to the outrage of Justice Jackson who wrote in his famous stinging dissent: "The case which irrestibly comes to mind as the most fitting precedent is that of Julia who, according to Byron's reports, 'whispering "I will ne'er consent"—consented'."[180]

The Supreme Court has in fact consented to a great deal of govern-

173. *See generally*, BLANCHARD, AMERICAN FREEDOM AND CATHOLIC POWER (1949) for a discussion of the potential dangers of state-supported parochial schools.

174. *See* Walz v. Tax Comm'n of New York, 397 U.S. 664 (1970).

175. Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 119 (1952).

176. 330 U.S. 1 (1947).

177. *Id.* at 15.

178. 343 U.S. 306 (1952).

179. *Id.* at 312. In a further passage cited repeatedly with approval by the courts, Douglas argues: "We are a religious people whose institutions presuppose a Supreme Being." *Id.* at 313. This remark cannot be questioned in its historical context, yet it provides a troubling constitutional precedent to uphold state aid to religion. Certainly schools and other institutions could have been said to presuppose the continued existence of segregation in the era preceding Brown v. Bd. of Educ., 347 U.S. 483 (1954); but the historical support for the separate but equal doctrine was insignificant in comparison to the 14th amendment rights of black school children.

180. Everson v. Bd. of Educ., 330 U.S. 1, 19 (1947) (Jackson, J., dissenting).

ment aid to religion, from tax exemptions[181] to financial funding for religious colleges.[182] However, there are certain types of aid, such as tuition payments to parents of children attending parochial schools[183] and state-sponsored classroom prayer,[184] which the Court will not permit. To distinguish between permissible and impermissible government aid, a three part test has been formulated which the Court applies in most establishment cases: (1) Does the government action (or inaction) have a secular purpose? (2) Does it have the primary effect of neither advancing nor inhibiting religion? (3) Will it avoid excessive government entanglement with religion? The challenged action must pass all of three parts of this standard.[185]

Many commentators have expressed dissatisfaction with various inconsistencies which have resulted from application of the tripartite test[186] and have suggested alternatives. The best known is Professor Kurland's "neutrality" theory, which would prohibit the state from using religion as a classification to impose either a benefit or a burden.[187] Kurland's test, which has the appeal of clarity and consistency, would preclude religiously based exemptions from unemployment compensation laws but would permit all types of aid to private schools, so long as the aid was not directed exclusively to religious schools. Professor Choper has proposed a test which focuses on the principle of voluntarism and which would allow aid to religion as long as the aid "does not itself interfere with anyone's religious liberty and is not outweighed by a sufficiently strong government interest."[188] Professor Kurland's test has been explicitly rejected by at

181. Walz v. Tax Comm'n of New York, 397 U.S. 664 (1970).

182. Roemer v. Bd. of Pub. Works of Maryland, 426 U.S. 736 (1976); Hunt v. McNair, 413 U.S. 734 (1973); Tilton v. Richardson, 403 U.S. 672 (1971).

183. Comm. for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973). *Nyquists'* continuing validity may be questionable in light of Mueller v. Allen, 103 S. Ct. 3062 (1983), in which the court upheld a Minnesota law allowing parents of children in public and private schools to deduct educational expenses from their state income tax. However, Justice Rehnquist's majority opinion takes pains to distinguish *Nyquist's* tuition grant, which applied only to parents in private schools, from Minnesota's across-the-board exemption. Rehnquist chose to ignore the fact that parents of children in public schools have virtually no educational expenses. Justice Marshall, dissenting, emphasizes that "the most substantial benefit provided by the statutes is available only to those parents who send their children to schools that charge tuition." *Id.* at 3074.

184. Engel v. Vitale, 370 U.S. 421 (1962).

185. The first two prongs of the test were set out in Abington School Dist. v. Schempp, 374 U.S. 203, 222-27 (1963). Walz v. Tax Comm'n of New York, 397 U.S. 664 (1970) introduced the third prong—entanglement.

186. Professor Choper's comments are typical: "I think it is fair to say that application of the Court's three-pronged test [in the context of school aid cases] has generated ad hoc judgments which are incapable of being reconciled on any principled basis." Choper, *supra* note 13, at 680.

187. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961). Kurland states that "[t]he freedom and separation clauses should be read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses . . . prohibit classification in terms of religion either to confer a benefit or impose a burden." *Id.* at 96. State licensing exemptions directed exclusively to religious groups would clearly fail Professor Kurland's test.

188. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579 (1982). The problem with Professor Choper's approach is that it effectively limits the establishment clause to instances where the freedom of religion clause is violated, thus making the establishment clause a redundancy. Choper's approach would presumably permit a state to adopt an official religion, as long as membership in that religion is voluntary. Professor Choper admitted as much in response to a question during a constitutional law seminar:

least one member of the Supreme Court[189] and it appears unlikely that Professor Choper's test will meet with any more success.

Although Chief Justice Burger's majority opinion in *Lynch v. Donnelly* indicates that he, at least, would prefer to disregard the traditional tripartite test,[190] it remains the standard by which the court has reached results which have resculptured the metaphorical wall between church and state into a "blurred and indistinct variable, depending on all circumstances of a particular relationship."[191] Because regulatory exemptions allow less governmental involvement with religion, it is clear that they pass the entanglement test.[192] This Article, therefore, analyzes the exemptions only in the context of the secular purpose and secular effect tests.

C. *The Secular Purpose Test*

The first prong of the tripartite test—the requirement that the purpose behind legislation which may benefit religion must be neutral—is the weakest. If a law can be viewed as having both a secular purpose and a religious one, the Court will inevitably focus on the secular purpose and conclude that the constitutional requirement is met.[193] This seems to be

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Q: "[under your theory] it might be permissible for the State of Maryland to pass a law that would . . . recognize Methodism as the official religion . . . . In theory, that law doesn't infringe upon anybody's religious liberties, yet it seems a classic establishment clause violation.

Choper: ". . . I think it highly unlikely, given our traditions, that the State of Maryland is going to adopt Methodism as the official religion of the State of Maryland. But if it did and it used no money in the process, and—subject to all the perfectly valid qualifications that Larry Tribe just mentioned about basing constitutional principles on behavioral proof—if there were no plausible or credible demonstration that this is influencing, coercing or compromising someone's religious beliefs, I'd say . . . I might not like this . . . it does not violate the establishment clause.

NATIONAL PRACTICE INSTITUTE 1982-1983: AN EDITED TRANSCRIPT OF THE FIFTH ANNUAL SUPREME COURT REVIEW AND CONSTITUTIONAL LAW SYMPOSIUM 287-8 (1984).

189. In Sherbert v. Verner, 374 U.S. 398, 422 (1963) (Harlan, J., dissenting) Justice Harlan, in his dissent, considered and rejected the Kurland test; yet commentators generally consider the majority opinion as an implied rejection of the test. *E.g.* Giannella, *supra* note 13, at 1382.

190. 52 U.S.L.W. 4317. Burger makes the amazing statement that "we have repeatedly emphasized our unwillingness to be confined to any single test or criteria in this sensitive area. *Id.* at 4320. As Justice Brennan points out in his dissent, the three-pronged test has been disregarded in only two cases. *Id.* at 4325 n.2. Although Burger's assertion is inaccurate as a statement of what the Court has done in the past, it may signal that the test will become less important in the future.

191. Lemon v. Kurtzman, 403 U.S. 602 (1971). Justice Jackson has expressed a similar view, but with much greater disapproval: "The wall which the Court was professing to erect between church and state has become even more warped and twisted than I expected." Zorach v. Clauson, 343 U.S. 306, 306 (1952).

192. For a persuasive argument that this test is useless as an analytic tool, see Laycock, *Toward a General Theory of the Religion Clauses: The Case of Church Labor Relations and Church Autonomy*, 81 COL. L. REV. 1373, 1392 (1981).

193. *See, e.g.*, Mueller v. Allen, 463 U.S. 3062 (1983); Lemon v. Kurtzman, 403 U.S. 602, 613 (1971); McGowan v. Maryland, 336 U.S. 420, 445 (1961). Professor Tribe applauds this result, arguing that it would be unthinkable to outlaw laws against murder, for example, because they coincide with religious doctrine. L. TRIBE, *supra* note 13, at 835. However, a more stringent secular purpose test would not necessarily lead to Tribe's hypothetical results. The purpose of a law against murder is not to aid religion, but to prevent killing. Tribe's argument assumes that the Court would move from its current extreme of finding and seizing upon any conceivable secular purpose to validate a law to the opposite extreme of serving upon any conceivable sectarian purpose to invalidate a law. An alternative and desirable approach would be for the Court to acknowledge both the religious and secular purpose behind a law and to determine which is the

true even if a valid argument can be made that the religious motive for the law was the stronger motive. For example, in *McGowan v. Maryland*,[194] the Court determined that laws requiring businesses to close on Sunday were passed for the secular purpose of insuring a uniform day of rest. In so doing, it virtually dismissed the arguments that (1) the reason why the selected "neutral" uniform day of rest is always Sunday is due to the Christian tradition of Sunday as the holy day of the week and that (2) the laws were also passed to facilitate and encourage church attendance. Justice Warren's majority opinion acknowledged that "[t]here is no dispute that the original laws which deal with Sunday labor were motivated by religious forces."[195] Nevertheless, the Court noted that in more recent times the advocates of a universal day of rest have included secular business groups and concluded that the original religious purpose behind Sunday closing laws is no longer the predominant one.[196]

The secular-purpose test is not totally meaningless, however. If no reasonable purpose for a law's existence other than aid to religion can be imagined, the law will be struck. This was the result in *Epperson v. Arkansas*,[197] the celebrated "Monkey Law" case. The Court scrutinized the Arkansas statute forbidding the teaching of evolution in the public schools and concluded that "[n]o suggestion has been made that Arkansas law may be justified by considerations of state policy other than the religious views of some of its citizens." It is clear that fundamentalist-sectarian conviction was and is the law's reason for existence.[198]

The legislative history of many of the state licensing exemptions for institutions operated by religious groups shows several similarities to the *Epperson* situation. First, as in the case of the Arkansas anti-evolution statutes, the exemptions have been supported by a single religious group—the fundamentalists.[199] In many instances, other religious leaders and denominations have actively opposed the exemptions.[200] Second, the leaders

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stronger. Only when the religious element outweighs the secular element would a law constitute an establishment clause violation.

194. 366 U.S. 420 (1961). *Accord* Discount Records, Inc. v. City of Little Rock, 671 F.2d 1220 (8th Cir. 1982).

195. *Id.* at 431-33.

196. *Id.* at 452.

197. 393 U.S. 97 (1968). *See also* Stone v. Graham, 449 U.S. 39 (1980) (purpose of posting of Ten Commandments found clearly religious).

198. *Id.* at 107-08 (footnotes omitted). A similar statute in Tennessee was the focus of the celebrated Scopes trial. For a fictionalized version of that trial, see J. LAWRENCE AND R. LEE, INHERIT THE WIND (1955).

199. *See supra* note 18. In Forest Hills Early Learning Center v. Lukhard, 540 F.Supp. 1046, 1048-49 (1982), plaintiff day-care centers submitted an affidavit from James Payne, Associate Executive Secretary of the Virginia Council of Churches, who monitored the legislation stating that "The exemption of church day-care centers. . .was supported, almost exclusively, by fundamentalistic religious groups. At no point in any of the precedings was any secular purpose advanced for the exception." In North Carolina, a bill which exempted church-operated private schools was passed in response to "an intense religious lobby" of fundamentalists. Comment, *The State and Sectarian Education: Regulation to Deregulation*, 1980 DUKE L.J. 801, 803 (1980).

200. The Virginia legislation was opposed by the National Council of Churches and by Jewish and Catholic groups. Similarly, the proposed Oklahoma day-care center exemption was opposed by the Catholic church, Baptists, Methodists and Episcopalians. Dr. Lowell Milburn, executive director of the Department of Child Care for the Baptist General Convention of Oklahoma was quoted as saying: "We helped write the [licensing] law. I've never seen anything in the licensing

behind "deregulation" attempts quite openly state that their purpose is to aid religious groups by freeing them from the shackles of the state.

It seems difficult to hypothesize a secular purpose for licensing exemptions; however, a federal court in the Eastern District of Virginia, in *Forest Hills Early Learning Center v. Lukhard*,[201] has managed to do so. In rejecting a challenge to the Virginia day-care center exemption, Judge Warriner concluded that the purpose of the law was to accommodate the free exercise rights of the religiously-affiliated institutions and to prevent litigation over the free exercise concerns expressed by the operators of religiously-affiliated centers.[202] The Fourth Circuit has questioned this conclusion, due to the fact that the District Court expressly declined to consider the merits of the religious liberty issues.[203] The Fourth Circuit concluded that "It does not seem possible—without wholly abdicating the judicial review function—to hold the accommodation a valid secular legislative purpose for the exemption, except on the basis of an independent judicial determination that free exercise rights justifying the accommodation did in fact exist."[204] As a result, the case was remanded so that the religious groups—not a party to the original—could present their arguments.[205] If Judge Warriner's contention is correct,[206] it raises an interesting issue: can the purpose of avoiding freedom-of-religion litigation be properly characterized as secular? Certainly there are secular elements to the goal of avoiding costs of money and time. But to allow any legislation which aids religion to fall under the definitional net of "avoidance of free exercise litigation" would provide a carte blanche validation of all such legislation. For example, the Arkansas "anti-evolution law" could be recharacterized today as a means of avoiding free exercise demands of the "creationists" for a "creation science"[207] course, or a state-sponsored

law that would be an infringement of freedom of religion. If they are exempt, I don't know how there could be standards, or who would inspect them. Who would enforce it? We feel there's a need for some protection for children." Tulsa World, Apr. 16, 1982, at A8, col. 1. *See infra* notes 217-20 for a discussion of the significance of this opposition. In an analogous situation involving a fundamentalist-sponsored bill, the members of almost all "mainstream" Protestant, Jewish, and Catholic denominations were plaintiffs in a lawsuit challenging an Arkansas law requiring teaching of "creationism" in public schools. McLean v. Arkansas Bd. of Educ., 529 F.Supp. 1255 (1982). *See infra* note 207 for further discussion of this case.

201. 540 F. Supp. 1046 (1982); *see also* Forest Hills Early Learning Center v. Lukhard, 480 F.Supp. 636 (E.D. Va. 1979) (discussing plaintiff day-care center' lack of standing); *aff'd* 487 F.Supp. 1378 (E.D. Va. 1980), *vacated*, 642 F.2d 448 (4th Cir. 1981).

202. 540 F.Supp. at 1049-50.

203. Forest Hills Early Learning Center, Inc. v. Lukhard, 728 F.2d 230, 233 (1984).

204. *Id.* at 239-40.

205. *Id.* at 240.

206. The validity of Judge Warriner's conclusion is open to criticism. A memo by the Attorney General of Virginia introduced as evidence in the case concluded that the first amendment arguments of the religious day-care centers were without merit. *Supra*, note 201, at 1049. This would seem to undermine the "litigation avoidance" theory. However, the fact that lawsuits attacking licensing had been filed in other states does indicate that it would not be unreasonable for the legislature to be afraid of litigation if the exemptions were not granted.

207. These demands for courses in creationism are prevalent; however, there is every indication they would fail. In fact, one district court concluded that not only does the first amendment not *require* a course in the subject, but it does not *permit* a law requiring it. McLean v. Arkansas Bd. of Educ., 529 F.Supp. 1255 (E.D. Ark. 1982). This case represents a rare instance where even the secular purpose prong of the establishment test is not met. Judge Overton's opinion contains an extensive discussion of the legislative history of the creationism law and the lobbying efforts of

school prayer could be characterized as avoiding litigation by supporters of school prayers. As a result, the secular-purpose prong, already weak, would become completely meaningless.[208] Therefore, litigation avoidance must in many cases be considered a transparent shield covering the otherwise-impermissible purpose of aiding religion.

On the other hand, if a state has a valid concern over the merits of the free exercise claim and passes a *Sherbert*-type exemption for members of a particular religion to avoid inevitable litigation, it would be troubling to characterize this purpose as sectarian. That characterization would mean that it would fail the first prong of the establishment test and thus would automatically become an establishment violation.

Therefore, if a threat of free-exercise litigation is real and imminent, a state legislature must consider the merits of the free exercise claim balanced against the state's interest *and* the possibility of an establishment clause violation. If it concludes that the free exercise claim prevails, or that both claims seem to have substantial merit,[209] then it may characterize its litigation avoidance purpose as secular. If it concludes that the free exercise claim is weak and the establishment clause concern is serious, then it must not be allowed to characterize its purpose of avoiding litigation as secular, for although litigation may be costly and time-consuming, a state cannot pass unconstitutional laws just to avoid this litigation. Additionally, the Fourth Circuit is correct in determining that a court cannot refuse to consider the religious-liberty issue, yet accept without proof a state's assertion as to the secular purpose of its action.[210]

Since the courts to date have uniformly rejected freedom-of-religion

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the fundamentalists and concluded that "[t]he State failed to produce any evidence which would warrant an inference or conclusion that at any point in the process, anyone considered the legitimate educational value of the Act. It was simply and purely an effort to introduce the biblical version of creation into the public school curricula. The only inference which can be drawn . . . is that the Act was passed with the specific purpose . . . of advancing religion." *Id.* at 1264. The law was also found to violate the secular effect test. For a defense of "creationism," *see* Bird, *Creation-Science and Evolution-Science in Public Schools: A Constitutional Defense Under The First Amendment*, 9 N. KY. L. REV. 159 (1982). For a criticism of Bird's article, see Davidow and Wilson, *Wendell Bird's "Creation-Science" —"Newspeak" in the Attack of Secular Society*, 9 N. KY. L. REV. 207 (1982).

208. A similar concern about an all-encompassing secular-purpose characterization was expressed in Gilfillan v. City of Philadelphia, 637 F.2d 924 (3d Cir. 1980), *cert. denied*, 451 U.S. 987 (1981), in which the court decided that excessive expenses, including erection of an elaborate platform for the saying of Mass in connection with the visit of the Pope, violated the establishment clauses. The city attempted to characterize the purpose of the preparation as prompting tourism, or public relations, but the court warned "[i]f some peripheral public relations benefit constitutes a sufficient secular purpose, then the purpose test is destroyed, for it is hard to imagine a city expenditure that will not look good in someone's eyes." *Id.* at 930.

209. As a general matter, when a strong free exercise claim conflicts with a strong establishment claim, the free exercise claim will prevail. *See* L. TRIBE, *supra* note 13, at 833: "the free exercise principle should be dominant in any conflict with the anti-establishment principle. Such dominance is the natural result of tolerating religion as broadly as possible rather than thwarting at all costs the establishment of religion."

210. Forest Hills Early Learning Center, Inc. v. Lukhard, 728 F.2d 230, 240 (4th Cir. 1984). The court noted: "Because we cannot accept this, we disagree with the district court in its expressed view—critical to its decision—that whether the pre-exemption regulations violated the free exercise clause was not at issue in this case. We think it was inescapably put in issue by the state's deliberate reliance upon the actuality or possibility of free exercise violation as the justifying secular purpose for the legislative exemption." *Id.*

arguments based on generalized opposition to state regulation,[211] it would seem that state legislators have no reason to give these claims serious considerations and, even if threatened with litigation over licensing of church-run groups, must take the establishment clause into account in considering whether to pass licensing laws exempting these groups. If they do not, it is because their purpose is to aid religion; whether this purpose is motivated by an active desire to help religious groups or by a fear of the political pressure from these groups[212] is unimportant.

In summary, the history of most licensing exemptions indicates that they were passed primarily or exclusively for the purpose of aiding religion,[213] and thus they generally should fail the first prong of the establishment test.

D. *The Secular Effect Test*

The requirement that any state action must not have a primary effect of advancing religion is the most significant of the establishment-clause tests. It has been the basis for the Supreme Court's prohibition of certain forms of state funding of private schools[214] and of Bible reading[215] in the public schools. Significantly, state action which has both secular and sectarian effects will not necessarily pass the second prong of the Court's test. Instead, in contrast to its application of the secular-purpose test, the Court will focus on which effect is more significant. If the major effect is beneficial to religion, the action cannot stand.[216] To determine whether state li-

211. *See supra* note 4 and accompanying text.

212. When the governor of Oklahoma vetoed an exemption for church-owned homes and camps, *see supra* note 9, the author of the bill stated: "I hope fundamentalists and Christians everywhere realize we need a governor in there who believes in separation of Church and state." Tulsa World, June 26, 1983, at A5, col. 3.

213. A possible secular purpose, not yet asserted to this author's knowledge, would rely on the proposition that the state is attempting to avoid the costs of licensing and monitoring licensees by exempting a group that does not present a high risk of violation—just as an insurance company may lower car insurance rates for categories of "safer" drivers. However, this argument would only be possible if supported by statistical evidence that church-run institutions are "safer" and the likelihood of the existence of such evidence seems remote.

214. *See, e.g.*, Woman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975); McCullom v. Bd. of Educ., 333 U.S. 203 (1948). The distinction between permissible and impermissible aid to parochial schools is one of the most difficult and fundamentally inconsistent areas of establishment clause litigation, as the *Meek* and *Woman* opinions indicate. For example, why are textbook loans to students in parochial schools permissible, while loaning of instructional materials to the schools is not? The Court has admitted that "there is no litmus paper test," that "we are divided among ourselves," and that the Court has adopted a "course [which] sacrifices clarity and predictablity for flexibility." Committee for Pub. Ed. & Rel. Lib. v. Regan, 333 U.S. 646 (1980). *See generally*, Buchanan, *Governmental Aid to Sectarian Schools: A Study in Corrosive Precedents*, 15 HOUS. L. REV. 783 (1978); Young, *Constitutional Validity of State Aid to Pupils in Church-Related Schools—Internal Tension between the Establishment and Free Exercise Clauses*, 38 OHIO L. J. 783 (1977); Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CAL. L. REV. 260 (1968).

215. Abington School Dist. v. Schemp, 374 U.S. 303 (1963).

216. All aid to private parochial schools can be characterized as having the secular effect of promoting education. Although this effect is acknowledged, it will not be sufficient if the primary effect is to aid the religious aspects of this parochial school. The language in Meek v. Pittinger, 421 U.S. at 366, is typical: "Even though earmarked for secular purposes, when [aid] flows to an institution in which religion is so pervasive . . . state aid has the impermissible primary effect of advancing religion."

censing and other regulatory exemptions for religiously affiliated groups have a primary effect of aiding religion, it is useful to consider two aspects of the exemptions: (1) symbolic aid and (2) economic aid.

1. *Symbolic Aid to Religion*

The concept that the state aid to religion may be symbolic, as opposed to concrete or financial (such as aid providing funds to private religious schools or tax exemptions for churches) has been an important underlying justification for many of the major establishment decisions. Laws requiring state-written prayers[217] or Bible reading in the public schools[218] do not confer a tangible financial gift on a church,[219] but they are nevertheless

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217. Engel v. Vitale, 370 U.S. 421 (1976). The "School Prayer" decision generated an enormous amount of controversy and criticism and remains controversial today. As has been discussed, it resulted in proposed constitutional amendments to reinstate public school prayer, *see supra* note 22. *See generally* Brown, *Quis Custodict-Ipsos Custodes? The School Prayer Case*, 1963 SUP. CT. REV. 1; Kurland, *The Regents' School Prayer Case; Full of Sound and Fury, Signifying . . .*" 1962 SUP. CT. REV. 1.

Perhaps the most scathing legal criticism of Engel was that of Dean Griswold of the Harvard Law School, who argued that "religious toleration " should not "mean religious sterility," noting that this "has been, and is, a Christian country." Griswold, *Absolute is in the Dark—A Discussion of the Approach of the Supreme Court to Constitutional Questions*, 8 UTAH L. REV. 167, 168-76, 1963. This emphasis on the fact that Christianity is the majority religion in the United States must be troubling to a member of a minority religion or to an athiest. Just as the freedom of speech amendment has always been construed to mean protection for minority views, the establishment clause must be construed to protect members of minority religions from having to accept, in the public school context, the religion of the majority. Even more troubling in this respect is Griswold's rather cavalier dismissal of the rights of the non-mainstream Christian child:

> Let us consider the Jewish child, or the Catholic child, or the nonbeliever, or the Congregationalist, or the Quaker. He . . . attends public schools [which] has prescribed the Regent's prayer. When the prayer is recited, if this child or his parents feel that he cannot participate, he may stand or sit . . . while the other children take part in the ceremony. Or he may leave the room. It is said that this is bad, because it sets him apart from the other children. . . . But is this the way it should be looked at? The child of a nonconforming or minority group is, to be sure, different in his beliefs. That is what it means to be a member of a minority. Is it not desirable, and educational, for him to learn and observe this, in the atmosphere of the school—not so much that he is different, as that other children are different from him? And is it not desirable that, at the same time, he experiences and learns the fact that his difference is tolerated and accepted? No compulsion is put upon him. He need not participate. But he, too, has the opportunity to be tolerant. He allows the majority of the group to follow their own tradition, perhaps coming to understand and to respect what they feel is significant to them.

Id. at 177. This argument ignores Justice Black's statement that "[t]he Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether these laws operate directly to coerce non-observing officials or not." Engel v. Vitale, 370 U.S. 421, 430 (1962). Moreover, it shows a complete disregard for the equal protection principles established in Brown v. Bd. of Educ. 347 U.S. 483 (1954) which recognized the psychological impact of "separate but equal" segregation laws upon members of minority races: "[t]he impact is greater when it has the sanction of Law: for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro Group." *Id.* at 494.

Similarly, any public school policy that in effect sanctions Christianity in turn places the minority religious member in an inferior position. If Griswold's logic were applied to racial discrimination, would he ask whether racial discrimination is "bad" because it sets the black child "apart from other children?" Would he state that "the child of a . . . minority race is, to be sure, different in his color . . . . That is what it means to be member of a minority," thus dismissing the child's right to be treated equally by the law? Griswold, *supra* note 217, at 177.

218. Abington School Dist. v. Schempp, 374 U.S. 303 (1963).

219. Justice Douglas' concurrence in Engel v. Vitale, 370 U.S. 421 (1972), argues that the prayer did "finance" religion since prayer was supported by school taxes. This argument may be

unconstitutional. Although arguably religion is benefitted financially by the increased membership such indoctrination may provide,[220] the decisions can best be explained as concern regarding the state vesting its approval on a certain prayer or belief.[221] Justice Black explained, in *Engel v. Vitale*,[222] that "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform the prevailing officially approved religion is plain."[223] Similarly, Justice O'Connor argues that "[e]ndorsement [of religion] sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[224]

Licensing exemptions give symbolic aid to religious institutions by implying that religious groups are better or more trustworthy than non-religious groups and need not conform to regulations passed for the general good and by delegating the state's licensing responsibility to the "self-regulation" of the church-run institutions. An analogous situation occured in *Larkin v. Grendel's Den*[225] in which the Court invalidated a Massachusetts zoning law giving churches the authority to object to liquor licenses for nearby establishments. The state argued this regulation had only a "remote and incidental" effect on religion. This argument might well have been considered valid if the zoning law was considered only in terms of financial effect. Justice Burger emphasized instead that "the mere appearance of a joint legislative authority provided a significant *symbolic benefit* to religion in the minds of some by reason of the power conferred" and that "[t]he framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions."[226]

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logically correct, but the one minute of daily classroom time represents such a small percentage of public funds as to be minimal.

220. Of course, a counter-argument could be made that children will become so bored by a forced diet of Bible-reading that they will "drop out" of their religion.

221. Professor Tribe believes that "the very symbolism of conspicious governmental aid to identifiably religious enterprise is regarded as an independent evil." L. TRIBE, *supra* note 13, at 868. Singularly, Professor Greenawalt notes that "[A] preferential benefit to members of a certain denomination may provide both a tangible incentive and an apparent stamp of approval that encourages membership in the denomination." Greenawalt, *supra* note 41.

222. 370 U.S. 421 (1972).

223. *Id.* at 431. This concern regarding symbolic support is the best explanation of the seemingly contradictory results in Zorach v. Clauson, 343 U.S. 306 (1952) which upheld a "released time" program allowing a child to attend religious services during the school day and McCullon v. Bd. of Educ., 333 U.S. 203 (1948) which struck a program allowing religious instruction in the public schools. The practical effect of both programs was identical: children attended religious services during school hours, but the symbolic effect, according to the *Zorach* majority, was quite different. The conducting of religious activities in state-supported classrooms during the school hours was viewed as positive symbolic approval of religion, the release of children for outside services as neutral.

224. Donnelly v. Lynch, 52 U.S.L.W. 4317, 4322 (1984). Justice O'Connor also states that courts must evaluate both the objective and subjective nature of the governmental action and its effect on members of the community to determine whether it constitutes forbidden endorsement or disapproval of religion. *Id.* at 4323.

225. 459 U.S. 116 (1982).

226. *Id.* at 125-27 (emphasis added).

The zoning laws in *Grendel's Den* allowed the churches to use the state's machinery for their own purposes. Since this is not the mechanism utilized by most licensing exemptions, *Grendel's Den* does not provide absolute authority for the proposition that licensing exemptions would not pass the secular effect test. However, the *Grendel's Den* majority emphasis on the symbolic effects of a regulation which Justice Rehnquist characterized in dissent as "a quite sensible Massachusetts liquor zoning law,"[227] does seem to constitute judicial recognition of the concept that the effect of a law may be sectarian if it unreasonably subjugates the state's authority to the church.[228] States which exempt church-run institutions from their licensing or other regulatory functions are also creating a symbolic joint system of authority—the church has absolute authority over all its own institutions, the government over all others. This is the type of symbolic support of religion the establishment clause should not permit.

An additional issue regarding symbolic aid stems from the fact that licensing exemptions in many states were supported exclusively by fundamentalists and opposed by other groups.[229] Although the exemptions on their face benefit all religions, if only the fundamentalists desire and will take advantage of them, then arguably they benefit only one religion. The "clearest command of the establishment clause" is that the state cannot play favorites among religions,[230] and if laws which benefit primarily fundamentalists are examples of "religious gerrymandering"[231] then they cannot stand. The Fourth Circuit recognized this problem in *Forest Hills Early Learning Center v. Lukhard*, noting that "a significant number of the facially exempted centers" have approved regulation. The Fourth Circuit went on to argue that "[t]he awkward—if not cruel—Hobson's choice thereby imposed upon sectarian sponsors forced to choose between relinquishment of an unsought but gratuitously conferred compliance advantages over their nonsectarian counterparts and the maintenance of religious and constitutional principles at odds with those of other sectarian counterparts may well involve still another basis for constitutional challenge."[232]

On the other hand, the laws generally apply across-the-board to all religions,[233] and it may well be that other religious groups, even those who

227. *Id.* at 128 (Rehnquist, J., dissenting).

228. For an argument that North Carolina's law exempting private schools from state accreditation requirements violates the establishment clause by "ceding state authority," *see* Comment, *The State and Sectarian Education: Regulation to Deregulation*, 1980 DUKE L.J. 801, 840-42.

229. *See supra* note 200.

230. Larsen v. Valente, 456 U.S. 228, 230 (1982). The Supreme Court struck a Minnesota law imposing registration and reporting requirements only upon religious groups which solicited more than 50% of their funds from nonmembers. The law, which was clearly designed to discriminate against members of the Unification Church and favored "mainstream" religions, was found to violate all three prongs of the establishment tests.

231. Gillette v. United States, 401 U.S. 437, 452 (1971).

232. Forest Hills Early Learning Center v. Lukhard, 728 F.2d 230, 244 n.15 (4th Cir. 1984).

233. The Missouri statutory exemption, *supra* note 6, applies only to "any well-known religious order." If this provision is interpreted to mean that less traditional religions such as the Unification Church (commonly known as the Moonies) cannot qualify, then it will almost certainly be found to be an unconstitutional establishment of religion. *See* Larsen v. Valente, 456 U.S. 228 (1982) *supra* note 230. IND. CODE. ANN. § 12-2-12.7 (Supp. 1983) exempts all groups

initially opposed them, will benefit from the freedom of noncompliance with licensing requirements. Therefore, unless solid factual evidence can be presented indicating that favoritism to fundamentalists was the law's purpose[234] or is the law's effect, this argument will probably not succeed.[235]

There is a consistent reminder in all religion cases that the Constitution prohibits hostility to religion[236] and it would seem that the concept of prohibition of symbolic aid to religion might require such prohibited hostility. This is not the case; the Constitution requires neutrality towards religion and neutrality requires even-handed treatment among religious and nonreligious groups.[237] Obviously, a state could not pass a law regulating only religiously-affiliated institutions, but the concept of neutrality requires that it must not exempt these institutions from its otherwise uniform regulations. The majority of exemptions discussed herein single out religious institutions as the only major group exempted and do not apply to other non-profit organizations.[238] In Virginia, for example, exempt church-run day-care centers in 1978 constituted 30% of all non-profit centers; the remaining 70% were not exempt.[239]

The fact that most state regulatory exemptions apply primarily to religious groups significantly distinguishes these exemptions from the real

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classified by the I.R.S. as religious, and although the statute may be defective in other respects, it would seem to avoid the favoritism stigma. *See supra* note 8.

234. This may be a valid possibility, given the legislative history of many of the exemptions, *see supra* notes 199-200 and accompanying text.

235. Repeated attempts have been made to characterize aid to private schools as establishing the religion of Catholicism, since the vast majority of parochial schools are Catholic, but the Court has never accepted this argument. See Justice Jackson's dissent in Everson v. Allen, 330 U.S. 1, 21-28 (Jackson, J., dissenting) for a discussion of this problem. On the other hand, the Court's denial of aid to parochial schools has been characterized as disguised anti-Catholicism. *See supra* note 131.

236. This standard was articulated in the first major establishment case, Everson v. Bd. of Educ., 330 U.S. 1 (1941) by Justice Black: "[t]he Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, as it is to favor them." *Id.* at 18. This standard has been followed with approval in succeeding cases. *See, e.g.* Walz v. Tax Comm'n, 397 U.S. 664 (1970).

237. The "neutrality" toward religion discussed in Supreme Court cases is to be distinguished from Professor Kurland's "strict neutrality" theory, Kurland, *supra* note 187, which would not allow religion as a classification the state can use to confer a benefit or impose a burden.

238. Most states exempt parents caring for their own or other children from regulation, but no other groups are exempt. Florida specifically exempts family day-care centers, but no other groups except for facilities which are integral parts of church parochial schools conducting classes if they are a "member of an organization which requires compliance with its standard, for health, safety and sanitation." FLA. STAT. ANN § 402.316 (1974). Missouri exempts more groups including government-operated institutions and "any graded boarding school, nursery school and summer camp, hospital, sanitarium or home which is conducted in good faith, primarily to provide education, recreation, medical treatments or nursing or convalescent care for children." MO. ANN. STAT. §§ 210, 211 (Vernon 1951). If this can be read to mean all non-profit groups, Missouri's exemption of "any well-known religious order" might pass constitutional muster, but it probably does not cover all non-graded centers for children below nursery school age. Indiana exempts only day nurseries operated by tax-exempt religious organizations, IND. CODE ANN. § 12-3-2-12.7 (1982 Cum. Supp.). Virginia exempts exclusively "religiously-affiliated" institutions. VA. CODE § 6A 193.6 (1959).

239. The court in Forest Hills Early Learning Center v. Lukhard, 728 F.2d 230, 241-42 (4th Cir. 1984), recognized that the law demonstrated "palpable non-neutrality" in respect of religion and expressly distinguished *Walz* in the manner discussed in this Article.

property tax exemptions for churches upheld in *Walz v. Tax Commission of New York*.[240] The regulation in *Walz* did not "single out one particular church or religious group as such; rather it has granted exemption to all houses of religious worship within a *broad class* of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical and patriotic groups."[241] Thus, it represented a neutral experience of the state's power to grant exemptions. The opinion repeatedly emphasized that religious groups were not the sole beneficiaries of the exemption, leading Professor Katz to conclude that "[i]t was apparently agreed that a tax exemption limited to churches would violate the Establishment Clause."[242]

Professor Tribe also equates an "inquiry into the *breadth* of the class benefited" with symbolic aid to religion and concludes: "[h]owever separated from religion the benefited aspect of an enterprise might be, the government's policy is unconstitutional unless religious enterprises are benefited no more than, and only as part of, some broader category . . . . Again, what turns on the breadth of the benefited class is not dollars—the amount of aid plainly does not depend on how many others also receive it—but symbols: the broader the class benefited, the less likely it is that the program will be perceived as aid to religion."[243] Since the state regulatory exemptions do not benefit a broad category, it appears likely that they cannot pass the secular effect test.

Additionally, in terms of symbolic support for religion, there is an important difference between a decision not to tax and a decision not to regulate. The primary purpose of taxation is to raise money for the state. Therefore, decisions as to the desirability of imposing heavier tax burdens on a particular group or of not imposing them at all are often based on policy concerns which do not necessarily confer a governmental stamp of approval for that group. Thus, a decision not to tax oil-well producers does not necessarily reflect a judgment that oil-well producers are fine human beings who deserve a benefit, but rather a judgment that such exemptions are in the interest of the economy. Similarly, a decision not to tax churches can be explained as a policy judgment that the costs of taxation would outweigh the added revenue.

In contrast, the decision to pass licensing regulations is generally based on a perceived need for regulation to protect the public or to implement an important government policy. Exemptions from licensing would seem justifiable only if it can be determined that one group is so trustworthy and capable of self-regulation that it does not need to be controlled.

240. 397 U.S. 664 (1969).

241. *Id.* at 673.

242. Katz, *Radiations from Church Tax Exemptions*, 1970 SUP. CT. REV. 93.

243. L. TRIBE, *supra* note 13, at 845 (emphasis added). Professor Giannella has also suggested that exemptions from economic regulation which confer a benefit would be invalid. "[E]xemptions under these circumstances would not simply relieve the religious practitioner from a burden on the free exercise of religion, but would also turn the regulatory scheme into a device for advancing a particular religion. . . . Thus, the general rule appears to be that religious exemptions from economic regulations are denied where uniformity of treatment goes to the essence of the regulatory scheme." Giannella, *supra* note 13, at 1399.

The decision not to license church-run day-care centers or hospitals implies that religious groups by their very nature are more likely to be concerned with the welfare of children or patients under their care than are other individuals or groups operating such institutions. This may or may not be true;[244] nevertheless, it represents a state decision to confer a "halo" on these institutions that the establishment clause cannot permit.

It can be argued that the state does routinely lend symbolic support to religion in many ways—state-paid chaplains lead prayers in state legislatures,[245] the Pledge of Allegiance refers to the "One Nation under God," even our dollar bills contain the words "In God We Trust," and the courts have explicitly condoned these practices.[246] These examples seem difficult to reconcile with a non-symbolic-aid theory, but they differ significantly from state "deregulation" of religious-operated institutions in two significant ways.

First, the use of the word "God" and other common references to religious symbols is so prevalent in public places that they may have taken on a common-place secular significance. In *Donnelly v. Lynch*,[247] the "Nativity Scene" case, the Supreme Court concluded that a nativity creche "depicts the historical origins of a traditional event long recognized as a national holiday" and thus the city's asserted secular purpose of celebrating Christmas was considered legitimate.[248] Similarly, the Ninth Circuit Court of Appeals had no difficulty upholding the use of "In God We Trust" on our coins and currency, stating that the motto is "patriotic and ceremonial" and "has no theological or ritualistic impact."[249] In contrast, regulations which specifically refer to "religious institutions" cannot possibly be characterized as having a secular significance. The average person may very well not perceive words which he does not often read on a dollar bill as aid to religion, but he would almost certainly perceive a law explicitly benefitting a religious institution as such aid.

Second, and more significantly, these examples represent practices which have substantial historical precedent—many of them date from the time of the founding of the country. Thus, it is possible for the courts'

244. Critics of certain fundamentalist institutions which take care of children have charged that physical abuse is common in these institutions. For example, a Dallas newspaper reported an incident in which a seventeen-year-old girl attending the fundamentalist St. Amant Baptist Church's boarding school was admitted to a hospital with "marked bruising and evidence of physical restraints to an excessive extent." Dallas Morning News, Aug. 14, 1983, 6AA, col. 2.

245. See discussion of Marsh v. Chambers, 103 S. Ct. 3330 (1983), *infra* notes 250-255 and accompanying text.

246. In Zorach v. Clauson, 343 U.S. 306, 313 (1952), Justice Douglas listed a number of religious practices which he assumed were constitutional, including legislative prayers, proclamations making Thanksgiving a holiday, the courtroom oath "So help me God," and the opening of the Supreme Court with the words "God save the United States and this Honorable Court."

247. 52 U.S.L.W. 4317 (1984).

248. *Id.* at 4320. *See also* Justice O'Connor's concurrence for a discussion of the arguably secular nature of the creche. *Id.* at 4324.

249. Aronow v. United States, 432 F.2d 242, 243 (9th Cir. 1970). *See also* Johnson Bd. of County Comm'rs of Bernalillo County, 528 F.Supp. 919, 924 (D.C. N.M. 1981) (characterizing a county seal with cross and Spanish religious motto as part of the rich cultural heritage of the county); Protestants and Others United for Separation of Church and State v. O'Brien, 272 F.Supp. 712 (D.D.D.C. 1967) (approving issuance of a postage stamp with a picture of the Madonna).

condonation of them to be construed as simply a reluctance to change practices which have become a part of our everyday life and a recognition that to remove "In God We Trust" from our money, for example, would imply an impermissible hostility toward religion.

This emphasis on history is the most satisfactory way to explain the result in *Marsh v. Chambers*,[250] the "Legislative Chaplain" case, which seems to fly in the face of the Court's decisions in the school prayer[251] and Bible reading cases.[252] In *Marsh*, the Court upheld Nebraska's payment of state funds to a chaplain who opened the state legislature with a prayer.[253] Justice Burger's majority opinion completely ignored the traditional three-prong test, characterizing legislative prayers as "unique" due to their historical element.[254] Since the Continental Congress in 1774 had a paid chaplain and prayers in Congress have been an unbroken tradition since its inception, he concluded that the Framers of the religion clauses clearly intended for such prayers to be outside the scope of the establishment clause, that prayers had become a "part of the fabric of our society," and that under the circumstances, the establishment clause was not violated by Nebraska's practice.[255] Similarly, in *Lynch v. Donnelly*, the Court held that a city-sponsored nativity scene was permissible, emphasizing the historical precedent for displays celebrating the holiday of Christmas.[256] This emphasis on history occurs in *Walz v. Tax Commission of New York* in which the Court emphasized historical evidence that Congress viewed the Constitution as authorizing real property exemptions[257] and noted that "[r]arely if ever has this Court considered the constitutionality of a practice for which the historical support is so overwhelming."[258]

Obviously, no such historical support exists for most state regulatory exemptions. Most licensing laws are recent products of the complexity of twentieth-century society. Exemptions from these laws are even more recent. They have not acquired the "historical legitimacy"[259] which might validate them,[260] and the secular effect of their symbolic support for religion fails the second prong of the establishment test.

2. *Financial Benefits of Licensing Exemptions*

Although the actual cost of compliance or non-compliance with state

250. 103 S. Ct. 3330 (1983).
251. Engel v. Vitale, 370 U.S. 421 (1982).
252. Abington School Dist. v. Schempp, 374 U.S. 303 (1963).
253. 103 S. Ct. 3330, 3336 (1983). Marsh can also be explained as a case verging on a "political question."
254. *Id.*
255. *Id.* at 3336-37.
256. 52 U.S.L.W. 4317 (1984).
257. 397 U.S. 664, 667 (1970).
258. *Id.* at 681 (Brennan, J., concurring).
259. Hall v. Bradshaw, 630 F.2d 1018, 1023 (4th Cir. 1980) (holding that the use of a motorists prayer on a state map published by the State Department of Transportation violates the Establishment Clause and noting that there is no historical precedent for the prayer on the map and that it retains its religious character), *cert. denied*, 450 U.S. 965 (1980).
260. Despite the heavy emphasis on history in Marsh v. Chambers, 103 S. Ct. 3330 (1983), the fact that a certain practice has been in existence for a long period of time will not always assure its constitutionality as the school prayer and Bible reading cases indicate.

licensing cannot be determined in a categorical manner, it seems evident that deregulation usually results in lower costs for deregulated institutions. The challengers of the Virginia day-care exemption are not constitutional purists; they are non-exempt center operators who are concerned about the competitive advantage of the exemption.[261]

Non-exempt centers must continue to comply with regulations requiring specific ratios of indoor and outdoor play space per child which limit the number of children a given center can accommodate. Exempt centers, therefore, can accommodate more children and thus charge lower fees per child. Licensing regulations also affect teacher-child ratios and food preparation, two other areas in which noncompliance could result in a significant cutting of operating costs, and similar benefits can easily be hypothesized.[262] In terms of financial aid, the primary effect of the exemption may impermissibly benefit religious institutions.

However, this theory could almost certainly be countered by law and economics theorists who might argue, among other things, that non-fundamentalist parents of children enrolled in exempt day-care centers may affirmatively desire licensing and thus will remove their children from the schools. It will be difficult to assume that the financial aid of "deregulation" constitutes a secular-effect violation until it can be determined by a study of the growth and financial condition of the regulated industries versus non-regulated industries that such aid does in fact exist. This was the approach taken by federal districts Judge Warriner in the "Virginia Day-Care Center" case:[263] he concluded that "The State provides no funds to church-run day-care centers; any economic benefit is remote [and] speculative . . . ."[264] Therefore, unless individual plaintiffs can prove by actual

261. If they were constitutional purists, they might very well not have standing. Judge Warriner's original decision in *Forest Hills Learning Center* dismissed plaintiffs for lack of standing, 480 F.Supp. 636 (E.D. Va. 1980); 487 F.Supp. 1378 (E.D. Va. 1980); *vacated*, 642 F.2d 448 (4th Cir. 1981). Although Warriner was almost certainly incorrect, Valley Forge v. Americans United for Separation of Church and State, 454 U.S. 464 (1982) indicates a cutback in the Court's analysis of standing in religion cases. *See generally*, Marshall and Flood, *Establishment Clause Standing: The Not Very Revolutionary Decision at Valley Forge*, 11 HOF. L. REV. 63 (1982).

262. The Fourth Circuit Court of Appeals acknowledged that the difference in standards gave the non-exempt centers a substantial advantage. Forest Hills Early Learning Center v. Lukhard, 728 F.2d 230, 241 (1984). In Forest Hills Early Learning Center v. Lukhard, 540 F.Supp. 1046 (E.D. Va. 1982), plaintiffs revised complaint (on file at the ARIZONA LAW REVIEW) alleged that:

> 30. The costs of complying with the requirements imposed on exempt centers by Section 196.3 is significantly less than the cost of complying with the requirements imposed on nonexempt centers by the licensing standards . . . .
>
> 31. Exempt centers now in existence, are in fact, not meeting the standards required for non-exempt centers. One such center was recently opened within a few blocks of a center operated by a plaintiff, and it is able to charge and does charge lower rates than the plaintiff's center. Plaintiff cannot lower its rates to meet the rates of the exempt center because of its higher costs of operation resulting from its compliance with the minimum licensing standards.
>
> . . . .
>
> 33. The opening of exempt centers has increased and will continue to increase the supply of child care spaces in particular neighborhoods.

263. Forest Hills Early Learning Center v. Lukhard, 540 F.Supp. 1046 (E.D. Va. 1982), *remanded*, 728 F.2d 230 (4th Cir. 1984). The Fourth Circuit Court of Appeals in dicta disagreed with Judge Warriner's conclusion. *Id.* at 241.

264. *Forest Hills*, 540 F.Supp. at 1050. Judge Warriner's earlier opinion, 408 F.Supp. 636 (E.D. Va. 1979), 487 F.Supp. 1378 (E.D. Va. 1980), *vacated*, 642 F.2d 448 (4th Cir. 1981), dis-

evidence that exemptions offer financial benefits which have the secular effect of aiding religion, such a general argument should fail as being too hypothetical.

CONCLUSION

"Something there is that does not love a wall."[265]

Courts have generally rejected arguments that the free-exercise clause mandates state regulatory exemptions for religiously affiliated groups when these groups have asserted a general opposition to regulation. Although this Article argues that the decisions may be too perfunctory in their evaluation of the conflict between regulation and the central belief that the church must not submit to the state's authority, it concludes that the freedom of religion concerns must not prevail over the compelling state interests in health and safety, child welfare, and uniform licensing. In part II, this Article concludes that general regulatory exemptions for religious-affiliated institutions have the secular purpose and secular effect of providing symbolic aid[266] to religion and are prohibited by the establishment clause. These laws which appear, at first glance, to strengthen the wall between church and state by reducing government involvement with religion are actually based on a proposition which undermines basic separationist principles. By allowing religious groups to be superior to state laws which do not conflict with specific religious beliefs, the state has in effect conceded the superiority of the church to the state; the church has become an institution "more equal" than others. The exemptions represent subtle chinks in the wall between church and state, created by those who would destroy the wall entirely.[267] For fundamentalists who argue that "the Constitution guarantees freedom of religion, not freedom from religion,"[268]

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cussed his lack of benefit theory in greater detail. He additionally editorializes that plaintiffs' theory (that pressures from the marketplace will lead to a relaxation of standards in exempt centers) is "the antithesis of the theory of competition. The history of competitive capitalism in this country and wherever else it has been allowed to pour forth its beneficence has disapproved plaintiffs' statist expectations." 480 F.Supp. 636, 637 (1979).

265. FROST, COMPLETE POEMS OF ROBERT FROST 47 (17th ed. 1984).

266. Additionally, when the regulations have been in effect for several years, it may be possible to prove that they provide direct financial aid to the institution. *See supra* notes 263-64 and accompanying text.

267. *See supra* note 22 and accompanying text for discussion of the attempts by fundamentalists to put "God back into government" by school prayer amendments. As one commentator notes: "The current resurgence of religious fervor belies Justice Powell's confident assertion that religious extremism no longer poses any threat to our democratic institutions. Recent alliances between fundamentalist religious factions and right wing political groups may be interpreted as just a threat. The danger does not lie in the participation of these factions in the political process, but rather in their use of the political process to further their own group's beliefs and practices." Note, *Rebuilding the Wall: The Case for a Return to the Strict Interpretation of the Establishment Clause*, 81 COL. L. REV. 1463, 1475 (1981).

268. This popular slogan represents the fundamentalist rejection of the values underlying separation of church and state. The repeated statement by religious leaders that this is a Christian country founded by Christians, *see* Griswold, *supra* note 217, and that therefore laws protecting Christian beliefs are acceptable, represents a similar blindness to the right of minority religious groups and the rights of nonbelievers. The establishment clause does protect "freedom from religion" for those who wish not to conform with traditional religious beliefs. It means that athiest, Unitarian and Jewish children do not have to sit in a public school classroom where the teacher reads the New Testament of the Bible and tells pupils that everyone who does not believe in

Jefferson's metaphorical wall resembles more closely the wall separating the mythical lovers, Pyramis and Thisby.[269] The goals of the Pyramesque legislators, who desire powerful fundamentalist support, and of the Thisbish church leaders, who propose to use the strength of the state to implement their religious beliefs, are well served by the chinks which allow their mutual attraction to grow stronger. This attraction, if unchecked, may eventually (as strong attractions often do) lead to marriage, and marriage between church and state is the very evil the Framers of the Constitution intended to prevent.

The dangers of special privileges for religious groups may initially seem somewhat trivial and unimportant. But the history of organized religion indicates that the threat of erosion of anti-establishment principles and the subsequent growth of an all-powerful church is real.[270] It is important to remember the wisdom of Justice Clark's warning:

> The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, "it is proper to take alarm at the first experiment on our liberties."[271]

Christ will go to hell. If the fundamentalists become stronger, "establishment" of their religion will mean that the "freedom from religion" rights of non-fundamentalists will be destroyed.

269. The story of Pyramus and Thisby was told in OVID, METAMORPHOSES, Book IV (Eng. trans. 1567) and immortalized by Shakespeare in "A Midsummer Nights Dream":

> WALL. In this same interlude it doth befall That I, one Snout by name, present a wall, And such a wall, as I would have you think, That had in it a crannied hole or chink, Through which the lovers, Pyramus and Thisby, Did whisper often very secretly, This loam, this roughcast, and this stone doth show That I am that same wall. The truth is so. And this the cranny is, right and sinister, Through which the fearful lovers are to whisper.

W. SHAKESPEARE, COMPLETE WORKS 537 (1952 ed.).

270. As Justice Black acknowledged in Engel v. Vitale, 370 U.S. 421, 429 (1962):

> By the time of the adoption of the Constitution, our history shows that there was a widespread awareness among many Americans of the dangers of a union of Church and State. These people knew, some of them from bitter personal experience, that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services.

Many commentators argue that establishment clause concerns are not serious today and that, therefore, the free exercise clause is of much greater significance. *See, e.g.*, L. TRIBE, *supra* note 13, Choper, *supra* note 13, Giannella, *supra* note 13. These arguments seem to ignore the threat posed by religious groups who clearly desire increased political power and who openly advocate removal of the establishment values. For an excellent argument that establishment clause values must remain strong, see Note, *Rebuilding the Wall: The Case for a Return to the Strict Interpretation of the Establishment Clause*, 81 COL. L. REV. 1463 (1981).

271. Abington School Dist. v. Schemp, 374 U.S. 203, 225 (1963) (Clark, J., dissenting).