1993

1993 Survey of Trends and Developments on Religious Liberty in the Courts

Carl H. Esbeck

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The purpose of this survey is to note important case law developments in the state and lower federal courts concerning religious liberty. Purposely omitted are the widely reported United States Supreme Court opinions, as well as cases where the Supreme Court has granted review during the 1993-94 term. The focus here is on significant or interesting cases that may otherwise escape broad attention. Only the facts and rationale of each decision is summarized. No editorial comment on the merits of these cases is intended.

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I. Labor Practices & Discrimination Claims

Welsh v Boy Scouts of America, 993 F2d 1267 (7th Cir 1993), *cert denied*, 114 S Ct 602 (1993)

A scouting troop declined to admit to membership a boy who refused to affirm a belief in God as required by the constitution and bylaws of the Boy Scouts of America (BSA). The troop also declined to allow the boy's father to become an adult partner because the father refused to affirm a belief in God. Suit was brought under Title II of the Civil Rights Act of 1964, 42 U.S.C. 2000a *et seq.* The Seventh Circuit held that BSA is not a public accommodation for purposes of Title II, and that even if it was BSA would fall within the private club exception.

In holding that BSA did not fit within the classification of a public accommodation, the court of appeals found that Congress only intended to include organizations which maintained a close relationship to a structural facility. Title II regulates facilities and not groups. The entity must "serve the public" and be classified as an "establishment," "place," or "facility." Membership organizations are not covered by this statute. BSA operates in small groups that meet in homes and thus cannot be governed as a facility. The administrative office buildings of BSA do not transform this group into a public accommodation. BSA does not even need its own facility in which to operate and thus cannot be declared a place of public accommodation.

A private home cannot be treated as a public accommodation. Owners of a home are free to refuse entry into their home of anyone they wish. Title II specifically states that a private home does not become a public accommodation because the owner opens his/her home to the public. It is irrelevant whether a scout troop meets in a private home, a church, or in the wilderness. Congress did not intend to include membership organizations without a close connection to a certain "facility," "place," or "establishment."

Although construction of the term "public accommodation" was sufficient to dismiss the case, the court chose to respond to the dissent by Judge Cummings. Title II's private club exception requires that a club have a selective membership. Although the scouts admit a large number of boys from diverse backgrounds, there are still requirements for membership set forth in the constitution and bylaws. The scouting oath, which has been in existence since 1911, sets forth the purpose of the group and the basis on

which BSA selects its members. To alter the oath would change the purpose of scouting, which, *inter alia*, is to advance a belief in God. Because BSA has been around for a long time, has a selective membership, was a nonprofit organization, and has not changed its purpose over time, it falls within the private club exception.

Judge Cummings dissented believing the majority's reasoning was an unnecessarily narrow construction of Title II. He did state, however, that the majority arguably reached the right result. Judge Cummings' problem with the reasoning was that it would allow other groups such as Little League or the Jaycees to exclude African-Americans, Jews, Catholics, or whomever, free from the constraints of Title II. Title II does restrict discrimination by membership organizations. The dissent would not use the "place" analysis, but would focus on the nature of the group. The dissent also stated that an organization of five-million members cannot be considered a private club. Thus, BSA would not fall within that exception. The dissent would exempt BSA from the coverage of Title II based on First Amendment freedom of association.

Hart v Cult Awareness Network, 16 Cal Rptr 2d 705 (Cal App 1993)

A California court of appeals denied an injunction sought by Hart, a member of the Church of Scientology, which would have enjoined the Cult Awareness Network (CAN) from refusing Hart membership in the group. CAN is a nonprofit corporation designed to inform the public of the destructive activities of various cults and to offer assistance to those seeking to escape from the influence of a cult. The court held that CAN is not a business establishment. Thus, excluding persons from Scientology and other minority religious organizations did not violate the state's civil rights act.

CAN operates on both a national, CAN-National, and a local level. The local organization involved in this suit was the Los Angeles Chapter, CAN-LA. CAN-LA is completely a volunteer organization and has no paid staff. It sells no products and only occasionally receives small amounts of money as speaking honoraria. The group does not lobby for legislation at either the state or the national level.

Hart was a member of Scientology who sought to become a member of CAN-LA in order to convince them that Scientology was not a cult. CAN-National is open to anyone and would extend membership to Hart, but CAN-LA refused him membership because of his membership in Scientology which it classifies as a cult.

To succeed on a claim under the Unruh Civil Rights Act, Hart had to convince the court that CAN-LA was a "business establishment." The court stated that the term "business establishment" was to be construed broadly and included nonprofit organizations. However, the act did not cover purely private organizations and could not infringe upon a group's constitutional right to freedom of association.

The court concluded that the close personal relationships among the members of CAN-LA warranted protection for the freedom of private association. The court found persuasive the selective membership criteria set forth in the group's bylaws which only allowed persons to join CAN-LA who were former members of a cult, family members of those currently or formerly involved in a cult, and those who are committed to ending the destructive influences of cults. One of the requirements of membership is that the person sign a statement declaring that he/she is no longer a member of a destructive group and will not do anything to hinder the objectives of CAN-National or CAN-LA.

Hart was unable to show the existence of a compelling governmental interest to overcome this constitutional right. For the state to order CAN-LA to accept members it does not want would be sponsorship of one group's religious beliefs over those of another. The Establishment Clause prohibits this. The California Constitution, which provides more religious freedom than the U.S. Constitution, also prohibits the state from showing a preference for one religion over another and from engaging in any religious discrimination that would hinder the free exercise of one's religion.

***Murphy v Derwinski*, 990 F2d 540 (10th Cir 1993)**

Murphy, a female, applied for a position as a Roman Catholic chaplain at a veteran's hospital. The Veteran's Administration (VA) required applicants to be an ordained member of the clergy and to have an ecclesiastical endorsement. Murphy could not be ordained by the Catholic Church because she is a woman, although it is possible for a woman to receive an ecclesiastical endorsement.

When she was rejected for the position, Murphy claimed sex discrimination under Title VII. The Tenth Circuit granted summary judgment in favor of Murphy. Requiring applicants to be ordained clergy was a pretext for sex discrimination. The possession of an ecclesiastical endorsement should be sufficient.

Murphy did not claim that the ordination requirement was intentionally discriminatory, but rather that it had a disparate impact on women. Under a disparate impact theory, the plaintiff must first show that "a specific identifiable employment practice or policy caused a significant disparate impact on a protected group." *Ortega v. Safeway Stores, Inc.*, 943 F2d 1230, 1242 (10th Cir 1991). The defendant then has the burden of showing that there is a sufficient business justification for the practice or policy. *Id* at 1243. If this can be done, the plaintiff must show that the business justification is merely a pretext.

Murphy was able to show that the policy requiring ordination had a disparate impact on women. The VA claimed that it had a business justification because only ordained clergy can perform the entire spectrum of duties of a minister; for example, only priests may perform the Eucharist, hear confession, and give the Last Rites. When a nonordained chaplain is the only one at the hospital, patients, especially dying patients, will be unable to receive the full range of services. The court of appeals ruled that if the church is willing to endorse nonclergy as chaplains, then the VA should be willing to accept them as well. The court found that it is not necessary to be a priest to fulfill the requirements of being a chaplain. Since the VA was being more selective than churches in the requirements for serving as a chaplain, the business justification was merely a pretext for sex discrimination. The VA was ordered to change its policy.

Rasmussen v Glass, 498 NW2d 508 (Minn App 1993)

The Minnesota Court of Appeals held that a restaurant owner who refused to deliver food to a medical facility performing abortions did not discriminate based on creed. The court struck down a city ordinance under which the owner was fined as violative of the right of conscience guaranteed by the Minnesota Constitution.

Glass owned the Beach Club restaurant, which served its customers both on the premises and by delivery. An employee of Midwest Health Center for Women, a nonprofit clinic performing

abortions, telephoned the Beach Club and attempted to place an order for delivery. The employee was told that the Beach Club would not deliver food to Midwest. The Midwest employee reported this incident to Rasmussen, Midwest's director, who called Glass to complain. Glass told Rasmussen that he believed that abortion was murder and would not deliver to Midwest.

Rasmussen filed a complaint with the Minneapolis Department of Human Rights (MDHR) which conducted an investigation. Glass told MDHR that he refused to deliver food to Midwest on "the grounds of moral conscience." Glass assured MDHR that he would not discriminate against customers based on their personal moral beliefs concerning abortion, and that this was a "business to business relationship." After a hearing, Glass was charged with discrimination based on creed and fined $500.

The court of appeals held that the word "creed" in the ordinance referred only to religion and religious beliefs, not political, sociological, or philosophical beliefs. Thus, the ordinance prohibiting discrimination based on creed did not apply to this case. Even if the ordinance did apply, the court said that MDHR's decision would be reversed on constitutional grounds. The Minnesota Constitution contains a "freedom of conscience" clause. The clause protects Glass' actions because the ordinance burdened his sincerely held religious belief by giving him the choice of compromising his conscience by complying with the ordinance or ignoring the ordinance and being fined. The court found that there was no compelling governmental interest in enforcing this ordinance.

Judge Klaphake dissented on the basis that the word "creed" includes more than just religious beliefs and that Glass' refusal to deliver food to Midwest was not due to a strongly held religious belief against abortion. This was a factual finding not made by MDHR and the evidence showed that Glass had other reasons for deciding to not deliver food to Midwest. Judge Klaphake also believed that eliminating discrimination was a compelling governmental interest.

***Meltebeke v Bureau of Labor and Industries*, 852 P2d 859 (Ore App 1993)**

An employee, Meltebeke, filed a religious discrimination claim against his employer who persistently shared his religious beliefs with Meltebeke at the workplace. The Oregon Bureau of La-

bor and Industries determined that the employer's actions constituted unlawful religious harassment. Religious harassment was defined as religious advances that a reasonable person would find hostile, intimidating, or offensive.

The Oregon Court of Appeals reversed reasoning that the definition of religious harassment impermissibly burdened the employer's free exercise of religion. The definition was not the least restrictive means available to advance the state's interest in preventing religious discrimination. The Oregon Constitution's guarantees of religious freedom are intended to permit minorities to engage in religious practices that the majority might find objectionable. Those guarantees would be meaningless if religious conduct could be prohibited whenever a "reasonable person" considered the conduct hostile or offensive.

Patterson v Southwestern Baptist Theological Seminary, 858 SW2d 602 (Tex App 1993)

The Texas Court of Appeals held that the dismissal of a seminary professor was an ecclesiastical concern over which the First Amendment prohibits its taking jurisdiction. This prohibition, the court held, applies to both substantive and procedural rights.

Patterson was a tenured professor at Southwestern Baptist Theological Seminary. The Academic Affairs Committee charged him with six complaints concerning his job performance and personal lifestyle. After informing Patterson of the charges and unsuccessfully working with him to correct matters, the seminary voted to terminate him. Patterson sued both the seminary and its president for wrongful termination of his employment contract.

The First Amendment protects all religious organizations making ecclesiastical decisions, not merely disputes between churches and ministers. The seminary is clearly a religious organization. The seminary's bylaws and faculty manual demonstrate that the seminary made employment decisions based substantially on religious criteria. All of the classes offered at the seminary had, at least in part, an ecclesiastical purpose. Thus, Patterson's employment was an ecclesiastical concern and any disputes arising therefrom are out of the court's reach. This principle also prohibits the courts from finding that a religious organization violated procedural rights granted to employees in its own bylaws or constitution.

"Neutral principles of law" cannot be discovered to govern such disputes.

II. Taxes & Tax Regulation

Baylor v Centre County Board of Assessment and Revision of Taxes, 623 A2d 882 (Pa Commw Ct 1993)

Baylor, an ordained minister, was employed as the administrator of a private religious school. The Board of Assessment denied his request for an exemption from the occupational assessment tax levied by the school district and borough. The Commonwealth Court of Pennsylvania held that assessing an occupational tax on Baylor violated the Free Exercise Clause.

The court found that Baylor's occupation as administrator of a religious school was a religious activity and thus cannot be taxed. The court based its reasoning on *Stajkowski v. Carbon County Board of Assessment and Revision of Taxes*, 541 A2d 1384 (Pa Sup Ct 1988), which held that taxing a Roman Catholic priest with both religious and secular duties violated the First Amendment. Religious education is a religious activity because the religious and academic pursuits are intertwined. Likewise, Baylor's duties as administrator intertwined the religious and the academic.

III. Public Schools & Equal Access

Hedges v Wauconda Community Unit School District No. 118, 9 F3d 1295 (7th Cir 1993)

An eighth-grade Christian student was prohibited from passing out flyers at her public junior high school that concerned an event to be held at her church. The school had a policy which forbid the distribution of all flyers that were obscene, libelous, or religious in nature. Most other literature could be distributed. The federal district court quickly found this policy unconstitutional due to its discrimination against material of religious content. The school then adopted a new policy which was more complex and placed restrictions on any flyer of which more than ten copies were to be distributed, including obtaining the permission of the principal beforehand and having a designated table as the sole place from which to distribute the flyers. Religious literature could not be handed out if it concerned prayer, scriptures, or literature of a particular faith, materials meant to proselytize, or materials whose format would lead students to believe that the school sponsored or

endorsed the material represented. The new policy also prohibited material which was prepared by a nonstudent or concerned a nonstudent organization. The district court also found this new policy violative of the First Amendment.

The Seventh Circuit agreed that the old policy was wholly unconstitutional as viewpoint discriminatory and found the new policy unconstitutional in part. The old policy unlawfully targeted religious expression. Analyzing the new policy was more complex. The court of appeals first dealt with what it perceived to be a split among U.S. Supreme Court Justices over the Establishment Clause: four justices believing that a school may not endorse any religious perspective and four justices believing that a school may accommodate or engage in religious speech as long as it is not imposed upon a student. Justice Ginsburg remains the unknown. Nevertheless, so long as literature of religious and nonreligious content is treated equally, allowing students to pass out religious flyers will not result in other students believing that the school is endorsing the message. Accordingly, the Establishment Clause does not require the school to single out for censorship literature that deals with religious worship or proselytization.

A junior high school is a nonpublic forum. The neutral time, place, and manner restrictions in the new policy concerning the distribution of flyers only at designated times and only from distribution tables did not violate the Free Speech Clause. The court also found that the restriction on distributing flyers prepared by nonstudents was both reasonable and neutral as to content. The school was not being unreasonable in demanding that students disseminate ideas that they have written themselves.

Sherman v Community Consolidated School District 21 of Wheeling Township, 8 F3d 1160 (7th Cir 1993), *cert denied*, 62 USLW 3773 (US May 23, 1994) (No. 93-8474)

The Seventh Circuit affirmed a lower court decision holding that a school district did not violate the Establishment Clause by allowing the Boy Scouts of America (BSA) to solicit membership at a grade school during school hours. Moreover, BSA was not a state actor under the Fourteenth Amendment and thus the school district could not be held liable for a violation of the Equal Protection Clause.

Plaintiffs, a father and son, are atheists and were consequently denied membership in BSA. BSA uses the school building for meetings and puts posters in the school advertising meetings. BSA complied with all restrictions placed by the school district. Classified as a "community organization," BSA received second priority in the use of facilities, behind any school-related groups.

Alleged violations of the Establishment Clause in a grade school are taken more seriously than in other settings due to the impressionable age of the children. However, this policy did not violate the Establishment Clause. The school treated equally religious groups (such as BSA) and nonreligious groups. Flyers from all organizations were distributed to all students once during the week. The school provided a community bulletin board for the use of all groups.

BSA did not have a symbiotic relationship with the school district, nor did the school worsen the religious discrimination practiced by BSA. The school had neither coerced nor significantly encouraged BSA in its discriminatory membership requirements. Finally, BSA did not serve a traditional government function. Thus, since BSA was not a state actor, there was no violation of the Equal Protection Clause.

***Garnett v Renton School District No. 403*, 987 F2d 641 (9th Cir 1993), *cert denied*, 114 S Ct 72 (1993)**

A group of high school students in the State of Washington requested the use of a classroom to start a club for the purpose of Bible study and prayer before the start of the school day. The school district denied this request believing that access would violate the Establishment Clause as well as the state constitution. The students brought suit claiming that this denial violated the Equal Access Act (EAA), 20 USC §§ 4071-74. The Ninth Circuit ruled the denial did violate the EAA, and that the act preempted any contrary state law.

The EAA prohibits a school with a limited open forum from discriminating against noncurricular student groups based on religious, political, philosophical, or other speech content. The court of appeals held that Congress intended a broad reading of the EAA so as to eradicate discrimination against student religious clubs. The EAA provides that if one "noncurriculum related" club is allowed to meet, so must all other noncurriculum related clubs,

including religious clubs. The court also gave the term "noncurriculum related" a broad interpretation because to do otherwise would result in allowing schools to evade the EAA altogether.

Schools can avoid the EAA only by rejecting federal funding or closing their limited open forum. Concerning the Washington Constitution, states are free to grant more rights than the U.S. Constitution provides but cannot restrict those rights granted to the people by federal law.

Judge Farris concurred in the opinion stating that a state's authority to maintain a strict separation of church and state is outweighed by the rights of religious groups to meet on campuses with limited open forums. Schools still retain the right to close their limited forum and thus bar religious groups from meeting on campus. The concurrence closed by saying that it feared for the future of the Establishment Clause.

IV. Private Schools & Universities

Minnesota Federation of Teachers v Mammenga, 500 NW2d 136 (Minn App 1993)

The Minnesota Court of Appeals held that a state statute providing funds for high school students to enroll in nonsectarian college courses did not violate the state constitution. The Post-Secondary Enrollment Options Act (PSEOA) permitted high school juniors and seniors to enroll in certain courses at public or private colleges and universities in the state. The expenses were paid by the state if the students took the classes for secondary, as opposed to post-secondary, credit. If the class was taken at a private college, funds would only be provided for nonsectarian courses.

The Minnesota Federation of Teachers claimed that the no-establishment clauses of the state constitution were violated when funds were distributed to sectarian schools. The court stated that claims involving the no-establishment clauses must be evaluated by a two-step process: first, looking at whether the public benefit or support to the school is indirect and incidental; and, second, examining whether the school is pervasively sectarian.

The case dealt specifically with the PSEOA as it applied to Bethel College and Seminary. The court concluded that the benefits received by Bethel College were incidental and indirect. The program was intended to benefit the students, not the schools

which they attended. The students were allowed to choose which school to attend, and, thus, Bethel had no control over how many students decided to take its classes. Bethel was only reimbursed for nonsectarian courses, and it only received forty-two percent of the actual costs of tuition, books, materials, and other fees. Accordingly, the court reasoned that it was not necessary to decide whether Bethel was pervasively sectarian.

***Felter v Cape Girardeau Public School District*, 810 F Supp 1062 (ED Mo 1993) and 830 F Supp 1279 (ED Mo 1993)**

Sarah Felter was a parochial school student, but each afternoon she attended special education classes at the local public school. The school district refused to provide Felter with transportation from the parochial school to the public school. Her parents sued the public school on Felter's behalf under the Individuals with Disabilities Education Act (IDEA), 20 USC § 1400 *et seq*, and the Rehabilitation Act of 1973, 42 USC § 794. Felter attended classes at the public school as part of her Individualized Education Program (IEP), formulated pursuant to the IDEA. The IDEA defines transportation as a related service which must be provided if the service is designed to meet Felter's needs caused by her disability. The transportation is necessary due to Felter's lack of mobility, visual impairment, and the school location.

A federal district court held that providing the transportation would not violate the Establishment Clause. Applying the three-part *Lemon* test, the court held that providing transportation from the parochial school to the public school serves an important state interest, does not involve personnel from the parochial school, and does not constitute a direct financial benefit to the parochial school.

Article IX, sections 5 and 8 of the Missouri Constitution did not prohibit the school district from providing Felter the transportation. The Missouri Constitution prohibits school districts from providing transportation to a parochial school. The court said that it was not the parochial school that was benefiting, rather it was Felter who needed the transportation as part of her IEP.

Summary judgment in Felter's favor was issued on the IDEA claim. In the later proceeding, an order of contempt was entered against defendants for failing to comply with the injunction.

V. HOME SCHOOLING

Floyd v Smith, 820 F Supp 350 (ED Tenn 1993), *vacated as moot*, No. 93-5455, 1994 WL 163737 (6th Cir 1994)

Thomas Floyd challenged regulations of the Tennessee Department of Education that required a parent home schooling a child beyond the eighth grade to have a bachelor's degree or a statutory exemption. Floyd held no such degree and was home schooling his children beyond the eighth grade.

A federal district court held that the regulations were reasonable and violated neither the Free Exercise Clause nor the Due Process Clause of the Fourteenth Amendment.

People v DeJonge, 501 NW2d 127 (Mich 1993)

The Supreme Court of Michigan decided this case the same day as *People v. Bennett, infra.* The facts of the two cases are similar in that both involve parents who were convicted for violating Michigan's compulsory education laws concerning home-schooled children. The difference in this case is that the DeJonges home-schooled for religious reasons. The *DeJonge* court held that the teacher certification requirement violated the Free Exercise Clause when applied to parents who teach their children at home in accordance with a religious belief that prohibits the use of certified instructors.

The DeJonges used a program from the Church of Christian Liberty and Academy. There was never any question as to the sufficiency of the education received by the children. Applying a "compelling state interest" standard, the teacher certification requirement could not be upheld.

The DeJonges' religious beliefs were sincerely held and motivated their conduct. The Free Exercise Clause protects religious beliefs regardless of their orthodoxy. The DeJonges' conduct was religious in nature because they wanted their children to have a "Christ-centered education." The regulation burdened their religious belief because they were forced to choose between violating God's law or man's law.

Michigan's interest in maintaining its teacher certification requirement did not outweigh the religious beliefs of the DeJonges. In reaching this conclusion, the court stated that the law focused on the wrong state interest. Rather than centering on its interest in having children attain a certain level of education, the law focused

on the manner of achieving that goal. The state failed to show that the children faced a "clear and present" danger. The teacher certification requirement was not essential to the interest claimed because many states do not have such a requirement and various studies have shown that children educated by certified teachers have not scored higher on standardized exams than children who were not educated by certified teachers.

Justice Levin concurred stating that the teacher certification requirement was not the least intrusive means of meeting the state's interest in educating the DeJonge children.

Justice Mallett, joined by Justices Brickley and Boyle, dissented stating that *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 US 872 (1990), required a free exercise claim to be combined with another constitutional right in order to triumph over "neutral laws of general applicability." However, even if the majority was willing to find a fundamental right of parents to direct their children's education, the state's position passes the compelling state interest test. The dissent stated that the majority was applying an "undue interference" test rather than a "least restrictive means" test.

***People v Bennett*, 501 NW2d 106 (Mich 1993)**

The Supreme Court of Michigan held that parents do not have a fundamental right under the Fourteenth Amendment to home school their children. In doing so, the court upheld a teacher certification requirement for home schools. The Bennetts, who home schooled their children, need only be provided a hearing to determine whether their home school met the requirements of state law before they could be prosecuted for violating the compulsory education laws.

The Bennetts decided to home school their four children due to dissatisfaction with the public school system, not out of any religious belief. Neither of them are certified teachers. They enrolled their children in an instruction program called Home Based Education Program (HBEP). HBEP gives parents access to classrooms on the Ann Arbor campus and the services of certified teachers. The curriculum was designed in consultation with the school district where the children had previously attended. Through HBEP the children were provided some instruction by certified teachers, but not the required minimum of six hours a day. At the end of the

school year, three of the four children had standardized test results which placed them at or above their grade level.

The Bennetts were convicted of violating the teacher certification requirement and fined fifty dollars each.

The court denied the parents' claim. Parents only have a fundamental right to direct the religious education of their children. The standard of review is "strict scrutiny" only when the parents' interest in the education of their children is combined with a Free Exercise Clause claim. Absent such a claim, states have the power to regulate education so long as the law has a rational relationship to the state's interest in the education of children.

A teacher certification requirement was found to be reasonable, notwithstanding that less restrictive means might exist. The existence of different methods used by other states did not mean that the certification requirement was unreasonable. Those states may have different interests in regulating education.

Justice Riley dissented on the basis that the law interfered with the parents' right to direct the education of their children. The dissent would hold that parents have a liberty right under the Due Process Clause to raise their children as they see fit, including their choice of educational instruction. This right is implicit in the right to establish a home and raise children, citing *Meyer v. Nebraska*, 262 US 390 (1923), and *Pierce v. Society of Sisters*, 268 US 510 (1925). Admittedly this right is not absolute, and a reasonable regulation that advances a legitimate state interest may override it. But in this case, the regulation has not been shown to be related to the goal of educating children. Nor has the adequate education of the Bennetts' children been called into question. The Bennetts had done a better job at teaching their children than the public school system.

VI. Tort Claims

Marshall v Munro, 845 P2d 424 (Alaska 1993)

Marshall and Munro were ordained ministers in the Presbyterian Church. They worked together in Alaska until Marshall moved to Tennessee to accept a pastorate. When Marshall arrived in Tennessee the church declined to employ him because of allegedly defamatory remarks made by Munro. The alleged statements included telling the Tennessee church that Marshall made an improper sexual advance toward a church member, was divorced, dis-

honest, and that he was unable to perform the job because of throat surgery.

Marshall brought suit against Munro claiming defamation as well as breach of contract. The trial court granted summary judgment on the basis that the First Amendment prohibits courts from interfering in conflicts between a church and its clergy or between members of the clergy. The Alaska Supreme Court reversed and remanded the case for factual determinations.

Consistent with the First Amendment, courts may not determine questions of religious doctrine or ecclesiastical questions. Marshall argued that the mere fact that he and Munro were clergy could not turn a private dispute into an ecclesiastical dispute. Munro countered that it was his duty as a pastor to respond to inquiries from churches considering calling a pastor. Because the alleged defamatory remarks were made as a matter of internal church administration, the courts had no business interfering in such "core ecclesiastical concerns."

The supreme court did not adopt Munro's argument that the statements related to Marshall's clerical qualifications. It held that the trial court did not have to decide religiously related questions to determine whether the statements were defamatory. If Munro did in fact make these remarks within the scope of his employment, this would serve as a qualified privilege. However, recognition of a qualified privilege did not take the case out of the court's jurisdiction.

Farley v Wisconsin Evangelical Lutheran Synod, 821 F Supp 1286 (D Minn 1993)

A federal district court held that it lacked jurisdiction to resolve a defamation claim brought by a Lutheran minister against a synod. Hearing the case would impermissibly involve the court in ecclesiastical matters.

Farley was hired by the Wisconsin Evangelical Lutheran Synod as pastor of the Peace Lutheran Church. The local church, newly established, was termed "exploratory." The Synod later determined that Farley was not capable of leading the church through the transition from "exploratory" to a self-sustaining church. Consequently, the church was denied mission status, a prerequisite to receive funding. Absent subsidization, the church, including Farley's position, came to an end. Farley then sued the Synod for def-

amation based on both written and oral statements concerning his competence as a pastor.

The Free Exercise Clause strips courts of jurisdiction in most cases arising from the actions of a religious organization. Although the court noted that it was possible that a defamation action involving a religious organization could arise in which there would be jurisdiction, this case did not present such a scenario because Farley was challenging the authority of the Synod to comment on his qualifications. Hiring decisions within the church are ecclesiastical concerns off limits to the civil courts.

***Schoenhals v Mains*, 504 NW2d 233 (Minn App 1993)**

The Schoenhals were members of the Faith Tabernacle of Truth Church, where Ronald Mains was the pastor. The Schoenhals were guarantors on a debt owed by the church. Upon receiving notification that the church was late in making several payments, the Schoenhals sought a release from their guarantee agreement. Thereafter, Mains issued a letter dismissing the Schoenhals from church membership and read the letter, which contained the reasons for dismissal, to the entire church congregation. The Schoenhals brought this action alleging fraud, defamation, and breach of contract against Mains and the church.

The trial court granted summary judgment for Mains and the church, and the court of appeals affirmed. The Schoenhals' claim of defamation centered on the statements in the letter of dismissal supporting the asserted causes for disfellowship. The bases for the dismissal from membership were attributed to the Bible, as well as the church's religious beliefs and practices as expressed in the written Articles of Faith and By-Laws. To be defamatory a statement must be false. A jury could not inquire into whether the asserted causes were false without inquiring into religious doctrine in reference to the circumstances under which the letter was issued. Requiring a civil jury to probe the doctrines of a church and determine whether doctrines were violated by the Schoenhals would be an impermissible oversight of internal church affairs.

VII. Intrachurch Disputes

***Shearry v Sanders*, 621 So2d 1307 (Ala 1993)**

Sanders was pastor of the Church of Christ in Opelika, Alabama. Each local church is operated according to the model of the

elders controlling the money and property, as well as the hiring and firing of the pastor. However, because no elders existed at the time he signed, Sanders' one-year contract had been signed by the "brethren" of the church. Shearry and Summers were later ordained as elders.

When Sanders' contract expired, the two elders gave him a new contract to sign. Sanders refused to sign because it named the two elders as the employing party rather than the "male brethren" of the church. The elders then ordered Sanders to vacate his position and the parsonage. Sanders disregarded this order. Despite the elders' objection, the treasurer continued to pay Sanders' salary. Sanders called a church meeting at which he announced that Shearry and Summers had been impeached and removed from their elderships.

A Committee of Church of Christ ministers and elders from around the state met to resolve the differences at this local church. The committee concluded that the two elders had full authority over the situation, a conclusion that Sanders refused to accept. In response, Shearry and Summers sued for injunctive relief. The trial court ordered Sanders to vacate the parsonage, cease doing business on behalf of the church, and refrain from further ministry services. Despite this order, Sanders called a meeting with some church members and voted to "disfellowship" the two elders. The following day a meeting was held after the Sunday service to announce this decision. Notice of the Sunday meeting was given during the worship service, although the purpose of the meeting was not stated. Summers attended this meeting, but Shearry did not. Shearry and Summers later received copies of the minutes notifying them that they were no longer elders of the church.

Finding that Shearry and Summers were no longer elders, the trial court withdrew its injunction and entered a declaratory judgment in favor of Sanders. The court held that the elders were afforded legally sufficient due process. Because Summers was present at the meeting, he was given due process. This action invalidated Shearry's position as well because church rules state that there can be no elders unless there are at least two.

The Supreme Court of Alabama reversed the judgment of the trial court and held that the putative dismissal of the elders was ineffective because they were not afforded due process. The notice during the Sunday service was given the day after the crucial meet-

ing. Church rules dictate a set procedure for removing elders and these were not followed.

***Darab v United States*, 623 A2d 127 (DC Ct App 1993)**

Abdul Darab and others were arrested and charged with unlawful entry after they participated in a disturbance at a mosque and refused, following a police order, to vacate the premises. The defendants were members of the Muslim community who had become displeased with the appointment of leadership at the Islamic Center, a mosque organized as a nonprofit corporation.

Darab argued that prosecution under the unlawful entry statute would impermissibly involve the court in the resolution of a religious controversy. In order to reach a verdict, the jury would have to resolve several principles of Islamic law such as whether anyone can "own" a mosque or whether Darab had a "religious justification" to be present in the mosque and press his displeasure with the leadership.

The court of appeals held that the Free Exercise and Establishment Clauses were not violated. The unlawful entry statute was facially neutral and generally applicable to all conduct, not a law directly aimed at religious practice. Properly instructed, the jury had not been asked to resolve religious disputes. Rather, the jury was presented with the evidence relating to the elements of unlawful entry and asked to determine whether the crime had occurred. The convictions were affirmed.

VIII. Religious Symbols

***California School Employees Association v Marin Community College District*, 19 Cal Rptr 2d 572 (Cal App 1993), *rev granted*, 21 Cal Rptr 2d 356 (Cal 1993)**

The California School Employment Association petitioned a court for a writ of mandate compelling Marin Community College District to recognize as paid holidays three days proclaimed by President Bush to be days of thanksgiving celebrating the liberation of Kuwait and the return of American soldiers. A California court of appeals held that recognizing these days as paid holidays would not violate either state or federal prohibitions against the establishment of religion despite the references in the Presidential Proclamation to worshipping and thanking God.

The court found that the three-day celebration was not inherently religious. Days set aside for thanksgiving are deeply rooted in American tradition. Days of thanksgiving have been set aside after the end of numerous wars in our country's history. The days fall within California's definition of "holiday" because the purpose is to rejoice over a "great national event."

A California statute permits taking as paid holidays these three days. This statute satisfies the three-part *Lemon* test. There is a legitimate, secular purpose to celebrating the end of our involvement in hostilities in a foreign land. The statute did not have a primary effect of advancing religion because no religious observance was required and no religious belief was given priority over another. There is no more entanglement between religion and government with these three holidays than there is with Thanksgiving Day, which has long been recognized as a paid holiday.

***Clever v Cherry Hill Township Board of Education*, 838 F Supp 929 (D NJ 1993)**

Plaintiffs challenged a school policy permitting classrooms to maintain calendars depicting a large variety of national, cultural, ethnic, and religious holidays, and that permitted seasonal displays containing religious symbols, as violative of the Establishment Clause.

Applying the three-part *Lemon* test, the federal district court found that the policy furthered a secular educational purpose, did not impermissibly promote religion, and did not unduly entangle the school in a relationship with church affairs. The court relied, *inter alia*, on *Florey v. Sioux Falls School District*, 619 F2d 1311 (8th Cir 1980), *cert denied*, 449 US 987 (1980), upholding a school policy permitting religious music and symbols when presented in an objective manner as part of the cultural and religious heritage of Americans.

IX. Free Speech & Political Activities

***New York City Board of Ancient Order of Hibernians v Dinkins*, 814 F Supp 358 (SDNY 1993)**

A federal district court declared that New York City violated the free speech rights of the Ancient Order of Hibernians (AOH), sponsors of the annual St. Patrick's Day Parade, by refusing to issue a parade permit unless AOH allowed homosexuals to march in

the parade under their own banner. The parade has taken place in New York City for the last two hundred years and has been sponsored by AOH for most of the last one hundred and fifty years. The parade is inherently tied to the Roman Catholic Church, although many non-Catholic groups participate.

The AOH has a rule that forbids groups from using the parade to advance a political, social, or commercial agenda inconsistent with the views of AOH or the Roman Catholic Church. The Irish Lesbian and Gay Organization (ILGO) requested permission to march in the parade. AOH denied the request because ILGO's message was contrary to the Catholic faith. The city asked the AOH to allow them to march, and a compromise was reached whereby ILGO was allowed to march but not under its own banner. This resulted in discord between ILGO and some people watching the parade.

The next year, the state Human Rights Commission (HRC) ordered the Police Commissioner not to issue AOH a parade permit. HRC ruled that the parade was a public accommodation and that AOH violated the Human Rights Law by excluding ILGO from the parade. AOH challenged this order by filing a suit in the state trial court. While this lawsuit was pending, two other groups applied for a permit to hold a St. Patrick's Day Parade. Because of AOH's exclusion of ILGO, a parade permit was issued to another group. The state court then dismissed the lawsuit as moot. AOH was in a dilemma. AOH could not get the permit without the court overturning the HRC order. However, the state trial court would not decide the issue because the parade permit had already been awarded to another group. Consequently, AOH went to federal district court seeking injunctive relief under the First and Fourteenth Amendments.

The court held that a parade is a form of speech protected by freedom of expression. To allow the city to regulate participation in a parade would give government the power of censorship. A parade cannot be declared a public accommodation if it constitutes protected speech. Requiring AOH to accept participants with whom it does not want to associate is a violation of its rights. Government may regulate the time, place, and manner of a parade, but such restrictions may not discriminate on the content of the speech. There is no content-neutral justification for the city's actions, and, hence, denial of the permit violates the First Amendment.

The court recognized that there may also be a violation of AOH's rights to freedom of association and freedom of religion, but said that it was unnecessary to reach these claims in light of the free speech holding. A preliminary injunction issued granting AOH the permit and ordering the city not to interfere with the parade by requiring ILGO's inclusion.

***Otway v City of New York*, 818 F Supp 659 (SDNY 1993)**

This case arose out of the same facts set forth in *Dinkins*. When the court ruled in *Dinkins* that the city was violating the free speech of the Ancient Order of Hibernians (AOH), Otway filed suit to claim, *inter alia*, that allowing AOH to use the city streets, city personnel, and public funds would violate the Establishment Clause.

The federal district court first noted that no public funds supported the parade other than clean-up and police protection, services afforded to every parade. City personnel marching in the parade were not paid but volunteered their time. The court held that issuing the parade permit does not violate the Establishment Clause. A free-speech case focuses on the activity of the private actor, while an establishment of religion case focuses on the actions of the government. The city's actions in issuing the permit was neutral as to religion and satisfies the three-part *Lemon* test. Reserving the streets for AOH, admittedly a religious group, allows the city to prepare. Religious groups have the same rights to use the streets as secular groups. Certainly granting a permit does not show that the city is endorsing one religion over another. In fact, the city made it quite clear through the media that they did not support AOH and that it supported ILGO. Finally, the presence of off-duty police officers marching in the parade did not constitute excessive entanglement.

X. Government Regulation of Religion

***Church of Scientology v City of Clearwater*, 2 F3d 1514 (11th Cir 1993), *reh'g denied*, 12 F 3d 221 (11th Cir 1993), *petition for cert filed*, 62 USLW 3707 (US Apr 11, 1994) (No. 93-1604)**

An ordinance of the City of Clearwater, Florida, imposed substantial recordkeeping and disclosure requirements on charities, including religious organizations, that solicit funds. The Church of

Scientology claimed that the ordinance violated its rights under the First and Fourteenth Amendments and sought an injunction against its enforcement.

The ordinance required organizations to obtain an annual certificate to solicit any funds within the city, including the solicitation of funds from a group's own members. The form to acquire the certificate required that the group disclose the nature and identity of the organization, its tax-exempt status, criminal histories of its officers and solicitors, names of other Florida cities in which it has registered, and an explanation of why any of this information is unavailable. Sworn private disclosures of the information could be filed, but were nonetheless open to the members of the charitable organization. At the end of each registration period, the group had to disclose the amount of money and property collected in the city and an itemized lists of all costs incurred in the process of soliciting such funds. The group had to disclose in which bank, if any, the funds were being held, and to what use the money would be put. Donations from members of the group could be made in sworn private statements.

The city clerk had the power to determine whether the requirements were met. If the clerk determined they were not met, the city attorney had authority to investigate and prosecute any noncomplying group. This authority entailed the power to subpoena documents, including the private statements. Failure to fulfill these obligations was a criminal offense.

The Eleventh Circuit applied the three-part *Lemon* test. There was sufficient evidence to deny the city's motion for summary judgment. Scientology presented evidence that the city had singled out Scientology for this burdensome regulation. There was also evidence that the ordinance was passed with the purpose of driving Scientology from the city, where it maintained one of its largest headquarters.

Despite the ordinance being facially neutral, the court of appeals found that the recordkeeping and disclosure requirements fostered excessive entanglement with religion. The ordinance empowered a group's members to view the private statements on file, thereby enabling continuous surveillance over the group. The city did not have the authority to give citizens power that they did not have under the rules of the church. This ordinance took power from the church administration and passed it to the laity. This is forbidden by the Establishment Clause. The claims relating to the

public financial, operational, and organizational disclosures, as well as the private statement procedures, essentially involved ecclesiastical disputes between church and laity. The city should abstain from getting involved in such matters.

Because soliciting contributions was an important aspect of free speech, this was a "hybrid" case combining speech and free exercise. Hence, *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 US 872 (1990), did not apply. Strict scrutiny was the standard of review. The court found a compelling interest in protecting church members from fraudulent solicitation of funds. Funds may be ill-gotten although later used for legitimate religious purposes. Nevertheless, a compelling interest only exists when affirmative misrepresentations are made regarding the use of the money solicited. Thus, there was no compelling interest when the members were not told how the funds would be used. Except for the limited prospective disclosure requirements, this ordinance had no legitimate purpose and was not narrowly tailored to achieve its purpose. The disclosure provisions, with the exception of the limited prospective disclosure requirements, violated the Free Exercise Clause.

The ordinance also regulated refund policies offered by a group to contributors. The city had a compelling interest in preventing fraud upon church members, and this provision was narrowly tailored to accomplish that end. The provision requiring that a written refund policy be provided to members to whom a refund promise was made withstood strict scrutiny. However, a sixty day time limit placed on the refund policy was not narrowly tailored and did not withstand strict scrutiny.

***Barghout v Mayor and City Council of Baltimore*, 833 F Supp 540 (D Md 1993)**

A federal district court held that a City of Baltimore ordinance criminalizing the intentional mislabelling of kosher foods violated the Establishment Clause. The court held that the regulation fostered excessive entanglement between civil and religious authorities. The problem with the ordinance was the term "kosher," forcing courts to look to orthodox Hebrew dietary law as providing the rules of decision.

The ordinance set up the Bureau of Kosher Meat and Food Control, consisting of three ordained orthodox Rabbis and three

laymen selected from a list provided by Rabbinical and Jewish councils. The Bureau investigated a food shop owned by Barghout selling kosher hot dogs. The investigating Rabbi determined that the hot dogs lost their kosher status because they contacted grease from nonkosher meat. After several warning letters advising Barghout to change cooking methods, he was charged with violating the ordinance and fined $400.

Barghout challenged the ordinance as unconstitutionally vague and violative of the Establishment Clause. The court applied the three-part *Lemon* test. Despite providing a substantial religious benefit to a particular religious group, the court held that the ordinance had the valid secular purpose of preventing fraud. However, the ordinance directly and substantially entangled the government in matters of the Jewish faith. The ordinance set up a wholly religious standard for governing behavior and utilized religious groups and persons to judge the enforcement of the standard. Courts could decide what was, and what was not, "kosher" under Hebrew dietary laws. Nor could the city use religious leaders to enforce the ordinance according to their knowledge of religious law. Further, the ordinance required continued monitoring of religious practices.

The ordinance also failed on the second prong of *Lemon* because the ordinance represented the city's endorsement of Orthodox Judaism. Violations of religious laws were held to be violations of the city's laws. This advanced the cause of Orthodox Judaism, to which Conservative and Reformed Jews might object.

XI. Government Benefits & Exemptions for Religion

Henry v Life Haven, Inc., 1993 WL 182313 (Conn Super Ct 1993)

Life Haven, Inc., was a nonprofit corporation operating a shelter for homeless women and children. Life Haven's facility was leased from the St. Francis Church Convent for a period of twenty-five years. The State of Connecticut gave Life Haven over one million dollars to improve the premises and continued to provide funds for the shelter's operation. Henry and a group of fellow taxpayers sought to enjoin public funds from being distributed to the shelter. Henry claimed that the benefits from the funds were going directly to the church. In finding insufficient facts to establish a

cause of action, the court held it unnecessary to decide whether the claimants had standing as taxpayers.

Establishment Clause claims are measured by the three-part *Lemon* test, designed to prevent government sponsorship, financial support, and active involvement in religious activities. There was no basis for claiming that the primary effect of the public funds was to advance religion. Likewise, giving money to a homeless shelter housed in a church did not give rise to excessive entanglement of government and religion. There were no facts presented that the money was used to benefit the church. Hence, the court concluded that there was no unconstitutional government aid to religion.

***Cohen v City of Des Plaines*, 8 F3d 484 (7th Cir Oct 25, 1993), *petition for cert filed*, 62 USLW 3757 (US May 5, 1994) (No. 93-1756).**

Cohen sought to open a day-care center in an area zoned for single-family residential use. The zoning ordinance excepted schools and churches from the use requirement, including nursery schools operated in a religious building. Other day-care centers could operate in this zoning area only with a special permit. Cohen's request for a permit was denied. She filed suit against the city claiming violations of the First and Fourteenth Amendments due to the numerous day-care centers operating in church buildings within residentially zoned areas.

Cohen's first claim was brought under the Establishment Clause. Applying the three-part *Lemon* test, the Seventh Circuit found that the Establishment Clause was not violated. The city's purpose in exempting day-care centers operated in church buildings was to reduce governmental interference in the functions performed by churches. This was a valid legislative purpose, notwithstanding that the day-care centers were not required to have a religious purpose, only be operated within a church building. It was not proper for courts to determine what was, and what was not, sufficiently religious. Such a determination would itself violate the Establishment Clause.

On the second prong of the *Lemon* test, the court of appeals held that allowing churches to pursue their goals free from government regulation does not involve the city in advancing the cause of religion. Education of its members was an important function of the church. However, to be constitutional the ordinance had to be

read to exempt only church-operated day-care centers that were not-for-profit. Otherwise, a direct benefit would be conferred on religious day-care centers not available to secular day-care centers. The court did note that an indirect benefit was being conferred, but that did not invalidate the ordinance. The exemption was an accommodation to the free exercise of religion, not an endorsement of it.

The third prong of *Lemon* was satisfied because the ordinance freed government from entanglement with religion, rather than fostering entanglement.

Cohen's second claim was brought under the Equal Protection Clause. The court found that separating church and state and pursuing goals of residential zoning were rational means of achieving legitimate ends. The exempted day-care centers were restricted to those operating in buildings that also operated as churches. The requirement also cut down on traffic, noise, and overcrowding.

Rowe v Superior Court of Los Angeles County, 19 Cal Rptr 2d 625 (Cal App 1993)

Section 425.14 of the California Code of Civil Procedure provides that a court may allow the filing of an amended pleading claiming punitive damages against a religious corporation only upon a finding "that the plaintiff has established evidence which substantiates that plaintiff will meet the clear and convincing standard of proof." Dee and Glover Rowe sought to amend their pleading in a claim alleging various intentional torts committed by the Church of Scientology. When amendment was denied pursuant to section 425.14, the Rowes challenged the rule of procedure as violative of the Establishment Clause.

The court of appeals held that the special pleading rule had the secular purpose of relieving religious institutions of unfounded claims for punitive damages which was related to preventing undue "chilling" of the free exercise of religion. Nonetheless, the court reversed because it appeared that the trial court had applied the wrong standard of "clear and convincing" proof for evaluating the Rowes' proposed amended pleading.

***United States v Peters*, 1993 WL 335812 (ND Ill 1993), *aff'd*, No. 93-3328, 1994 WL 236979 (7th Cir June 2, 1994).**

Following his conviction for aggravated battery and robbery, Kenneth Carter filed a petition for writ of habeas corpus with a federal district court. The crime had taken place in the vestibule of a church. The court held that a state sentencing statute which increased penalties for crimes committed in a place of public religious worship did not violate the Establishment Clause.

***Society of Separationists, Inc. v Taggart*, 862 P2d 1339 (Utah 1993)**

Taggart was the Superintendent of Public Instruction for the State of Utah. In his official capacity, Taggart contributed $10,000 from state funds to the public school in Providence, Rhode Island, that was defending prayer during commencement ceremonies in the case of *Lee v. Weisman*, 112 S Ct 2649 (1992), then pending in the U.S. Supreme Court.

The Society of Separationists, Inc., filed this suit alleging that the Utah constitution, which prohibits the payment of public funds to an "ecclesiastical establishment," was violated by the payment. The court dismissed the claim reasoning that to advocate the legality of a practice is not to fund the practice.

XII. Prisoner Rights

***Warner v Orange County Department of Probation*, 827 F Supp 261 (SDNY 1993)**

Convicted of his third alcohol-related driving offense in just over a year, Warner was sentenced to three-years probation with several conditions, including attendance at meetings of Alcoholics Anonymous (AA). AA materials make reference to a "Higher Power" and the need to subjugate oneself to this Power as a precondition of successful treatment. AA frequently begins meetings with a prayer invoking the Lord's name, and AA encourages readings which make reference to spirituality and God.

Warner, an atheist, brought suit claiming that forced participation in the AA program violated the Establishment Clause. The court agreed, citing the terms of probation which brought coercive pressure on Warner to participate in AA and thus the religious aspects of AA's program.

XIII. CLERGY-PARISHONER PRIVILEGE

State of New Jersey v Szemple, 622 A2d 248 (NJ Super Ct, App Div 1993), *aff'd*, No. A-25, 1994 WL 189635 (NJ May 12, 1994)

Szemple was tried and convicted for murder. At the trial evidence was presented of Szemple's confession to several murders to a visiting minister, Paul Bischoff, while Szemple was incarcerated. At trial Bischoff voluntarily testified to the confessions over Szemple's objection.

The issue was whether the clergy-parishioner privilege is held by the penitent or the clergy. The appeals court said that the privilege was held by the clergy, and thus, was waivable by Bischoff. The conviction was affirmed.

XIV. JUSTICIABILITY/ABSTENTION

World of Faith World Outreach Center v Morales, 986 F2d 962 (5th Cir 1993), *cert denied*, 114 S Ct 82 (1993)

ABC's television show *Prime Time Live* aired a story on the World of Faith Outreach Center, a church organized as a Texas nonprofit corporation. The show accused the church and its pastor, The Reverend Robert Tilton, of the following: operating as a sole proprietorship with Mr. and Mrs. Tilton having direct access to church funds; of lying about supporting a Haitian orphanage; of distributing vials of water from Taiwan, claiming it was holy water from the Red Sea; and, of discarding prayer requests received in the mail accompanying contributions.

In an attempt to prove the allegations false, several times the church's attorney requested a meeting with the Texas Attorney General to present church records. The attorney general's office refused to meet, but did demand the church documents. The church refused to present the records without a meeting. The attorney general then filed a *quo warranto* action in state court seeking production of the documents, as well as to revoke the church's charter and dissolve the corporation.

The church filed its own lawsuit in federal district court to determine its rights and privileges under the First Amendment. The federal court issued a temporary restraining order (TRO) enjoining the state court from proceeding with the *quo warranto* action. The state appealed.

The Fifth Circuit held that the Eleventh Amendment does not prohibit a citizen from filing suit in federal court if he/she is seeking injunctive relief against a state official sued in his/her individual capacity.

The court of appeals also held that the *Pullman* doctrine applied. See *Railroad Comm'n v. Pullman Co.*, 312 US 496 (1941). The *Pullman* doctrine states that federal courts should abstain from taking jurisdiction when the resolution of a difficult or unsettled state-law question may render the federal constitutional question moot. It is possible that the law under which the attorney general sought production of the church's documents did not apply to the church. The attorney general amended his request so that the *quo warranto* action was not seeking membership lists of the church nor the imprisonment of church officials. The amendment resolved most, if not all, of the federal constitutional problems. Accordingly, the court of appeals concluded that the TRO should not have been issued and remanded the case to the district court with instructions to dissolve the TRO and abstain under *Pullman*.

***Presbytery of New Jersey of the Orthodox Presbyterian Church v Florio*, 830 F Supp 241 (D NJ 1993)**

New Jersey adopted civil rights legislation that made unlawful certain discrimination on the basis of sexual orientation. A church brought suit alleging that the legislation violated its free exercise of religion.

The suit was dismissed as not yet ripe for review. State officials argued that they were not planning to enforce the law against the church, the state had neither promulgated any regulations under the new law nor printed the poster the church said it would refuse to post at its establishment of business, and there was no indication of a private discrimination claim was about to be brought against the church.