1986

1985 Survey of Trends and Developments on Religious Liberty in the Courts

Carl H. Esbeck

Survey

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The purpose of this survey is to note important caselaw developments in the state and lower federal courts concerning religious liberty during 1985. Purposely omitted are the widely reported United State Supreme Court opinions, as well as cases where the high court has granted review during its 1985-86 term. The focus here is to collect significant cases that may otherwise escape broad attention. Only the facts and rationale of each court's decision is recorded. No editorial comment on the merits of these cases is intended.

I. Labor and Employment Practices

Catholic High School Association of the Archdiocese of New York v. Culvert, 753 F.2d 1161 (2d Cir. Jan. 10, 1985).

The Second Circuit Court of Appeals has ruled that the New York State Labor Relations Board (Board) can assert jurisdiction over the labor relations between parochial schools and their lay teachers. The decision reverses a summary judgment order in favor of the Catholic High School Association (Association). The district court had held that the exercise of jurisdiction by the Board would violate the Establishment Clause because it "threatens to produce excessive entanglement between church and state."

The court of appeals first addressed the issue of whether a justifiable controversy existed by reason of the mere assertion of jurisdiction without a factual record showing actual interference with religious beliefs. The court held that the assertion of jurisdiction necessarily implicated the religion clauses. The potential for interference with religious affairs was enough of a threat to the Association's constitutional rights to create a controversy.

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The district court had based its decision on two aspects of Board jurisdiction. First, it found that the Association might be required to bargain on religious subjects. Second, it found the Board would have to determine the validity of an asserted religious reason for discharge in cases alleging unlawful discharge. The court of appeals found that the district court "misapprehended the degree of supervision" by the Board over the bargaining process and that there was room for accommodation between church and state in the area of discharges.

With respect to the Board's supervision of collective bargaining, the court of appeals found (1) the Board becomes involved only when a complaint of an unfair labor practice is made, (2) the unfair labor practices it may investigate are entirely secular, (3) its investigation is limited to the charge in the complaint, (4) the Board's orders are not self-enforcing, and (5) the Board cannot compel the parties to agree on any specific terms. Therefore, the Board's supervision is not of the comprehensive or continuing type, and would not involve excessive entanglement between church and state.

The court then turned to the Board's role in cases of alleged unlawful discharge. The danger is "the possibility of recurrent questioning of whether a particular church actually holds a particular belief. . . . Inevitably this would lead to the degradation of religion. . . . Thus, the first amendment prohibits the State Board from inquiring into an asserted religious motive to determine whether it is pretextual." However, the court held that this restraint on the Board's power does not preclude the exercise of jurisdiction. An accommodation can be made. The Board can determine whether the asserted religious motive was the reason for the discharge. The Board may not order reinstatement where there is a religious motive even if it is coupled with an unlawful motive.

In dealing with the Association's free exercise claim, the court found that the burden on free exercise created by the Board's jurisdiction is indirect and incidental. This minimal intrusion is justified by the state's compelling interest in fair labor practices for all employees.

Volunteers of America - Minnesota Bar None Boys Ranch v. NLRB, 752 F.2d 345 (8th Cir. Jan. 15, 1985), *cert. denied*, 105 S. Ct. 3502 (June 24, 1985) (No. 84-1623).

The Eighth Circuit Court of Appeals affirmed a decision of the National Labor Relations Board requiring the VOA-Minnesota Bar

None Boys Ranch (Ranch) to bargain with a union representing Ranch employees.

The Ranch is operated by the VOA-Minnesota, a religious organization. The VOA-Minnesota operates the Ranch as a residential treatment and religious education center for children. A Minnesota Teamsters union local petitioned the NLRB for a representation election among the Ranch's employees. The NLRB conducted a hearing on the petition, and at the hearing the Ranch claimed the NLRB's exercise of power was impermissible under the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, and violated the religion clauses of the first amendment. The NLRB nonetheless directed that an election be held and later certified its results, naming the union as collective bargaining representative of Ranch employees. The Ranch refused to deal with the union, which then filed an unfair labor practice complaint with the NLRB. The NLRB granted summary judgment for the union and issued a bargaining order.

The Ranch appealed and raised two issues. The Ranch claimed that the NLRB had exceeded its congressional grant of jurisdiction, since Congress had not given the NLRB power over religious institutions. The Ranch also claimed that such power, even if granted by Congress, violated the religion clauses of the first amendment. The court, citing *NLRB v. St. Louis Christian Home*, 663 F.2d 60 (8th Cir. 1981), found the Ranch to be a secular employer. The Ranch was secular in several critical respects: it offered primarily treatment, not religious indoctrination; the Ranch employed no staff ministers; and Ranch employees performed secular functions. Since the Ranch was essentially secular, the court reasoned, it fell within the jurisdiction of the NLRB and posed no constitutional barrier to enforcing the bargaining order.

NLRB v. The Salvation Army of Massachusetts Day Care Center, 763 F.2d 1 (1st Cir. May 23, 1985).

The First Circuit Court of Appeals has ruled that the NLRB has jurisdiction over a day-care center operated by The Salvation Army. The court rejected The Salvation Army's argument that NLRB jurisdiction would pose a significant risk of infringement upon its first amendment rights. The court also ruled that the religious purpose of the day-care center was not a mandatory bargaining subject.

The court found the critical facts to be as follows: the day-care center provides day-care services to children selected solely on the

basis of need without regard to creed, the center provides no religious instruction, the staff is hired without regard to creed or any other condition of a religious nature, and the director of the center is not required to be a member of The Salvation Army.

The court distinguished the United States Supreme Court's decision in *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979). In that case the Supreme Court found that lay teachers at Catholic high schools played a "critical and unique" role in fulfilling the mission of the schools, which was described as "the propagation of a religious faith." In the instant case the court said, "Although there is evidence that the [day-care] center fulfills the religious mission of The Salvation Army, there is no evidence that the center serves anything other than a secular function with respect to the children, parents, and teachers." The court found this situation to be almost identical to that in *Denver Post of the National Society of Volunteers of America v. NLRB*, 732 F.2d 769 (10th Cir. 1984). In that case the court decided that the NLRB did have jurisdiction over a religious organization that provided social services of an essentially secular nature.

The court concluded that the operation of The Salvation Army's day-care center was indistinguishable from that of a secular day-care center since it did not include the "infusion of religion" in its programming. Therefore, a finding of NLRB jurisdiction was required.

During its negotiations with the union, The Salvation Army had insisted on the inclusion in the contract of a clause acknowledging the religious mission of The Salvation Army and the day-care center's role in that mission. The union refused to negotiate regarding the clause and the NLRB ruled that they were not required to do so because the clause was not a mandatory bargaining subject. The Salvation Army argued that without the clause it would not be able to insure that the center would fulfill its spiritual mission. The court held that the clause did not bear a direct relationship to the terms and conditions of employment at the center and therefore was not a mandatory bargaining subject. The court noted that The Salvation Army could take into account its religious concerns during negotiations with respect to all mandatory bargaining subjects.

Rayburn v. General Conference of Seventh-day Adventists, 772 F.2d 1164 (4th Cir. Sept. 23, 1986), *cert. denied*, 106 S. Ct. 3333 (July 7, 1986) (No. 85-1071).

The Fourth Circuit Court of Appeals has ruled that the Seventh-

day Adventist church cannot be sued for discrimination with regard to hiring for pastoral positions. "The guidance of the state cannot substitute for that of the Holy Spirit," the court said.

Carole Rayburn, a graduate of the church's theological seminary, sued the church and two of its leaders for employment discrimination under Title VII of the federal Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, after the church hired another woman as an associate in pastoral care for the Sligo Seventh-day Adventist Church in Takoma Park, Maryland. The federal district court in Baltimore granted summary judgment in the church's favor on the grounds that the suit was barred by the Free Exercise and Establishment Clauses of the first amendment.

In affirming the district court's decision, the court of appeals said, "Tensions have developed between our cardinal Constitutional principles of freedom of religion . . . and our national attempt to eradicate all forms of discrimination." The court resolved the tension in favor of the church's free exercise of religion.

"The right to choose ministers without government restriction underlies the well-being of religious community," the court said, because "perpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrines both to its own membership and to the world at large." The court added that no church member may use the first amendment to claim an "enforceable right" to be considered for the ministry of a church. It noted that the "evidence is simply overwhelming" that the position for which Rayburn applied "is important to the spiritual and pastoral mission of the church."

That the Adventist Church does not ordain women did not influence the court's analysis, the court indicated. "In quintessentially religious matters, . . . the free exercise clause . . . protects the act of a decision rather than a motivation behind it."

The court said subjecting such pastoral employment decisions to government scrutiny also would violate the Establishment Clause of the first amendment and the concept of church-state separation:

"Bureaucratic suggestion in employment decisions of a pastoral character, in contravention of a church's own perception of its needs and purposes, would constitute unprecedented entanglement with religious authority and compromise the premise that both religion and government can best work to achieve their lofty aims if each is left free of the other within its respective sphere."

The court concluded that "churches are not . . . and should not be . . . above the law. Like any other person or organization, they may be held liable for their torts and upon their valid contracts. Their employment decisions may be subject to Title VII scrutiny where the decision does not involve the church's spiritual functions."

Ninth and "O" Street Baptist Church v. EEOC, 616 F. Supp. 1231 (W.D. Ky. Aug. 16, 1985), *aff'd.*, 802 F.2d 459 (6th Cir. Aug. 15, 1986).

A federal district court has ruled that the EEOC has the right to conduct an investigation of a church in order to determine whether it has jurisdiction over a discrimination claim. Ninth and "O" Street Baptist Church operated the Early Childhood Development Center. The church announced a new policy that all employees of the center would have to be members of the church. Current employees not members of the church would be required to join the church by a certain date or face discharge. A teacher at the center contacted the EEOC to see if this policy violated her rights. When the church learned of her contact with the EEOC, they fired her. She then filed a complaint with the EEOC charging retaliatory discharge. The EEOC served subpoenas on the church. The church filed this suit asking the court to enjoin the EEOC from investigating it.

The church claimed that the teacher was fired because her actions violated a religious doctrine. It argued that for the EEOC to investigate the church would violate the Free Exercise and Establishment Clauses of the first amendment. The EEOC claimed that no such violations would result from an investigation conducted solely to determine its jurisdiction.

The court ruled that an EEOC investigation at this stage of proceedings would not violate either the Establishment or Free Exercise Clauses. In finding no violation of the Establishment Clause, the court pointed to the secular purpose of the EEOC to eliminate all forms of discrimination. The primary effect of the investigation would not be the inhibition of religion and it would not result in excessive entanglement between church and state. The court relied upon the fact that the intrusion upon religious beliefs would be minimal and that no ongoing relationship would be set up. Also, the EEOC has no power to require the church to change any policies.

In ruling on the free exercise claim, the court considered the magnitude of the impact on religious beliefs, the existence of a com-

pelling state interest, and the extent to which an exemption would impede the government's objectives. The court found that the investigation would not interfere with the day-to-day activities of the church. The court recognized the elimination of discrimination to be a compelling state interest that justified the minimal burden on the church's free exercise rights.

Amos v. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, 618 F. Supp. 1013 (D. Utah Sept. 18, 1985), *prob. jurisdiction postponed*, 107 S. Ct. 396 (Nov. 3, 1986) (Nos. 86-179 and 86-401).

In an earlier decision in this case, *Amos v. Corporation of the Presiding Bishop*, 594 F. Supp. 791 (D. Utah 1984) (*Amos I*), the court ruled that the provisions of Title VII allowing religious organizations to discriminate on the basis of religion were unconstitutional when applied to employment in nonreligious activities. In this decision the court applied the test it devised in *Amos I* for determining whether certain activities are religious. It applied the test to two institutions owned by the Mormon Church. This suit was initiated by former employees of the two institutions. They claimed that they were terminated from their employment because they did not satisfy worthiness requirements of the Mormon Church for temple recommends.

The court reiterated the three-part test it set forth in *Amos I* for determining whether an activity is religious for purposes of religious discrimination suits. "First, the court must look at the tie between the religious organization and the activity at issue with regard to areas such as financial affairs, day-to-day operations and management. Second, whether or not there is a close and substantial tie between the two, the court next must examine the nexus between the primary function of the activity in question and the religious rituals or tenets of the religious organization or matters of church administration. If there is a substantial connection between the activity in question and the organization's religious tenets or matters of church administration and the tie under the first part of the test is close, the court does not need to proceed any further and may declare the activity religious." After applying the first two parts to the test, if it is not clear whether an activity is religious, a third inquiry is to be made. "The court must consider the relationship between the nature of the job the employee is performing and the religious rituals or tenets of the religious organization or matters of church administration. If there is substantial relationship . . . the court must find the activity religious."

The court first considered a motion for summary judgment against Beehive Clothing Mills. Beehive is an unincorporated division of the Mormon Church that manufactures temple clothing, garments, and veils. These items are considered sacred by the church. Several of the plaintiffs were employed as seamstresses at Beehive. Beehive is owned by the church and managed by high church officials. Its banking and accounting are handled through the church. Temple garments have not always been made in Mormon-owned facilities, and some garments made overseas currently are made in non-Mormon plants. Whether or not non-Mormons are currently hired at Beehive is disputed by the parties. There is also disagreement regarding why garments made overseas are made by non-Mormons. The court found that resolution of these factual disputes was relevant and necessary for application of the three-part test. Therefore, summary judgment was denied, and the matter was set for an evidentiary hearing.

The court next considered a motion for summary judgment regarding Deseret Industries. Deseret is a division of the Mormon Church's Welfare Services Department. It provides employment and training for handicapped and mentally retarded persons. These employees refurbish goods that are then provided to the needy. Deseret is subsidized by the church, and its operations are tax-exempt. Employees come to Deseret by way of referrals from Mormon bishops. One of the plaintiffs was a truck driver for Deseret.

All parties agreed that under the first part of the *Amos I* test there is clearly a close and substantial tie between the Mormom Church and the day-to-day activities, finances, and management of Deseret. The dispute in this case centered on the second part of the test. The court rejected the plaintiff's position that this inquiry should focus on the type of job the employee performs. The analysis calls for a much broader view of the activity of the organization. The court must look at the purpose that the activity serves. A substantial connection between that purpose and the tenets or administration of the religious organization satisfies the second prong of the *Amos I* test.

The second prong of the *Amos I* test encompasses "an inquiry into the belief system that informs the particular actions in question." The welfare system of the Mormon Church, of which Deseret is a part, was set up so that "independence, industry, thrift and self-respect be once more established among [Mormons]." The court cited several sources in Mormon scriptures and history establishing the importance of welfare work in Mormon beliefs.

The court distinguished the present case from *Denver Post of the*

National Society of Volunteers of America v. NLRB, 732 F.2d 769 (10th Cir. 1984). In that case the court found that the VOA's charitable operations were not religious. It ruled that religious motivation was not enough to make "essentially secular" charitable activities religious actions. In the present case the court found a stronger link between Deseret and the Mormon Church than existed in the *Denver Post* case. Deseret was staffed by and employed only church members. It provided assistance to bishops, and daily devotional exercises were held. The court ruled that, were it to strictly limit religious activity to the propagation or advocation of religious beliefs, it would "drastically curtail the scope of protection provided by the first amendment."

The court found a close and substantial nexus between Deseret's primary function and the religious tenets of the Mormon Church. Since both the first and second prong of the *Amos I* test were satisfied, Deseret's activities were religious. Therefore, the court granted summary judgment for the church with regard to the discrimination charges against Deseret Industries.

II. Taxes and Tax Regulation

Salem College and Academy, Inc. v. Employment Division, 298 Or. 471, 695 P.2d 25 (Jan. 15, 1985).

The Oregon Supreme Court has ruled that all religious schools in Oregon must pay state unemployment compensation taxes. This case presented the difficult task of interpreting state law so as to comply, if possible, with both the standards of the Federal Unemployment Tax Act (FUTA) and the religious liberty guarantees of the Oregon Constitution. The task was further complicated by the questionable validity of the current federal interpretation of FUTA standards.

In order for employers to get credit for state unemployment taxes when paying the federal tax, the state tax system must comply with federal standards as to the type of employers included within the system. It is permissible for the state law to require participation by a greater number of employers than is required by the FUTA standards. Current FUTA policy exempts churches, associations of churches, and "any organization which is operated, supervised, controlled or principally supported by a church or convention or association of churches." The Supreme Court in *St. Martin Lutheran Church v. South Dakota*, 451 U.S. 772 (1981), ruled that this exemption includes schools "integrated into a church's structure." The

Supreme Court has not ruled on the validity of distinguishing between such schools and religious schools separately incorporated. Such a distinction is current federal policy.

The Oregon Court of Appeals had ruled that this distinction violated the Establishment Clause of the first amendment. Its opinion ordered an exemption for Salem College and Academy, a separately incorporated school. The Oregon Supreme Court found that it was unnecessary for the court of appeals to decide the case on federal constitutional grounds. It interpreted the state tax statute in such a way as to comply with state law and the FUTA standards.

The court found that taxing religious schools on an equal basis with other employers does not violate their right to the free exercise of religion. The court then stated:

> The free exercise of religion and rights of conscience, Or. Const., Art. I, sec. 2, may not relieve religious schools from providing unemployment insurance for their employees, but if the state chooses to exempt organizations from that duty by virtue of their religious character, it cannot discriminate among otherwise similar religious schools by their structural relationship with one or another form of church or religious congregation.

To obtain the uniform treatment compelled by the Oregon Constitution by exempting all religious schools, would risk nonconformity with FUTA should the present distinction in federal policy be eventually upheld by the Supreme Court as nonviolative of the Establishment Clause. Therefore, since the intent of the legislature was clearly to have the state law comply with FUTA standards, the proper interpretation of state law was to require all religious schools to participate in the system. Under such an interpretation, state law would comply with FUTA regardless of how the question of the validity of present policy was resolved.

Baltimore Lutheran High School Association, Inc. v. Employment Security Administration, 302 Md. 649, 490 A.2d 701 (Md. App. Apr. 10, 1985).

The Court of Appeals of Maryland has upheld a decision that employees of Baltimore Lutheran High School Association, Inc. (Lutheran) do not qualify for an exemption from the provisions of the Maryland unemployment compensation tax. Lutheran had sought a determination that they were exempt as employees of "an organization operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or con-

vention or association of churches." There was no contention in this case that Lutheran was not an organization operated by a church. Lutheran was an association of Lutheran churches, all members of the Missouri Synod, which operated Baltimore Lutheran High School. The only question was whether Lutheran was operated primarily for religious purposes.

This case had previously been remanded by the court of appeals to the Employment Security Division Board of Appeals to hear further evidence regarding this issue and to reconsider its original determination that Lutheran was not operated primarily for religious purposes. Specifically, the Board was to accept evidence regarding (1) the nature of mandatory chapel services, (2) whether religion classes were devoted to the indoctrination of a particular faith, and (3) what impact religious viewpoint had on the teaching methodology and the substantive content of other courses. Also, the Board was to consider whether the school subscribed to principles of academic freedom. On remand, the only evidence presented by Lutheran was the testimony of the principal of the high school. The Board once again determined that the evidence did not meet the burden required of Lutheran to show that it was operated primarily for religious purposes.

The court ruled that in light of its limited ability to review factual determinations of the Board, it could not overturn this determination. It found the record as a whole could reasonably support the finding of the Board. The Board had considered all of the factors set out by the court when it remanded the case.

Inasmuch as the court upheld the determination of the Board that Lutheran did not qualify for an exemption under the statute, the court proceeded to consider Lutheran's alternative argument that the application of the unemployment tax to its employees violates the Free Exercise and Establishment Clauses of the first amendment.

The court found that the decision of the United States Supreme Court in *United States v. Lee*, 455 U.S. 252 (1982), was dispositive of Lutheran's free exercise claim. Lutheran argued that the refusal to grant an exemption would adversely affect Lutheran's desire to employ teachers who communicate the doctrine of the Synod and would limit its ability to assign employees to activities in furtherance of their religious mission. Assuming these burdens existed, the court stated that it did not believe that they amounted to the type of burden that was not justified by compelling state interest. The state's very high interest in avoiding the dangers of involuntary unemployment was sufficiently compelling to override the alleged limitations on Lu-

theran's religious liberty. Granting an exemption to Lutheran would unduly interfere with the fulfillment of the state's interest.

With regard to Lutheran's Establishment Clause claim, the court noted that Lutheran based this claim entirely on the argument that application of the tax scheme to Lutheran would result in an excessive entanglement of church and state. The court pointed out that the burdens of the tax did not fall any heavier on religious institutions than it did on any other employers. The administrative burdens were not greater than a host of other regulations such as fire and safety codes. Lutheran also claimed that it would not be able to discharge employees for doctrinal reasons without opening its doctrines up to state scrutiny in litigation involving eligibility for unemployment benefits. The court did not believe that discharges for doctrinal reasons were so frequent as to require an exemption from the unemployment compensation system entirely. Such cases could be dealt with on an individual basis when they arose. For these reasons the court found no Establishment Clause violation.

Lutheran Social Services of Minnesota v. United States, 758 F.2d 1283 (8th Cir. Apr. 3, 1985).

The Eighth Circuit Court of Appeals has ruled that Lutheran Social Services (LSS), a church-affiliated tax-exempt organization, is exempt from filing annual informational returns with the IRS. LSS had argued that it was exempt from the filing requirements of 26 U.S.C. § 6033 because it is a church or because it is a convention of churches. The court rejected both of these arguments. However, the court agreed with LSS that it was an integrated auxiliary of a church and therefore exempt from the filing requirements of § 6033. In so ruling, the court overturned a treasury regulation that required an organization to have a principal activity that is exclusively religious in order to meet the definition of an integrated auxiliary.

LSS is affiliated with the three main Lutheran bodies in the United States: the Lutheran Church in America, the American Lutheran Church and the Lutheran Church-Missouri Synod. It provides various social services including family counseling, residential treatment for retarded persons, nutrition programs, and community-based correctional programs for young male felons. LSS admits that many of its services would be secular if performed by a secular organization. LSS maintains that its services are religious in that they are "religiously motivated, a manifestation of religious belief, a form of worship and a means of propagation of the Christian faith."

The court applied the definition of "church" contained in Treasury Regulation § 1.511-2(a)(3)(ii), and other criteria set forth by the IRS in determining whether LSS was entitled to a filing exemption as a church. Among the provisions of the regulation is a requirement that the organization's duties include the "ministration of sacerdotal functions." The court ruled that the services provided by LSS are secular in nature and "cannot be transformed into 'ministrations of sacerdotal functions' merely because they are performed by a religiously affiliated organization." Therefore, LSS could not be considered a church within the meaning of § 6033.

For the same reason, LSS could not be considered a convention or association of churches. This term was merely intended to include congregational churches within the meaning of churches so that they would not be treated differently from hierarchical churches.

However, the court did find LSS to be an integrated auxiliary of a church. The court struck down Treasury Regulation § 1.60332(g)(5)(i). This regulation required that an integrated auxiliary have a principal activity that is exclusively religious. The regulations defined "exclusively religious" as activities other than "educational, literary, charitable or of another nature (other than religious) that would serve as a basis for exemption under section 501(c)(3)."

The court found the IRS regulation to be contrary to the plain language and the legislative history of § 6033. The legislative history contained references to the types of organizations that were intended to be considered integrated auxiliaries. Many of these organizations were of the type that clearly would not have a principal activity that was exclusively religious. The court found it significant that Congress included an "exclusively religious" requirement for religious orders in the same section of the statute but did not impose that restriction on integrated auxiliaries.

III. PUBLIC SCHOOLS

Aguillard v. Edwards, 765 F.2d 1251 (5th Cir. July 8, 1985), *rehearing denied*, 778 F.2d 225 (5th Cir. Dec. 12, 1985) (en banc), *prob. juris. noted*, 106 S. Ct. 1946 (May 5, 1986) (No. 85-1513).

The Fifth Circuit Court of Appeals has affirmed the summary judgment of the district court, *Aguillard v. Treen*, No. 81-4787 (E.D. La. Jan. 10, 1985), striking down a Louisiana law requiring the teach-

ing of creation-science in the public schools whenever evolution is taught. The court held that the law violates the Establishment Clause of the first amendment.

The court stated, "This particular case is a simple one, subject to a simple disposal: The Act violates the Establishment Clause of the first amendment because the purpose of the statute is to promote a religious belief." The court went on to say, "Irrespective of whether it is fully supported by scientific evidence, the theory of creation is a religious belief." The court rejected the state's argument that the purpose of the act was to promote academic freedom. The court said that requiring the teaching of a particular theory was contrary to the very concept of academic freedom. Judged against the historical background of the struggle by religious fundamentalists to discredit the theory of evolution, the court found that the purpose of the statute was to promote creation-science as a religious belief. The court said that because the statute required the teaching of creation-science only when evolution was taught, its religious purpose was demonstrated.

Graham v. Central Community School District of Decatur County, 608 F. Supp. 531 (S.D. Iowa May 9, 1985).

In this case a federal district court has enjoined a public school district from including a religious invocation and a religious benediction in its graduation ceremonies. For at least the last twenty years the school district had opened and closed its graduation ceremonies with a prayer led by a Christian minister.

The court ruled that the purpose of the invocation and benediction was religious and that there was no secular purpose. The court also ruled that the primary effect of the prayers was to advance the Christian religion. The court emphasized that its decision was based on the specific facts developed at the hearing in this case. The minister scheduled to deliver the invocation and benediction for the 1985 ceremonies testified that he believed the purpose for the prayers was religious. Three expert witnesses also testified that the purpose of graduation prayers was religious. The school superintendent testified that the prayers were a tradition, the purpose of which was to lend a "serious note" to the ceremonies. The court found that prayer is inherently religious.

The court rejected the school district's argument that banning the prayers would infringe the free exercise rights of others. The Free Exercise Clause "does not give [people] a right to have government

provide them public prayer at government functions and ceremonies, even if the majority would like it."

Stein v. Plainwell Community Schools, 610 F. Supp 43 (W.D. Mich. Mar. 22, 1985).

In this case a federal district court refused to issue a preliminary injunction prohibiting the inclusion of an invocation and a benediction in graduation ceremonies. Under the stipulated facts, the court believed that the school district would win a trial on the merits. The court applied the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to the facts. It found that there was a secular legislative purpose, no primary effect of advancing religion, and no excessive entanglement between church and state.

The court noted that the purpose of the individual giving the benediction could be religious while the purpose of the school district in allowing the prayers could be secular. The court found that the evidence showed that the prayers were included for ceremonial purposes as part of a long-standing tradition. Also, the schools had a purpose of letting students plan or participate in the ceremonies. At one school the students gave the invocation and benediction and at the other the students decided to invite a minister to give them.

The court cited six factors that indicated that the primary effect of the policy was not to advance religion. First, the graduation ceremony is not a mandatory event; attendance is voluntary. Second, the schools exercise no control over the content of the invocation and benediction. The school board does not decide whether such prayers will be included but merely acquiesces in the decision of the students. Third, the prayers are not a daily event. They are heard once a year, each time by a different audience. Fourth, those hearing the prayers are not impressionable children, but largely adults. This includes the graduating seniors themselves. Fifth, the graduation is not an educational program, but a ceremonial one. Finally, there is no evidence that the invocations or benedictions are used to proselytize.

The court also held that there was no excessive entanglement between church and state. The schools did not write or control the content of the prayers. The ceremonies were held only once a year, there was no continuing relationship between church and state.

Ford v. Manuel, 629 F. Supp. 771 (N.D. Ohio Aug. 8, 1985).

A federal district court has ruled that the use of public school

facilities by a community organization to teach religion classes immediately before of after regular school classes is unconstitutional. The Findlay, Ohio, Board of Education adopted a policy of allowing the community to use school facilities when it did not interfere with regular school activities. One of the groups that rented school facilities under this policy was the Findlay Weekday Religious Education Council (WREC). The WREC taught religion classes once a week in the elementary schools. These classes either ended 15 minutes prior to regular classes or began five minutes after regular classes ended for the day. They were taught by nonschool personnel, and attendance was voluntary. For the 1984-85 school year, school personnel were prohibited from passing out advertisements, permission slips, or any other material regarding the religion classes. The classes were conducted during the time all public school personnel were required to be on school premises. The WREC received contributions from some Findlay Parent-Teacher Organizations. The organizations received funds from membership contributions and fund raising activities.

The court found that the WREC program impermissibly advanced religion in violation of the Establishment Clause. Although there was a valid secular purpose for the school board's policy and the program did not result in excessive entanglement between church and state, the program's primary effect was found to be the advancement of religion. The court believed that the religion classes created the appearance of official support of religion in the eyes of elementary school students. This impression was given to all students, those in the WREC classes and those not in the classes. The program was "inextricably bound up with the educational function of the public schools." The requirement that public school teachers be present at the time of the classes, and the close juxtaposition of the religion classes and regular classes, led to this "erroneous" impression. Due to their timing, the classes also benefited from the compulsory education laws of Ohio.

The court distinguished the building use by the WREC from the use by the Worldwide Church of God, which rented the schools for religious services and Bible study. The court found the fact that the church rented the facilities at night and on weekends to be the crucial difference. The message of state support of religion would be minimal because school children and teachers would not be present at those times.

The court also rejected the argument that the schools were public forums. Schools are not traditional public forums, and the court

found nothing to indicate that they had been turned into limited open forums during the hours they are in use by school personnel.

The court characterized its decision as narrow. It emphasized the timing of the classes as well as the age of the children and location, as reasons for its decision.

May v. Evansville-Vanderburgh School Corporation, 615 F. Supp. 761 (S.D. Ind. June 27, 1985), *aff'd.*, 787 F.2d 1105 (7th Cir. 1986).

A federal district court has ruled that a school board may prohibit voluntary prayer meetings by school employees on school property. Such a policy, the court ruled, does not violate the free speech or free exercise rights of the employees.

Mary May, a teacher's aid, along with other teacher's aides and teachers, were holding prayer meetings on school grounds prior to the commencement of the official school day. No students attended the meetings. When the meetings came to the attention of the school board, the board ordered that they be discontinued.

The court first addressed the question of whether the school was a public forum. The court noted that not all government-owned property becomes a public forum simply by its existence. Public schools are not inherently public forums; rather, affirmative steps must be taken in order to create a public forum at a public school. The court found that no such steps were taken by the school district. On the contrary, the school district had a consistent policy prohibiting religious activity on school grounds. No other formal meetings of teachers were held other than those necessary to conduct normal school business. Since there was no public forum created, there was no violation of the free speech rights of the employees.

The court next examined the school district's policy with respect to the Establishment Clause. The court found that the school board policy of not allowing religious activity on school property had a secular purpose of establishing a neutral policy towards religion. The policy does not have the primary effect of advancing religion. On the contrary, it serves opposite ends. It avoids the need for any continuing supervision of religious meetings that might lead to excessive entanglement between church and state. The court concluded that there was a compelling state interest to follow the Establishment Clause that overrides the alleged violations to the plaintiff's association, equal protection, and free exercise rights.

IV. PRIVATE/PAROCHIAL SCHOOLS AND UNIVERSITIES

Johnson v. Charles City Comm. Schools Bd., 368 N.W.2d 74 (Iowa May 22, 1985), *cert. denied sub nom. Pruessner v. Benton*, 106 S. Ct. 594 (Dec. 16, 1985 (No. 85-671).

The Iowa Supreme Court upheld the provision of the Iowa compulsory education statute that requires students not attending public schools to attend schools giving "equivalent instruction by a certified teacher." The parents of school-age children being prosecuted under the compulsory education law had challenged the law as a violation of their free exercise rights. The parents were sending their children to private religious school. The religious school refused to submit to any regulation by the state.

The court rejected "out of hand" the parents' argument that the Free Exercise Clause requires the state to accommodate their absolute and total rejection of any regulation. Although the first amendment imposes limitations on the state's power to regulate the education of children, that power "plainly extends to such matters as basic parameters for curriculum and teacher qualifications." The state has a clear right to set minimum educational standards. The court was careful to point out that the appeal in this case did not challenge any particular minimum standard of the vagueness of the statutory provision. Instead, the right of the state to regulate was the only issue raised.

The court also upheld an administrative determination that the parents in this case did not qualify for an "Amish exemption" from the compulsory attendance laws. That exemption requires parents to demonstrate that their church "professes principles or tenets that differ substantially from the objectives, goals and philosophy of education embodied in standards set forth in [Iowa statutes]." The court believed that the legislature intended this exemption to be applied narrowly and that the exemption was not to be given to all who seek to provide a religiously oriented education. The court found that the parents had failed to point to any tenets of their faith that were inconsistent with the minimum educational goals of the state.

Stark v. St. Cloud State University, 604 F. Supp. 1555 (D. Minn. Mar. 29, 1985), *aff'd*, 802 F.2d 1046 (8th Cir. Oct. 8, 1986).

A federal district court has ruled that a state university policy allowing university students to satisfy their teaching requirements at private parochial schools violates the Establishment Clause of the first amendment. The court found that the policy impermissibly advanced

religion and that the type of surveillance necessary to prevent such an advancement of religion would result in excessive entanglement of church and state.

Under the program, a student teacher is placed in an elementary or high school classroom and takes over the teaching of that class under the supervision of the regular teacher and a faculty supervisor from the university. The policy provides for the placement of a student teacher in a parochial school only upon the request of the student teacher. The policy further provides that any involvement on the part of the student teacher in the religious aspect of the parochial school program "is exclusively between the parochial school and the student teacher." Schools in which student teachers are placed are paid a fee by the university.

The court reviewed the line of United States Supreme Court cases dealing with state aid to parochial schools and found the policy in this case involved a much greater entanglement than is permissible under the Establishment Clause. The student teachers were placed in a role equivalent to that of the regular parochial school teacher and were under the supervision and guidance of the parochial school teacher. The policy made no attempt to safeguard against the student teacher becoming involved in the religious indoctrination of students. The policy does not require that the fees paid to the parochial schools be used for secular purposes.

The court rejected the university's argument that this case was distinguishable because the university was not providing aid to the parochial schools but instead the parochial schools were providing a service to the university for which a fee was paid. The court stated that the fact that placement in parochial schools was initiated at the request of the parochial school indicated that the policy did help the school advance its functions. The schools received benefits such as an opportunity to evaluate prospective teachers, exposure to the latest teaching techniques, and the symbolic benefit of association with a state university.

Gay Rights Coalition v. Georgetown University, 496 A.2d 567, *vacated and set for reargument*, 496 A.2d 587 (D.C. App. July 30, 1985) (en banc).

A three-judge panel of the District of Columbia Court of Appeals issued an opinion reversing the trial court's judgment in favor of Georgetown University. In a rare move on the same day, the court of

appeals issued an order vacating the panel's decision and resetting the case for argument before the entire court.

The vacated opinion ruled that the university must grant official recognition to gay student groups despite the religious objections of the university. The suit was brought by two gay student organizations alleging that the university's refusal to grant them official recognition was a violation of the District of Columbia Human Rights Act. That act prohibits discrimination by an education institution on the basis of sexual orientation. The trial court had ruled that the Free Exercise Clause of the first amendment prevented the application of the statute to Georgetown University, a Roman Catholic institution.

The court of appeals, in the panel decision, ruled that although official recognition meant "endorsement," such endorsement merely conveyed tolerance and not approval. The panel went on to find that the District of Columbia had a compelling interest in eliminating discrimination. In making this finding, the panel relied upon the high priority given to the act by the Council of the District of Columbia. There were no less restrictive means by which to enforce this compelling interest because equal access to facilities, which the university had already granted, was not enough. "Equal citizenship" is what the act required. Without official recognition there would still be discrimination. The panel concluded that the burden upon the university's free exercise rights was outweighed by the District's compelling interest. The university was not being compelled to espouse any repugnant views and could alleviate any burden by disclaiming any approval of the views of the gay organizations.

V. HOME SCHOOLING

Delconte v. North Carolina, 313 N.C. 384, 329 S.E2d 636 (May 7, 1985).

The North Carolina Supreme Court ruled that the home instruction of school-age children by their parents does not violate North Carolina laws. The court found it unnecessary to determine whether a statutory scheme that prohibited home schooling would violate the constitutional rights of parents. This suit was initiated by parents who were teaching their children at home. They sought a declaration that they were in compliance with North Carolina's compulsory attendance laws.

In reversing the court of appeals, the court rejected the reasoning that the intrinsic meaning of the word "school" required an institu-

tion of a character different from schooling at home. The court found that the North Carolina legislature had evinced an intent to set objective standards to measure the quality of education being received by students without an intent to mandate any particular instructional setting. This interpretation of compulsory attendance laws followed the spirit of the law, which was to ensure that all children be educated, not that they be educated in any particular way.

The record indicated that the Delconte's home instruction complied with all of the statutory standards. Records were kept on attendance, immunization and standardized test scores. Health and safety inspections were permitted, and the schooling was carried out on a regular schedule that complied with the statutory standards. The court agreed with the trial court's conclusion that the instruction provided to the Delconte children met the standards set out in North Carolina's compulsory attendance laws.

Although the court declined to address them, it acknowledged that serious constitutional questions would arise if the court were to rule that North Carolina's laws prohibited home schooling. The court said that the United States Supreme Court decisions in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), although not necessarily controlling under the facts of this case, shed considerable doubt on such statutory scheme.

Ellis v. O'Hara, 612 F. Supp. 379 (E.D. Mo. July 5, 1985), *rev'd.*, 802 F.2d 462 (8th Cir. July 1, 1986).

A federal district court in Missouri has struck down the Missouri compulsory education statute as being unconstitutionally vague. The plaintiffs were Christian parents who were giving their school-age children home education and religious instruction. The court found the statute void for vagueness because it allows for home education only if the instruction given is found to be "substantially equivalent" to public school instruction, and the term "substantially equivalent" cannot be given a reasonably precise definition.

Minnesota v. Budke, 371 N.W.2d 533, *Minnesota v. Newstrom*, 371 N.W.2d 525 (Minn. July 19, 1985).

In these companion cases, the Minnesota Supreme Court declared unconstitutional a portion of the Minnesota compulsory education law. The court found the statute to be impermissibly vague. The

decision overturned the criminal convictions, in these two cases, of parents who had been educating their children at home.

The Minnesota compulsory education statute required students not attending public schools to be taught by "teachers whose qualifications are essentially equivalent to the minimum standards for public school teachers of the same grades or subjects." The court found the term "essentially equivalent" to be insufficiently definite to apprise ordinary people of the requirements of the statute. The term "is at best ambiguous" and implies a judgment without indicating who is to make the judgment or what criteria are to be used. The court found that "the evidence on the record indicates that the Newstroms intended to comply with the compulsory education law and in good faith believed that Jeanne Newstrom's credentials were 'essentially equivalent' to those of a licensed teacher."

The court refused to impose a strict construction on the language of the statute that would interpret it to require certified teachers for all students. The court believed this construction to be inconsistent with the intent of the legislature to provide some flexibility. The court stated, "It may well be that in that small margin of flexibility lies the constitutional protection afforded parents to direct the education of their children without unreasonable restrictions by the state."

VI. State Regulation of Parachurch Ministries

Texas v. Corpus Christi People's Baptist Church, 683 S.W.2d 692 (Tex. Dec. 19, 1984) (rehearing denied, Fed. 13, 1985), *app. dismissed*, 106 S. Ct. 32 (Oct. 7, 1985) (No. 84-1791).

The Texas Supreme Court, reversing the state court of appeals, held that the state licensing procedure for twenty-four hour child care facilities did not violate the religion clauses of the first amendment.

The State of Texas requires child care facilities operating in the state to obtain a license. The purpose of the state legislature in enacting the license requirement is to insure that the facilities meet minimal requirements for safety and health. The legislature also made it clear that such licensing requirements were not to interfere with the content of the religious curriculum or the organization of religious schools.

People's Baptist Church refused to conform to the licensing procedures, and the state sued for an injunction to force People's Baptist Church to comply. The trial court found the licensing procedure vio-

lated the religion clauses of both the federal and Texas Constitutions. An appeals court affirmed.

The Texas Supreme Court reversed. The court first found that the licensing procedure did not offend the Establishment Clause, citing the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The court reasoned that if the state regulated nonreligious facilities while exempting religious facilities, the result would "advance religion," an impermissible result under *Lemon*. Moreover, there was no "excessive entanglement" between the state and religious facilities, because the state licensing scheme expressly forbids inquiry into curriculum.

The court next found the licensing scheme did not violate the first amendment's Free Exercise Clause. The court determined that the state had a compelling interest in protecting the health and safety of its children. The court, utilizing the test set forth in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), then reasoned that the licensing scheme afforded the least restrictive means of furthering that interest.

Kansas ex rel. Pringle v. Heritage Baptist Temple, 236 Kan. 544, 693 P.2d 1163 (Jan. 26, 1985).

The Kansas Supreme Court affirmed the trial court's issuance of an injunction sought by the State of Kansas to prevent Heritage Baptist Temple from operating a day-care center without a license as required by Kan. Stat. Ann. 65-501 *et seq.*

Heritage Baptist Temple had operated a day-care center since 1974, except for a period in late 1979 and 1980. Although the church had obtained a license for the day-care center prior to 1983, it did not renew its license from the state for that year. The church claimed it conducted a "preschool ministry," not a day-care center, and thus did not fall within the statutory scheme. Church leaders indicated they believed the day-care center was a religious activity protected by the first amendment.

The trial court granted an injunction, finding that the church came within the ambit of the license requirement and finding that the church had not proven a religious liberty interest sufficient to preclude the state from requiring the day-care center be licensed.

On appeal the Kansas Supreme Court defined the issue as whether the trial court erred in finding that Heritage Baptist Temple did not have a protected free exercise interest. The Supreme Court began by asserting the doctrine that a state may reasonably limit the free exercise of religion so as to protect the health and safety of its

citizens. The court then proceeded to evaluate Heritage Baptist's claim under the tests set forth in *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

The court held that the church was not furthering a "genuine religious belief," as in the first requirement of Yoder, when it operated the day-care center. The court found it significant that the operations the state sought to regulate were the "secular" activities of the center, *i.e.*, feeding, clothing and sheltering children; that the center charged a fee for its services; and that most attending children were not church members. The court noted that Baptist doctrine did not mandate the operation of day-care centers. Using the same analysis, the court then concluded that the licensing requirement did not impermissibly burden Heritage Baptist's religious practice since, as the court previously noted, the state concerned itself with regulating the secular aspects of the operation, leaving Heritage free to pursue its religious aims.

VII. TORT ACTIONS

Nally v. Grace Community Church of the Valley, No. NCC 18668-B (Cal. Super. Ct., Los Angeles County, May 16, 1985), appeal docketed, No. B015721 (Cal. App., 2d Dist., 1985).

The plaintiffs in this case alleged that their son committed suicide as a result of counseling he received at Grace Community Church. The case went to trial on remand from the California Court of Appeal, 157 Cal. App. 3d 912, 204 Cal. Rptr. 303 (1984). On August 30, 1984, the California Supreme Court denied hearing in the case and ordered the opinion of the court of appeal not to be officially published. After presentation of the plaintiff's case, the trial court granted the church's motion for nonsuit as to all three counts and dismissed this action. The court ruled that the claims in the first two counts of the complaint were barred by the religion clauses of the first amendment. The court also ruled that the evidence presented was insufficient to sustain these claims even if they were not barred by the Constitution. The third count was dismissed for insufficient evidence.

The first two counts attempted to impose on the church the duty to investigate Kenneth Nally's suicidal manifestations; the duty to inform other professionals of his suicidal manifestations; the duty to refer Nally to mental health professionals; and the duty to train and employ competent counselors and make them available to Nally. The court held that for courts to attempt to regulate and impose standards

on pastoral counseling would have a chilling effect on the free exercise of religion. Such an attempt to regulate would require the courts to set standards for competence, training, the types of problems that pastoral counselors could address and who may be counseled. For courts to attempt such regulation would plunge them into a "bottomless pit." The court found no compelling state interest to justify court interference in pastoral counseling.

The court also ruled that the evidence submitted by the plaintiffs did not establish a breach of the alleged duties and did not establish any proximate cause between any alleged breach of duty and Nally's suicide. The third count alleged intentional infliction of mental distress. The court found that the evidence did not establish a claim under that count and that the evidence did not establish any proximate cause between the actions of the church and Nally's suicide.

Christofferson v. Church of Scientology, No. A7704-05184 (Or. Cir. Ct., Multnomah County July 19, 1985).

The trial court in this case declared a mistrial after a jury awarded the plaintiff a $39 million judgment. The case had been retried after the Oregon Court of Appeals reversed a previous judgment of $2 million against the Church of Scientology. 57 Or. App. 203, 644 P.2d 577 (182), *appeal dismissed*, 293 Or. 456, 650 P.2d 928 (1982), *cert. denied*, 459 U.S. 1227 (1983).

Christofferson, a former Scientologist, sued the church alleging fraud. She claimed that she was promised better eyesight and a higher I.Q. if she took one of Scientology's courses. The trial court ruled that a mistrial had to be granted because of improper prejudicial statements made by Christofferson's attorney during jury arguments and because the judge had failed to instruct the jury properly on evidentiary matters. The improper jury argument was in regard to whether or not Scientology was a religion. The court of appeals had already ruled that it was a religion.

VIII. INTRACHURCH DISPUTES

Reid v. Gholson, 229 Va. 179, 327 S.E.2d 107 (Mar. 8, 1985), *cert. denied*, 106 S. Ct. 80 (Oct. 7, 1985) (No. 84-1926, *rehearing denied*, 106 S. Ct. 548 (Dec. 2, 1985).

The Virginia Supreme Court has ruled that an equity court in this case properly appointed a commissioner to run and oversee a congregational meeting in order to resolve a dispute between two factions

of a congregational church. The Supreme Court found that such a remedy was not an infringement of the Establishment Clause.

The dispute began when a group of dissenters went to court in an attempt to force an audit of the financial records of the church. The pastor and his followers responded by proposing changes in the church's constitution that would centralize decision-making power in an executive council and remove from the membership the right to vote on questions concerning church property and all other controversial subjects. The executive council would also have the power to terminate church membership without prior notice. The dissenters complained that at two subsequent congregational meetings various actions on the part of the pastor's faction resulted in the meetings being fundamentally undemocratic. The trial court invalidated the results of these meetings and appointed a commissioner in chancery to run and oversee a meeting at which questions of title to property and constitutional changes would be voted on.

On appeal the pastor argued that any judicial inquiry into church governance is in itself an unwarranted intrusion into ecclesiastical affairs by civil authorities. It does not matter, he argued, that the dispute does not involve matters of doctrine.

The court conceded that in hierarchical churches ecclesiastical determinations are constitutionally immune from judicial review even when the issue is merely one of internal governance, because in such churches the resolution of internal governmental disputes depends upon matters of doctrine. One accepts the internal rules of such a church and the decisions of its tribunals when becoming a member. "Congregational churches, on the other hand, are governed by the will of the majority. . . . When the majority has spoken in a fairly conducted congregational meeting held after proper notice to the membership, . . . its decision is constitutionally immune from judicial review." However, this does not preclude a member from seeking court protection to insure a fairly conducted meeting in the first place. A member of a congregational church cannot appeal to a higher church tribunal. His only appeal is to "simple and fundamental principles of democratic right to attend and advocate one's views and the right to an honest count of the votes." These neutral principles of law are fundamental to our notions of due process. "Therefore," the court concluded, "the authorities which preclude the courts from examining whether an hierarchical church correctly followed its own internal procedures, or correctly applied its canon law, are inapposite to the question before us."

The court found that the unrefuted evidence made a clear showing that the civil and property rights of the dissenters was threatened. Therefore, this was a proper case for judicial intervention. The remedy fashioned by the trial court was not overly intrusive.

XI. CHAPLAINCY PROGRAMS

Katcoff v. Marsh, 755 F.2d 223 (2d Cir. Jan. 22, 1985).

The Second Circuit Court of Appeals has upheld a district court ruling that the Army's chaplaincy program, in general, does not violate the Establishment Clause. However, the court remanded to the district court two specific issues regarding particular minor aspects of the program.

The court noted that if the chaplaincy program were viewed solely with the Establishment Clause in mind, it would no doubt be unconstitutional since its primary effect is to advance religion. However, the court stated that other provisions of the Constitution must be considered and, if possible, interpreted compatibly with the Establishment Clause. Two other constitutional provisions bear directly on the issues in this case. They are the War Power Clause of Article I, Sec. 8 and the Free Exercise Clause.

The court stated that deference must be accorded to Congress' exercise of its war powers and to the expert opinion of the military as to its needs respecting morale and discipline, but that this deference did not preclude an analysis of the permissibility of the chaplaincy program. After a review of the needs of the chaplaincy program, the court characterized an alternative program proposed by the plaintiffs as "will-o'-the-wisp" and "so inherently impractical as to border on the frivolous." The court also noted that having no chaplaincy program at all could very well violate the free exercise rights of individual soldiers.

X. RELIGIOUS SYMBOLS

Friedman v. Board of Country Com'rs. of Bernalillo County, 781 F.2d 777 (10th Cir. Dec. 26, 1985) (en banc), *cert. denied*, 106 S. Ct. 2890 (June 9, 1986) (No. 85-1600).

The Tenth Circuit Court of Appeals, on rehearing en banc, has vacated an earlier panel opinion and held that a county government's use of a seal bearing religious symbols violates the Establishment Clause.

The circular seal in question bears the phrases, "Bernalillo County," and "State of New Mexico," separated by two diamonds along its outermost green edge. Within an inner circle, the Spanish motto, "CON ESTA VENCEMOS," which translates as, "With This We Conquer," or "With This We Overcome," arches over a golden latin cross, lightened by white edging and a blaze of golden light. The motto and cross are set in a blue background depicting the sky over four darker blue mountains and a green plain. Eight white sheep stand on the plain.

The testimony was conflicting as to the purpose and meaning of the seal. It was used on county documents, stationery, motor vehicles and shoulder patches. There was testimony that the cross represented the role of the Catholic Church in the settlement of the Southwest. Specifically, there was testimony that the cross and motto referred to priests and friars that accompanied Spanish conquistadors into the area. Witnesses conflicted as to whether the sheep were symbolic of the sheep-raising industry in the county's history or to the "flock of Jesus."

The majority held that the effect prong of the *Lemon* test was violated because the seal "provides a significant symbolic benefit to religion in the minds of some." The court found that "the seal as used conveys a strong impression to the average observer that Christianity is being endorsed. It recalls a less tolerant time and foreshadows its return." The court thought it plausible that a "person approached by officers leaving a patrol car emblazoned with this seal could reasonably assume that the officers were Christian police, and that the organization they represented identified itself with the Christian God. A follower of any non-Christian religion might well question the officers' ability to provide even-handed treatment. A citizen with no strong religious conviction might conclude that secular benefit could be obtained by becoming a Christian."

Copies of the county seal are reproduced in an appendix to the opinion.

XI. MEDICAL CARE

Mercy Hospital, Inc. v. Jackson, 62 Md. App. 409, 489 A.2d 1130 (Apr. 4, 1985), *vacated*, 306 Md. 556, 510 A.2d 562 (June 30, 1986).

The Court of Special Appeals of Maryland has ruled that a competent, conscious, rational, pregnant adult may refuse for religious

reasons to submit to blood transfusions during a Caesarean section delivery if the refusal does not endanger the health of the child. The mother in this case, a Jehovah's Witness, held religious beliefs that prevented her from consenting to a blood transfusion. The hospital sought a court order for the appointment of a guardian who could consent to the transfusion. After a hearing the trial court refused to appoint a guardian.

The appellate court upheld the trial court's decision stating that the state's interest in preserving human life was a qualified one. The need to respect fundamental individual liberties such as the free exercise of religion limited the state's interest in preserving life. The Maryland statutes on informed consent by patients buttressed this position. The right to consent to treatment includes the right to refuse consent.

Crouse Irving Memorial Hospital v. Paddock, 127 Misc. 2d 101, 485 N.Y.S.2d 443 (Sup. Ct. Jan. 15, 1985).

The New York Supreme Court, Special Term, has issued an order authorizing Crouse Irving Memorial Hospital and attending physicians to give blood transfusions to a mother and child during a Caesarean section delivery despite the fact that both parents hold religious beliefs prohibiting the receipt of blood transfusions. The pregnant woman, Stacy Paddock, consented to the Caesarean section after it became necessary due to medical complications with her pregnancy. However, she refused to consent to any blood transfusions even though she understood the life-threatening risk of a loss of blood during the operation.

In permitting the hospital to give transfusions to the child, the court followed the reasoning of the New York Court of Appeals in *Matter of Sampson*, 29 N.Y. 2d 900, 278 N.E. 2d 918 (1972), stating that the state's vital interest in the welfare of the child overrides the parent's right to free exercise of religion. As for allowing blood transfusions to the mother, the court recognized the right of a competent adult to refuse to consent to medical treatment. However, in this case the court reasoned that a patient requesting a physician to perform a surgical procedure must allow the physician to properly carry out his responsibilities. Here, it was the requested procedure that would be the direct cause of the loss of blood. In this case the physician was permitted to continue blood transfusions to the mother, even after delivery, until her condition had stabilized.

XII. CHILD CUSTODY

In re Short, 698 P.2d 1310 (Colo. Jan. 14, 1985).

The Colorado Supreme Court has announced standards for the consideration of the religious beliefs of parents by courts in determining child custody disputes. In doing so, it rejected an appellate court ruling as unduly restrictive and "inconsistent with the broad scope of review accorded to the trial court in child custody proceedings." The appellate court had ruled that evidence concerning religious beliefs could be admitted "only if there is a substantial probability that the religious belief or practice will result in actual harm or endangerment to the child's welfare."

The Colorado Supreme Court stated that courts are precluded by the Free Exercise Clause from weighing the comparative merits of the religious tenets of various faiths, but held that courts must not blind themselves to evidence that bears upon the safety and welfare of the child. "The authority of the state [to ensure the welfare of the child] is not nullified merely because a parent grounds his claim to control the child's course of conduct on religion or conscience." *In re D.L.E. II*, 645 P.2d 271, 275 (Colo. 1982).

The court held that evidence should be admitted of religious beliefs or practices which are "reasonably likely to cause present or future harm to the physical or mental development of the child. . . . The evidence need not be restricted to actual present harm or impairment." In this case, the father had attempted to introduce evidence regarding the beliefs and practices of the mother as a Jehovah's Witness. This included the practices of proselytizing and door-to-door solicitation and the belief in disassociation with people who are not members of the Jehovah's Witness religion.