Pepperdine Law Review

Volume 7 | Issue 2 Article 5

1-15-1980

The Government's Role in the "Purification" of Religious Organizations

Robert L. Toms

Lisa A. Runquist

The Government's Role in the "Purification" of Religious Organizations

ROBERT L. TOMS*
LISA A. RUNQUIST**

The authors examine when governmental intervention into the affairs of religious organizations may be permitted. Specifically, areas of the new California nonprofit religious corporation law which may give rise to first amendment challenges are considered. The discussion begins with an analysis of problems in defining "religion" and "religious activity" and continues with a focus on the procedure for and result of a determination that an organization is religious. As part of this discussion, the attorney general's role in the affairs of the religious corporation is examined. The specific areas examined are the state's role in: 1) the examination of religious organizations for violations of the public trust; 2) the supervision of the distribution of assets upon the dissolution of a religious corporation; 3) the settlement of internal disputes regarding ownership of church property; and 4) the regulation of secular activities engaged in by a religious organization. In conclusion, the authors anticipate that in attempting to define and regulate religion, the new nonprofit corporation law may be heading for a constitutional challenge depending on how the state decides to exercise its power.

---

* J.D., University of Southern California and Duke University, 1965; Partner, Caldwell & Toms, Los Angeles, California. Mr. Toms is a former California State Commissioner of Corporations. He has written in the fields of international investment, gold trading, and corporations. Member of the California and North Carolina Bars.

** J.D., University of Minnesota, 1976; Associate, Caldwell & Toms, Los Angeles, California. Member of California and Minnesota Bars.

On January first of this year, a new nonprofit corporation law went into effect in California. This law, as a momentary glance will disclose, is a complete renovation of the California nonprofit corporation law. Although all of the repercussions stemming from the changes will not be felt for some time, it is possible that some constitutional challenges may be raised in the near future.

The area considered in this article is the right of the attorney general and the state to exercise control over churches and other religious organizations.[1] The purpose is to give an overview of when, in light of federal constitutional restrictions limiting the state's right of interference, government intervention into a religious organization may be appropriate. Because the new California nonprofit corporation laws have made definite changes in this area, and because of the likelihood of resulting controversy, potential consequences shall be considered.

The controversy which has arisen in regard to religious corporations stems from two different views of the relationship between the church corporation and the state. One view holds the position that the church, as a religious corporation, operates in a separate sphere of sovereignty from the state and should be left to operate in whatever manner it sees fit.[2] The other view takes the position that the church corporation is a ward of the state inasmuch as (1) its very existence is a matter over which the state has control, and (2) its funds are held in a public trust which must be enforced by the state if it appears that such public trust is being violated.[3] The truth of the matter may lie somewhere between these two positions,[4] because although the church is guaranteed certain rights and immunities by the constitution which restricts the government's right to interfere with the church, the state government

---

1. Although the Internal Revenue Code has produced a controversy over the legitimacy of a distinction between a "church" and a "religious organization," no corresponding distinction has been raised in the new nonprofit corporation law. Therefore, the terms "church," "religious corporation" and "religious organization" shall be used interchangeably in this article.

2. This position is strongly supported by case law and by the United States Constitution. The first amendment states in part that "Congress shall make no law respecting the establishment of religion, nor prohibiting the free exercise thereof."

3. According to a California deputy attorney general, speaking in the World Wide Church of God case presently being litigated,

> "It is Your Honor's responsibility, as we see it, to do whatever needs to be done to appoint receivers and other agents to do whatever needs to be done to . . . protect the assets and records, and no one has any basis to resist that intervention . . . . You [the Court] are the guardian and this Church is Your ward."

Reporter's Transcript, January 10-12, at 9, 12.

4. "The Constitutional standard is the separation of Church and State. The problem . . . is one of degree." Zorach v. Clauson, 343 U.S. 306, 314 (1952).

has a duty to protect its constituents. This holds true even where an impropriety is ostensibly "religious."

I. THE DETERMINATION OF "RELIGION" OR "RELIGIOUS"

Many aggravated controversies in this area can be attributed to a failure to define or agree upon common definitions of terms that establish the premises for a thoughtful analysis. The definition of what is "religion" or "religious" is not established. However, freedom of religion is a right guaranteed by the first amendment to the United States Constitution. Further, the determination of whether or not a corporation is a "religious" organization determines the law to be applied under the new nonprofit corporation law.

The definition of the term "religion" has been a problematic issue facing the courts for many years. The traditional definition of religion commonly used in many decisions until the 1930's was based on a theistic perception of religion. *Malnak v. Yogi* stated, "Chief Justice Hughes, writing a dissent in 1931, could conclude without concern that '[t]he essence of religion is belief in a relation to God involving duties superior to those arising from any human relation.' "[5] This definition is no longer satisfactory inasmuch as many religions, such as Hinduism, Buddhism, Transcendental Meditation and Secular Humanism conceive of no "God" in traditional sense. Even so, they should be subject to the same limitations of the Establishment Clause as are Christianity and Judaism.

The 1960's and early 1970's saw several "conscientious objector" cases decided which gave the terms "religious training or belief" a much broader definition. The resulting standard, according to *United States v. Seeger*, is that the requisite beliefs be "sincere religious beliefs which [are] based upon a power or being, or upon a faith, to which all else is ultimately dependent."[6] Although Justice Adams, in a concurring opinion in *Malnak*, finds this standard to be too broad, the definition he proposes is not much narrower. In defining Transcendental Meditation as a religion, he finds that "[i]t concerns itself with the same search for ultimate truth as other religions and seeks to offer a comprehensive and critically important answer to the questions and doubts

5. Malnak v. Yogi, 592 F.2d 197, 201 (3rd Cir. 1979).
6. 380 U.S. 163, 176 (1965).

that haunt modern man."[7]

In addition to the problem of defining "religion" *per se*, another problem that arises in attempting to define "religion" occurs in determining the difference between "religious" and "secular" activity. Is operating a radio or television station a religious activity? Is running a school or a hospital a religious activity? It is obvious that each of these activities may occur in religious and secular settings. If the only programs on the radio or television station are religious, and the station's only purpose is to advance the tenets of the particular faith, it will likely be found to be religious. Similarly, the Supreme Court has, in case after case, found that church schools are unquestionably religious, and therefore subject to the restrictions and protections of the first amendment.[8] However, the protections afforded under the first amendment, may not extend to all activities engaged in by a religious organization.[9] Since "it is well established that a religious group may not claim the protection of the first amendment with respect to its purely secular activities,"[10] the findings of an activity to be religious or secular may be determinative of how much control the government may exercise in regulating the activity.

In analyzing the relevant cases, it appears that the determination of whether a corporate activity is religious is more dependent upon the purpose of the corporation (as set forth in the articles of incorporation) and its corresponding conduct, than upon the type of activity.[11] In other words, if the activities of an organization can be shown to be for the purpose of advancing religion and the conduct is found to correspond with this purpose, then the organization and activity will be entitled to a classification of "religious."

The question which remains, however, is whether the mere inquiry into the "religious" nature of a group or activity violates the protections of the first amendment. A certain amount of such inquiry has been found to be permissible. As the Supreme Court stated in *Lemon v. Kurtzman*:

> Some relationship between government and religious organizations is inevitable. [citations deleted] Fire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws

---

7. Malnak v. Yogi, 592 F.2d 197, 214 (3rd Cir. 1979).

8. NLRB v. Catholic Bishop, 99 S. Ct. 1313 (1979); Meek v. Pittenger, 421 U.S. 349 (1975); Tilton v. Richardson, 403 U.S. 672 (1971); Lemon v. Kurtzman, 403 U.S. 602 (1971).

9. *See, e.g.*, Queen of Angels Hospital v. Younger, 66 Cal. App. 3d 359, 136 Cal. Rptr. 36 (1977).

10. *Id.* at 370, 136 Cal. Rptr. at 42.

11. "[I]n some instances the 'character of the institution is to be determined not alone by the powers of the corporation as defined in its charter, but also by the manner of conducting' its activities." Lynch v. Spilman, 67 Cal. 2d 251, 264, 431 P.2d 636, 645, 62 Cal. Rptr. 12, 21 (1967).

> are examples of necessary and permissible contacts. Indeed, under the statutory exemption before us in *Walz*, the State had a continuing burden to ascertain that the exempt property was in fact being used for religious worship.[12]

At the same time, this inquiry must be limited in scope. For example, if the state presumes to determine what is or is not religious, it may have to examine the religious doctrines or beliefs of the organization. The state is prohibited from doing this. In *Kedroff v. St. Nicholas Cathedral*,[13] the Supreme Court noted the century-old recognition of "a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, a power to decide for themselves, free from state interference, matters of . . . faith and doctrine." Controversies over religious doctrine are to be determined by the religious organization, rather than by the civil government.[14] Obviously, the power to define "church" or "religion" is the power to limit religion and its expression. However, as the Supreme Court has stated, "freedom of thought, which includes freedom of religious beliefs, is basic in a society of free men. . . . Men may believe what they cannot prove. They may not be put to proof of their religious doctrines or beliefs."[15]

In addition to the restrictions against examining religious doctrine, the government is prohibited from involving itself in anything that would cause it to take anything other than a neutral position in regard to religion. "The basic purpose of these provisions . . . is to insure that no religion be sponsored or favored, none commanded, and none inhibited."[16] A number of decisions have held that a law that involves the government in a continuing surveillance of a religious institution violates this neutrality.[17] It appears, therefore, that the government may be delving into con-

12. 403 U.S. 602, 614 (1970), citing Walz v. Tax Commission, 322 U.S. 78 (1943).
13. 344 U.S. 94, 116 (1952).
14. *See, e.g.*, Presbyterian Church v. Hull Church, 393 U.S. 440 (1969).
15. United States v. Ballard, 322 U.S. 78, 86 (1944) (citations omitted).
16. Walz v. Tax Commission, 397 U.S. 664, 669 (1970).
17. In *Walz*, 397 U.S. at 674, the Supreme Court warned against governmental involvements with churches which produce "a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize," and was very concerned over the introduction of any "element of governmental evaluation and standards." *See also* Lemon v. Kurtzman, 403 U.S. at 615, 621 (prohibiting programs which entangle the state in details of administration), and Public Funds for Public Schools of New Jersey v. Marburger, 358 F. Supp. 29, 36 (D.N.J. 1973) *aff'd mem.*, 417 U.S. 961 (1964) (barring relationships where the state and religious organization would "necessarily be involved in negotiations.").

stitutionally prohibited concerns when it attempts to define what is religious. Indeed, a government that is capable of defining "religion" by executive fiat becomes an arbiter and teacher of faith, mediating between God and man by separating the "valid" religion from the "invalid," on behalf of its constituents.[18]

II. Organization of the New Nonprofit Corporation Law

The California legislature, recognizing the large diversity in nonprofit corporations, has classified these corporations into three types: Nonprofit public benefit corporations,[19] nonprofit mutual benefit corporations,[20] and nonprofit religious corporations.[21] This new legislation took effect on January 1, 1980.

Corporations formed under the new law will initially qualify as religious corporations by complying with the organizational requirements of the law. These requirements include a provision mandating that the corporation's articles of incorporation include a statement stipulating the religious purpose.[22]

For corporations already existing on January 1, 1980, the determination of whether they are subject to the new nonprofit religious corporation law is based on a transition provision which provides that "any corporation organized primarily or exclusively for religious purposes shall be subject to the new religious corporation law."[23]

Because the legislature recognized the special problems resulting from state interference with religious organizations, it made the right of the attorney general to intervene in religious organizations much more circumspect than his right to intervene in the affairs of other nonprofit corporations. Therefore, the classifica-

18. The fact that we are guaranteed religious freedom by the U.S. Constitution is of no consequence if that guarantee is not enforced. This fact is even more evident if we realize that the Constitution of the U.S.S.R., Article 52, also guarantees "the right to profess or not to profess any religion, and to conduct religious worship or atheistic propaganda." Indeed, it is specifically stated that, "[i]n the U.S.S.R., the church is separate from the state." Yet the reports of both Christians and Jews from the Soviet Union tell an entirely different story in practice.

A good exposition of the type of inquisition that can develop if a government is allowed to intrude in the area of defining "religious" is found in *Of Tares and Heretics*, Liberty, May-June 1979, at 23.

19. Cal. Corp. Code §§ 5110-6910 (West Supp. 1979).

20. Cal. Corp. Code §§ 7110-8910 (West Supp. 1979).

21. Cal. Corp. Code §§ 9110-9690 (West Supp. 1979).

22. Cal. Corp. Code § 9130(b) (West Supp. 1979) requires that each such corporation include the following statement: "This corporation is a religious corporation and is not organized for the private gain of any person. It is organized under the Non-profit Religious Corporation Law (primarily or exclusively [insert one or both]) for religious purposes." (The articles may include a further description of the corporation's purposes.).

23. Cal. Corp. Code § 9912 (West Supp. 1979).

tion of a corporation as a religious corporation, for purposes of falling within the scope of the new nonprofit religious corporation law, is of primary importance.

As noted above, the determinative factor is whether the corporation is "primarily or exclusively religious." Prior to January 1, 1980, the Secretary of State's office was to have sent a "nonbinding advisory notice to each corporation" subject to the old nonprofit corporation law, "indicating the type of corporation it is, based on the rules set forth in subdivision (a) of this section."[24] Because it is nonbinding, this notice apparently has no effect on the ultimate determination of the type of corporation. However, it is likely that unless the Secretary of State is willing to change its determination or unless the organization petitions the superior court for a determination of its status as provided by section 9912(d) of the new law, this notice will be used by the attorney general and by other government officials, as a basis for their actions towards a corporation.[25]

A. Role of the Attorney General

Under the former nonprofit corporation law, the statute that gave the attorney general supervision over nonprofit corporations was applicable to all nonprofit corporations.[26] Therefore, there was no requirement that the attorney general look at the religious nature, as such, of the corporation. Under the new law, however, the first instance in which the attorney general may examine a corporation concerns whether it fails to qualify as a religious corporation,[27] in other words, whether it is primarily or exclusively religious. If the attorney general determines that there is "reasonable cause" to believe it is not religious, it may institute an action "to establish that the corporation fails to qualify as a religious corporation under this part, and if a court so finds it shall enter an order that the corporation shall no longer operate as a religious corporation under this part."[28]

---

24. CAL. CORP. CODE § 9912(b) (West Supp. 1979).

25. The Attorney General is under no compulsion to follow the Secretary of State's determination, and has indicated that he will decide for himself if a corporation is religous.

26. CAL. CORP. CODE § 9505 (West 1977) (repealed 1980).

27. CAL. CORP. CODE § 9230(a)(1) (West Supp. 1979). *See also* CAL. CORP. CODE § 9912(d), where the attorney general must be notified of and may intervene in a proceeding determining the nature of an organization.

28. CAL. CORP. CODE § 9230(d)(1) (West Supp. 1979).

There are two potential problems inherent in this law. The first is whether the inquiry into the religious nature is a violation of the first amendment. The second involves a conflict between the corporation's stated purpose and the mandates of the law relating to a corporation found not to be in compliance with the requirements for a religious corporation.

The problem of whether the attorney general, by inquiring into the religious nature of an organization, has violated the first amendment is dependent upon the scope of the inquiry made by the attorney general. As we have noted, some inquiry is permissible. However, if the inquiry reaches a point where it begins to examine religious doctrine to determine whether the corporation is genuinely religious, or if it develops into a continuing inquiry or surveillance of the organization, it has gone beyond the constitutional bounds.[29]

The second problem arises from the failure of a corporation to "qualify" as a religious corporation. It is apparent that this qualification is distinguished from compliance with the organizational requirement that the articles of incorporation contain a statement that the purpose is religious. Let us assume that a disqualified corporation has stated in its articles that it is exclusively religious. As shall be seen, a corporation must be operated for the purposes set forth in its articles.[30] Yet the new law could now require that this corporation *not* operate for the purposes set forth in its articles, but rather for some other purpose—perhaps in the manner in which it has been operating. This is not only contrary to prior case law,[31] but, if followed by the disqualified corporation, would operate to make the corporation liable for examination by the attorney general for "substantial diversion of corporate assets from stated corporate purposes."[32]

B. The State's Rights and Responsibilities

Assuming the corporation is "religious," there are at least four distinct situations that may trigger state involvement with such organizations. First, if there is any indication of wrong-doing, commission of a crime, or violation of the "public trust," the state, if it finds a possible violation, will investigate and take whatever steps are found necessary to preserve the assets of the organization. Secondly, if a religious corporation is dissolved or its major

29. *See* text accompanying notes 12-18, *supra*.
30. *See* text accompanying notes 37, 44 and 45, *infra*.
31. *See, e.g.*, Queen of Angels Hospital v. Younger, 66 Cal. App. 3d 359, 136 Cal. Rptr. 36 (1977).
32. CAL. CORP. CODE § 9230(a)(5) (West Supp. 1979).

assets disposed of, the state automatically becomes involved with the distribution of assets. Third, if there is some dispute within the church regarding property, the state may decide the matter of its disposition. Finally, if the organization is engaged in some activity licensed or otherwise regulated by the state, involvement will occur.

In the first two cases involving the right of the state to intervene when there is a dissolution of a religious corporation or when there has been a violation of a law or of the public trust, state action is supported by the new statute and by prior case law. In these situations, the authority of the state is based upon its special obligation to protect the public interest in situations where there may be no individual capable of asserting such interest.[33]

In the last two situations, the right of the state to decide property matters or to control certain activities stems from its general police power to protect public health, safety and general welfare. Although the question of the state's right to intervene in religious affairs arises in both of these situations, these are matters dealing with the state's general civil authority.

C. Violation of the Public Trust

It has long been recognized that the attorney general has a right to institute actions where there has been mismanagement of a public charity or trust. Over 80 years ago a California court stated that:

> It is not only the right, but the duty of the attorney general to prosecute such an action. The state, as *parens patriae*, superintends the management of all public charities or trusts, and, in these matters, acts through her attorney general. . . . Such was the rule at common law, and it has not been changed in this state.[34]

Scott had stated that:

> In England the records show that even before the enactment of the Statute of Charitable Uses in 1601 suits were brought by the Attorney General to enforce charitable trusts. The community has an interest in the enforcement of such trusts and the Attorney General represents the community in seeing that the trusts are properly performed.[35]

Up until January 1, 1980, the applicable statute read as follows:

> A nonprofit corporation which holds property subject to any public or charitable trust is subject at all times to examination by the Attorney

33. *See* Holt v. College of Osteopathic Physicians & Surgeons, 61 Cal. 2d 750, 754, 394 P.2d 932, 936, 40 Cal. Rptr. 244, 248 (1964).
34. People v. Cogswell, 113 Cal. 129, 136 (1896).
35. SCOTT, TRUSTS § 391 (1939).

> General, on behalf of the State, to ascertain the condition of its affairs and to what extent, if at all, it may fail to comply with trusts which it has assumed or may depart from the general purposes for which it is formed. In case of any such failure or departure the Attorney General shall institute, in the name of the State, the proceedings necessary to correct the noncompliance or departure.[36]

It is to be noted that this statute was applicable to all nonprofit corporations holding property in trust, and was not limited simply to religious organizations. In fact, it is not clear from this language, or from the language in the above-cited cases, that the power of the attorney general was applicable to religious organizations at all. However, judicial interpretations have clearly indicated that property held by a nonprofit or charitable corporation is held in trust for the purposes for which the corporation was formed. For instance, in *Pacific Home v. County of Los Angeles*,[37] the court found that:

> All the assets of a corporation organized solely for charitable purposes must be deemed to be impressed with a charitable trust by virtue of the express declaration of the corporation's purposes, and notwithstanding the absence of any express declaration by those who contribute such assets as to the purpose for which the contributions are made. In other words, the acceptance of such assets under these circumstances establishes a charitable trust for the declared corporate purposes as effectively as though the assets had been accepted from a donor who had expressly provided in the instrument evidencing the gift that it was to be held in trust solely for such charitable purposes.

Therefore, any property held by a corporation with charitable purposes holds the property in trust.

Additionally, California cases have indicated that the definition of "charitable" encompasses "religious." In *Lynch v. Spilman*,[38] the court states that:

> [A] charitable corporation is one created for or devoted to charitable purposes. 'Charitable purposes include (a) the relief of poverty; (b) the advancement of education; (c) *the advancement of religion*; (d) the promotion of health; (e) governmental or municipal purposes; (f) other purposes the accomplishment of which is beneficial to the community' . . . . As we said in another context . . . 'a bequest is charitable if (1) it is made for a charitable purpose; its aims and accomplishments are of *religious*, educational, political or general social interest to mankind.[39]

Therefore, according to California case law, a nonprofit religious corporation is charitable, and holds its assets in trust for the purpose for which it is formed—and is therefore subject to regulation by the attorney general under the general power of regulation contained in section 9505 of the old nonprofit corporation law.

With the new law, specific instances have been enumerated de-

---

36. CAL. CORP. CODE § 9505 (West 1977) (repealed 1980).
37. 41 Cal. 2d 844, 852, 264 P.2d 539 (1953).
38. 67 Cal. 2d 251, 431 P.2d 636, 62 Cal. Rptr. 12 (1967).
39. *Id.* at 261, 431 P.2d at 642, 62 Cal. Rptr. at 18 (citations omitted, emphasis added).

noting when the attorney general may examine religious organizations and institute an action for violation of the public trust:

> (2) There is or has been any fraudulent activity in connection with the corporation's property; or the general power of regulation
> (3) Any corporate property is or has been improperly diverted for the personal benefit of any person; or
> (4) Property solicited and received from the general public, based on a representation that it would be used for a limited purpose other than general support of the corporation's religious activities, has been improperly used in a manner for which the property was solicited; or
> (5) There has been a substantial diversion of corporate assets from stated corporate purposes.[40]

In all of these cases, there must first be reasonable grounds to believe that such condition or conditions have occurred or do exist. This requirement of reasonableness is a necessary limitation, and may prevent indiscriminate examination of religious organizations. In addition, the itemization of the specific situations that must exist for the attorney general to intervene actually provide more protection to the church than was provided by the old law.

There exists, however, a major constitutional problem which might arise under this part of the new law. This is in regard to the corporate purpose of the organization. The requirements of the statute are basically simple—the corporate purpose must be primarily or exclusively religious in order to be affected by this statute. However, what the state views as "religious" and what the organization views as "religious" may be widely disparate. Again, if the state endeavors to determine whether religious purposes are being carried out, it may encounter the first amendment prohibition against examining religious doctrine. The United States Supreme Court, in *Cantwell v. State of Connecticut*, indicated that "to condition the solicitation of and for the perpetration of religious views or systems upon a license, the grant of which rests in the exercise of the determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution."[41] Although there may be many cases where an organization is clearly not using its assets as required by its articles, it is also probable that there will be cases where the question of a violation of corporate purpose hinges upon the particular definition of "religion" that was being used.[42]

40. CAL. CORP. CODE § 9230(a) (West Supp. 1979).
41. 310 U.S. 296, 303 (1940).
42. *See* text accompanying notes 5-17, *supra*.

The balance of section 9230(a), other than the inquiry into what is "religious," is basically a codification of case law. It makes explicit what was originally implicit, and affirms the position already taken by the California courts. So long as its use is limited to where warranted, the rest of this section is unlikely to violate the Constitution. However, if it is used unreasonably or if its effect leads to continuing surveillances of religious organizations, the result will be unconstitutional.

D. Dissolution of a Corporation

As in the case of a violation of the public trust, the state's right to intervene in the dissolution of a corporation is supported both by prior case law and by statute.[43] The basic purpose of this jurisdiction is to ensure that the assets of the corporation are used for the purposes for which the corporation was formed. As stated by the court in *Metropolitan Baptist Church of Richmond v. Younger*:

> California has expressed a strong public policy that trust property of a nonprofit religious or charitable corporation be not diverted from its declared purpose. Ordinarily the Attorney General is charged with the responsibility of preventing such a departure. (Corp. Code Section 9505) Special statutory precaution is taken that the trust's purpose will continue, as nearly as possible, even after the corporation's dissolution.[44]

The state's power in this area is limited to ensuring that the purposes for which the corporation was formed are fulfilled. It cannot take the funds and divert them to another purpose. The state cannot, for example, take funds given to a religious corporation and build a hospital any more than it can allow a corporation created for the purposes of establishing and running a hospital to discontinue operation in favor of operating another type of charitable organization. "The question is not whether Queen [of Angels Hospital] can use some of its assets or the proceeds from the operation of the hospital for purposes other than running a hospital; it certainly can and has. The question is whether it can cease to perform the primary purpose for which it was organized. That, we believe, it cannot do."[45]

Under the old law, the assets of a charitable corporation would be disposed of as directed by the superior court in an action involving the attorney general.[46] Since the statute itself did not pro-

43. CAL. CORP. CODE §§ 9800-9802 (repealed 1978); Cal. Corp. Code § 9680 (West Supp. 1979); Metropolitan Baptist Church of Richmond v. Younger, 48 Cal. App. 3d 850, 121 Cal. Rptr. 899 (1975).

44. 48 Cal. App. 3d 850, 857, 121 Cal. Rptr. 899, 903 (1975).

45. Queen of Angels Hospital v. Younger, 66 Cal. App. 3d 359, 368, 136 Cal. Rptr. 36, 41 (1977).

46. CAL. CORP. CODE § 9801 (West 1977) (repealed 1980).

vide for the type of disposition to occur, assets were disposed of in accordance with the case law above.

The new law provides that "[e]xcept as provided in Section 6715, all of a corporation's assets shall be disposed of on dissolution in conformity with its articles or bylaws subject to complying with the provisions of any trust under which such assets are held."[47] Thus, the requirement that the assets are disposed of in accordance with the corporation's purposes has been incorporated in the statute.

Additionally, the new law has rendered the government's role even more limited than before. If the attorney general waives, in writing, any objections to the disposition, no superior decree is necessary, although without such waiver a decree must be procured. Further, this decree may be granted upon petition by any person concerned in the dissolution, after appropriate notice to the attorney general,[48] in contrast to the old statute, which required that the attorney general be a party to the proceedings.[49]

It is apparent, then, that the new nonprofit religious corporation law has again incorporated the prior case law and has also provided a means by which dissolution need not involve the government to any great degree, unless the attorney general deems such involvement necessary. It is unlikely that any constitutional objection could be successfully raised against the government's role in this area.

E. Property Determinations

Another situation where the government often finds itself involved with church matters occurs following disputes within a church, when it is called upon to determine ownership of church property. Often, one or both sides to a dispute involving church property resort to the civil courts to adjudicate the matter. Such a dispute may be the result of simple dissension among members of a church. Another situation which could become more common due to a recent Supreme Court decision, occurs when a church which has been affiliated with a denomination, decides to withdraw from that denomination and is faced with the subse-

47. CAL. CORP. CODE § 9680(e)(1) (West Supp. 1979).
48. CAL. CORP. CODE § 9680(e)(2) (West Supp. 1979).
49. CAL. CORP. CODE § 9801 (West 1977) (repealed 1980).

quent demand that the church property be relinquished. In both cases, resort to the courts for resolution is possible.

Although there are few absolute rules in this area, certain guidelines have been established by the United States Supreme Court. The controlling principles in regard to state intervention in a dispute over the rights to or disposition of certain church property were set forth in *Presbyterian Church v. Hull Church*:

> First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. . . . [T]he Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine.[50]

Thus, it was determined that the state may decide church property disputes, only to the extent that it can do so without becoming involved in disputes regarding religious doctrine. Whatever approach the state uses is permissible "so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenents of faith."[51]

In a recent 5-4 decision involving the disposition of church property where a hierarchial church organization was involved, the Supreme Court again emphasized that "the First Amendment does not dictate that a State must follow a particular method of resolving church property disputes."[52] The decision then proceeded to outline what it terms a "neutral principles approach" for resolving such disputes. Rather than simply deferring to the decision of an authoritative tribunal of the hierarchical church, it requires the court to first examine "certain religious documents, such as a church constitution, for language of trust in favor of the general church."[53] Therefore, there apparently must be a fairly explicit statement of trust in the church documents, turning the property or the disposition of the property over to the general or "hierarchical" church, before the court will defer to a decision rendered by such body.[54] Potentially, this may cause major problems for some of the large denominational churches who, relying on the old case of *Watson v. Jones*,[55] never made their trusts explicit, and who are now experiencing a weakening of denomina-

---

50. 393 U.S. 440, 449 (1969).

51. Maryland & Virginia Churches v. Sharpsburg Church, 396 U.S. 367, 368 (1970).

52. Jones v. Wolf, 99 S. Ct. 3020, 3025 (1979).

53. *Id.* at 3026.

54. Even before the decision in Jones v. Wolf, *supra*, was released, a California Court of Appeal came to a similar conclusion when it held that because the local church had no notice or knowledge that an implied trust existed, no such implied trust could be enforced. Presbytery of Riverside v. Community Church of Palm Springs, 89 Cal. App. 3d 910, 152 Cal. Rptr. 854 (1979).

55. Watson v. Jones, 80 U.S. (13 Wall.) 679 (1872).

tional ties.[56]

As mentioned above, division within a church often occurs and may sometimes stalemate any action being taken by the directors of the church. If this endangers the corporate property, the new code provides for a resolution of the problem through the use of a neutral party:

> a) Except as otherwise provided in the articles or bylaws, if the directors are equally divided so that there is danger that the property of the corporation will be impaired or lost, the superior court of the proper county may appoint a provisional director pursuant to this section. Action for such appointment may be brought by any director or by members holding not less than 33-1/2 percent of the voting power.
>
> b) A provisional director shall be an impartial person. A provisional director shall have all the rights and powers of a director until such provisional director is removed by order of the court or by approval of a majority of all members (Section 5033). Such person shall be entitled to such compensation as shall be fixed by the court unless otherwise agreed with the corporation.[57]

It must be noted that, although the attorney general or the court cannot initiate an action, once an action is brought before the court, a provisional director may be appointed to see that the assets of the corporation are preserved. However, there are no guidelines governing how the director is to decide what is to occur, and no limitations are placed on his power to act. Indeed, he is expressly given all the rights and powers of a director. In other words, unless the corporation has expressly provided otherwise, the state can do indirectly (by appointing a director) what it cannot do directly (decide points of doctrine). If this provision is put into effect, it seems apparent that the requirements of the first amendment have been violated, just as surely as if the state itself entered into any decisions promulgated by the provisional director. The requirement of the statute, that the provisional director be "an impartial person," does not solve the problem because decisions dealing with doctrine involve "taking a side," regardless of how "impartial" one is. A provisional director appointed under state action raises the spectre of establishment clause problems through excessive entanglement.

F. Regulation of Secular Activities

"The First Amendment embraces two concepts, freedom to believe and freedom to act. The first is absolute but, in the nature of

56. *See, e.g.*, THE PRESBYTERIAN LAYMAN, October/November 1979.
57. CAL. CORP. CODE § 9225 (West Supp. 1979).

things, the second cannot be. Conduct remains subject to regulation for the protection of society."[58]

Cases challenging the right of the state to license or otherwise control activities carried on by religious organizations have been of two varieties. The first type involves the situation in which the organization is engaged in "secular" activities. The second is where the conduct engaged in involves a religious activity which infringes upon rights of society.

The first variety may be illustrated by cases such as *De La Salle Institute v. United States*,[59] and *Queen of Angels Hospital v. Younger*.[60] In both of these cases it was held to be "well established that a religious group may not claim the protection of the First Amendment with respect to its purely secular activities."[61] The first amendment is not brought into play simply because a religious group is involved. Rather, the "established rule (is) that the application of neutral principles to situations not involving the internal operations of a religious group infringes on no First Amendment rights."[62]

This position seems to be uncontrovertible; laws regulating secular activities, promulgated for the good of the public, should be applied uniformly. A difficulty arises, however, with the definition of "secular" as opposed to "religious activities," both of which the state and the religious organization define differently. The differences may arise even when both parties are acting in good faith.

The problem has most recently been seen in the attempts by the government to require private religious schools, a number of which are run directly by churches, to pay unemployment insurance, although church employees are exempt according to statute.[63] The rationale used is that such schools are not engaged in a 'primarily religious activity,' and are thus subject to the same regulations as secular schools. This contention is vigorously denied by the churches and religious schools across the country, and is presently being litigated in a number of forums.[64]

---

58. Cantwell v. Conn., 310 U.S. 296, 303-04 (1940).

59. 195 F. Supp. 891 (N.D. Cal. 1961) (Christian Brothers Winery case).

60. 66 Cal. App. 3d 359, 136 Cal. Rptr. 36 (1977) (hospital run by a religious group).

61. *Id.* at 370, 136 Cal. Rptr. at 42.

62. *Id.*

63. Federal Unemployment Tax Act, § 3309(b)(1) & (2), 26 U.S.C. § 3309(b)(1) & (b)(2)(1977); CAL. UNEMP. INS. CODE §§ 634.5, 2606 (West Supp. 1979).

64. A preliminary injunction was recently obtained against the State of California in a case in the U.S. District Court, Central District of California, Grace Brethren Church, et al. v. California, CV 79-0093 MKP (Kx). This rationale is also contrary to Supreme Court decisions which have held private religious schools to be so inherently religious as to be ineligible for state aid. *See, e.g.*, Meek v. Pittenger, 421 U.S. 349 (1975); Lemon v. Kurtzman, 403 U.S. 602 (1970).

In recognizing the growing trend of the government involvement in this type of religious activity,[65] an increasing number of religious groups are becoming convinced that in order to maintain control over their church and its religious activities, there must be substantial resistance to any licensing or regulatory schemes promulgated by any government organization.[66] In *Ohio's Trojan Horse*,[67] written about a case which concerns a church-school in Ohio, it is stated that:

> Christian schools everywhere must be, and hereby are, warned of the pitfalls inherent in *any* system of state licensure or chartering that interferes in the internal operation of church-schools . . . . Once the wall of separation has been breached it is extremely difficult—perhaps impossible—to restore. Those Christians who willingly surrender their church-operated schools to the control of the government should be advised to thoughtfully consider the long-term results of their capitulation.[68]

This fear of state control is not without foundation. William B. Ball, an eminent scholar and lawyer,[69] expressed the reason for this fear when he wrote:

> Sometimes these regulations are common sensical, unpretentious and worthwhile. But more and more we see the tendency in governmental regulation to reach out to embrace every facet of the educational process—even of the nontax-supported religious schools . . . . The multiple "standards" are often "higher" in nothing but cost. The perfectionism of bureaucrats appears at times as though designed to drive nontax-supported schools out of existence.[70]

Therefore, the danger to religion may be present in the form of the public servant with a well-designed plan to "protect" religion and the state from insincere practitioners of religion. However, the fact that the religious activity (*e.g.*, school) may take place in a secular context as well, does not do away with the freedom from state domination and control guaranteed by the first amendment.

The second type of action by a religious group which could invoke state regulation occurs where the action, although religious in nature, might, without regulation, infringe upon the rights of others. A typical example of this is seen in solicitation cases,

---

65. *See, e.g.*, NLRB v. Catholic Bishop, 99 S. Ct. 1313 (1979); Ohio v. Whisner, 47 Ohio St. 2d 181, 351 N.E. 2d 750 (1976).

66. Stang, *The Government is Threatening Your Church*, AMERICAN OPINION, Jan. 1980.

67. A. GROVER, OHIO'S TROJAN HORSE (1977).

68. *Id.* at 144.

69. Plaintiff's counsel in cases such as NLRB v. Catholic Bishop, 99 S. Ct. 1313 (1979); Wisconsin v. Yoder, 406 U.S. 205 (1972); Ohio v. Whisner, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976).

70. *Pierce: The Dramatis Personae Live On*, FREEDOM & EDUCATION: PIERCE V. SOCIETY OF SISTERS RECONSIDERED, (1978).

where the government has attempted to regulate the solicitation of the public by various charitable and religious groups. Some such regulation is permissible:

> It is equally clear that a state may by general and nondiscriminatory legislation regulate the times, the places and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community without unconstitutionally invading the liberties protected by the Fourteenth Amendment.[71]

While there is no absolute right to solicit, any denial of the right to solicit must be based on adequate and nondiscriminatory grounds, and must have a basis of promoting the public welfare:

> Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds on the public . . . . Without a doubt, a state may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent.[72]

However, a regulation which gives a public official power to discriminate, and thus to censor certain causes, is in violation of liberties guaranteed by the first and fourteenth amendments. The regulation will not be open to constitutional objection only if it does not involve any religious test and is not unreasonable.

III. CONCLUSION

It appears that many constitutional problems inherent in the new nonprofit corporations code stem from the government's attempts to define religion, and from what may be overzealous attempts to enforce the law without consideration of constitutionally guaranteed religious liberties. It is forseeable that the new nonprofit corporation law, although an improvement over the old law in many ways, may encourage the overstepping of constitutional bounds. Ultimately, the question of whether any challenges to the law will be raised, will depend upon the extent to which the state chooses to exercise its power, and whether its officers remain mindful of the first amendment.

---

71. Cantwell v. Conn., 310 U.S. 296, 304 (1940).
72. *Id.* at 306.