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A Reconsideration Of The Religious Exemption: The Need For Financial Disclosure Of Religious Fund Raising And Solicitation Practices

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INTRODUCTION

Public awareness of abuses in the administration of charitable fund raising practices has increased over the past twenty years.¹ This has resulted in the promulgation of state registration and reporting statutes,² together with increased supervision of charities and enforcement by the state attorneys general.³ By the end of 1977, thirty-four states and the District of Columbia had enacted statutes requiring financial disclosure of contributions and fund raising costs by charitable organizations which solicited money from the public.⁴ However, virtually every state, with the recent exceptions of North Carolina and Maryland,⁵ has followed the Uniform Supervision of Charitable Foundations Act of 1973.


Trustees for Charitable Purposes Act and exempted religious organizations from these requirements. Broad exemptions for religious charities stem from the belief that, in the absence of an exemption, insurmountable constitutional difficulties would be encountered.

The Pallottine scandal in Baltimore provides a recent and graphic example of the type of abuse which disclosure statutes may prevent. In 1976 it was revealed that of the $20 million raised in contributions by this Roman Catholic order less than four cents of each dollar was spent on the charitable purposes for which donations were solicited. The Pallottines’ annual direct mail fund raising campaign advertised that “money donated will be used to support Pallottine missions in underdeveloped countries around the world.”

The twofold purpose of this article is (1) to explore the constitutional boundaries of permissible governmental regulation of religious charities which publicly solicit contributions; and (2) to recommend that fund raising by religious groups, like that of secular groups, be subject to registration and financial reporting requirements.

6. 9C U.L.A. 208. See also “An Act to Regulate Individuals and Organizations Engaged in Charitable Public Solicitation”, Ad Hoc Committee to Review State Legislation of the National Health Council (1973). This model legislation also contains a religious exemption. A critique of the Ad Hoc Committee’s Model Act is found in Report of the Ohio Attorney General, supra note 2, at 2763.


9. It is necessary to recognize the distinction between public contributions and sacramental offerings or congregational dues. The latter monies are generally allocated for spiritual well-being, propogation of the faith, or worship, and come from donors who are members of or have a direct connection with the donee religious organization. Public contributions are those which are donated by persons outside the direct membership of the religious organization.
GOVERNMENTAL REGULATION AND THE FREE EXERCISE CLAUSE

An analysis of the constitutional parameters of permissible governmental regulation of religious charities includes consideration of financial disclosure statutes and legislation implementing the taxation authority of federal, state, and local governments. While legislation in the first category generally requires charitable organizations to describe the ongoing financial nature of their fund raising, administrative and service activities, tax statutes contain no specific charitable solicitation regulations. Disclosure statutes almost

10. In addition to the state and territorial statutes mentioned in Abernathy, supra note 4, and Report of the Attorney General, supra note 2 at 2755, there are numerous municipal ordinances which require some form of registration and reporting on the part of charities soliciting within the confines of the municipal jurisdiction.

At the present time no federal statutes govern interstate solicitations by public charities per se although the Postal Service does have jurisdiction to prosecute instances of civil and criminal fraud, of either a commercial or charitable nature. 39 U.S.C. §§ 3005, 3007 (1970 & Supp. IV 1974); 18 U.S.C. § 1341 (1970). Charities which use the mails to solicit contributions are subject to disqualification from the preferential rates they receive for all classes of mail. 39 C.F.R. §§ 132.3(f), 132.8 (1975) (special second class permits); 39 C.F.R. § 134.5(d),(f) (1975). No permit is required for the fourth class rate, 39 C.F.R. § 135.2(a)(5) (1975).


11. “Regulation” under the second category may be a misnomer since charities have a long history, both in Great Britain and the United States, of exemption from all forms of taxation. See M. FREMONT-SMITH, FOUNDATIONS AND GOVERNMENT 11-53 (1965); E. FISCH, D. FREED & E. SHACHTER, CHARITIES AND CHARITABLE FOUNDATIONS 598 (1974).

The special legislative treatment afforded religious charities, not applicable to secular charities, by the Internal Revenue Code is relevant to the subject of this article. For example, churches, their integrated auxiliaries and associations of churches are not required to file annual returns with the I.R.S. 26 U.S.C. § 6033(a)(2)(A)(i) (1970). See note 70 infra. Prior to January 1, 1976, churches were also exempt from taxation on unrelated business income, unlike other federally tax-exempt entities. 26 U.S.C. §§ 6033(a)(2), 508(a)(1), and 512(b)(16) (1970).

12. Most state jurisdictions have incorporated accounting requirements established by the American Institute of Certified Public Accountants in its various audit guides. See Gross, State Compliance Reporting for Nonprofit Organizations, 45 C.P.A. J. 33 (April, 1975); Gross, Nonprofit Accounting: The Continuing Revolution, 143 J. ACCOUNTANCY (June, 1977); M. GROSS, FINANCIAL AND ACCOUNTING GUIDE FOR NONPROFIT ORGANIZATIONS (1972).

invariably exempt religious charities from the requirements which secular charities must meet, but this is not true under the tax laws, which generally exempt all charities, whether religious or secular in nature.  

The authority to regulate charitable solicitations is derived from the police powers retained and inherent in the states. As a general principle, a statute enacted pursuant to a state's police power will withstand a constitutional attack so long as the means utilized are "reasonably necessary" for the accomplishment of the state's purpose, and are not overly oppressive in their effect upon individuals. It is thus clear that states have the power to enact statutes to prevent acts of fraud and deceit upon the public. The proposition that religious charities be subjected to registration and reporting requirements comes within this area of permissible exer-


14. Included in this category are income, property (real and personal), employment, inheritance and sales taxes. See Note, Constitutionality of Tax Benefits Accorded Religion, 49 Colum. L. Rev. 968, 975-76, 981-82 (1949); see also, Hurvich, Religion and the Taxing Power, 35 U. Cin. L. Rev. 531 (1966); Van Alstyne, Tax Exemption of Church Property, 20 Ohio St. L.J. 461 (1959). There is little uniformity in these exemption provisions among the federal, state and local statutes and ordinances. For a cogent study of the benefits afforded charities through the mechanism of tax exemption, see M. Larson, & C. Lowell, Praise the Lord for Tax Exemption (1969).


16. The term "police power" eludes definitional specifics. Justice Taney broadly defined it as encompassing "nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions." The License Cases, 46 U.S. 554, 583 (1847). It is defined narrowly in terms of public health, welfare, safety and morals. In addition, it has been expressed by the maxim "salus populi suprema lex" (the welfare of the people is the highest law), St. Louis & S.F. Ry. v. Mathews, 165 U.S. 1 (1897). This maxim clearly expresses the concept that everyone's freedom, to some degree, must be restricted in order that others, and society as a whole, may exercise theirs. Thus in reality the police power is the means by which society protects its existence. It is the law of necessity, expanding and contracting when necessary to meet the needs of the public. Pierce Oil Corp. v. Hope, 248 U.S. 498 (1919).

In the American constitutional scheme, all powers not specifically delegated to the federal government are retained by the people and the states. Since the police power is not a delegated power, it is retained by the people and the states. The people exercise this power through their representatives in their respective state legislatures, who in turn enact legislation necessary to secure the peace, good order, health, morals and general welfare of the public. While the police power is very broad it is limited by the federal and state constitutions.


exercise of police powers.

However, where rights guaranteed by the free exercise clause of the first amendment are the subject of legislation, the standard of "reasonableness" is replaced by one of "strict scrutiny." The Supreme Court has noted that in this constitutional area, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation."

This judicial warning has prompted legislative bodies unnecessarily to exempt religious organizations from the coverage of statutes designed to regulate charitable solicitations through a fear of infringing upon the free exercise of religious beliefs. While it is clear that the Supreme Court has repeatedly held that the free exercise clause mandates a complete prohibition of governmental interference with religious beliefs, religious practices, such as public fund raising, may be subjected to reasonable regulations. Thus, statutes promoting public policy or morals, protecting public health or safety, imposing criminal sanctions, and promulgating economic

19. The first amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." The fourteenth amendment guarantees the application of the first amendment to the states. Stromberg v. California, 283 U.S. 359 (1931). The free exercise clause was expressly deemed incorporated in Cantwell v. Connecticut, 310 U.S. 296 (1940) and the establishment clause was incorporated in Everson v. Board of Educ., 330 U.S. 1 (1947).

For an explanation of the relationship between the free exercise and establishment clauses, see Moore, The Supreme Court and the Relationship between the "Establishment" and "Free Exercise" Clauses, 42 Tex. L. Rev. 143, 147 (1963).


While the judicial reading of the religion clauses of the first amendment has vacillated between the extremes of the Jeffersonian "wall of separation" and much more flexible interpretations, it seems clear that the Supreme Court now envisions the two clauses somewhere within the latter category. Thus, in Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 760 (1973), the Court was impelled to state:

[T]his Nation's history has not been one of entirely sanitized separation between Church and State. It has never been thought either possible or desirable to enforce a regime of total separation, and as a consequence cases arising under these Clauses have presented some of the most perplexing questions to come before this Court.

A complete history of the origins and development of the religion clauses is found in M. Howe, The Garden and the Wilderness (1965), and W. Katz, Religion and American Constitutions (1964). See also C. Antieau, P. Carroll, & T. Burke, Religion under the State Constitutions (1965).
regulatory schemes have fared well against first amendment attacks.\textsuperscript{24}

In developing a constitutional standard under the free exercise clause, the Supreme Court has long recognized this dichotomy between religious beliefs and religious practices. The fund raising activities under consideration here clearly come within the latter category. \textit{Reynolds v. United States}\textsuperscript{25} was the earliest case in which the Supreme Court addressed the constitutionality of a statute in the face of a religious challenge. The Court, in upholding a statute prohibiting polygamy, stated "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."\textsuperscript{26}

Eleven years later in \textit{Davis v. Beason},\textsuperscript{27} the Supreme Court re-examined its earlier treatment of the \textit{Reynolds} polygamy statute and determined that the male members of the Mormon Church could not justify their violation of the statute even though they believed the practice to be an integral part of their religious duties. The Court made it clear that the free exercise clause does not excuse criminal conduct, at least in so far as such conduct violates the basic moral values of society:

\begin{quote}
It was never intended or supposed that the amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society . . . .
\end{quote}


Numerous state court decisions indicate the same treatment. \textit{See} Harden v. State, 188 Tenn. 17, 216 S.W.2d 708 (1948) (statute prohibiting exhibition of poisonous reptiles upheld even though use of snakes was part of a religious ceremony); State v. Bullard 267 N.C. 599, 148 S.E.2d 565 (1966), \textit{cert. denied}, 386 U.S. 917 (1967) (conviction for unlawful possession of narcotics may not be set aside upon defense that drugs are part of religious practice); People v. Pierson, 176 N.Y. 201, 68 N.E. 243 (1903) (statute requiring the furnishing of medical care to a young child upheld).

\textsuperscript{25} 98 U.S. 145 (1878).

\textsuperscript{26} \textit{Id.} at 166.

\textsuperscript{27} 133 U.S. 333 (1890).
However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation.\textsuperscript{28}

The Reynolds and Davis cases comprise the foundation upon which later free exercise cases were decided by the Court in analyzing the impact of governmental regulations or limitations upon religious activity.\textsuperscript{29}

Following the rationale of Reynolds, the Court in Chaplinsky v. New Hampshire\textsuperscript{30} upheld the defendant's conviction for cursing a city marshall while distributing literature conveying religious beliefs. The Court noted that even if the activities preceding the cursing incident might be seen as religious in nature, and thereby clearly protected under the fourteenth amendment, the defendant was not "cloak[ed] . . . with immunity from the legal consequences for concomitant acts committed in violation of a valid criminal statute."\textsuperscript{31} Fraud and abuse in connection with public solicitation by religious charities should be similarly devoid of constitutional protections.

Of particular importance to the subject of regulation of religious charities is Cantwell v. Connecticut.\textsuperscript{32} Cantwell involved the solicitation of charitable contributions by the Jehovah's Witnesses. At issue was the constitutionality of a Connecticut statute which required all persons soliciting contributions for a religious, charitable, or philanthropic cause to obtain prior approval from the Secretary of the Public Welfare Council. In summarizing the protection afforded by the free exercise clause, the Supreme Court interpreted the first amendment as embracing two concepts—freedom to be-

\textsuperscript{28} Id. at 342-43.
\textsuperscript{29} See, e.g., United States v. Ballard, 322 U.S. 78 (1943), which exemplifies the Court's refinement of the concept of freedom of religious belief. In Ballard, the Court held that while a jury could not examine the veracity of a belief, it could consider the sincerity with which the belief was held. Id. at 84.
\textsuperscript{30} 315 U.S. 568 (1942).
\textsuperscript{31} Id. at 571. See also Braunfeld v. Brown, 366 U.S. 599 (1961); but see People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) (record established that the use of peyote, an otherwise illegal substance, was the cornerstone of the Navajo religion; application of the statutory prohibition against its use would result in the virtual prohibition of this religion in violation of the guarantee of the free exercise clause). In Cox v. New Hampshire, 312 U.S. 569 (1941), the Court considered a statute which allowed New Hampshire cities to require persons parading on public streets to procure a license. The statute was upheld against a free exercise attack by a Jehovah's witness, despite the fact that it gave the licensing board broad discretion to grant and revoke licenses. The Court indicated that the secular interest in promoting the safety of public roads took precedence over an indirect interference with religion. Id. at 574.
\textsuperscript{32} 310 U.S. 296 (1940).
lieve and freedom to act. Unlike the first, the latter concept cannot
be absolute. Certain conduct remains subject to regulation for the
protection of society. However, "[i]n every case the power to regu-
late must be so exercised as not, in attaining a permissible end,
unduly to infringe the protected freedom."33

The Cantwell Court held that the statute did not withstand the
first amendment challenge because it permitted the Secretary to
withhold approval of solicitation activities upon a determination
that the cause was not religious, not a bona fide object of charity,
or not in conformance with reasonable standards of efficiency and
integrity.34 The Court reasoned that a prior restraint,35 based only
upon a determination that the religious cause in question was not
valid or worthy, violated the first amendment, and concluded that
the state could not make its regulations dependent upon the type
of religious beliefs involved.36

Although holding that the statute in question did not withstand
the free exercise clause attack, the Court indicated that religious
activities or practices may nonetheless be subjected to regulation by
the states:

[A] State may by general and non-discriminatory legislation reg-
ulate the times, the places, and the manner of soliciting upon its
streets, and of holding meetings thereon; and may in other respects

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33. Id. at 304.
34. Id. at 305.
35. In constitutional terms, the doctrine of "prior restraint" forbids governmental officials
or those acting under color of law from imposing limitations before the fact, with few excep-
tions, upon modes of expressions guaranteed under the first amendment. See Near v. Minne-
sota, 283 U.S. 697 (1931).

The major considerations underlying the doctrine of prior restraint are matters of adminis-
tration, enforcement, and operation, and their effect upon the basic objectives of the first
In contrast to other doctrines which have developed out of the first amendment, the doctrine
of prior restraint is more precise in its application. According to Emerson:

It does not require the same degree of judicial balancing that the courts have held
to be necessary in the use of the clear and present danger test, the rule against
vagueness, the doctrine that a statute must be narrowly drawn, or the various
formulae of reasonableness. Hence, it does not involve the same necessity for the
court to pit its judgment on controversial matters of economics, politics, or social
theory against that of legislature.

Id.

In the Near case, the Supreme Court's major pronouncement on the doctrine of prior
restraint, it was stated that the first amendment granted protection against prior restrains,
but that the freedom is not absolutely protected. Three different grounds were enunciated
upon which justification for some prior restraint could be predicated: (1) national security in
time of war; (2) in obscenity cases where the requirements of decency are involved; and (3)
where the "security of the community life" requires protection "against incitements to acts
of violence and the overthrow by force of orderly government." 283 U.S. at 716.
36. 310 U.S. at 307.
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safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment.37

The Court also pointed out that a statute regulating the public interest of solicitation is not constitutionally objectionable so long as it "does not unreasonably obstruct or delay the collection of funds . . . even though the collection be for a religious purpose."38 Furthermore, the decision specifically noted that "a State may protect its citizens from fraudulent solicitation" by requiring solicitors to establish their identity and authority to act for the cause which they purport to represent.39

Application of Cantwell

Cantwell gives strong indication that a statute regulating public solicitations, designed to protect and promote public safety, peace, comfort, or convenience will not run afoul of the first amendment so long as it does not directly inhibit the expression of religious beliefs. Cases following Cantwell have reaffirmed this principle,40 and the test articulated by Cantwell has been applied numerous times by state and lower federal courts in cases involving the validity of statutes or ordinances regulating the solicitations of charitable contributions. These cases have generally upheld the right of local government to regulate religious solicitation activities.

In Gospel Army v. City of Los Angeles,41 for example, a religious

37. Id. at 304.
38. Id. at 305.
39. Id. at 306.
40. In Saia v. New York, 334 U.S. 558 (1948), the Court held that an ordinance which allowed the Chief of Police arbitrarily to deny a permit to persons seeking to use loud speaker equipment in public places was unconstitutional because it involved a prior restraint on the expression of religious beliefs. The Court noted that a narrow statute, designed to regulate time, place or noise level, would be constitutionally permissible.
Murdock v. Pennsylvania, 319 U.S. 105 (1943), is noteworthy for narrowly defining the area of protected religious conduct while broadly defining the area of legitimate governmental regulation. The Court stated that only religious activities well established by a religious organization come within the umbrella of the first amendment, and even these activities are subject to non-restrictive regulation. The Court implied that a mere registration requirement or a nominal regulatory fee would be a valid exercise of the police power.
Prince v. Massachusetts, 321 U.S. 158, rehearing denied, 321 U.S. 804 (1944), indicates that even religious which is protected by the free exercise clause may be subjected to governmental regulation amounting to a prohibition when a countervailing governmental interest of paramount importance is involved. In Prince, the Supreme Court upheld the conviction—for violating the child labor laws—of an adult member of Jehovah's Witnesses who permitted a nine-year old girl to sell magazines and solicit charitable contributions. The Court held that the evils of child labor were not diminished by the fact that the labor was on behalf of a religious cause, and that the power of the state to protect and control children reached beyond the scope of its authority over adults. Id. at 170.
organization engaged in the solicitation of charitable contributions argued to the California Supreme Court that enforcement of the ordinance regulating solicitations would violate the free exercise clause if applied to them. Even though the plaintiffs contended that solicitation of charitable contributions was an integral part of their religious duties, the court upheld the ordinance as a reasonable exercise of the state's police power:

Activities characteristic of the secular life of the community may properly be a concern of the community even though they are carried on by a religious organization . . . . Conceivably they may engage in virtually any worldly activity, but it does not follow that they may do so as specially privileged groups, free of the regulations that others must observe. If they were given such freedom, the direct consequence of their activities would be a diminution of the state's power to protect the public health and safety and the general welfare. With that power so easily diminished there would soon cease to be that separation of church and state underlying the constitutional concept of religious liberty. . . .

The Gospel Army court further observed that many charitable activities concern community activities unrelated to religion, and that there is a public interest in regulating such activities to prevent fraud. The information required by such a regulation served the public interest by enabling the public to determine the nature and value of the purposes for which the solicitation was made.

The validity of prior restraints of solicitation activity when exercised through a legislative standard designed to prohibit fraudulent solicitation schemes has also been recognized. In National Foundation v. Fort Worth, the Fifth Circuit upheld the validity of an ordinance which required all organizations wishing to solicit charitable funds within Fort Worth to obtain a permit. The ordinance

42. Id. at 238-39, 163 P.2d at 711. The ordinance regulating the solicitation activities required the filing of a registration statement disclosing the identity of the organization, the purpose of the solicitation, the manner in which the solicitation would be conducted, and the percentage breakdown of administrative and fund raising costs in relation to distributions to the charitable beneficiaries. Permits were automatically issued upon the filing of the required information. The licensing board could not disallow a proposed solicitation but it could investigate organizations and publicize its findings. Id., 163 P.2d at 708-09, 711.

43. Id. at 244-45, 163 P.2d at 712.

44. Id. at 246, 163 P.2d at 712-13.

45. Id. at 247. A year later in Rescue Army v. Municipal Court, 28 Cal. 2d 460, 171 P.2d 8 (1946), appeal dismissed, 331 U.S. 549 (1947), the California Supreme Court determined that the same ordinance was valid even though it granted the licensing board the discretion to prohibit public canister solicitations. The court found this was not a prior restraint based upon a religious test; it found, instead, that a prohibition would be predicated upon a showing of fraud or interference with public convenience and safety. Id. at 472, 171 P.2d at 16.

conditioned the obtaining of the permit upon several requirements, one of which mandated that the expected cost of solicitation not exceed a twenty per cent limit, barring special circumstances. In rejecting the Foundation's contention that the ordinance was a prior restraint of free speech and free press, the court stated that "[n]o constitutional right exists to make a public solicitation of funds for charity" and that "[t]he reasonable regulation of charitable organizations is within a government's police power." Furthermore, the court held that despite the twenty per cent limitation on fund raising costs, the ordinance was a reasonable exercise of the city's police power.

Although the ordinance considered in National Foundation exempted a church or religious society which solicited solely from its own membership, a religious organization soliciting from the general public was required to meet the twenty per cent limitation. This standard did not violate the free exercise clause as it was not a religious test based upon the consideration of religious beliefs.

Twenty years after the "beliefs/practices" dichotomy was articulated in Cantwell, the Supreme Court began revising that notion in favor of a delicate balancing standard. In Wisconsin v. Yoder, the Court noted that "in this context belief and action cannot be neatly confined in logic-tight compartments." Weighing the asserted state interests against the importance of the religious activities being regulated, the Court considered in great detail the sincerity and importance of the religious value of the regulated activities against the necessity, importance and impact of the governmental regulation.

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47. Id. at 44. The ordinance provided that the 20% limit could be exceeded upon a showing of special facts or circumstances.
48. Id. at 45.
49. Id. at 47.
52. In Sherbert v. Verner, 374 U.S. 398 (1963), a member of the Seventh-day Adventist Church contended that the decision of the South Carolina Employment Security Commission in denying her unemployment benefits because she refused to work on Saturdays violated the free exercise clause. All of the mills in the area where the plaintiff lived operated a six-day week and refusal to work on Saturdays was tantamount to a refusal to work at all. Although the plaintiff was unavailable for work, work was not unavailable. The Court held that the state's interest in discouraging the filing of fraudulent claims which diluted the unemployment compensation fund was not compelling enough to outweigh the plaintiff's constitutional claim since it had not been demonstrated that alternative forms of regulation would not combat such abuses. The Court concluded that even if the statute had a rational relationship to a colorable state interest, this would not suffice to force a choice between unemployment benefits and the precepts of one's religion.

In Wisconsin v. Yoder, 406 U.S. 205 (1972), the Court held that Wisconsin's compulsory
Although the "beliefs/practices" test originating with *Reynolds* must be replaced by a balancing test "in some contexts," the fundamental proposition remains—public religious solicitations may be subjected to governmental regulation requiring registration and financial reporting statements. When a religious fund raising activity is closely intertwined with the religious beliefs of the members, it is incumbent upon the religious group to demonstrate both the sincerity and importance of the activity. It is unlikely that many religious groups could sustain such a burden, as did the Navajos in *People v. Woody,* or the Amish in *Wisconsin v. Yoder.*

Education law was invalid under the free exercise clause as applied to children of the Amish faith. The children's parents contended that it was contrary to the Amish religion and way of life to send their children to public schools beyond the eighth grade. In resolving the issue, the Court determined that the state's admittedly legitimate interest in regulating the duration of basic education must be balanced against the Amish parents' interest in directing the religious upbringing and education of their children. The Court concluded that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Id.* at 215.

53. 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

54. 406 U.S. 205 (1972). The Court's analysis of the validity of the Amish's practices is relevant to the subject of this article. In *Yoder* the Court described at length how the Amish had demonstrated that the continuation of their religious beliefs and practices outweighed any state interest in compulsory high school education. In support of their position the Amish presented expert witnesses—scholars on religion and education—whose testimony was uncontradicted. The history of the Amish sect was given in some detail. The concept of life aloof from the world and its values was shown to be central to the Amish faith, and well ingrained in its 300-year history. The Old Order Amish religion "pervades and determines the entire mode of life of its adherents." *Id.* at 210. The Amish objection to formal high school education was firmly grounded in their central religious concepts, for it took the children out of the community during a crucial stage in their development. Expert testimony was submitted to the court stating that compulsory high school attendance "could not only result in great psychological harm to Amish children, . . . but would also . . . ultimately result in the destruction of the Old Order Amish church community. . . ." *Id.* at 212. Another expert witness testified that the Amish were successful in preparing their high school age children to be productive members of the Amish community. Of further importance was evidence that "[t]he Amish have an excellent record as law-abiding and generally self-sufficient members of society." *Id.* at 212-13. The Court examined the quality of the claims of the Amish and found important the determination of whether "the Amish religious faith and their mode of life are, as they claim, inseparable and interdependent." *Id.* at 215. The claims must be rooted in religious belief and will not be a barrier to reasonable state regulation if based on purely secular consideration. The traditional way of life of the Amish sect was shown to be "one of deep religious conviction, shared by an organized group, and intimately related to daily living." *Id.* at 216. This way of life did not alter in fundamentals for centuries but remained constant as the society around them changed. Expert witnesses testified that the impact of the state compulsory education law on the Amish practice of religion "is not only severe, but inescapable. . . . It carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent." *Id.* at 218. The Court found that the free exercise of the Amish sect's religious beliefs would be gravely endangered if not destroyed by the state's law. *Id.* at 219.

The delicate balancing test utilized by the *Yoder* Court illustrates the process which a court must now undertake when a regulatory statute is challenged on free exercise grounds. First, the court must consider whether or not a specific statute represents an infringement of the
State legislation requiring charitable organizations to file registration and financial reporting statements when engaged in public solicitation efforts involves a reasonable exercise of state police power. When analyzed amidst the well-documented and widespread abuses in the area of charitable solicitations, such legislation should withstand the constitutional objections considered above even when the strict scrutiny standard is applied. These laws would be well within the confines of both Cantwell and the more recent decisions since they would not be based on religious beliefs.

The cases concerning the free exercise clause indicate that governmental regulation of religious solicitations will withstand challenge under the free exercise clause so long as the regulation does not: (1) involve a prior restraint based upon a weighing of religious beliefs; (2) vest arbitrary authority in those charged with enforcing the regulation; or (3) directly inhibit the propagation of religious beliefs. A statute requiring registration and financial statements from all charities engaged in public solicitations would not contravene these standards.

The Tax Cases

Religious organizations are not automatically exempt from tax liabilities, a fact which is often overlooked. This exemption has nevertheless been well-established in the United States since colo-

individual’s constitutional right to the free exercise of religion. The court will try to determine whether a belief or merely a religious act or practice is infringed upon. The court may also examine the role a particular belief plays in a group’s overall religious scheme. See People v. Woody, 61 Cal.2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

Next the court considers whether some compelling state interest justifies the infringement upon the free exercise of religion. Once a bona fide first amendment issue is joined, the government must shoulder the burden of defending a regulation impacting on religious actions. Stevens v. Berger, 428 F. Supp. 986 (E.D.N.Y. 1977). As the Court has said: “It is basic that no showing merely of a rationale relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, ‘[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitations.’” Thomas v. Collins, 323 U.S. 516, 530 (1945) as cited in Sherbert v. Verner, 374 U.S. 398, 406 (1963).

The Supreme Court re-emphasized this norm in Elrod v. Burns, 427 U.S. 347, 362 (1976): “It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny . . . . [E]ncroachment cannot be justified upon a mere showing of a legitimate state interest. . . . The interest advanced must be paramount, one of vital importance, and the burden is on the Government to show the existence of such an interest.”

55. See notes 25-54 supra and accompanying text.
56. See Justice Douglas’ dissenting opinion in Walz v. Tax Commission, 397 U.S. 664, 707 (1970), where the majority opinion held that a state scheme granting property tax exemptions to religious organizations did not violate the establishment clause of the first amendment. See notes 85-94 infra and accompanying text. See also Murdock v. Pennsylvania, 319 U.S. 105 (1943), where the Court, noting such power was not unbridled, stating that “[t]he power to tax the exercise of a privilege [i.e., the free exercise of religion] is [also] the power to control or suppress its enjoyment.” Id. at 112.
Every state accords some tax exemptions to religious organizations, and the federal tax laws are replete with religious exemptions. The constitutionality of this preferential treatment continues to be debated. At present, these statutes and the case law attendant thereto provide an instructive source of authority in a consideration of the constitutionality of legislation regulating public solicitations by religious organizations.

**Tax Exemption and the Free Exercise Clause**

The Internal Revenue Code (IRC) exempts from federal income taxation "Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific . . . or educational purposes. . . ." Additionally, the Internal Revenue Service (IRS) excuses "churches, their integrated auxiliaries, and conventions or associations of churches" from even having to apply formally for recognition of their exemption from income taxation.

Three distinct issues have been raised as a result of attempts to tax religious groups. The issues concern the existence and scope of the exemption, along with the permissible extent of governmental impact on the activities of these groups.

**The Definitional Issue**

The terms "religion" and "religious purposes" are not defined by

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57. See note 11 supra and note 86 infra and authorities cited therein.
58. State schemes of taxation exempt religious organizations from, inter alia, taxes imposed upon income, property, inheritance and sales. For exemptions under the federal scheme of taxation, see note 69 infra and accompanying text. See also Van Alstyne, Tax Exemption of Church Property, 20 Ohio St. L.J. 461 (1959), where the author, after cataloging constitutional and statutory laws granting tax exemptions to church property, notes that such exemptions are firmly rooted in American law. Additionally, see note 14 supra and accompanying text.
61. 26 U.S.C. § 508(c)(1)(A). This provision is an exception to the mandatory notice requirements of § 508(a), as set forth in Treas. Reg. § 1.508-1(a)(1)(ii), (1976), wherein it is provided that "[n]o organization shall be exempt from taxation under section 501(a) by reason of being described in section 501(c)(3) whenever such organization is not treated as described in section 501(c)(3) by reason of section 508(a) and this paragraph." Stated in the affirmative, Treas. Reg. § 1.508-1(a)(4) (1976) provides that "[a]ny organization excepted from the requirement of filing notice under section 508(a) will be exempt from taxation under section 501(c)(3) if it meets the requirements of that section . . . ." These special rules with respect to 501(c)(3) organizations, are applicable to an organization organized after October 9, 1969.
either the Internal Revenue Code or the Treasury Regulations. This void may reflect sensitivity to first amendment prohibitions, thereby producing a reluctance to formulate definitions which could so easily be held unconstitutional. The lack of definitions also reflects the sometimes vague belief/practices distinction which was discussed earlier.

Because laws "cannot interfere with mere religious belief and opinions," the courts have not perceived themselves at liberty to engage in a comparison of religious beliefs when addressing government claims that particular activities are not "religious" in the context of the federal tax statutes. A district court in California expressed this reluctance in holding against the government:

Neither this Court, nor any branch of this Government, will consider the merits or fallacies of a religion. Nor will this Court compare the beliefs, dogmas, and practices of a newly organized religion with those of an older, more established religion. Nor will the Court praise or condemn a religion, however excellent or fanatical or preposterous it may seem. Were the Court to do so, it would impinge upon the guarantees of the First Amendment.

The court avoided the formulation of a definition and limited its reasoning to a negatively phrased finding that the operations of the Universal Life Church were not "substantial activities which do not further any religious purpose."

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62. The only attempt to define these terms appears in the Treasury Regulations under § 511 with respect to unrelated business income of exempt organizations, where the term "church" is defined as including "a religious order or a religious organization if such order or organization (a) is an integral part of a church, and (b) is engaged in carrying out the functions of a church. . . ." Treas. Reg. § 1.511-2(a)(3)(ii) (1972). The Code presently sets forth 15 basic religious distinctions, rendering consistent interpretation or definition virtually impossible, as noted in Whelan, "Church" in the Internal Revenue Code: The Definitional Problems, 45 FORDHAM L. REV. 885, 887-89 (1977).

63. See note 67 infra and accompanying text.

64. See Religion in Politics, supra note 59, at 400.

65. See notes 25 and 26 supra and accompanying text.


69. Id. The court, in considering what constitutes a "religious purpose," seemingly adopts the test set forth in United States v. Seeger, 380 U.S. 163, 184 (1965), wherein the Court stated "does the claimed belief occupy the same place in the life of the objector [to the draft] as an orthodox belief in God holds in the life of one clearly qualified for exemption?"
Broad statements such as these open the door to favorable tax treatment for any organization claiming to be "organized and operated for religious purposes." This amorphous definition together with the absence of any requirement of formal application for an exempt status facilitates the potential for abuse—a potential which has become a reality.

Legislative and Political Activities

The charitable organizations described in the IRC are not eligible for the exemption from federal income tax liability if a "substantial part of [their] activities . . . is carrying on propaganda, or otherwise attempting to influence legislation . . ." or if they participate in any political campaign on behalf of a candidate for public office.
The possible revocation of a religious organization's exemption because of legislative or political activities may raise first amendment problems.\textsuperscript{74}

Courts first considering this subject addressed the issue of whether a particular group was organized and operated exclusively for religious purposes.\textsuperscript{75} The Tenth Circuit was the first court to confront the legislative and political limitations of this Internal Revenue Code exemption. In \textit{Christian Echoes National Ministry, Inc. v. United States},\textsuperscript{78} the IRS had revoked the tax exempt status of Christian Echoes. The group proceeded to sue for a refund in federal court. Christian Echoes was a nonprofit religious corporation which promoted activities such as religious radio and television broadcasts, authored publications and engaged in evangelistic cam-

\textsuperscript{74} U.S. CONST. amend. I provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." For example, many religious groups speak out on matters under consideration by legislative bodies (e.g., state or federal funds for abortion) and feel dutybound to do so. To prohibit such activity may impinge upon the free exercise of one's religion, while to permit some religions to do so, while forbidding others, would favor one religion over the other, thereby running afoul of the establishment clause. However, this activity may be deemed consistent with exempt status, for Treas. Reg. § 1.501(c)(3)-1(d)(2) (1976), provides that the fact that an organization, in carrying out its primary purpose, advocates social or civil changes or presents opinion on controversial issues with the intention of molding public opinion or creating public sentiment to an acceptance of its view does not preclude such organization from qualifying under section 501(c)(3) so long as it is not an "action" organization of any one of the types described in paragraph (c)(3) of this section.

As defined in Treas. Reg. § 1.501(c)(3)-1(c)(3) (1976), an "action" organization is an organization which, as its primary objective, advocates the adoption of a doctrine or theory which can become effective only by the enactment of legislation. Rev. Rul. 62-71, 1962-1 C.B. 85. See also note 83 infra. \textsuperscript{75} See, e.g., Girard Trust Co. v. Commissioner, 122 F.2d 108 (3d Cir. 1941). Challenges concerning prohibited political activities and first amendment problems came later. In \textit{Girard}, the Third Circuit offered its comments on political-type activities:

Religion includes a way of life as well as beliefs upon the nature of the world... The step from acceptance by the believer to his seeking to influence others in the same direction is a perfectly natural one... The next step, equally natural, is to secure the sanction of organized society for or against certain outward practices thought to be essential. \textit{Id.} at 110. See also Fowler v. Rhode Island, 345 U.S. 67 (1953). The Court, in reversing the conviction of a Jehovah's Witnesses minister for delivering a sermon in a public park in violation of a city ordinance, stated that "it is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment." \textit{Id.} at 70.

\textsuperscript{76} 470 F.2d 849 (10th Cir. 1972), \textit{cert. denied}, 414 U.S. 864 (1973).
paigns and meetings.\textsuperscript{77} The district court found for the group, concluding that all its activities were motivated by sincere religious convictions,\textsuperscript{78} and that the IRS revocation of Christian Echoes' exemption had violated its right to the free exercise of religion.\textsuperscript{79} The Tenth Circuit reversed, holding that the IRS limitations on political activities were constitutionally valid and that Christian Echoes had not been denied the free exercise of religion.\textsuperscript{80} Christian Echoes' political activities included appeals to their readers to write congressmen to influence political decisions in Washington; to work in politics at the precinct level; and to demand a "congressional investigation of biased reporting of major television networks."\textsuperscript{81} The court was not willing to find that religious organizations must be left free of any and all legislative restrictions.\textsuperscript{82}

Christian Echoes represents a departure from the previous hands-off attitude of the courts in dealing with the tax exempt status of religious groups.\textsuperscript{83} The case may indicate the watershed between judicial passivity and active scrutiny of the constitutional limits on regulation of religious organizations in this context. Christian Echoes lends strong support to the constitutional validity of the present proposal—that state governments should and can enact statutes requiring registration and financial reporting by religious

\textsuperscript{77}Id. at 852.
\textsuperscript{78}See text accompanying notes 62 to 71 supra.
\textsuperscript{79}470 F.2d at 856-57.
\textsuperscript{80}In so holding, the court noted: "[t]he free exercise clause of the First Amendment is restrained only to the extent of denying tax exempt status and then only in keeping with an overwhelming and compelling Governmental interest: That of guarantying that the wall separating church and state remain high and firm." Id. at 857.
\textsuperscript{81}Id. at 855. The Tenth Circuit rejected the district court's conclusion that there must be specific legislation before Congress in order for the "attempt to influence legislation" prohibition to take effect. Id. at 854.
\textsuperscript{82}Id. at 856-57.
\textsuperscript{83}The Christian Echoes holding was such a departure from previous cases that many commentators have concluded that the limitations on the legislative activities of 501(c)(3) religious organizations are unconstitutional on their face. See note 59 supra. This position is summarized succinctly in Persons, Osborn & Feldman, IV Criteria For Exemption Under Section 501(c)(3) 1909,1962-63 Research Papers Sponsored by The Commission on Private Philanthropy and Public Needs (Department of the Treasury, 1977). The major arguments advanced in support of the unconstitutionality of the legislative limitations language contained in § 501(c)(3), include, \textit{inter alia}: (1) that the limiting language, as written, is void for vagueness and overbreadth; (2) that legislative activity is protected by the first amendment; (3) that legislative activity may be so enmeshed in the furtherance of the religious purposes of an organization, that to prohibit it would be to deny the free exercise of that organization's religion; and (4) that tax benefits cannot be denied on the basis of exercising one's first amendment rights. It should also be noted that in passage of the Tax Reform Act of 1976, Pub.L.No. 94-455, 90 Stat. 1722, the Congressional Committee report, while acknowledging the Christian Echoes litigation, stated that its actions were not to be regarded as an approval or disapproval of the decision of the Tenth Circuit, or of any of the reasoning leading to that decision.
Religious Exemptions—Disclosure

groups. The Tenth Circuit's summary dismissal of the free exercise claim raised by Christian Echoes should encourage the passage of such legislation by reinforcing the constitutional permissibility of legislative attempts to repeal the current exemptions afforded religious charities under state solicitation statutes.

Tax Exemption and the Establishment Clause

After bypassing several opportunities, the Supreme Court reviewed the constitutionality of tax exemptions for religious organizations in *Walz v. Tax Commission*. The Court held that property tax exemptions granted to religious organizations did not violate the establishment clause. The importance of the *Walz* decision lies in its articulation of a new standard to be applied in considering the permissible extent of governmental regulation of religious organizations under the first amendment.

Prior to *Walz*, the relevant test consisted of a twofold inquiry: whether the statute reflected a secular legislative purpose, and whether its primary effect was to advance or inhibit religion. The *Walz* Court, however, found a need to extend the inquiry to be sure that "the end result—the effect—is not an excessive government

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86. Id. at 679-80. The Court noted that up to 1885, reflecting more than a century of this country's history and practice, it had accepted the proposition that federal or state grants of tax exemption to churches were not violative of the religion clauses of the first amendment. In 1886, in Gibbons v. District of Columbia, 116 U.S. 404, 408 (1886), the Court stated: "In the exercise of this [taxing] power, Congress, like any State legislature unrestricted by constitutional provisions, may, at its discretion, wholly exempt certain classes of property from taxation, or may tax them at a lower rate than other property." In recent years, commentators have divided into pro-exemption and anti-exemption camps with respect to the desirability and constitutionality of property tax exemptions granted to religious organizations. See, e.g., Bittker, *Churches, Taxes and the Constitution*, 78 Yale L.J. 1285 (1969); D. Kelley, *Why Churches Should Not Pay Taxes* (1977); Comment, *Constitutionality of Tax Exemptions Accorded American Church Property*, 30 Alb. L. Rev. 58 (1966); Gabler & Shannon, *IV The Exemption of Religious, Educational, and Charitable Institutions From Property Taxation* 2535, 2543-55, Research Papers Sponsored by The Commission on Private Philanthropy and Public Needs (Department of the Treasury, 1977). The authors neither join in this debate, nor express their positions relative to it.


entanglement with religion. The test is inescapably one of degree. 89 Using this test, the Court found there was no nexus between tax exemption and establishment of religion, concluding that exemption, rather than taxation, served to minimize the involvement between church and state. 90

The Walz Court did not hold that the constitution required that religious groups be given property tax exemptions. Rather, the Court's decision reflected its deference to the history and practice of granting such exemptions. 91 The Court found that neither the history nor the practice of granting exemptions encouraged a movement towards an established church or religion. 92 The Court emphasized that the first amendment neither says, nor can be interpreted to mean, that "in every and all respects there shall be a separation of Church and State." 93 This observation enabled the Court to dis-

89. 397 U.S. at 674. As noted by Mr. Chief Justice Burger, in the analysis and application of these "tests," "there is no single constitutional caliper that can be used to measure the precise degree." Rather, "viewed as guidelines," these tests should consider "the cumulative criteria developed over many years and applying to a wide range of governmental action challenged as violative of the Establishment Clause." Tilton v. Richardson, 403 U.S. 672, 677-78 (1971), cited with approval in Committee For Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 773 n.31 (1973).

90. 397 U.S. at 675. For the Walz Court, exemption, and not taxation, was the fiscal relationship which tended to reinforce the desired separation of church and state by insulating one from the other. Id.

91. Although quick to point out that "no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it," Id. at 678, the Court tempered this statement by reference to comments by Mr. Justice Holmes, in concluding that "an unbroken practice of according the exemption to churches, openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside." Id. In New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921), Mr. Justice Holmes remarked that "a page of history is worth a volume of logic," and later, in Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922), he stated: "If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it . . . ." That the historical underpinnings of tax exemptions played a significant role in the Walz Court's decision cannot be denied, for tax benefits for parents whose children attend parochial school were disallowed in Nyquist, being termed "a recent innovation" without historical precedent. 413 U.S. at 792.

92. Rather than leading to an established church or religion, the Court observed that our two centuries of according religion uninterrupted freedom from taxation "has operated affirmatively to help guarantee the free exercise of all forms of religious belief." 397 U.S. at 678. The Court also noted the difficulties in reconciling the two religion clauses of the first amendment:

The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution. The sweep of the absolute prohibitions in the Religion Clauses may have been calculated; but the purpose was to state an objective, not to write a statute. In attempting to articulate the scope of the two Religion Clauses, the Court's opinions reflect the limitations inherent in formulating general principles on a case-by-case basis.

Id. at 668. Also writing for the Court in Lemon v. Kurtzman, 403 U.S. 602, 612 (1971), Mr. Chief Justice Burger referred to the language of the religion clauses as being "at best opaque."

tistinguish exemption from direct aid, finding that exemptions tended
to complement and reinforce the separation of church and state.\textsuperscript{84}

In cases raising establishment clause issues, the Court focuses on
the concerns against which the clause was designed to pro-
tect—"sponsorship, financial support, and active involvement of
the sovereign in religious activity."\textsuperscript{85} Though these concepts may
seem clear, the boundaries of permissible government activity in
this area are only dimly perceived.\textsuperscript{86} Thus the Court will examine
"the form of the relationship for the light that it casts on the
substance."\textsuperscript{87}

Refinement and application of the \textit{Walz} "excessive entanglement
test" has occurred primarily in actions challenging the constitution-
ality of public aid to church-related schools.\textsuperscript{88} In these cases, the
Court has stated that "we must examine the character and purposes

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94. In the context of exemption or taxation, "separation" was not interpreted by the Court
to mean absence of all contact, as the complexities of modern life are not conducive to such.
For as the Court points out, "[n]o perfect or absolute separation is really possible; the very
existence of the Religion Clauses is an involvement of sorts—one that seeks to mark bounda-
ries to avoid excessive entanglement. 397 U.S. at 670. Mr. Chief Justice Burger also noted
that the general principle deducible from the first amendment is "that we [the Court] will
not tolerate either governmentally established religion or governmental interference with
religion. Short of those expressly proscribed governmental acts there is room for play in the
joints productive of a benevolent neutrality which will permit religious exercise to exist
without sponsorship and without interference." \textit{Id.} at 669.

95. \textit{Id.} at 668.

96. \textit{Id.} at 678. See \textit{Lemon v. Kurtzman}, 403 U.S. 602, 612 (1971), where the Court stated:
A law "respecting" the proscribed result, that is, the establishment of religion, is
not always easily identifiable as one violative of the Clause. A given law might not
establish a state religion but nevertheless be one "respecting" that end in the sense
of being a step that could lead to such establishment and hence offend the First
Amendment.

97. \textit{Lemon v. Kurtzman}, 403 U.S. 602, 614 (1971). This examination is both necessary and
inevitable, as the line of separation between church and state, "far from being a "wall," is a
blurred, indistinct, and variable barrier depending on all the circumstances of a particular
relationship." \textit{Id.}

Although posing considerations and subtleties distinct from tax exemptions, the analyses of
the subsidies involved in these cases are equally applicable to a \textit{Walz}-like exemption case.
See generally \textit{Note, Tax Exemptions, Subsidies and Religious Freedom after Walz v. Tax
\end{alphanum}
of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.99 The Walz Court construed tax exemption as a fiscal relationship designed to minimize entanglement between church and state.100 In contrast, the Court in Lemon v. Kurtzman101 found that direct aid from the state involved surveillance and audit powers carrying the dangerous potential of excessive government supervision of church schools. The legislation was found to violate the establishment clause.

Because the "test" is inescapably one of degree,102 the Court has acknowledged that "while some involvement and entanglement are inevitable, lines must be drawn."103 The difficulties in drawing such lines are apparent. Application of the tripartite Walz test therefore must be limited in scope and effect to a case-by-case analysis of the facts presented.104

In the event that statutes are passed requiring religious groups engaged in public solicitations to register with the state, such groups might raise the Walz prohibition against "excessive entanglement" as a bar to the enforcement of such statutes.105 Application of the tripartite test demonstrates that this argument is not tenable.

As discussed earlier,106 the government has a paramount interest in enacting and implementing such a statutory scheme. This interest is found in the state's power to protect public health, safety and general welfare. Furthermore, such legislation would reflect a secular legislative purpose, satisfying the first prong of the test.107 No one religion would be singled out; all those engaged in public solicitation of contributions would be treated and classified in the same manner.108

The second prong of the test is also satisfied in that the primary effect of the statute would be neither the advancement nor the inhibition of religion.109 However, religious groups would undoubt-

101. 403 U.S. at 621.
102. See note 89 supra and accompanying text.
103. 403 U.S. at 625.
104. See note 92 supra.
106. See text accompanying notes 43-45 supra.
107. See note 87 supra and accompanying text. See also Epperson v. Arkansas, 393 U.S. 97, 106 (1968).
108. This analysis parallels that of the Walz Court's consideration of the legislative purpose of a property tax exemption. 397 U.S. at 672.
edly claim that the legislation inhibited their religious and fund raising activities in violation of the free exercise clause. Like the free exercise claim summarily dismissed in *Christian Echoes,* it is equally clear that religion is neither advanced nor inhibited by mandatory filing of registration and financial statements. Fund raising cannot be equated with the free exercise of religion; and public disclosure of fund raising practices, along with the attendant public accountability, do not come within the scope of constitutional protections of religion.

The third and final prong of the *Walz* test—whether the statute fosters excessive government entanglement with religion—is directed at the prohibitions of the establishment clause. Whether a statute fosters unconstitutional "excessive entanglement," or whether it promotes only inevitable involvement between the state and the church is the issue to be addressed.

As noted by the Supreme Court in *Roemer v. Maryland Public Works Board,* "entanglement is essentially a procedural problem," and three factors must be considered: (1) the character and purposes of the benefited institutions; (2) the nature of the aid; and (3) the resulting relationship between government and the religious authority. A requirement that religious organizations file registration and financial statements would neither benefit nor aid such groups within the meaning of the first two factors. The third factor has been defined as a consideration of "whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance. . . ." The filing of a registration statement would be a one-time occurrence and would thus seem to be outside the "excessive" category.

However, filing of financial statements on an annual basis would probably provide the greatest potential for excessive governmental entanglement. The danger which has become apparent in the past involves state aid to religious schools. This type of aid is subject to surveillance by the granting authority to ensure that the funds be

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110. See notes 25-54 *supra* and accompanying text, wherein the free exercise claims of religious organizations resulting from the abrogation of this exemption have been considered.
112. See note 120 *infra* and accompanying text.
113. See note 89 *supra* and accompanying text.
114. See note 96 *supra* and accompanying text.
116. *Id.* at 755.
117. *Id.* at 762-63. See also note 99 *supra* and accompanying text.
118. 397 U.S. at 675.
applied to secular purposes. In this situation a great deal of control lies with the party exercising the pursestrings, and an impermissible degree of governmental entanglement with the religious recipients is thereby fostered.\textsuperscript{119}

The filing of financial statements by religious groups would serve to assure the public that solicited funds are actually being used for the stated purposes. Such statements would not serve to involve government in the "essentially religious activities of religious organizations."\textsuperscript{120} The states would instead be concerned with the secular fund raising activities of religious groups. To conclude that this type of involvement violates the establishment clause is not the logical extension of the \textit{Walz} "excessive entanglement" test.\textsuperscript{121}

\textbf{Recommendations}

Religious charities solicited nearly $13 billion in 1976, approximately half of which was allocated for secular purposes. Practically speaking, these religious charities are indistinguishable from secular charities in terms of functions performed and beneficiaries served.\textsuperscript{122} Nevertheless, financial accountability and disclosure regulations are staggeringly minimal in the religious sector when compared to the accountability required of secular charities.

The existence of significant fraud and abuse in solicitation practices of religious charities demands that state statutes be enacted providing for registration and financial disclosure.\textsuperscript{123} Christian

\textsuperscript{119} As the pursestrings are normally closely guarded and tightly drawn, the evil of various religious organizations competing among themselves for monetary benefits persists, thereby creating the "risk of politicizing religion" in attempting to secure these funds. (Opinion of Justice Harlan in \textit{Walz}, 397 U.S. at 695). As noted in Lemon v. Kurtzman, 403 U.S. 602, 622 (1971): "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect." Thus, the prohibition of the establishment clause's "excessive entanglement test" encompasses state programs with "successive and very likely permanent annual appropriations that benefit relatively few religious groups," which by their nature create divisive political potential and "[political fragmentation . . . on religious lines]." \textit{Id.} at 623.

\textsuperscript{120} Lemon v. Kurtzman, 403 U.S. 602, 658 (1971) (opinion of Mr. Justice Brennan).

\textsuperscript{121} See note 103 supra.

\textsuperscript{122} Herman, \textit{Legislative Impact on Charitable Giving}, 116 \textit{Trusts & Estates} 794 (December, 1977). Religious organizations received $12.84 billion in contributions in 1976. Nearly 43\% of all charitable contributions are donated to religious causes or organizations. \textit{Giving U.S.A. 1976 Report}, American Association of Fund Raising Counsel (New York). However, the percentage that is solicited from the general public for non-sacramental purposes, as contrasted to funds raised as sacramental donations, most likely amounts to one-half of $6.5 billion. See \textit{I A Study of Religious Receipts and Expenditures in the United States}, Interfaith Research Committee of Commission on Private Philanthropy and Public Needs 365-450.

\textsuperscript{123} See \textit{Church, State and Fund-Raising}, \textit{Philanthropy Monthly} (November, 1977) (Members of the National Association of Attorneys General Committee on Charitable Trusts and Solicitations plan to modify the religious exemptions of state charitable solicitation statutes.).
Echoes supports the contention that the implementation of such statutes would encompass neither an examination into the beliefs, doctrines, tenets or merits of a religion, nor involve a comparison of the beliefs of one religious group with another. State regulation would reflect the fund raising practices of the soliciting charity.

 Existing Regulation

A few states presently have statutes which regulate public solicitation by religious organizations. Until 1976, the Maryland solicitation statute\(^{124}\) did not apply to "religious corporations."\(^{125}\) The statute was amended in 1976, primarily as a result of the Pallottine scandal in that state.\(^{126}\)

Maryland’s new statute exempts some organizations from its registration and financial disclosure requirements. The exemption is based upon types of fund raising activities\(^{127}\) rather than whether the group is secular or religious. Some organizations are exempt from registration requirements if they “do not employ a professional solicitor . . . or if they do not mail more than 500,000 solicitations . . . in any one year. . . .”\(^{128}\) The list of organizations eligible for the exemption includes a “bona fide religious organization” which presently holds a federal tax exemption.\(^{129}\) Nevertheless, charities claiming an exemption must still register an exemption claim with the Secretary of State.\(^{130}\)

The statute provides for a twenty five percent limit on income used for expenses, although the Secretary of State is authorized to make exceptions.\(^{131}\) Finally, violations of the statute constitute misdemeanors, for which a maximum fine of $5,000 or a one year sentence may be imposed.\(^{132}\)

\(^{125}\) Id. at § 103D. Charitable organizations in general were also exempt if they did not receive contributions exceeding $2,500 during the fiscal year so long as two additional requirements were met: the organization’s fundraising could not be carried on by a paid professional, and none of the organization’s assets or income could be paid to any officer or member of the organization. Id.
\(^{127}\) Md. Code Ann. art. 41, § 103C(a) (1977 Supp.).
\(^{128}\) Id.
\(^{129}\) Id. at § 103C(a)(6).
\(^{130}\) Id. at § 103C(b). The exemption claim must include the name, address, and purpose of the organization, together with “a statement setting forth the reason for the claim for exemption.” Id.
\(^{131}\) Id. at § 103D(a). More than 25% of income may be used for expenses “where the 25% limitation would effectively prevent the charitable organization from raising contributions.” Id.
\(^{132}\) Id. at § 103L(a). The Secretary may also cancel the registration of the violator. Id.
North Carolina until recently exempted religious organizations which solicit only from their own membership, with the qualification that "memberships" not be granted to persons making a contribution as a result of a solicitation.\textsuperscript{133} However, amendments effective in 1975 greatly expanded the statute's length and specificity. Unlike Maryland, North Carolina has attempted to define a religious organization in terms of its activities. The following description is found in the list of exempt persons:

A religious corporation, trust, or organization incorporated or established for religious purposes, or other religious organizations which serve religion by the preservation of religious rights and freedom from persecution or prejudice or by the fostering of religion, including the moral and ethical aspects of a particular religious faith: Provided, however, that such religious corporation, trust or organization established for religious purposes shall not be exempt from filing a license application with respect to secular activities [sic], nor shall such religious corporation, trust or organization established for religious purposes be exempt from filing a license application if its financial support is derived primarily from contributions solicited from persons other than its own members, excluding sales of printed or recorded religious materials: Provided further, however, that no part of the net income of which inures to the benefit of any individual and that the organization had received a declaration of current tax-exempt status as a religious organization from the government of the United States.\textsuperscript{134}

"Religious purposes" is in turn defined as "maintaining or propagating religion or supporting public religious services, according to the rites of a particular denomination."\textsuperscript{135} By limiting the exemption to religious groups whose financial support comes "primarily" from its own members, North Carolina is compelling the registration of any religious group which engages in significant public solicitations.

North Carolina also attempts to supervise the use of professional fund raisers: the application for licensure must identify the group's professional solicitors together with the compensation they are to be paid;\textsuperscript{136} solicitors must be separately licensed and post bond;\textsuperscript{137} contracts between professional solicitors and charitable organizations

\textsuperscript{at § 103L(b)(1).}
\textsuperscript{133. N.C. GEN. STAT. §§ 108-67 to 108-75, repealed by N.C. GEN. STAT. §§ 108-75.1 et seq. (1977 Supp.).}
\textsuperscript{134. N.C. GEN. STAT. § 108-75.7 (1977 Supp.).}
\textsuperscript{135. Id. at § 108-75.3(17).}
\textsuperscript{136. Id. at § 108-75.6(11).}
\textsuperscript{137. Id. at § 108-75.8.}
must be filed with the state;\textsuperscript{138} and, finally, the solicitor may not be paid more than five percent of the gross amount of money or other property raised or received.\textsuperscript{139}

The state may revoke or suspend a license if it finds that solicitation expenses have exceeded thirty-five percent of moneys raised.\textsuperscript{140} First offenders may be fined $100—$500 and/or imprisoned for not more than six months.\textsuperscript{141} This statute is presently under challenge on the basis of the religion clauses of the first amendment.\textsuperscript{142}

Examples of the more common form of solicitation statutes as applied to religious groups include those of Minnesota and Pennsylvania. Minnesota provides a blanket exemption for religious groups unless a professional fund raiser is used.\textsuperscript{143} "Professional fund raiser" does not include an officer or employee of the organization unless his compensation is computed on the basis of funds to be raised.\textsuperscript{144} Pennsylvania's statute was amended in 1972 to provide for more extensive regulation of charities in general,\textsuperscript{145} but religious groups retain a blanket exemption so long as (1) "no part of the net income . . . inures to the direct benefit of any individual," and (2) the group must hold federal tax exempt status.\textsuperscript{146}

Carefully drafted statutes eliminating the current distinctions between secular and religious fund raising would withstand constitutional challenge. The following proposed definitions of "contribution" and "membership" may dissuade any contention that the statute is impinging upon constitutionally protected activities.

CONCLUSION

Some governmental involvement in the affairs of religious organizations is inevitable and has already been recognized and accepted by the courts. That which is proposed here, even more than being inevitable and constitutional, is desirable. An examination of recent fund raising practices of many religious organizations, while not a majority, leads inexorably to the conclusion that the public, as well as religious organizations themselves, would have much to gain from

\textsuperscript{138} Id. at § 108-75.10(b).
\textsuperscript{139} Id. at § 108-75.11(a).
\textsuperscript{140} Id. at § 108-75.18(6).
\textsuperscript{141} Id. at § 108-75.22(d).
\textsuperscript{142} Heritage Village Church & Missionary Fellowship, Inc. v. North Carolina, No. 77 CUS 6460 (General Court of Justice Super. Ct. Div. 1977).
\textsuperscript{143} Minn. Stat. Ann. § 309.515 (e), subd. 2 (1978 Supp.).
\textsuperscript{144} Id. at § 309.50, subd. 6 (1969).
\textsuperscript{146} Id. at § 160-2(1) (Purdon 1965).
public disclosure mandated by statutes currently applicable to solicitation activities by secular charities. If the scandals which have periodically surfaced with religious fund raising activities in recent years continue, religious charities may soon—if they have not already—suffer the loss of credibility upon which all philanthropic giving is based.

In all other segments of commercial and philanthropic enterprise, the consumer has been afforded a system of public disclosure and accountability for monies expended, invested or donated.147 This has resulted from either legislative or judicial pronouncement. Yet, with the billions of dollars of donations made annually to religious charities, the only safeguard for the charitable donor is the good faith of the donee charity. Public accountability should no longer rest within the discretion of the soliciting religious charities. State legislatures should follow the lead of North Carolina and Maryland and take action to repeal the exemptions currently afforded religious organizations to ensure that the public and the ultimate charitable beneficiaries are protected.148


148. While this article, in the main, attempts to describe the constitutional limits of permissible governmental regulation of religious fundraising activities and the need for basic financial disclosure of such activities, it is nonetheless helpful to consider proposed statutory provisions which the authors believe would abrogate the religious exemption in most of the current state solicitations statutes. First, the basic definition of "charitable organization" would be as follows:

Section

A. "Charitable Organization" means a person which is or holds itself out to be a benevolent, religious, educational, philanthropic, humane, civic, or patriotic organization, or any person who solicits or obtains contributions solicited from the public for charitable purposes. A chapter, branch, area office or similar affiliate or any person soliciting contributions within the State for a charitable organization which has its principal place of business outside the State shall be a charitable organization for the purposes of this statute.

B. "Charitable purpose" means any benevolent, religious, educational, philanthropic, humane, civic or patriotic purpose.

C. "Person" means any individual, organization, trust, foundation, group, association, partnership, corporation, society, or any combination of them.

D. "Contribution" means the promise, promise to pay, payment, or grant of any money, services, credit, or property of any kind or value or any combination of these, except payments by members of an organization for membership fees, dues, fines, assessments, sacerdotal or sacramental donations or services rendered to individual members, if membership in such organization confers a bona fide right, privilege, professional standing, honor or other direct benefit, other than the right to vote, elect officers, or hold office, and except money or property received from any governmental authority.

E. "Membership" means that for the payment of fees, dues, or assessments or
for purpose of affiliation with a religious organization an organization provides services and confers a bona fide right, privilege, professional standing, honor or other direct benefit, other than the right to vote, elect officers, or hold office. The term "membership" shall not include those persons who are granted a membership upon making a contribution as the result of solicitation.

Thus, the qualifying terminology is found in the definitions of "contribution" and "membership" which remove from regulation, sacramental and sacerdotal donations. These definitions, in the author's opinion, carve a constitutionally permissible scope for financial reporting on the part of religious organizations.
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