

The Faith-Based Initiative and the Freedom of the Church

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Over the last quarter century, federal funds have increasingly been made available to faith-based organizations. Although some programs involving these organizations have been controversial, presidential administrations and legislators from both political parties have generally supported extending federal grants to these groups.¹ The federal courts have also aided the effort. Two decades ago, the courts frequently read the language of the First Amendment that prohibits the establishment of religion to require something of a strict separation of church and state. This “separationist” reading of the Constitution led the courts to strike down programs that enabled religious organizations to receive public funds and other support.² In recent years, however, the United States Supreme Court has read the First Amendment to require the government to be neutral on matters related to religion.³ Under this view, government can neither favor nor disfavor religion. This approach has made it considerably easier for the federal courts to uphold programs that directed funds to religious groups. Indeed, the neutrality principle goes a long way toward justifying the funding of faith-based organizations engaged in social work. If two groups, one religious and the other secular, are engaged in providing the same social service, a neutral government should fund either both or neither.

In one respect, however, American law remains remarkably inhospitable to religious groups that engage in social work. When a church, synagogue, or other religious community ventures beyond acts of worship, its activities become subject to a host of general laws. At times, compliance with these laws can create a real conflict with the shared identity and mission of a religious

community. Neither the political branches nor the courts have offered much protection to religious communities from the effect of these laws whether or not the communities take public funds of any kind. For many groups encouraged to participate in public programs by the president's faith-based initiative, their vulnerability to these laws will no doubt come as a rude surprise. As we will see, state employment discrimination laws can require a faith-based organization to hire someone whose religious views are antithetical or even hostile to those of the organization. State laws regulating employee benefits can dictate that a religious organization provide abortifacients to its employees even though the organization considers use of such products to be gravely sinful.

This article will describe how general laws like these can adversely affect religious groups engaged in education, charitable work, and other social services. The article urges the federal courts to read the First Amendment to better protect churches from general laws that conflict so sharply with their mission and sense of themselves. It is, after all, the freedom of the church from secular authority that is the first and most fundamental meaning of religious liberty as it has developed in the West.

Restrictions on Hiring Decisions

Any discussion of religious liberty in the United States must begin with the Supreme Court's seminal decisions in *Employment Division v. Smith*.⁴ In *Smith*, two Native Americans who practiced a religious ceremony that involved peyote were discharged from their jobs because of their use of the drug. When they applied for unemployment benefits, the state denied their application because use of the drug violated the state's criminal laws. These laws made no exception for religious use of peyote. The two discharged individuals filed suit in federal court and claimed the state's laws impinged upon the free exercise of their religion. The Supreme Court, however, ruled against them. In an opinion written by Justice Scalia, the Court held that when a state has enacted a generally applicable law, a religious believer cannot claim an exemption from that law on the basis of the First Amendment.⁵ While there are some exceptions to the reach of the ruling in *Smith*, it established the basic framework employed by the federal courts today when a believer claims his or her freedom of religion is burdened by a state law or regulation.

The federal courts have recognized one exception to the reach of the ruling in *Smith*: the hiring of clergy. Lower federal courts ruled long before *Smith* that a church or congregation should have the freedom to decide whom it wants to hire as its pastor, minister, rabbi, or imam without regard to employment-

discrimination laws.⁶ A Presbyterian congregation, for example, should be able to discriminate on the basis of religion when it hires its pastor. It should not be required to give the job to a Catholic or a Baptist. An orthodox synagogue can limit its search for a new rabbi to orthodox men. The federal courts that crafted this sensible exception to the employment-discrimination laws tended to ground their rulings in the free-exercise language of the First Amendment. As a result, litigants challenged this “ministerial exception” after the Supreme Court decision in *Smith*. They argued that because the employment-discrimination laws are laws of general application, no one, under *Smith*, should receive a religious exemption from them. The lower federal courts, however, have generally rejected this argument. They have continued to recognize the ministerial exception, usually on the basis that it implicates establishment-clause values as well as free-exercise concerns.⁷ The federal courts, these cases hold, should not become “entangled” with a church’s selection of its ministers and teachers.⁸

Although the Supreme Court has never considered the ministerial exception, the lower courts have consistently recognized it and defined its scope. The chief limitation on the exception is that it applies to a fairly narrow set of church offices. To be entitled to the exception, a church must be looking to fill a position that involves preaching, teaching, church governance or “participation in religious ritual and worship.”⁹ In short, the ministerial exception does not extend much beyond clergy. This limited scope does not pose much of a problem as far as federal law is concerned, however. Congress has created a statutory exemption from federal employment discrimination laws that generally shields churches from suit when they hire on the basis of religious beliefs. Section 702 of the Civil Rights Act specifically exempts religious entities from Title VII’s strictures against religious discrimination.¹⁰ This statutory exemption is broader than the ministerial exception in that it reaches all positions related to the church’s activities. A church can discriminate on the basis of religion when it hires a janitor or groundskeeper, for example.¹¹ The statutory exemption is narrower than the ministerial exception, however, in two respects. First, the exemption extends only to the religious discrimination banned by Title VII, not other forms of discrimination covered by the title such as discrimination on the basis of race or sex. Second, the exemption in Title VII does not affect state and local laws while the ministerial exemption, which is grounded in the federal constitution, does.

When one turns from federal employment laws to state and local measures, the legal picture becomes far more complicated and, in many respects, far less hospitable to churches. Most states have employment-discrimination laws. A few of these laws ban all forms of discrimination and provide no exemption

for religious entities such as the statutory exemption in Title VII. These laws can foster a great deal of state intrusion on the inner workings of a church. In *Ward v. Hengle*,¹² for example, a Catholic parish hired a clerk who wore a monk's habit to work. The clerk's community of monks, however, had never been canonically recognized by the Catholic Church. Hence, the pastor of the parish asked the clerk to stop wearing his habit to work. When the clerk refused to do so, he was fired. He sued the parish, claiming he was discharged on account of his religion. Because Ohio has no statutory exception in its employment laws for religious discrimination by churches, the clerk won a verdict against the parish that was affirmed on appeal. The ministerial exception, applicable as a matter of constitutional law, had no bearing in the case because the clerk did not hold a ministerial position. He was hired to provide office help. Nor was the church liable to suit under Title VII because of the section 702 exemption that protects churches from religious discrimination claims. This exemption, however, did not shield the church from Ohio's antidiscrimination laws. Ohio has no exemption in its state antidiscrimination statute like that of section 702 of the Civil Rights Act, and the parish was therefore liable in the suit. Note that Ohio's antidiscrimination laws applied to the decision of the parish even though the parish accepted no public funds.

When a church accepts funds from a public agency, the prospect of church liability grows. Again, federal law is not particularly problematic. Generally, a church retains the constitutional ministerial exception and the statutory immunity provided by Title VII unless the church participates in a grant program that requires a waiver of these privileges.¹³ The Child Care and Development Block Grant program, for example, requires the agency that administers the program to assure that a recipient does not discriminate on the basis of religion in hiring caretakers if 80 percent or more of the recipient's operating budget comes from federal or state grants.¹⁴ Provisions such as these are relatively rare in federal programs and, in any event, would be made known to any applicant for the grant. They are program specific and should not surprise a church or other group that applies for a program grant.

State and local provisions of law pose much more of a problem to churches and other faith-based organizations that receive public funds. Many states and local governments have general provisions of law that deprive a faith-based organization that receives public funds from the protection of any statutory exception it would otherwise enjoy from state and local employment-discrimination laws. The loss of an exemption from these laws can create a deeper quandary for many churches than would the loss of the federal exemption. State and local employment discrimination laws often protect more

classes of persons than do Title VII and other provisions of federal law. San Francisco, for example, prohibits any contractor with the city from discriminating on the basis of race, color, religion, ancestry, national origin, age, sex, sexual orientation, gender identity, domestic partner status, marital status, disability, weight, height, Acquired Immune Deficiency Syndrome (AIDS/HIV status), or association with members of any such protected classes.¹⁵ There is no exemption in San Francisco's municipal code for churches or other faith-based organizations that contract with the city. Thus, a church group that had agreed to assist the city in a program of counseling alcoholics could not refuse to hire a counselor who was living with another person outside marriage, nor could the group hire only members of the church as counselors. In 2001, the House of Representatives passed the Charitable Choice Act of 2001 that would have provided an exemption from state antidiscrimination laws for faith-based charities.¹⁶ The measure, however, never passed the Senate.¹⁷ Any faith-based group that ventures beyond worship to engage in social work can find itself liable to suit under state and local employment-discrimination laws.

Employee Benefits

The intrusion of state law into church decisions is also becoming pronounced in the field of employee benefits. Groups such as Planned Parenthood are promoting legislation that requires employers who offer prescription drug coverage to their employees to also offer coverage for contraceptives.¹⁸ To these groups, the legislation addresses a gender-equity issue. The legislation these groups promote frequently covers any contraceptive or drug approved by the Food and Drug Administration, including drugs and devices many religious groups consider to be abortifacients.¹⁹ Moreover, the legislation promoted by these groups frequently sets forth no exception for religious employers.²⁰ When there is an exception for religious employers, the exception is often very narrowly drawn.

Legislation of this kind was challenged by a faith-based organization in *Catholic Charities of Sacramento, Inc. v. Superior Court*.²¹ In 1999, California enacted the Women's Contraceptive Equity Act. The act requires any employer who offers prescription drug coverage to its employees to include within that coverage all contraceptive devices and drugs approved by the Food and Drug Administration.²² The legislation has an exemption for religious employers, but the exemption is so narrowly drawn that it would not include Catholic Charities nor, probably, any other group engaged in a faith-based initiative. To qualify for the exemption, a group must have as its purpose "the inculcation of

religious values.”²³ The group could neither employ, nor serve as a client, anyone of a different faith.²⁴ Finally, an exempt group must meet the narrow definition of an exempt organization under section 6033 of the Internal Revenue Code, a definition that would exclude virtually any organization engaged in activities beyond worship.²⁵ In Catholic Charities’ pleadings, the organization recognized it could not meet the requirement of the stringent, statutory exemption:

The corporate purpose of Catholic Charities is not the direct inculcation of religious values. Rather, [its] purpose ... is to offer social services to the general public that promote a just, compassionate society that supports the dignity of individuals and families, to reduce the causes and results of poverty, and to build healthy communities through social service programs such as counseling, mental health and immigration services, low-income housing, and supportive social services to the poor and vulnerable. Further, Catholic Charities does not primarily employ persons who share its Roman Catholic religious beliefs, but, rather, employs a diverse group of persons of many religious backgrounds, all of whom share [its] Gospel-based commitment to promote a just, compassionate society that supports the dignity of individuals and families. Moreover, Catholic Charities serves people of all faith backgrounds, a significant majority of [whom] do not share [its] Roman Catholic faith. Finally, ... Catholic Charities, although an exempt organization under 26 U.S.C. ‘501(c)(3) is not a nonprofit organization pursuant to [s]ection 6033(a)(2)(A)(i) of the Internal Revenue Code of 1986. Consequently, ... Catholic Charities is not entitled ... to an exemption from the mandate imposed by the [Women’s Contraceptive Equity Act].²⁶

Because it did not qualify for the exemption set forth in the statute, Catholic Charities challenged the Women’s Contraceptive Equity Act under the United States and California constitutions. Catholic Charities claimed that the act creates a Hobson’s choice of alternatives, either one of which seriously burdened its religious beliefs and intruded upon its autonomy. If, on the one hand, the group complied with the act, it would offend the teachings of the Catholic Church on contraceptives and abortion. If, on the other hand, the group ceased offering prescription drugs to its employees, it would offend Catholic teaching that “an employer has a moral obligation at all times to consider the well-being of its employees and to offer just wages and benefits in order to provide a dignified livelihood for the employee and his or her family”²⁷

The California Supreme Court rejected the constitutional challenges raised by Catholic Charities and ruled, by a 6 to 1 vote, Janice Rogers Brown dissenting, that neither the federal nor the state constitution exempted the organi-

zation from its legal duty to comply with the act. In addressing the organization's challenge based on the free exercise clause, the court majority relied principally on *Smith*. The Women's Contraceptive Equity Act established a neutral law of general application. Under *Smith*, neither individuals nor churches were entitled to a constitutional exemption from such a law.²⁸ Catholic Charities asked the Supreme Court of the United States to review the California high court decision. The Supreme Court, however, denied the group's petition for writ of certiorari.²⁹

The decision in *Catholic Charities* exemplifies the scant protection American constitutional law affords churches. A law of general application can interfere directly with how a church defines itself and performs its mission in the world. Note that under the California high court decision, Catholic Charities' legal obligation to comply with the Women's Contraceptive Equity Act had nothing to do with its acceptance of government funds. Simply by providing charitable services to non-Catholics, the organization deprived itself of the very narrow statutory exemption in the act. Of course, virtually any group engaged in a faith-based initiative would lose the right to claim this statutory exemption. Indeed, any group engaged in religiously motivated activity beyond worship and religious instruction is not entitled to the California exemption. The decision is a sad example of the marked failure of American law to respect the autonomy of churches. This shortcoming seriously undermines religious freedom. It is inconsistent with most fundamental values enshrined in the First Amendment and should be redressed.

Freedom of the Church

The First Amendment rests upon an understanding of the relationship between church and state that has developed over two millennia and is, in many respects, unique to the West. Unlike most other world religions, Christianity in its early years was not aligned with any state power. Indeed, such state power as existed at the time was often hostile to the church. In the Christian Scriptures, church and state are separate. Jesus taught that believers should render to Caesar what is Caesar's and to God what is God's.³⁰ Exactly where the line of separation lies has always been somewhat difficult to discern, but a few points seem to have been well settled. Very early on, Christians categorically rejected any suggestion that the state had the power to interfere in matters of church governance. In the mid-fourth century, for example, Bishop Hosius warned Emperor Constantius:

Do not interfere in matters ecclesiastical, nor give us orders on such questions, but learn about them from us. For into your hands God has put the kingdom; the affairs of his Church he has committed to us. If any man stole the Empire from you, he would be resisting the ordinance of God; in the same way you on your part should be afraid lest, in taking upon yourself the government of the Church, you incur the guilt of a grave offense. "Render unto Caesar the things that are Caesar's and unto God the things that are God's."³¹

In English legal history, well known to the framers of the American Constitution, the conflict between Henry II and Thomas Becket engendered a respect for the separation of the crown and the church.³² Throughout the West, lawyers gave this separation legal recognition while they worked through the conflict between the church and the crowned heads of Europe over lay investiture of bishops. This conflict led to a legal revolution.³³ Law schools appeared in the West. Core ideas of Western constitutionalism took shape. The power of the crown was understood to be limited and subordinate to law.³⁴ The church and the crown were understood to have separate jurisdictions, the progenitor of the Western idea of separation of powers.³⁵ The law itself was grounded upon and was legitimized by its consistency with the natural law, which was written in the hearts of all and could be understood by right reason.³⁶

In England, the conflict over lay investiture came to a head over King John's desire to install his own candidate as Archbishop of Canterbury rather than the pope's choice, a man educated in law at the University of Paris, Stephen Langton.³⁷ King John lost that battle and Langton later enshrined many of the core principles of the medieval legal revolution in the Magna Carta. The first clause of the Magna Carta declares "that the English Church shall be free, and shall have her rights entire, and her liberties, inviolate."³⁸ The succeeding clauses delineate liberties of English freeman that all eighteenth-century Whigs, such as the American founders, saw as the basis of constitutional law. Although several of these clauses are echoed in the American Bill of Rights, none was more important than the idea that royal power was subject to the "law of the land."³⁹ The Magna Carta closes with a clause that lists freedom of the church first among the essential liberties guaranteed by the document: "We wish and straitly enjoin that the English Church shall be free and that the men in our kingdom shall have and hold all the aforesaid liberties, rights and grants well and in peace, freely and quietly, fully and completely, for themselves and their heirs from us and our heirs, in all things and in all places forever..."⁴⁰

The generation of Americans who established the Republic distrusted the establishment of the Church of England. This distrust was pronounced in New England and the middle colonies, which had been founded by dissenting sects. For example, in 1744, Elisha Williams, one of Jonathan Edwards' teachers at Yale, wrote an essay, *The Essential Rights and Liberties of Protestants*, highly critical of a Connecticut statute intended to remedy abuses within the church.⁴¹ Williams thought the statute was an unwarranted intrusion on religious liberty, in part, because it interfered with church autonomy. In Williams view, "the civil authority hath no Power to make or ordain Articles of Faith, Creeds, Forms of Worship, or Church Government.... For these are already established by CHRIST himself...."⁴²

In the years just before the ratification of the federal constitution, inhabitants of the southern states also began to look askance at their established church. In 1785, Virginia disestablished the Anglican Church in a political fight led by James Madison, one of the Constitution's principal authors and the draftsman of the First Amendment. Although deists, like Jefferson, favored disestablishment, the Virginia bill to support Anglican ministers with a special tax assessment was ultimately defeated because evangelical Christians opposed the idea of government appointment of teachers of religion. "[W]hat Valuable Purpose would such Assessment answer, Would it introduce any More Useful and faithful men into the Ministry? Surely not, Those whom divine grace hath Called to that work, will esteem it to their highest honour to do his Pleasure, on the Contrary it might call in Many Hirelings Whose chief Motive and design would be Temporal Interest."⁴³

This sense of the separation between the temporal and the spiritual, the respective domains of church and state, animated the movement to disestablish churches in all the American states during the early national period. Throughout this period, there were always two sides to disestablishment. Government would no longer support religion, but it would also respect the autonomy of churches.⁴⁴ The same state legislatures that disestablished churches also exempted them from taxes.⁴⁵ The freedom of church from government interference with their mission and internal affairs has thus always been recognized in American law as an essential element of the separation of church and state. Long before the Supreme Court ruled that the First Amendment was binding on the states, it held that the federal courts could not interfere with ecclesiastical court decisions over church property. In 1871, the Supreme Court stated quite broadly,

the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws ... is, that, whenever the questions of [church] discipline, or of faith, or of ecclesiastical rule, custom or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding upon them.”⁴⁶

Thus, in the Western legal tradition and in the mind of the framers and the generation that succeeded them, Caesar’s coin had two sides. The state should not support the church but neither should it interfere with it. Government could not interfere with how a church presented its message to the world. To these generations, who set the balance between church and state, respect for church autonomy was as central a constitutional value as is the demand that government not aid religion.

The Legal Risks for Churches Engaged in a Faith-Based Initiative

In American law today, however, Caesar’s coin is one sided. The federal courts will permit no aid to religion. They will not, however, protect the church from interference regarding general state laws. This is true with the President’s faith-based initiative, which is often incorrectly portrayed as if it countenances aid to religion. The White House Web site and the regulations governing the initiative’s programs make it abundantly clear that government money can never be used to aid a faith-based organization in the pursuit of its religious mission.⁴⁷ Even if the President or the Congress were otherwise inclined, the federal courts would never permit public funds to be used for sectarian purposes.⁴⁸ In *Freedom from Religion Foundation, Inc. v. McCallum*, for example, a federal court enjoined Wisconsin’s Department of Workforce Development from funding a faith-based organization that was engaged in a charitable choice program designed to rehabilitate drug and alcohol abusers on welfare.⁴⁹ Because government funds were used to support counselors’ salaries and those counselors participated in Alcoholic’s Anonymous meetings, the federal court held that government funds had aided a religious program in violation of the establishment clause.⁵⁰

The federal courts have not been nearly as diligent in watching the other side of Caesar’s coin. As we have seen, if a church or other faith-based organization ventures beyond acts of worship to pursue a mission in charitable work, it cannot rely on the ministerial exception to maintain control of its hiring deci-

sions. State or local laws could require the organization to hire persons to pursue that group's mission who do not share that group's view on moral questions. State laws could require that group to pay for contraceptives, including abortifacients, that the group considers abhorrent. These issues, who presents a church's mission to the world and what a church teaches on moral questions, should be beyond state interference.

The federal courts can and should do better. The decision in *Smith* should not be seen as an obstacle toward greater judicial protection for church autonomy. The *Smith* decision was concerned with individuals who raised a free exercise claim that they were entitled to an exemption from a generally applicable state law. The litigation in *Smith* did not present the question of government interference in regard to whom a church hires to do its work in the world or what it considers to be sinful. The long Western tradition of the separation of church and state, reflected in the First Amendment's stricture against the establishment of religion, should surely bar such state interference. The church should be free.

Notes

1. See, for example, The Adolescent Family Life Act, 42 U.S.C. § 300z et seq. (1981); The Emergency Food and Shelter Program, 42 U.S.C. § 11331 et seq. (1983); The Childcare and Development Block Grant Act of 1990, 42 U.S.C. § 9858 et seq. (1990); The Personal Responsibility and Work Opportunities Reconciliation Act, 42 U.S.C. § 604a (1996).
2. See, for example, *Aguilar v. Felton*, 473 U.S. 402 (1985), overruled by *Agostini v. Felton*, 521 U.S. 203 (1997) (banning a public school teacher from offering remedial reading services in a parochial school); *Wolman v. Walter*, 433 U.S. 229 (1977), overruled by *Mitchell v. Helms*, 530 U.S. 793 (2000) (barring the use of public school buses to take parochial schoolchildren on field trips); *Meek v. Pittenger*, 421 U.S. 349 (1975), overruled by *Mitchell v. Helms*, 530 U.S. 793 (2000) (holding as unconstitutional the provision of neutral secular instructional material and equipment to religious schools); *Levitt v. Committee for Public Education*, 413 U.S. 472 (1973) (banning a state from reimbursing a church school for their expenses incurred in administering tests mandated by the state).
3. See, for example, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000) (plurality decision); *Agostini v. Felton*, 521 U.S. 203 (1997).
4. 494 U.S. 872 (1990).

5. *Ibid.*, 878–79.
6. See, for example, *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972) (The Constitution required dismissal of a suit filed by a woman who claimed that the Salvation Army discriminated on the basis of sex when it hired and promoted ministers); accord, *Rayburn v. Gen'l Conference of Seventh Day Adventists*, 772 F.2d 1164 (4th Cir. 1985).
7. *Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299 (11th Cir. 2000); *EEOC v. Catholic University*, 83 F.3d 455 (D.C. Cir. 1996); *Young v. Northern Ill. Conference of United Methodist Church*, 21 F.3d 184 (7th Cir. 1994).
8. *EEOC v. Catholic University*, *supra* note 7.
9. *EEOC v. Roman Catholic Diocese*, 213 F.3d 795, 801 (4th Cir. 2000).
10. 42 U.S.C. § 2000e-1(a)(2005) (“This subchapter shall not apply to ... a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities”).
11. *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987).
12. 124 Ohio App. 3d 396, 706 N.E.2d 392 (9th Dist. 1997).
13. *Lown v. Salvation Army, Inc.*, 2005 U.S. Dist. LEXIS 22260 (S.D.N.Y. 2005); *Hall v. Baptist Memorial Health Care Corp.*, 215 F.3d 618 (6th Cir. 2000); *Siegel v. Truett-McConnell College*, 13 F.Supp. 2d 1335 (N.D. Ga. 1994), *aff'd*, 73 F.3d 1108 (11th Cir. 1995).
14. 45 C.F.R. § 98.47(c) (2005).
15. San Francisco Administrative Code § 12B.1 (2005), available at http://www.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=amlegal:sanfrancisco_ca_mc.
16. See, 147 CONG. REC. H4281 (daily ed. July 19, 2001). The Charitable Choice Act was part the Community Solutions Act of 2001, H.R. 7, 107th Cong. § 201 (2001).
17. See, Charity Aid, Recovery, and Empowerment Act, S. 1924, 107th Cong. (2002).
18. Planned Parenthood’s Web site promotes such legislation. <http://www.plannedparenthood.org/pp2/portal/files/portal/medicalinfo/birthcontrol/fact-prescription-coverage-act.xml>

19. See, Sample Contraceptive Equity Legislation, § 3(B)(1), Business and Professional Women/USA, <http://www.bpwusa.org/i4a/pages/index.cfm?pageid=4437>.
20. Ibid.
21. 32 Cal.4th 527, 85 P.3d 67, 10 Cal. Rptr. 3d 283, *cert. Denied*, 125 S.Ct. 53 (2004).
22. Cal. Health & Safety Code, § 1367.25 (2005).
23. Cal. Health & Safety Code, § 1367.25(b)(1)(A) (2005).
24. Cal. Health & Safety Code, § 1367.25(b)(1)(B) and (C) (2005).
25. Cal. Health & Safety Code, § 1367.25(b)(1)(D) (2005).
26. Catholic Charities, *supra* note 21, 32 Cal. 4th at 539–40.
27. Ibid. See also, 1 Timothy 5:18; Luke 10:7 (KJV).
28. Catholic Charities, *supra* note 21, 32 Cal.4th at 547–52.
29. *Catholic Charities of Sacramento, Inc. v. Superior Court*, 125 S.Ct. 53 (2004).
30. Mark 12:13–17.
31. *Documents of the Christian Church* 27 (Henry Bettenson ed., 2d ed. 1963) quoted in Carl H. Esbeck, “Dissent and Disestablishment: The Church-State Settlement in the Early American Republic,” *Brigham Young University Law Review* (2004): 1385, 1391.
32. John T. Noonan and Edward McGlynn Gaffney, *Religious Freedom History, Cases, and Other Materials on the Interaction of Religion and Government* (New York: Foundation Press, 2001), 68–69.
33. Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass.: Harvard University Press, 1983).
34. Ibid., 145.
35. Ibid., 294.
36. Ibid., 144–47.
37. Noonan and Gaffney, *Religious Freedom History*, *supra* note 32, 75–76.
38. Daniel R. Coquillette, *The Anglo-American Legal Heritage* (Durham, N.C.: Carolina Academic Press, 1999), 81.
39. Ibid., 85.
40. Ibid., 88.
41. Carl H. Esbeck, “Dissent and Disestablishment,” *supra* note 31, 1421–22.

42. Ibid. 1423, n. 99.
43. Petition of the Inhabitants of Cumberland County, October 26, 1785, reprinted in Noonan and Gaffney, *Religious Freedom History*, supra note 32, 178–79. This petition attracted over three times the number of signatures than Madison’s more famous Memorial and Remonstrance. Ibid., 178.
44. For a magisterial treatment of this era, see Carl H. Esbeck, “Dissent and Disestablishment,” supra note 31, 1385.
45. It is a mark of the lack of respect for church autonomy in the current decisions of the Supreme Court that the exemption from taxes is seen as a matter of legislative grace. It is not constitutionally required. *Jimmy Swaggart Ministries v. California State Board of Equalization*, 493 U.S. 378 (1990) (upholding state sales tax on the distribution of religious literature by a religious organization).
46. *Watkins v. Jones*, 80 U.S. 679 (1871).
47. See, for example, “White House Faith-Based and Community Initiatives, Guidance to Faith-Based and Community Organizations on Partnering with the Federal Government,” 10 (“... you can not use any part of a direct Federal grant to fund religious worship, instruction or proselytization. Instead, organizations may use government money only to support the nonreligious social services that they provide. Therefore, faith-based organizations that receive direct governmental funds should take steps to separate, in time of location, their inherently religious activities from the government-funded services that they offer. Such organizations should also carefully account for their use of all government money.”)
48. *Mitchell v. Helms*, 530 U.S. 793, 808 (2000) (a government program cannot advance religion, result in indoctrination, define recipients of government aid by religion or foster excessive entanglement with religion). In a 5-4 decision, the Court upheld the use of vouchers that allowed indirect aid to reach a faith-based organization. The individuals given the vouchers, however, must have a real choice of secular and religious alternatives for such a program to pass constitutional muster. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).
49. 179 F.Supp. 2d 950 (W.D. Wisc. 2002).
50. Ibid. The opinion is a well-reasoned application of the standards set by the Supreme Court’s decision in *Mitchell*, supra note 2. The religious content in the Alcoholics Anonymous program has also led a federal court of appeals to ban government funding of the program. See *DiStefano v. Emergency Housing Group*, 247 F.3d 397 (2d Cir. 2001).