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(719) 386-3000

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INSIDE

Pastoral Confidences Preserved by Lutheran Pastor

by L. Martin Nussbaum

On the last day of 2000, Isaac Grimes, a 15-year-old sophomore at Palmer High School in Colorado Springs, killed his best friend, Tony Dutcher, also 15. Isaac slashed Tony's throat while he lay asleep in his sleeping bag near his grandparents' trailer. Jonathan Matheny, a 17-year-old friend from the same high school, watched. Later that evening Jonathan shot and killed Tony's grandfather and grandmother, Carl and Joanna Dutcher, with an assault rifle. The Dutchers' bodies were not found until three days later. Two months would pass before the police arrested Isaac and Jonathan along with 19-year-old Simon Sue, who, according to Isaac, ordered the raid on the Dutchers' residence as proof of their loyalty to him.

Isaac and his parents were longtime members of Ascension Lutheran Church, a medium-size Lutheran congregation in Colorado Springs. Isaac's parents sang in Ascension's choir and participated in its Sunday school. Isaac had been baptized in the Evangelical Lutheran Church of America (ELCA). He had participated in the church's youth activities, volunteered at Vacation Bible School, and served as an altar boy. Isaac had even brought his friend Tony to church with him on occasion. When news of Tony's grisly murder was published, Ascension's pastoral staff and congregation members consoled Isaac and his parents—never contemplating that Isaac might have been the one who drew the knife.

On March 8, 2001, law enforcement officials asked to interview Isaac. Although Isaac's mother did not know the full story herself, she urged her son to tell the investigators everything. He did. After two months and eight days and—one would suspect—many sleepless nights, Isaac Grimes's conscience awakened. He confessed his crime. He also explained that he and Jonathan belonged to a paramilitary organization led by Simon; that there were many weapons stored at Simon's residence; and that Simon had threatened to kill Isaac, his parents, and his three siblings if Isaac did not take down his friend. Isaac was promptly arrested as were Jonathan and Simon the following day.

At the time of Isaac's confession, the Reverend Keith Hedstrom had served as senior pastor at Ascension Lutheran for more than 15 years. He had been formed by doing what pastors do. Day in and day out, year after year, Pastor Hedstrom had studied the Word, proclaimed the Good News, baptized the newly faith-filled, prepared couples for marriage, sat with the dying, and along the way learned of God's mercy. Pastor Hedstrom knew his flock. He knew Isaac as he had himself prepared Isaac for confirmation, and he knew Isaac's parents.

When Keith Hedstrom was ordained in 1971, he vowed that he would be faithful to the Holy Scriptures and the ancient Christian creeds. He promised that he

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would "pray for God's people," and he committed himself to "give faithful witness in the world [of] God's love." The bishop who ordained him then admonished Pastor Hedstrom to "tend the flock of God that is your charge" and instructed him to "[c]are for God's people, bear their burden, and do not betray their confidence." The Evangelical Lutheran Church of America takes pastoral confidences seriously. Its constitution requires that Lutheran pastors preserve inviolate the confidences that are part of their ministry.

> In keeping with the historic discipline and practice of the Lutheran church and to be true to a sacred trust inherent in the nature of the pastoral office, no ordained minister … shall divulge any confidential disclosure received in the course of the care of souls…nor testify concerning conduct observed by the ordained minister while working in a pastoral capacity…

Faithful to his promises and the work that had shaped him, Pastor Hedstrom instinctively understood his role when he learned of Isaac's crime. He repeatedly visited Isaac who was jailed in Fairplay, Colorado, 85 miles from Colorado Springs. During each visit he "followed the Lutheran rite for confession and absolution consisting of pastoral counsel, confession, absolution, prayer, consideration of a scriptural text, consecration of the bread and wine, communion, and benediction." Pastor Hedstrom also knew that Isaac's parents were devastated and promptly began seeing them for what would become more than 50 pastoral visits and counseling sessions—all subject to an expectation of confidence.

On March 12, 2002, Isaac confessed in court to one count of second-degree murder and one count of conspiracy to commit murder. During the hearing, Judge Plotz gave Isaac an opportunity to speak. Isaac apologized to Tony's parents and to his own, to the defense and prosecuting attorneys, and to the judge and investigators. Tony's mother choked out "thank you" from the back of the court, and then Isaac said, "I won't ask for forgiveness. I don't deserve it. I thank God that I was caught and that all of this was stopped."

If a church teaches that some church communications are confidential, it should carefully articulate the character and theological basis for such confidentiality.

On August 14, 2002, Simon Sue's defense attorney issued a subpoena that ordered Pastor Hedstrom to hand over all of his notes regarding the pastoral care he had given Isaac and his family and to appear at the Park County District Court to testify about all of these confidences. Pastor Hedstrom knew he could not do this. He had vowed long ago to preserve inviolate such confidences. Pastor Hedstrom reflected on the witness that Lutheran Pastor Dietrich Bonhoeffer had given against the German state in World War II and determined that he could not comply with the subpoena.

Pastor Hedstrom, with the support of Bishop Alan Bjornberg and the national denomination, then asked our firm for assistance. We determined that his penitential communications with Isaac were almost certainly subject to the statutory confidential clergy communications privilege, but that it was unclear whether the statute would also protect the counseling communications between Pastor Hedstrom and Isaac's parents. Because of our daily work assisting congregations and denominations, we were aware of a large number of disparate cases that protected, from government review or oversight, a wide variety of church communications. The recent *Bryce* case from the Tenth Circuit held that government courts had no jurisdiction over parish dialogues or a pastor's controversial handouts to his parishioners. The 1964 Iowa case *Cimijott v. Paulsen* held that the government could not adjudicate defamatory statements made before a church marriage tribunal. The 1990 *Griffin v. Coughlin* decision from New York protected even the rights of prisoners to speak confidentially with their pastor, and the 1981 *Southwestern Baptist Theological Seminary* case from the Fifth Circuit held that the EEOC could not even force a seminary to disclose demographic information about its faculty and administrators. There were many other cases in which the First Amendment Doctrine of Church Autonomy protected from government intrusion church membership lists, church financial records, church personnel information, penitential communications, church statements regarding discipline of members and ministers, and more. We promptly filed a motion to quash Simon Sue's subpoena, and Judge Plotz did so.

Application. There are many instances in which government power is used to invade church communications. Parties in a divorce proceeding sometimes serve a subpoena on the pastor who counseled them hoping that his or her testimony will help one side or the other regarding a child custody or other issue. The Census Bureau, the EEOC, and other government

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"One Nation, Under God" Okay For Now

by Michael J. DeBoer

On June 14, 2004, the Supreme Court handed down its much-anticipated decision in *Elk Grove Unified School District v. Newdow*, which challenged the constitutionality of the Pledge of Allegiance. Despite four separate opinions by members of the Court, the question regarding the Pledge's constitutionality remains unresolved.

Michael A. Newdow, the atheist father of a public school student, filed a lawsuit in federal court claiming that his daughter's school-mandated and teacher-led recitation of the Pledge of Allegiance that included the words "under God" violated the Establishment and Free Exercise Clauses of the U.S. Constitution. Although the parents shared joint custody, the mother had the final decision as to matters upon which they could not agree. The trial court dismissed the father's case, finding that the Pledge did not violate the Establishment Clause. The Ninth Circuit, however, reversed that decision, finding that the father could challenge the public school's practice that interferes with his right to direct the religious education of his daughter and that the "under God" language violated the Establishment Clause.

The Supreme Court took the case to consider two questions: (1) whether the father had standing as a non-custodial parent to challenge the policy; and (2) if so, whether the policy offends the First Amendment. The Court determined that the father did not have standing to bring the suit. The Court observed that a state court had found that the father lacked the right to sue on behalf of his daughter and that the father's real desire was to forestall his daughter's exposure to religious ideas that her mother endorses and to use his parental status to challenge the influences to which his daughter may be exposed in school when the father and mother disagree. The Court also noted that the policy does not impair the father's right to instruct his daughter in his religious views. In reversing the Ninth Circuit's judgment, the Court observed that family law rights are largely a matter of state law and that the most prudent course for a federal court to take when a claimant's standing before a court is premised upon questions of domestic relations is to refuse to entertain the claim. Because the Court found that the father lacked the necessary standing to challenge the policy, the Court did not reach the issue whether the "under God" language violates the First Amendment.

Justice Scalia took no part in the consideration or decision of the Court because he recused himself from the cases based upon a private speech he made in which he expressed his views. Joined by Justice O'Connor and in part by Justice Thomas, Chief Justice Rehnquist concurred in the Court's judgment, but disagreed with the "new" prudential standing principle adopted by the Court. These three justices concluded that the father had standing to challenge the policy based upon his relationship to his daughter and his rights and interests associated with that relationship, including his right to expose his daughter to his religious views.

For the Chief Justice and Justice O'Connor, the public school policy that requires teachers to lead willing students in reciting the Pledge, which includes the words "under God," does not violate the Establishment Clause. The Chief Justice's opinion recounts a number of examples of patriotic invocations of God and official acknowledgments of religion's role in the nation's history and indicates that the Pledge is a patriotic observance focused primarily on the flag and the nation and only secondarily on the description of the nation as "under God." According to this opinion, the national culture allows public recognition of the nation's religious history and character, and the phrase "under God" in the Pledge neither converts its recital into a "religious exercise" nor constitutes a prayer or an endorsement of any religion. Those who recite the Pledge promise fidelity to the flag and the nation, not to any particular God, faith, or church, and the recital of the descriptive phrase "under God" in a patriotic ceremony cannot possibly lead to anything resembling an establishment of a religion.

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Although she fully concurred in the Chief Justice's opinion, Justice O'Connor also wrote separately to explain the principles that guide her own constitutional analysis. Justice O'Connor believes that when government-sponsored speech or displays are challenged, the endorsement test captures the essential command of the Establishment Clause (i.e., that government must not make a person's religious beliefs relevant to his or her standing in the political community by conveying a message that religion or a particular religious belief is favored or preferred). For Justice O'Connor, government may, without violating the Constitution, acknowledge or refer to the divine in a discrete category of cases she calls "ceremonial deism." An instance of ceremonial deism—such as the national motto, religious references in traditional patriotic songs, and the words used to open the Court's sessions—is determined based upon its history, character, and context and whether it conveys a message to a reasonable person that those who do not adhere to its literal message are political outsiders. Justice O'Connor found the Pledge to constitute an instance of ceremonial deism based upon her analysis of four factors: (1) the history and ubiquity of the practice, (2) the absence of worship or prayer, (3) the absence of reference to a particular religion, and (4) the minimal religious content. She indicated that she would reach the same result under the coercion test.

Exhibiting remarkable candor and thoughtful reflection, Justice Thomas wrote that the Court's Establishment Clause jurisprudence is in a state of "confusion [that] has led to results that can only be described as silly," and he offered his opinion to begin the process of rethinking the Establishment Clause. For Justice Thomas, the Ninth Circuit correctly applied the Supreme Court's jurisprudence when it determined that the Pledge's inclusion of "under God" violated the Establishment Clause. He is of the opinion, however, that some of these Supreme Court decisions were wrongly decided.

Even more remarkably, Justice Thomas declared that, although the Free Exercise Clause and its protection of an individual right apply against the states through the Fourteenth Amendment, the Establishment Clause is a federalism provision that resists incorporation under the Fourteenth Amendment. The history and text of the Establishment Clause strongly suggest that it was intended to prevent Congress from interfering with state establishments of religion and from establishing a national religion and that it was not intended to protect any individual right. For Justice Thomas, the Pledge policy is not implicated by any sensible incorporation of the Establishment Clause—government has not created or maintained any religious establishment, granted government authority to an existing religion, or exposed anyone to legal coercion associated with an established religion. Although the policy implicates a religious liberty right protected by the Fourteenth Amendment, no free exercise rights are at issue, and the policy fully comports with the Constitution.

Practical Significance

Although three members of the Court found that the Pledge policy did not violate the Constitution and a fourth would likely uphold the policy, the views of the remaining five members of the Court are not clearly known. Although the Court avoided the constitutional question in this case, the Court will again be presented with the issue, and perhaps at that time some resolution will be reached. Regardless, this case demonstrates well the need for the Court to overhaul its Establishment Clause jurisprudence, and the opinion of Justice Thomas is a welcome invitation for the Court's wholesale reconsideration. ■

Michael J. DeBoer is an associate attorney practicing in RJ&L's Colorado Springs office where he represents religious institutions, nonprofits, and corporate clients in a variety of legal matters, including policy development, litigation, employment, and First Amendment law. Mr. DeBoer graduated magna cum laude in 1998 from Valparaiso University School of Law where he was the editor-in-chief of the Valparaiso University Law Review. *He can be reached at 719-386-3014 or by e-mail at mdeboer@rothgerber.com.*

Supreme Court Identifies "Play in the Joints" When Government Funds Religion

by L. Martin Nussbaum

For 23 years, from 1980 through 2003, the U.S. Supreme Court found no constitutional impediment in one government program after another that provided substantial economic benefit to religious institutions. It approved of government reimbursement to religious schools for mandated testing expenses (*Regan* 1980); state tuition tax credits for parochial school tuition, textbook, and transportation expenses (*Mueller* 1983); scholarships for the disabled even when they attended Bible school to become a minister (*Witters* 1986); funds for abstinence-based family planning programs offered by religious institutions (*Bowen* 1988); tax deductions for charitable contributions to religious groups (*Hernandez* 1989); public school rental of facilities for religious uses (*Lamb's Chapel* 1993); a government-paid sign-language interpreter for a deaf student attending Catholic high school (*Zobrest* 1993); a government grant for an evangelical student paper at a public college even when its purpose was to proselytize (*Rosenberger* 1993); public school remedial education teachers assisting at religious and other private schools (*Agostini* 1997); government loans of educational materials including computer hardware and software to religious and other private schools (*Mitchell* 2000); and school vouchers redeemable at religious and other private schools (*Zelman* 2002). In the 1997 *Zobrest* decision, the high court even reversed two earlier decisions and thereby approved of loans to remedial education teachers at private schools and the "shared time" provision of remedial and enrichment clauses on parochial school premises. In earlier years, the high court also had approved of tax-exempt bond financing for religious colleges (*Hunt* 1973), construction grants and loans benefitting a religious college (*Tilton* 1971), and religious purposes property tax exemptions (*Walz* 1970).

In its latest decision on this subject, *Locke v. Davey* (2003), the U.S. Supreme Court rediscovered that there is some "play in the joints" in what is permitted of legislatures under the Establishment Clause but not required of them by the Free Exercise Clause. It held in a 7–2 decision, authored by Chief Justice Rehnquist, that a state legislature may, as it chooses, either provide or deny a scholarship to a student majoring in "devotional theology" even when the scholarship is generally available for other academic majors. It defined "devotional theology" as a degree that is "devotional in nature or designed to induce religious faith." Of note in *Locke v. Davey* is that a unanimous Court seemed to indicate that if a legislature decided to offer scholarships to all students, including those majoring in "devotional theology," it would not matter that the educational institution was pervasively sectarian. ■

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agencies may demand sensitive church information. Prosecutors, grand juries, and private litigants seek to acquire and review minister personnel files. Others try to use the formal discovery tools to acquire information from elder boards and church tribunals.

If a church teaches that some church communications are confidential, it—like the Evangelical Lutheran Church of America—should carefully articulate the character and theological basis for such confidentiality. It should then publish those statements in its governing documents, handbooks, and, when appropriate, liturgical books. After a church or denomination has articulated that some of its communications are confidential, it should protect that confidentiality by education and persuasion of anyone using government authority to invade the confidence and, if that fails, by engaging competent counsel to invoke the many legal precedents preserving church confidences. Pastor Hedstrom and the Lutheran Church have provided a first-rate example of how to preserve inviolate the confidentiality of their pastoral care. ■

A partner practicing in RJ&L's Colorado Springs office, Martin Nussbaum co-chairs the firm's Religious Institutions Group. He represents churches and religious organizations across the nation in a variety of legal matters, including risk management, ministerial misconduct, corporate, tax, property, tax-exempt financing, licensing, employment, First Amendment rights, and related litigation. He can be reached at 719-386-3004 or by e-mail at mnussbaum@rothgerber.com.

Tax Benefits and Abuses of Having "Church" Status

by Constance D. Smith

The Internal Revenue Code (the Code) provides some major benefits for the subclass of 501(c)(3) entities known as churches. This article describes the definition of a church, the Code's special benefits for churches, and several types of entities that the Internal Revenue Service has determined do not qualify as a church.

What is a Church?

While the Code does not itself define a "church," the IRS Internal Revenue Manual has identified 14 factors that suggest that a 501(c)(3) entity is a church. Some of these are distinct entity existence, recognized creed, definite ecclesiastical government, formal code of doctrine and discipline, distinct religious history, membership not associated with any other church or denomination, ministers who are ordained after a prescribed course of study, places of worship, literature of its own, established congregations and places of worship, regular worship, and religious instruction. Under the Code, "church" includes organized congregations of worship, such as parishes, mosques, temples, tabernacles, and synagogues.

However, not all tax-exempt religious organizations qualify as a church. Nondenominational ministries, interdenominational and ecumenical organizations, and other entities whose principal purpose is the study or advancement of religion, if they are not integrated auxiliaries of a church, are not considered to be churches by the IRS. Outside of the traditional religions, it can be difficult to define exactly what a church is because of the broad protection granted to religion under the First Amendment of the Constitution. The organizational structure is not determinative, and churches can be unincorporated associations, nonprofit corporations, corporations sole, or charitable trusts. A church can also be an "organized" association with no name, no charter, no permanent headquarters, and no comprehensive records, so long as a formally structured group exists exclusively for appropriate religious purposes. Each organization's facts and circumstances will be individually evaluated to determine whether it qualifies for "church" status.

Tax Benefits

Reporting Requirements

Churches are automatically tax-exempt without the requirement of filing an Application for Tax Exempt Status (Form 1023). While other 501(c)(3) entities must report their financial status, activities, and compensation paid to directors and officers on an Annual Information Report (Form 990), churches are exempt from filing these annual informational returns. Congress gave churches the reporting exemption for constitutional protection of religious institutions. Because these forms are available for public review, the filing exemptions for churches remove them from public scrutiny. Without access to the form information, the IRS is also less likely to investigate a church. In many cases, an entity claiming to be a church comes under IRS review only for income tax evasion or charitable income tax deductions on an individual's tax return. There are proposals to greatly expand the reporting requirements of tax-exempt organizations following the 9/11 attacks and recent corporate abuses, but under current proposals, valid churches would remain free from these additional disclosure requirements.

Charitable Deductions

Donations made to 501(c)(3) entities, including churches, provide the donor with an income tax deduction. However, a donation to a church automatically qualifies for the highest deduction limitation, matching any qualified public charity.

Social Security Taxes (FICA)

Except for those employees engaged in unrelated business activities, a church can elect to exempt its employees from FICA. To obtain such an exemption, the church must certify that it opposes such taxes for religious reasons. The exempted employees will still be subject to self-employment taxes, but the church has no obligation to match employee FICA contributions or to handle any FICA payments.

In addition, any ordained, commissioned, or licensed ministers, priests, rabbis, members of a religious order, and Christian Science practitioners may elect to be exempt from self-employment taxes. The exemption will be granted on reli-

gious grounds if the organization that ordained, commissioned, or licensed the applicant qualifies as a religious organization. Only compensation received for duties performed in their religious capacity are exempted. Self-employed members of religious faiths can qualify for the exemption using a different form than church employees. Members of religious orders who have taken a vow of poverty are automatically exempted from self-employment tax and do not need to file an application.

Federal Unemployment Taxes (FUTA)

Churches (and religious organizations) are exempt from federal and state unemployment taxes.

Housing Allowances

For income tax purposes, ordained, commissioned, or licensed ministers, priests, or rabbis may exclude a housing allowance from their gross income, to the extent it is used to pay expenses of providing their home. However, to be tax-exempt, the minister's local church must designate the housing allowance by official action taken before payment of the allowance. A housing allowance may also be partially exempt from self-employment taxes.

Church Plans

Each church is eligible to maintain an employee benefit and retirement plan under less restrictive "church plan" rules. Specifically, a church plan can be exempt from the federal requirements for group term life insurance nondiscrimination and from the COBRA continuation coverage for group health plans. However, Colorado law requires local churches to provide a benefit similar to the federal COBRA coverage. Church health insurance plans that required proof of good health on July 15, 1997, and have maintained such requirement ever since are grandfathered and can continue to favor healthy employees.

The required beginning date for distributions from church retirement plans can be delayed. All church plans also do not require any employer contributions.

Limited Audits

Congress has imposed special limitations on how and when the IRS may audit churches, but requests for information regarding compliance with tax payments, reporting requirements, and supplemental information for returns are not limited. Criminal investigations and tax matters of persons or organizations related to the church are also not restricted. However, the IRS can only examine the church's religious activities to the extent necessary to determine whether the organization qualifies for church status, and may examine the church's records only to the extent necessary to determine whether it is liable for any additional internal revenue tax.

A written statement by the Director, Exempt Organizations, Examinations is required to begin a "church tax inquiry." The church must be given a written notice that states the IRS's concerns and the entity's administrative and constitutional rights, but the issues stated do not limit the scope of investigation.

After a tax inquiry notice is sent, the IRS may send a notice of "examination" of the church records. An examination must be completed and a report issued within two years after the notifcation. No action may be taken against the church until the IRS obtains a written determination from regional counsel of substantial compliance with the procedural requirements, and approval of any action against the church. If the examination does not result in additional taxes or tax-exempt status revocation, another examination cannot be commenced for five years.

False Claims of Church Status

With so many benefits available to churches, it is no surprise that abusive schemes abound. In most cases, the taxpayer or entity attempts to convert taxable-enterprise income to tax-exempt income, take funds from a nonprofit entity as tax-exempt benefits, or take charitable deductions for assets contributed to the entity. Invalid claims of church status generally fall into well-recognized approaches.

Mail-Order Churches

Mail-order churches often consist of a parent organization that advertises its tax benefits and then sells "ordination" papers to individuals who create their own "churches" to avoid the taxation of personal income. Sometimes, the purchasers take "vows of poverty" and contribute all their worldly assets to the "church," drawing their living expenses from the entity as "housing allowances" and tax-exempt minister's wages and benefits. The entities typically exist only on paper, using the founder's home address with no churchlike activities such as worship, religious education, evangelizing, and charity. The IRS finds such purchasing entities to be nonexempt.

Corporation Sole

A corporation sole is a special type of nonprofit corporation that accommodates the legitimate canonical needs of Catholic and other hierarchical churches so that the "corporation" is the individual bishop or his successor without the requirement of officers and directors. Some promoters exploit this legal structure by persuading individuals to place their personal assets in a corporation sole in order to avoid individual income taxes. This just uses a "corporation sole" instead of "church" to evade income tax.

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Erroneous Use of Church Funds

Organizations may be formed that do perform tax-exempt church activities, but the founders or employees take advantage of the tax-exempt status. This can take the form of donating wages or assets to the church for a tax deduction while retaining personal use or benefit, taking excessive salaries or allowances, deriving personal benefit through business deals with the organizations, or performing profitable activities along with nonprofit activities. When in doubt, churches should consult competent tax advisors to avoid unintentionally non-qualifying arrangements.

The IRS is now looking for unreasonable charitable deductions for personal property donations and for excess benefits to a contributor. The benefit returned to the donor can be travel or tickets to social or sporting events, life insurance on the donor, or any item or service of value given in return for a donation. Churches must be careful not to violate tax-exempt status requirements by providing a valuable benefit in exchange for a contribution.

Small New Religious Groups

Sometimes members of a family claim to be starting a new religion or church. Under the constitutional protections, the IRS and courts avoid making a determination as to the veracity of the religion or religious beliefs. When the founders perform tax-exempt functions based upon firmly held beliefs, absent any tax abuse, the courts typically find a tax-exempt religious organization, but usually not a "church." However, when the group's actions appear to have tax evasion intent, the entity is typically denied tax-exempt status based upon criteria that many valid fledgling churches would fail. Such criteria include the founder having almost total control over the entity's assets and activities, not having a building separate from the founder's home, or having few or related members. In essence the courts use a test much like the Supreme Court's description of pornography—"You know it when you see it"—for determining the founders' intent.

Conclusion

This is an area of law that is often in the news because of recent legal developments and promoters selling tax-avoidance schemes. Most tax protesters of the 1970s and 1980s who used "churches" have been stopped by the courts. Of more concern are the tax scheme sellers who try a new twist on an unsuspecting public and the impact on valid churches under new IRS rulings. In reviewing the tax schemes, the old adage still applies: "If it sounds too good to be true, it probably is." For valid churches, all new ventures should be reviewed for tax-exempt status implications, and regular review of current activities under new law is wise. ■

Constance Smith is special counsel in RJ&L's Denver office. She specializes in tax planning for estate disposition, lifetime wealth transfers, business succession, and probate administration. Her expertise in multiple areas of law, personal finance, and small business administration permits the use of custom-designed wills, trusts, partnerships, and private foundation documents to accomplish the integration of wealth transfers, family dynamics, and tax savings. She can be reached at 303-628-9557 or by e-mail at csmith@rothgerber.com.

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School Vouchers: One Step Forward and One Step Back

The District of Columbia Moves Forward; Colorado Stalls

by Eric V. Hall

School vouchers make it financially possible for middle-class and poor families to send their children to private schools. Until relatively recently, with the advent of a few large-scale voucher programs, sending a child to private school was an option only for the rich. In June 2003, the U.S. Supreme Court laid to rest the concern that vouchers violated the federal Constitution. In that case, *Zelman v. Simmons-Harris*, the Court ruled that programs that provide vouchers to parents, who in turn redeem them at a private school of their choice—secular or religious—do not violate the Establishment Clause of the First Amendment. Since then, two major voucher programs have been enacted: one in Colorado and one in the District of Columbia.

A Setback in Colorado: Court Finds Voucher Funding Violates the State Constitution

On June 28, 2004, a closely divided Colorado Supreme Court (4–3) upheld the decision of a Denver district court that found that the Colorado voucher program violated the "local control" provision of the Colorado Constitution. Only five other states share such a provision. The relevant portion of this "local control" provision, found at Article IX, Section 15, states that each local school board "shall have control of instruction in the public schools of their respective districts."

On its face, this language seemingly would not apply because nothing in Colorado's voucher program took away the ability of local school boards to control the instruction of the traditional public schools in their districts. Four members of the court, however, found that Colorado case law had altered the plain meaning of this "local control" provision. The majority reasoned that this clause requires that local school districts retain control over all local property taxes dedicated to education. Because the parties agreed that Colorado's program required districts to fund vouchers with some local property tax money, the court held the program unconstitutional.

While the decision certainly marks a setback, voucher proponents took solace in the facts that three justices would have upheld the program and that the entire process has stimulated an ongoing, statewide debate about vouchers. And vouchers are winning the debate: a spring 2004 poll found that, for the first time, a majority of Colorado voters (52%) favored vouchers.

In addition, the program's legislative sponsor, Rep. Nancy Spence (R-Centennial) (now running for state Senate) has vowed to conform the program to the Supreme Court's decision. Specifically, instead of vouchers being funded by both state and local dollars, all the funding would come from the state education budget. Indeed, Rep. Spence tried to amend the program along these same lines this past legislative session but was defeated by one vote. Assuming that the makeup of the Colorado statehouse does not change too dramatically this November, there is a good chance that Colorado's voucher program will be reinstated by early summer 2005.

District of Columbia Voucher Program Gets Started

In late January 2004, Congress enacted the D.C. School Choice Incentive Act of 2003. This legislation created a five-year voucher program in the District of Columbia, a city known for abysmal student performance despite massive public school funding. There are several notable differences between the D.C. program and others around the country, including Colorado's. First, Congress funded D.C.'s vouchers with fresh money—$14 million in its first year. In contrast, most state legislatures do not have the luxury of new appropriations. For instance, Colorado's tight budget required that vouchers be funded with a portion of the money that would have otherwise followed a student to a public school—school districts were entitled to keep approximately 25% of each student's funding for themselves. Second, in D.C., the Secretary of Education determines which private school applicants may participate in the program. In Colorado, school districts served this role as "gatekeeper" to the pri-

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vate schools. The inherent conflict of interest proved too much for a few districts; they abused this power by denying over 90% of private school applicants. Third, the D.C. program establishes intermediate organizations to administer the program, for example, ensuring that parents receive good information, private schools are held financially accountable, and students and schools are well matched.

Students are eligible for the D.C. program only if they qualify for free or reduced-cost lunch— 185% of the poverty line, for example, an annual income of about $34,000 for a family of four in 2003. Approximately 2,000 K–12 students will be randomly selected to participate. Priority will be given to both the poorest families and those students in public schools "in need of improvement" under No Child Left Behind. A voucher will be worth up to $7,500 and may pay for tuition, fees, and transportation. This amount exceeds the maximum in Colorado by about $2,000. Another improvement over Colorado's program is that it includes transportation costs. Lack of funds for transportation became a sore point under the Colorado program.

Conclusion: The Voucher Tide Continues to Rise

The nation's attention has shifted from Colorado to D.C. as the upcoming school year approaches. Voucher supporters and detractors will be scrutinizing the D.C. program to evaluate how much vouchers improve student performance and the effect of the program on public schools. In the final analysis, though, the past tumultuous school year has seen the voucher tide continue to rise.

Eric V. Hall is an associate at RJ&L's Colorado Springs office where he represents religious schools, churches, and other faith-based organizations. He is an advocate of Colorado's school voucher initiative and recently served on the team of attorneys who assisted the Institute for Justice in defending Colorado's voucher program in a lawsuit challenging its constitutionality. Mr. Hall holds a B.A. from the College of William and Mary, an M.A. from St. John's College, and a J.D. from the University of Notre Dame Law School. After law school, Mr. Hall served as a law clerk for the Honorable David M. Ebel of the U.S. Court of Appeals for the Tenth Circuit. He can be reached at

RJ&L Religious Liberty Archive Expands

The RJ&L Religious Liberty Archive at *www.churchstatelaw.com* has expanded its collection of religious liberty materials. Martin Nussbaum, webmaster, recently announced that the free website library sponsored by the Rothgerber Johnson & Lyons Religious Institutions Group has added to its collection the current text of state constitutional provisions related to religion and religious liberty for all 50 states. This includes more than 200 documents compiled by Michael DeBoer, a Rothgerber attorney with special interest in religious liberty and state constitutional law. In addition, Eric Hall has updated the collection of state Religious Freedom Acts so that the new statutes passed in Missouri and Oklahoma and changes in the statute from Illinois are reflected. The website now also includes an important scholarly article by Professor Carl Esbeck commenting on a wide range of Establishment Clause jurisprudence, Martin Nussbaum's commentary on the Constitution in the wake of the Catholic scandal, and updated current developments by Sam Ventola and Michael DeBoer.

www.churchstatelaw.com

More than 200,000 individuals have utilized the RJ&L Religious Liberty Archive. It is the most complete archive of American religious liberty materials on the Internet and includes the full text of almost 300 cases (including every U.S. Supreme Court case) and over 200 important historical materials, including colonial constitutions, the debates on the First Amendment, and letters and statements from Madison, Jefferson, Washington, Adams, Witherspoon, Penn, Williams, and other American founders. The website also includes helpful treatises on a variety of subjects, such as consensus statements regarding religion and the public schools. Visit it today! ■

Current Developments in Church-State Law

by Samuel M. Ventola

July 2004

Federal Court of Appeals Limits Free-Speech Rights of Abortion Protesters

The Eighth Circuit Court of Appeals recently held in *Hale v. Kansas City Missouri Police* that the First Amendment does not protect the right of anti-abortion protesters to use signs depicting aborted fetuses, if these are used near a roadway. The decision is hard to square with the Supreme Court's 1975 decision in *Erznoznik v. City of Jacksonville*, which held that the First Amendment protected depictions of nudity on drive-in movie screens, even when these could be seen from the surrounding roadways. One of the three judges on the Eighth Circuit's panel dissented, and the case may be the subject of further review *en banc* by the entire Eighth Circuit.

Town Cannot Begin Council Meetings With Christian Prayer

In *Wynne v. Town of Great Falls*, the Fourth Circuit held that it violated the Establishment Clause of the First Amendment for the town to open town council meetings with a Christian prayer. The court distinguished earlier decisions that had allowed town meetings to be commenced with a "non-sectarian" prayer.

June 2004

It Could Certainly Be Worse

Whenever we begin to despair about the lack of protection of religious freedom in the United States, we can take some comfort from the fact that it could be worse. Even in other Western democracies, religious freedom is routinely put behind the perceived interests of the government. For example, in *Leyla Sahin v. Turkey*, the European Court of Human Rights recently upheld a statute prohibiting Muslim students from wearing headscarves in school. Similarly, a proposed statute in Canada would criminalize criticism of homosexuality. Previously, Canadian citizens have been required to pay fines for expressing religious views.

Federal Appeals Court Protects Equal Access to School Distribution Program

At the end of June, the Fourth Circuit issued its decision in *Child Evangelism Fellowship v. Montgomery County*. The school district had distributed flyers for various organizations, including religious groups, into students' backpacks to take home. However, the school district refused to distribute Child Evangelism Fellowship's literature because of the evangelical and proselytizing nature of the group and its messages. The school district argued that to distribute CEF's literature would violate the Establishment Clause, because of the strongly religious nature of the group and its literature, and because these religious messages were being transmitted during school hours, without prior parental consent, and with the active participation of school officials. The Fourth Circuit held that these facts were insufficient to distinguish the case from *Good News Club v. Milford*. The school district is currently planning to respond by eliminating the distribution program in its entirety, even though this would damage many student groups.

May 2004

Federal Courts Reach Different Conclusions About the Constitutionality of RLUIPA

In April 2004, the Sixth Circuit Court of Appeals denied rehearing in its case of *Cutter v. Wilkinson*, in which the court had held that the Religious Land Use and Institutionalized Persons Act (RLUIPA), which protects religious rights beyond the First Amendment in two limited contexts—land use and people in prison, violates the U.S. Constitution. State and local governments have argued that RLUIPA is unconstitutional as an "establishment" of religion because it provides more protection for religious activities than for other activities. They have also argued that Congress lacked the constitutional power to enact the statute. The Sixth Circuit accepted the Establishment Clause argument and held the Act to be unconstitutional, at least in the context of

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prison cases, because it encouraged prisoners to engage in religious conduct.

However, a contrary result was reached by the Fourth Circuit in *Bass v. Madison*, in which the court held that Congress had the constitutional power to pass RLUIPA. The court did not address the Establishment Clause argument, because the State of Virginia did not raise it (probably because a decision that the Establishment Clause invalidates RLUIPA would also imply that other Virginia programs that benefit religion were unconstitutional).

The losing parties in both cases have filed petitions for review by the U.S. Supreme Court. Both petitions remain pending. ■

Sam Ventola is special counsel in RJ&L's Denver office where his practice focuses on religious institutions law, constitutional law, campaign funding, insurance, civil rights, and employment law. Mr. Ventola is a 1988 graduate of the University of Colorado School of Law. He can be reached at 303-628-9527 or by e-mail at sventola@rothgerber.com

Archbishop Chaput to Deliver Keynote at Annual RJ&L Religious Institutions Law Day

Archbishop Chaput

The Most Reverend Charles J. Chaput, O.F.M. Cap., Archbishop of Denver, will deliver the keynote address at the annual Religious Institutions Law Day program, sponsored by the RJ&L Religious Institutions Group. The full-day seminar will be held October 7, 2004, at New Life Church in north Colorado Springs.

Archbishop Chaput not only serves as shepherd for the almost half million Catholics comprising the Archdiocese of Denver, he is also a member of the U.S. Commission on International Religious Freedom. He has been active in recent months reminding Catholics and Catholic politicians that "private faith, if it's genuine, always becomes public witness—including political witness." His keynote address, "Divided Hearts: Americans, Religion and National Policy," will first examine global issues of religious freedom and then inquire whether Americans can encourage religious freedom abroad while debasing it at home with an enforced and alien secular materialist foundation to public life.

RJ&L's annual Religious Institutions Law Day is intended for pastors and church human resources and business managers across the Front Range. RJ&L attorneys will address a broad variety of helpful and important legal topics for churches and other religious institutions and will also provide helpful written materials. For registration or more information, call Karen Lutterschmidt at 719-386-3055. ■

Refocusing on Religion Provisions in State Constitutions

by Michael J. DeBoer

During much of the 20th century, courts, when considering an array of issues involving religious freedom and the relationship between church and state, focused primarily upon the First Amendment to the U.S. Constitution, which provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Along with Article VI, section 3, which states "no religious test shall ever be required as a qualification to any office or public trust under the United States," the Establishment Clause and the Free Exercise Clause represent the whole of the U.S. Constitution's mention of religion. Despite the sparseness of the mention of religion in the Constitution, the importance of these provisions in matters of religious liberty and church-state relations is widely known and well appreciated.

During the last decade, however, another set of sources has reemerged that provide significant protection of religious liberty and additional instruction regarding the relationship between government and public institutions and people of faith and their institutions. These sources—the religion provisions of state constitutions—are beginning to garner more attention and are being consulted for answers regarding these fundamental questions. Although many of these provisions were adopted before the First Amendment, their importance is now coming back into focus after decades of neglect. For a comprehensive list of religion provisions in state constitutions, see "Historical Materials" in the Rothgerber Johnson & Lyons Religious Liberty Archive at *www.churchstatelaw.com*.

Despite the limited mention of religion in the U.S. Constitution, most state constitutions include several detailed provisions on religion. Many state constitutions begin with an expression of gratitude to or an acknowledgment of God. Thus, in Pennsylvania, the Preamble reads: "We, the people of the Commonwealth of Pennsylvania, grateful to Almighty God for the blessings of civil and religious liberty, and humbly invoking His guidance, do ordain and establish this Constitution." The Washington Preamble states: "We, the people of the State of Washington, grateful to the Supreme Ruler of the Universe for our liberties, do ordain this constitution."

State constitutions typically also include religion provisions in their bills of rights that broadly declare the freedom of religion and otherwise address the relationship between church and state. Among these provisions are a variety of clauses that:

- Guarantee every individual the natural right to worship God according to the dictates of conscience; the absolute freedom of conscience in all matters of religious sentiment, belief, and worship; or the free exercise and enjoyment of religion without discrimination or preference.
- Require that the government enact laws to protect religious denominations in the peaceable enjoyment of their modes of public worship; that perfect toleration of religious sentiment be secured; or that the law equally protect every person, denomination, or sect.
- Prohibit any person's civil rights, privileges, and capacities from being diminished, enlarged, or affected because of religious belief; any law controlling the free exercise and enjoyment of religious opinions or interfering with the rights of conscience; any law prohibiting the free exercise of religion; or the government from molesting any person or denying any civil or political right or privilege on account of religious opinion or mode of religious worship.
- Prohibit religious freedom and liberty of conscience from being construed so as to excuse acts of licentiousness or to justify practices inconsistent with public morals, peace, or safety.
- Prohibit the union of church and state; any church from dominating the state or interfering with its functions; any law establishing religion; any law subordinating or preferring any creed, religious group, or mode of worship; or the government compelling any person to attend, erect, or support any place of worship or to maintain any minister or ministry.
- Prohibit money being drawn from the treasury for the benefit of any religious or theological institution.
- Prohibit any religious test as a qualification for office.
- Prohibit any person being rendered incompetent as a witness based upon his opinions on religious matters or being questioned regarding his religious

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belief so as to affect the weight of his testimony.

- Require that the mode of administering an oath or affirmation be such as may be most consistent with and binding upon the conscience of the sworn individual.

Provisions that prohibit the government from requiring those conscientiously opposed to bearing arms to serve in the militia are also included in many state constitutions.

In many state constitutions, the government is prohibited from supporting any sectarian or denominational school with money raised for the public schools. Thus, the Alaska Constitution requires that "[n]o money shall be paid from public funds for the direct benefit of any religious or other private educational institution." Some state constitutions also prohibit instruction on any sectarian or denominational doctrine in any public school.

Additionally, many state constitutions provide that property used for religious or charitable purposes may be exempted from property taxation. For example, the Indiana Constitution states that "[t]he General Assembly may exempt from property taxation any property . . . being used for municipal, educational, literary, scientific, religious or charitable purposes." Some constitutions prohibit the government from laying any tax or appropriating public money in aid of any church or private or sectarian school.

These provisions provide significant protections to people of faith and religious institutions and embody profound wisdom regarding the relationship between church and state.

Although the language of the state religion provisions varies from that of the First Amendment, some courts have held that their state provisions have precisely the same meaning as the First Amendment. Other courts have thoughtfully considered the unique language and history of their state religion provisions and have given their provisions meaning separate and independent from the First Amendment. Often this has meant that the state provisions are understood to provide broader protection of religious liberty than the First Amendment.

Practical Significance

Although the religion provisions in most state constitutions remain untilled soil and although the unique language of these provisions and their history often remain unexplored, they hold great promise. These provisions provide significant protections to people of faith and religious institutions and embody profound wisdom regarding the relationship between church and state. In the present legal context, these additional protections must be considered, and courts should be presented with opportunities to apply these provisions and recognize the broad protections the framers of these provisions intended people of faith and their institutions to enjoy. ■

The Religious Institutions Practice at Rothgerber Johnson & Lyons LLP

Religious institutions regularly confront a variety of legal issues just as other nonprofit organizations do. They face legal problems arising from their employees and their reliance on volunteers. Legal problems frequently arise from buying, selling, renting, exchanging, zoning, and developing property. Legal issues also regularly arise in conjunction with fund-raising, borrowing money, and determining tax obligations.

Religious organizations, however, are unique in several regards. They are called by faith to advance a religious mission. Their inspired callings result in unique polities and governance and, often, in values and practices that may be contrary to the dominant secular culture and the civil laws reflecting that culture. Religious institutions are called to serve the vulnerable and the broken, which carries special liability risks. Pastors, rabbis, pastoral counselors, and others deal daily with highly confidential information involving their parishioners. Because churches, synagogues, and religious schools teach and preach particular beliefs and high ethical standards, departure from those teachings may give rise to scandal and more potent civil claims. In addition, government has, by statutory exemption and by a variety of federal and state statutes, routinely treated religious organizations differently from their secular counterparts.

Attorneys in the RJ&L Religious Institutions Group serve religious organizations with great sensitivity to their distinctive characteristics and with knowledge and experience regarding their unique legal status. Our lawyers routinely advocate on behalf of religious entities in administrative settings and in state and federal trial and appellate courts from coast to coast. On matters of common interest, our attorneys frequently organize ecumenical coalitions to address legislative concerns and prepare amicus briefs regarding cases of general concern pending in appellate courts. Our attorneys also discreetly consult with and advise general counsel serving a variety of religious institutions.

The Religious Institutions Group provides experienced legal representation in the following areas:

- ***Alternative Dispute Resolution***
- ***Amicus Advocacy***
- ***Appellate Advocacy***
- ***Child Abuse Reporting***
- ***Child Care Regulation***
- ***Child Placement Agencies***
- ***Construction***
- ***Consulting Services***
- ***Contracts***
- ***Estate and Gift Planning***
- ***Federal Tax Issues***
- ***Financing***
- ***First Amendment***
- ***Handbooks and Policy Manuals***
- ***Human Resources***
- ***Investigations***
- ***Land Use, Zoning, and Permitting***
- ***Litigation***
- ***Lobbying***
- ***Minister Misconduct***
- ***Political Activities***
- ***Real Estate Transactions***
- ***Releases***
- ***Schools***
- ***Sexual Misconduct Policies***
- ***Tax-Exempt Financing***
- ***Tax Exemptions***
- ***Volunteer Liability***

The following professionals practice in this area:

Denver Office

Charles Goldberg
(303) 628-9533
cgoldberg@rothgerber.com

Glen A. Burbridge
(303) 628-9590
gburbridge@rothgerber.com

Samuel M. Ventola
(303) 628-9527
sventola@rothgerber.com

James R. Walker
(303) 628-9510
jwalker@rothgerber.com

Scott M. Browning
(303) 628-9540
sbrowning@rothgerber.com

Susan Strebel Sperber
(303) 628-9563
ssperber@rothgerber.com

Constance D. Smith
(303) 628-9557
csmith@rothgerber.com

Colorado Springs Office

L. Martin Nussbaum
(719) 386-3004
mnussbaum@rothgerber.com

Eric V. Hall
(719) 386-3030
ehall@rothgerber.com

Michael J. DeBoer
(719) 386-3014
mdeboer@rothgerber.com

H. William Mahaffey
(719) 386-3005
wmahaffey@rothgerber.com

Bruce N. Warren
(719) 386-3003
bwarren@rothgerber.com

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THE FIRST FREEDOM

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ROTHGERBER JOHNSON & LYONS LLP
ATTORNEYS AT LAW

One Tabor Center, Suite 3000
1200 Seventeenth Street
Denver, Colorado 80202-5855

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