The Crumbling Wall Between Church and State: Attorney General Supervision of Religious Corporations in California

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Introduction

The First Amendment directly precludes the federal government, and the individual states through the Fourteenth Amendment, from making any law "respecting an establishment of religion, or prohibiting the free exercise thereof."[1] The United States Supreme Court has attempted to establish workable guidelines for the application of these clauses to situations involving both religion and action or inaction by the state. These guidelines, however, do not provide clear perimeters for legislation touching on religion.[2] In reconciling the requirements of

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1. U.S. CONST. amend. I. The California Constitution provides for the same prohibition in more specific language. "Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The legislature shall make no law respecting an establishment of religion." CAL. CONST. art. I, § 4. The free exercise clause of the United States Constitution was first applied to the states through the due process clause of the Fourteenth Amendment in Cantwell v. Connecticut, 310 U.S. 296 (1940). The establishment clause of the United States Constitution was first applied to the states in Everson v. Board of Educ., 330 U.S. 1 (1947).

2. "[I]t is evident from the numerous opinions of the Court, and of Justices in concurrence and dissent in the leading cases applying the establishment clause, that no 'bright line' guidance is afforded. Instead, while there has been general agreement upon the applicable principles and upon the framework of analysis, the Court has recognized its inability to perceive with invariable clarity the 'lines of demarcation in this extraordinarily sensitive area of constitutional law.'" Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 761 n.5 (1973) (quoting Lemon v. Kurtzman, 403 U.S. 602, 612 (1971)). *See also* Zoetway, *Excessive Entanglement: Development of a Guideline for Assessing Acceptable Church-State Relationships*, 3 PEPPERDINE L. REV. 279 (1976). "[T]he [establishment clause] tests may have created a paradoxical constitutional requirement." *Id.* at 294. Section 9230 of the California Corporations Code, the subject of this note, provides a good example of the problems encountered by legislatures in applying free exercise and establishment clause principles. It was thought that when the original version of § 9230 was passed, it would solve the First Amendment problems of the prior law. *See* Abbott & Kornblum, *The Jurisdiction of the Attorney General Over Corporate Fiduciaries Under the New California Non-*

both the establishment and the free exercise clauses with statutory law, courts have sometimes drawn tenuous distinctions, based on the desired outcome in a particular case.[3]

The California Legislature has fallen victim to the confusion surrounding the free exercise and establishment clauses. One example of this confusion is section 9230 of the California Corporations Code, which involves state attorney general supervision of religious corporations in order to prevent fraud. The powers of the California attorney general to act to prevent fraud by religious corporations have been revised and substantially modified twice in less than two years.

This note is concerned with the statutory attempt by the California Legislature to accommodate the free exercise and establishment clauses in the revised version of section 9230,[4] the most recent of three laws defining the scope of the attorney general's jurisdiction to investigate and prosecute criminal and civil fraud within religious corporations.[5] Traditionally, the attorney general held broad powers of charitable trust supervision over religious corporations to remedy breachs of trust by religious corporations.[6] These powers included the injunction of ac-

profit Corporation Law, 13 U.S.F.L. REV. 753, 792 (1979); Hone, *California's New Nonprofit Corporation Law—An Introduction and Conceptual Background*, 13 U.S.F.L. REV. 733, 744 (1979).

3. For example, in Lemon v. Kurtzman, 403 U.S. 602 (1971), the United States Supreme Court held unconstitutional a 15% supplement to the salaries of private elementary school teachers who taught only secular courses and used only public school materials. No payment was to be made for any course containing any religious or moral teaching. This practice was held to involve excessive governmental entanglement with religion. Only five years later, in Roemer v. Board of Pub. Works, 426 U.S. 736 (1976), the Supreme Court upheld a program of grants to private colleges, including those religiously affiliated. Although in *Lemon*, nonpublic elementary schools were held to be substantially religious in purpose, 403 U.S. at 616, in *Roemer*, colleges were held not to be "pervasively sectarian," 426 U.S. at 762. Limiting the use of state funds to nonsectarian purposes was enough to guarantee that they would not be used to aid religion. *Id.* at 759-60. The Court has also drawn distinctions based on whether or not textbooks are loaned to nonpublic schools or to the students themselves. Although loaning text books to students is constitutional, loaning secular and nonideological instructional materials to nonpublic schools is not. Meek v. Pittenger, 421 U.S. 349 (1975). *See also* Board of Educ. v. Allen, 392 U.S. 236, 243-44 (1968).

In Braunfeld v. Brown, 366 U.S. 599 (1961), the Court declined to require a sabbatarian exemption to Sunday closing laws. In Sherbert v. Verner, 374 U.S. 398 (1963), the Court held that a state may not deny unemployment compensation to a Seventh Day Adventist who declined, for religious reasons, to accept a position requiring work on Saturday. For a critique of both decisions, see W. KATZ, RELIGION AND AMERICAN CONSTITUTIONS 98-100 (1964).

4. CAL. CORP. CODE § 9230 (West Supp. 1982).

5. The first statute was § 9505 of the California Corporations Code, which codified the traditional power of the attorney general to supervise charitable trusts. CAL. CORP. CODE § 9505 (West 1977) (repealed 1980). For the full text of this section, see note 14 *infra*.

6. *See* Howland, *The History of Charitable Trusts and Corporations in California*, 13 U.C.L.A. L. REV. 1029, 1036-37 (1966). In 1959, California adopted the Uniform Supervision of Trustees for Charitable Purposes Act, CAL. GOV'T CODE §§ 12580-12597 (West

tivities, the removal and substitution of trustees, the distribution of funds, the restitution of funds improperly distributed, the cancellation or revision of contracts, and the ordering of the winding up of the corporation. The original version of section 9230,[7] that is, the second of three statutory attempts to regulate this subject, narrowed the scope of the traditional powers but was criticized as an overbroad and excessive regulation of protected religious activity in contravention of the free exercise and establishment clauses.[8]

The California Legislature responded to these criticisms by repealing the original version of section 9230 and enacting a substantially modified version of the statute in its place,[9] even though no court had yet ruled on the constitutionality of the repealed statute.[10] Section 9230, as previously enacted, was in practical effect for only nine

1980). Section 12591 of that Act states, "The Attorney General may institute *appropriate* jurisdiction of the court. The powers and duties of the Attorney General provided in this article are in addition to his existing powers and duties." *Id.* at § 12591 (emphasis added).

7. The original version of § 9230 was passed in 1978 as part of the overall revision of the Nonprofit Corporations Law which took effect on January 1, 1980. Act of Aug. 29, 1978, ch. 567, § 7, 1978 Cal. Stat. 1905, *amended by* Act of Sept. 14, 1979, ch. 681, § 1, 1979 Cal. Stat. 2131, *repealed by* Act of Sept. 30, 1980, ch. 1324, § 3, 1980 Cal. Stat. 4617. Prior to that time, the attorney general had traditional charitable trust supervision and enforcement powers over religious corporations to the same extent as over all other nonprofit corporations. CAL. CORP. CODE § 9505 (West 1977) (repealed 1980). The statute did not provide any guidelines or limitations for when such investigation was permitted or justified. "[I]n the absence of any legislative restriction, [the attorney general] has the power to file any civil action or proceeding directly involving the rights and interests of the state, or which he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights and interest." D'Amico v. Board of Medical Examiners, 11 Cal. 3d 1, 14-15, 520 P.2d 10, 20, 112 Cal. Rptr. 786, 796 (1974) (quoting Pierce v. Superior Court, 1 Cal. 2d 759, 761-62, 37 P.2d 453, 460-61 (1934)).

8. The revision of § 9230 was actively promoted by the California Church Council, Americans United for Separation of Church and State, Church State Council, Church of Scientology, California Catholic Conference, California Council for Religious Freedom, and other church organizations. The new version of the statute was initially drafted by the American Civil Liberties Union. Leo Pfeffer, well-known author and advocate of religious freedom, strongly advocated the adoption of the new version. Mr. Pfeffer claimed to represent "the views of the 80 million Americans represented by the Protestant and Jewish organizations in whose behalf [he] submitted a brief *amicus curiae* to the United States Supreme Court [in Worldwide Church of God, Inc. v. Superior Court, *cert. denied*, 449 U.S. 900 (1980)]." *Hearings on S.B. 1493 Enacted into Law Sept. 1980 Before the Cal. Legislative Comm.* Nov. 25, 1980 at 1 (statement of Leo Pfeffer) [hereinafter cited as Statement of L. Pfeffer]. Mr. Pfeffer stated his opinion that the original version of § 9230 was part of a "real, if perhaps not officially declared, war against the [Worldwide Church of God]." *Id.* at 9.

9. Act of Sept. 9, 1980, ch. 1324, § 4, 1980 Cal. Stat. 4617 (codified as amended at CAL. CORP. CODE § 9230 (West Supp. 1982)).

10. The United States Supreme Court had recently denied certiorari to a petition by the Worldwide Church of God claiming that the attorney general had acted unconstitutionally in exercising his powers under the previous, and broader, § 9505 of the California Corporations Code. *See* Worldwide Church of God, Inc. v. Superior Court, *cert. denied*, 449 U.S. 900 (1980).

months.[11] One reason for the quick action by the California Legislature on this subject may have been strong pressure applied by religious groups who, in the wake of the recent tragedy of Jonestown and the People's Temple, feared increased public interest and scrutiny of their affairs and practices. The 1980 revision of section 9230 severely curtails the attorney general's power to investigate and prosecute civil fraud within religious corporations. This curtailment by the legislature has raised a different set of constitutional objections, in that the current version, by narrowly circumscribing the power of the attorney general to investigate and prosecute religious fraud, favors religious corporations over all other nonprofit corporations.

Recognizing the constitutional problems raised by the new law, the legislature postponed the effective date of the new version of section 9230 from January 1, 1981, until June 1 of that year. This was done to provide time for further study and analysis of the constitutional questions raised by the new section and to allow for amendment.[12] That time has now passed, and the problem remains. Religious corporations continue to solicit billions of dollars of contributions from the public with little or no accountability to anyone but themselves.[13] While no court has yet spoken on the constitutionality of either version of section 9230, review of the case law indicates that section 9230 fails to strike an acceptable balance between the state's interest in protecting the public welfare and the individual or corporate interest in the free and unfettered exercise of religious beliefs.

This note first discusses the power of the attorney general to investigate and prosecute religious fraud both under the original section 9230 and under the current revision. It next examines the constitutional implications of state interference with religious organizations. The note concludes that in removing the provision dealing with violation of the free exercise clause in the old law, the revised section fails to withstand scrutiny under the establishment clause. By exempting only religious corporations from examination by the attorney general for civil fraud, the California Legislature has unconstitutionally accorded preferential treatment to religion over nonreligion. The final section suggests a compromise that would achieve a constitutional balance between the individual's freedom of religion and the state's interest in protecting the public from fraudulent activities that operate under the guise of religion.

11. Although the revised version of § 9230 did not officially go into effect until June 1, 1981, the attorney general, upon passage of the revised section, dropped many cases and investigations pending under the prior section because the legislature had demonstrated its intent that he no longer act in this area. *See* note 50 *infra*.

12. Los Angeles Daily Journal, June 16, 1980, at 3, col. 8.

13. *See* note 50 *infra*.

I. California Corporations Code Section 9230

A. History of Section 9230

Prior to January 1, 1980, the California attorney general's power to supervise charitable trusts included authority over religious as well as secular charitable corporations.[14] Thus, when religious corporations held their properties subject to a charitable trust, the attorney general had full power to investigate for possible violations of that trust and to appoint a receiver to control church assets and records during investigation and prosecution.[15] The statute did not provide any guidelines suggesting when an investigation was permitted or justified—the corporation was subject "at all times to examination by the Attorney General."[16] Despite this apparent conflict with the free exercise clause of the First Amendment, the statue was upheld as constitutional in 1977 by the California Court of Appeals in *Queen of Angels Hospital v. Younger*.[17] The court held that "the [attorney general's role] is one of neutrality . . . [and because] the dispute does not require 'the resolution by civil courts of controversies over religious doctrine and practice,' no infringement [of] First Amendment rights results."[18] In its analysis, the court made no distinction between religious charitable corporations and all other charitable corporations. It reasoned that the state was obligated to protect the public's interest in any charitable trust and that only the attorney general, as representative of the state, could properly represent the interests of the trust or the public.[19]

In 1980, the structure of the Nonprofit Corporations Division of the California Corporations Code was modified.[20] Instead of being a general nonprofit corporation law, the new statute classified nonprofit corporations into three groups, with religious corporations receiving

14. CAL. CORP. CODE § 9505 (West 1977) (repealed 1980). The section read, "A nonprofit corporation which holds property subject to any public or charitable trust is subject at all times to examination by the Attorney General, on behalf of the State, to ascertain the condition of its affairs and to what extent, if at all, it may fail to comply with trusts which it has assumed or may depart from the general purposes for which it is formed. In case of any such failure or departure the Attorney General shall institute, in the name of the State, the proceedings necessary to correct the noncompliance or departure." *Id.*

15. *Id.* For a discussion of general receivership powers of the attorney general, see Note, *Receivers, Churches and Nonprofit Corporations: A First Amendment Analysis*, 56 IND. L.J. 175 (1980).

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

17. 66 Cal. App. 3d 359, 136 Cal. Rptr. 36 (1977).

18. *Id.* at 369, 136 Cal. Rptr. at 42 (quoting Presbyterian Church v. Hull Church, 393 U.S. 440, 449 (1969)).

19. *Id.* at 365, 136 Cal. Rptr. at 39.

20. Act of Aug. 29, 1978, ch. 567, 1978 Cal. Stat. 1740 (operative Jan. 1, 1980) (codified as amended at CAL. CORP. CODE §§ 5000-10856 (West Supp. 1982)).

separate treatment.[21] While nonprofit public benefit corporations and nonprofit mutual benefit corporations continue to be covered by provisions virtually identical to the general charitable trust provision of the old law,[22] the provision for attorney general supervision of religious corporations was made considerably more restrictive.

Prior to its repeal and substitution, subdivision (a) of the original version of section 9230 permitted the attorney general to investigate religious corporations if he had reasonable grounds to believe that one or more of five specific conditions had occurred or existed.[23] The attorney general could examine the religious corporation to determine if:

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21. The legislature divided nonprofit corporations into three classifications: public benefit corporations (organizations intended to carry out public or charitable purposes), CAL. CORP. CODE §§ 5110-6910 (West Supp. 1982); mutual benefit corporations (organizations intended not to distribute profits), CAL. CORP. CODE §§ 7110-8910 (West Supp. 1982); and religious corporations (organizations formed primarily or exclusively to further religion), CAL. CORP. CODE §§ 9110-9690 (West Supp. 1982).

22. Attorney general supervision of public benefit corporations is covered by § 5270 of the California Corporations Code, and supervision of mutual benefit corporations is now covered by § 7240 of the same code.

23. The original version of § 9230, Act of Aug. 29, 1978, ch. 567, § 7, 1978 Cal. Stat. 1905, *amended by* Act of Sept. 14, 1979, ch. 681, § 1, 1979 Cal. Stat. 2131, reads as follows: "(a) Upon reasonable grounds to believe that the following condition or conditions have occurred or do exist, the Attorney General may, at reasonable times, examine a corporation to determine whether:

"(1) The corporation fails to qualify as a religious corporation under this part; or

"(2) There is or has been any fraudulent activity in connection with the corporation's property; or

"(3) Any corporate property is or has been improperly diverted for the personal benefit of any person; or

"(4) Property solicited and received from the general public, based on a representation that it would be used for a limited purpose other than general support of the corporation's religious activities, has been improperly used in a manner inconsistent with the stated purpose for which the property was solicited; or

"(5) There has been a substantial diversion of corporate assets from stated corporate purposes.

"(b) Such examination shall respect privileges enumerated in Division 8 (commencing with Section 900) of the Evidence Code and shall protect the confidential nature of membership lists by using such lists only in connection with the examination and any subsequent court proceeding. In addition, such examination shall not unnecessarily interfere with normal operations and religious observances of the corporation.

"(c) The Attorney General may institute an action in the name of the state to enforce the right of examination set forth in subdivision (a).

"(d) For reasonable cause, the Attorney General may institute an action in the name of the state:

"(1) To establish that the corporation fails to qualify as a religious corporation under this part, and if a court so finds it shall enter an order that the corporation shall no longer operate as a religious corporation under this part.

"(2) To correct any wrongful activity which has taken place in connection with or as a result of any condition or conditions set forth in paragrah (2), (3), (4) or (5) of subdivision (a)."

See Abbott & Kornblum, *supra* note 2, at 790-91.

(1) it failed to qualify as a religious corporation under the revised religious corporations part of the Corporations Code, or (2) there had been any fraudulent activity in connection with the corporation's property, or (3) there had been improper diversion of corporate property for the personal benefit of any person, or (4) property solicited from the public for a specific purpose had been improperly used in a manner inconsistent with the stated purpose, or (5) there had been a substantial diversion of corporate assets from stated corporate purposes.[24] Section 9230 required the attorney general to have reasonable grounds for believing that one of the five specified conditions existed.[25] There was no reasonableness requirement, however, for attorney general investigation of other charitable trust corporations.[26]

Section 9230 further required that in making the examinations the attorney general observe the privileges enumerated in the California Evidence Code. For example, the attorney general was forbidden to interfere unnecessarily with the normal operations and religious observances of the corporation and was required to protect the confidentiality of church records and membership lists.[27]

In spite of the restrictions placed on the attorney general in the original version of section 9230, that version did not sufficiently protect the weighty First Amendment rights involved. The important nature of religious freedom requires that the state bear some inconvenience so that those rights may be protected. The attorney general had excessive discretion to interfere with the practices of religious corporations. He exercised sole discretion in deciding when reasonable grounds existed to believe that a violation had occurred.[28] This discretionary power did not conform to the requirement that government officials be provided with definite objective guidelines within which to exercise their discretion when First Amendment rights are being infringed upon by state action.[29]

Section 9230 also placed no restrictions on the degree of government entanglement with religious corporations,[30] which the establishment clause proscribes. Section 9230 was in effect for a very short time, thereby limiting the opportunity for excessive entanglement; arguably,

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24. *See id.*

25. *See id.*; Hone, *supra* note 2, at 744. By providing a standard of reasonableness, by limiting the nature and scope of investigation and suit, and by mandating protections and privileges for religious corporations, the legislature thought that the provisions would withstand any constitutional challenge. *Id.*

26. CAL. CORP. CODE §§ 5250, 7240 (West Supp. 1982).

27. *See* note 23 *supra*. These requirements were not in the prior § 9505. *See* note 14 *supra*.

28. *See* note 23 *supra*.

29. *See* notes 82-85 and accompanying text *infra*.

30. For a discussion of the excessive entanglement element of the establishment clause, see notes 120-28 and accompanying text *infra*.

however, the potential existed for such excessive entanglement.[31]

B. Current Section 9230

In 1980, the California Legislature repealed the old version of section 9230 and enacted a new version in its place.[32] The new enactment was intended to restrict what was thought to be the overly broad power of the attorney general to investigate religious corporations. It was feared that section 9230, as originally enacted, would become a tool for persecution of unpopular religious fringe groups, particularly the bur-

31. The potential for excessive entanglement is all that need be shown. *See, e.g.*, Wolman v. Walter, 433 U.S. 229 (1977); Roemer v. Board of Pub. Works, 426 U.S. 736 (1976).

32. Act of Sept. 30, 1980, ch. 1324, § 4, 1980 Cal. Stat. 4617 (codified as amended at CAL. CORP. CODE § 9230 (West Supp. 1982) (effective June 1, 1981)). The new and amended version reads as follows:

"(a) Except as the Attorney General is empowered to act in the enforcement of the criminal laws of this state, and except as the Attorney General is expressly empowered by subdivisions (b), (c) and (d), the Attorney General shall have no powers with respect to any corporation incorporated or classified as a religious corporation under or pursuant to this code.

"(b) The Attorney General shall have authority to institute an action or proceeding under Section 803 of the Code of Civil Procedure, to obtain judicial determination that a corporation is not properly qualified or classified as a religious corporation under the provisions of this part.

"(c) The Attorney General shall have the authority (1) expressly granted with respect to any subject or matter covered by Sections 9660 to 9690, inclusive; (2) to initiate criminal procedures to prosecute violations of the criminal laws, and upon conviction seek restitution as punishment; and (3) to represent as legal counsel any other agency or department of the State of California expressly empowered to act with respect to the status of religious corporations, or expressly empowered to regulate activities in which religious corporations, as well as other entities, may engage.

"(d) Where property has been solicited and received from the general public, based on a representation that it would be used for a specific charitable purpose other than general support of the corporation's activities, and has been used in a manner contrary to that specific charitable purpose for which the property was solicited, the Attorney General may institute an action to enforce the specific charitable purpose for which the property was solicited; provided charitable purpose for which the property was solicited; provided (1) that before bringing such action the Attorney General shall notify the corporation that an action will be brought unless the corporation take immediate steps to correct the improper diversion of funds, and (2) that in the event it becomes impractical or impossible for the corporation to devote the property to the specified charitable purpose, or that the directors or members of the corporation in good faith expressly conclude and record in writing that the stated purpose for which the property was contributed is no longer in accord with the policies of the corporation, then the directors or members of the corporation may approve or ratify in good faith the use of such property for the general purposes of the corporation rather than for the specific purpose for which it was contributed.

"As used in this section, 'solicited from the general public' means solicitations directed to the general public, or to any individual or group of individuals who are not directly affiliated with the soliciting organization and includes, but is not limited to, instances where property has been solicited on an individual basis, such as door to door, direct mail, face to face, or similar solicitations, as well as solicitations on a more general level to the general

geoning cult movements in California.[33]

Section 9230, as presently enacted, significantly reduces the authority of the attorney general to investigate and prosecute religious corporations for civil fraud. The legislature has expressly removed the attorney general's common law and statutory charitable trust enforcement powers over religious corporations.[34] The attorney general retains only limited powers of enforcement under criminal statutes and under narrowly drawn technical compliance sections of the California Corporations Code—for instance, he can enforce corporate filing requirements and statutes dealing with falsification of corporate records.[35] Examples of these limited powers are described below.

Under the new law, the attorney general still has power to bring a *quo warranto* action pursuant to section 803 of the California Code of Civil Procedure.[36] The attorney general, under his *quo warranto* authority, may obtain a judicial determination that the corporation is not properly qualified as a religious corporation under section 9111 of the California Corporations Code.[37] The purpose of a *quo warranto* action is to put the corporation out of business by requiring it to forfeit its charter. Such a result, however, fails to accomplish one of the main objectives of section 9230: to stop fraudulent actions by directors and officers and to return misappropriated funds to a valid religious corporation. An action in *quo warranto* is further limited by the application

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public, or a portion thereof, such as through the media, including newspapers, television, radio, or similar solicitations.

"(e) Nothing in this section shall be construed to affect any individual rights of action which were accorded under law in existence prior to the enactment of Chapter 1324 of the Statutes of 1980.

"As used in this section, 'individual rights of action' include only rights enforceable by private individuals and do not include any right of action of a public officer in an official capacity regardless of whether the officer brings the action on behalf of a private individual.

"(f) Nothing in this section shall be construed to require express statutory authorization by the California Legislature of any otherwise lawful and duly authorized action by any agency of local government." *Id.*

33. *See* note 8 *supra*.

34. For a discussion of the attorney general's common law and statutory charitable trust powers, see note 7 and accompanying text *supra*.

35. *See* note 32 *supra*; CAL. ASSEMBLY JUDICIARY COMM., REPORT BY THE DEPARTMENT OF JUSTICE ON THE IMPACT OF S.B. 1493 ON THE ATTORNEY GENERAL'S ENFORCEMENT JURISDICTION OVER RELIGIOUS CORPORATIONS (1980). The bill, introduced by State Senator Petris of Oakland, was intended to repeal all common law and statutory powers of the attorney general to prosecute religious fraud except those which it expressly granted in the new § 9230. It reads, "This bill would repeal existing law and instead provide that except as the Attorney General is empowered to act in the enforcement of criminal laws of the state and except as specifically empowered by this bill, the Attorney General shall have no powers with respect to any corporation incorporated or classified as a religious corporation." S.B. 1493, 1979-1980 Regular Sess. (1980).

36. CAL. CIV. PROC. CODE § 803 (West 1980).

37. CAL. CORP. CODE § 9111 (West Supp. 1982).

of section 9111 of the newly modified California Corporations Code in combination with the case law definition of religion.

Section 9111 states that "a corporation may be formed under this part primarily or exclusively for *any religious purposes*."[38] The United States Supreme Court first attempted to define a "religious" belief in *United States v. Seeger*.[39] *Seeger* involved the claim of a conscientious objector who sought exemption from military duty because of his religious training and belief. The Court in *Seeger* held that in determining whether or not a particular belief is religious, a court should not inquire into the validity of the belief.[40] Instead, it should examine whether or not the "claimed belief occup[ies] the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption."[41] The Supreme Court expanded the definition of religion in terms of its function in the life of the believer[42] in *Welsh v. United States*.[43] The central consideration in determining whether or not a belief is religious is if it plays the role of a religion and functions as a religion in the believer's life.[44] In *Welsh*, this consideration was held to include beliefs which were purely ethical and moral in derivation.[45] Although the Supreme Court has emphasized the *function* of such beliefs in the individual's life, California courts have also attempted to define religion in institutional terms.[46] "Religion" in this context refers simply to a belief, not necessarily one concerning supernatural powers; a cult involving an association openly expressing the belief; a system of moral practice resulting from adherence to the belief; and an organization within the cult designed to observe the tenets of that belief.[47] Under either broad definition, almost any group can

38. *Id.* (emphasis added).

39. 380 U.S. 163 (1965).

40. *Id.* at 184. " 'Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others.' " *Id.* (quoting United States v. Ballard, 322 U.S. 78, 86 (1944) (Douglas, J.)).

41. 380 U.S. at 184.

42. *See* Boyan, *Defining Religion in Operational and Institutional Terms*, 116 U. PA. L. REV. 479, 487-88 (1968).

43. 398 U.S. 333 (1970). *Welsh* also involved conscientious objectors to war.

44. *Id.* at 339.

45. *Id.* at 344.

46. *See* Boyan, *supra* note 42, at 491-93.

47. Saint Germain Found. v. County of Siskiyou, 212 Cal. App. 2d 911, 916, 28 Cal. Rptr. 393, 395 (1963); Fellowship of Humanity v. County of Alameda, 153 Cal. App. 2d 673, 693, 315 P.2d 394, 406 (1957). *See also* United States v. Ballard, 322 U.S. 78 (1944). More recently, a federal district court in California applied an even more amorphous and vague definition of religion. The court in Universal Life Church, Inc. v. United States, 372 F. Supp. 770 (E.D. Cal. 1974) stated, "Neither this Court, nor any branch of this Government, will consider the merits or fallacies of a religion. Nor will the Court compare the beliefs, dogmas, and practices of a newly organized religion with those of an older, more established

qualify as religious, and therefore a *quo warranto* will fail.

Section 9230 also provides the attorney general with authority to institute actions to prosecute violations of the criminal laws. Whereas under the prior law, the attorney general could bring a civil action for self-dealing, mismanagement, or improper diversion of corporate assets without having to prove criminal intent, now prosecution must be for *criminal* fraud only.[48] Prosecution for criminal fraud requires proof beyond a reasonable doubt that the defendant had a fraudulent intent at the time the act was committed.[49] Since the defendants in these criminal prosecutions will most often be the directors of the religious corporation, proof of the necessary criminal intent, particularly in the context of religious corporations, will be much more difficult than in the previous civil actions.[50] For example, lack of concealment provides

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religion. Nor will the Court praise or condemn any religion, however excellent or fanatical or preposterous it may seem." *Id.* at 776. The court in that case avoided the formulation of a definition altogether and limited its reasoning to a negatively phrased finding that the operations of the Universal Life Church were not "substantial activities which do not further any religious purpose." *Id. See also* Rakay & Sugarman, *A Reconsideration of the Religious Exemption: The Need for Financial Disclosure of Religious Fund Raising and Solicitation Practices*, 9 LOY. U. CHI. L.J. 863, 877 (1978).

48. Some examples are theft, embezzlement, and obtaining property by false pretenses. In addition, the attorney general may represent as legal counsel any other agency or department of the State of California expressly empowered to act with respect to the status of religious corporations or to regulate activities in which religious corporations engage. CAL. CORP. CODE § 9230(c) (West Supp. 1982). The types of actions that can be brought under this provision include quasi-criminal and technical compliance actions for falsification of corporate records, CAL. CORP. CODE § 6215 (West Supp. 1982), for violations of filing requirements, CAL. CORP. CODE §§ 6810, 9660, 9690 (West 1977 & Supp. 1982), and for theft of corporate property, CAL. CORP. CODE §§ 6811, 6813 (West 1977 & Supp. 1982).

49. For example, to support a conviction of larceny, the defendant must have intended to steal the property at the time he took it. If the intent arose after the act of taking, the crime may be embezzlement or a lesser offense, but it cannot be larceny. CAL. PENAL CODE §§ 484 (theft), 503 (embezzlement), 532 (false pretenses) (West 1970 & Supp. 1982). Penal Code § 20 states, "To constitute crime there must be unity of act and intent. In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence." CAL. PENAL CODE § 20 (West 1970). *See* People v. Green, 27 Cal. 3d 1, 609 P.2d 468, 164 Cal. Rptr. 1 (1980); People v. Fewkes, 214 Cal. 142, 4 P.2d 538 (1931); People v. Turner, 267 Cal. App. 2d 440, 73 Cal. Rptr. 263 (1968).

50. Upon the signing by the governor of S.B. 1493 (the 1980 version of § 9230), the attorney general dropped several pending cases and investigations of religious corporations. A summary of the dropped complaints was provided to the Senate Committee on the Judiciary on November 13, 1980. Among the allegations were: (1) A church official sold a $1.8 million Beverly Hills house, purchased and maintained by church funds, and pocketed the proceeds; a church employee spent more than $2 million of church funds on travel, clothing, jewelry, and other personal items in a three-year period; a church official is a partner in a firm formed to lease airplanes to the church at a profit (People v. Worldwide Church of God, Inc.), and (2) Synanon at various times distributed more than $500,000 to various members without authority; Synanon made retroactive salary payments of $300,000 to certain officers and directors which, in fact, constituted a gift of foundation money; Synanon gave the defendant Charles Dederich $500,000 as a pre-retirement bonus; twenty-five thou-

a possible defense to the crime of embezzlement.[51] Since defendants will have control of the corporate records, they will have little need to conceal their acts.[52]

The attorney general also has the power to enforce a charitable trust against a religious corporation "[w]here property has been solicited and received from the general public, based on a representation that it would be used for a specific charitable purpose other than general support of the corporation's activities, and has been used in a manner contrary to that specific charitable purpose."[53] This provision is less effective than it first appears, for the statute provides directors with an escape clause. Once a director has been accused of improper diversion of funds for purposes other than those specifically represented, he may vary the use of property solicited from the public provided that he has decided, in good faith, that it has become "impractical or impossible for the corporation to devote the property to the specified charitable purpose."[54] Again, the attorney general must prove the criminal intent of the actor, which makes successful prosecution difficult.

II. The Constitutional Problem

A. Section 9230 and the Free Exercise Clause

The Supreme Court has held that although the free exercise clause forbids the government from interfering with religious beliefs and opinions, the federal government may regulate religious practices.[55] In

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sand dollars of church assets were spent for vehicles and other personal property for directors and officers (People v. Charles Dederich (Synanon Foundation)).

Complaints had also been made against the officers and directors of Faith Center, Inc., Sierra Christian Service Corp., Old Time Faith, Inc., Fellowship Ministries, Inc., and others for misuse and diversion of corporate assets to personal use. CAL. SENATE COMM. ON JUDICIARY, CASES DROPPED BY THE ATTORNEY GENERAL UPON THE SIGNING OF S.B. 1493 1-3 (Nov. 13, 1980) (summary of cases and complaints dropped by attorney general).

51. Section 511 of the California Penal Code states that "[u]pon any indictment for embezzlement, it is a sufficient defense that the property was appropriated openly and avowedly, and under a claim of title preferred in good faith, *even though such claim is untenable*." CAL. PENAL CODE § 511 (West 1970) (emphasis added). Almost any action can be justified under a standard of "untenable good faith."

52. CAL. SENATE COMM. ON JUDICIARY, MEMO FROM R. THOMPSON TO MEMBERS OF THE SENATE AND ASSEMBLY JUDICIARY COMM. CONCERNING HEARING ON THE AUTHORITY OF THE ATTORNEY GENERAL TO INVESTIGATE RELIGIOUS CORPORATIONS 3 (Nov. 13, 1980) [hereinafter cited as THOMPSON MEMO].

53. CAL. CORP. CODE § 9230(d) (West Supp. 1982).

54. *Id.*

55. Reynolds v. United States, 98 U.S. 145, 164 (1878). This broad statement of state power to regulate religion has been qualified and narrowed in subsequent cases. *See generally* Wisconsin v. Yoder, 406 U.S. 205 (1972); Gillette v. United States, 401 U.S. 437 (1971); Sherbert v. Verner, 374 U.S. 398 (1963); Cantwell v. Connecticut, 310 U.S. 296 (1940); People v. Fogelson, 21 Cal. 3d 158, 577 P.2d 677, 145 Cal. Rptr. 542 (1978); People v. Woody, 61

Cantwell v. Connecticut,[56] the Court applied this interpretation of the free exercise clause to the states through the due process clause of the Fourteenth Amendment.

Cantwell concerned the validity of a statute that required persons to obtain a permit to solicit contributions for religious purposes. The government agent who issued the permits was required to determine whether or not the religion was "bona fide."[57] The statute was held unconstitutional because it authorized more than the regulation of religious conduct, actually requiring a judgment of the applicant's religious beliefs.[58] Despite this limit on governmental power, the Court warned, "Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public . . . . Even the exercise of religion may be at some slight inconvenience in order that the state may protect its citizens from injury."[59] While *Cantwell* made clear that some governmental infringement of the First Amendment's free exercise rights was permissible,[60] it was for later decisions to define the extent to which the state could justify the regulation of religious conduct as being for the protection of the public welfare.

It was not until the early 1960's that the Court began to articulate the permissible scope of governmental action that interfered with the free exercise of religion. The Court applied both a "compelling state interest"[61] test and an "alternative means"[62] test to determine the constitutionality of governmental regulation of activities under the free exercise clause.[63]

The Supreme Court, when first considering the extent to which governmental action may justifiably infringe upon the free exercise of religion, required that the state show a "compelling state interest," not merely a rational relationship to some colorable state interest. In this

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Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964); Gospel Army v. City of Los Angeles, 27 Cal. 2d 232, 163 P.2d 704 (1945).

56. 310 U.S. 296 (1940).

57. *Id.* at 302.

58. *Id.* at 303-04.

59. *Id.* at 306.

60. "[A] state may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding of meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment [due process clause]." *Id.* at 304.

61. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963); notes 64-67 and accompanying text *infra*.

62. Braunfeld v. Brown, 366 U.S. 599 (1961). For a discussion of the alternative means test, see text accompanying notes 68-71 *infra*.

63. *See generally* Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development*, 80 HARV. L. REV. 1381 (1967).

highly sensitive constitutional area, " '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.' "[64] Later, in *Wisconsin v. Yoder*,[65] the Court imposed a heavier burden upon the use of state police power that threatened the free exercise of religion. In addition to showing a compelling state interest, the state was required to apply a balancing test in which "only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion."[66] Under this balancing test, even a "compelling" state interest may be required to give way to First Amendment protection in order to prevent a significant infringement on free exercise rights. The importance of the state interest must be balanced against the importance of the right infringed upon. The burden is on the government to show the existence of such a significant and compelling state interest.[67]

In addition to the burden of proving a compelling state interest in a particular regulation, the state must prove that there are no other less offensive means it could utilize to accomplish its valid objective.[68] Addressing the proper scope of a statute that interferes with religious practice, the Supreme Court in *Braunfeld v. Brown*[69] explained, "[I]f the State regulates conduct by enacting a general law within its power, . . . the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden."[70] Whenever a state seeks to regulate religious activity, those regulations must be drafted as narrowly as possible in order to survive scrutiny under the alternative means test. "[N]othing . . . would prevent officials from proceeding with a program grounded in a strong state interest so long as they have explored, and in good faith rejected, seemingly less restrictive alternatives."[71]

The California Supreme Court's protection of religious practices under the free exercise clause of the California Constitution closely parallels that of the United States Supreme Court.[72] In addition to applying the compelling state interest test and the balancing approach, California case law distinguishes between purely religious and merely

64. Sherbert v. Verner, 374 U.S. 398, 406 (1963) (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

65. 406 U.S. 205 (1972).

66. *Id.* at 215.

67. Elrod v. Burns, 427 U.S. 347, 362 (1976).

68. Sherbert v. Verner, 374 U.S. 398, 407 (1963).

69. 366 U.S. 599 (1960).

70. *Id.* at 607. *See also* People v. Woody, 61 Cal. 2d 716, 723, 394 P.2d 813, 819, 40 Cal. Rptr. 69, 75 (1964).

71. Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1078 (1978).

72. *See* People v. Woody, 61 Cal. 2d 716, 718, 394 P.2d 813, 815-16, 40 Cal. Rptr. 69, 71-72 (1964).

secular activities of a religious group. While a compelling state interest is necessary to regulate the latter, the state bears an even heavier burden when attempting to regulate the former.[73]

Religious organizations engage in a broad scope of activities, including the operation of schools, wineries, hospitals, and various commercial enterprises. Commenting on the use of state police power to regulate the basically nonreligious activities of religious corporations, the California Supreme Court wrote:

> Conceivably [religious corporations] may engage in virtually any worldly activity, but it does not follow that they may do so as specially privileged groups, free of the regulations that others must observe. If they were given such freedom, the direct consequence of their activities would be a diminution of the state's power to protect the public health and safety and the general welfare. With that power so easily diminished there would soon cease to be that separation of church and state underlying the constitutional concept of religious liberty.[74]

The extent of the California requirement of a stricter showing of a compelling state interest when the state attempts to regulate essential and purely religious functions is exemplified in the decision of *People v. Woody*.[75] In *Woody*, the state's prohibition of the use of peyote in the religious ceremonies of Native Americans was held unconstitutional.[76] The court considered the following in determining whether or not the regulation impermissibly invaded the Native Americans' constitutionally protected religious exercise: (1) the extent of the burden on free exercise, (2) the existence of a compelling state interest to justify the infringement,[77] and (3) the possibility of accomplishing the state's objective by a less offensive means.[78] The court found that prohibition of the use of peyote would result in a "virtual inhibition of the practice of defendants' religion."[79] Although the court recognized the state's strong interest in enforcing its narcotics laws, it was not convinced that a means which did not single out a particular religious practice could not be utilized to achieve that end.[80]

Although subsequent to *Woody* the California Supreme Court recognized that some governmental regulation of First Amendment activi-

73. Gospel Army v. City of Los Angeles, 27 Cal. 2d 232, 245-46, 163 P.2d 704, 712 (1945). *See also* Giannella, *supra* note 63, at 1384.

74. Gospel Army v. City of Los Angeles, 27 Cal. 2d 232, 245, 163 P.2d 704, 712 (1945).

75. 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

76. *Id.* at 727, 394 P.2d at 821, 40 Cal. Rptr. at 77.

77. *Id.* at 719, 394 P.2d at 816, 40 Cal. Rptr. at 72. *See also* Giannella, *supra* note 63, at 1394-95.

78. 61 Cal. 2d at 723, 394 P.2d at 819, 40 Cal. Rptr. at 75.

79. *Id.* at 722, 394 P.2d at 818, 40 Cal. Rptr. at 74.

80. *Id.* at 723, 394 P.2d at 819, 40 Cal. Rptr. at 75.

ties is necessary and desirable,[81] it has not relaxed the requirement that the least offensive means be employed.[82] Furthermore, state officials must have "definite, objective guidelines"[83] within which to exercise their discretion.[84] Especially to be protected, in the court's view, are First Amendment freedoms, including constitutionally protected forms of solicitation, for which "the touchstone of regulation must be precision—narrowly drawn standards closely related to permissible state interests."[85]

Once the state proves that it has a compelling state interest and that it has chosen the least offensive means to accomplish its objective, the state may constitutionally regulate the practices of religious groups. Indeed, the public interest in safety will often require such regulation.

Proponents of the revised section 9230 recognize the state's interest in protecting the public against fraud and breach of trust by the directors of religious corporations. They do not, however, believe that the *means* provided by the original version of the section were properly tailored so as to infringe First Amendment rights as little as possible.[86] They contend that the attorney general's power was too broad and too discretionary, and that prosecution only under the criminal laws provides the necessary safeguard of the public interest as well as an adequate means with which to accomplish the state's objective.[87]

Although the original version of section 9230 may have given the attorney general excessive discretion in determining the existence of "reasonable cause" that a violation had been committed,[88] reliance on the Penal Code reduces the state's power to protect the public welfare from fraud in religious corporations. Is reliance solely on the criminal law as a method for dealing with the problem of internal fraud a viable "alternative means"? Conviction for criminal fraud requires proof beyond a reasonable doubt that the defendant had a fraudulent intent at the time the act was committed.[89] The attorney general has stated that to prove criminal intent, there must generally be evidence that the defendant concealed his act.[90] Since the defendant directors often have

81. People v. Fogelson, 21 Cal. 3d 158, 577 P.2d 677, 145 Cal. Rptr. 542 (1978).

82. *Id.*

83. *Id.* at 166, 577 P.2d at 682, 145 Cal. Rptr. at 547.

84. The California Supreme Court has held that statutes which accord officials excessive discretion are unconstitutional on their face. *Id.* at 167, 577 P.2d at 682, 145 Cal. Rptr. at 547.

85. *Id.* at 166, 577 P.2d at 681, 145 Cal. Rptr. at 546.

86. *See* note 8 *supra*.

87. *Id.*

88. *See* note 28 and accompanying text *supra*.

89. *See* note 49 and accompanying text *supra*.

90. *Cal. Dep't of Justice: Interim Hearings on S.B. 1493 (Petris): Impact of S.B. 1493 on Attorney General's Enforcement Jurisdiction Over Religous Corporations Before the Assembly Judiciary Comm.* 3 (Nov. 12, 1980) (memorandum from state attorney general).

complete control over corporate assets and books, there is no need for their concealment of action[91]—particularly because the books are not subject to public inspection and because the directors and officers have the power to prevent even members from inspecting the annual reports and corporate records if they include such restrictions in the church bylaws.[92]

Only those defendants actually found guilty of a specific intent crime are subject to the additional sanction of restitution. The objective of a civil fraud action, however, is restitution of misappropriated funds to the corporation, assuming a valid religious corporation exists. Under the new law, even though the primary sanction is criminal punishment for fraud, the courts are also encouraged as part of sentencing "to exercise their authority to impose restitution as a means of compensating the victims."[93] This remedy will be less effective than the prior law because only a fraction of those who would be required to return misappropriated funds under civil sanctions will be required to pay under the criminal provision.[94]

Although the statute authorizes criminal prosecution by the attorney general against religious corporations and their directors who are engaged in fraudulent activities, there are no statutory provisions for other individuals to institute civil actions for restitution. Under the new Nonprofit Corporations Law, only "members," officers, and directors have standing to sue for misuse of church assets.[95] "Members" are those persons who under the corporate articles or bylaws have the right to elect directors and to vote disposition of church assets upon dissolution.[96] A religious corporation has no members unless the articles of incorporation specifically provide for them.[97] A membership is not required.[98] In the absence of members, any action that might otherwise require their approval requires approval only by the directors of the corporation. Most of the congregations of religious organizations are not "members" for purposes of the California Corporations Code.[99]

Even if the rank and file members had standing to sue, their ability to bring civil actions is severely limited by the Corporations Code, which requires the posting of an expensive security bond in derivative

91. *See* note 51 and accompanying text *supra*.

92. CAL. CORP. CODE § 9511 (West Supp. 1982).

93. CAL. CORP. CODE § 9690 (West Supp. 1982).

94. Restitution as a sanction may be imposed only during sentencing of the defendant following conviction. CAL. CORP. CODE § 9690 (West Supp. 1982).

95. CAL. CORP. CODE § 9243(c) (West Supp. 1982).

96. CAL. CORP. CODE § 5056 (West Supp. 1982).

97. CAL. CORP. CODE § 9310 (West Supp. 1982).

98. *Id.*

99. THOMPSON MEMO, *supra* note 52, at 4.

suits.[100] The individual's actual interest would likely be too small to justify the cost of such an action. As a result of the revision of section 9230, civil fraud enforcement powers are effectively left in the hands of the very persons who control, and who might most easily misuse, church assets.

B. Section 9230 and the Establishment Clause

Proponents of the new version of section 9230 argue that the original version of the section violated the establishment clause by allowing "excessive government entanglement" with religion.[101] The establishment clause is intended to afford protection against state sponsorship of, financial support of, and active involvement in religious activity.[102] To withstand scrutiny under the establishment clause, the law in question must (1) reflect a clearly secular legislative purpose, (2) have a primary effect that neither advances nor inhibits religion, and (3) avoid excessive government entanglement with religion.[103]

The first element of the tripartite test, that the law have a clearly secular legislative purpose, has been little discussed; in only one Supreme Court case has a law been found unconstitutional because the legislature did not have a secular legislative purpose.[104] In *Epperson v. Arkansas*,[105] the Supreme Court held unconstitutional a statute that prohibited the teaching of Darwin's theory of evolution in public schools.[106] The Court found that the purpose of the state in enacting such a law was to suppress the teaching of a theory that denied the divine creation of man. The Court stated, "It is clear that fundamen-

100. CAL. CORP. CODE § 5710 (West Supp. 1982) requires the posting by the plaintiff in a shareholder derivative suit of a security bond of up to $50,000 upon motion by the defendant corporation, officer, or director to cover reasonable expenses that may be incurred by the defendant if successful.

101. *See* Lemon v. Kurtzman, 403 U.S. 602, 613 (1971). For a discussion of the entanglement problems, see notes 120-28 and accompanying text *infra*.

102. Lemon v. Kurtzmen, 403 U.S. at 612. In Everson v. Board of Education, 330 U.S. 1 (1947), the Supreme Court stated, "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state.'" *Id.* at 15-16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878).

103. Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 772-73 (1973). *See generally* Note, *Establishment Clause Analysis of Legislative and Administrative Aid to Religion*, 74 COLUM. L. REV. 1175 (1974).

104. Epperson v. Arkansas, 393 U.S. 97 (1968).

105. *Id.*

106. *Id.* at 103.

talist sectarian conviction was and is the law's reason for existence."[107] Objections to government aid of religion have arisen primarily under the second and third prong of the establishment clause test.

The second element of the establishment clause test, that the law have a primary effect that neither advances nor inhibits religion, means, in effect, that a regulation specifically enacted for religious considerations is unconstitutional, while one that has some impact on religion only incidental to its main purpose is valid.[108] The establishment clause does not prohibit governmental regulation of conduct "whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions. . . . Congress or state legislatures [may] conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulation."[109] In *McGowan v. Maryland*,[110] the Supreme Court thus upheld a Sunday closing law because the state had a legitimate secular purpose in providing its citizens a uniform day of rest and because any benefit to religions whose Sabbath fell on Sunday was purely incidental.[111] The Supreme Court has also held constitutional the state provision of textbooks to all schoolchildren, including children attending parochial schools, even though parochial schools thereby receive an incidental benefit.[112] The Court reasoned that such action is comparable to public provision of police and fire protection, sewage facilities, and sidewalks.[113]

A helpful analogy by which to explore the implications of the new version of Corporations Code section 9230 is provided by those statutes that establish tax exemptions for religious institutions. *Walz v. Tax Commission*[114] upheld the constitutionality of one such statute[115] because there was a neutral secular justification for the exemption. Justice Harlan, concurring in *Walz*, noted that the tax exemption in question applied not only to religious institutions but to a class of entities "whose common denominator is their nonprofit pursuit of activities

107. *Id.* at 107-08.

108. Meek v. Pittenger, 421 U.S. 349, 359 (1975). *See also* Roemer v. Board of Pub. Works, 426 U.S. 736, 747 (1976) (plurality opinion).

109. McGowan v. Maryland, 366 U.S. 420, 442 (1961).

110. 366 U.S. 420 (1961).

111. *Id.* at 442-44.

112. Board of Educ. v. Allen, 392 U.S. 236, 238 (1968).

113. *Id.* at 242.

114. 397 U.S. 664 (1970).

115. The statute in question read, " 'Real property owned by a corporation or association organized exclusively for the moral or mental improvement of men and women, or for religious, bible, tract, charitable, benevolent, missionary, hospital, infirmary, educational, public playground, scientific, literary, bar association, medical society, library, patriotic, historical or cemetary purposes . . . and used exclusively for carrying out thereupon one or more of such purposes . . . shall be exempt from taxation.' " N.Y. CONST. art. XVI, § 1 (implemented in N.Y. REAL PROP. TAX LAW § 420(1) (McKinney 1971)), *quoted in* Walz v. Tax Comm'n, 397 U.S. 664, 667 n.1 (1970).

devoted to cultural and moral improvement and the doing of 'good works' " in the community.[116] He stated that "[t]o the extent that religious institutions sponsor the secular activities that this legislation is designed to promote, it is consistent with neutrality to grant them an exemption just as other organizations devoting resources to these projects receive exemptions."[117]

The Court in *Walz* stressed the fact that statutory exemption for religious institutions was part of a neutral regulation that applied to a wide scope of public benefit activities. Any benefit to religious organizations was purely incidental to the overall purpose of promoting socially beneficial activities.[118] A statute that "confers an 'indirect,' 'remote,' or 'incidental' benefit upon religious institutions is [not], for that reason alone, constitutionally invalid."[119]

It was in *Walz* that the Supreme Court first discussed the third requirement for legislation consistent with the establishment clause.[120] It is not enough that a law have a secular legislative purpose and a primary effect that neither advances nor inhibits religion; the law also must not foster excessive governmental entanglement with religion.[121] This requirement is similar in effect to the alternative means test as

116. Walz v. Tax Comm'n, 397 U.S. at 697 (Harlan, J., concurring). Justice Harlan noted further that "[t]he statute by its terms grants this exemption in furtherance of moral and intellectual diversity and would appear not to omit any organization that could be reasonably thought to contribute to that goal." *Id.*

117. *Id.*

118. Other examples of incidental benefits to religion found constitutional by the Court include (1) public transportation of all schoolchildren to both public and private schools, Everson v. Board of Educ., 330 U.S. 1, 18 (1947) (the Court in *Walz* noted that the transportation of children to sectarian schools was constitutional as it was merely part of a plan to aid all schoolchildren and their parents and any benefit to religious schools was purely incidental, 397 U.S. at 670), and (2) the loaning of textbooks to all students in both public and parochial schools, Meek v. Pittenger, 421 U.S. 349, 362 (1975); Board of Educ. v. Allen, 392 U.S. 236, 248 (1968) (the Court in *Walz* suggested that the furnishing of books to all schoolchildren be compared with the furnishing of police and fire protection, 397 U.S. at 671-72). The California Supreme Court, in California Educ. Facilities v. Priest, 12 Cal. 3d 593, 526 P.2d 513, 116 Cal. Rptr. 361 (1974), found constitutional an act providing a system of bonds for all educational institutions because the bonds were available to all nonpublic institutions of higher learning as part of a secular state program to provide expanded opportunities for college education.

119. Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 771 (1973). *See also* McGowan v. Maryland, 366 U.S. 420 (1961) (Sunday closing laws), in which the Court stated, " [T]he 'Establishment' clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions. In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulation." *Id.* at 442.

120. While the principle was first enunciated in *Walz*, 397 U.S. at 674, the excessive entanglement element was first used as an independent ground for unconstitutionality in Lemon v. Kurtzman, 403 U.S. 602, 613-15, 625 (1971).

121. Lemon v. Kurtzman, 403 U.S. at 612-14.

applied under the free exercise clause.[122] An otherwise valid statute promoting a secular legislative purpose will be declared invalid if it causes excessive involvement by the government in religious activity.

Lemon v. Kurtzman,[123] the first case to apply excessive entanglement as an independent requirement, involved a challenge to the provision of state aid to, or for the benefit of, nonpublic schools.[124] The statutes were found unconstitutional because they provided direct aid to church schools and gave the state postaudit power to evaluate the school's financial records in order to determine which expenditures were secular.[125] The need for the state to inspect and evaluate religious school records was described by the Court to be "pregnant with dangers of excessive government direction of church schools and hence of churches."[126] The Court recognized that some relationship between government and religious organizations is inevitable and that total separation is impossible. For example, fire inspections, building and zoning regulations, and state requirements under compulsory school attendance laws are all examples of "necessary and permissible contacts."[127] The Court noted that "[j]udicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[128]

Critics of the original version of section 9230 argue that the statutory framework of the prior law permitted excessive interference by the attorney general in the internal functioning and religious practice of religious corporations.[129] Supervision by the attorney general of all corporations—including religious corporations—which may take the form of police protection or building regulations, is a kind of public

122. For a discussion of the alternative means test, see text accompanying notes 68-71 *supra*.

123. 403 U.S. 602 (1971).

124. The Court in *Lemon* noted that 95% of the children attending nonpublic elementary schools in Rhode Island attended schools affiliated with the Roman Catholic Church. *Id.* at 608.

125. *Id.* at 619-20.

126. *Id.* at 620. *See also* New York v. Cathedral Academy, 434 U.S. 125, 133 (1977) (state audit of classroom materials could result in excessive state involvement in religious affairs).

127. *Lemon*, 403 U.S. at 614.

128. *Id.*

129. The primary complaint has been the broad power of the attorney general to appoint and supervise a receiver to manage corporate assets and records while the investigation is in progress. *See, e.g.*, Worldwide Church of God, Inc. v. California, 623 F.2d 613 (9th Cir. 1980). *See also* Note, *Government Protection of Church Assets from Fiscal Abuse: the Constitutionality of Attorney General Enforcement Under the Religion Clauses of the First Amendment*, 53 S. CAL. L. REV. 1277 (1980).

welfare legislation.[130] It is intended to keep the public free from harm.[131] Nevertheless, attorney general supervision is distinguishable in that perpetration of civil fraud does not directly endanger the health or safety of the public. Such supervision is not necessary to prevent outbreaks of violence or disorder or to protect the physical well-being of the community. Considering the large amounts of money solicited each year from the general public by religious corporations, however, the public interest is of significant proportions.[132]

Under the original section 9230, state interference with normal operations and religious observances of the corporation was limited by the vague standard of necessity.[133] Critics argued that "comprehensive, discriminating, and continuing state surveillance"[134] would be needed to insure that religious organizations do not perpetrate civil fraud. They also claimed that the remedial power of the attorney general to appoint "a receiver to manage and control the operation of a church reeked of excessive entanglement."[135]

Some state interference is inevitable in the enforcement of a regulation such as section 9230. The *scope* of the attorney general's interference, however, must be as narrow as possible to minimize government entanglement with the internal operations of a religious corporation. Determining the point at which entanglement becomes excessive is not easy.[136] With respect to section 9230, the California Legislature concluded that the scope of the original section was not

130. In Worldwide Church of God, Inc. v. California, 623 F.2d 613 (9th Cir. 1980), the court stated, "Investigation and regulation of fraud in charitable trusts . . . is [a state] interest of the magnitude of controlling welfare fraud . . . or regulating child custody." *Id.* at 616. *See generally* Rakay & Sugarman, *supra* note 47, at 884.

131. The existence of significant fraud in religious corporations is widely recognized. *See* Rakay & Sugarman, *supra* note 47, at 886.

132. Religious charities solicited nearly $13 billion in 1976, half of which was allocated for secular purposes. *Id.*

133. *See* note 23 *supra*.

134. Lemon v. Kurtzman, 403 U.S. 602, 619 (1971). In Wolman v. Walter, 433 U.S. 229 (1976), the Supreme Court found state funding of field trips for children in nonpublic schools unconstitutional because to insure the secular use of funds, close state supervision of the nonpublic teachers would be required. This would result in excessive entanglement. *Id.* at 254.

135. *See* Statement of L. Pfeffer, *supra* note 8, at 9. On three occasions, the United States Supreme Court has declined to review state court decisions sustaining the receivership or discovery orders relating to state litigation involving religious corporations: Worldwide Church of God, Inc. v. Superior Court, *cert. denied*, 449 U.S. 900 (1980); Rader v. Superior Court, *cert. denied*, 444 U.S. 916 (1979); Worldwide Church of God, Inc. v. Superior Court, *cert. denied*, 444 U.S. 883 (1979). The case against Worldwide Church of God, Inc. was dropped by the attorney general following passage of the new version of § 9230. *See* note 50 *supra*.

136. There is no clear method to determine what constitutes excessive entanglement of church and state. Roemer v. Board of Pub. Works, 426 U.S. 736, 766 (1976) (plurality opinion). Justice White, in his concurring opinion in *Roemer*, called the excessive entanglement

sufficiently circumscribed to insure minimum government entanglement with religious corporations. The new version attempts to solve the excessive entanglement problem by drastically curtailing the attorney general's power to investigate and prosecute religious corporations under the civil laws of California. The establishment clause does not prohibit *all* government entanglement with religion, however, only excessive entanglement. The entanglement problem is essentially procedural, while the primary effect question is substantive.[137] Entanglement concerns the degree of governmental involvement with religion that satisfies the primary effect and secular purposes tests.

Although the original version of section 9230 was criticized for fostering excessive entanglement, the present version presents problems under the application of the primary effect and the secular legislative purpose tests.[138] The main theme stressed by the Supreme Court in upholding state legislation from claims of violations of the establishment clause has been the broad spectrum of activities receiving the benefit—that religious organizations were receiving only an incidental benefit as part of *general* social welfare legislation.[139] Section 9230, in contrast, is a governmental regulation that has an impact only on religious corporations.[140] So-called religious, nonprofit corporations thus have been singled out by the legislature to receive favorable treatment.[141]

Classification of a corporation as primarily religious removes it from the ambit of civil scrutiny because section 9230 creates an exemption for religious corporations from examination by the attorney general. Furthermore, the legislature has put forward no general secular legislative purpose for enacting the new law restricting the attorney general's powers. There is no overriding secular goal such as the improvement of the education system found in aid-to-religion cases such as *Board of Education v. Allen*[142] or in the enforcement of narcotics laws as in *People v. Woody*.[143] The only asserted justification for the

criterion both "insolubly paradoxical," *id.* at 768, and a " 'blurred, indistinct, and variable barrier,' " *id.* at 769 (quoting Lemon v. Kurtzman, 403 U.S. 602, 614 (1971)).

137. *Roemer*, 426 U.S. at 755.

138. For a discussion of these tests, see notes 104-28 and accompanying text *supra*.

139. Even when the Court upheld Sunday closing laws in McGowan v. Maryland, 366 U.S. 420 (1961), it stressed that there was a general secular purpose behind the law—to grant everyone a day of rest. Although Sunday was originally the day of rest for Christian religions, it had become accepted by society in general as the day of rest irrespective of religious beliefs. The benefit to Christians of keeping one uniform day of rest on Sunday was purely incidental to the benefit to society of having a universally accepted day off. *Id.* at 442-44.

140. All other nonprofit corporations are still subject to unlimited examination by the attorney general. *See* note 26 and accompanying text *supra*.

141. *See* notes 21-27 and accompanying text *supra*.

142. 392 U.S. 236 (1968).

143. *See* notes 75-80 and accompanying text *supra*.

legislation is the fear that supervision by the attorney general will become a means for the persecution of religious cults rather than for its proper purpose of investigating and prosecuting religious corporations on good cause for civil fraud.[144] Abusive prosecution, if indeed actually occurring, may be controlled in a manner more consistent with First Amendment considerations.[145]

One of the primary effects of the new Religious Corporations Law, given the low threshold requirements for qualifying as a religious corporation,[146] will be to encourage corporations to file as religious corporations because of the special treatment accorded them. It is naive to believe that religious corporations, solely because of their classification as "religious," are free of the vices that plague all other aspects of organized society, vices that the attorney general was empowered to remedy under common and statutory law.[147] Moreover, the reluctance (or refusal) of the courts to define what constitutes a "religion"[148] makes the choice of chartering a corporation as one with a religious purpose particularly appealing.

Exemption from supervision by the attorney general favors corporations choosing to incorporate under the new Religious Corporations Law. This favoritism is contrary to the establishment clause of the First Amendment which " 'requires the state to be a *neutral* in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.' "[149]

III. An Alternative

In order to reconcile the conflicting demands of the establishment and free exercise clauses, a new compromise should be sought between

144. *See* Statement of L. Pfeffer, *supra* note 8, at 14.

145. There is no evidence that any abuse of the attorney general's power took place in the short time that the prior version of § 9230 was in effect. The only actions taken in that time were under § 9505; in those suits a California superior court upheld all actions taken by the attorney general. The appeal to the United States Supreme Court on the ground of unconstitutionality of the statute was thrice denied certiorari. *See* note 135 *supra*.

146. *See* CAL. CORP. CODE § 9130 (West Supp. 1982). The articles of incorporation must state merely that the corporation is organized "primarily or exclusively for religious purposes." *Id.*

147. Churches today are big business. In 1977, 43 denominations reported contributions exceeding $6.2 billion. *See* U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 55 (99th ed. 1978). *See also* Rakay & Sugarman, *supra* note 47; Note, *supra* note 15.

148. *See, e.g.*, United States v. Ballard, 322 U.S. 78 (1944); notes 39-47 and accompanying text *supra*. *See also* Hitchcock, *The Supreme Court and Religion: Historical Overview and Future Prognosis*, 24 ST. LOUIS U.L.J. 183, 202 (1980).

149. School Dist. v. Schempp, 374 U.S. 203, 218 (1963) (quoting Everson v. Board of Educ., 330 U.S. 1, 18 (1947)) (emphasis added).

the two versions of section 9230 put forward by the California Legislature. This new compromise, in order to satisfy both clauses, must: (1) find the appropriate means to carry out a valid and compelling state interest in protecting the public from fraud while invading First Amendment freedoms as little as possible, (2) find the appropriate means so as not to entangle government excessively in the activities or operations of the religious corporation, and (3) remain neutral in the treatment of religious corporations so as not to favor religious over secular corporations.[150]

Because the new compromise must resolve the extent to which religious corporations must be exempt from the traditional charitable trust supervisory powers of the attorney general, it is logical to begin with a regulatory scheme that creates no exemptions for religious corporations. We then determine how many or how few may be granted to them without violating the neutrality and secular purposes test of the establishment clause, and how many must be granted to avoid violating the free exercise clause. It is necessary to start with no exemptions, because the purpose of balancing the interests requires a determination of their relative importance.

The common law allowed the attorney general the same power to investigate and to supervise religious organizations as he was allowed with regard to all nonprofit corporations under his general power of charitable trust supervision.[151] This law was codified in repealed section 9505,[152] the precursor to both versions of section 9230. The original section 9230 was the state's attempt to narrow this power with regard to religious corporations, in recognition of the unique constitutional considerations involved in the regulation of churches and religious organizations as opposed to other nonprofit corporations. Although the powers granted in that version were substantially less stringent for religious corporations than for general nonprofit corpora-

150. While some commentators have urged the application of a strict neutrality approach to the religion clauses, *see, e.g.*, P. KURLAND, RELIGION AND THE LAW 112 (1962), the Supreme Court has held that, at least under certain conditions, the state must make special provisions to relieve religious liberties from restrictions imposed by generally legitimate governmental regulations. Sherbert v. Verner, 374 U.S. 398 (1963). Thus, for example, the Court in *Sherbert* compelled South Carolina to provide unemployment benefits to claimants who would not accept available work because of their unwillingness to work on their sabbath. *Id.* at 410.

Adherence to the principle of strict neutrality carries with it the potential for serious infringement of free exercise rights. For example, application of the strict neutrality approach would have required the Court to invalidate all Sunday closing laws, which it did not do in McGowan v. Maryland, 366 U.S. 420 (1961), or in Braunfeld v. Brown, 366 U.S. 599 (1961). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 852 (1978).

151. *See* note 7 and accompanying text *supra*.

152. CAL. CORP. CODE § 9505 (West 1977) (repealed 1980). For the full text of the section, see note 14 *supra*.

tions,[153] opponents forcefully argued that the law gave overly broad discretion and power to the attorney general to investigate the financial practices of religious corporations.[154] In the revised section, the legislature effectively removed the attorney general's civil fraud enforcement powers, thereby removing the most important legal impediment to fraudulent activities on the part of religious corporations or their officers or directors. While the present section cannot provoke complaints of violation of the free exercise clause, it does favor religious over secular corporations, in violation of the establishment clause.

This note proposes a solution that would allow the attorney general to retain the power to investigate and prosecute religious corporations for civil fraud. The compromise would impose strict limitations on the attorney general's power to initiate investigations into the financial affairs of religious corporations, but would not substantially change his power under the original version to act once a violation has been found. Under this proposal, the attorney general would no longer be free to decide independently what constituted reasonable grounds to believe that violations of the Religious Corporations Law had occurred. The investigation could begin only after a church member (not limited by the definition of "member" provided by the California Corporations Code)[155] filed a complaint with the attorney general. Before proceeding with an investigation, the attorney general would be required to bring the complaint and any other evidence available before a superior court judge. The judge would then decide whether or not there existed reasonable cause to believe a violation of the laws had occurred. In addition to this restriction on the attorney general's power to initiate an investigation, the attorney general would be required to report to the superior court at regular intervals. If at any time the court determined that reasonable cause no longer existed, it could order the investigation terminated.[156] "By barring the state from beginning on

153. *See* Abbott & Kornblum, *supra* note 2, at 790.

154. *See, e.g.*, Note, *supra* note 15.

155. For a definition of "members" as provided by the California Corporations Code, see notes 95-99 and accompanying text *supra*.

156. The author of this note has drafted a model statute to replace § 9230:

(a) Upon determination by a judge of the superior court that the Attorney General has reasonable grounds to believe that the following condition or conditions have occurred or do exist, the Attorney General may, by order of the court, examine a corporation to determine whether:

(1) The corporation fails to qualify as a religious corporation under this part; or

(2) There is or has been any fraudulent activity in connection with the corporation's property; or

(3) Any corporate property is or has been improperly diverted for the personal benefit of any person; or

(4) Property solicited and received from the general public based upon a representation that it would be used for a limited or specific purpose other than the general support of

its own initiative an investigation into a cult or religion, and by requiring the involvement of an impartial magistrate to rule on the grounds for investigation, freedom of religion can be ensured without depriving citizens of protection against fraud."[157]

Similar judicial supervision should be placed on the attorney general's power to appoint a receiver to manage the corporation's assets. The power of the receiver to subpoena church records and to control the disposition of church assets should be limited to the particular violation(s) found. Normal operations of the corporation must be allowed to continue. If directors or officers are found to be perpetrating civil fraud on the church and the public, the individuals should be removed from their positions and replaced as soon as possible to allow the corporation to resume normal operations. The power of the receiver should last no longer than the time it takes the directors or the church members to replace those responsible for the violations. At that point, the attorney general would be free to continue an action for restitution against the violators without further interruption of normal church operations.

By restricting the discretion of the attorney general to interefere with the religious operations of religious corporations, the state could

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the corporation's religious activities, has been improperly used in a manner inconsistent with the stated purpose for which the property was solicited; or

(5) There has been a substantial diversion of corporate assets from stated corporate purposes.

(b) The Attorney General shall report to the superior court at regular intervals as set by the court, and the court shall, on the basis of such reports, determine whether reasonable cause under this Section still exists. If the court determines that reasonable cause no longer exists, the Attorney General shall cease its examination of the corporation.

(c) Such examination shall respect privileges enumerated in Division 8 (commencing with Section 900) of the Evidence Code and shall protect the confidential nature of membership lists by using such lists only in connection with the examination and any subsequent court proceedings resulting from such examination. In addition, such examination shall not unnecessarily interfere with normal operations and religious observances of the corporation.

(d) Any person qualified to bring an action under Section 9141 or 9142 may petition the court upon belief that a violation of subdivision (c) has occurred. Upon determination of the court that the Attorney General has violated subdivison (c), the court may order the Attorney General to cease such violation, or it may order that the examination authorized under subdivison (a) cease.

(e) Upon a determination by the superior court that reasonable cause exists, the Attorney General may institute an action in the name of the state:

(1) To establish that the corporation fails to qualify as a religious corporation under this part, and if a court so finds, it shall enter an order that the corporation no longer operate as a religious corporation under this part.

(2) To correct any wrongful activity which has taken place in connection with or as a result of any condition or conditions set forth in paragraph (2), (3), (4) or (5) of subdivison (a).

157. *When Religion Goes Awry*, Richmond, Cal. Independent & Gazette, June 15, 1980, at 10, col. 1.

demonstrate that it had chosen the least offensive means.[158] The touchstone of the regulation would be precision, with narrowly drawn standards closely related to a permissible state interest—the protection of the public from fraud.[159] This would preclude the free exercise complaints against the original version of section 9230.[160]

By allowing the attorney general to retain his investigatory powers, the primary effect of the legislation would no longer be to benefit religious corporations. Corporations would no longer be encouraged to file as religious because of the special treatment accorded religious corporations. The purpose of the regulation would be secular: the protection of the public from fraud. Governmental entanglement would be kept to a minimum because of court supervision of the attorney general and the restricted use of receiverships. Therefore, there would no longer be a violation of the establishment clause.

Conclusion

In all other segments of corporate activity, commercial and charitable, the public is afforded protection from the fraudulent practices of corporations and their officers and directors. In the area of nonprofit activity, the attorney general has been the sole champion of the public trust. The California Legislature, by enacting the current revision of section 9230, has left the public trust without effective protection from the fraudulent practices of officers and directors of religious corporations. Now, with the billions of dollars of donations made annually to religious corporations, the only safeguard of the public interest in the money donated is the good faith of the recipient church. Public accountability for those funds should not rest in the discretion of the very people likely to be violating the public trust. The attorney general must have effective power to protect and to enforce the public interest in funds solicited for religious purposes. The California Legislature must make one more effort to accommodate the conflicting claims in this area by reinstating the attorney general's civil fraud enforcement powers, this time with greater restrictions on the discretion of the attorney general to act, thereby protecting the strong interest in religious liberty.

158. For a discussion of the meaning of "least offensive means," see notes 68-71 and accompanying text *supra*.

159. People v. Fogelson, 21 Cal. 3d 158, 577 P.2d 677, 145 Cal. Rptr. 542 (1978). *See also* notes 83-85 and accompanying text *supra*.

160. For a discussion of the free exercise complaints, see notes 86-100 and accompanying text *supra*.