LOCAL GOVERNMENT LAW

Number 75 November 1996 **David M. Lawrence, Editor**

APPROPRIATIONS TO CHURCH-AFFILIATED ORGANIZATIONS

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Several churches operate a combination soup kitchen and homeless shelter in the city of Greensboro. They approach the city council and ask for public money so that the program can be expanded to feed and house a larger share of the city's destitute. The council members feel that the churches are doing the community a service and would like to grant their request. Their only concern: Would the contribution violate the separation of church and state mandated by the Constitution?

The United States Constitution states that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[1] This declaration, among the most well-known parts of the Constitution, represented a guarantee of religious freedom to early Americans, many of whom had come to the New World primarily to escape religious persecution. While we casually refer to it as the separation of church and state, that language appears nowhere in the Constitution's text. The First Amendment has never been interpreted to be the "wall of separation" envisioned by many of the founding fathers.[2] It has never been thought either possible or desirable to enforce a regime of total separation and, as a consequence, cases arising under the Establishment Clause have presented some of the most perplexing questions that the courts have had to address.[3] This bulletin will attempt to answer the question: Under what circumstances, if any, may local governments make contributions to churches or religiously affiliated organizations? My conclusion is that while local governments are not absolutely precluded from making these contributions, they may do so only if they meet the requirements of the *Lemon* test.

1. U.S. CONST. amend. I.

2. McCollum v. Board of Educ., 333 U.S. 203, 238 (1948) (Jackson, J., concurring) (quoting Thomas Jefferson).

3. Committee for Public Education v. Nyquist, 413 U.S. 756, 760 (1973).

The *Lemon v. Kurtzman* Test

The Supreme Court has stated that the primary concerns of the Establishment Clause of the First Amendment are sponsorship, financial support, and active involvement of the sovereign in religious activity.[4] In *Lemon v. Kurtzman*,[5] the Supreme Court codified those concerns with a three-part test for determining whether a governmental practice violates the Establishment Clause. To withstand a challenge, the test requires that the law or activity in question (1) reflect a clearly secular purpose, (2) have the primary effect of neither advancing nor inhibiting religion, and (3) avoid excessive government entanglement with religion.[6]

The Law or Activity Must Reflect a Clearly Secular Purpose

The first prong of the *Lemon* test is the least treacherous. While analyzing cases under this prong, the Court has stated that it "will defer to a municipality's sincere articulation of a secular purpose."[7] This deference flows from the well-settled maxim that courts are "reluctant to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute."[8] The Court has invalidated legislation or government action on the ground that a secular purpose was lacking, but only when it has concluded that there was no question that the statute was motivated wholly by religious considerations.[9] The controlling case law *does* suggest that certain acts are so intrinsically religious that they have little chance of surviving under *Lemon*. For example, in *Stone v. Graham*[10] the Court held that the preeminent purpose of posting the Ten Commandments on schoolroom walls was plainly religious in nature, despite the state legislature's explicit statements to the contrary. Similarly in *Hall v. Bradshaw*[11] the Fourth Circuit held that prayer is "undeniably religious."

Additionally, the Court has noted that in applying the "purpose test" it is appropriate to ask "whether the government's actual purpose is to endorse or disapprove of religion."[12] This prohibition against government endorsement of religion "precludes government from conveying or attempting to convey a message that a religion or a particular religious belief is favored or preferred."[13]

The Law Must Have the Primary Effect of Neither Advancing nor Inhibiting Religion

The second prong of the *Lemon* test is more complex than the "purpose test"; it asks in part "whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or approval."[14] This is similar to the endorsement aspect of the "purpose test," except that when analyzing a law or activity under the "primary effect" prong, the government's intent is irrelevant; the focus is on how the act is perceived.[15] An example of a court finding religious favoritism occurred in *Voswinkel v. Charlotte*;[16] there the city of Charlotte and a local Baptist congregation entered into an agreement under which the church agreed to furnish the city with the services of a minister to serve as the full-time police chaplain. The city and the church each agreed to contribute ten thousand dollars to pay the chaplain's salary. The court held that the arrangement put the church in the unique position of placing the nominee in a position with unavoidable religious associations, creating the appearance of favoritism toward that congregation and the Baptist faith.[17]

4. Tilton v. Richardson, 403 U.S. 672 (1971).

5. 403 U.S. 602 (1971).

6. *Id.*

7. Edwards v. Aguillard, 482 U.S. 578, 586 (1987).

8. Mueller v. Allen, 463 U.S. 388, 394–95 (1983).

9. Lynch v. Donnelly, 465 U.S. 668, 680 (1984) citing as an example Abington School District v. Schempp, 374 U.S. 203 (1963) (striking down practices of two states requiring daily Bible readings in public schools).

10. 449 U.S. 39 (1980).

11. 630 F.2d 1018 (4th Cir. 1980).

12. Wallace v. Jaffree, 472 U.S. 38, 56 (1985).

13. *Id.* at 70. (O'Conner, J., concurring in judgment).

14. *Lynch*, 465 U.S. at 690.

15. North Carolina Civil Liberties Union Legal Foundation v. Constangy, 947 F.2d 1147, 1152 (4th Cir. 1991). *See also* Grand Rapids v. Ball, 473 U.S. 373, 390 (1985) (stating that when evaluating the effect of government conduct, courts "must ascertain whether the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval of their individual religious choices").

16. 495 F. Supp. 588 (W.D.N.C. 1980).

17. The court distinguished a police chaplaincy position from military, prison, or legislative chaplaincies, all of which have been upheld by courts. With respect to military and prison chaplains, the court noted that because of the extraordinary restraint to which both soldiers and prisoners are subjected, the provision of chaplains can be considered

The second prong of the *Lemon* test also looks to see if the governmental action has the "primary effect" of advancing or inhibiting religion. It is clear from the decisions that apply this test that the word *primary* is not a synonym for greater or predominant; instead, it is used in the sense of direct or nonsecondary, as distinguished from remote or incidental.[18] For example, in *Church of Jesus Christ of Latter-Day Saints v. Amos*,[19] an employee brought an action under Title VII of the Civil Rights Act of 1964, which prohibits religious discrimination in employment, against a Mormon Church-run company after he was fired for failing to present certification that he was a member of the Church. Section 702 of Title VII exempts religious organizations from this prohibition; the plaintiff alleged that if the section allowed religious employers to discriminate on religious grounds in nonreligious jobs, then it was unconstitutional. When analyzing the facts under this prong of *Lemon*, the Court found no evidence that the Church's ability to propagate its religious doctrine was any greater as a result of the Civil Rights Act, hence it could not be said that governmental action had a primary effect of advancing religion. The Supreme Court further noted that "a law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose."[20] Instead of focusing on whether a governmental activity allows religious organizations to advance religion, the Court has observed that to have the effects forbidden under *Lemon*, "it must be fair to say that the government itself has advanced religion through its own activities and influence."[21]

In applying the second prong of *Lemon*, the Court has also steadfastly held that religious institutions' receipt of public benefits that are neutrally available to all does not have the impermissible effect of advancing religion. The Court has consistently rejected the view that the Establishment Clause prohibits any program that in some manner aids an institution with a religious affiliation.[22] As early as 1899 in *Bradfield v. Roberts*[23] the Supreme Court allowed the District of Columbia to provide moneys to a religiously affiliated hospital. The Court has allowed the state to supply transportation for children to and from church-related as well as public schools.[24] It has done the same with respect to secular textbooks loaned by the state on equal terms to students attending both public and church-related elementary schools.[25] The Court has also allowed state moneys to go to religiously affiliated colleges when it was part of a general program available to all private schools in the state without regard to religion.[26] Far from advancing religion, a view so narrow as to deny religious institutions access to these neutrally available public benefits would have the impermissible effect of inhibiting religion.

One situation where aid normally *has* been thought to have the primary effect of advancing religion occurs when it flows to an institution in which "religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission."[27] A clear example of a pervasively sectarian institution is a parochial school because of its "substantial purpose in the inculcation of religious values."[28] The Court has required that (1) no state aid at all go to institutions that are so "pervasively sectarian" that secular activities cannot be separated from sectarian ones, and (2) that if secular activities can be separated out, they alone may be funded.[29]

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as a reasonable government measure to fulfill the constitutional obligation not to interfere with the free exercise of religion. As for legislative chaplaincies, the court found that the legislative chaplaincy has through centuries of custom become like the motto "In God We Trust" on our coins, purely ceremonial in impact. The court also spoke about the historical reluctance of courts to interfere with internal legislative affairs. The court found none of these considerations applicable for the position of police chaplain.

18. *Id.* at 597.

19. Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 337 (1987).

20. *Amos*, 483 U.S. at 337.

21. *Id.*

22. Roemer v. Board of Pub. Works of Maryland, 426 U.S. 736, 746 (1976).

23. 175 U.S. 291 (1899).

24. *See, e.g.*, Everson v. Board of Educ., 330 U.S. 1 (1947).

25. *See, e.g.*, Board of Educ. v. Allen, 392 U.S. 236 (1968).

26. Tilton v. Richardson, 403 U.S. 672 (1971) (plurality opinion) (upholding Maryland state statute that authorized payment of state funds to any private institution of higher learning in the state, excepting those that awarded only theological or seminarian degrees). North Carolina has a similar program, N.C. GEN. STAT. § 116-19 through -116-22 (hereinafter G.S.), wherein residents of the state attending private universities in North Carolina can receive a tuition grant. The constitutionality of the program was upheld in Smith v. Board of Governors, 429 F. Supp. 871 (W.D.N.C. 1977).

27. Hunt v. McNair, 413 U.S. 734, 743 (1973).

28. Aguilar v. Felton, 473 U.S. 402, 411 (1985).

29. *Id.* at 755.

The Law or Activity Must Avoid Excessive Government Entanglement with Religion

Unlike the "primary effect" prong of the *Lemon* test, the "excessive entanglement" prong requires more of a procedural inquiry, rather than a substantive one. This element proscribes "excessive" government involvement in religion, an involvement that entails continuing official surveillance "leading to an impermissible degree of entanglement with religion."[30] The Court has identified several relevant factors in determining whether there is an "excessively entangling relationship": (1) the character of the aided institution, (2) the form of aid and the funding process, and (3) the possibility of political divisiveness.[31]

The analysis of the "institution's character" is similar to the "pervasively sectarian" analysis under "primary effect." If an institution's character is not pervasively sectarian, then secular activities can be taken at face value, thereby reducing the danger that ostensibly secular activities will actually be infused with religious content.[32] For example, the Court has consistently held that the supervision necessary to ensure that teachers in parochial schools are not conveying religious messages to their students constitutes excessive entanglement.[33] If these secular activities cannot be taken at face value, the government and religious organization face a Catch-22 situation where the government must engage in ongoing surveillance of the institution to insure that moneys are not being siphoned off to fund religious activities; this surveillance would constitute an "excessive entanglement."[34] The Court has described a profile of a pervasively sectarian parochial school that can be applied to other types of religious organizations; the profile includes a requirement of obedience to religious dogma, required attendance at religious services, and the study of particular religious doctrine.[35] If one of these characteristics exists in an organization with religious ties, a warning signal should go up to local government officials because any public contribution to such an organization will probably be found to be unconstitutional.

The next part of the analysis, the form of aid and the funding process, concerns how the institution receives the moneys from the government. The Court has looked favorably upon "one-time, single purpose" grants because they entail "no continuing financial relationships or dependencies, no annual audits, and no government analysis of an institution's expenditures."[36] While acknowledging that the risk of entanglement is lessened by the fact that the payment is one time, the Court has also noted that "excessive entanglement does not necessarily result from the fact that the subsidy is an annual one."[37]

The final element listed by the Court is the threat of political divisiveness. While affirming that "[p]olitical division along religious lines was one of the principal evils against which the First Amendment was intended to protect,"[38] the Court has confined the political divisiveness analysis to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools.[39]

Case Application

Any Establishment Clause inquiry is very fact specific. Accordingly, this bulletin now turns to two cases that involve issues that local governments might have to address. The first case is *Arneth v. Gross*,[40] which involved the city of New York's child foster care program. The city had historically depended on nongovernmental child-care facilities in administering its program, with many of these institutions being operated under sectarian auspices. Public money went to these programs just as it would to a foster parent. In this particular case the foster children were placed in a

30. Walz v. Tax Commission of New York, 397 U.S. 664, 675 (1970).

31. Roemer v. Board of Pub. Works of Maryland, 426 U.S. 736, 762–63 (1976).

32. *Id*.

33. *See*, *e.g.*, Meek v. Pittenger, 421 U.S. 349 (1975) (invalidating a state program that offered guidance, testing, and remedial and therapeutic services performed by public employees on the premises of parochial schools. The Court observed that though a comprehensive system of supervision might conceivably prevent teachers from having the primary effect of advancing religion, such a system would inevitably lead to an unconstitutional administrative entanglement between church and state).

34. *Id*.

35. Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973).

36. Tilton v. Richardson, 403 U.S. 672, 688 (1971).

37. Roemer v. Board of Pub. Works of Maryland, 426 U.S. 736, 763 (1976) (upholding aid program that called for annual subsidies on grounds that secular and sectarian activities of colleges are easily distinguished so that the occasional audits by the government would be "quick and non-judgmental").

38. Lemon v. Kurtzman, 403 U.S. 602, 622 (1971).

39. Bowen v. Kendrick, 487 U.S. 589, 617 (1988).

40. 699 F. Supp 450 (S.D.N.Y. 1988).

group home affiliated with the Catholic Church. The home, upholding Catholic religious principles, confiscated the children's contraceptive devices and prescriptions. If a child refused to comply, the home insisted they be transferred. The court found that the foster home was impermissibly fostering religion in violation of the Establishment Clause. Therefore the foster home could either (1) enforce its stated policy prohibiting its charges' use or possession of contraceptive drugs or devices, but forgo federal, state, or city funds; or (2) accept such funds and relinquish any requirements of adherence to its religious doctrines that conflict with its charges' constitutional privacy rights. The court observed, "Simply put, if it wishes to enforce its policy and insist on the transfer to other agencies those of its charges who will not adhere, it may do so, but must then operate with private funds."[41]

In the second case, *Center Township v. Coe*,[42] the state of Indiana's "poor relief" laws required the township to provide emergency shelter for the homeless. Plaintiffs brought a class-action lawsuit to enjoin the township from using religiously affiliated shelters in providing this service. The missions, which were reimbursed by the township, required potential occupants to attend religious services as a condition of sojourning there. The court strongly reiterated the common maxim that a person cannot be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program. The court went on to note that it was not prohibiting the use of religious missions as vendors of shelter services if receipt of the shelter was not conditioned on attendance at religious services. As long as the statutorily mandated benefit is provided in a manner that does not infringe upon the occupants' constitutional rights, the use of the religiously affiliated missions is acceptable.

The preceding two cases are examples where the courts have found governmental programs where aid went to religious organizations to be unconstitutional. While they are useful for their illumination of what cannot be done, they also show by negative implication that programs can be designed that courts will uphold. The following case, on the other hand, is one in which the governmental aid scheme was approved. In *Bowen v. Kendrick*[43] the constitutionality of the Adolescent Family Life Act (AFLA) was challenged. The act authorized federal grants to organizations for providing services such as counseling and education relating to family life and problems associated with adolescent pre-marital sex. The statute explicitly stated that the complexity of the problem requires the involvement of religious organizations. The Supreme Court in upholding the statute went through a full *Lemon* analysis, finding that (1) it was clear from the face of the statute that the AFLA was motivated primarily, if not entirely, by a legitimate secular purpose—the elimination or reduction of social and economic problems caused by teenage sexuality, pregnancy, and parenthood; (2) the statute was not impermissibly advancing religion because religious organizations are not quarantined from participating in public welfare programs, and no evidence was presented proving that aid had gone to pervasively sectarian institutions (though the case was remanded for further findings of fact on this issue); and (3) because there was no evidence that aid was going to pervasively sectarian institutions, there was no reason for the type of government supervision that would form an excessive entanglement.

41. *Id.* at 453.

42. 572 N.E.2d 1350 (Ind. Ct. App. 1991).

43. 487 U.S. 589 (1988).

Summary

Now that we have sifted through the law, it is appropriate to return to the hypothetical case that began this article. The best way to deal with a situation like that presented is to apply a step-by-step *Lemon* analysis to it.

1. Is There a Clearly Secular Purpose to the Proposed Funding of the Homeless Shelter/Soup Kitchen?

As with most cases, this test is easily met here as there is a clear secular purpose to assisting in the funding of a homeless shelter/soup kitchen. There is nothing inherently religious about wanting to feed and house the city's destitute.

2. Would Funding the Homeless Shelter/Soup Kitchen Have the Primary Effect of Either Advancing or Inhibiting Religion?

The analysis under this prong is a bit more involved. As to the first part of this prong, which asks whether the action conveys a message of endorsement or disapproval, the outcome is dependent on facts not given in the hypothetical situation. The act of contributing money to the churches will not in itself fail the

"primary effect" prong. However, if, for instance, there are two religious groups, one Catholic and one Jewish, that operate shelters fully exclusive of each other and the city decides to contribute to one and not the other, a court might find in this situation that the action impermissibly conveys a message of approval of one religion over the other. This prong of *Lemon* also looks to see if the primary effect of the governmental action advances or inhibits religion. A court could conceivably find that the city's contributions helped increase the ability of a church to propagate its religious doctrines. Because of this possibility, it is imperative that the city look to cases like *Center Township* and make sure that the churches offer the services without a requirement of participation in religious activities. The churches would, in addition, need to refrain from proselytizing to their "captive audience," and make sure that sectarianism does not pervasively subsume their humanistic actions.

3. Would the Contributions Excessively Entangle the City with the Churches?

Under this prong, the character of the aided institution is first examined. Similar to the "primary effect" analysis discussed above, the churches must refrain from sectarian activities in the provision of the services, thus allowing the city to accept the activities at face value instead of having to do its own surveillance, which would be considered an excessive entanglement. The next part of the analysis, the form of aid and the funding process, would not seem to be a difficult one for the city to pass. These grants would probably be given annually, and although one-time grants have been looked upon favorably by the courts, in this case an annual grant should not present a problem because of the realities of the situation. Unlike contributing money for a school building, it would not be feasible to try and determine the needs of a shelter for the next five years.

The final element under this prong has no relevance here as this example does not include parochial schools.

Conclusion

In conclusion it seems clear that there is not an absolute prohibition on governmental monetary contributions to religious organizations. It is also clear that any such contribution must withstand *Lemon* scrutiny. A local governing unit should use its best judgment in deciding whether to give money to any religious group. One set-in-stone rule to take from the cases is that "pervasively sectarian" institutions, such as parochial schools, cannot be funded. Other than that, there are really no brightline rules in this area. The strongest statement we have from the Supreme Court is from *Bowen*. That case indicates that local governments probably can fund public welfare projects like homeless shelters and soup kitchens such as the one described at the beginning of this bulletin. One final warning: The participating religious organizations must understand that, when using public funds, they are providing the public service of feeding the hungry and housing the weary, not saving the souls of the wretched.

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