F. CHURCH STRUCTURES

It is important to religious bodies to be able to determine the appropriate levels of decision-making within themselves, to define the relations between the parts, and to channel the exercise of authority among them as they see fit. These are essentially internal affairs, and how they are arranged can be characterized as church *structure*. Churches spend a lot of time, energy and money—some would say *too* much, but that is no business of outsiders—on arranging and rearranging their internal structures.

It would certainly be neater if all religious bodies had the same structure, but neatness is not a high value in the exercise of any human liberty; in fact, neatness may be a value antithetical to liberty. Certainly it is if neatness is imposed by outside force. Religious bodies have a moral—not legal—responsibility to their members to keep their internal affairs reasonably neat, predictable and in order, but they have a much lesser such duty—if any—to outsiders, including government. And if they can be penalized by law because of their choice of internal structure, then their religious liberty has been seriously impaired, and government is guilty of "preferring one religion over another," contrary to the Supreme Court's definition of the no-establishment clause.[1]

On the other hand, it is in the nature of religious bodies, whose members feel strongly about their spiritual and moral commitments, to get themselves into plights that they are not able to resolve internally, and then the world is treated to the spectacle of the religious devotees "going to law before the heathen" and asking a civil court to sort out their disputes. That occurred in one of the early decisions of the Supreme Court pertaining to religious matters.

1. *Smith v. Swormstedt* (1853).

One of the least-known decisions of the Supreme Court of the United States pertained to the structure and the distribution of resources of the Methodist Episcopal Church when it divided over the issue of slavery in the middle of the nineteenth century. That division was portentous for the fate of the nation itself, which was becoming increasingly agitated over the slavery issue—pro and con. In 1844, the General Conference of that denomination voted to divide the church into northern (antislavery) and southern (proslavery) branches along the lines of a Plan of Separation overwhelmingly adopted by both elements. The parting was relatively amicable and fraternal at the time, both sides expressing the wish that they should

1. *Everson v. Bd. of Ed.*, 330 U.S. 1 (1947).

remain on good terms notwithstanding their differences on the matter of slavery. But that amicability did not continue in all quarters. When the northern delegates returned home to the annual conferences—the basic units of the church—that had elected them, they met resistance to the terms of the separation.

The essence of the Plan of Separation was that the division was equal and mutual. Neither the resulting Methodist Episcopal Church nor the Methodist Episcopal Church, South, was senior to the other. There was to be no parent and offspring, no original body and schismatic splinter. But the sentiment began to form in the north that the southern annual conferences had left the mother church and were by their own choice seceders, having no claim on the resources of the (original and only) Methodist Episcopal Church.

That sentiment became so strong that by the time of the next General Conference (1848), few of the delegates who represented the annual conferences of the north were reelected, having been replaced by delegates who were hostile to the Plan of Separation. Meanwhile, of course, the southern annual conferences—thirteen in number—had voted to form their own church, as provided in the Plan of Separation, and so were not represented at the 1848 General Conference. The other annual conferences—amounting to about two-thirds of the original church body—were represented in a General Conference in Pittsburgh in 1848 that resoundingly repudiated the Plan of Separation and rejected the proposed pro rata division of the assets of the original body.

There were few assets of the whole church to be divided, most of them being in the several annual conferences. But one repository provided ample bone of contention for years of litigation—the Book Concern. Begun as a modest endeavor to provide tracts, Bible-study lessons and other pious literature for distribution and sale by the preachers of the denomination, it had become a large and prosperous enterprise. The surplusage of that enterprise beyond what was needed for prudent upkeep, maintenance and expansion was devoted to the relief of distressed and worn-out preachers, their widows and orphans, and a Restrictive Rule had been adopted in the *Book of Discipline*, the basic law of the church, prohibiting the General Conference from using that surplusage for any other purpose. The preachers and their dependents in the southern church demanded their share of the capital stock and profits of the Book Concern, but the managers of the Book Concern insisted that its beneficiaries were restricted to the preachers and dependents in connection with the Methodist Episcopal Church. The claimants were not in that connection but in connection with another ecclesiastical body, and they had therefore forfeited any right or share in it.

The claimants in the southern church sought relief in the courts, and their case was eventually heard in the Supreme Court of the United States. The plaintiffs were representatives of the Methodist Episcopal Church, South, appointed to sue for the

southern church's share of the Book Concern, and their position was summarized as follows:

> We claim, in the first place, that the division of the church was a valid act, and thereby the original church was divided into two churches equally legitimate, and that the members and beneficiaries in each have equal rights to their distributive share of all the property and funds.
>
> Secondly. That if there was no valid division of the original church, yet, under the circumstances in which it was made, the benficiaries of this charity [the Book Concern] have not lost that character by adhering to the church south, because the separation was authorized by the highest official and legislative authority of the church, and the beneficiaries living in the south had no choice or alternative but adherence to that church or the total loss of all church membership and privileges....
>
> This fund [the Book Concern] was founded by the travelling preachers,[2] and chiefly accumulated by their labor. It never belonged to the church in absolute right, but was simply intrusted to its management....
>
> The lawful division of the church, territorially, into two distinct churches, did not destroy the church or affect the right of the beneficiaries, but it necessarily required a change of management.... [E]ach of the [resulting] churches becomes the proper manager of so much of the fund as is to be distributed to the beneficiaries within its exclusive jurisdiction....[3]

The other side's position was as follows:

> [P]rior to 1844 the Methodist Episcopal Church was the only religious denomination bearing that name, and it was one in organization, discipline and doctrine.... From 1844 to the present time, the same Methodist Episcopal Church has continued to exist identical in name, organization, discipline and doctrine, and under a regular succession of the same officers: some conferences in the slaveholding States have withdrawn from it; it has lost and gained individual members..., but these changes have not affected its organization or destroyed its identity.... [I]t is by connection with [that church] as an organized body, and by and through it alone, that any individual is now entitled as a beneficiary.... [N]o individual members of the church, or any section of it, large or small,

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2. "Travelling preacher" (of which the author is one) is a term of art in the Methodist Church, referring to ministers who are in "full connection" with the annual conference of which they are members and thus eligible for, and serving in, appointment by the bishop to any pulpit or charge within the connection, that is, able to "travel" from one place to another as appointed by the bishop. These members of the "itineracy" are distinguished from "local" preachers, authorized to serve pulpits only in their own locality, "supernumerary" preachers relieved from appointment for various incapacities, and retired or "worn-out" preachers no longer subject to appointment. "Traveling preachers" are not only subject to appointment but are guaranteed appointment—livelihood as Methodist ministers—unless "located" for cause.

3. *Smith v. Swormstedt*, 57 U.S. 288, 289-91 *passim*.

> could by mere secession entitle himself or themselves to any portion of the trust fund [the Book Concern], separate from and independent of the organized, still subsisting church.

That side contended that the General Conference of 1844 had no power or authority to discontinue the then-existing church.

> [T]he General Conference is not, since 1808, an original body possessed of inherent powers, but representative merely, having no other powers than those conferred on it by the constitution which created it. [T]he general grant of powers to this conference extends only to the making rules and regulations for the Methodist Episcopal Church, not for the division, dissolution, or destruction of the church....
>
> It is, then, so far as the thirteen southern and south-western conferences are concerned, a case of voluntary withdrawal from the Methodist Episcopal Church as organized, and the formation of a new and separate organization; and...the voluntary abandonment of the organized church is also the voluntary surrender of all the temporal privileges and immunities belonging to that organization. And it is very clear that this trust-fund, which was intrusted in its administration to the annual conferences of this organization, cannot be transferred by a court of equity to a conference which has ceased to belong to that organization, any more than to one which never had belonged to it.[4]

The decision of the Supreme Court was announced by Justice Samuel Nelson.

> There is no material controversy between the parties, as it respects the facts. The main difference lies in the interpretation and effect to be given to the acts and proceedings of these several bodies and authorities of the church. Our opinion will be founded almost wholly upon the facts alleged in the [complaint], and admitted in the answer....
>
> The Book Concern, the property in question, is a part of a fund which had its origin at a very early day.... The establishment was at first small; but at present, is one of very large capital, and of extensive operations, producing great profits....
>
> In 1844 the travelling preachers in General Conference assembled, for causes which it is not important particularly to refer to, agreed upon a plan for a division of the Methodist Episcopal Church in case the annual conferences in the slave-holding states should deem it necessary; and to the erection of two separate and distinct ecclesiastical organizations.... It was also agreed that the common property of the church, including this Book Concern, that belonged specially to the body of travelling preachers, should, in case the separation took place, be divided between the two churches in proportion to the number of travelling preachers falling within the respective divisions. This was in 1844....

4. Ibid., pp. 293-295 *passim*.

> The division of the church, as originally constituted, thus became complete; and from this time two separate and distinct organizations have taken the place of the one previously existing.

The plaintiffs now demanded their share of the Book Concern, and the defendants replied that it was held in trust for the travelling preachers and their dependants in connection with the Methodist Episcopal Church, as organized and established in the United States at the time of the foundation of the trust fund. Since the claimants did not meet that qualification, they were not beneficiaries of the fund.

> This argument, we apprehend, if it proves any thing, proves too much; for if sound, the necessary consequence is that the beneficiaries connected with the church, north as well as south, have forfeited their right to the fund. It can no more be affirmed, either in point of fact or of law, that they are travelling preachers in connection with the Methodist Church as originally constituted, since the division, than of those in connection with the church south. Their organization covers but about half of the territory embraced within that of the former church; and includes within it but a little over two thirds of the travelling preachers. Their general conference is not the general conference of the old church, nor does it represent the interest or possess, territorially, the authority of the same; nor are they the body under whose care this fund was placed by its founders. It may be admitted that, within the restricted limits, the organization and authority are the same as the former church. But the same is equally true in respect to the organization of the church south.
>
> Assuming therefore that this argument is well founded, the consequence is that all the beneficiaries of the fund, whether in the southern or northern division, are deprived of any right to a distribution, not being in a condition to bring themselves within the description of persons for whose benefit it was established: in which event the foundation of the fund would become broken up, and the capital revert to the original proprietors, a result that would differ very little in its effect from that sought to be produced by the complainants....
>
> [With respect to the claim that the General Conference of 1844 was without authority to divide the church,] we do not agree that this division was made without proper authority. On the contrary, we entertain no doubt but that the General Conference of 1844 was competent to make it; and that each division of the church, under the separate organization, is just as legitimate, and can claim as high a sanction, ecclesiastical and temporal, as the Methodist Episcopal Church first founded in the United States. The same authority which founded that church in 1784 has divided it, and established two separate and independent organizations occupying the place of the old one.... [T]his body possessed the power to divide it and authorize the organization and establishment of the two separate independent churches. The power must necessarily be regarded as inherent in the General Conference. As they might have constructed two ecclesiastical organizations over the territory of the United States

> originally, if deemed expedient, in the place of one, so they might, at any subsequent period, the power remaining unchanged....
>
> Without pursuing the case further, our conclusion is, that the complainants and those they represent, are entitled to their share of the property in this Book Concern.[5]

Thus did the Supreme Court of the United States recognize and effectuate the original Plan of Separation notwithstanding subsequent revisionism in the northern church. Its decision was consonant with a strain prevailing at that time in Congress, the executive branch and the courts to downplay the agitation over slavery[6] that had gained a dominant role in the Methodist Episcopal Church between 1840 and 1844, and which shortly thereafter led to similar schisms in the Baptist and Presbyterian denominations.

The gordian knot was severed by the court, and the split between the northern and southern branches of the Methodist Episcopal Church was confirmed as a parting of equals, neither having legal preeminence over the other. The split was complete—one of many dissolutions of the social and cultural fabric of the nation over the issue of slavery that prepared the way for the outbreak of hostilities at Ft. Sumter in 1860. It was not repaired until the severed branches of the church were reunited to form The Methodist Church in 1936.

The court's Solomonic decision sought to effectuate the structural design prepared by the differing parties before their difference arose, predicated upon facts not in dispute at the time. Along the way, the court sought to show the party rejecting that design that, if it succeeded in its argument, it would be no better off than the other party, and both would be in a situation not too different from that in which the design would have left them.

2. *Serbian Eastern Orthodox Diocese* (1976) and *St. Martin's Church v. South Dakota* (1981).

The *Serbian* case has been noted in two contexts already, one having to do with church property law[7] and one with the removal of a bishop,[8] but there is a third aspect of the case that is pertinent here. The Supreme Court of Illinois held that the Holy Synod in Belgrade did not have authority to divide the North American Diocese into three new dioceses.[9] The U.S. Supreme Court reversed, saying:

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5. *Smith v .Swormstedt, supra.*

6. See the cases from this same period arising from the operation of the "undergound railroad" spiriting fugitive slaves to freedom: *U.S. v. Hanway* (1851) and *Van Metre v. Mitchell* (1853), discussed at IVB1b and a, respectively.

7. See § B7 above.

8. See § D1e above.

9. 60 Ill. 2d 478 (1975) at 506-507.

> ... the Supreme Court of Illinois substituted *its* interpretation of the [church] constitutions for that of the highest ecclesiastical tribunals in which church law vests authority to make that interpretation. This the First and Fourteenth Amendments forbid.
>
> We will not delve into the various church constitutional provisions relevant to this conclusion, for that would repeat the error of the Illinois Supreme Court. It suffices to note that the reorganization of the Diocese involves a matter of internal church government, an issue at the core of ecclesiastical affairs.... *Kedroff*... stated that religious freedom encompasses the "power [of religious bodies] to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[10]

Also described earlier,[11] *St. Martin's Evangelical Lutheran Church v. South Dakota*[12] dealt with exemption of two Lutheran parochial schools from unemployment compensation tax. The U.S. Supreme Court found the two schools exempt because they were not separately incorporated, and thus were internal to the church. If they had been separately incorporated—as many parochial schools are—the result might have been different. Thus significant tax consequences would depend upon a seemingly minor structural choice that might not have signified the degree of independence of the school from the church that the court's distinction suggested.[13]

A third case already analyzed, *Jones v. Wolf*,[14] is an instance in which the "neutral principles of law" approach resulted in the "congregationalizing" of a connectional church by the courts, contrary to the denomination's own definition of its structure. An opposite effect was obtained in some "ascending liability" cases, which follow.

3. *Barr v. United Methodist Church* (1979)

The Methodist Church appears again in this series of wrestlings of the courts with the knotty riddles of ecclesiastical structures. In 1977 a group of fourteen retirement institutions in California, Arizona and Hawaii collectively known as "Pacific Homes" filed for bankruptcy because they could not meet the costs of caring for residents with whom they had contracted to care for the rest of their lives. These institutions, though related to the Pacific Southwest Annual Conference of the United Methodist Church (PSWAC), were not supervised or controlled by it. Nevertheless, the bishop of the Los Angeles Area and the leaders of PSWAC began to try to develop a plan for meeting the homes' obligations toward their elderly residents, who had paid

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10. 426 U.S. 696 (1976) emphasis added; second brackets in original.

11. See § D3c above.

12. *St. Martin's*, 451 U.S. 772 (1981).

13. See discussion of incorporation at AUTONOMY § 6, *supra*. See also *Calif. v. Grace Brethren* at § D3d above.

14. 443 U.S. 595 (1979), see § B8 above.

substantial amounts upon admission and substantial monthly charges thereafter. But before the plan could be put into effect, 150 of the residents went to court, suing PSWAC, the General Council on Finance and Administration, the General Board of Global Ministries, and The United Methodist Church (UMC) as a whole for $366 million for breach of contract.

The only aspect of that litigation of concern here is the effort to sue The United Methodist Church. The attorney for the General Council on Finance and Administration (GCFA) informed the court that there was no suable entity corresponding to the words "The United Methodist Church," since there was no plenary entity embodying the whole church between the quadrennial sessions of the General Conference. The general church had no corporate form, no officers (except a secretary, who merely convened the General Conference and credentialed the members thereof), no headquarters, no assets, and no one to authorize, retain or instruct legal counsel to answer suit.

It had no head, since the Council of Bishops had no plenary executive responsibility; the several bishops (who presided over the General Conference in rotation) had significant powers in their own respective Episcopal Areas, but collectively they were merely an aggregation of regional prelates; the President of the Council was a rotating, titular office without executive powers.

The church was not trying to avoid its responsibilities, since the Annual Conference and the GCFA were answering suit. They maintained that the plaintiffs, in search of a "deep pocket," were trying to reach the United Methodist Church as a whole, imputing liability to persons and groups across the nation and the world who had no knowledge of, or responsibility for, Pacific Homes, and shared nothing with that institution but some aspects of the name "Methodist," and even the implications of any connectional responsibility through use of the name were vehemently disputed.

But prior to the question of *responsibility* for the alleged offenses of Pacific Homes (which never actually was reached, since the case was settled out of court) was the threshold question of *suability*, and that question went up through the courts of appeals, both state and federal,[15] to determine whether the "United Methodist Church" could indeed be sued.

For whatever reasons, the United Methodist Church and its predecessor bodies have rather consistently resisted the idea of having anything corresponding to an overall executive, individual or collective. No archbishop for them, nor even an Executive Council (such as the Episcopal Church has). The United Methodist Church sees itself to be, not a single monolithic hierarchy sloping down from a central pontiff or executive officer, but a "connection," a loose association of many congregations, annual conferences, ministers and other organizations. At least that is

15. *Sub nomine Barr v. United Methodist Church*, 153 Cal. Rptr. 322 (Cal. Ct. App. 1979) and *In re Pac. Homes*, 456 F. Supp. 851 (C.D. Cal. 1978), *rev'd*, 611 F.2d 1253 (9th Cir. 1980).

the current dominant view.[16] But the plaintiffs insisted that the United Methodist Church must bear some plenary responsibility for what Pacific Homes had done, or at least come to court and defend against the charges, contending that the UMC is "a highly organized and hierarchical entity capable of being sued in California as an unincorporated association."[17]

The trial court ruled on March 20, 1978, that the subpoenas that had been served on various individuals in an attempt to reach "the United Methodist Church" were to be quashed, since "the United Methodist Church is no more than a `spiritual confederation' and is not a jural entity or unincorporated association subject to suit...."[18] Plaintiffs appealed this issue to the California Court of Appeal. The Court of Appeal reversed, holding the UMC to be suable. It did so on the following grounds:

> The facts... are not in dispute. The only ostensible factual conflict which arises is related to the ultimate issue expressed in opinions of witnesses on behalf of UMC to the effect that UMC cannot be sued.... The result which must be reached in this case does not rest on ecclesiastical expertise, but rather on principles of law. The question as to the jural status of UMC is one of law and not of fact.[19]

The court traced the trend in case law to recognize unincorporated associations as suable legal entities in cases involving labor unions and political parties, stock exchanges, environmental associations and religious organizations, despite claims that they were really only informal coalitions of state or local bodies.

> The criteria applied to determine whether an entity is an unincorporated association are no more complicated than (1) a group whose members share a common purpose, and (2) who function under a common name under circumstances where fairness requires the group be recognized as a legal entity. Fairness includes those situations where persons dealing with the association contend their legal rights have been violated.

The court found support for its view in several characteristics it ascribed to the UMC (which seem to have been matters, not just of law, but of *fact*):

> [C]ourts have identified at least two categories of church polities: congregational and hierarchal [*sic*].... UMC is not congregational, i.e., the local church is not the highest authority in all matters of doctrine and usage. It is hierarchal; the 43,000 local churches and 114 Annual

16. As a United Methodist minister for fifty years, the author does not always recognize from his experience what the current spokespersons for the church claim it to be.

17. Appellant's Opening Brief in Court of Appeal, California Fourth Appellate District, Division One, 4th Civ. No. 18244, p. 7.

18. Order of the Superior Court of San Diego County, Calif., Ross G. Tharp, J., March 20, 1978.

19. *Barr v. United Methodist Church*, 153 Cal. Rptr. 322, 326 (Cal. Ct. App. 1979).

> Conferences are governed through the structure described by the Book of Discipline of the United Methodist Church....
>
> UMC may be unique in that it has no single chief operating officer, but... a persuasive argument can be made that the Council of Bishops is equivalent to the board of directors of UMC.[20]

The court examined the role of the General Council on Finance and Administration, which in applying for a group exemption from income tax described itself as "the central treasury and fiscal agent of the United Methodist Church," authorized by the *Discipline* "to take all necessary legal steps to safeguard and protect the interest and rights of the United Methodist Church.... A reasonable legal inference which can be drawn from this grant and description of authority to an agent is the existence of UMC as principal." Indeed, said the court, "UMC has appeared as principal in... litigation" (citing several cases). But an insurance policy offered the court the *coup de grace*:

> The possibility of UMC's liability has not gone unnoticed by those responsible for insurance coverage. UMC is a named insured on a high limit contract for insurance... with a broad range of fidelity, casualty, property, fire, theft, medical malpractice and comprehensive general liability coverage. The policy... describes UMC as a corporation engaged in business as a religious organization.

The court took cognizance of a number of connections between Pacific Homes and UMC. The articles of incorporation of the homes recite that the corporation shall be "subject to the uses and Discipline of The Methodist Church."[21] Pacific Homes was recognized as an "affiliate" by the Certification Council of the (then) General Board of Hospitals and Homes (a plenary agency of the whole church) in 1967, and "the successful performance by Pacific Homes was pointed to with pride over a number of years in many public statements by the President of the UMC's Council of Bishops."[22] Perhaps most damaging of all, in the court's eyes, was the *fact* that literature prepared by Pacific Homes represented itself to be "an agency of the United Methodist Church Southern California—Arizona Conference," and characterized itself as being sponsored by that entity.

The court concluded:

> [O]ur decision in the pleading phase of this litigation does not imply any lack of compassion by UMC or infer liability on its part. Our holding based upon neutral principles of law simply determines UMC is suable.

* * *

20. Ibid., pp. 9-10, 11, 12, quoting the powers of the Council as defined in the *Discipline*.

21. Ibid., p. 16 (That was the name of the church in an earlier period.)

22. Ibid., p. 17.

> The costs for lodging and the type of accommodations [of Pacific Homes] are primarily business decisions. UMC, in fulfilling its commitment to society, has elected to involve itself in worldly activities by participating in many socially valuable projects. It has enjoyed the benefits, both economic and spiritual, of those projects. It has even on occasion filed suit for the protection of its interests. It must now, as part of its involvement in society, be amenable to suit.

In response to the claimed constitutional harms warned of by the church in such an outcome, the court added that the rule of judicial deference expressed in *Serbian Diocese* "has not been extended into secular disputes. Clearly the present case is secular."

> California cases addressing this issue outside the realm of intra-church disputes have held that civil courts are not bound by a church's constitution or its ecclesiastical doctrine.... To hold UMC suable is not equivalent to a review of its polity thus interfering with its internal affairs in violation of the free exercise clause of the First Amendment. There is no evidence to show that rendering UMC amenable to suit would affect the distribution of power or property within the denomination...or would have any effect other than to oblige UMC to defend itself when sued upon civil obligations it is alleged to have incurred.[23]

The California Supreme Court declined to review this decision, as did the U.S. Supreme Court. A companion case working it way up through the federal system, *Trigg v. UMC*, met a similar fate on this issue, when the U.S. District Court for the Southern District of California found the UMC to be suable, the Ninth Circuit Court of Appeals affirmed, and the U.S. Supreme Court denied *certiorari*. The parties settled out of court before the cases came to trial, so there was no appellate review on the merits and no U.S. Supreme Court assessment of the church's claim that its world-level entity was not suable.[24]

Much of the significant decision quoted above could be accepted as true: that the UMC was not congregational, that powers were exercised in its name by agencies that were answering suit, and insurance was taken out against harms befalling entities under that name, *without* rendering "The United Methodist Church" a "principal" with powers and continuing instrumentalities *itself* to act. Unless the intention of the plaintiffs was somehow to reach all the 43,000 congregations (which they originally admitted but later disavowed), there seemed little point in a misdirected effort to sue

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23. Ibid., pp. 15-16; 17-18; 20; and 21, citing *Queen of Angels Hospital v. Younger*, 66 Cal. App. 3d, 359, 372 (1977), and *In re Metropolitan Baptist Church of Richmond, Inc.*, 48 Cal. App. 3d 850, 859 (1975).

24. —Except for a comment by Justice Rehnquist in denying (as circuit justice) a motion of GCFA to be severed from the suit because of remoteness, in which Rehnquist expressed the view that judicial deference applied only to internal disputes and not to suits by outside parties, a view consistent with his dissent in *Serbian Diocese*, q.v., at § B7 above.

a name that represented in itself no head, no headquarters, no assets, no property, no officers and no employees. And it seems, at the very least, highly inappropriate for a civil court by fiat to purport to convert it into such an entity. Yet the highest appellate decisions in *Barr* and *Trigg* did just that: by ordering "The United Methodist Church" to answer suit, they effectively converted the church from the polity it had defined for itself to something else: they "hierarchialized" a "connectional" church (whatever that is).

4. "Ascending Liability"

The problem posed by efforts to hold overarching religious organizations responsible for the misdeeds of their subsidiaries was well stated by Edward McGlynn Gaffney and his coauthors in the only work dealing explicitly with this issue: *Ascending Liability in Religious and Other Nonprofit Organizations*.[25]

> The real significance of *Barr* is that the relationship between the United Methodist Church and Pacific Homes was not especially unusual. If the United Methodist Church and its denominational agencies could be liable for the contracts of Pacific Homes, then they and other denominations could be liable for the contracts and torts of thousands of schools, hospitals, homes, colleges, and agencies where the relationship is akin to that of Pacific Homes. The Pacific Homes case, then, has raised several open-ended questions concerning the legal responsibility of religious bodies for the actions taken by their agencies and affiliates, as well as the legal responsibilities of these agencies and affiliates for each other.
>
> The amount of the out-of-court settlement in *Barr* was twenty-one million dollars, and the legal fees incurred by the church and various boards or agencies involved in the suit were reported to have approximated four million dollars. Although the financial consequences of the ascending liability issue can be substantial, or even catastrophic in some instances, ascending liability is much more than a money issue to religious and other nonprofit organizations. The social impact of the *Barr* case will far exceed the cash settlement if these kinds of organizations choose, by reason of their new awareness of the extent of their risk exposure, to forego sponsorship of beneficial programs or to restrict the activities of their agencies. Moreover, the structures and procedures of governance of nonprofit organizations might require profound alterations in order to protect against legal doctrines that permit unlimited ascending liability. A nonprofit group might have to choose between unlimited exposure to risk or a form of organization and governance incompatible with its tenets. Such a dilemma would be especially unpalatable to a religious body if the only form of organization and governance available

25. (Macon, Ga.: Mercer University Press, 1984).

> to it to limit its liability were unacceptable as a matter of religious conviction.[26]

Gaffney quoted an important observation from a pertinent law-review article: "The integrity, autonomy and stability of a religious association are deeply threatened when the state distorts the association's internal government structure."[27] He concluded that a religious organization's selection, formulation and maintenance of its structure are fully protected by the Free Exercise Clause:

> [A] denomination's structure usually is closely related to its form of worship, goal, and purposes: Thus, it should be entitled to protection under the free exercise clause. The relationship of a congregation to the general church, and the interaction of different units within a denomination may reflect a church's beliefs, as the doctrine and polity grew from scriptural roots. The distribution of authority in a religious association's strata is crucial in determining the accountability of an individual or a unit within the church.... The church's polity is thus a central tenet.... The self-understanding of a religious body, then, should be accorded the full protection of the First Amendment.

Gaffney cautioned against assuming or imputing a relationship of agency between a church and those inspired by it to undertake activities of charitable service.

> Creation by a nonprofit organization of an affiliate, and retention by the organization of broad policy control over the affiliate, should not work to create an agency or alter-ego relationship. Control of an organization over a nonprofit association not exceeding that of a shareholder over a profit corporation should not give rise to responsibilities beyond those of a shareholder.

This was a reference to the principle in corporate (commercial) law of "veil-piercing"; one corporation can "own" another without necessarily becoming responsible for its every act if it does so through a "stockholder" role, even if it be the sole stockholder of all of the subsidiary's stock. It can set broad policy for its subsidiaries, but so long as it does not "pierce the corporate veil"—that is, become involved in the day-to-day management decisions of the subsidiary corporation—it is not responsible for the outcome of those decisions. Nonprofit organizations, especially religious ones, should be entitled to at least as much insulation from the operational missteps of their subsidiary corporations as parent organizations in the commercial world.

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26. Gaffney, Sorenson, and Griffin, *Ascending Liability, supra*, p. 13.

27. Note, "Judicial Intervention in Disputes Over the Use of Church Property," 75 *Harv. L. Rev.* 1142 at 1154 (1962).

> In the case of religious organizations, doctrinal control should not be confused with the control incident to an agency relationship, that is, the right to control conduct. While doctrinal control may amount to agency-like control or coincide with it, often it does not. On occasion doctrinal control may be the only apparent authority. The temptation on these occasions to find agency in doctrinal control should be resisted.
>
> Whether the use of names or relational terms constitutes representation of agency requires independent consideration in the nonprofit context. Public and judicial misconceptions about organizational ties, which are rife among nonprofit organizational complexes, should not give rise to agency responsibility if those misconceptions are neither fostered nor exploited by the organizations. No organization, such as a Baptist Convention, is under a duty to regulate the generic terms of its name, or be responsible for the actions of those who do use such terms. This assertion may, at first blush, appear surprising. We are accustomed to organizations wishing to police the use of their names and marks and thereby assuming any corresponding responsibilities.[28]
>
> However, an organization is not required to trademark or otherwise protect its name or any part thereof, nor must it assume, in such a case, any responsibilities inherent in trademark ownership. Moreover, no general legal duty would require a private party to prevent another from creating a confusion of identities.... The use of identical terms in nonprofits' names often indicates shared beliefs or common ideals and no more.[29]

Just as the *Episcopal* Church could not be held responsible for the deeds or misdeeds of the (former) Methodist *Episcopal* Church, and neither of them be held responsible for the Christian *Methodist Episcopal* Church or the African *Methodist Episcopal* Church, so a church body should not be held responsible for a hospital or college that takes a name pointing to the same venerated person or movement to which the church's name points unless the church does actually exercise operational control over it, which is a very rare situation indeed.

The foregoing passage from Gaffney may sound like a warning: Let Those Seeking Help Beware! It is, but no different from that which should be posted over all new ventures and relationships: Be sure of what you're getting into; Look Before You Leap, etc. On the other hand, churches should try to minimize the possibilities of misunderstandings and erroneous expectations on the part of people seeking help or service.

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28. This effort at quality control has indeed been the policy of some denominations. The Methodist Church insisted that an organization created by some of its members—the Methodist Federation for Social Action—add the term "(unofficial)" to its name, and the Church of Christ, Scientist has been very zealous in seeking to prevent use of the term "Christian Science" by any group not controlled by the Mother Church.

29. Gaffney, *et al., supra*, pp. 91-92.

Gaffney had advice for religious bodies in drawing up or revising their fundamental organizational documents in order to minimize the dangers of ascending liability.

> Court decisions involving a church have been and will continue to be influenced by the church's organizational polity. Increased judicial review of its methods of operation is likely. It is therefore important that religious bodies undertake a careful examination of their structures, so that they may present themselves clearly to courts, the government, and the public. A church's polity normally reflects the religious purposes and beliefs of the denomination; hence, in order to avail itself of the protections of the free exercise clause, the explanation of church structure should clearly reflect the relationship between church polity and religious beliefs.
>
> In any litigation a court will carefully examine a corporate church's articles of incorporation, bylaws, and other documents. They must therefore be written carefully to insure that they faithfully reflect the intended structure and allocation of authority. Standardized pattern language from a legal form book should be avoided because a careful presentation of the religious nature of the corporation could never be captured by traditional legal phrases. The statement of corporate purpose should reflect the religious doctrines and aims of that body. It should not be expressed too narrowly, however, for a restricted or specific statement of purpose may limit later desires to change or expand the denomination's goals.
>
> The documents should be functional, clearly presenting procedures by which decisions are made, but they should also express religious justifications for the sources of authority or the purpose of a particular decision....
>
> * * *
>
> These documents must be written in such a way that the religious basis for the denomination's governance, objectives, and actions cannot be separated from seemingly "secular" aspects of the church, as construed under "neutral principles of law." The essentially religious character of the church must pervade the descriptions of all aspects of the denomination's self-description. The goal of a religious group is the preservation of its autonomy; it wants to be able to make its own decisions to the greatest degree possible. It must therefore provide to a court invited to exercise jurisdiction over it whatever relevant information the court may need in order to afford to the church the broad First Amendment protection to which it is entitled.[30]

Excellent as the Gaffney study was, it still left some ambiguities, if not self-contradictions, such as two injunctions that seem at odds with points made earlier in this work and also in Gaffney's.

30. Ibid., pp. 99, 100.

(1) ***Use of religious language in church documents***. This is certainly good advice from a theological standpoint, but it could have either of two possible results when examined by a court. It could either persuade the court that the relationship in question was protected by the Free Exercise Clause—as Gaffney urged—*or* it could cause the court to shy away from that portion of the evidence and go seeking "neutral principles of law" that did not involve religious "doctrines and tenets." Presumably Gaffney's advice meant to utilize religious explanations for *why* the church does what it does but not for *how* it does it. That is, the description of the person or group in whom the authority for governance and/or resolution of disputes reposes and the procedures to be used in such resolution should be clearly identified and described in unambiguous secular language intelligible to the most secular judge, whatever religious explanations of purposes, gifts, anointings or effects may precede or follow. Even that may be risky, but it is a risk that must be taken if the church is to be true to its own self-understanding.

It should never be forgotten, however, that the ultimate goal of the church is not "the preservation of its autonomy." That is merely an instrumental objective in the service of its *real* goal, which is to carry out its mission of proclaiming and serving God, whether in autonomy or not.

(2) ***Local congregations or affiliated organizations are not (necessarily) to be understood as agents of the general church***. This advice, though cogent with respect to ascending liability, seems to run counter to this work's analysis of the character of hierarchical churches,[31] in which the dependent and subordinate nature of local congregations was emphasized. To the extent that they are the creations of the general church—its "branch offices"—their linkage to the general church is firm and indisseverable from the subordinate's side. It may be that the general church has granted them varying degrees of autonomy to manage their own affairs, but such grant does not imply that they can spin off from the general church and keep the property and assets that it gave or under its aegis were amassed. It may be a relationship in which the image of "piercing the corporate veil" is pertinent. The local congregation is entitled to carry on its own day-to-day operations without supervision from the general church, and its actions thus do not implicate the general church in liability for its supposed mistakes, but it cannot unilaterally alienate the assets in which the general church is chief and sole "stockholder"—to use the terms that seem intelligible enough to courts in a commercial context and might explain to them a similar relationship in the religious realm that is even more worthy of legal recognition.

But if such a distinction is not recognized with respect to churches, they may have to make a difficult decision. Are they going to "own" their local "outlets," even if that means being responsible for their shortcomings, or are they going to turn them free to make their own mistakes? To choose the former may mean risking awards of damages

31. See § B10 above.

against the general church that could severely cripple or devastate it. To choose the latter may mean relinquishing responsibility for quality control of the teaching and practice of the faith in organizations spawned and nurtured by the general church in its theological tradition and ethos.

5. "Integrated Auxiliaries"

In the Tax Reform Act of 1969 a new term was added to the Internal Revenue Code that has elicited a long controversy. In Section 6033, which requires all tax-exempt organizations to file annual informational returns (Form 990) with the IRS, there is a "mandatory exception" for "churches, their integrated auxiliaries, and conventions or associations of churches."[32] When the Senate Finance Committee was considering that section of the Tax Reform Act, Senator Wallace Bennett (R-Utah) suggested the addition of the term "auxiliaries" to the phrase that is common to other sections of the Code, "churches, conventions or associations of churches." He had in mind the men's, women's, and youth organizations of a church, which in his own (Mormon) denomination are called "auxiliaries." The Treasury, however, wanted a somewhat more restrictive term, and persuaded the conference committee to add the modifier "integrated," producing a strange hybrid—"integrated auxiliaries"—unknown to any existing ecclesiastical nomenclature.[33]

When the Tax Reform Act was adopted, this term posed a puzzle for the Treasury in writing regulations defining it. No regulations were forthcoming—perhaps for this reason—until February 11, 1976,[34] and then the proposed regulations bore no resemblance to information supplied by the churches.[35] Protests from churches resulted in some minor revisions, but the essential thrust remained in the final regulations promulgated on January 4, 1977:[36] only those organizations that (1) have a "separate legal identity," (2) are described in Section 501 (c)(3), and (3) are "exclusively religious" can qualify as "integrated auxiliaries." The regulation defined "exclusively religious" to mean that if such an organization were applying for its own independent exemption, it must be entitled to a *religious* exemption rather than a charitable, educational or other exemption (among those listed in Section 501 (c)(3)).

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32. I.R.C. Section 6033 (a)(2)(A)(i).

33. Draheim, Philip E., "Concordia College Challenges the IRS," in Kelley, D.M., ed., *Government Intervention in Religious Affairs* (New York: Pilgrim Press, 1982), p. 87.

34. Proposed Treasury Regulation § 1.6033-2, 41 *Federal Register* 6073.

35. Five years after the enactment, this author, at the invitation of Meade Whitaker, Chief Counsel of the Internal Revenue Service, convened a broad group of denominational representatives to whom Whitaker put the question, "What does `integrated auxiliary' mean in your polity?" The response of the churches' representatives was, in effect, "We didn't invent that term; we don't know what it means; it's your problem." This author further circularized the heads of a number of denominations with the same question, and received various replies from sixteen of them, which he forwarded to Whitaker in 1975 for whatever help they might afford.

36. Regulation Section 1.6033-2 (g)(5), 42 Fed. Reg. 767 (1977).

The rationale of the Treasury seemed to be that an organization could not be *both* religious *and* charitable or religious *and* educational. The effect of the regulation was to require church-related hospitals and homes, colleges and universities to file annual informational returns, whatever their relationship might be to the parent church. As much was admitted by Alvin D. Lurie, Assistant Commissioner for Employee Plans and Exempt Organizations, Internal Revenue Service, speaking to a conference of the Baptist Joint Committee on Public Affairs:

> [T]he issue addressed in the Regulation is... how to identify those organizations which, though corporately separate from a church, are so closely integrated with and auxiliary to the church as to have been meant by Congress to enjoy the same constitutional immunity from public accountability reserved to the church itself.[37]

An organization is not an integrated auxiliary, he said, if it has "secular counterparts." The Internal Revenue Service has explained the "secular counterpart" rationale in the following language, which has appeared in several recent technical advice memoranda:

> The rationale of the statute and the regulation is that a church-affiliated organization and an exempt non-affiliated organization providing the same services to the community should account to the public equally. The church-affiliated organization should not, solely because of its affiliation with the church, be excused from its duty to account.[38]

The effect of this regulation was to split off a church-related college or hospital from the church and to treat it as more college than church, or more hospital than church, just because there were other colleges or hospitals that were not related to churches, even though the church-related institutions—and their relation to the church—might be, and often are, much older. In other words, a church may institute a college or a hospital to help carry out its mission, and may consider that institution an integral part of its work. But if other colleges and hospitals spring up nearby, often in imitation of the church-related prototype, but are themselves unrelated to any church, then the latecomer *secular* institutions preempt the field, and the church-related college or hospital is legally assimilated to the "secular counterpart" category rather than remaining more akin to the founding church, at least with respect to legal definition of its character for purposes of exemption from filing annual informational returns.

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37. "Taxation and the Free Exercise of Religion," Papers and Proceedings of the Sixteenth Religious Liberty Conference, October, 1977, quoted in Draheim, *supra* p. 89.

38. Internal Revenue Service, National Office Technical Advice Memoranda Nos. 8048010 and 8046004, quoted in Worthing, Sharon, "The Potential in Recent Statutes for Government Surveillance of Religious Organizations," in Kelley, ed., *Government Intervention in Religious Affairs, supra*, p. 114.

There was no provision whatever in the regulations for the IRS to consult the *church* to which the would-be "integrated auxiliary" claimed to be related. Perhaps the church's opinion should not be dispositive, but it would seem to be a pertinent datum for determining a relationship: is it acknowledged by the other party from which its exemption ostensibly derives?

a. The Struggle Against the Regulation. The 1977 regulation was not satisfactory to a number of religious bodies, and some of them—including some of the most conservative—refused to accept it. Concordia College declined to file an informational return on the ground that the Lutheran Church—Missouri Synod considered it, not an integrated auxiliary," but part of the church.[39] The Tennessee Baptist Children's Home likewise refused to file informational returns on the ground that it was an integrated auxiliary of the Southern Baptist Convention.[40]

In 1982 a broad coalition of religious bodies attempted to persuade the Treasury to revise the offending regulation, but for two years without success.[41] But in mid-1984 a striking development occurred. As he was leaving office, Assistant Secretary of the Treasury John Chapoton wrote the author suggesting that the Coalition on Internal Revenue Definitions of Religious Bodies might meet with the Assistant Commissioner of the Internal Revenue Service for Employee Plans and Exempt Organizations and his staff to discuss the integrated auxiliary problems and any other matters in the Internal Revenue Code that were troubling the churches! Eventually such meetings were held, and over the course of a year and a half a solution was reached, due largely to the commitment and persistence of two career officers in the Exempt Organizations branch—Milton Cerny and Howard Schoenfeld—and their colleagues.

The Coalition, which included representatives from Roman Catholic, evangelical, ecumenical and "unaligned" religious bodies (from the Seventh-day Adventists to the Unitarians and from the Southern Baptists to the Mormons), posed several issues at the outset (that had been expressed in the correspondence of previous years):

1. The regulation defining some organizations related to churches as not "exclusively religious" was unacceptable to the churches. A number of their organizations did not object to having to file annual information returns—if it came to that—but they didn't want the government to "read them out of the church" by defining them as not being religious.
2. The churches wanted some input into the IRS's determination of what were their integrated auxiliaries.

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39. See Draheim, *supra*.

40. See discussion at § 5c below.

41. Corr. between John Chapoton, Assistant Secretary of the Treasury for Tax Policy, and the author as secretary for the Coalition on Internal Revenue Definitions of Religious Bodies. Nov. 4 and Dec. 10, 1982; reply Mar. 15, 1983; further corr. Dec. 19, 1983, May 25, 1984.

3. The churches were troubled about the use of the language asserting "supervision and control" over their subsidiaries in the Group Ruling revenue procedure under which a denomination could list its affiliates every year for inclusion in its tax exemption.

Over a lengthy period of constructive discussion, the two sides worked out a two-stage process in which the churches had a say in the first stage, and the government applied an "objective" test in the second. The resulting Revenue Procedure (No. 86-23) provided for the affiliation test as follows:

> SEC. 4. AFFILIATED WITH A CHURCH OR CONVENTION OR ASSOCIATION OF CHURCHES
>
> For purposes of Sec. 3, an organization is affiliated with a church or a convention or association of churches if:
>
> 1. The organization is covered by a group exemption letter under Rev. Proc. 80-27, 1980-1 C.B. 677, or subsequent revision; or
>
> 2. The organization is operated, supervised, or controlled by or in connection with, as defined in section 1.509(a)-4 of the regulations, a church or convention or association of churches; or
>
> 3. Relevant facts and circumstances show that it is so affiliated. The factors to be considered include:
>
> (a) The organization's enabling instrument (corporate charter, trust instrument, articles of association, constitution, or similar document) or by-laws affirm that the organization shares common religious doctrines, principles, disciplines, or practices with the church or convention or association of churches.
>
> (b) The church or convention or association of churches has authority to appoint or remove or to control the appointment or removal of at least one of the organization's officers or directors.
>
> (c) The church or convention or association of churches receives reports, at least annually, on the financial and general operations of the organization.
>
> (d) The corporate name of the organization indicates an institutional relationship, which relationship is affirmed by the church or convention or association of churches or a designee thereof; or if the corporate name of the organization does not indicate an institutional relationship, this institutional relationship is affirmed by the church, or convention or association of churches, or designee thereof.
>
> (e) In the event of dissolution, the assets are required to be distributed to the church or convention or association of churches or to an affiliate thereof within the meaning of this revenue procedure.
>
> (f) Any other relevant fact or circumstance.
>
> The absence of one or more of the above factors does not necessarily preclude classification of an organization as being affiliated with a church or convention or association of churches.

The second stage was based upon the objective measure of the proportion of church "support," and was designed to allow as little leeway as possible for discretion on the part of the IRS:

> SEC. 5. INTERNAL SUPPORT REQUIREMENT
>
> For purposes of Sec. 3, an organization is internally supported within the meaning of this section *unless* it both:
>
> 1. offers admissions, goods, services, or facilities for sale, other than on an incidental basis, to the general public (except goods, services or facilities sold at a nominal charge or substantially less than cost), and
>
> 2. normally receives more than 50 percent of its support from a combination of governmental sources; public solicitations of contributions (such as through a community fund drive); and receipts from the sale of admissions, goods, performance of services, or furnishing of facilities in activities that are not unrelated trades or businesses.[42]

b. *Lutheran Social Service of Minnesota v. U.S.* (1985). Perhaps one reason for the Internal Revenue Service's receptivity to a new approach to definition of integrated auxiliary was its failure to persuade the courts that the old definition was acceptable. Two cases had arisen under that definition, *Tennessee Baptist Children's Home* and *Lutheran Social Service of Minnesota*. The latter will be discussed first because it reached appellate resolution first.

Lutheran Social Service of Minnesota (hereinafter LSS) was a tax-exempt nonprofit social service agency created by and affiliated with several synods of the Lutheran churches of the region. Its board of directors was elected by Minnesota judicatories of the three largest national Lutheran denominations at that time, the American Lutheran Church (whose headquarters were in Minneapolis), the Lutheran Church in America, and the Lutheran Church—Missouri Synod. It provided various social services in Minnesota, such as child care and adoption services; family and individual counseling; residential treatment services for the emotionally disturbed, the mentally retarded and selected male felons in a community-based correctional program; a camp for physically and mentally impaired persons; resettlement programs and a chaplaincy program. Although it charged fees for its services proportionate to clients' ability to pay, 65 percent of its operating funds came from federal, state and county funds.

> LSS maintains that the services it provides are religious in that they are "religiously motivated, a manifestation of religious belief, a form of worship, and a means of propagation of the Christian faith...." LSS admits, however, that many of its services would be secular in nature if performed by secular organizations.[43]

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42. Internal Revenue Bulletin No. 1986-20, May 19, 1986.

43. *Lutheran Social Service of Minnesota v. United States*, 758 F.2d 1283 (1985).

LSS and its sponsoring denominations firmly believed that it was an integrated auxiliary of the churches and so resolved to test the Internal Revenue Service's insistence—on the basis of the 1977 regulation discussed above—that it wasn't. So in 1979 LSS filed the required Form 990 (Return of Organization Exempt from Income Tax) and incurred a late-filing penalty of $700. It paid the penalty and then sued for a refund, which is the customary way to challenge an action of the federal taxing authority. After the IRS denied the claim, the issue was taken to court. The federal district court upheld the government's contention with hardly any independent scrutiny of the validity of the regulation in question.[44]

LSS appealed to the U.S. Court of Appeals for the Eighth Circuit, and in April 1985 it rendered its decision, written by Circuit Judge Donald R. Ross for a unanimous panel composed of himself and Circuit Judges Gerald W. Heaney and George G. Fagg.

> The issue presented by this appeal is whether LSS, a church-affiliated tax-exempt organization, is exempt from filing annual informational returns....
>
> * * *
>
> LSS contends that it is exempt from filing the Form 990 informational return.... [A]lthough LSS concedes that it is not an integrated auxiliary of a church as the term is defined by the IRS, LSS asserts that the Treasury regulation which defines integrated auxiliary is invalid because it includes an exclusively religious purpose requirement not contained in the statute.... [W]e agree that the exclusively religious purpose requirement embodied in Treas. Reg. Section 1.6033-2(g)(5)(i) is contrary to the legislative history of section 6033.
>
> * * *
>
> LSS argues that the types of organizations that are expressly exempted are not more "exclusively religious" in their activities than it is, and that by providing an exemption for such groups, Congress could not have intended that an "exclusively religious" test be applied to integrated auxiliaries.
>
> In response, the government contends that the court must grant deference to Treasury regulations that implement the Congressional mandate in a reasonable manner, and that the regulation in question must be sustained unless unreasonable and plainly inconsistent with the statute....
>
> While it is true that Treasury regulations are entitled to a great deal of deference, we cannot "rubber-stamp" the regulation if it will "frustrate the congressional policy underlying the statute...." A treasury regulation that is inconsistent with the statute upon which it is based cannot be sustained.... In this case, both the plain language of Section 6033 and the

44. *LSS of M v. U.S.*, 583 F.Supp. 1298 (1984), by Judge Harry H. MacLaughlin, who also decided the *Eilers* case, discussed at IIB4c(6) below.

> legislative history of section 6033 convince us that the IRS regulation is inconsistent with clear congressional policy.
>
> Looking first to the language of the statute, we bear in mind that "[w]here Congress includes particular language in one Section of a statute but omits it in another section of the same [statute], it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion...." Here, while Congress specifically required that religious orders be "exclusively religious" to qualify for section 6033's mandatory exceptions, 26 U.S.C. Section 6033 (a)(2)(A)(iii), it did not mandate the same requirement with respect to integrated auxiliaries, id. at Section 6033 (a)(2)(A)(i). This omission on the part of Congress can only be viewed as an intentional and purposeful decision not to limit the group of integrated auxiliaries qualifying for the filing exception to those that are exclusively religious.... The government's attempt to include an exclusively religious component in the definition of an integrated auxiliary unreasonably restricts the intended scope of the section's mandatory exceptions, is contrary to Congress's clear intent, and thus cannot be sustained.
>
> * * *
>
> When the exclusively religious requirement is removed or eliminated from Treasury Regulation Section 1.6033-2(g)(5)(ii) it is uncontested by the IRS that LSS is an integrated auxiliary as the IRS defines the term.
>
> The plain meaning of the words of the statute, combined with the legislative history, persuade us to hold that LSS falls within the purview of the statute.[45]

This opinion cited on almost every page an article by Father Charles F. Whelan, "`Church' in the Internal Revenue Code: The Definitional Problems" (though misspelling his name as "Wheelan" throughout), and quoted his trenchant comment that "churches... themselves are not `exclusively religious' in the sense that the... regulations require of their `integrated auxiliaries."[46]

c. *Tennessee Baptist Children's Homes v. U.S.* (1986). A case that began before *Lutheran Social Service of Minnesota* but ended later was that of the Tennessee Baptist Children's Homes, Inc. (TBCH), successor to the Tennessee Orphans Home founded in 1891. In 1986 it operated four child care facilities in Tennessee and was entirely funded and controlled by the Tennessee Baptist Convention, an affiliate of the Southern Baptist Convention. Following the promulgation of its regulation defining an "integrated auxiliary" of a church,[47] the Internal Revenue Service notified TBCH that it was not an "integrated auxiliary" and would therefore have to file an annual informational return (Form 990). TBCH insisted that it *was* an integrated

45. *LSS of M v. U.S.*, 758 F.2d 1283 (1985), *supra*.

46. Whelan, Charles F., S.J., 45 *Fordham L. Rev.* 855 at 899 (1977). Father Whelan, Professor of Law at Fordham Law School, was co-director, with the present author, of the Project on Church, State and Taxation financed by the Eli Lilly Endowment, 1980-1984.

47. Treas. Reg. Section 1.6033-2(g)(1)(i) & (g)(5), Jan. 4, 1977.

auxiliary and refused to file. The IRS assessed and collected penalties, plus interest, of $29,665.12, and TBCH sued for a refund.

The government responded that the Home did not qualify for exemption from the reporting requirement because its "principal activity" was not "exclusively religious"—as required by the new regulation—since its services were dedicated to the entire community, and its nonreligious activity—operating child care facilities—would justify its exemption from taxation under Section 501(c)(3) as a *charitable*, rather than a *religious*, entity.

> TBCH responded... that its principal activity was "exclusively religious"... and not primarily charitable as erroneously hypothecated by the Government, because its sole and primary dedication and purpose for maintaining and operating its child care facilities was and is to create a pervasively Christian environment for leading its enrolled children to a saving relationship with Christ and to systematically indoctrinate and/or convert those children committed to its care to the tenets of the Baptist faith. As such... it had no secular counterpart....
>
> [T]he district court rejected the Government's argument that it was entitled to [summary] judgment as a matter of law.... The trial judge reasoned that... factual issues of material consequence were joined to be judged by a jury.... Accordingly, the trial court confined the jury's deliberations to the narrow factual consideration of identifying the principal activity pursued by TBCH and, secondly, whether such activity was "exclusively religious."[48]

The Homes, like Lutheran Social Service of Minnesota, had claimed that it was more than an "integrated auxiliary"; it was itself *part* of the church. Since there was no intermediate term in the statute between "church" and "integrated auxiliary," that came out as claiming to be "a church," which of course seems absurd. What was meant was not that it was *a* church, but it was "church"—of the same nature and continuous with the church that founded and operated it. That misunderstood claim was rejected.

> The jury was given two written questions, and it responded as follows:
>
> 1. Q. Is the plaintiff, Tennessee Baptist Children's Homes, Inc., a "church" as that term has been defined by the Court?
>
> A. No.
>
> 2. Q. Is the principal activity of the plaintiff, Tennessee Baptist Children's Homes, Inc., "exclusively religious," as that term has been defined by the Court?
>
> A. Yes.

The trial court therefore decided for the plaintiff, but denied its motion for costs and attorney fees. The government appealed the first point, and the Homes

48. *Tennessee Baptist Children's Homes v. U.S.*, 790 F.2d 534 (1986).

cross-appealed the second. The Sixth Circuit Court of Appeals, in an opinion written by Judge Robert B. Krupansky for himself and Judges Guy and Peck, announced its decision on May 14, 1986, more than a year after *Lutheran Social Service*.

> The sole issue confronting this court on appellate review was the propriety of the district court's decision [against] the Government....
>
> * * *
>
> Significantly absent from the definitions articulated by the regulations was a definition of the term "principal activity".... The regulations therefore necessitate a preliminary factual inquiry as to the identification of the affiliate's principal activity. The Government, having ignored the factual issue thus presented, erroneously hypothecated the factually unsupported conclusion that the principal activity of TBCH was as a matter of law the operation of an orphanage dedicated to the public interest....
>
> * * *
>
> Accordingly, the district court's [decision pursuant to the jury's verdict declaring TBCH to be an integrated auxiliary of a church exempt from filing informational returns] was appropriate.

The government had lost *both* cases testing its definition of "integrated auxiliary," and so everyone was ready for a new one. The Coalition on Internal Revenue Definitions of Religious Bodies was informed that there no longer was any "constituency" at IRS for "exclusively religious," and the new Revenue Procedure was announced in the *Federal Register*. The Coalition had wanted some assurance in writing that the old "exclusively religious" regulation was going to be recast, even if it took fifteen years (as estimated by the commissioner at the time of the beginning of the dialogue with IRS). And on May 19, 1986, a letter from the Office of Chief Counsel of IRS to this author announced that a new rules project had been opened to revise that regulation to incorporate the compromise of Rev. Proc. 86-23.[49] A mere eight years later, a notice appeared in the *Federal Register* to the effect that the new regulation was to be promulgated by the end of 1994![50] That publication was followed by a year of comment by interested parties and rumination by the Internal Revenue Service, resulting in a few minor revisions, the most substantive of which was that the categories enumerated by Senator Bennett back in 1969 would be recognized as "integrated auxiliaries:" "Men's and women's organizations, seminaries, mission societies and youth groups... are integrated auxiliaries of a church whether such an organization meets the internal support requirement." With its publication on December 20, 1995, the new regulation became final and effective, a mere twenty-six

49. Letter from James J. McGovern, Director for Employee Plans & Exempt Organizations Division, Office of Chief Counsel, IRS, to Dean M. Kelley, Sec'y. of Coalition on Internal Revenue Definitions of Religious Bodies, May 19, 1986.

50. 59 Fed. Reg. 20909, Apr. 25, 1994.

years after the term "integrated auxiliary" was first included in the Internal Revenue Code![51]

6. *Moon v. U.S.*

One of the issues that contributed to the conviction of the Rev. Sun Myung Moon for federal income tax fraud was the structure—or alleged lack of structure—of the Unification Church. That is, he claimed to be holding $1.6 million in trust for the international Unification movement that he headed. The government contended that the money was his personal property, and it gained a conviction for his failure to declare the interest on it as income and to pay taxes on it. One factor supporting the government's case (in the eyes of jury and judge, at least) was the fact that there was no *corporate* entity corresponding to the international Unification movement for which he claimed to be holding the money in trust.

To the unprejudiced mind, that might suggest a good reason why he held it in his own name rather than putting it in a bank account in the name of the international movement. But that was not the conclusion the government drew and offered to the jury. Their conclusion was that there was no *corporate* entity because there was *no such thing* as an international Unification movement, and therefore Moon couldn't have been holding anything in trust for it. As one government prosecutor put it:

> Your Honor, there is no evidence of any association relating to these funds other than one person, and that's Reverend Moon.... There is no entity, there is no structure. And indeed, your Honor, if you look at the evidence in the case, every time they want an entity, they know how to go about doing it. They incorporate it, they apply for tax exemptions.... We have the International One World Crusade, we have the International Cultural Foundation.... When it comes to these funds, there is no incorporation, there is no application for tax exemption, and there is only one reason: it is because it is Reverend Moon's money.[52]

It would seem quite intelligible that Moon might not want to incorporate the *international* movement itself in any one country, especially one that was a relative latecomer to the movement, since that might cause "loss of face" to the Japanese and Korean branches, from which much of the money was said to have come for "missionary" work in the much "younger" territory, the United States. But whether that was the reason or not, the church's choice of its internal structure, and whether

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51. 60 FR 65550 (Dec. 20, 1995). Also notable was the fact that about the same time a new Assistant Commissioner for Employee Plans and Exempt Organizations was appointed—James J. McGovern, who had written this author in 1986 assuring him that he had "opened a regulation project to reconsider the current definition of an integrated auxiliary." The process he had instituted was finally accomplished, and it didn't quite take ten years.

52. *Moon v. U.S.*, Memorandum of Law in Support of Defendant's Motion for New Trial, quoting trial transcript, pp. 5516-17 (punctuation supplied).

to incorporate one part of it or another, should never have been used as (supposed) evidence to support a criminal conviction of its leader!

Other churches have made equally inscrutable decisions about their internal structures and their incorporation: there is no corporate entity corresponding to "The United Methodist Church;"[53] the Episcopal Church as such is not incorporated; its property is held by the "Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the U.S.A." That does not mean that the United Methodist Church or the Episcopal Church do not exist, but simply that they have chosen another—and subordinate—entity for incorporation. The Roman Catholic Church in the United States has a dual organizational form: the National Conference of Catholic Bishops and the U.S. Catholic Conference, consisting to a large extent of the same leaders, whose respective functions and capacities are not readily distinguishable to outsiders.

Yet the trial court accepted the government's contention to the extent of instructing the jury that in determining whether the international movement "existed and whether the movement owned the [assets]," the jury "should consider... such factors" as "whether the [m]ovement had a specific organizational structure, written charter or constitution, [and] the existence of other Unification Church corporate entities."[54] The jury apparently accepted this invitation to engage in a constitutionally forbidden inquiry and to use whatever its members thought they had learned from it in arriving at a decision that penalized a religious body for having one kind of structure rather than another. Does that not tend to press other religious bodies toward a preference for incorporating every element of their structures (or not incorporating any of them) because of invidious inferences that might be drawn in civil law from their incorporating some and not others? Such considerations should play no part in how a religious body structures itself.

53. See § F2 above.

54. *Moon v. U.S.*, Brief for Appellant, U.S. Second Circuit Court of Appeals, p. 44-45, quoting transcript of jury instructions, brackets in the brief.