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DISCOVERY AND USE OF CHURCH RECORDS BY CIVIL AUTHORITIES

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I. INTRODUCTION

The general subject of this outline is the defenses which may be available to avoid a subpoena duces tecum which seeks church-related documents and records. The outline is organized in terms of four substantive issues: (1) whether the underlying action in which church records are sought is a proper subject of civil jurisdiction, or otherwise whether compelled disclosure of the records would entangle the government with the church in violation of the Establishment Clause; (2) whether compelled disclosure of church records or the use to which the documents will be put violates the Free Exercise Clause; (3) whether compelled disclosure infringes upon First Amendment rights of free speech and association; and (4) whether the documents sought by the subpoena are protected by a nonconstitutional privilege, such as the priest-penitent privilege. The final part of this outline briefly discusses some of the procedural questions which may arise in an attempt to quash a subpoena which seeks church documents.

II. FIRST AMENDMENT LIMITATIONS ON CIVIL JURISDICTION

The initial issues in any instance where church-related records are sought is whether the underlying governmental action (litigation, administrative investigation, etc.) is properly the subject of civil jurisdiction. If it is not, then the requested documents need not be disclosed.¹ The Religion Clauses — in particular, the Establishment Clause and its prohibi-

* Murphey, Young & Smith, Columbus, Ohio.
¹ Surinach v. Pesquera de Busquets, 604 F.2d 73, 74 (1st Cir. 1979).
tion of "excessive entanglement" between church and state — impose a limit on the extent to which civil authorities can take cognizance of church-related disputes.

A. Three-Part Test

Establishment questions are decided by a three-part test. According to *Lemon v. Kurtzman*: "First, the statute [or other exercise of civil authority] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute [or other action] must not foster an excessive government entanglement with religion."

B. Entanglement

The entanglement prong of the test first appeared in *Walz v. Tax Commission*, although its origins can be traced back to *Watson v. Jones*, and other early cases. The concept is primarily concerned with government *involvement* with religious interests.

1. Administrative Entanglement

In *Walz*, the Court defined three types of administrative entanglement that must be avoided: substantive "government evaluation" of religious practices; involvement of "government in difficult classifications of what is or is not religious," and extensive state investigation into church operations and finances.

2. Underlying Rationale

The administrative entanglement concerns expressed in *Walz* are based on two of the fundamental premises of the Religion Clauses. Each is discussed briefly below.

a. Chilling Effect

Government involvement with religious interest, particularly when it take the form of ongoing administrative investigation and regulation, can pose a substantial danger of chilling and coercing religious decision-mak-
ing." For example, ongoing state evaluation and supervision of the tuition charges by Catholic schools can result in impermissible state intrusion upon decisions by school authorities regarding how funds should be allocated between the religious and secular programs of the schools.\(^\text{10}\)

b. **State Definition of Religion**

The second basis for the entanglement concept, and perhaps the more important one, is that government must not become involved in defining what is or is not "religious."\(^\text{11}\)

C. **Entanglement Limits On Civil Authority**

The foregoing entanglement concerns have led to three interrelated lines of cases which limit civil jurisdiction over church-related matters. Each is discussed below.

1. **Church Property Disputes**

In a line of cases such as *Watson v. Jones*,\(^\text{12}\) *Kedroff v. St. Nicholas Cathedral*,\(^\text{13}\) *Presbyterian Church v. Hull Church*,\(^\text{14}\) *Maryland & Virginia Eldership of the Churches of God v. Church of God ad Sharpsburg*,\(^\text{15}\) and *Jones v. Wolf*,\(^\text{16}\) the Court has held that a civil court can decide church property disputes (i.e., which faction of a hierarchical church is entitled to church property after a schism within the local church or between the local church and the general church) only in accordance with "neutral principles of law," such as settled principles of the law of property, trusts, and corporations or unincorporated associations. The court cannot decide questions of religious doctrine or dogma. If such a question arises in the


\(^{10}\) Surinach v. Pesquera de Busquets, 604 F.2d 73, 76 (1st Cir. 1979).

\(^{11}\) West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in . . . religion or other matters of opinion"); United States v. Ballard, 322 U.S. 78, 86-87 (1944); Lemon v. Kurtzman, 403 U.S. at 620 ("state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids"); P. KAUPER, RELIGION AND THE CONSTITUTION 26 (1964) ("a principal purpose underlying religious liberty is to remove the question of what is true religion from the domain of secular authority"). But see United States v. Moon, 718 F.2d 1210, 1227 (2d Cir. 1983) ("in this criminal proceeding the jury was not bound to accept the . . . Church's definition of what constitutes a religious use or purpose").

\(^{12}\) 80 U.S. 679 (1871).

\(^{13}\) 344 U.S. 94 (1952).

\(^{14}\) 393 U.S. 440 (1969).

\(^{15}\) 396 U.S. 367 (1970).

\(^{16}\) 443 U.S. 595 (1979).
course of litigation, the court must defer to and accept the decision of the governing body or highest ecclesiastical tribunal of the general church.

2. Other Church-Related Disputes

Religious disputes which do not involve control of church property (e.g., questions of church discipline, such as where an expelled member of the congregation sues his church claiming that the expulsion was in violation of church doctrine), or which only incidentally involve such issues (e.g., litigation over the validity of the defrockment of a bishop which incidentally involves who is entitled to property formerly controlled by the bishop), can be decided only in accordance with the decisions, doctrines, and policies of the proper church authorities, without regard to "neutral principles."

The courts cannot decide what constitutes church doctrine or policy, but must instead defer to the church tribunals and governing bodies. In such a case, a strong argument can be made that civil jurisdiction is entirely ousted by the first Amendment.

a. Ecclesiastical Issues

The distinction between cases involving church discipline, doctrine, administration, and organization, which arguable cannot be the subject of civil jurisdiction, and cases involving church property, which can be resolved by civil courts, but only in accordance with neutral principles of law, lies in the fact that the former cases by their very nature cannot be adjudicated by reference to neutral principles, since they involve purely ecclesiastical matters.

b. Serbian Eastern Orthodox

The leading case is Serbian Eastern Orthodox Diocese v. Milivojevich, in which a defrocked bishop sued his general church, claiming that the defrockment was wrongful and arbitrary under the internal doctrines of the general church, and seeking a declaration that he therefore remained in control of the diocesan property. The Illinois Supreme Court ruled in favor of the bishop, but the United States Supreme

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17 Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 713 (1976) ("religious controversies are not the proper subject of civil court inquiry, and ... a civil court must accept the ecclesiastical decisions of church tribunals as it finds them").

18 L. Tribe, American Constitutional Law 879 (1978) ("whatever room the First Amendment might leave for independent civil resolution of secular but church-related disputes through neutral principles of law, it leaves no room whatever for independent civil adjudication of questions ... at the core of ecclesiastical concern").

Court reversed, holding that "questions of church discipline and the composition of the church hierarchy are at the core of ecclesiastical concern."\(^{30}\) "[T]he Illinois Supreme Court has undertaken the resolution of quintessentially unconstitutionally religious controversies whose resolution the First Amendment commits exclusively to the highest ecclesiastical tribunals of . . . [the] church."\(^{31}\) "[T]he Supreme Court of Illinois substituted its interpretation of the . . . [c]hurch constitution[s] for that of the highest ecclesiastical tribunals in which church law vests authority to make that interpretation. This the First and Fourteenth Amendments forbid."\(^{32}\) The Court further stated:

"[T]he First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters. When this choice is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the Constitution requires that civil courts accept their decisions as binding upon them."\(^{33}\)

Cases following the *Serbian Eastern Orthodox* rationale are discussed below.

(i) In *Kaufmann v. Sheehan*,\(^{34}\) the Eighth Circuit affirmed dismissal of a defamation and "denial of ecclesiastical due process" suit by a Catholic priest against his bishop, on the ground that the plaintiff's claims related to his status and employment as a priest, matters which are exclusively reserved to internal church authorities.

(ii) In *Congregation Beth Yitzhok v. Briskman*,\(^{35}\) the court refused to extend jurisdiction over a RICO claim brought by one religious faction against a rival faction, on the ground that the court would have to decide who was the true leader of the religion, a purely ecclesiastical issue.

(iii) In *Nunn v. Black*,\(^{36}\) the court dismissed an action brought by expelled church members who claimed that the expulsion was wrongful, on the ground that matters of internal church discipline are beyond the bounds of civil jurisdiction.

c. **Doctrine Still Developing**

The precise scope of the doctrine announced in *Serbian Eastern Or-

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\(^{30}\) Id. at 717.
\(^{31}\) Id. at 720.
\(^{32}\) Id. at 721.
\(^{33}\) Id. at 724-25.
\(^{34}\) 707 F.2d 355 (8th Cir. 1983).
thodox is open to question.

(i) In Serbian Eastern Orthodox, the Court left open the issue of whether a purely ecclesiastical decision can nevertheless be attacked in civil court on the narrow grounds of fraud, collusion, or arbitrariness.27

(ii) In General Council on Finance and Administration, United Methodist Church v. California Superior Court,28 Justice Rehnquist, as Circuit Justice, denied a stay of proceedings in a California state court, partly based on his view that the Serbian Eastern Orthodox rule did not apply to the case. The applicant for the stay was a defendant in a breach of contract and fraud action in state court arising out of the business failure of a nursing home affiliated with the Methodist Church. The defendant General Council had moved to dismiss for lack of personal jurisdiction, relying on the constitution and bylaws of the Methodist Church and on testimony of church officials as to the Council's role in the church hierarchy. The trial court rejected the evidence offered by the Council and reached a contrary interpretation of the church constitution and bylaws. The Council argued that the trial court's independent evaluation of church doctrine violated the Serbian Eastern Orthodox rule that civil courts cannot inquire into matters of church doctrine and organization. Justice Rehnquist disagreed, ruling that:

applicant plainly is wrong when it asserts that the First and Fourteenth Amendments prevent a civil court from independently examining, and making the ultimate decision regarding the structure and actual operation of a hierarchical church and its constituent units in an action such as this. There are constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastical cognizance and polity in adjudicating intra-church disputes . . . . But this Court never has suggested that those constraints . . . apply outside the context of . . . intra-organization disputes. Thus, Serbian Eastern Orthodox and the other cases cited by applicant are not in point. Those cases are premised on a perceived danger that in resolving intra-church disputes the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs . . . . Such considerations are not applicable to purely secular disputes between third parties and a particular defendant, albeit a religious affiliated organization, in which fraud, breach of contract, and statutory violations are alleged.29

Whether Justice Rehnquist's views will be adopted by the full Court is questionable. It should be noted that Justice Rehnquist dissented in Serbian Eastern Orthodox.

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29 Id. at 1372-73.
(iii) In *Ambassador College v. Geotzke*, discussed in greater detail in Part III(B)(2) infra, the court followed Justice Rehnquist's opinion in *United Methodist Council* and held that *Serbian Eastern Orthodox* does not apply to private litigation which does not involve an intra-church dispute.

(iv) A number of courts have held that religious organizations are subject to the employment discrimination prohibitions of Title VII, even where the alleged discriminatory treatment is a form of internal church discipline for the employee's violation of church doctrine.

3. Ongoing State Regulation

In addition to the foregoing limits on civil jurisdiction over ecclesiastical disputes, it is settled that government has no authority to engage in ongoing investigation and regulation of church-related organizations if such action could lead to a chilling effect on the free exercise of religion or an impermissible entanglement of government defining what is or is not “religious.”

a. Catholic Bishop Rule

The leading case is *NLRB v. Catholic Bishop*, which involved whether the National Labor Relations Board can assert jurisdiction over lay faculty members at Catholic schools. The Seventh Circuit denied enforcement of the NLRB order asserting jurisdiction, both on statutory and constitutional grounds, and the Supreme Court affirmed. Although the Court purported to rest its decision on the labor statutes, it also engaged in a detailed discussion of the First Amendment entanglement concerns. The Court perceived at least two instances where NLRB jurisdiction over church school teachers could create risks of entanglement. First, in many instances Catholic schools would defend unfair labor practice charges on the ground that the “challenged actions were mandated by their religious creeds.” According to the Court: “The resolution of such

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675 F.2d 662 (5th Cir. 1982).

See *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981); *EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980).

See *EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272 (9th Cir. 1982); *Dayton Christian Schools v. Ohio Civil Rights Comm'n*, Case No. C-3-80-410 (S.D. Ohio 1984). But see *McClure v. Salvation Army*, 460 F.2d 553, 558-59 (5th Cir. 1972) (holding that Title VII cannot be applied to the employment relationship between a church and its ministers because such matters “must necessarily be recognized as a prime ecclesiastical concern”). Also, it should be noted that § 702 of Title VII exempts religious organizations from employment discrimination based on religious considerations — *i.e.*, religious organizations can discriminate in favor of members of their faith.

559 F.2d 1112 (7th Cir. 1977), aff'd., 440 U.S. 490 (1979).
charges . . . will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions".34 Second, the Court noted that the NLRB would decide the "terms and conditions" of the Catholic teachers' employment, and that "[i]nevitably the Board's inquiry will implicate sensitive issues that open the door to conflicts between clergy-administrators and the Board, or conflicts with negotiators for unions".35 Because of these impermissible risks of entanglement, the Court construed the National Labor Relations Act as not covering teachers in church-related schools.

b. Catholic Bishop and Church Records

The Catholic Bishop approach has been applied to regulatory investigations of church-related activity in which the state sought disclosure of church records. In Surinach v. Pesquera de Busquets,36 the Puerto Rico Department of Consumer Affairs, as part of an ongoing investigation into the operating costs and tuitions of private schools, issued a subpoena to the Bishop to produce the financial records of the Puerto Rico Catholic schools. The Bishop commenced suit in federal court to enjoin the investigation. The district court dismissed the complaint, but the First Circuit reversed and ordered the trial court to issue the injunction. The First Circuit reasoned that the underlying investigation posed a clear risk of involving the government agency in the schools' decisions regarding "the recruitment, allocation, and expenditure of their funds," decisions which are "intimately bound up in their mission of religious education".37 The court concluded that such involvement would: "permit . . . [the state] to intrude upon decisions of religious authorities as to how much money should be expended and how funds should best be allotted to serve the religious goals of the schools . . . . [Such] involvement strikes us as a relationship pregnant with dangers of excessive government direction of church schools and hence of churches."38

c. Subsequent Cases

The Catholic Bishop-Surinach approach has been followed in Ban-

34 Catholic Bishop, 440 U.S. at 502 (emphasis added).
35 Id. at 503.
36 604 f.2d 73 (1st Cir. 1979).
37 Id. at 78.
38 Id. at 79 (quoting Lemon v. Kurtzman, 403 U.S. 602, 620 (1971).
gor Baptist Church v. State of Maine, Taylor v. City of Knoxville, and Sylte v. Metropolitan Government of Nashville, all of which hold that ongoing government investigation or regulation of church-related activity can result in an impermissible entanglement.

d. Limits on Catholic Bishop

The Catholic Bishop-Surinach approach is not without its limitations, as disclosed by the following cases in which the courts did not perceive any impermissible entanglement resulting from government investigation of church-related activity and records.

(i) In Cuesnongle v. Ramos, the First Circuit considered whether the Puerto Rico Department of consumer Affairs' investigation of a college affiliated with the Catholic Church posed the same entanglement concerns as in Surinach. The Cuesnongle court held that it did not. The court reasoned that unlike the parochial schools at issue in Surinach, the college was not "pervasively sectarian" and thus "not primarily carrying on a religious activity in the First Amendment sense". Absent such a "pervasively sectarian" nature, the court held that the potential for entanglement was minimal.

(ii) In Donovan v. Central Baptist Church, the Secretary of labor brought suit to enjoin the church from violating the Fair Labor Standards Act. The church refused to answer interrogatories regarding its employees, claiming that its relationship with its employees was an integral part of its ministry and that application of the minimum wage laws would therefore entangle the government with the church. Although the court recognized the potential validity of the church's contention, it held that the issue went to the ultimate merits, not the discovery request, and therefore ordered the church to answer. The court reasoned that the requested information must be supplied "in order to enable the court to have any meaningful basis to evaluate the First Amendment claims on the merits". The court distinguished Surinach on the ground that in that case there was "no rational end product use of the information which . . . [would] not encroach on . . . First Amendment rights," whereas "the same cannot be said of the information sought in this case."

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60 566 F. Supp. 925 (E.D.Tenn. 1982).
62 713 F.2d 881 (1st Cir. 1983).
63 Id. at 883.
64 96 F.R.D. 4 (S.D. Tex. 1982).
65 Id. at 6.
66 Id. (emphasis added).
In *United States v. Freedom Church,* the IRS was investigating the church's tax-exempt status and issued a subpoena to the church pastor to produce all financial records of the church. When the church refused to comply, the IRS petitioned for and received enforcement by the district court. The First Circuit affirmed. In rejecting the church's First Amendment argument, the court stressed that

"[w]here unconstitutional entanglement has been found, it has been in the government's continuing monitoring or potential for regulating the religious activities under scrutiny. . . . In the present case, the IRS does not seek to regulate or in any way become involved in the religious activities or control the financial matters of the church. It merely seeks to make a determination based on all available and pertinent data of the church's tax exempt status."*

Similar reasoning was expressed and similar results reached in *United States v. Holmes,* and *Ambassador College v. Geotzke,* the free exercise implications of which are discussed in Part III(B)(2) infra.

**D. Summary of Entanglement Issues**

Although the extent to which the entanglement concept limits civil authority over church matters is unclear and still a point of judicial development, an entanglement challenge to the underlying civil action should be considered whenever church records are sought by government or through government process. This is particularly true where the records are sought by the government in litigation commenced by it or in the course of ongoing regulatory activity. It is also true in litigation between private parties which affects internal church policy. For example, suppose a Catholic school lay teacher is terminated for advocating pro-abortion beliefs, and he then brings suit against the Diocesan schools for wrongful termination and also directs a subpoena to the Bishop for documents relating to the abortion issue. The schools should defend the litigation on the ground that it involves matters of internal church policy beyond the scope of civil jurisdiction. The Bishop should move to quash the subpoena on the same ground.

**III. Free Exercise Limits on Compelled Disclosure of Church Records**

If the foregoing entanglement defenses are unavailable to prevent

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*613 F.2d 316 (1st Cir. 1979).*

*Id.* at 320 (emphasis added).

614 F.2d 985 (5th Cir. 1980).

675 F.2d 662 (5th Cir. 1982).*
disclosure of church records sought by civil authorities, disclosure may possibly be avoided by reliance on the Free Exercise Clause, although the courts have shown a reluctance to accept this defense.

A. Elements of a Free Exercise Violation

Whereas the Establishment Clause is concerned primarily with government involvement with religion in the institutional sense, the Free Exercise Clause protects against government "coercion" of individual religious freedom.\(^1\) Proof of a free exercise violation involves a two-part analysis. First, the claimant must demonstrate that the challenged governmental action (e.g., a subpoena directed to a Bishop and seeking church records) "coerces" his religious liberty by placing substantial pressure on him to violate a sincerely held and central tenet of his religion.\(^2\) Second, if such a coercive effect is shown, the burden shifts to the state to demonstrate that its infringement of religious freedom is justified by a sufficiently "compelling state interest."\(^3\) An asserted state interest can be "compelling" only if it is in the "least restrictive alternative" available under the circumstances to achieve the governmental objective.\(^4\)

B. Free Exercise Implications of Compelled Disclosure of Church Documents:

A subpoena demanding production of church-related documents and records can implicate the Free Exercise Clause in two ways. First, the use to which the disclosed information will be put may coerce or threaten coercion of free exercise rights. Second, and more importantly, compelled disclosure itself may contravene a religious requirement (such as a provision of the Code of Canon Law) that the information be maintained in secrecy. Each of these possibilities is discussed below.

1. Use of Disclosed Church Records:

In *Surinach v. Pesquera de Busquets*,\(^5\) discussed in Part II(C)(3) above, the First Circuit also noted that the intended use of the school financial records sought by the state threatened free exercise rights. The court relied on the fact that Canon Law requires the Bishops to operate

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\(^1\) Abington School Dist. v. Schempp, 374 U.S. 203, 223 (1963) ("a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended").


\(^4\) *Sherbert*, 374 U.S. at 407.

\(^5\) 604 F.2d 73 (1st Cir. 1979).
the Catholic schools to achieve "academic excellency and genuine Catholicism." The court characterized this as a "religious duty" imposed on the Bishops, and then reasoned that ongoing state supervision of the financial operations of the schools could force the Bishops to violate or otherwise compromise this duty. According to the court:

The Department [of Consumer Affairs] . . . may conclude that costs are rising too fast and must be contained to a specified level. While such a determination might be consistent with the Department's mandate, it surely could clash with what is a religious belief and practice of those who administer these schools, namely that the highest quality education possible must be provided to their students.\footnote{Id. at 77 (emphasis added).}

The court concluded that the state had failed to show that this burden on religion was justified by any compelling interest or that it was the least restrictive means available.

2. **Compelled Disclosure Alone as a Free Exercise Violation**

   The free exercise question in *Surinach* was decided on the basis of the use which would be made of the subpoenaed documents. The court also noted that "compelled disclosure, in itself, can seriously impinge" upon the free exercise of religion.\footnote{Surinach, 604 F.2d at 79 (quoting Buckley v. Valeo, 424 U.S. 1, 64 (1976)) (emphasis added).}

   a. **Compelled Disclosure and Canon Law**

      Compelled disclosure of church records, in itself, could constitute a free exercise violation where the subpoenaed documents are required by church doctrine to be kept in secrecy. For example, the Code of Canon law requires the Bishops to maintain certain documents in the secret archives of the diocese. If a subpoena sought these documents, the Bishop would be forced to choose between violating Canon Law or contempt of civil authority. Such a conflict is precisely what the Free Exercise Clause is intended to void.

   b. **Case Law**

      The case law dealing with the foregoing situation or analogous ones is mixed, with nearly all courts holding that the subpoenaed documents must be disclosed notwithstanding the potential free exercise violation. The courts which have ruled in favor of disclosure generally have done so on the ground that there was a "compelling" governmental need for the information which outweighed any infringement of religious freedom. The
case law is summarized below.

(i) In *Randle v. Cotter*, a will contest, the petitioner issued a subpoena duces tecum to the Archbishop of Los Angeles to produce the personnel and psychiatric records of Father Patrick Cotter, one of the respondents in the case. The court quashed the subpoena, partly on free exercise grounds, although it gave no analysis to support its decision. This is the only known case in which a court has wholeheartedly accepted a free exercise challenge to a subpoena seeking church documents.

(ii) In *In re Rabbinical Seminary*, a grand jury investigating possible criminal violations of 18 U.S.C., Section 1001, which forbids the making of false statements to a federal agency, issued a subpoena to a seminary for its financial records and documents relating to student loan transactions. The court denied the seminary’s motion to quash, holding that “[p]roduction of the demanded records would [not] violate any tenet of Judaism. The grand jury has not required compliance with the subpoena in a manner at odds with Jewish law or belief.” The court also held that enforcement of the subpoena was justified by the grand jury’s role in criminal prosecution. “While ‘the first amendment right of free association and freedom of religion reach within the closed doors of the grand jury chamber . . ., the investigation of crime by the grand jury implements a fundamental governmental role of securing the safety of the person and property of the citizen’.”

(iii) In *United States v. Holmes*, the IRS, as part of an investigation into the tax-exempt status of a church, sought enforcement of a subpoena requesting all financial records of the church. Although the Fifth Circuit held that the subpoena was overbroad on statutory grounds, the court rejected the church’s free exercise argument, holding that “[b]alanced against the incidental burden on church religious activities is the substantial government interest in maintaining the integrity of its fiscal policies . . . . This interest is sufficiently compelling to justify any incidental infringement of plaintiff’s First Amendment rights.”

(iv) In *Pagano v. Hadley*, a Roman Catholic priest had commenced a defamation action against law enforcement authorities. Defendants, seeking discovery regarding plaintiff’s reputation before and after the incident, served a subpoena duces tecum on the Bishop seeking documents in the plaintiff’s personnel file. The court rejected the Bishop’s free exercise

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84 Case No. NEP-26177 (Cal. Sup. Court 1983).
86 Id. at 1081.
87 Id. at 1083 (quoting *In re Wood*, 430 F. Supp. 41, 45 (S.D.N.Y. 1977)).
88 614 F.2d 985 (5th Cir. 1980).
89 Id. at 990.
90 Case No. 81-381-WKS (D. Del. 1984).
argument that disclosure could violate Canon Law, and ordered enforcement of the subpoena.

(v) In *Roman Catholic Diocese of Tucson v. Superior Court,* the court reached a similar result as in the Pagano case. A Catholic priest had commenced a defamation suit in state court against his former parishioners, and the parishioners served a subpoena duces tecum on the Bishop seeking the priest's personnel records. The Bishop commenced an action in federal court to enjoin enforcement of the subpoena. The federal court denied the Bishop's motion for a preliminary injunction. Although the court recognized that "the Church is threatened with a violation of its law of secrecy," it held that the countervailing "state interest is of the highest order — the state is fulfilling its basic function of rendering justice between citizens." The court found support for this conclusion in that the information sought was not available elsewhere, and the state court had ordered that the records could be used only for purposes of trial but otherwise must remain confidential. The court concluded by stating that "[t]he Diocese has made one potentially convincing objection — that the order will require Church officials to violate Canon Law. But there is no apparent way to accommodate defendants' needs that will result in any lesser violation of Canon Law." The case is currently on appeal to the Ninth Circuit.

(vi) In *Ambassador College v. Geotzke,* the sole heir of a decedent brought suit in state court against a church-affiliated college, claiming that the college had used undue influence and fraud to obtain property under decedent's will. The college refused on First Amendment grounds to answer discovery requests seeking information as to the college's financial matters. As a sanction, the state trial court entered judgment against the college, and the state appellate courts affirmed. The college then commenced this action in federal court for a declaratory judgment that the sanctions imposed in state court violated the college's First Amendment rights. The federal district court dismissed the complaint for lack of a colorable constitutional question, and the Fifth Circuit affirmed. The court stressed that free exercise considerations are minimal in a suit between private parties, where "[t]here is no danger of government seeking to monitor or regulate a religious group." The Geotzke court held:

*[T]he church must respond to discovery requests as any other similarly situated litigant would be required. As the Supreme Court stated in Cantwell . . ., 'Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public.' In the instant case the appellants are accused of

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89 675 F.2d 662 (5th Cir. 1982).
90 Id. at 664.
taking questionable actions, bordering upon fraud. The raising of a first amendment right does not require a balancing test of the interests involved in discovery.\textsuperscript{68}

c. Criticism

Although most of the courts which have compelled disclosure of church documents have done so on a finding of a “compelling state interest,” few have considered whether compelled disclosure was “the least restrictive alternative” under the circumstances. This should be an important consideration in two inter-related respects. First, the court should consider whether the requested documents are “necessary,” or whether the litigation or other governmental action can reasonably proceed without the documents. Second, and perhaps more significantly, the court should consider whether the subpoenaed documents or the information therein is available elsewhere (such as in the form of oral testimony). If either factor is present, compelled disclosure would not be the least restrictive alternative available.

C. Summary of Free Exercise Issues

Thus far, more courts have not looked favorably upon free exercise challenges to subpoenas seeking church records, even where enforcement of the subpoena will cause the custodian of the documents to violate a religious belief. Because of the potential for damaging precedent, careful consideration should be given before raising a free exercise defense.

IV. ALTERNATIVE SOURCES OF CONSTITUTIONAL PROTECTION OF CHURCH-RELATED DOCUMENTS

In addition to protection provided by the religion clauses, the First Amendment guarantees of freedom of association and free speech may, in appropriate cases, be available to prevent compelled disclosure of church-related records.

A. Free Association

In \textit{Buckley v. Valeo},\textsuperscript{69} the Court stated that “compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment”.\textsuperscript{70} In \textit{United States v. Freedom Church},\textsuperscript{71} the court held that freedom of association can prevent compelled disclos-

\textsuperscript{68} Id. at 664-65 (quoting Cantwell v. Connecticut, 310 U.S. 306 (1940))(emphasis added).
\textsuperscript{69} 424 U.S. 1 (1976).
\textsuperscript{70} Id. at 64.
\textsuperscript{71} 613 F.2d 316 (1st Cir. 1979).
ure of church-related documents if "the party asserting the constitutional privilege . . . show[s] that disclosure of the information will be prejudicial to those asserting the privilege, such as exposure to public hostility, or deterrence of free association, or denial of anonymity where there is reason therefor." If such a prejudicial effect is shown, the burden shifts to the government to demonstrate a compelling interest which justifies the invasion of First Amendment right.

B. Free Speech

At least in the area of state investigation and regulation of educational activities by church-related schools, the Free Speech Clause may be available to prevent state regulation, and thereby preclude compelled disclosure of church-related records. Teaching is considered a form of protected speech. In *Cuesnongle v. Ramos*, the court held that the free speech protection accorded to academic freedom and operation of schools can prevent state investigation and regulation if the government action would have a chilling effect on protected rights.

V. Nonconstitutional Sources of Protection

In addition to the possible protection afforded by the First Amendment, protection of church-related documents and records against disclosure to civil authorities may also be available through common law or statutory privilege — the "priest-penitent" or "clergyman's" privilege — or through special statutes enacted to protect church records.

A. The Priest-Penitent Privilege

The privilege is generally governed by state law, and thus varies depending upon the jurisdiction. A few generalizations are set forth below.

1. Historical Basis

The priest-penitent privilege did not exist at common law. However, all but a very few states have now enacted statutes which extend protection to confidential communications to members of the clergy.

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72 Id. at 320 (quoting Bronner v. Commissioner, 72 T.C. 368, 371 (1979)).
73 Buckley, 424 U.S. at 64-65.
75 713 F.2d 881 (1st Cir. 1983).
76 Id. at 884-86.
77 8 J. Wigmore on Evidence § 2394 (1961).
78 C. McCormick on Evidence § 77, at 158 (2d ed. 1972); Reese, Confidential Communications To The Clergy, 24 Ohio St. L.J. 55 (1963).
2. Scope of the Privilege

The statutes which create the privilege are of two general types: those, such as Uniform Rule of Evidence 29, which recognize the privilege but limit it to "confession of culpable conduct made secretly and in confidence by a penitent to a priest in the course of discipline or practice of the church"; and more recent enactments which expand the privilege to all matters of spiritual advice if disclosure thereof would violate a sacred or moral trust. Even under the broader formulation of the privilege, the following elements must be present: (a) The communication must be intended to be confidential and must be held in confidence. (b) The clergyman must be acting in his capacity as a clergyman. (c) The communications must relate to spiritual or religious matters.

3. The Privilege in Federal Court

Under Federal Rule of Evidence 501, a federal court exercising federal question jurisdiction is not bound to follow state statutory privileges. However, the federal courts apparently accept the priest-penitent privilege as a matter of federal "common law."

B. Special Statutes

Louisiana has enacted a special statute designed to protect certain confidential church records from compelled disclosure. The statute (R.S. § 13:3734.2) protects the records of church tribunals on matters relating to marital status or rights.

VI. PROCEDURAL ISSUES IN PROTECTING CHURCH-RELATED DOCUMENTS

The foregoing discussion deals with the substantive bases for protecting church-related documents and records from compelled disclosure. The remainder of this outline addresses the procedural issues which might arise, particularly with respect to attacks upon subpoenas. A related topic is the extent to which federal courts can adjudicate the validity of subpoenas issued by the parallel state courts.

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79 C. McCormick, supra note 78, at § 177, at 158.
80 United States v. Webb, 615 F.2d 828 (9th Cir. 1980).
81 See United States v. Gordon, 655 F.2d 478, 486 (2d Cir. 1981); United States v. Wells, 446 F.2d 2, 4 (2d Cir. 1971).
**A. Civil Litigation**

Under Rule 45(b) of the Federal Rules of Civil Procedure, the person to whom a subpoena duces tecum is directed may move the court to quash the subpoena on the ground that it is "unreasonable and oppressive."

1. **Claim of Privilege**

Rule 45, governing subpoenas, is read in light of Rule 26(c) of the Federal Rules of Civil Procedure and Rule 501 of the Federal Rules of Evidence, which provide the basis for asserting that the documents sought are subject to a privilege, constitutional or otherwise.

2. **Deposition Subpoena**

If the subpoena duces tecum is for production at deposition rather than trial, the party to whom the subpoena is directed can avoid the necessity of a motion to quash by objecting under Rule 45(d) to the attorney designated in the subpoena, thereby placing the burden of going to court on the party seeking the documents.

**B. Criminal Litigation**

Federal Rule of Criminal Procedure 17(c) provides that a person to whom a subpoena duces tecum is directed may move the court to quash the subpoena on the ground that it is "unreasonable or oppressive." Federal Rule of Criminal Procedure 26 and Federal Rule of Evidence 501 form the basis for assertion that the subpoenaed documents are privileged. Also, Federal Rule of Criminal Procedure 15(a), pertaining to depositions in criminal proceedings, states that only non-privileged matters can be the subject of a deposition.

**C. IRS Administrative Subpoenas**

26 U.S.C. Section 7602 authorized the IRS to issue subpoenas in aid of its administrative proceedings and investigations, and to seek enforcement in federal district court. There are two limitations on IRS subpoena authority as it relates to churches and church records.

1. **Good Faith Test**

All IRS subpoenas are subject to a four-part "good faith" test: (a) the IRS investigation is being conducted for a legitimate purpose; (b) the specific inquiry is relevant to that purpose; (c) the information sought is not already in IRS possession; and (d) all administrative steps imposed by
the Internal Revenue Code have been followed.  

2. Statutory Limitation  

26 U.S.C. Section 7605(a) provides that:  

[N]o examination of the books of account of a church . . . shall be made to determine whether such organization may be engaged in the carrying on of an unrelated trade or business or may be otherwise engaged in activities which may be subject to tax as . . . business income of exempt organizations . . ., unless the Secretary . . . believes that such organization may be so engaged and so notifies the organization in advance of the examination. No examination of the religious activities of such an organization shall be made except to the extent necessary to determine whether such organization is a church . . ., and no examination of the books of account of such an organization shall be made other than to the extent necessary to determine the amount of tax imposed by this title.  

D. Federal-State Comity Issues  

Where the subpoena is issued by a state court (or administrative agency), considerations of res judicata and federalism may prevent the party to whom the subpoena is directed from challenging the subpoena on constitutional grounds in federal court.  

1. Res Judicata  

If the party to whom the subpoena is directed moves to quash the subpoena in state court and the motion is denied, res judicata will bar a collateral attack on the subpoena in federal court if the state court decision on the motion is deemed “final” under state law.  

2. Federalism  

Even if the party to whom the subpoena is directed does not move to quash in state court, federalism principles as announced in Younger v. Harris, may preclude a federal court from enjoining enforcement of the subpoena. This would be particularly true where the state is a party to the state court litigation.  

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44 See United States v. Powell, 379 U.S. 48 (1964); United States v. Freedom Church, 613 F.2d 316 (1st Cir. 1979); United States v. Church of Scientology, 520 F.2d 818 (9th Cir. 1975).  
48 See Middlesex County Ethics Comm'n v. Garden State Bar Ass'n, 457 U.S. 423 (1982); C.
3. Other Federal State Questions

Res judicata and the Younger doctrine are the two most significant obstacles to invoking federal court jurisdiction to challenge a state court subpoena. By way of contrast, exhaustion of remedies and the federal anti-injunction statute** should not preclude federal jurisdiction in such a case. A federal court challenge to a state court subpoena would be based on 42 U.S.C. Section 1983. There is no requirement of exhaustion of state administrative or judicial remedies prior to commencement of a Section 1983 action in federal court.  

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**Wright & A. Miller, Federal Practice & Procedure §§ 4251-4255 (1981).**
