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Holistic Medicine and Freedom of Religion

F. Stephen Knippenberg

HOLISTIC MEDICINE AND FREEDOM OF RELIGION

I. INTRODUCTION

Of the personal rights secured by the United States Constitution, few have been so jealously guarded, so resolutely championed as the right of religious freedom.[1] That right is assured by the emphatic language of the first amendment providing that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."[2] Commendable in their objective, it has only been with difficulty that the religion clauses have been applied.[3] The source of that difficulty is easily discerned. Both clauses are "cast in absolute terms, and either . . . if expanded to a logical extreme, would tend to clash with the other."[4] So far as the religion clauses are concerned, then, the United States Supreme Court's task has been one to effect a coalescence of antithetical constitutional imperatives, so that the Court's efforts throughout the religion cases have been described, and are best understood, as attempts to reconcile the two clauses.[5] In *Tulsa Area Hospital Council, Inc. v. Oral Roberts University*[6] the Oklahoma Supreme Court will attempt that task. The court may be called upon to decide whether the state may consider religious beliefs in deciding whether to allow a hospital to be built. Further, the court must decide whether the exclusion of religious attitudes from the state's consideration process violates the free exercise clause.

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1. It has been observed that "[t]he place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind." School Dist. v. Schempp, 374 U.S. 203, 226 (1963). The Court also stated: "It can be truly said, therefore, that today, as in the beginning, our national life reflects a religious people . . . ." *Id.* at 213.

2. U.S. CONST. amend. I.

3. "The difficulty that has historically plagued courts in implementing these provisions stems in part from the fact that their purpose 'was to state an objective, not to write a statute.' Thus, the judiciary has necessarily been left with the task of developing rules and principles to realize the goal of the religion clauses without freezing them into an overly rigid mold." L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-2, at 813 (1978) (footnote omitted).

4. Walz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970).

5. *See* TRIBE, *supra* note 3, § 14-4.

6. No. 53059 (Okla., filed Sept. 10, 1979).

II. JUDICIAL EXPLICATION OF THE RELIGION CLAUSES: THE NEUTRALITY CLAUSES

The United States Supreme Court's efforts to reconcile the clauses have frequently taken the form of historical excursuses by some of the Justices,[7] intended to reveal the purposes of the clauses as envisaged by those who framed the amendment. The direct results of these historical inquiries need not detain us,[8] but it should be noted that certain of them have been adopted by the Court "with remarkable consensus."[9] Moreover, those results have moved the Court to identify certain concerns of the Framers as paramount. Those concerns have profoundly affected the interpretation of the religion clauses.

As to the establishment clause, the above-mentioned historical scholarship has induced the Court to declare that "[i]ts (the establishment clause's) first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and degrade religion."[10] The first and most immediate purpose of the establishment clause was to avert an interdependence of church and state,[11] a purpose predicated upon the notion that the integrity of both government and religion is best preserved where each entity remains self-reliant and independent of the other. But what acts of state will be

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7. Largely through the efforts of Justices Black and Rutledge, the Court has assumed the role of constitutional historian in its quest after the meaning of the religion clauses. TRIBE, *supra* note 2, § 14-3, at 817. *Compare* Everson v. Board of Educ., 330 U.S. 1, 1-18 (1974) (Black, J.) *with id.* at 28-74 (Rutledge, J., dissenting).

This is not to say, however, that reliance upon the intent of the Framers in addressing religion questions has been invariably applauded: "[A]n awareness of history and an appreciation of the aims of the Founding Fathers do not always resolve concrete problems." School Dist. v. Schempp, 374 U.S. 203, 234 (1963). *See, e.g., id.* at 237-38 (Brennan, J., concurring) ("[To] rigidly adhere to views characteristic of the Framers could gravely imperil the freedoms sought by the two religion clauses.").

8. The histories of Black and Rutledge agree that the political-religious philosophies of Jefferson and Madison are the immediate antecedents of the religion clauses. Jefferson feared that a close association of a church and state might lead to ecclesiastical control of governmental matters. He wanted to impose a "wall of separation" between state and church, to avoid the intrusion of religion into secular matters. M. HOWE, THE GARDEN AND THE WILDERNESS 2 (1965). Madison also sought separatism, but his advocacy of this position stemmed from a fear of governmental control of religion, an intrusion of government into matters belonging properly to ecclesiastics. *See* IX THE WRITINGS OF JAMES MADISON 487 (G. Hunt ed. 1910). *See generally* Hunt, *James Madison and Religious Liberty*, 1 AM. HIST. A. REP. 165 (1961).

9. TRIBE, *supra* note § 14-4, at 818. *See, e.g.*, Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 770 (1973); Flast v. Cohen, 392 U.S. 83, 103-04 (1968); School Dist. v. Schempp, 374 U.S. 203, 214 (1963); McGowan v. Maryland, 366 U.S. 420, 430 & n.7, 437-43 (1961).

10. Engel v. Vitale, 370 U.S. 421, 431 (1962). Thus, the historical inquiry reveals a pervading distrust of unified government and religion to be uppermost in the minds of the Framers.

11. *See* note 8 *supra*.

deemed to author that dependence dreaded by the Framers? Three evils have been identified as pregnant with the threat of engendering the forbidden dependence: sponsorship; financial support; and, active involvement of the sovereign in religious matters.[12] The call to avoid these evils was translated by the Court into a mandate of neutrality.[13]

Neutrality, however, is neither an absolute nor a self-defining term;[14] rather, state action is adjudged to be religiously neutral or otherwise by reference to now well-defined principles or tests developed by the Supreme Court over the course of the religion cases. Accordingly, a state is considered to have acted neutrally where it acts pursuant to a secular purpose,[15] the activity has a primarily secular effect,[16] and such action does not yield an excessive entanglement of state with church.[17]

It must not be supposed that these tests are ends in themselves.[18] Instead, they are indices that reveal the presence of the primary evils described above, which evils, in turn, portend the forbidden dependence against which the establishment clause stands.[19] The tests of neutrality, then, serve the historically identified ends of the establishment clause by virtue of their special competence in bringing to bold relief that state activity replete with the evils that lead to interdependence.

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12. *E.g.*, Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970).

13. *See, e.g.*, Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 788 (1973); Tilton v. Richardson, 403 U.S. 672, 683 (1971); Gillette v. United States, 401 U.S. 437, 449 (1971); Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970); School Dist. v. Schempp, 374 U.S. 203, 214 (1963).

14. *See* Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970).

15. *See* notes 50-54 *infra* and accompanying text.

16. *See* notes 59-64 *infra* and accompanying text.

17. *See* notes 70-76 *infra* and accompanying text.

18. The Court has remarked that the tests of establishment are "no more than helpful signposts." Hunt v. McNair, 413 U.S. 734, 741 (1973). The Court has likewise warned "[t]here are always risks in treating criteria . . . as 'tests' in any limiting sense of that term." Tilton v. Richardson, 403 U.S. 672, 678 (1971).

19. In dicta the Court has referred to such a relationship of the primary evils and the establishment clause tests: "In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970).

The Court has also stated:

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion.

Board of Educ. v. Allen, 392 U.S. 236, 243 (1968). Finally, the statute must not foster "an excessive government entanglement with religion." 397 U.S. at 674.

The purpose ordinarily identified with the free exercise clause has a rather more metaphysical underpinning than that attributed to the establishment clause. Historical evidence indicates the purpose of the former to be one of placing religious beliefs entirely outside the concern of the state.[20] This purpose rests squarely upon the determination that such beliefs are so deeply personal in nature as to require their being reserved to the exclusive concern of the individual. Religious beliefs as such, therefore, are given absolute protection in having been withdrawn altogether from matters within the legitimate scope of governmental concern.

While religious beliefs are absolutely protected from regulation, conduct motivated by religious belief cannot be placed beyond the power of the state to regulate.[21] Thus, a distinction has been drawn between beliefs and actions in cases where the Court has been called upon to explicate the language of the free exercise clause.[22] This is not to say, however, that the state may regulate with impunity conduct born of religious belief.[23] Rather, where regulation burdens religiously engendered conduct, the onus falls upon the state to show that its regulation is the least burdensome means available by which to effect a compelling state end.[24]

The free exercise clause, then, imposes certain restrictions upon a

20. *See* School Dist. v. Schempp, 374 U.S. 203, 222-23 (1963); United States v. Ballard, 322 U.S. 78, 86 (1944); Reynolds v. United States, 98 U.S. 145, 162-65 (1879).

21. Cantwell v. Connecticut, 310 U.S. 296, 303-06 (1940). The Court has repeatedly referred to this belief-action distinction. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 220 (1972); Braunfeld v. Brown, 366 U.S. 599, 604 (1961); United States v. Ballard, 322 U.S. 78, 86 (1944). The distinction was originally articulated in Reynolds v. United States, 98 U.S. 145 (1878), wherein the Court observed: "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order." *Id.* at 164.

22. *See* Sherbert v. Verner, 374 U.S. 398 (1963), where the Court recalls from its earlier decisions that "[t]he door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such." *Id.* at 402.

23. So stated the Supreme Court in Wisconsin v. Yoder, 406 U.S. 205 (1972):

> Wisconsin concedes that under the Religion Clauses religious beliefs are absolutely free from the State's control, but it argues that "actions," even though religiously grounded, are outside the protection of the First Amendment. But our decisions have rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause. It is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers. But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause . . . and thus beyond the power of the State to control, even under regulations of general applicability.

Id. at 220 (citations omitted).

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

state's capacity to act to affect even conduct where that conduct is religiously engendered. It must not be supposed, however, that by "burdensome state activity" is meant only the imposition of penalties upon religious practices. A state burdens religion anytime it acts in a manner which has a coercive effect upon religious beliefs. This may be the case where a state witholds its benefits as well.[25] The free exercise clause insists upon a demonstration of least restrictive means to compelling end in this context as well.

It should be apparent that rarely, if ever, are there establishment clause cases or free exercise cases.[26] There are, rather, religion cases sharing each clause. In every case in which a state seeks to include religious institutions among the objects of benign legislation, an establishment clause question is raised; yet, should that same state deliberately exclude religious institutions from among the beneficiaries of state legislation, a free exercise claim is raised. Thus, enlightened resolution of religion clause cases can only be reached through an accommodation of the two clauses, an accommodation arrived at after scrupulous attention has been paid the concerns of each clause.

III. THE CASE

In *Tulsa Area Hospital Council, Inc. v. Oral Roberts University*,[27] the Oklahoma Supreme Court will consider, among other things,[28] the first amendment religion clauses. Simply stated, the facts as they shall be before the Court are as follow.

In late 1977, Oral Roberts University (ORU) announced plans to construct a medical complex,[29] the City of Faith, at its campus in Tulsa, Oklahoma. Pursuant to Oklahoma law, ORU applied to the Oklahoma Health Planning Commission (OHPC) for a Certificate of Need

25. *Id.* at 404-06. The *Sherbert* majority notes an analogy here between free exercise and free speech. *Id.* at 406 n.5.

26. TRIBE, *supra* note 3, § 14-7, at 834.

27. No. 53059 (Okla., filed Sept. 10, 1979).

28. Also under consideration is the Tulsa Area Hospital Council's standing to challenge the Oklahoma Health Planning Commission's action in the Tulsa County District Court under the Oklahoma Administrative Procedures Act, OKLA. STAT. tit. 75, §§ 301-327 (1971), as well as questions regarding the district court's treatment of certain evidentiary matters in reviewing the OHPC proceedings.

29. Brief of Appellant at 1, Tulsa Area Hosp. Council, Inc. v. Oral Roberts Univ., No. 53059 (Okla., filed Sept. 10, 1979). "This complex would consist of three major buildings arising from a common three-story base which houses mechanical systems and support facilities servicing the three towers. Included in the complex is a sixty-story medical clinic-office building, a twenty-story research-continuing education building and a thirty-story hospital." *Id.*

(CON).[30] In considering an application for a CON, the OHPC must determine whether the need for a new hospital facility exists.[31] In reaching that determination, the OHPC is statutorily directed to consider:

> (a) the adequacy of institutional health services in the locality,
>
> (b) the availability of services which may serve as alternatives or substitutes,

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30. The health planning laws involved are formidable in their complexity, but need not detain the reader inordinately. Nevertheless, some general understanding of the procedures involved is necessary. In 1975 the Oklahoma legislature enacted the Institutional Health Services Act, 1975 Okla. Sess. Laws, ch. 276, §§ 1-6 (codified at OKLA. STAT. tit. 63, §§ 2651-2656 (Supp. 1979)), thereby enlisting Oklahoma in a national health planning effort designed to promote the orderly and economically efficacious development of health care facilities across the United States. This effort was a response to the Hill-Burton Act under which massive federal funds were made available for hospital construction in the years immediately following World War II. 42 U.S.C. § 291 (1976). Ultimately, supply came to far exceed demand, construction having continued past need. Oklahoma did not escape this syndrome, and over-supply has been a concern in this state. *See* OKLAHOMA HEALTH PLANNING COUNCIL, HEALTH PLANNING REPORT 1, 4 (1978).

The process for assuring orderly facility growth is the product of a state-federal regulatory coalition. Under the Institutional Health Services Act, OKLA. STAT. tit. 63, §§ 2651-2656 (Supp. 1979), both new and additional facility construction requires a Certificate of Need (CON) from the Oklahoma Health Planning Commission (OHPC) a state agency comprised of the heads of the state departments of Health, Mental Health, and Welfare. OKLA. STAT. tit. 63, § 2651 (Supp. 1979).

Applications for a CON, however, do not begin with OHPC scrutiny; rather, these are first reviewed by the Oklahoma Health Systems Agency (OHSA) a federally funded, nonprofit corporation consisting of thirty members representing consumers and health care providers. This organization makes its recommendation to the OHPC as to the propriety of the new construction proposed. (While that process will not be developed here, the recommendation process is itself complex, consisting of three identifiable aspects, including a public hearing.) The recommendations of the OHSA is advisory only, though they are part of the planning statute and are considered by the OHPC in its disposition of an application for a CON.

The OHPC, upon reaching its own determination of need, advises the federal Department of Health, Education & Welfare. Should the OHPC's recommendation be unfavorable to the applicant, the Social Security Act, 42 U.S.C. § 1320 a-1 (Supp. II 1978), empowers the Secretary of Health, Education & Welfare to withhold, among other things, reimbursement of medicare and medicaid to the extent that patient charges relate to capital expenditures for new or supplementary construction. The purpose of § 1320 a-1 was declared to be, "to be sure that Federal funds appropriated under subchapters V, XVIII, and XIX of this chapter [medicare, medicaid and others] are not used to support unnecessary capital expenditures by or on behalf of health care facilities . . . ." *Id.*

After an unfavorable recommendation to the OHPC by the OHSA, the OHPC decided by unanimous vote on April 26, 1978, to approve the construction of the City of Faith complex, and granted a CON to ORU. (For a scrupulously detailed account of the history of the ORU application for a CON and resistance thereto, see Brief of the Attorney General, Tulsa Area Hosp. Council, Inc. v. Oral Roberts Univ., No. 53059 (Okla., filed Sept. 10, 1979).) For a discussion of the hazards of health care facility oversupply, see A. SOMERS, HOSPITAL REGULATION: THE DILEMMA OF PUBLIC POLICY (1969).

31. OKLA. STAT. tit. 63, § 2651 (Supp. 1979).

> (c) the adequacy of financial resources for the new services,
>
> (d) the availability of sufficient manpower to properly staff and operate the proposed new services,
>
> (e) the availability of both allopathic and osteopathic facilities and services to protect the freedom of patient choice in the locality; and
>
> (f) any other matter which the Commission deems appropriate.[32]

ORU asserted that the City of Faith complex would satisfy three needs,[33] including the needs of the national constituency of the Oral Roberts Ministry for a facility wherein "holistic medicine" might be practiced.[34] After reviewing the ORU application, the OHPC issued a CON to ORU based upon the following findings:[35]

> (1) Mental attitudes and beliefs of people are important to the physical healing process and should be considered by the OHPC in its review of any application.
>
> (2) A national constituency comprising the membership of the Oral Roberts Ministry is possessed of such mental dictates as would affect the health process, such dictates being in the form of religious beliefs.[36]

Having made these determinations, the OHPC observed that no hospital accommodations were available which might address the beliefs of the membership, and ruled that a new facility was needed within the meaning of the statutory command.[37]

Throughout the CON process before the OHPC, the Tulsa Area Hospital Council, Inc., opposed the ORU application. Upon favorable disposition of the application, the Council appealed the OHPC decision to the District Court of Tulsa County.[38] While it was not contended

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32. *Id.* § 2652.

33. ORU described the needs it asserted in its application in the following terms: "(1) The needs of the national constituency of the Oral Roberts Ministry . . . for a facility wherein holistic medicine could be practiced; (2) The needs of the ORU medical school for a hospital wherein clinical training could be provided; (3) The needs of ORU for a hospital wherein clinical research could be conducted." Brief of Appellant at 2.

34. *Id.* Holistic does not refer to "holy" medicine but to medicine which considers "man as a functioning whole, or relat[es] to the conception of man as a functioning whole." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 624 (23d ed. 1957).

35. The Attorney General lists some fourteen findings. Brief of the Attorney General at 4-5.

36. *See* Record at 44-2858 to 59.

37. *Id.*

38. On May 9, 1978, the Tulsa Area Hospital Council appealed to the Tulsa County District Court, naming both ORU and the OHPC as respondents. ORU moved to dismiss the appeal under OKLA. STAT. tit. 75, § 318 (1971), insisting that the Council was not an aggrieved party

that the OHPC might not legitimately consider influential mental attitudes in determining need, the Council argued that religious beliefs could not be counted among such attitudes in considering applications for CONs.[39]

The OHPC determined that psychological and philosophical directives, including those which might be labeled religious dictates, are profound in their effect upon the healing process. The OHPC further determined that a national constituency comprising the Oral Roberts Ministry is possessed of such directives in the form of religious beliefs calling for medical services administered pursuant to a holistic medical philosophy.[40] Recognizing the potential influence of such inclinations in the administration of clinical health care, the OHPC turned to existing facilities in search of any which might address the constituency's holistic requirements.

The District Court of Tulsa County agreed with the Tulsa Area Hospital Council that the manner in which the OHPC found a need for the City of Faith complex was unconstitutional.[41] Specifically, the district court ruled that the OHPC violated the establishment clause of the first amendment in that "when . . . [it] went no further than to determine that there existed a 'need for a hospital practicing a particular type of Holistic Medicine' an advantage was conferred on ORU on solely a religious basis."[42]

Following this conclusion, the trial court proposed its own formula by which, the court suggested, the OHPC could recognize need sufficient to justify issuing a CON to ORU, while avoiding conflict with the establishment clause. The formula would permit the OHPC to take cognizance of the existence of the ORU constituency and of the demand for holistic medicine, though such demand be religiously based. The formula, however, would then direct the OHPC to compare need so identified with the number of hospital beds available in all facilities

within the meaning of the statute and, therefore, lacked standing. At a hearing on July 28, 1978, the District Court denied the motion to dismiss. This Order is now part of the record for appeal, Recort at 262. The appeal taken by the Tulsa Area Hospital Council ultimately resulted in the district court's December 1, 1978, Order. Record at 216.

39. The district court said, "[W]hen the OHPC went no further than to determine that there existed a 'need for a hospital practicing a particular type of Holistic Medicine' an advantage was conferred on ORU on solely a religious basis." Record at 216. The court called upon the OHPC to compare demand (a count taken of the constituency) with available bed-space in all area hospitals. *Id.*

40. Record at 44-2859.

41. Record at 213.

42. *Id.*

in the Tulsa area, whether or not these facilities would minister to the patient's holistic needs.[43] In short, while the court held that the OHPC could legitimately determine that philosophical directives influence clinical care, where such directives are born of religious beliefs, the district court decision would preclude the OHPC from considering those philosophical directives.

Whatever constitutional analysis it might have considered[44] or undertaken, the district court elected not to include that analysis in its order. The only statement the court made reflecting upon the legal conclusion it reached is in the form of a citation from *Gillette v. United States*.[45] From that case, the district court selected two statements: "An attack founded in disparate treatment of religious claims invokes what is perhaps the central purpose of the Establishment Clause—the purpose of ensuring governmental neutrality in matters of religion."[46] "[T]he Establishment Clause stands at least for the proposition that when government activities touch on the religious sphere, they must be secular in purpose, evenhanded in operation, and neutral in primary impact."[47] Apparently, the district court concluded the OHPC had not acted neutrally in considering the ORU application, but on precisely what grounds it so concluded is open to speculation. It is impossible to say from the order whether the district court thought the OHPC acted for a religious purpose, whether it produced a primarily religious effect, or whether its decision to award ORU with a CON would somehow lead to an excessive involvement of state and religious institutions.

IV. APPEAL TO THE OKLAHOMA SUPREME COURT

In any event, the court's order presents the Oklahoma Supreme Court with what is undoubtedly the most difficult first amendment religion clause questions ever addressed by that supreme court.[48] In its

43. *Id.* at 213, 216.

44. The TAHC argued to the district court that granting the CON to ORU would entangle the OHPC in religious matters. *See* notes 71-78 *infra* and accompanying text. The TAHC renewed the argument on appeal. *See* Brief for Appellee at 60. The court, however, never made such a determination, or, if it did, it did not so declare in its order of December 1, 1978.

45. 401 U.S. 437 (1971).

46. *Id.* at 449 (quoted in Record at 216).

47. *Id.* at 450 (quoted in Record at 216).

48. Oklahoma's courts have only infrequently considered the religion clauses. Most recently, the Oklahoma Court of Criminal Appeals considered—and rejected—a free exercise of religion defense of one charged with drug related offenses. Lewellyn v. State, 592 P.2d 538 (Okla. Crim. App. 1979). *Compare* this case *with* Reynolds v. United States, 98 U.S. 244 (1879), wherein Reynolds, a Mormon, unsuccessfully appealed a bigamy conviction on free exercise grounds.

appeal, ORU has asserted as to its constitutional claims that first, the OHPC did not violate the establishment clause, and second, that the district court's "religion-blind" proposal for determining need violates ORU's right of free exercise.[49] Thus, the religious issues before the Oklahoma Supreme Court appear to present themselves in the following terms: Having determined that attitudinal influences may be so profound in their impact upon clinical health care that they warrant consideration in finding need for CON purposes, did the OHPC violate the establishment clause when it counted ORU's religious convictions among such attitudes? Would the *exclusion* of attitudinal influences born of religious conviction from consideration in the CON process violate the free exercise clause?

A. *The Establishment Clause Claim*

1. Secular Purpose Doctrine

The first of the three tests of establishment, the doctrine of secular purpose,[50] requires that a state point to some nonsectarian reason for legislating or regulating.[51] The doctrine is simply a reflex of the immediate purpose of the free exercise clause, to remove religious beliefs from the realm of those items which may be the legitimate object of state concern.[52]

While a government may act only pursuant to secular ends, inci-

49. Brief of Appellant at 56-85.

50. This doctrine has been most clearly described in establishment clause cases, where it has been deemed one of the three tests in an establishment accusation. *See, e.g.*, Hunt v. McNair, 413 U.S. 734, 743 (1973); Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

51. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). The secular purpose doctrine is fundamental to the notion of religious freedom. The principles underpinning it as part of the protection of religious freedom are succinctly stated in Davis v. Beason, 133 U.S. 333, 342 (1890): "With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted . . . ." *Id.*

52. This relationship is useful in explaining certain areas of doctrine, particularly, the belief-action distinction discussed *supra* at note 21. Taken at face value as first articulated in *Reynolds* the distinction is less than helpful. No real distinction is possible, and even where made does not really answer important questions: Does the distinction and its attendant doctrine mean that the state might forbid prayer, which is more fairly described as conduct than belief? Must the state hire a school bus driver whose religious beliefs include the slaughter of children? *See* Hollon v. Pierce, 257 Cal. App. 2d 468, 470, 64 Cal. Rptr. 808, 810 (1968). To pose such questions is to answer them. TRIBE, *supra* note 3, § 14-8, at 838. Here, the secular purpose doctrine comes to the aid of understanding the *Reynolds* dichotomy. As Tribe observes, "Here, as in the context of free speech, the real distinction must be between laws that *aim* only at a *religious aspect* of conduct or seek to achieve a clearly religious end, and laws that *aim* at a *secular dimension* of the subject matter either regulated or supported. It is here that this test (belief-conduct) coalesces with the requirement of secular purpose." *Id.*

dental conformity of a state's purposes with those entertained by religious institutions does not per se invalidate the governmental action.[53] A coincidence of secular and sectarian interests does not threaten those identified evils (here, probably sponsorship) which are the harbingers of dreaded interdependence. Thus, for the most part, where state and religious aims overlap, the Court has looked to a state's express recitation of purpose and has found an establishment clause violation for failure of the secular purpose test only in the complete absence of any secular aim upon which the state may have acted.[54]

In the present case, the inquiry with regard to the secular purpose doctrine may be distilled to this question: Having determined that influential philosophic directives were legitimate factors to be considered in determining statutory need, did the OHPC seek to accomplish a sectarian aim when it considered religious beliefs and their influence on effective health care administration?

This question was never squarely decided or, for that matter, addressed by the district court. Nor was it argued there,[55] a fact which will complicate the question of purpose for the Oklahoma Supreme

53. McGowan v. Maryland, 366 U.S. 420 (1961) (upholding state Sunday closing laws in the face of an establishment clause claim).

54. TRIBE, *supra* note 3, § 14-8, at 836. Moreover, it is immaterial that "[a] possibility always exists . . . that the legitimate objectives of any law or legislative program may be subverted by conscious design . . . . [J]udicial concern about these possibilities cannot . . . warrant striking down a statute as unconstitutional." Tilton v. Richardson, 403 U.S. 672, 679 (1971).

For these reasons, the secular purpose test, however fundamental, has rarely proved decisive, and has been described as a mere "threshold test." TRIBE, *supra* note 3, § 14-8, at 835. A notable exception exists, however, in Epperson v. Arkansas, 393 U.S. 97 (1968). There, the Court found no "suggestion . . . [that] Arkansas' law [could] be justified by considerations of state policy other than [a purpose to support] the religious views of some of its citizens." *Id.* at 107. In support of the notion that a demonstration of any legitimate state purpose will do, however, it is noteworthy that the *Epperson* Court also stated: "The overriding fact is that Arkansas' law selects from the body of knowledge a particular segment [theory of evolution] which it proscribes *for the sole reason* that it is deemed to conflict with a particular religious doctrine . . . ." *Id.* (emphasis added). *But see* School Dist. v. Schempp, 374 U.S. 203 (1963) (state law mandated reading of Bible passage in the public schools). When the law involved in *Schempp*, was challenged under the establishment clause, the state urged that its purpose was not religious, but rather that it was one to promote nonreligious moral inspiration. The Court rejected this contention, declaring that the facts before it were simply altogether inconsistent with the purpose tendered by the state. *Id.* at 224.

55. The TAHC did not, at trial, urge that the OHPC had acted pursuant to a sectarian purpose, nor that the effects of the agency's actions were other than secular. Rather, the Council argued that should the OHPC grant the CON to ORU under the circumstances, a precedent would be established such that other religious groups could not be denied CONs for similar reasons offered in their applications. This would yield repeated state-church intercourse and, it is argued, an entanglement of church and state. *See* Lemon v. Kurtzman, 403 U.S. 602, 624 (1971) (discussing Walz v. Tax Comm'n, 397 U.S. 664 (1970), where this progression argument was rejected, but indicating that that argument was more persuasive under the *Lemon* facts).

Court. Neither the OHPC nor ORU put forward any secular purposes for which the OHPC might have been acting. Speculation in this case, however, need not be ill-informed speculation. The statutory purposes for which the OHPC must act are two-fold. First, the agency must act to assure orderly hospital facility development for economic reasons; second, the OHPC must also act to insure that health care needs are met, either by existing facilities or by the construction of new facilities.[56]

The availability of hospital facilities capable of delivering the most effectual medical services to as many patients as possible—including the membership of the Oral Roberts Ministry—is a concern shared by ORU (for reasons of self-interest) and the OHPC (by virtue of statutory mandate). To this extent the OHPC's aims overlap those of a religious group. On the other hand, it is beyond doubt that the state has a legitimate, if not emphatically compelling, interest in the effective administration of health care to all patients seeking care within its borders. This interest is no less secular because mutually entertained by ORU. In short, this overlap of aims creates no real conflict with the establishment clause.

Arguably, however, the district court did consider and reject implicitly the possibility that the OHPC acted in this case in mere pursuance of its statutory purposes. Indeed, this can be inferred from the language in the trial court's order where the court stated that "an advantage was conferred on ORU on solely a religious basis."[57] This might easily be taken to mean that the court decided that the OHPC acted for religious rather than secular reasons, seeking to fulfill sectarian rather than secular purposes. If this is the determination made on appeal, then the OHPC's manner of finding a need for the City of Faith complex is unconstitutional, and the inquiry need go no further.

As a practical matter, however, it seems unlikely that such was the conclusion of the district court. It is less likely still that the Oklahoma Supreme Court will so construe the trial court's language on appeal. This is particularly true in that the OHPC findings as to the ORU application are as consistent with secular purposes as they are with religious purposes. As ORU argued,

> The observation (the OHPC finding) that attitudes of *whatever* variety are an important factor in a patient's recov-

56. OKLA. STAT. tit. 63, § 2651 (Supp. 1979).
57. Record at 216.

> ery is manifestly a secular observation, an observation susceptible of being made about religion entirely without reference to the internal affairs of religion. Neither is the observation that the Oral Robert's constituency is possessed of certain beliefs which exert such influence anything other than a secular observation.[58]

It is quite true that the OHPC could have made these determinations without intending to advocate the religious beliefs it regarded as potentially influential in administering health care services to a religious group. In short, it seems unlikely that the religious issues on appeal will be decided under the secular purpose doctrine.

2. Secular Effect Doctrine

The principle of secular effect[59] mandates that official activity, whatever its purpose, not produce an effect primarily to advance or inhibit religion.[60] The doctrine does not mandate, however, that the effects a state seeks to produce through its activity may not be realized in a religious context;[61] nor does the doctrine invalidate state action which incidentally advances religion by making the practice of religious traditions less costly or less burdensome.[62] Rather, neutrality of effect contemplates a benevolent neutrality,[63] such that religion may be

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58. Brief of Appellant at 67. ORU, also claimed, "To recognize the impact of beliefs upon health care, and to recognize further that an identifiable group entertains beliefs of that ilk, is in no way to adopt or advocate those beliefs." *Id.*

59. This test, announced as one of the tests of establishment, has free exercise implications as well. As Professor Tribe observes:

> Even if it cannot be shown that a government policy was *aimed* at a religious aspect of behavior, if the essential *effect* of the government's action is to influence—either positively or negatively—the pursuit of a religious tradition or the expression of a religious belief, it should be struck down as violative of the free exercise clause if the effect is negative, and of the establishment clause if positive.

TRIBE, *supra* note 3, § 14-9, at 839.

60. Hunt v. McNair, 413 U.S 734, 741 (1973); Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

61. TRIBE, *supra* note 3, § 14-9, at 839-40. *See also* Tilton v. Richardson, 403 U.S. 672 (1971).

62. The Supreme Court has recognized that incidental benefits to religious institutions in the form of grants of money, materials, and tax relief make the practice of religion easier: "[B]us transportation, textbooks, and tax exemptions all gave aid in the sense that religious bodies would otherwise have been forced to find other sources from which to finance these services. Yet all of these forms of governmental assistance have been upheld." Tilton v. Richardson, 403 U.S. 672, 679 (1971) (citations omitted).

63. Gillette v. United States, 401 U.S. 437, 454 (1971). The notion of benevolent neutrality is described in Walz v. Tax Comm'n, 397 U.S. 664 (1970), as a function of the interplay between the establishment and free exercise clauses.

> The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established

incidentally or indirectly advanced along with the general welfare[64] through beneficent legislative or executive activity.

With regard to the *ORU* case the secular effect inquiry might be phrased in this way: Was the effect of the OHPC's action one primarily advancing the religion of the Oral Roberts Ministry, or would the agency's actions yield a primarily secular effect, attended by an incidental effect to advance the religion of the Oral Roberts Ministry? In addressing this question, a brief review of the OHPC's findings, upon which it based the decision to issue the CON to ORU, might prove helpful. First, the OHPC found that a patient's attitudes and philosophic inclinations operate to influence his capacity for clinical recovery. Accordingly, the OHPC resolved to take cognizance of such matters in arriving at the required statutory need determination. Per-

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religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

Id. at 669. Later in that case, the Court observed, "Few concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise . . . ." *Id.* at 676-77.

A similar notion emerges from Zorach v. Clauson, 343 U.S. 306 (1952). There, however, benevolence was embraced by the term, "accomodation". That is, the government may accomodate its programs to the interests of religious bodies. For an extensive discussion of the notion of accomodation, see TRIBE, *supra* note 3, at § 14-5. A good summary statement of the place of accomodation in the first amendment framework is contained in the following language from *Zorach v. Clauson*:

When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.

343 U.S. at 313-14.

64. In Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370 (1930), the Court had before it a state statute requiring school books to be furnished without charge to all students, whether attending private or public schools. In response to the charge that the statute served no public purpose and, thereby, violated the establishment clause, the Court drew the following conclusion: "[The State's] interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded." *Id.* at 375.

Similarly, in Everson v. Board of Educ., 330 U.S. 1 (1946), the Supreme Court upheld a New Jersey statute authorizing local school districts to provide transportation of school children to and from school, including children attending parochial schools. Therein, the Court announced, "[W]e must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief." *Id.* at 16. The Court implied this same proposition in Wolman v. Walter, 433 U.S. 229 (1977), when it stated, "This Court's decisions contain a common thread to the effect that the provision of health services to all schoolchildren—public and nonpublic—does not have the primary effect of aiding religion." *Id.* at 242. *See also* Lemon v. Kurtzman, 403 U.S. 602, 616-17 (1971).

ceiving the beliefs of the Ministry membership to be convictions of a kind having great clinical significance in successful health care administration to this group, the OHPC authorized the construction of the City of Faith complex.

The Oklahoma Supreme Court's resolution of the secular effect question will turn on the breadth with which it perceives the OHPC's findings. Narrowly viewed, the finding is no more than the agency's conclusion that a particular religious group is possessed of certain convictions about holistic medicine, convictions that show only a membership demand[65] for health care administered pursuant to a particular religious philosophy. If the OHPC's finding so perceived was the basis of its issuing a CON to ORU, it is clear that the Oral Roberts Ministry is directly and primarily advanced. Indeed, it is difficult to imagine how the general welfare would be advanced at all by the favorable disposition of the ORU application.

The findings of the agency, however, may as easily be viewed broadly. Then, the critical finding of the OHPC should be regarded as that which recognized the impact of attitudes and philosophic directives of *all kinds* on health care. Arguably, at least, this finding represents a step forward in reaching enlightened decisions on the question of need for hospital facilities, decisions which consider more than mere bed count figures. This finding might, therefore, be deemed generally beneficial to all who are without access to facilities catering to their special needs. The general welfare is surely enhanced where more complete and efficacious health care is afforded more persons through sensitive and enlightened decision making.

If this is the view taken of the OHPC findings, the primary effect inquiry must be rephrased. In this case, the Ministry membership is suddenly not receiving especial treatment, but is seeking to take advantage of generally beneficial state activity. Specifically, given that the OHPC resolved to consider attitudinal influences in reaching its need decisions, the membership was seeking to have its own attitudinal influences, concededly religious in origin, considered in the agency's CON process on equal footing with other applicants. It is certainly arguable that this is precisely what the OHPC did, and if this is the case, the constitutional inquiry must be stated anew: Was the Oral Roberts Ministry impermissibly advanced when the holistic convictions

65. *See* notes 42-43 *supra* and accompanying text.

of its membership were recognized by the OHPC in the CON process in the same way as *secular* attitudinal influence would be recognized?

This issue is not—and will not—be susceptible of easy disposition. But it may be said with some confidence that so far as the United States Supreme Court is concerned, this sort of equal treatment of religious and secular entities as to benevolent state activity is not beyond the constitutional pale.[66] Indeed, the alternatives are less than satisfactory. To exclude the convictions of a religious group because those convictions are religiously engendered,[67] even where it is clear that such convictions profoundly affect the successful administration of health care services to those possessed of such convictions is hostility, not neutrality.[68] The process employed by the OHPC would be one of segregating those attitudinal influences determined to be religious in origin and disregarding them, although the agency may have deemed them influential in health care.

An inimical treatment of religion, however, is not required by the establishment clause, and to require the OHPC to identify certain convictions to be religious, then to isolate them for singular unfavorable treatment because they are religious is not constitutionally required. Indeed, such action might well be constitutionally proscribed. In any event, resolution of the secular effect question will require cautious concept-structuring of the OHPC findings by the Oklahoma court. Resolution of that issue will turn on the conceptual model the court chooses to adopt. It is here that the most difficulty faces the court.

B. *Entanglement Doctrine*

The third and final test of establishment is concerned with an excessive entanglement of the affairs of state with the affairs of church.[69] The entanglement may be of two sorts identified by the United States Supreme Court, political entanglement or administrative entanglement. Political entanglement describes an involvement of state and church resulting in political division along religious lines,[70] "and reflects a

66. Arguably, an equal protection clause claim presents itself under all such circumstances. *But see* Gillette v. United States, 401 U.S. 437, 449 n.6 (1971).

67. Everson v. Board of Educ., 330 U.S. 1, 16-18 (1947).

68. *Id.*

69. Roemer v. Maryland Pub. Works Bd., 426 U.S. 736, 745 (1976); Lemon v. Kurtzman, 403 U.S. 602, 613 (1971).

70. Meek v. Pittenger, 421 U.S. 349, 372 (1975). *See generally* Tilton v. Richardson, 403 U.S. 672, 386 (1971); Lemon v. Kurtzman, 403 U.S. 602, 622-23 (1971).

characteristically Jeffersonian fear of church intrusion into politics."[71] Administrative entanglement, on the other hand, seeks to avoid an involvement of state and church for fear that the state under such circumstances "might too readily intrude into the spiritual realm."[72]

Whether entanglement is excessive or otherwise, is a question of degree.[73] Certain activities of the state which bring it into contact with religious institutions, however, have long been regarded as fraught with the dangers of excessive entanglement, and have been carefully scrutinized by the United States Supreme Court. In particular, state programs which call for the repeated and regular contact of state and church institutions are regarded with suspicion, inasmuch as these may encourage "extensive state investigation into church operations and finances."[74] As well, associations should generally be avoided which call upon the state to make "difficult classifications of what is or is not religious."[75] For these reasons, continuing aid programs are more likely to result in entanglement which may be described as excessive than are "one time, single purpose" associations between religious and governmental entities.[76]

It takes an extended effort to imagine that the OHPC's favorable disposition of the ORU application for a CON might somehow become an entangling precedent, whatever the constitutional merits of that action otherwise. Granting the certificate does not call upon the OHPC to become involved in the day-to-day matters of the City of Faith complex. Instead, it appears that all contact would cease upon disposition of the application. The point is, of the three principles upon which the Oklahoma Supreme Court could arguably uphold the ruling of the unconstitutionality of the OHPC's actions, the entanglement principle is the least plausible.

C. *The Free Exercise Claim*

On appeal from the trial court's adverse ruling, ORU has asserted

71. TRIBE, *supra* note 3, § 14-12, at 866.

72. *Id.*

73. Roemer v. Maryland Pub. Works Bd., 426 U.S. 736, 766-67 (1976). *See* Tilton v. Richardson, 403 U.S. 672, 688 (1971).

74. Walz v. Tax Comm'n, 397 U.S. 664, 691 (1970) (Brennan, J., concurring). *See* Lemon v. Kurtzman, 403 U.S. 602, 620 (1971).

75. Walz v. Tax Comm'n, 397 U.S. 664, 698 (1970) (Harlan, J., concurring). TRIBE, *supra* note 3, § 14-12, at 869.

76. Roemer v. Maryland Pub. Works Bd., 426 U.S. 736, 766 (1976).

not only that the OHPC did not violate the establishment clause,[77] it argued further that, "[t]o the extent the lower court's order would impose a religiously hostile formula upon the OHPC in calculating need, a formula that would exclude appellant's convictions from consideration, the Order violates appellant's right of free exercise as guaranteed by the First Amendment."[78] Specifically, ORU urged that should religious convictions be excluded from the general class, attitudinal influences, in determining statutory need, the result would be a burden upon its religious practices yielding coercion of beliefs proper by indirection.[79] To adopt a view conforming to that of ORU in this matter, it is necessary first to adopt what was earlier described as a "broad view"[80] of the OHPC findings at issue. From this perspective, ORU's argument becomes at once apparent; the alleged burden upon ORU's religious practices is disclosed. If the beneficial activity of the OHPC resided in its determination that influential attitudes will be considered in the CON process, then to exclude religious convictions because they are religious convictions is to deny religious groups the benefits of official activity available to others with directives rooted in secular convictions.

It is clear that the protection of the free exercise clause reaches not only penalties imposed by the state upon religious practices, but that it also reaches the withholding of state benefits, where to do so would burden religious practice.[81] The prototypical case here is *Sherbert v. Verner*[82] upon which ORU has relied heavily in its argument to the Oklahoma court.[83] In *Sherbert* the United States Supreme Court held that the state impermissibly burdened religious practice where, without exempting Seventh Day Adventists, it denied unemployment benefits to all who refused to work Saturdays.

The burden on religious practice in *Sherbert* is fairly clear. Seventh Day Adventists were forced to elect between collecting unemployment benefits and observing a religious conviction against working Saturdays. The resultant, if indirect, pressure upon the conviction is clear—the individual is urged indirectly to forgo the belief altogether, because the conviction without observance would be of little conse-

77. *See* Brief of Appellant at 56.
78. *Id.* at 76.
79. *Id.* at 80-81.
80. *See* notes 66-67 *supra* and accompanying text.
81. *See* note 25 *supra*.
82. 374 U.S. 398, 404-06 (1963).
83. *See* Brief of Appellant at 78.

quence.[84] The burden upon ORU, however, is not so clear. The "discrimination"[85] argument is somewhat compelling, but it is difficult to imagine how the Ministry membership would be coerced into forfeiting its convictions as to holistic medicine in the event that the OHPC were to exclude religious directives, however influential, from the CON process. ORU is not precluded from applying for and receiving a CON; rather, it would simply be required to make a showing of secular need to be awarded the certificate.[86]

Still, the refusal to consider religious convictions and influences in health care need determination would, arguably, foreclose to ORU one avenue of showing need, an avenue available to those whose attitudes are not born of religious notions. To do so would place ORU in a less favorable position and would make it more difficult for ORU to show need.

Assuming the Oklahoma Supreme Court agrees that the formula advocated by the district court (that is, one foreclosing the effect of religious convictions from consideration in the CON process) burdens ORU's religious practice, the state must show that such a formula is the least burdensome means to some compelling end.[87] With this in mind, two observations about the free exercise test, are in order. First, as to compelling end, the United States Supreme Court has been (at least recently)[88] exacting in its demands. It is clear that a polite nod in the direction of some merely legitimate state inerest will not do.[89] Moreover, it is equally clear that the requirement that the means to such end be the least burdensome or restrictive is no less exacting.[90] In view of

84. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963).

85. Brief of Appellant at 80.

86. *See* notes 43-47 *supra* and accompanying text.

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

88. *Cf.* Reynolds v. United States, 98 U.S. 145 (1879) (upholding polygamy conviction over religious objections). Tribe severely criticizes this decision, suggesting that the amorphous social goal announced by the Court in that case would not, after *Sherbert*, justify the burden upon religious practice involved. TRIBE, *supra* note 3, § 14-10, at 853-54.

89. "The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." Wisconsin v. Yoder, 406 U.S. 205, 215 (1972). In *Yoder*, even the state's concededly paramount interest in public education failed to overbalance the burden upon free exercise. The *Sherbert* Court declared that "[t]he conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order." 374 U.S. 398, 403 (1963). Thomas v. Collins, 323 U.S. 516 (1945) (cited with approval in *Sherbert*, 374 U.S. at 406) noted: "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitations." 323 U.S. at 530.

90. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 408-09 (1963) (distinguishing Braunfeld v. Brown, 366 U.S. 599 (1961) in this respect).

the fairly stubborn adherence called for by the Supreme Court in applying these standards, and assuming the Oklahoma Supreme Court will apply them with equal fervor, the district court's proposal for finding need may not fare well.

The only end to be promoted in excluding religious directives from among those considered in the CON process was the district court's aim to avoid an establishment clause violation. Whether such an end could be regarded as legitimate, let alone compelling, is difficult to say,[91] but accomodations made for free exercise values do not violate the establishment clause.[92] Therefore, if it is determined that the district court's formula will burden ORU's religious practices, it would be no answer to declare that the formula sought the ends of nonestablishment.

It would be more difficult to regard the trial court's religion-free formula as the least burdensome of alternatives open to the OHPC. The alternate route to avoid establishment is that already taken by the OHPC, "an alternative that would not discriminate against the Oral Roberts Ministry."[93] The OHPC could simply continue to recognize religious convictions as influential in the same way as secular convictions are influential.

V. CONCLUSION

The above analysis proceeds from the broad view construction of the OHPC findings described above and assumed by ORU.[94] Absent the Oklahoma court's agreement in this regard, ORU's free exercise claim largely evaporates. It can be said with assurance that this appeal presents the Oklahoma court with religion clause issues of the greatest significance. The court's resolution of the trial court's establishment clause ruling is more likely to turn on the primary effect test and less, if at all, upon the other tests of establishment, the secular purpose doctrine and the concept of excessive entanglement. This possibility, however, does not go far in lessening the difficulty of addressing the establishment clause claim. Even to phrase the primary effect issue will likely prove no mean feat. The court's view of the OHPC findings—

91. This question was raised, but not decided, in McDaniel v. Paty, 435 U.S. 618, 628-29 (1978). *But see* TRIBE, *supra* note 3, § 14-10, at 852.

92. *See* Wisconsin v. Yoder, 406 U.S 205, 220-21 (1971); Sherbert v. Verner, 374 U.S. 398, 409 (1963).

93. Brief of Appellant at 82.

94. *Id.* at 72-75.

either from the broad perspective proffered by appellant or the narrower view—may well be determinative of the issue.

The free exercise claim of ORU also depends heavily upon the broad view of the OHPC findings. Only from this perspective are the appellant's allegations of discriminatory hostile treatment under the trial court's need formula apparent. Only from this perspective does ORU bring itself within the spirit, if not the letter, of *Sherbert v. Verner*[95] upon which ORU so heavily relies. Should ORU's primary effect argument collapse, its free exercise claim is as likely to collapse in its wake.

F. Stephen Knippenberg

95. 374 U.S. 398 (1963).