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CONSTITUTIONAL LAW—First Amendment—Placement of Children in Religiously Affiliated Foster Care Facilities Held Not Violative of Establishment Clause Where State Acts *in loco parentis* to Meet Free Exercise Rights of Children in Its Care. *Wilder v. Sugarman*, 385 F. Supp. 1013 (S.D.N.Y. 1974) (per curiam).

The New York State Constitution provides for the assignment of foster children to "an institution or agency governed by persons, or in the custody of a person, of the same religious persuasion as the child." (matching)[1] It likewise empowers the state to reimburse foster care institutions for the expense of caring for the children (funding).[2]

Plaintiffs, six children for whom guardians were appointed, sought a declaratory judgment that provisions of the New York State Constitution and statutes implementing these constitutional provisions violate the first, eighth, and fourteenth amendments of

1. N.Y. CONST. art. VI, § 32. This intention is implemented by provisions of the New York Social Services Law which provide in part: "1. Whenever a child is committed to any agency . . . such commitment shall be made, when practicable, to an authorized agency under the control of persons of the same religious faith as that of the child." N.Y. SOC. WELFARE LAW § 373 (McKinney 1966), *as amended and retitled*, N.Y. SOC. SERV. LAW § 373 (McKinney Supp. 1974). The Family Court Act specifies that such religious matching "shall, so far as consistent with the best interests of the child, and where practicable, be applied so as to give effect to the religious wishes of the natural mother, if the child is born out-of-wedlock, or if born in-wedlock, the religious wishes of the parents of the child . . . ." N.Y. FAMILY CT. ACT § 116(g) (McKinney Supp. 1974).

2. N.Y. CONST. art. VII, § 8(2) permits the state legislature to provide for "the aid, care and support of neglected and dependent children . . . through agencies and institutions authorized by the state board of social welfare or other state department having the power of inspection thereof, by payments made on a per capita basis directly or through the subdivisions of the state . . . ." *See* N.Y. SOC. SERV. LAW §§ 153(a)-(b) (McKinney Supp. 1974), which provides the statutory scheme for the funding of these social welfare programs. It should be noted that the method by which private foster care facilities receive funds from the state does not involve "direct" subsidies, but reimbursement on a contractual basis. These arrangements involve the foster care facilities and local social service districts. The state, in turn, is authorized to reimburse the local districts for their expenses. *Id.*

the United States Constitution.[3] Defendants were public agencies and officials responsible for the administration of the child care system.[4]

A special three-judge federal court[5] concluded that the New York program did not, on its face, violate the United States Constitution.[6] Pursuant to a pre-trial order the issue before the court was defined as: " '[w]hether New York Social Services Law § 373(1), (2) and (5), New York State Constitution Article 6, § 32, Family Court Act § 116(a), New York Social Services Law § 153 and New York Constitution Article 7, § 8(2) violate the Establishment Clause of the First Amendment to the Constitution of the United States on their face . . . .' "[7] The court recognized that "the issues now before [it] present a clash between the Establishment and Free Exercise Clauses of the First Amendment"[8] and "ascertainment of the proper

3. The decision reached in this opinion relates only to the facial constitutionality of the New York child care program. Accordingly only the question of whether the funding and matching aspects of the New York program violate the first amendment is discussed in this Note. Further proceedings in this case are discussed in N.Y. Times, Mar. 16, 1975, at 1, col. 6.

4. Wilder v. Sugarman, 385 F. Supp. 1013 (S.D.N.Y. 1974) (per curiam). Those named as defendants included the heads of the New York City Human Resources Administration, Special Services for Children, Bureau of Child Welfare, the Administrative Judge of the Family Court, the Commission of the N.Y. State Department of Social Services, and the Executive Director of the N.Y. State Board of Social Welfare, as well as the administrators and directors of the seventy-seven agencies which provide for child care in the City of New York. The religious aspect of the issue is reflected by the *amici curiae* briefs filed on behalf of the Federation of Jewish Philanthropies of New York, the Federation of Protestant Welfare Agencies, Inc., the Roman Catholic Archdiocese of New York, and Catholic Charities, Diocese of Brooklyn. *Id.* at 1015-17.

5. The court was convened pursuant to 28 U.S.C. §§ 2281, 2283 (1970).

6. 385 F. Supp. at 1029.

7. *Id.* at 1018.

8. *Id.* U.S. CONST. amend. I provides in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." This prohibition is made applicable to the states via the fourteenth amendment. Cantwell v. Connecticut, 310 U.S. 296 (1940). "The fundamental concept of liberty embodied in that [fourteenth] Amendment embraces the liberties guaranteed by the First

'wall' between Church and State . . . in a given context is, as always, fraught with difficulties."[9] Balancing these competing claims of the first amendment, the court concluded that when the state acts *in loco parentis* it assumes the obligation of providing for the total well-being of children entrusted to its care, and may constitutionally provide funds to foster care facilities run by religious organizations which meet a child's religious needs.[10]

In *Dickens v. Ernesto,*[11] the New York Court of Appeals passed upon the constitutionality of the same religious matching provisions as were before the court in *Wilder.* Plaintiffs in *Dickens* had filed an application to become adoptive parents. The application was denied on the grounds that the adoptive parents did not have a religious affiliation.[12] The court held that the denial of plaintiffs' application did not infringe their constitutional rights. It reasoned that under the New York Constitution:

> religion is but one of many factors in the placement of a child for adoption and . . . that placement in conformity with "the religious wishes of the parents of the child," though desirable, is not mandatory. . . . Thus, the challenged legislation places primary emphasis on the temporal best interests of the child, although the religious preference of the natural parents remains a relevant consideration.[13]

Amendment." *Id.* at 303. *See also* Everson v. Board of Educ., 330 U.S. 1 (1947).

9. 385 F. Supp. at 1019. *See also* Wisconsin v. Yoder, 406 U.S. 205 (1972) (compulsory education unconstitutional); Tilton v. Richardson, 403 U.S. 672 (1971) (federal funds used for building on sectarian college campus constitutional); Walz v. Tax Comm'n, 397 U.S. 664 (1970) (tax exemptions for church property constitutional); Abington School Dist. v. Schempp, 374 U.S. 203 (1963) (prayer recitation in public schools unconstitutional); Zorach v. Clauson, 343 U.S. 306 (1952) (New York's "released time" program constitutional).

10. 385 F. Supp. at 1026-27.

11. 30 N.Y.2d 61, 281 N.E.2d 153, 330 N.Y.S.2d 346, *appeal dismissed for want of substantial federal question,* 407 U.S. 917 (1972); *see* Annot., 48 A.L.R.3d 383, 410-13 (1973).

12. 30 N.Y.2d at 64, 281 N.E.2d at 154, 330 N.Y.S.2d at 347; *see* 1 FORDHAM URBAN L.J. 106 (1972).

13. 30 N.Y.2d at 65-66, 281 N.E.2d at 155, 330 N.Y.S.2d at 348. *Contra, In re* Adoption of "E," 59 N.J. 36, 279 A.2d 785 (1971) (adoption cannot be denied solely on grounds of prospective parents' lack of religious beliefs). *See also* Annot., 48 A.L.R.3d 366 (1973). The court found that

The decision in *Dickens* was preceded by a line of state decisions which were not always consistent in their interpretation of the matching policy. In *In re Adoption of Maxwell,*[14] the court of appeals took an even less rigid approach to the matching question than it did in *Dickens,* approving an adoption in the best interests of the child, despite religious difference between the child and the adoptive parents.[15] However, in *Starr v. De Rocco,*[16] the court departed from *Maxwell* and held that, absent compelling circumstances to the contrary, custody should be awarded to persons of the same religious persuasion as that of the child.[17]

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nothing in the statutes violated other considerations relevant to the first amendment: "[The relevant legislation] undoubtedly fulfills a 'secular legislative purpose' and certainly reflects and preserves a 'benevolent neutrality' toward religion. And, just as clearly, the 'matching' provisions neither have the 'primary effect' of advancing or inhibiting religion [*sic*] nor foster an 'excessive government entanglement' with church interests." 30 N.Y.2d at 66, 281 N.E.2d at 156, 330 N.Y.S.2d at 349 (citations omitted). *See also* Lemon v. Kurtzman, 403 U.S. 602 (1971); Walz v. Tax Comm'n, 397 U.S. 664 (1970).

14. 4 N.Y.2d 429, 151 N.E.2d 848, 176 N.Y.S.2d 281 (1958). *See also* 10 SYRACUSE L. REV. 124 (1958).

15. *Accord, In re* Adoption of Michael D., 37 App. Div. 2d 78, 322 N.Y.S.2d 532 (4th Dep't 1971); *In re* Efrain C., 63 Misc. 2d 1019, 314 N.Y.S.2d 255 (Family Ct. 1970); *In re* Anonymous, 46 Misc. 2d 928, 261 N.Y.S.2d 439 (Family Ct. 1965). *But see In re* Adoption of "William G. Hale," 207 Misc. 240, 137 N.Y.S.2d 720 (County Ct. 1955) where a petition for adoption was denied under almost exactly similar circumstances.

16. 24 N.Y.2d 1011, 250 N.E.2d 240, 302 N.Y.S.2d 835 (1969) (mem.).

17. *Id.* at 1012, 250 N.E.2d at 240, 302 N.Y.S.2d at 836. This strict approach to religious matching was also applied in the much criticized cases of *In re* Santos, 278 App. Div. 373, 105 N.Y.S.2d 716 (1st Dep't 1951) and *In re* Adoption of Anonymous, 195 Misc. 6, 88 N.Y.S.2d 829 (Sur. Ct. 1949). For criticism of the New York program, see Comment, *A Reconsideration of the Religious Element in Adoption*, 56 CORNELL L. REV. 780 (1971); Note, *Religious Factors in Adoption*, 27 N.Y.U.L. REV. 848 (1952); 28 IND. L.J. 401 (1952); 65 HARV. L. REV. 694 (1952). In light of what had been the more recent trend toward the consideration of religion as only one of many factors in child care cases, the conclusions of the court in *Dickens* seem appropriate and the criticism of the New York approach less justified.

The *Starr* decision clouded the New York position concerning the importance of religious factors in such cases, until *Dickens* held that the matching provisions of the New York Constitution required only that the religious preferences of the parents be considered in such cases.

Defendants in *Wilder* urged the court to adopt the holding of *Dickens* in order to sustain the New York program.[18] The court declined, finding that it could not "compartmentalize one or two laws, such as the religious-matching provision, and ignore their close relationship to others, such as the public funding statutes."[19] Plaintiffs in *Wilder* raised the issue of state funding of religious institutions—a question that was not before the court in *Dickens*.[20]

In *Lemon v. Kurtzman*,[21] the United States Supreme Court promulgated a set of guidelines for determining whether a given statute violated the establishment clause of the first amendment:

> First, the statute must have a secular legislative purpose; second, its principal [*sic*] or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."[22]

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18. 385 F. Supp. at 1022.

19. *Id.* (footnotes omitted). "When New York's religious-matching, funding and foster care laws are considered together as one legislative scheme, we cannot ignore the fact that they authorize the funding of foster care by religious institutions dedicated to the propagation of their respective faiths." *Id.*

20. *Id.* at 1023. The court stated: "Even if we accepted [*Dickens'*] interpretation of the state's religious-matching laws as permissive rather than mandatory—a course which we are prepared to follow since the construction emanates from the state's own highest court and presumably governs those administering the laws—we doubt that *Dickens* 'controls' this case, which deals with *state-funded* religious care." *Id.* (footnote omitted).

21. 403 U.S. 602, 615-22 (1971). In this case, the Court declared unconsitutional statutes of Rhode Island and Pennsylvania which sought to reimburse non-public schools for teacher costs related to non-religious education. *See also* Americans United for the Separation of Church and State v. Dunn, 384 F. Supp. 714 (M.D. Tenn. 1974), *rev. granted sub nom.* Blanton v. Americans United for the Separation of Church and State, 43 U.S.L.W. 3510 (U.S., Mar. 24, 1975).

22. 403 U.S. at 612-13 (citations omitted). The tests expounded in *Lemon* were derived, mainly, from the decisions of the Supreme Court in Walz v. Tax Comm'n, 397 U.S. 664 (1970) (upholding tax exemptions for

Since *Lemon,* the above tripartite test has been frequently applied. In *Levitt v. Committee for Public Education & Religious Liberty,*[23] the United States Supreme Court held unconstitutional a New York statute permitting the reimbursement of non-public schools for expenses incurred in administering tests and preparing reports and records required by state law. The Court held that lump sum payments to these schools violated the *Lemon* tests in that the aid for secular purposes was not distinct and separable from that usable for religious activities.[24]

The Court reached a similar conclusion in *Committee for Public Education & Religious Liberty v. Nyquist,*[25] where it struck down a New York law which provided for reimbursement of non-public schools for maintenance of their facilities and equipment. The statute also permitted the reimbursement of low-income parents for the tuition costs of sending their children to private schools. As in *Levitt,* the Court held that the program failed to distinguish between religious and non-religious facilities[26] which served to advance religion,[27] and created a potential entanglement between the state and religion.[28]

The court in *Wilder* directly confronted the constitutional problem posed by lump sum payments to religiously affiliated institutions. Citing *Nyquist,* it determined that where such government funds may be used for religious purposes, laws authorizing the expenditure of such funds are generally invalid.[29]

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religiously owned property); Board of Educ. v. Allen, 392 U.S. 236 (1968) (upholding a New York statute providing for a loan of textbooks to children in parochial schools); and Everson v. Board of Educ., 330 U.S. 1 (1947) (upholding a New Jersey statute allowing for the reimbursement of parents for the transportation costs of children attending sectarian schools).

23. 413 U.S. 472 (1973).

24. *Id.* at 481-82.

25. 413 U.S. 756 (1973).

26. *Id.* at 774-80; *accord,* Sloan v. Lemon, 413 U.S. 825 (1973), which struck down a similar program in Pennsylvania.

27. 413 U.S. at 788.

28. *Id.* at 794. *See also* Hunt v. McNair, 413 U.S. 734 (1973); Norwood v. Harrison, 413 U.S. 455 (1973).

29. 385 F. Supp. at 1024. The court concluded: "Where there is a pros-

It likewise recognized that the New York statutes, "insofar as they govern foster care, do not have a solely secular purpose. One of the principal objectives is to provide for the religious education of foster children in accordance with the parents' wishes."[30] Thus, a rigid application of the *Lemon* tests would require a finding of unconstitutionality. But the court determined that a rigid application of *Lemon* would be inappropriate. Instead, it adopted a balancing approach[31] designed to implement and protect "other equally important provisions of the Constitution . . . ."[32]

The *Wilder* court concluded that the right and obligation of parents to direct the educational and spiritual upbringing of their children must be given consideration.[33] These parental rights have long been recognized. Justice McReynolds, writing for the United States Supreme Court in *Pierce v. Society of Sisters*,[34] stated:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children . . . . The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[35]

In *Wisconsin v. Yoder*,[36] the Supreme Court sustained a challenge

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pect that governmental payments, direct or indirect, may be used for sectarian purposes, laws authorizing such funding, even though enacted for socially laudable purposes, have been invalidated as violative of the Establishment Clause because their primary or principal effect is to advance religion." *Id.*

30. *Id.* The court rejected defendants' statistical arguments which illustrated that the amounts paid by the state were sufficient only to meet a child's temporal needs: "The important point for present purposes is that, regardless of how the state's statutes are labelled and whether or not payments made under them exceed the actual cost of the child's secular needs, the religious institutions or agencies are free under the statutes to use the funds for advancement of the religions propagated by them." *Id.*

31. *See* text accompanying notes 10-14 *supra.*

32. 385 F. Supp. at 1024.

33. *Id.* at 1025. The question propounded by the court was whether, "since the religious-matching statutes were enacted in recognition of the rights of parents and foster children freely to exercise their religious beliefs, the public interest in free exercise of religion entitles them to be upheld despite their involvement of the state in religion." *Id.*

34. 268 U.S. 510 (1925).

35. *Id.* at 535.

36. 406 U.S. 205 (1972).

by members of the Amish Menonite Church to a Wisconsin statute requiring school attendance until age sixteen. The Court held that such a law could not be applied as against the religious tenets of the parents.[37] Citing *Pierce,* the Court noted that the rights and obligations of parents toward their children extend to "the inculcation of moral standards, religious beliefs, and elements of good citizenship."[38]

The court in *Wilder* concluded that where the state has assumed the responsibility of acting as a "surrogate parent"[39] it is obligated to "enforce the biological parent's individual rights to provide religious direction . . . ."[40] To deny this right would be tantamount to government interference with religion.[41] The court thus rejected a literal reading of the establishment clause that would bar the state from fully exercising its responsibilities as a substitute parent,[42] and concluded that the free exercise clause of the first amendment validated the New York practice.

This interpretation of the establishment clause appears to be a natural extension of Justice Brennan's concurring opinion in

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37. *Id.* at 234.

38. *Id.* at 233. The rights of parents in relation to the free exercise clause are also considered in Board of Educ. v. Barnette, 319 U.S. 624 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940); Meyer v. Nebraska, 262 U.S. 390 (1923); United States v. Jakobson, 325 F.2d 409 (2d Cir. 1963). For illustrations of problems involving parent and child, see Roe v. Doe, 29 N.Y.2d 188, 272 N.E.2d 567, 324 N.Y.S.2d 71 (1971); 46 ST. JOHNS L. REV. 139 (1971). *See also* 2 FORDHAM URBAN L.J. 599 (1974). The courts have, however, restricted this doctrine to specific instances where the health, safety, or morals of a child are jeopardized by the beliefs or activities of the parents. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158 (1944); Reynolds v. United States, 98 U.S. 145 (1878); *cf.* People v. Pierson, 176 N.Y. 201, 68 N.E. 243 (1903); Clark, *Guidelines for the Free Excercise Clause,* 83 HARV. L. REV. 327 (1969); Note, *State Intrusion Into Family Affairs: Justifications and Limitations*, 26 STAN. L. REV. 1383 (1974).

39. 385 F. Supp. at 1026.

40. *Id.*

41. *Id.*

42. The court realized the difficulty it faced and quoted Walz v. Tax Comm'n, 397 U.S. 664 (1970), where the United States Supreme Court recognized that "[n]o perfect or absolute separation [between religion and government] is really possible . . . ." 385 F. Supp. at 1026.

Abington School District v. Schempp.[43]

> There are certain practices, conceivably violative of the Establishment Clause, the striking down of which might seriously interfere with certain religious liberties also protected by the First Amendment. Provisions for churches and chaplains at military establishments for those in the armed services may afford one such example. The like provision by state and federal governments for chaplains in penal institutions may afford another example. It is argued that such provisions may be assumed to contravene the Establishment Clause, yet be sustained on constitutional grounds as necessary to secure to the members of the Armed Forces and prisoners . . . those rights of worship guaranteed under the Free Exercise Clause.[44]

Once *Wilder* "concluded that an accommodation between the Religious Clauses, when they are in conflict, is constitutionally permissible,"[45] the remaining question[46] was "whether New York's religious placement laws are reasonable and necessary."[47] In upholding the New York laws, *Wilder* stated that the first amendment should

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43. 374 U.S. 203, 230 (1963) (Brennan, J., concurring).

44. *Id.* at 296-97 (Brennan, J., concurring) (footnotes omitted). Justice Stewart utilized the same reasoning. He concluded: "The short of the matter is simply that the two relevant clauses of the First Amendment cannot accurately be reflected in a sterile metaphor which by its very nature may distort rather than illumine the problems involved in a particular case." *Id.* at 309 (Stewart, J., dissenting). Another case supporting this view is Horn v. California, 321 F. Supp. 961 (E.D. Cal. 1968), *aff'd mem.*, 436 F.2d 1375 (9th Cir. 1970), *cert. denied*, 401 U.S. 976 (1971), where the district court held, *inter alia*, that the payment of government funds to prison chaplains did not constitute an establishment of religion in derogation of the first amendment. *Accord*, Remmers v. Brewer, 361 F. Supp. 537, 543 (S.D. Iowa 1973), *aff'd*, 494 F.2d 1277 (8th Cir. 1974); Theriault v. Carlson, 339 F. Supp. 375 (N.D. Ga. 1972), *vacated on other grounds*, 495 F.2d 390 (5th Cir. 1974); *cf.*, Note, *Religious Freedom in Prison—Free Exercise vs. The Need for Prison Security*, 36 ALBANY L. REV. 416 (1972). For a broader view of the impact of the free exercise clause upon the establishment clause, see Manning, *The Douglas Concept of God in Government*, 39 WASH. L. REV. 47, 53-57, 65-69 (1964).

45. 385 F. Supp. at 1027.

46. *See* note 1 *supra.*

47. 385 F. Supp. at 1027. The court first pointed to the contributions of religiously-affiliated child care centers. *Id., see*, D. SCHNEIDER & A. DEUTSCH, THE HISTORY OF PUBLIC WELFARE IN NEW YORK STATE 1867-1940, at 5-9 (1941).

be viewed in a "sensible and realistic fashion with a view to achieving whatever reconciliation is reasonably consistent with the purpose and intention of the Founding Fathers."[48]

The *Wilder* plaintiffs argued that the rights of foster children and the wishes of their parents might be satisfied without involving the state in religion if the children were to receive religious instruction outside of a state supported foster care facility.[49] The court pointed out the difficulty with such an approach in a community where there is a wide diversity of religious creeds and practices.[50] Were the state required to ascertain the religious needs of children in its care and oversee their participation in religious practices, it would be involving itself in religion to a far greater extent than presently.[51]

Few issues are more likely to arouse public concern and political controversy as the relationship of the state to religion.[52] The estab-

48. 385 F. Supp. at 1026. *See also* Bradfield v. Roberts, 175 U.S. 291 (1899).

49. 385 F. Supp. at 1028.

50. *Id.*

51. *Id.* at 1028-29. The court provided this illustration: "The parents of a child brought up as a Congregationalist, for instance, might be satisfied with a 'weekly session' of sunday school followed by a short service . . . . But a child raised as a Hassidic Jew would demand a far more pervasive religious upbringing of the type associated with orthodox Judaism . . . . It requires no imagination to appreciate that Quakers, Moslems, Seventh Day Adventists and those of many other religious persuasions would undoubtedly assert perfectly reasonable demands necessitating wide variation in the handling by the state of children of these religions . . . . In our view, the state, if it were required in each case to be responsible for such 'custom-tailoring' of each child's religious training, determining the extent of a child's participation in communal religious activities of his persuasion and supervising the child's transportation to and custody at such activities, would be hopelessly entangled in religion, far beyond its existing simple relationship with foster parents and religious institutions, under which the latter assume all of these responsibilities . . . ." *Id.*; *cf.* Zorach v. Clauson, 343 U.S. 306, 313 (1952). The court further pointed out the practical problem with such a proposal: "Although plaintiffs suggest that non-sectarian homes, agencies or institutions be established, no clue is furnished as to where any such existing facilities might be found or how the capital funds for construction and staffing of new facilities might be provided." 385 F. Supp. at 1028.

52. "The potential divisiveness of such conflict is a threat to the nor-

lishment and free exercise clauses appear to be effective agents in securing the integrity of both the state and religion. As *Wilder* indicates, however, there are instances where the twin provisions of the first amendment, rather than complimenting one another, seem to conflict.[53] To make one absolute at the expense of the other is to upset the delicate balance which the first amendment seeks to achieve.[54]

In *Wilder*, the court attempted to find a balance between the funding aspect of the New York program and the right of parents to direct the spiritual upbringing of their children. In doing so it found sufficient "play in the joints productive of a benevolent neutrality"[55] to accommodate the non-establishment mandate of the first amendment with the no less important fact that "[w]e are a religious people whose institutions presuppose a Supreme Being."[56] In striking such a balance, it may be necessary, as Chief Justice Burger has pointed out, to walk a "tight rope"[57] between the two clauses of the first amendment; it is a tight rope that the court in *Wilder* has successfully traversed.

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mal political process." Lemon v. Kurtzman, 403 U.S. 602, 622 (1971).

53. *See, e.g.*, Zorach v. Clauson, 343 U.S. 306, 312 (1952).

54. 385 F. Supp. at 1026.

55. *Id.* at 1019, *quoting* Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970).

56. Zorach v. Clauson, 343 U.S. 306, 313 (1952).

57. Walz v. Tax Comm'n, 397 U.S. 664, 672 (1970).