WITH THE BEST OF INTENTIONS: THE CONSTITUTIONALITY OF THE STATUTORY SCHEME FOR VOLUNTARY CHILD-CARE AGENCIES IN NEW YORK

I. INTRODUCTION

Traditionally, the State of New York has recognized an obligation to provide for children who have been abandoned, who have been turned over to the authorities by parents who are unwilling or unable to care for them, or who have been adjudged by the New York Family Court to be in need of supervision for a variety of reasons, ranging from juvenile delinquency to parental abuse or neglect.[1] The state's obligation to these children has been codified in the laws.[2]

Although motivated by the best of intentions,[3] the State's method of fulfilling this obligation has been widely criticized.[4] Rather than undertaking the care of these children directly, the State has chosen to engage voluntary agencies by contract to provide services for children in need of care. Owing to historical influences the voluntary agencies are for the most part sectarian.[5] A child who is adjudged by the Family Court to be in need of care is referred to one of three central referral units,[6] which are operated by the Roman Catholic, Jewish and Protestant faiths and which serve as clearing houses for their agencies.[7] Automatic preference is given to a child of an agency's religion[8] and a child will be referred to an agency not of his or her religion only if there are no children of that agency's religion who need the space.[9] Placement according to religion is required by law. The New York State Constitution[10] as well as the regulatory statutes[11] pertaining to the voluntary agencies mandate that placement of a child must, when practicable, be made with an institution affiliated with the child's religion. In practice this generally means that if there is no agency of the child's religion willing or able to accept him or her, the child may spend months or years waiting for care.[12] An indication of the force of this "when practicable" restriction is found in an additional statute requiring that placement of a child in an agency of a dissimilar religious affiliation be explained in a statement of reasons which must be filed with the State.[13] The children whose placement is delayed

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1 D. Ellis, J. Frost, H. Syrett & H. Carman, A History of New York State 314 (rev. ed. 1967) [hereinafter Ellis].

2 N.Y. Soc. Serv. Law § 395-403 (McKinney 1966).

3 Ellis, supra note 1, at 314.

4 Among the latest critics is James Dumpson, the new Commissioner of the Human Resources Administration, who supervises the child-care system. N.Y. Post, Jan. 26, 1974, p. 22, col. 4. See, e.g., Mills, The War Against Children Life, May 19, 1972, at 55.

5 Ellis, supra note 1, at 314-15.

6 Policy Committee, Office of Children's Services, Juvenile Injustice, 14 (1973)[hereinafter Juvenile Injustice].

7 The three central referral units are the Joint Planning Service (Jewish), the Central Referral Unit (Roman Catholic) and the Central Referral Service (Protestant).

8 Juvenile Injustice, supra note 6, at 14.

9 Id. at 8.

10 N.Y. Const. art. VI, § 32 (McKinney 1969), which mandates that judges of the New York Family Court commit children to voluntary child-care agencies according to religion.

11 N.Y. Soc. Serv. Law § 373(1)-(2) (McKinney 1966).

12 "In fact, however, many children remain in the temporary shelters ... for months and sometimes years." Juvenile Injustice, supra note 6, at 8.

13 N.Y. Soc. Serv. Law § 373(5) (McKinney 1966).

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wait in inadequate shelters or homes.[14] Not infrequently, they find their way back to the streets.[15]

Currently the children whose placement is being delayed are overwhelmingly Protestant and black.[16] Because religious sects practiced the same racial segregation as the rest of the nation,[17] blacks are concentrated in six predominantly black Protestant denominations.[18] This factor and the still relatively weak economic position of blacks results, especially in New York City, in a population of children in need of care who are disproportionally Protestant in relation to the agency spaces available.[19] After black Protestant children are referred to voluntary child-care agencies and are rejected by the Roman Catholic and Jewish agencies on the basis of their religion, they must compete for the inadequate number of spaces in Protestant agencies. The losers are sent to state training schools or temporary shelters where they often become permanent residents.[20] The system which began as an attempt to get children off the streets now often sends them to places little better than the streets. For a child who is schizophrenic, mentally retarded, suicidal or addicted the shelters and training schools offer little if any treatment.[21] They are little better than holding centers with minimal facilities.[22] As the former Administrator of the Family Court, Judge Justine Polier, has said, "the system fails to reach out and serve the people it was created to serve."[23]

The failure referred to by Judge Polier has its roots in the history of the New York child-care system. The voluntary child-care agency system began in the reform movement of the early 1800's.[24] At that time many reformers became interested in the idea of special institutions for dependent, delinquent and neglected children.[25] As a result, the first juvenile reformatory in the United States, the House of Refuge for the Juvenile Delinquents in the City of New York, was founded in 1824.[26] Financial aid from the state followed, and soon similar institutions were opened in many other localities throughout the state.[27] By 1866 there were sixty such institutions receiving financial support from both the state and local governments.[28] The use of state funds led to the establishment of a central supervisory body in 1867 to oversee the use of public monies and to set standards.[29]

Meanwhile, in 1853, the New York Juvenile Asylum was founded to receive children between the ages of five and fourteen;[30] in that same year Charles Loring Brace organized the Children's Aid Society, which placed children with Protestant families on farms rather than in institutions.[31] The success of the Children's Aid Society and other similar Protestant groups led Roman Catholics, fearful of having Catholic children placed in Protestant homes, to form their own societies.[32] The

14 Juvenile Injustice, supra note 6, at 8.

15 Mills, supra note 4, at 60.

16 Juvenile Injustice, supra note 6, at 49-53.

17 G. Simpson & J. M. Yinger, Racial and Cultural Minorities (1965); J. M. Yinger, The Scientific Study of Religion (1970).

18 Simpson & Yinger, supra note 17; Yinger, supra note 17.

19 Juvenile Injustice, supra note 6.

20 Id. at 49; Mills, supra note 4, at 60.

21 Juvenile Injustice, supra note 6, at 49-73.

22 Id.

23 Mills, supra note 4, at 64.

24 Ellis, supra note 1, at 314.

25 Id. at 314.

26 Id.

27 Id.

28 Id.

29 Id.

30 Id. at 315.

31 M. Wolins & I. Piliaven, Institution or Foster Family: A Century of Debate 12-13 (1964).

32 Ellis, supra note 1, at 315.

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Catholics and eventually the Jews grew dependent on the institution rather than farm families as an answer to the problem of placement for their dependent and neglected children.[33] Gradually the reliance of the Protestant groups on "farming out" as a solution ended. They too established institutions.

What survived from this early period was a strongly sectarian child-care system,[34] sectarian both in terms of the institutions themselves and the statutory scheme which was evolved to fund and regulate them.[35] This combination has resulted in a situation where the predominant religion of children in need of care is not the religion of a proportionate number of the spaces available in the voluntary agencies. Yet the children must be considered for places in the agencies on the basis of their religion because of state mandate.[36]

Recently these inequities have resulted in legal action. *Wilder v. Sugarman*[37] is a suit challenging the current New York child-care system. It is a class action on behalf of all children in New York City who are in need of care outside their homes and who are black and predominantly of the Protestant faiths. Complainants charged the New York statutory scheme for voluntary child-care agencies with violations of the establishment and free exercise clauses of the first amendment,[38] the cruel and unusual punishment clause of the eighth amendment[39] and the due process and equal protection clauses of the fourteenth amendment.[40] The suit has provoked both criticism of and support for the present system.[41] That there are inequities in this and indeed in any system is not the issue. Rather the issue which *Wilder v. Sugarman*[42] has delineated is whether the inequities violate the constitutional rights of the children in need of care who are supposedly being helped by the system. This Note will consider the question of the constitutionality under the first and fourteenth amendments of New York's statutory scheme for voluntary child-care agencies. Another question is necessarily involved: whether the system is "dysfunctional and ought to be replaced."[43]

II. NEW YORK'S STATUTORY SCHEME AND THE FIRST AMENDMENT

The first amendment proscribes any law (1) "respecting an establishment of religion"[44] or (2) "prohibiting the free exercise thereof."[45] Constitutional challenges involving freedom of religion generally rely on only one of the two clauses.[46] However, in some instances both clauses are relevant since the protected areas overlap.

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33 Wolins & Piliaven, supra note 31, at 13.

34 Id. at 13.

35 N.Y. Const. art. VI, § 32 (McKinney 1969); N.Y. Soc. Serv. Law § 373(1)-(2) (McKinney 1966).

36 N.Y. Fam. Ct. Act. § 116(a) (McKinney 1963).

37 Civil No. 73-2644 (S.D.N.Y., filed June 11, 1973).

38 U.S. Const. amend. I.

39 U.S. Const. amend. VIII.

40 U.S. Const. amend. XIV, § 1.

41 Interview with James Dumpson, Commissioner of the Human Resources Administration, N.Y. Post, Jan. 26, 1974, p. 22, col. 4.

42 Civil No. 73-2644 (S.D.N.Y., filed June 11, 1973).

43 Interview with James Dumpson, Commissioner of the Human Resources Administration, N.Y. Post, Jan. 26, 1974, p. 22, col. 4.

44 U.S. Const. amend. I.

45 Id.

46 See, e.g., Tilton v. Richardson, 403 U.S. 672 (1971); Epperson v. Arkansas, 393 U.S. 97 (1968); Sherbert v. Verner, 374 U.S. 398 (1963).

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Braunfeld v. Brown,[47] for example, involved a Pennsylvania law making it criminal to retail certain items on Sunday. Plaintiff challenged the law as an establishment of religion, alleging the state had religious motives in selecting Sunday as the day of rest, and as an interference with free exercise, alleging that the law had the effect of forcing him to work on his sabbath in order to remain economically competitive with other businesses. The child-care system in New York can also be challenged on both grounds. Therefore it is necessary to consider two separate questions. First, does the child-care system constitute a use of state power to establish religion, contrary to the prohibition of the first amendment? Second, does the child-care system act as an interference by the state with the free exercise of religion, contrary to the guarantee of the first amendment?

A. The Establishment Clause: A Three-Part Test

Modern establishment clause cases have fallen into two basic categories: those involving governmental aid to religious organizations (primarily financial aid to Catholic schools, directly and indirectly)[48] and those involving an intrusion of religious matters into governmental activities.[49] From these cases the Supreme Court has developed a three-part test, first articulated in *Walz v. Tax Commission*.[50] More recently, in four companion cases decided on June 25, 1973,[51] the Court, relying on the three-part standard, commented:

> [T]o pass muster under the establishment clause the law in question, first must reflect a clearly secular legislative purpose, e.g. *Epperson v. Arkansas*, 393 U.S. 97 (1968), second, must have a primary effect that neither advances nor inhibits religion, e.g. *McGowan v. Maryland, supra; School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), and third, must avoid excessive entanglement with religion, *Walz v. Tax Commission, supra*.[52]

1. Primary Effect

The question under this part of the test is whether the statutory scheme for voluntary child-care agencies has a primary effect that either advances or inhibits religion. As the following cases indicate and as the Court has noted, "[t]his test is not easy to apply. . . ."[53] In *Everson v. Board of Education*,[54] where the test was first used, the Court upheld the reimbursement to parents of the cost of their children's transportation by public bus to schools, including both private and parochial. Noting

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47 366 U.S. 599 (1961).

48 Norwood v. Harrison, 413 U.S. 455 (1973) (invalidating a Mississippi textbook loan program which included students in private schools with racially discriminatory policies); Lemon v. Kurtzman, 403 U.S. 602 (1971) (holding state aid to sectarian schools, primarily for teachers' salaries, violative of the establishment clause); Board of Educ. v. Allen, 392 U.S. 236 (1968) (upholding a New York textbook loan program which included students in sectarian schools).

49 Epperson v. Arkansas, 393 U.S. 97 (1968) (invalidating a statute making it unlawful to teach evolution in public schools); McGowan v. Maryland, 366 U.S. 420 (1961) (upholding a Sunday closing law); Zorach v. Clauson, 343 U.S. 306 (1952) (upholding a New York early release program that allowed students to leave public schools early to obtain religious instruction).

50 397 U.S. 664 (1970).

51 Sloan v. Lemon, 413 U.S. 825, rehearing denied, 414 U.S. 881 (1973); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973); Hunt v. McNair, 413 U.S. 734 (1973); Levitt v. Committee for Pub. Educ., 413 U.S. 472 (1973).

52 Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 773 (1973).

53 Board of Educ. v. Allen, 392 U.S. 236, 243 (1968).

54 330 U.S. 1 (1947).

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that "state power is no more to be used to handicap religions, than it is to favor them,"[55] the Court held that the legislation was nothing more than a general program to help parents transport their children, regardless of religion, to and from school safely.[56]

However, in *McCollum v. Board of Education*,[57] the Court held that an Illinois "released time" program which allowed public school classrooms to be used for religious instruction violated the establishment clause.[58] Using the primary effect test, the Court found the use of public school classrooms the key factor in deciding that the state was favoring religion.[59] Unlike *Everson*, which simply allowed the state to provide nonsecular services to all pupils regardless of religion, *McCollum* involved a state endorsement of the religions involved to the fatal extent of putting publicly funded facilities at their disposal for religious uses. In contrast to *McCollum, Zorach v. Clauson*[60] upheld a New York "released time" program in which students were allowed to leave public schools to receive religious instruction elsewhere. The Court noted that the first amendment required the state to be neutral rather then either hostile or friendly to religions.[61] Without the use of public school rooms as in *McCollum*, the Court found only neutrality: "Here, as we have said, the public schools do no more than accommodate their schedules to a program of outside religious instruction."[62]

The line that the Court has drawn in these cases using the primary effect test is not always a clear one. One helpful approach is to remember that the effect may neither benefit nor inhibit religion. Another is to note that there may often be more than one primary effect. The Court, relying heavily on the primary effect test in the 1973 cases,[63] made this point explicitly:

> Our cases simply do not support the notion that a law found to have a "primary" effect to promote some legitimate end under the State's police power is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion.[64]

Several effects of New York's current child-care system might qualify as "direct and immediate" under this interpretation of the primary effect test. Arguably the system advances religion since it gives the religiously affiliated agencies total discretionary power over which children receive the benefits of the child-care system. At the same time another effect of the child-care system is inhibition of religion insofar as the system requires as a price for the adherence to some religions a lesser access to the voluntary child-care agencies and thus to the benefits of the child-care system. It is unnecessary to show that either of these effects is the major effect of the child-care scheme. It is sufficient to show that either advancement or inhibition of religion is a direct and immediate effect.[65]

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55 Id. at 18.
56 Id.
57 333 U.S. 203 (1948).
58 Id.
59 Id.
60 343 U.S. 306 (1952).
61 Id. at 314.
62 Id. at 315.
63 See cases cited in note 51 supra.
64 Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 783-84 n.39 (1973).
65 Id.

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2. *Clear Secular Purpose*

The second inquiry under the three-part test is whether the statutory scheme reflects a clearly secular purpose. Quite simply, this requirement means exactly what it says, that the legislation involved must have an obviously nonreligious aim. Unlike *Abington School District v. Schempp*[66] or *Epperson v. Arkansas*[67] which involved, respectively, a law mandating Bible reading in public schools and an anti-evolution statute preventing any but the Judaic-Christian theory of creation from being taught in public schools, New York's program has a clearly secular legislative purpose — to provide care for children in need of care.[68] That there is a religious aspect to this is not necessarily material so long as a clearly secular legislative purpose is present. For example, the Court has upheld a New York law requiring local public school authorities to lend textbooks to all students in grades seven through twelve, including those attending private schools,[69] on the grounds that the express purpose of the law in question was the furtherance of educational opportunities for the young; even the fact that some religious schools might be involved was not sufficient to make the purpose other than "clearly secular."[70] Similarly, the fact that the statutory scheme for child-care involves religiously affiliated agencies does not give a religious color to the purpose of the legislation.

3. *Excessive Government Entanglement with Religion*

The inquiry under the third part of the standard, whether the state is fostering excessive entanglement with religion, was first pursued in *Walz v. Tax Commission*.[71] The Court, by an eight to one majority, affirmed a state court decision sustaining tax exemptions for religious properties used solely for religious worship. After reviewing the past decisions, the Court noted that a clearly secular legislative purpose was not sufficient to sustain the exemption and commented: "We must also be sure that the end result — the effect — is not an excessive government entanglement with religion."[72]

Thus to avoid violation of the establishment clause, a law must not result in excessive involvement of the state with religion even if that very involvement would permit a law to pass muster under the "primary effect" test. For example, as noted in *Lemon v. Kurtzman*,[73] the very act of carefully supervising and policing implementation of a law to make sure that the effect was neither advancement nor inhibition of religion would constitute "excessive entanglement" and violate the establishment clause.[74] Chief Justice Burger's majority opinion in *Lemon* stated the standard succinctly:

> In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions which are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority. . . .[75]

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66 374 U.S. 203 (1963).

67 393 U.S. 97 (1968).

68 For a discussion of the motivation behind the child-care system, see text accompanying notes 24-35 supra.

69 Board of Educ. v. Allen, 392 U.S. 236 (1968).

70 Id. at 245.

71 397 U.S. 664 (1970).

72 Id. at 674.

73 403 U.S. 602 (1971).

74 Id. at 620.

75 Id. at 615.

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In *Lemon* the Court relied almost exclusively on the "excessive entanglement" test in holding that the Rhode Island Salary Supplement Act of 1969, which supplemented the salaries of teachers of secular subjects in nonpublic elementary schools, violated the establishment clause. In New York's system of voluntary child-care agencies, as in *Lemon*, the character of the institutions is substantially religious and the state's reliance on these institutions seems to give rise to the kind of entangling church-state relationships that the establishment clause seeks to avoid. In addition to interaction between the state and religious agencies mandated by New York's statutes, there is the obvious entanglement through direct financial aid from the state to the sectarian agencies. It is relevant to note that the three-part standard for examining possible violations of the establishment clause was developed to deal with the hard cases where the violation was questionable.[76] Direct financial aid from state to religious institutions has been the easy case, clearly impermissible under the establishment clause. The Court has made this point repeatedly.[77] Justice Black's majority opinion in *Everson* stated the principle:

> No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.[78]

Even indirect aid is rarely permitted. Cases like *Everson* and *Board of Education v. Allen*[79] avoided conflict with the establishment clause by directing aid to parents rather than to schools and by limiting even that aid to services provided to all students, such as busing.[80] Direct aid, as Justice Black said, is impermissible.[81]

However, the New York program for child-care might possibly escape the strictures of the establishment clause because the method of aid here is purchase of care: the state provides funds on the basis of number of children cared for by a given agency, and the state-agency relationship is a contractual one. The Court's first decision on the establishment clause, *Bradfield v. Roberts*,[82] upheld a federal appropriation for the construction of a public ward to be administered as part of a hospital under the control of the Roman Catholic Church, on the basis that it was a contractual purchase of care.[83] That decision, however, may be distinguished. While it involved purchase of care from a sectarian institution, that care did not involve the control over children of an impressionable age that has traditionally been an important factor in establishment clause decisions.[84] Indeed, aid to sectarian colleges and universities has been allowed in part because the children involved are older.[85]

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76 See, e.g., Walz v. Tax Commission, 397 U.S. 664 (1970); Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Everson v. Board of Educ., 330 U.S. 1 (1947).

77 Board of Educ. v. Allen, 392 U.S. 236 (1968); Zorach v. Clauson, 343 U.S. 306; Everson v. Board of Educ., 330 U.S. 1 (1947).

78 330 U.S. at 16.

79 392 U.S. 236 (1963).

80 Everson v. Board of Educ., 330 U.S. 1 (1947).

81 Id. at 16.

82 175 U.S. 291 (1899).

83 Id.

84 See, e.g., Hunt v. McNair, 413 U.S. 734 (1973) (upholding a plan to allow a Baptist College to make use of the state's ability to borrow money at low interest rates through the issuance of revenue bonds); Tilton v. Richardson, 403 U.S. 672 (1971) (upholding federal grants to sectarian colleges and universities for construction of buildings to be used exclusively for secular education). In these cases the Court found that university students were older and thus less susceptible to religious conversion. Two other elements distinguished the above cases from those involving elementary and secondary schools. First, the colleges seek free and critical responses, and second, there is less likelihood of secular and religious mixing and thus less need of federal surveillance.

85 See id.

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Further, the ward being financed in *Bradfield* was open to the public, without regard to religion,[86] while in the child-care system the agencies base admissions on religious grounds. Consequently prior cases indicate that New York's statutory scheme for voluntary child-care agencies is violative of the establishment clause of the first amendment.

New York's reliance on religiously affiliated child-care agencies, its failure to provide adequate alternatives and its regulation and direct funding of those agencies are factors which have led to findings of "excessive entanglement" in other cases.[87] In addition, giving sectarian agencies total discretionary power over which children are to receive the benefits of the child-care system and perhaps, therefore, making those benefits less accessible to children of certain religions may also violate the establishment clause. Finally, the state's direct financial aid to these religiously affiliated agencies has been held in and of itself impermissible under the establishment clause.[88]

B. The Free Exercise Clause

The Supreme Court has had greater difficulty in evolving a test for the free exercise clause than for the establishment clause.[89] In general the Court has limited free exercise of religion when actions have violated important social duties or were subversive of good order, even if the actions were demanded by one's religion.[90] For example, a polygamy conviction of a Mormon was upheld even though the practice of polygamy was a duty of male members of that faith.[91] A Massachusetts statute making it a crime for a minor to sell newspapers, periodicals or merchandise in public places was upheld against the challenge of a member of the Jehovah's Witnesses who believed that it was her religious duty to do so.[92] Recently a district court found equally subversive of good order the claim of the owner of a restaurant that his religious beliefs prevented him from serving blacks.[93] This general rule concerning the limits of free exercise has been applied in cases where a religious practice has a criminal sanction attached to it, for example, use of child labor[94] and practice of polygamy.[95] When the burden on a religious practice is not a criminal sanction the following two-part test is utilized: first, there must be an imposition of a burden on the right of free exercise; second, there must not be a compelling state interest which would justify that burden.[96]

This test has been applied, not without difficulty, in the most recent Supreme Court free exercise cases, *Braunfeld v. Brown*[97] and *Sherbert v. Verner*.[98] Notwith-

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86 175 U.S. at 299.

87 See, e.g., Lemon v. Kurtzman, 403 U.S. 602 (1971).

88 Everson v. Board of Educ., 330 U.S. 1 (1947).

89 See Sherbert v. Verner, 374 U.S. 398 (1963) (Stewart, J., concurring).

90 Prince v. Massachusetts, 321 U.S. 158 (1944); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (upholding the right of schoolchildren to refuse to salute the flag on both first and fourteenth amendment grounds); Cantwell v. Connecticut, 310 U.S. 296 (1940) (holding that the first amendment absolutely prevented state coercion of people to accept a creed, and conditionally protected free exercise of one's religion within general rules of peace and order); Reynolds v. United States, 98 U.S. 145 (1878).

91 Reynolds v. United States, 98 U.S. 145 (1878).

92 Prince v. Massachusetts, 321 U.S. 158 (1944).

93 Newman v. Piggie Park Enterprises, Inc., 256 F. Supp. 941 (D.S.C. 1966), rev'd on other grounds, 377 F.2d 433 (1967).

94 Prince v. Massachusetts, 321 U.S. 158 (1944).

95 Reynolds v. United States, 98 U.S. 145 (1878).

96 Sherbert v. Verner, 374 U.S. 398 (1963); Braunfeld v. Brown, 366 U.S. 599 (1961).

97 366 U.S. 599 (1961).

98 374 U.S. 398 (1963).

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standing the use of the foregoing test, the results in the two cases are seemingly contradictory; indeed one dissenting Justice in the latter case argued that the earlier case had been effectively overruled.[99] In *Braunfeld* the Court upheld a Pennsylvania criminal statute which prohibited the Sunday retail sale of certain merchandise against the claim of appellants, merchants of the Orthodox Jewish faith, that the statute compelled them either to give up observance of their sabbath or to operate at a serious economic disadvantage. The Court found that the compelling interest of the state in setting aside a uniform day of rest overcame any incidental burden on the appellants' free exercise rights. Noting that the statute might in fact result in some economic loss for them, the Court said, "[S]till the option is wholly different than when the legislation attempts to make a religious practice itself unlawful."[100]

In the second case, *Sherbert*, the same test was applied. A member of the Seventh-day Adventist Church has been denied unemployment compensation under a South Carolina statute which provided that in order to be eligible for benefits, a claimant must be available for work, with failure to accept work without good cause constituting grounds for disqualification from benefits.[101] The appellant was disqualified because she refused to accept employment requiring work on Saturday, the sabbath day of her faith. Applying the two-part test, the Court first found that the disqualification imposed a burden on her free exercise of religion by pressuring her to choose between either following her religion and forfeiting unemployment benefits, or abandoning a precept of her faith and accepting a job.[102] The Court found no compelling state interest that could justify the burden imposed.[103] Appellees had suggested the possibility that unscrupulous claimants might feign religious objections to Saturday work and thereby dilute the unemployment compensation fund.[104] Noting that no such contention had been made in the lower courts,[105] the Court pointed out that the prohibition against judicial inquiry into the truth or falsehood of religious beliefs prevents the consideration of such evidence,[106] and further that "it is highly doubtful whether such evidence would be sufficient to warrant a substantial infringement of religious liberties."[107]

The New York statutory scheme for child-care is more closely related to *Braunfeld* and *Sherbert* than to those cases discussed earlier. The burden on the needy child's free exercise is not a criminal sanction. Thus the two-part test, rather then the more general guidelines, seems applicable. Before applying the two-part test, however, it is necessary to analyze the apparent conflict between the *Sherbert* and *Braunfeld* decisions.

The cases may be distinguished by the state interest involved.[108] In *Braunfeld* the state desired to provide a uniform day of rest.[109] The state objective could be accomplished most effectively by allowing no exceptions.[110] To permit exceptions for any reason would defeat the desired uniformity and make it much more difficult to enforce the concept of everyone's being given a day of respite from work. In *Sherbert* the state interest was in providing relief for the unemployed, whose reasons for being

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99 Id. at 421 (Harlan & White, JJ., dissenting): "*First*, despite the Court's protestations to the contrary, the decision necessarily overrules Braunfeld v. Brown. . . ."

100 366 U.S. at 606.

101 S. C. Unemployment Compensation Act.

102 374 U.S. at 404.

103 Id. at 407.

104 Id.

105 Id.

106 United States v. Ballard, 322 U.S. 78, 86 (1944).

107 374 U.S. at 407.

108 See Note, A *Braunfeld v. Brown* Test for Indirect Burdens on the Free Exercise of Religion, 48 Minn. L. Rev. 1165, 1177 (1964) [hereinafter Note, Braunfeld Test].

109 366 U.S. at 602.

110 Note, Braunfeld Test, supra note 108, at 1178.

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unemployed were legitimate.[111] It was best achieved when all those in that category received benefits.[112] The Court simply expanded the category of legitimate reasons for unemployment to include religious beliefs. Using this analysis, the apparent contradictions between the cases are resolved. In both the Court has dealt with how a legitimate state interest could best be reached.

1. Imposition of a Burden

Although the child-care system, by mandating placement of children in voluntary agencies according to religion, appears to protect the free exercise rights of the children by preventing their exposure to an alien religion at an impressionable age and offering them ready access to instruction in their own religion, in practice it may result in violation of that freedom. Clearly, Protestant children are penalized for being Protestants insofar as they are sometimes forced to choose between their right to profess their religion and their right to essential services. Thus the statutory imposition of this dilemma often burdens the right of free exercise, fulfilling the first requirement of the Court's two-part test.

2. Compelling State Interest

The second part of the test asks whether there is a compelling state interest to justify that burden. If there is a state interest, undoubtedly it is to protect these children and to give them the necessary guidance and education to enable them to adjust to society.[113] The current system thwarts this interest to the extent that it denies some of these children access to the voluntary agencies. This situation is similar to that in *Sherbert*, for both involve classes of people who are being denied access to state-financed welfare programs on the basis of their religion. As in *Sherbert*, the goal of providing benefits for those in need of them is obviously better achieved by providing that care for all such persons. If there is a state interest here, it is to provide care, not for children of given religions, but for children in need of care, whatever their religion.

3. Other Tests

Those who have found the differences between *Braunfeld* and *Sherbert* insufficient to distinguish the two cases have suggested a variety of tests by which to measure alleged violations of the free exercise clause. The major test suggested is that of "neutrality." One commentator has asserted that this method of analysis reads the establishment clause and the free exercise clause as stating a single precept: that government cannot utilize religion for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden.[114] Under this test *Sherbert* would be reversed, since use of religion as a justification for failing to accept work would be to "single out for financial assistance those whose behavior is religiously motivated, even though it denies such assistance to others whose identical behavior (in this case, inability to work on Saturdays) is not religiously motivated."[115] In mandating placement on the basis of

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111 378 U.S. 398 (1963).

112 Note, Braunfeld Test, supra note 108, at 1178.

113 See, e.g., In re Whitmore, 47 N.Y.S.2d 143, 146 (Dom. Rel. Ct. 1944) (a neglect hearing).

114 Kurland, Of Church and State and the Supreme Court, 29 U. Chi. L. Rev. 1, 6 (1961).

115 378 U.S. at 422 (Harlan, J., dissenting).

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religion, the New York child-care system seems both to confer a benefit and impose a burden, depending on which religion is involved. Even under Justice Harlan's dissenting view in *Sherbert*, that the state could, if it wished, use religion as a basis to widen the availability of benefits (i.e., make religious scruples a legal release from some conditions otherwise mandatory),[116] the statutory scheme would appear invalid. At no point does he suggest that religion may be used as a basis to narrow availability of benefits. In addition, the "neutrality" principle is, as one commentator has said, "particularly weak as a justification for public expenditures that support welfare programs under religious auspices. . . ."[117]

Another solution that has been advanced for the "dilemma" of *Braunfeld* and *Sherbert* is that the free exercise clause should be interpreted to assure equality of treatment, with special protection only for acts of worship.[118] Under this test the child-care system appears no less faulty than under the other tests. No act of worship is involved and the treatment is apparently unequal, particularly since the statutes mandate inequality of treatment on the basis of religion.

By none of the tests delineated here does the statutory scheme for voluntary child-care agencies seem to escape the mandate of the free exercise clause. It imposes a burden on the free exercise of religion, without fulfilling a state interest that is sufficiently compelling to justify that burden. It is hardly neutral for a classification to bestow a benefit or to impose a burden in terms of religion. Rather, it requires inequality of treatment. As the Court reiterated in *Sherbert v. Verner*:[119]

> This holding but reaffirms a principle that we announced a decade and a half ago, namely that no State may "exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation."[120]

III. THE STATUTORY SCHEME AND THE FOURTEENTH AMENDMENT

The fourteenth amendment guarantees that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[121] While the equal protection clause was, with the rest of the fourteenth amendment, formulated to eradicate all vestiges of slavery[122] and has been utilized most dramatically in cases of racial discrimination,[123] it is equally applicable in cases of discrimination predicated on other than racial grounds.[124] The statutory scheme for voluntary child-care agencies involves two kinds of discrimination: religious and racial.

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116 Id.

117 Giannella, Religious Liberty, Nonestablishment, and Doctrinal Development, 81 Harv. L. Rev. 513, 519 (1968).

118 Fernandez, The Free Exercise of Religion, 36 S. Cal. L. Rev. 546, 586 (1963).

119 374 U.S. 398 (1968).

120 Id. at 410.

121 U.S. Const. amend. XIV.

122 See The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

123 See, e.g., Reitman v. Mulkey, 387 U.S. 369 (1967); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Brown v. Board of Educ., 347 U.S. 483 (1954).

124 See, e.g., Frontiero v. Richardson, 411 U.S. 677 (1973) (women); Reed v. Reed, 404 U.S. 71 (1971) (women); Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948) (aliens); Oyama v. California, 332 U.S. 633 (1948) (aliens).

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A. De Jure Religious Discrimination: The Statutory Scheme on its Face

The New York legislation consists of two sets of statutes, funding[125] and placement.[126] The funding statutes provide that the state will care for neglected and dependent children through authorized child-care agencies and reimburse the agencies through the local welfare districts. As previously discussed, the placement statutes mandate placement according to religion "when practicable."[127] Thus they require that children be classified according to religion. In equal protection analysis three factors must be present to sustain a constitutional attack.[128] First, there must be a statutory classification which affects members of the class adversely. Second, there must be state action involved. Third, the state interest must be insufficient to justify the burden upon the affected class.

1. Classification

The legislation clearly distinguishes between persons on the basis of their religion. This can be ascertained by a simple reading of the placement statutes.[129] Such classification is found as well in the state constitution.[130] That this classification affects its members adversely is equally clear. Those children who are classified Protestant under the laws are faced with the sorry choice of either professing their religion and risking a greater chance of assignment to inferior treatment facilities or giving up their religion and thus increasing their chance to be admitted to a voluntary agency.

2. State Action

Here, while state action is a major question, it is not a troublesome one. Clearly state action is present when the laws of the state classify by religion and implement that classification with funding and regulation. The fact that the agencies are not strictly speaking a part of the state but are engaged in a contractual relationship, a "purchase of care" arrangement, is not enough to dispell the shadow of state action. In *Burton v. Wilmington Parking Authority*[131] a contract between the state and a coffee shop in a state owned and state regulated parking facility presented a similar situation. The state in that case failed to prohibit discrimination in the terms of the contract despite its ability to do so. The Court found that failure contributory to an overall state involvement in the racial discrimination practiced by the coffee shop.[132] As the Court stated:

> [N]o state may effectively abdicate its responsbilities by either ignoring them or by merely failing to discharge them whatever the motive may be. . . . By its inaction, the Authority, and through it the State, has not only made itself a

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125 N.Y. Const. art. VII, § 8(2) (McKinney 1969); N.Y. Soc. Serv. Law § 153 (McKinney Supp. 1973-74).

126 N.Y. Const. art. VI, § 32 (McKinney 1969); N.Y. Fam. Ct. Act § 116(a) (McKinney 1963); N.Y. Soc. Serv. Law § 373(1)-(2) (McKinney Supp. 1973-74).

127 See text accompanying notes 10-13 supra.

128 See generally Note, Developments in the Law — Equal Protection, 82 Harv. L. Rev. 1065 (1969); Tussman & tenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341 (1949).

129 N.Y. Const. art. VI, § 32 (McKinney 1969); N.Y. Fam. Ct. Act § 116(a) (McKinney 1963); N.Y. Soc. Serv. Law § 373(1)-(2) (McKinney Supp. 1973-74).

130 N.Y. Const. art. VI, § 32 (McKinney 1969).

131 365 U.S. 715 (1961).

132 Id.

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party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination.[133]

In the case of New York's child-care system the argument for the presence of state action would seem to be much stronger because the state is putting its power behind discrimination not by inaction but by statutory action. Even without the statutory mandate regarding placement,[134] the regulatory,[135] funding[136] and reliance involvements of the state with the agencies seem to represent an interdependence that makes the state "a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment."[137]

The relationships which constitute state action seem to have been narrowed with *Moose Lodge No. 107 v. Irvis*,[138] but not sufficiently to affect the child-care system relationship. *Moose Lodge* held that a state liquor board's enforcement of the state regulatory scheme was insufficient by itself to implicate the state in the disriminatory guest policies of a private club holding a state liquor license. The involvement of the state in the voluntary child-care agency system is, as indicated previously,[139] far more direct and extensive. As the Court carefully pointed out in *Moose Lodge*, the organization involved was not publicly funded[140] and did not discharge a function or perform a service that "would otherwise in all likelihood be performed by the State."[141] The child-care agencies, however, are both publicly funded and performing a service that would otherwise be performed by the state.

3. State Interest

Beyond a classification that adversely affects its members and state action, a third element must be considered: whether there is a state interest sufficient to justify that classification. Two different standards are involved in the determination. The "reasonableness" test is usually applied to statutory classifications. It requires that the law have a proper purpose, that the classification be reasonably related to the objective of the law and that the effect on those classified not be oppressive in terms of the good accomplished. When the classification is "suspect" or restricts some "fundamental freedom" the classification must also meet a compelling state interest test.[142] The Court has clearly indicated that freedom of religion is a fundamental freedom and thus any infringement upon it must meet the second test. Justice Brennan made this apparent in *Sherbert* by stating that, in such a highly sensitive constitutional area, "[i]t is basic that no showing of merely a rational relationship to some colorable state interest would suffice...."[143]

In recent years these tests have sometimes merged, as in *Weber v. Aetna Casualty & Surety Co.*[144] There the Court seemed to apply a test balancing the legitimate state

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133 Id. at 725.

134 N.Y. Fam. Ct. Act § 116(a) (McKinney 1963); N.Y. Soc. Serv. Law § 373(1)-(2) (McKinney Supp. 1973-74).

135 N.Y. Exec. Law § 730 (McKinney 1971).

136 N.Y. Soc. Serv. Law § 153 (McKinney 1972).

137 Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961).

138 407 U.S. 163 (1972).

139 See text accompanying notes 129-134 supra.

140 407 U.S. at 171.

141 Id. at 175.

142 See Shapiro v. Thompson, 394 U.S. 618 (1969); Williams v. Rhodes, 393 U.S. 23 (1968); Korematsu v. United States, 323 U.S. 214 (1944).

143 374 U.S. at 401.

144 406 U.S. 164 (1972).

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interest in classifying illegitimates differently under a workmen's compensation law against the fundamental rights of the illegitimates that the classification disadvantaged, and found the latter controlling. Even under that standard, it is doubtful that the child-care scheme would be found constitutional.

If there is any state interest in classifying these children on the basis of religion it would seem to relate back to the early fears of the sectarian founders of child-care institutions that children of one religion might be exposed to the teachings of another religion and converted.[145] The state is apparently attempting to protect the free exercise rights of the children. In this attempt the state has failed. Children whose religion is proportionately under-represented go to either an agency of a different religion or, in many cases, to a training school or city shelter.[146] Other children are arbitrarily labelled Protestant if they are not Roman Catholic or Jewish, even if they are of a different or no religion.[147] Thus some children are denied access to an agency of their own religious affiliation, some children are placed in agencies of another religious affiliation and children of minority religions are treated as Protestant. Rather than protecting the free exercise rights, the state infringes them. Thus some children are being penalized for professing a religion. Moreover, the legislation appears to influence children to profess that religion most likely to gain them access to child-care agencies.

Accordingly, New York's child-care legislation seems to meet all three tests for de jure religious discrimination. There is a classification that affects its members adversely. There is state action in several respects, most importantly, substantial financial support. Finally, the state interest, however compelling, is not served by the infringement of the child's fundamental right of free exercise of religion. As Justice Brennan concluded after a similar analysis in *Lemon v. Kurtzman*:[148]

> [W]hen a sectarian institution accepts state financial aid it becomes obligated under the Equal Protection Clause of the Fourteenth Amendment not to discriminate in admissions policies. . . .[149]

B. De Facto Racial Discrimination: The Statutory Scheme as Applied

The New York child-care legislation, as enforced, also discriminates according to race. Although the statutes and the state constitution are silent as to race, racial discrimination may be a de facto part of the child-care system. De facto discrimination is a result partly of the current structure of the system[150] and partly of racial biases on the part of those who control admissions to child-care agencies.[151] To the extent that the agencies are discriminating against black children because they are of a religion other than the agency's, the racial discrimination is a result of the concentration of blacks in Protestant religions, rather than of any prejudice. Because the religious classification is drawn to protect a first amendment freedom, the child's right of free exercise, such de facto segregation would be of little concern if there were sufficient facilities for all the children. But the racial discrimination extends beyond these aspects.

The most recent study of the New York City child-care system[152] found that

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145 Wolings & Piliaven, supra note 31, at 8.

146 Juvenile Injustice, supra note 6, at 14.

147 Id.

148 403 U.S. 602 (1971).

149 Id. at 651 (concurring opinion).

150 See text accompanying notes 16-21 supra.

151 Juvenile Injustice, supra note 6, at ii.

152 Id.

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"minority group children are not accepted by the voluntary agencies on an equal basis with white children."[153] Using a representative sample, the study found that 88 percent of the white children who were placed went to the voluntary agencies but only 53 percent of the black children and 55 percent of the Puerto Rican children who were placed were accepted by voluntary agencies.[154] The study termed these disparities "shocking,"[155] and noted that "racism consciously or unconsciously, pervades the child-care system."[156] Other studies have come to substantially the same conclusions.[157]

Were this discrimination directly mandated by legislation there is no doubt it would be unconstitutional.[158] Even a simple finding of state intent to segregate would suffice. The Court has recently noted that the essential elements of de jure segregation are "a current condition of segregation resulting from intentional state action."[159] Where there is no state intent there is no de jure discrimination.[160] But the fact that the discrimination in the child-care system is de facto does not remove it from constitutional scrutiny.[161] If the voluntary child-care agencies are "purely private" their admissions policies might lie beyond the reach of the fourteenth amendment.[162] In fact, however, they are dependent on state funds. This state financial support, even without the other state involvements, negates the agencies' private right to indulge their racial biases.

It can be argued that the discrimination practiced by the agencies is not related to race. The disparity in statistics has been attributed to the fact that nonwhites more often have "undesirable backgrounds,"[163] such as a history of assault, drug use, suicide attempts or absconding, which make them less "suitable" for placement in a child-care agency. However, the purpose of the child-care system is to provide care for those children in need of care.[164] Those children most in need, those with histories of severe problems, are the least likely to gain access to the benefits of the system.[165] Those children, after being rejected by the agencies are, as a last resort, remanded to state training schools, where they are unlikely to receive the care they need.[166] Rejected even by the state training schools, some end up in a children's detention center where they may wait years for placement and treatment.[167] It is as though hospitals turned away the emergency cases, admitting only those with colds and sore throats. A state interest in providing care for needy children might be compelling enough to justify a system that discriminated in favor of those children with the most severe problems; it does not seem to be compelling enough to justify one that

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153 Id. at 51.

154 Id. at 49.

155 Id.

156 Id. at ii.

157 See, e.g., National Council on Crime and Delinquency, Juvenile Justice Confounded: Pretensions and Realities of Treatment Services (1972).

158 See Loving v. Virginia, 388 U.S. 1 (1967).

159 Keyes v. Denver School Dist. No. 1, 413 U.S. 189, 205 (1973).

160 Id. at 208.

161 Id.

162 See, e.g., Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961): "It is clear, as it always has been since the Civil Rights Cases, ... that private conduct abridging individual rights does no violence to the Equal Protection Clause...."

163 Juvenile Injustice, supra note 6, at 58.

164 See text accompanying notes 24-35 supra.

165 Juvenile Injustice, supra note 6, at 58.

166 Mills, supra note 4, at 56.

167 Id. at 60.

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discriminates against such children. That those children are more often nonwhite makes that discrimination even more constitutionally suspect.[168]

IV. THE ADOPTION ANALOGY: *DICKENS V. ERNESTO*

The same statutes that govern placement of children in voluntary child-care agencies, including the "when practicable" religious restriction, also govern placement of children for adoption.[169] *Dickens v. Ernesto*[170] recently challenged those statutes in the context of adoption on substantially the same grounds used by *Wilder v. Sugarman*[171] in terms of child-care: establishment of religion, interference with the right of free exercise and denial of due process and equal protection. *Dickens* involved prospective adoptive parents who had no religious affiliation and who were unable to secure a child for adoption on that basis.

The court held that the statutes did not violate any of the prospective parents' constitutional rights. Applying the three-fold establishment clause test, the court found that the statutes had a secular legislative purpose (placement of children), did not have a primary effect of advancing or inhibiting religion and did not foster an excessive government entanglement with religion.[172] The court found the free exercise claim without merit, noting that the current lack of adoptable children without religious affiliation in one county scarcely constituted pressure on the petitioners to choose between their right not to profess a religion and their right to adopt a child.[173] The court further held that the parents' equal protection argument was without substance,[174] stating bluntly:

> In point of fact, their real quarrel is not with the religious conformity provisions . . . but, rather with the shortages of adoptive children and surrendering parents without religious affiliation or preference.[175]

Despite the fact that this decision is based on the same statutes involved in *Wilder*, it can hardly be said that the issues are conclusively settled. In fact the decision in *Dickens* may act more to support the challenges in *Wilder* than to undercut them. The *Dickens* court repeatedly emphasized the welfare of the child involved, going so far as to say: "Thus, the challenged legislation places primary emphasis on the temporal best interests of the child. . . ."[176] In placing so much emphasis on the welfare of the child, the court implies that were the religious provisions to act so as to delay placement of the child or to prevent him or her from going to a good home, then those provisions should have no force. This interpretation would support the

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168 "It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect." Korematsu v. United States, 323 U.S. 214, 216 (1944).

169 N.Y. Fam. Ct. Act § 116 (McKinney 1963); N.Y. Soc. Serv. Law § 373 (McKinney Supp. 1973-74).

170 30 N.Y.2d 61, 281 N.E.2d 153, 330 N.Y.S.2d 346 (1972), appeal dismissed, 407 U.S. 917 (1972).

171 Civil No. 73-2644 (S.D.N.Y., filed June 11, 1973).

172 30 N.Y.2d at 66, 281 N.E.2d at 156, 330 N.Y.S.2d at 349.

173 Id.

174 Id. at 68, 281 N.E.2d at 157, 330 N.Y.S.2d at 350.

175 Id.

176 Id. at 67, 281 N.E.2d at 156, 330 N.Y.S.2d at 348.

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challenges to the statutory scheme for voluntary child-care agencies, since the agencies apparently use the religious provisions to delay and to deny placement.[177] Thus the statutes are not protective of the child's temporal best interests in that context. Even if this interpretation is unpersuasive, the issues may not be foreclosed. The *Dickens* case involved the rights of those with whom children were to be placed. Whether the statutes violate the rights of the children themselves has yet to be adjudicated.

V. CONCLUSION

On reflection, the New York statutory scheme for voluntary child-care agencies seems unconstitutional in light of past cases and standards. With the best of intentions, the state has evolved a system that probably violates both the first and fourteenth amendments. The decision in *Wilder* may or may not bear out this conclusion. Should the current child-care system be declared unconstitutional on any of the grounds alleged, the result of such an outcome could be as dramatic as the impact of *Brown v. Board of Education*.[178] Chaos in New York's child-care system would be one immediate and obvious consequence. Were the state unable to rely on religiously affiliated child-care agencies, it would be faced with the problem of finding facilities and personnel, as well as enough money to provide equal services for all (and to take up the slack that cessation of that portion of funds provided to the agencies by the religious groups will cause). Second, the state will be faced with the problem of completely restructuring the child-care system. The eventual result is difficult to predict. What is clear, however, is that it could not involve any reliance on voluntary child-care agencies with religious affiliations, in the sense that it does now. Nor is it realistic to presume that those agencies would sever their religious affiliation in order to continue to provide care. The religious function is probably as deeply ingrained in these agencies as it is in sectarian schools, none of which has shown any willingness to relinquish religious affiliation in exchange for state or federal funds. The temporary result of all this might well be equal care, but equally bad care rather than equally good. Hopefully the final result would be that those "best of intentions" which fostered the current apparently inequitable system would at long last be realized.

JAN TRENHOLM

177 Juvenile Injustice, supra note 6.
178 347 U.S. 483 (1954).

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