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IN GOD'S NAME

## As Exemptions Grow, Religion Outweighs Regulation

By [DIANA B. HENRIQUES](#)

### Correction Appended

At any moment, state inspectors can step uninvited into one of the three child care centers that Ethel White runs in Auburn, Ala., to make sure they meet state requirements intended to ensure that the children are safe. There must be continuing training for the staff. Her nurseries must have two sinks, one exclusively for food preparation. All cabinets must have safety locks. Medications for the children must be kept under lock and key, and refrigerated.

The Rev. Ray Fuson of the Harvest Temple Church of God in Montgomery, Ala., does not have to worry about unannounced state inspections at the day care center his church runs. Alabama exempts church day care programs from state licensing requirements, which were tightened after almost a dozen children died in licensed and unlicensed day care centers in the state in two years.

The differences do not end there. As an employer, Ms. White must comply with the civil rights laws; if employees feel mistreated, they can take the center to court. Religious organizations, including Pastor Fuson's, are protected by the courts from almost all lawsuits filed by their ministers or other religious staff members, no matter how unfairly those employees think they have been treated.

And if you are curious about how Ms. White's nonprofit center uses its public grants and donations, read the financial statements she is required to file each year with the [Internal Revenue Service](#). There are no I.R.S. reports from Harvest Temple. Federal law does not require churches to file them.

Far more than an hourlong stretch of highway separates these two busy, cheerful day care centers. Ms. White's center operates in the world occupied by most American organizations. As a religious ministry, Pastor Fuson's center does not.

In recent years, many politicians and commentators have cited what they consider a nationwide "war on religion" that exposes religious organizations to hostility and discrimination. But such organizations — from mainline Presbyterian and Methodist churches to mosques to synagogues to Hindu temples — enjoy an abundance of exemptions from regulations and taxes. And the number is

multiplying rapidly.

Some of the exceptions have existed for much of the nation's history, originally devised for Christian churches but expanded to other faiths as the nation has become more religiously diverse. But many have been granted in just the last 15 years — sometimes added to legislation, anonymously and with little attention, much as are the widely criticized “earmarks” benefiting other special interests.

An analysis by The New York Times of laws passed since 1989 shows that more than 200 special arrangements, protections or exemptions for religious groups or their adherents were tucked into Congressional legislation, covering topics ranging from pensions to [immigration](#) to land use. New breaks have also been provided by a host of pivotal court decisions at the state and federal level, and by numerous rule changes in almost every department and agency of the executive branch.

The special breaks amount to “a sort of religious affirmative action program,” said John Witte Jr., director of the Center for the Study of Law and Religion at the [Emory University](#) law school.

Professor Witte added: “Separation of church and state was certainly part of American law when many of today's public opinion makers were in school. But separation of church and state is no longer the law of the land.”

The changes reflect, in part, the growing political influence of religious groups and the growing presence of conservatives in the courts and regulatory agencies. But these tax and regulatory breaks have been endorsed by politicians of both major political parties, by judges around the country, and at all levels of government.

“The religious community has a lot of pull, and senators are very deferential to this kind of legislation,” said Richard R. Hammar, the editor of Church Law & Tax Report and an accountant with law and divinity degrees from [Harvard](#).

As a result of these special breaks, religious organizations of all faiths stand in a position that American businesses — and the thousands of nonprofit groups without that “religious” label — can only envy. And the new breaks come at a time when many religious organizations are expanding into activities — from day care centers to funeral homes, from ice cream parlors to fitness clubs, from bookstores to broadcasters — that compete with these same businesses and nonprofit organizations.

Religious organizations are exempt from many federal, state and local laws and regulations covering social services, including addiction treatment centers and child care, like those in Alabama.

Federal law gives religious congregations unique tools to challenge government restrictions on the way

they use their land. Consequently, land-use restrictions that are a result of longstanding public demands for open space or historic preservation may be trumped by a religious ministry's construction plans, as in a current dispute in Boulder County, Colo.

Exemptions in the civil rights laws protect religious employers from all legal complaints about faith-based preferences in hiring. The courts have shielded them from many complaints about other forms of discrimination, whether based on race, nationality, age, gender, medical condition or sexual orientation. And most religious organizations have been exempted from federal laws meant to protect pensions and to provide unemployment benefits.

Governments have been as generous with tax breaks as with regulatory exemptions. Congress has imposed limits on the I.R.S.'s ability to audit churches, synagogues and other religious congregations. And beyond the federal income tax exemption they share with all nonprofit groups, houses of worship have long been granted an exemption from local property taxes in every state.

As religious activities expand far beyond weekly worship, that venerable tax break is expanding, too. In recent years, a church-run fitness center with a tanning bed and video arcade in Minnesota, a biblical theme park in Florida, a ministry's 1,800-acre training retreat and conference center in Michigan, religious broadcasters' transmission towers in Washington State, and housing for teachers at church-run schools in Alaska have all been granted tax breaks by local officials — or, when they balked, by the courts or state legislators.

These organizations and their leaders still rely on public services — police and fire protection, street lights and storm drains, highway and bridge maintenance, food and drug inspections, national defense. But their tax exemptions shift the cost of providing those benefits onto other citizens. The total cost nationwide is not known, because no one keeps track.

### When Values Collide

Few Americans dispute the value of protecting religious liberty. The framers of the Constitution opened the First Amendment of the Bill of Rights with language preserving religious freedom with two clear goals in mind, constitutional scholars agree.

First, they wanted to assure that everyone, even members of small and possibly unpopular sects, could practice their faith without fearing the kind of persecution that many had experienced in their home countries, where a dominant religion was allied with the state. Just as important, the framers wanted to prevent the government from ever being captive to a particular religion or set of beliefs at the expense of people of other faiths.

Over the last two centuries, many scholars say, this tradition of religious freedom and tolerance, a radical concept in the 18th century, has helped this country avoid the spasms of sectarian violence that have erupted in countries from Ireland to India and attracted immigrants bringing talents from across the world.

Some legal scholars and judges see the special breaks for religious groups as a way to prevent government from infringing on those religious freedoms.

“Never forget that the exercise of religion is a constitutionally protected activity,” said Douglas Laycock, a law professor at the [University of Michigan](#) who has written and testified in support of greater legislative protection for religious liberty. “Regulation imposes burdens on the free exercise of religion. Exemptions lift those burdens.” He added, “That is constitutionally a good thing.”

Precious as protecting religious freedom is, however, there are cases where these special breaks collide with other values important in this country — like extending the protections of government to all citizens and sharing the responsibilities of society fairly.

Religious organizations defend the exemptions as a way to recognize the benefits religious groups have provided — operating schools, orphanages, old-age homes and hospitals long before social welfare and education were widely seen as the responsibility of government.

But while ministries that run soup kitchens and homeless shelters benefit from these exemptions, secular nonprofits serving the same needy people often do not. And rather than just rewarding charitable works that benefit society, these breaks are equally available to religious organizations that provide no charitable services to anyone.

Similarly, religious nonprofit groups that run nationwide broadcasting networks, produce best-selling publications or showcase a charismatic leader’s books and speeches can take advantage of exemptions that are not available to secular nonprofit groups — not to mention for-profit companies — engaged in the same activities.

Any government oversight of religious groups must fit within the First Amendment’s command that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”

For most of the past half-century, courts interpreted the first part of that clause as a barrier to government action that seemed to treat religious groups more favorably than secular ones, legal scholars said. But today, many lawyers agree, courts are taking a more accommodating view of government actions that benefit religious groups.

The willingness of the federal courts to accept these arrangements increased considerably under the influence of [William H. Rehnquist](#) when he was chief justice of the Supreme Court, said Derek H. Davis, until recently the director of the J. M. Dawson Institute of Church-State Studies at [Baylor University](#) in Waco, Tex.

“Clearly, we’re going to be in this accommodative mode for some time,” added Mr. Davis, who sees Chief Justice Rehnquist’s successor, Chief Justice [John G. Roberts Jr.](#), and Justice [Samuel A. Alito Jr.](#) as likely to follow in Chief Justice Rehnquist’s footsteps on cases affecting religious groups.

The problem is, efforts to protect the free exercise of religion can clash with efforts to assure that religion is not favored by the government.

Besides regulatory exemptions and special tax breaks, some of which have been in place for decades, religious organizations have recently become eligible for an increasing stream of federal grants and contracts from state and federal governments. This policy shift began in 1996 under President Clinton, and has continued with greater force under President Bush. Known in the Bush administration as the Faith Based Initiative, it has drawn considerable attention in political, religious and academic circles.

But the broader tapestry of regulatory and tax exemptions for religious groups has gone largely unacknowledged. Indeed, some religious leaders and politicians — focusing not on these special accommodations but on issues like the display of religious icons on public land — argue that religious groups in America are targets of antagonism, not favoritism. House Speaker [J. Dennis Hastert](#) of Illinois, in introducing a legislative agenda last July, said, “Radical courts have attempted to gut our religious freedom and redefine the value system on which America was built.”

In March, hundreds of people and a number of influential lawmakers attended a conference called “The War on Christians and the Values Voter in 2006” in Washington and applauded the premise that religion was under attack.

Society “treats Christianity like a second-class superstition,” [Tom DeLay](#), then [a Republican](#) representative from Texas, told the crowd. “Seen from that perspective, of course there is a war on religion.”

The argument that religious groups are victims of discrimination drew a sigh from Ms. White, the day care director in Alabama, where licensed day care centers are finding it harder to compete with unlicensed faith-based centers that do not have to comply with expensive licensing requirements.

James E. Long, a deputy attorney general for Alabama’s department of human resources, acknowledged that licensed day care operators have complained time and again that the exemption is

unfair. “But I am unaware of any bill ever having been introduced” that would eliminate it, Mr. Long said. “That would be a very contentious issue. I’m sure the churches would want to be heard on that.”

### Breaks for Social Services

On an early summer day at the Harvest Temple Church of God in Montgomery, a lively group of older children tossed soccer balls around a dim, cool gymnasium. In a smaller room to the side, staff members rocked sleeping infants and comforted cranky toddlers.

This bustling church-based center, next to the church sanctuary in a well-tended middle-class neighborhood, covers its costs and helps support the work of the church, the church pastor said.

“We have talked about getting licensed before in the past, but it would cost us quite a bit of money,” Pastor Fuson said. The staff would probably be large enough to meet state standards, he said, but the center would need costly renovations to upgrade the facilities.

Ms. White, whose licensed program, Auburn Daycare Centers, has become nationally accredited during her tenure, understands how demanding the state requirements are. Her centers in Auburn have to comply with them, down to the specific toys required for each age group.

As in many states, these regulations were a response to conditions that had put young lives at risk. In Alabama alone, almost a dozen children died in day care facilities in the two years before the state began upgrading its licensing requirements in 2000.

Ms. White said the root problem in Alabama is that there is not enough state aid for working families who need good day care. But given the state’s limited resources, she said, it seems unfair that subsidies are available to unlicensed centers as well as licensed ones — a view shared by the [Federation of Child Care Centers of Alabama](#), which has lobbied for greater financing and universal licensing.

Some churches in Alabama have voluntarily obtained licenses. The Rev. Paul B. Koch Jr., of First Christian Church in Huntsville, whose day care center is licensed, thinks licensing for such programs is appropriate and raises the quality of care. “But the [Christian Coalition](#) is still strong in Alabama and this is an issue for them,” he said.

John W. Giles, president of the state’s Christian Coalition, confirmed that his organization supported the exemption, noting that state oversight would be intrusive and was unnecessary “because the pastors and congregations are your quality control.” Although most of the unlicensed centers are run by Protestant churches or ministries, the exemption covers all faiths, from an Islamic preschool program in Huntsville to a Catholic parish center in Tuscaloosa.

Eleven other states — including Utah, Maryland, Illinois and Florida — also have exempted religious child care programs from at least some of the rules that apply to other nonprofit programs, according to the [National Child Care Information Center](#) in Fairfax, Va.

One state that has dropped off that list is Texas.

In 1997, George Bush, who was the governor, pushed through legislation that exempted faith-based day care centers and addiction treatment programs from state licensing, allowing them to be monitored instead by private associations controlled by pastors, program directors and other private citizens. Other laws enacted on his watch steered more state financing to these “alternatively accredited” institutions.

Fewer than a dozen child care centers and about 130 addiction treatment programs took advantage of this new alternative, according to subsequent studies. But several of these later became the focus of state investigations into complaints of physical abuse. A study by the [Texas Freedom Network Education Fund](#), a nonprofit research organization that opposed the faith-based initiatives, found that “the rate of confirmed cases of abuse and neglect at alternatively accredited facilities in Texas is more than 10 times that of state-licensed facilities.”

In spring 2001, the Texas Legislature quietly allowed the alternative accreditation program for day care centers to lapse.

Two leading First Amendment scholars, asked about faith-based day care licensing exemptions like these, said they were unfamiliar with the practice but thought it sounded legally dubious. “I think what you describe is unconstitutional,” said Ira C. Lupu, a law professor at [George Washington University](#) and the co-director of legal research for the Roundtable on Religion and Social Welfare Policy, an independent project of the Rockefeller Institute of Government.

Professor Witte, the director of Emory University’s Center for the Study of Law and Religion, said in an e-mail response that he “would frankly be surprised to find even this Supreme Court going that far.”

However, when a group of licensed day care centers challenged the Alabama law in a federal court in mid-2001, arguing that it deprived them of their constitutional right to equal protection before the law, the group lost.

Judge Myron H. Thompson of United States District Court, [who ruled on the case](#), said the state could have adopted the arrangement to avoid church-state entanglements or simply to accommodate the free exercise of religion. Indeed, he cited four other federal cases, all decided since 1988, that had upheld similar exemptions for day care centers in other states.



In Judge Thompson's view, it is "well settled" constitutional law that "the possible economic inequalities that might result from religious exemptions such as day care licensing exemptions" are not a violation of anyone's equal-protection rights.

### Exemptions From Zoning Rules

"When you fly in to Denver at night, you can always pick out Boulder," said Ben Pearlman, an athletic young lawyer who grew up there. "It's the only one with big patches of darkness around it."

As one of Boulder County's three governing commissioners, the soft-spoken Mr. Pearlman talks about protecting the county's spectacular beauty as if it were a sacred trust. In 1978, the county limited intensive development to already urbanized areas, buffered by large swaths of prairie and farmland. The landscape therefore now stands in stark contrast to the spreading carpet of subdivisions, office parks and malls in neighboring counties around Denver.

To Alan Ahlgrim, the mellow and mesmerizing preacher who founded Rocky Mountain Christian Church in eastern Boulder County in 1984, those encroaching subdivisions look like spiritual vineyards, full of families ready to be transformed by his church's call for them to become "blessed to be a blessing" to others.

"The church has never grown fast enough to suit me," Pastor Ahlgrim said with a grin that showed he was almost, but not quite, serious.

But the church, one of more than 200 in the county, did grow fast enough in the last 22 years — from about three dozen families in 1984 to more than 2,200 people today — to burst from its original building and five subsequent expansions approved by the county.

Today, its enthusiastic young congregation is once again bumping up against the walls of its 106,000-square-foot home, which sits on 55 acres in an agricultural buffer zone around the small town of Niwot. It is holding multiple services to handle the overflow congregation, but its Sunday school space is full, with some classes spilling out into hallways and temporary buildings set up in a parking lot.

Yet church members cringe at the notion of turning away newcomers. "Who do you say no to? Do you hang a 'no vacancy' sign out front?" asked Guy Scoma, a young father who visited the church as a lonely widower and stayed on when he met, then married, his wife, Kaarin.

The church wants to almost double the size of its facilities so it can accommodate up to 4,500 people. The church could then provide a new children's wing, more rooms for adult classes and a gymnasium with room for two basketball courts or potluck suppers for 1,000. The new wings, linked to the existing



building by spacious galleries, would be surrounded by more than 1,200 landscaped parking spaces, 60 percent more than today.

But the county's land-use plan and zoning rules for the agricultural buffer zone where the church stands would limit any construction on the site to a single residential building. So the church cannot build without the approval of the Boulder County commissioners. And in February, after an emotional public hearing attended by more than a thousand people, Mr. Pearlman and his two fellow commissioners said no.

"People are always trying to develop their properties to the limits of the law and sometimes beyond," Mr. Pearlman said. But the worst suburban sprawl is the consequence of "lots of little decisions that have this cumulative effect," he continued. "We're trying to resist this death by a thousand cuts, and preserve the land where we can."

Like the leaders of large, fast-growing churches across the country confronting zoning restrictions on their expansion plans, Pastor Ahlgrim is unhappy. The decision "is severely restrictive to our mission," he said. Like worshiping, teaching and gathering for fellowship, the practice of sharing with the community — in this case, allowing certain outside groups to use the church when it's available — is "vital to our mission," he continued. "When one of your core values is generosity and you are restricted from sharing what you want to share — what God has provided — we consider that to be a severe limitation."

The church had no choice but to go to court, he said.

The church has sued the county under a federal land-use law enacted by Congress and signed by [Bill Clinton](#) in 2000 to protect religious organizations from capricious or discriminatory zoning restrictions by local governments. The unusual law came after a decade-long bipartisan tug-of-war between Congress and the Supreme Court.

Before 1990, the court had generally held that any government restriction on religion must serve a compelling public interest in the least burdensome way — a standard known as the "strict scrutiny" test. But in one Oregon case dealing with two Native Americans' sacramental use of peyote, an illegal drug, the majority concluded that there was nothing unconstitutional about states expecting citizens to comply with valid, neutral and generally applicable laws — like those criminalizing peyote — even if compliance conflicted with religious beliefs.

This "[Smith decision](#)," [Employment Division v. Smith](#), provoked a fierce reaction that has energized the drive for more legislative protections for religion ever since. In 1993, under pressure from a broad coalition whose members ranged from the [Anti-Defamation League](#) to the [Southern Baptist](#)

[Convention](#) to the American Humanist Association, Congress adopted the Religious Freedom Restoration Act, which restored the “strict scrutiny” test to any federal, state or local government action affecting religious practice. A new tool had been added to the First Amendment emergency kit, although no one was quite sure how to use it.

Then the [Supreme Court tugged back](#). In 1997, it ruled that the religious freedom act could not be applied constitutionally to the states. In reaction, 13 states have subsequently adopted similar measures of their own. But Congress thought the decision left room for it to address zoning restrictions and, separately, religious restrictions imposed on prisoners.

In 2000 Congress adopted and Mr. Clinton signed the Religious Land Use and Institutionalized Persons Act, which restored the “strict scrutiny” test to local zoning decisions, making it easier for churches to challenge those decisions in court. The act also made it easier for prisoners to challenge restrictions on their religious practices.

The provisions that apply to prisoners have been upheld, but the Supreme Court has not yet ruled on the land-use provisions that Rocky Mountain Christian Church is invoking in its lawsuit against Boulder County. One of the church’s allies in the fight is the Justice Department’s civil rights division, which is defending the law’s constitutionality in cases around the country.

[Defenders of the law](#) say that some cases invoking its protections have addressed actions by local governments that seem to reflect blatant religious bias. For example, Rabbi Joseph Konikov of Orlando, Fla., successfully sued his local government under the law in 2002 after county officials repeatedly cited and fined him for holding small worship services in his suburban home, in violation of a zoning provision later found to be an unconstitutional burden on religious freedom.

“It was like Communist Russia,” said Rabbi Konikov, who said his grandfather had fled the Soviet Union to escape religious oppression. He has continued to hold services in his home. “It was very satisfying to see that, at the end, our Constitution and our American values and freedoms came through for us.”

Other zoning challenges, all invoking the 2000 law, have been filed by a Sikh society that wants to build a temple in a low-density residential area of Yuba City, Calif.; a Hindu congregation seeking permission to expand its temple and cultural center on a busy highway in Bridgewater, N.J.; and a Muslim organization that has been trying for years to build a mosque on land that the local government in Wayne Township, N.J., now wants to buy for open space.

Seeking a Protective Balance

Critics of the 2000 law argue that the First Amendment itself has long prohibited religious discrimination in zoning, and that such zoning decisions could have been challenged just as successfully in the courts if the law had never been passed.

When Congress considered the law, “what was actually being discussed was ‘How do we make sure churches don’t get discriminated against,’ ” said Marci A. Hamilton, a law professor at the Benjamin N. Cardozo School of Law at [Yeshiva University](#) in Manhattan and the author of “God vs. The Gavel: Religion and the Rule of Law” (Cambridge University Press, 2005), which calls for closer scrutiny of some religious exemptions, especially those affecting land use and family law.

“Unfortunately, the answer was to give such an expansive remedy that not only are they not getting discriminated against, but they are now capable of discriminating against all other landowners,” added Professor Hamilton, who is advising Boulder County in its case.

The financial stakes in the Boulder lawsuit are large.

Under the 2000 law, if the county loses, it will have to pay not only its own legal bills but also those of the church. If the church loses, it will sacrifice the money it has spent on legal, architectural and public relations fees, but it will not be required to pay the county’s legal bills. And unlike the county, it could seek free legal help from various religious advocacy groups, although it has not yet done so.

While a county victory might provide other local governments with a template for defending against similar challenges, some lawyers fear that if Boulder County, with its long history of careful land-use planning and its environmentally demanding voters, cannot successfully argue that preserving open space is a “compelling public interest,” few local governments could.

“Religious institutions have realized that land-use authorities are vulnerable to the threat of litigation,” David Evan Hughes, the deputy county attorney, asserted in the [county’s court filings](#). Without greater clarity from the courts, he continued, the new law’s reach “will expand to the point where religious institutions are effectively dictating their own land-use regulations.”

Like most Boulder County residents, several church members said they cherish the open space preserved by the county’s past land-use decisions. But they think the county was wrong to reject the church’s proposal.

Lanny Pinchuk, a church member who formerly served on the county planning board, praised all that the county has done to preserve the environment. “But you can’t keep people from coming to the religious institution of their choice,” he said. “I feel that is just, well, un-American.”

Church leaders and members said their current proposal was the “forever plan,” the last expansion the church would make on this site.

But they all struggled to explain why it is an unconstitutional burden for them to have to turn away newcomers now when, if they continue to grow, they will inevitably have to turn away people when their “forever” building is full.

“At some point, we’re going to have to say we can’t accommodate any more; I mean, we’re not going to have a 100-story building over there,” said Gerry Witt, a founding church member who has recently put his house on the market so he and his wife, Carole, can move to a less developed area on the western slope of the Rockies.

“So is there any limit?” He thought a moment, then answered his question. “Yes,” he said. “There’s God’s limit. When he says, ‘You’re at your limit,’ that’s when we will stop.”

*Andrew Lehren conducted computer analysis for this series, and Donna Anderson provided online research assistance.*

### **Correction: Oct. 10, 2006**

*A front-page article on Sunday about the expansion of legal exemptions for religious organizations referred imprecisely to the academic credentials of Richard R. Hammar, a lawyer and accountant specializing in church law and taxation who discussed the political influence of the religious groups. Although Mr. Hammar attended the Harvard Divinity School, he does not have a divinity degree.*

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