REGULATORS AND RELIGION: CAESAR'S REVENGE

Allan C. Carlson

THE ROMAN CATHOLIC bishops of the United States spend a full session during their November 1978 assembly discussing governmental "intrusion" into church affairs. . . . The Lutheran Council in the U.S.A. convenes representatives from seven sometimes quarreling Lutheran bodies in early 1979 to explore the troubling implications of federal activity affecting the church community. . . . The governing board of the National Council of Churches of Christ, not recently known for opposing other extensions of governmental authority, approves a resolution at its November 1978 session calling on churches to resist regulation. . . . Something has clearly unsettled the relationship between government and organized religion.

The disturbing element is the recent growth in the number of bureaucratic rules, regulations, and related administrative requirements affecting the church community. Religious organizations are seeing their activities and autonomy compromised directly by new or threatened state controls and compromised indirectly by governmental definitions that confine unrestricted "church activity" to an ever smaller circle.

There are, of course, constitutional limits to how far this can go, but they are neither as restrictive nor as clear as one might imagine. The "free exercise" clause of the First Amendment does provide strong constraints against governmental meddling in doctrinal questions and in liturgical or ceremonial practices. This has never meant, however, that *all* activities of religious institutions are immune from state controls, and as government regulation—through both the stick and the carrot—has expanded in our society, its power over religious institutions has become considerable. The churches fear that what is God's is increasingly being rendered unto Caesar.

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Churches Meet the Social Engineers

Joining most other private institutions, the churches are facing for the first time the discomfiting adjustments demanded by a bureaucratic state pursuing a set of abstract policy goals. Social regulation has spread far beyond its once limited domain. The government's commitment to an "affirmative" vision of individual and group equality and to augmented collective security, together with state protection of a new set of "rights" unknown several decades ago, is altering the religious community.

Churches and their related agencies and schools are subject to the major statutes and implementing regulations designed to seek various forms of equality. Special provisions found in the Civil Rights Act of 1964 as amend-

NOTE: This essay follows the general, albeit hazy, practice of extending the "church" label to synagogues, temples, mosques, and their assorted hierarchies, together with "para-churches" such as Young Life.

ed and in Title IX (sex discrimination) of the Education Amendments of 1972 allow church institutions to practice religious and sexual discrimination in hiring and educational practices only where doctrinal matters are involved. Section 504 (equal opportunities and access for the handicapped) of the Rehabilitation Act of 1973 and the entire Age Discrimination in Employment Act of 1967 as amended contain no special religious exemptions.

Many denominations supported these and similar measures as matters of social justice. Until recently, most denominations have followed federal requirements without abnormal amounts of friction. But conflicts are now emerging as certain churches and related institutions refuse, on grounds of religious liberty, to comply with federal directives. For example, the Equal Employment Opportunity Commission recently took the Southwest Baptist Seminary to court demanding information on the number, duties, tenure, pay, sex, race, and national origin of its employees. The Department of Labor has brought suit against the Pacific Union Conference of the Seventh-Day Adventist Church, charging it with violating the Fair Labor Standards Act by not providing equal pay to male and female school administrators and teachers. Both religious organizations say the matters questioned are internal religious affairs not subject to federal review.

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The Internal Revenue Service has also attempted to advance a social policy affecting the church community. In August 1978 the agency proposed a "revenue procedure" that would have conditioned federal tax exemption for church-sponsored and other private schools on a new racial minority enrollment quota test. It would have established an administrative category, "reviewable school"—defined as a school adjudged to have a racially discriminatory policy, or "formed or substantially expanded" near the time of a public school desegregation decree in the community served by the school and having a minority student percentage less than 20 percent of the proportion of minority children in the school's "community." The latter term was defined as the public school district where the private school was located and any other district from which the school drew at least 5 percent of its enrollment. Under the proposal, "reviewable schools" were presumed to be racially discriminatory and consequently subject to losing their exempt status unless they could prove their innocence to the IRS by meeting four out of five other minority sensitive tests.

The IRS added that "other schools" neither adjudged discriminatory nor classifiable as "reviewable schools" would be considered reviewable if they had what the agency considered to be an insubstantial minority enrollment. In addition, private colleges and universities would be covered by the procedure "in appropriate cases."

Following a flood of 100,000 largely negative written comments, the appearance of over two hundred mostly hostile witnesses at an IRS public hearing in December, more hearings by the Oversight Subcommittee of the House Ways and Means Committee in February 1979, and consultations with church and private school officials, the IRS released a modified proposal on February 9. In it, the 20 percent minority enrollment quota becomes a "safe harbor" for a given school, ensuring automatic nonreview. The definition of "community" also is made more flexible. The proposal specifies that a school can be "reviewable" only if its formation or substantial expansion was "related in fact," not in circumstance, to public school desegregation. IRS agents would have substantial leeway in judging the growth patterns, religious nature, and special attributes of individual schools that did not meet the percentage test, while an automatic appeal of adverse rulings to the IRS national office would theoretically ensure the procedure's equal application. Colleges, universities, and preschools would not be affected by the proposal.

In general, the thrust of this alternative has the support of the U.S. Catholic Conference and the Lutheran Church–Missouri Synod, representing the nation's two largest parochial school systems. But many evangelical and independent Christian schools, joined by strict church-state separationists, remain opposed.

In another attempted expansion of bureaucratic domain, the National Labor Relations Board (NLRB) decided in 1975 to exercise jurisdiction over labor-management relations in the Roman Catholic elementary and secondary school system. While there is no express religious exemption in the National Labor Relations Act, the board had hitherto declined jurisdiction over church-sponsored schools. (Public schools, interestingly enough, *are* exempt from the act, which left the federal government in the awkward pose of asserting more authority over privately funded, church-run schools than over state schools partly supported by federal tax dollars.)

To justify its decision, the NLRB claimed a compelling state interest in protecting the collective bargaining rights of parochial school teachers, and promised to stick to "secular matters" so as not to require church employers to take actions inconsistent with their religious beliefs. Roman Catholic bishops argued, however, that the free exercise clause of the First Amendment guarantees to churches the right to maintain institutional as well as doctrinal integrity in the face of government action. And, they added, only churches can decide when their nature is being or would be altered by state intrusion. The bishops insisted that NLRB jurisdiction over parochial school teachers would compromise the church's authority to ensure teaching practices compatible with the Roman Catholic faith.

On March 21, 1979, the Supreme Court overturned the NLRB action in a 5–4 decision. The majority argued that since Congress had not specifically considered church-sponsored schools when drafting the National Labor Relations Act, the Court should not interpret that measure in a manner forcing it to resolve "difficult and sensitive" First Amendment questions. The minority criticized the Court's creation of a new exemption for church-sponsored schools and accused the majority of being "irresponsible" in avoiding resolution of the First Amendment issue.

Even the Federal Trade Commission (FTC) has tried to carve out a slice of the ecclesiastical pie. Legislation introduced in the last Congress at the behest of FTC staff would have modified the commission's governing statute (which defines corporations subject to FTC regulation) to include for the first time "not-for-profit organizations, incorporated or unincorporated, which conduct activities in or affecting commerce. . . ." FTC frustration over its inability to deal with an unnamed "Christian college" involved in questionable advertising practices was one informally cited justification for this claim of jurisdiction.

The Price of Involvement

Since the 1930s, the federal government has exacted a price for granting organizations exemption from income tax and eligibility to receive deductible charitable contributions. Section 501(c)(3) of the Internal Revenue Code, which confers exemption on educational, charitable, religious, and certain other entities, requires that "no substantial part" of their activities be "carrying on propaganda or otherwise attempting to influence legislation." The provision also stipulates that qualifying groups may not "participate, or intervene in (including the publishing or distributing of statements) any political campaign on behalf of any candidate for public office."

While churches have long exerted influence on public policy questions (a revealing example is the early twentieth-century campaign for Prohibition), the civil rights and anti-war activism of the 1960s stimulated stronger institutional commitments to such involvement. Many churches now consider "advocacy" on public issues to be part of their religious mission and assert a constitutional immunity from the 501(c)(3) lobbying restraints. For the same reasons, churches insisted upon and won their exclusion from a provision in the Tax Reform Act of 1976—a provision supported by most secular "501(c)(3)s"—that effectively defined in broad percentage and dollar terms the limits of insubstantial lobbying. Some also actively opposed lobbying disclosure legislation considered by the 94th and 95th congresses, rejecting all proposed registration and reporting requirements as infringements on their freedoms of speech, assembly, and religion.

Direct IRS challenges to churches under the "substantial lobbying" test are still infrequent. On the one hand, the agency has been somewhat skittish about creating "martyrs" over the church lobbying issue. On the other, churches with active advocacy arms and exten-

sive involvement in political and social issues are deeply committed to such activities and, in any case, usually protected by their much larger budgets for other areas of their work. The IRS did revoke the exempt status of and collect back taxes from the avowedly anti-Communist "Christian Echoes National Ministry" of Billy Joe Hargis in 1968. Three years later, it also conducted an audit of the National Council of Churches largely to determine whether that body had exceeded allowable limits on political and legislative activity. But the effect of the substantiality clause on the church community has been mostly to discourage religious bodies of a more quietistic, evangelical, or conservative nature from partipicating in the public debate. Such groups tend to be smaller (making any sum potentially substantial), less prone theologically to view "advocacy" as a necessary part of their mission, and less willing to risk testing the limits of an extremely vague provision.

The "political campaign" clause of section 501(c)(3) is subject to more evident new bureaucratic controls. Churches interpreted this provision and its implementing regulations to prohibit only partisan political involvement. Many exempt bodies, including religious groups, carried on such "political education" endeavors as the publication of congressional voting records or the polling of candidates on public issues. But an IRS ruling of May 1978 sharply narrowed the sphere of acceptable political education work. It stated that a nonprofit educational organization that mailed questionnaires to political candidates and published their replies (without editorializing) in a newsletter did not qualify for 501(c)(3) status. The "political campaign" restrictions found in the section, according to the IRS, referred not only "to participation or intervention with a partisan motive, but to any participation or intervention which affects voter acceptance or rejection of a candidate."

Responding to widespread criticism, the IRS withdrew the rule a month later and issued a new one, apparently more lenient and certainly more obscure than its predecessor. It specified that some voter education activities "conducted in a nonpartisan manner may not constitute prohibited political activity," while others may. Examples of acceptable activity were (1) publishing the voting records of all members of Congress on a wide range of legislative issues and without editorial comment and (2) publishing the solicited responses of candidates on issues "selected by the organizations solely on the basis of their importance and interest to the electorate as a whole," without bias or preference. Proscribed activities were (1) publishing political candidate responses to a questionnaire where "some questions evidence bias on certain issues" and (2) publishing incumbents' voting records on "a narrow range of issues," even if presented without bias.

With key terms such as "bias," "wide range," and "narrow range" undefined, the IRS action has had a chilling effect on several religious social action bodies. In January 1979 the United Church of Christ announced its intention to challenge the rule on religious liberty grounds, but subsequently backed away, unwilling to risk loss of its exempt status.

"The Root of All Evils"?

The will-o'-the-wisp attractions of government money have lured elements of the church community deeper into the bureaucratic quagmire. Despite constitutional restraints on direct financial assistance to religious organizations, many church-sponsored colleges and universities, hospitals, and agencies are eligible (as voluntary nonprofit organizations) to receive monetary support from a variety of federal programs. The appeal of dollars to be used for expansion or improved services has generally outweighed a residual queasiness among church, school, and agency administrators over accepting federal funds with the regulatory and other strings invariably attached.

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Over the past decade inflation has increased the pressure for access to governmental treasuries. Churches (more than secular charities) depend financially on relatively small givers drawn from the middle and lower-

middle classes. As inflation nears the double-digit level, these givers find their own real incomes leveling off or declining and tend to reduce real giving as one of the few personal expenses they are still able to control. At the same time, inflation diminishes the real value of endowments upon which church schools and agencies often depend.

Consequently, church-sponsored institutions increasingly turn to direct federal grant, loan, or capital programs under Title XX of the Social Security Act, Titles I and III of the Higher Education Act of 1965, section 202 of the Housing Act of 1949, the Older Americans Act of 1972, or the "Hill-Burton" hospital and nursing home construction program. Additional eligibility, reporting, accounting, and affirmative action requirements follow. State and federal student-aid benefits and various federal welfare or social insurance programs provide other forms of indirect (but still regulation-encumbered) assistance.

One annoying result is the growing amount of paperwork needed to account properly for the use of federal funds and to document compliance with other governmental requirements. While there are few hard data, informal consultation with Lutheran social agency executives suggests they tend to spend 15 to 35 percent of their time meeting federal, state, and local regulatory requirements. Personnel and resources are diverted from program work, and administrative staff swells. Another result is the appearance of grantsmen. Since money is available only for certain programs, and grant seekers obviously aim for what is available, schools and agencies often come to base their program decisions on available funding and governmental biases rather than on their own perceptions of social need.

The use of governmental funds undermines other aspects of institutional autonomy. Unpaid volunteer boards of directors often succumb to regulatory complexity and confusion and tend to rely on government initiatives and rules to guide the church-related institution. They will almost certainly become less willing to experiment with new approaches, challenge unreasonable or illegal governmental requirements, or take controversial stands. The fear of losing or not receiving essential program dollars must ultimately be a powerful incentive for compliance and silence.

Reliance on federal dollars also leads to an erosion of the tie between the receiving church-related institution and the sponsoring church itself. For example, guidelines adapted by HEW's Office of Education from court decisions generally prohibit funding where part of a college's faculty would be used for "sectarian activity," where religious worship is a consistent or continuing activity or where students are trained to enter religious vocations, even when a large share of the coursework is secular. The Law Enforcement Assistance Administration of the Department of Justice has conditioned grants to church-sponsored institutions under several of its programs (alcoholic treatment or "work-release," for example) on church-relatedness—the closer the religious connection, the less the prospects for grant approval. Facing such requirements, institutions actively seeking funds will de-emphasize their church relationship and religious character.

Blessed Are the Exempt

Some regulatory and rulemaking problems come about from difficulties in defining the terminology used to set the boundaries for churches as distinct legal entities enjoying unique exemptions and benefits. The Internal Revenue Code alone contains at least nineteen religious terms, including "church," "religious purposes," "church agency," "integrated auxiliaries" of a church, "church plans," "a convention or association of churches," "religious and apostolic association," "religious sect," "minister of the gospel," "dioceses," and "Christian Science practitioner." The great majority of these phrases have been added to the code since 1950, some at the behest of churches on constitutional grounds so as to limit monitoring and regulation by the government, and others granting exemptions and benefits not necessarily required by the First Amendment.

The sources of conflict are threefold. First, in order to limit the number of entities enjoying special treatment and to increase tax revenues, government agencies have a natural interest in seeing church terms defined as narrowly as possible. Churches, on the other hand, have an interest in expanding definitional limits. This fundamental conflict makes definitional disputes inevitable.

Second, churches have complex religious vocabularies and organizational structures predicated on transcendental visions of time and institutional identity and conditioned by centuries of historical and theological evolution. Governments, true to their nature, seek to develop vocabularies and shape structures that are uniform, simplified, readily understood and—in the modern world—not avowedly conditioned by the past. Church terminologies and hierarchies will appear illogical and therefore suspicious to the rationalizing, compartmentalized bureaucratic mind. Government definitions of "church" terms, on the other hand, will appear arbitrary and clumsy to those who are theologically and historically sensitive.

Third, various denominations hold widely different views of what "church" and similar terms mean. Baptists define "church" as a local congregation. Mormons or Roman Catholics see congregations or parishes, regional and national hierarchies, agencies, hospitals, and schools as part of one unified "church." Lutheran and other perceptions fall somewhere in between. Any bureaucratic attempt at uniform definitions of church terminology (especially any restrictive definition) naturally disturbs those religious bodies with alternative interpretations.

A major dispute involving such limits arose over successive IRS definitions of the term, "integrated auxiliary of a church." Before 1970, most religious organizations were exempted from filing financial disclosure forms with the IRS. Congress altered this arrangement in the Tax Reform Act of 1969, narrowing the exemption so it applied to only a few categories, including "churches, their integrated auxiliaries, and conventions or associations of churches." The Senate added the word "auxiliaries"—which has special meaning within the lexicon of the Church of Jesus Christ of Latter Day Saints—at the suggestion of Senator Wallace Bennett of Utah. When House-Senate conferees modified "auxiliaries" with "integrated," legislative intent grew murkier yet.

In February 1976 the IRS issued proposed regulations that defined an integrated auxiliary as an organization "whose primary purpose is to carry out the tenets, functions and principles of faith of the church with which it is affiliated" and whose operations "directly promote religious activity among the members of the church." Using this distinction, the IRS then specified that church men's and women's clubs, mission societies, and Sunday schools would be integrated auxiliaries, while church hospitals, social service agencies, retirement homes, and elementary schools would not.

In written comments and at a June 1976 public hearing, churches bitterly denounced the proposal for setting an arbitrary universal definition of religious mission and "principles of faith," for confining "religious activity" to members and thereby denying the evangelical and service work central to many religious bodies, for allowing the IRS to monitor internal church financial operations, and for distorting congressional intent by using "integrated auxiliaries" as a narrowing rather than a broadening term. For that term, though, they could not produce a commonly acceptable alternative consistent with the legislative history.

When final regulations were issued in January 1977 the IRS dropped the "primary purpose" distinction, adopting instead a somewhat more creative "secular counterpart" test. Integrated auxiliary is now defined as a tax-exempt organization which is "affiliated" with a church and whose "principle activity is exclusively religious." Under this definition an organization cannot be considered "exclusively religious" if it can also be considered "charitable" or "educational." Thus, church schools, agencies, and hospitals were again excluded (though for transparent political reasons, the secretary of the Treasury used his "discretionary authority" to exempt church-related elementary and secondary schools from the filing requirement—which diffused some opposition to the final regulations). Church protests against this arbitrary divorce of "religious" and "charitable" have been to no avail.

A second controversy developed from an April 1978 Department of Labor interpretation that church elementary and secondary schools are not exempted by federal statute from state unemployment insurance taxes. In 1976 Congress had repealed a provision of the Federal Unemployment Tax Act that allowed states to exclude the employees of private schools below the college level from unemployment insurance coverage. Churches argued that employees of church-sponsored schools were still exempt under a remaining provision that allows the exclusion of persons employed by a church or

convention or association of churches or by an organization operated primarily for religious purposes and run, supervised, controlled, or principally supported by a church. However, the Department of Labor ruled that Congress "clearly intended" to cover church-sponsored schools. Only "those strictly church duties performed by church employees pursuant to their religious responsibilities within the schools," the ruling continued, could "reasonably" fall within the religious exclusion's scope. Court challenges to this ruling are under way in many states.

Still another regulatory problem came about from the addition of the term "church plans" to the Internal Revenue Code by the Employee Retirement Income Security Act of 1974 (ERISA). The act exempts "church plans" from most ERISA regulation. (While such plans may make an irrevocable election to be covered by ERISA, few have done so.) Yet, in response to reported labor problems within several church-run hospitals in New York, the act also specifies by definition that while ERISA-exempt church plans could continue to cover the employees of "churches or conventions or associations of churches" indefinitely, they could not cover the employees of "agencies of a church or a convention or association of churches" after December 31, 1982. Proposed IRS regulations issued in April 1977 define "church plan" in a manner that does little to blunt the effect of the statutory language. Pension boards from twenty-five religious denominations, banded together as the "Church Alliance for the Clarification of ERISA," are supporting a definitional change that would allow them to cover church agency employees after 1982 while retaining their ERISA exemption.

The Wages of Original Sin

As should be apparent, federal recognition of an organization as a "church" confers many benefits, not the least of which is significant institutional insulation from government scrutiny. Undeniably, such status can be abused. Recent incidents have involved:

—The Rev. Guido Carcich, chief fund-raiser for the Roman Catholic Pallotine Fathers, who gathered millions of dollars for starving children through sophisticated fund-raising techniques, but used under 3 percent of those dollars for stated purposes;

—the Billy Graham Evangelistic Association, which acknowledged in 1977 with much embarrassment the existence of an unreported multi-million dollar special fund built up through regular donations;

—the Rev. Jim Jones, an ordained Christian Church (Disciples of Christ) minister, who forsook his faith, embraced revolutionary socialism, terrorized his opponents, siphoned off his congregation's wealth, and led over 900 followers to brutal death in a Guyana jungle;

—the Universal Life Church, which offers divinity degrees, ordination, and the attendant generous tax advantages to anyone making a $20 "offering."

Such incidents have increased pressures for bringing the financial transactions, fund-raising practices, and exempt status of the church community under fresh review. In that majority of states having some form of charitable solicitation disclosure law, existing exemptions for religious organizations are being reassessed. On the federal level, bills have been introduced in the last three congresses to place reporting and regulatory requirements on religious and other charitable fund-raising practices. The House Committee on Post Office and Civil Service approved such a measure in 1976. Reintroduced by Representative Charles Wilson in 1977, it was backed by several of the larger secular charities but, after receiving subcommittee approval, died in full committee in the face of strong church opposition. There are recurring rumors that the Department of the Treasury may propose legislation to govern the financial and fund-raising activities of 501(c)(3) charitable organizations, probably exempting churches but not related schools and agencies.

Religion in the Welfare State

The intrusion of regulation into the religious sphere, the tightening restraints on church advocacy and political education work, the growing (and compromising) dependency of church schools and agencies on state funds, the unseemly scramble for special church exemptions or privileges, the definitional disputes, and the

growing unwillingness of the public and government to tolerate abuse of religious liberty—these are more than the convergence of unrelated events. They reflect the problems and tensions that arise when institutions that emerged in an earlier and more cordial environment search for a relevant existence in the modern welfare state.

In 1840, Alexis de Tocqueville noted that while organized religion was less powerful in the United States than in other nations and eras, its influence was more lasting: "It restricts itself to its own resources, but of these none can deprive it; its circle is limited, but it pervades it and holds it under undisputed control." In 1979, the situation is almost the reverse. On the one hand, many churches have vastly broadened their "circle" of religious activity, cloaking their advocacy of the whole public agenda of expanding social and economic regulation with a spiritual mantle. On the other hand, their dependency on governmental funds (with the accompanying regulation) has become such that only a shrinking number can still claim undisputed control over even their more traditional institutional circles.

In many respects, the fate of churches and their related institutions is but one facet of a broader phenomenon—the decline of the American voluntary tradition. The Western European experience since 1945 suggests that a creative and independent voluntary sector may be incompatible with the egalitarianism, planned uniformity, and heavy tax burdens of the welfare state. Social democrats in Sweden, Great Britain, and elsewhere maintain that private charity is a bourgeois instrument now fully preempted by the state. Where government assumes the responsibility for funding, operating, and regulating *all* social services, voluntary associations must wither away or be effectively coopted into the planned mechanism.

Within this context, however, there remain possible changes in church perceptions and attitudes that might diminish tension and confusion between organized religion and the state. Churches might start by clarifying their own often sloppy structural definitions and organizational ties. Following examples already set by the Billy Graham association and the Roman Catholic bishops, they could voluntarily improve their public accountability in financial and fund-raising activities.

Churches could also sort their existing exemptions and related legal benefits into what is necessary, what is desirable, and what is unnecessary. They might then offer the government some ideas for reasonable regulatory alternatives—ones that would avoid excessive state interference in church affairs. On the "integrated auxiliary" question, for instance, Charles Whalen of Fordham Law School has proposed replacing the existing rule with a new test basing the required filing of financial disclosure returns on the degree to which church agencies accept governmental funding and purport to serve the general public, rather than on the degree of their "church relatedness." While not a perfect resolution of the problem, the proposal deserves more attention from churches than it has so far received.

American churches need to rediscover their vital interest in preservation of the classic liberal order. While advocating growing federal authority over private life for reasons of social justice, many churches have often sought for themselves (or complacently relied upon) special exemptions from that same authority. It is true that some governmental actions pose unique threats to the special purpose and peculiar nature of organized religion; and these are properly opposed on religious liberty grounds. But most current exemptions do not fall in this category. Religious groups cannot morally or constitutionally rely on special protections from the regulatory powers increasingly governing other private entities; nor can they realistically expect such treatment to stand the test of time.

On the government's side, Congress might reverse its course and begin hacking through the controversy-laden thicket of church terminology that congests the Internal Revenue Code and other federal statutes. Congress could also redraft the vague lobbying and political activity restrictions of Code Section 501(c)(3). Perhaps most important, Congress might take steps to strengthen the quasi-independent economic foundation of all voluntary associations. It is increasingly clear that the exploding costs of providing quality educational, social, and health services cannot be met by such groups unless governments reduce their enormous taxation of private funds that might otherwise be contributed for such purposes. A massive gen-

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