When the Constitution Fails on Church and State: Two Case Studies

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> An unconstitutional statute is not law; it confers no rights; it imposes no duties; it affords no protection; it creates no office. Justice Stephen J. Field, *Norton v. Shelby County*, 118 U.S. 425, 442 (1886).

INTRODUCTION: DO STATUTES AND CONSTITUTION FORM A COORDINATED JUDICIAL SYSTEM?

[1] This is the story of two statutes that appear to be, prima facie, unconstitutional. The situation suggests a reconsideration of American judicial arrangements. When statutes do not seem to accord with the "fundamental and paramount law of the nation", the question arises whether American jurisprudence, in the context of American politics, is as integrated a system in fact as it is in theory.[1]

[2] The theory of church/state relations is set out in the Federal Constitution, particularly the Establishment and Free Exercise clauses of the First Amendment.[2] These provisions are interpreted by the courts, particularly the Supreme Court of the United States.[3] Since the middle of the last century, these First Amendment provisions have been held to apply to the states through the Fourteenth Amendment: the Free Exercise

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[1] *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

[2] U.S. CONST. AMEND. VI.

[3] There is of course a vast literature by legal scholars concerning church/state jurisprudence. *See generally* JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES (2000). *See also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW ch. 14 (2d Ed. 1988); JOHN E. NOWAK AND RONALD D. ROTUNDA CONSTITUTIONAL LAW ch. 17 (5th Ed.1995); GERALD GUNTHER AND KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW ch. 14 (13th ed. 1997); and THOMAS C. BERG THE STATE AND RELIGION IN A NUTSHELL (1998). The historical background is treated in recent works by PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002) and John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 79 (2001).

Clause in *Cantwell v. Connecticut* in 1940[4], and the Establishment Clause in Everson v. Board of Education[5] in 1947.[6] Moreover, there is also the overarching axiom of American government, since *Marbury* that the Constitution is the "fundamental and paramount law of the nation, and that an act of the legislature, repugnant to the constitution, is void."[7] That is the theory. In practice, however, both the federal and state governments sometimes seem to ignore the Constitution, in this area of law.

[3] My first case study is an apparent violation of the Establishment Clause, a violation that appears to benefit religious groups. The second is an apparent violation of the Free Exercise Clause, and thus appears to cause detriment to certain, but not other, religious groups. Except for the pioneering work of Hoff on the Establishment Clause, these matters seem to have escaped the attention not only of the courts but of scholars as well.[8] The apparent Establishment Clause violation is provided in those sections of the Internal Revenue Code (IRC) that exempt religious groups, but not other non-profit

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[4] 310 U.S. 296 (1940).

[5] 330 U. S. 1 (1947).

[6] Justice Thomas, in a very recent case, has written a concurring opinion that interprets the Fourteenth Amendment as allowing the States more room for accommodation to religion than the Federal government. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 676-84 (2002) (rejecting challenge to program which provided tuition aid to students to attend participating public or private schools). See also John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 295-97 (2001).

[7] *Marbury*, 5 U.S at 177.

[8] *See generally*, Reka Potgieter Hoff, *The Financial Accountability of Churches for Federal Income Tax Purposes: Establishment or Free Exercise?*, 11 VA. TAX REV. 71 (1991).

organizations, from accountability. In effect, the IRC gives special privileges to religious groups.

[4] The apparent Free Exercise Clause violation arises from provisions of the New York State Religious Corporations Law (RCL) that require certain churches, and all Jewish synagogues, to appoint clergy by vote of the congregation, prohibiting boards of trustees, for example, from exercising this function.[9] New York's law prescribes church polity, exactly what it is not supposed to do under First Amendment judicial doctrine.

I. THE NON-ACCOUNTABILITY OF RELIGIOUS GROUPS

[5] The United States in recent years have seen well-publicized scandals in the Catholic Church, primarily concerning sex, but also involving concomitant financial irregularities.[10] The public discussion surrounding this matter has not touched upon the fact the Catholic Church, like all other religious groups, is given very unusual immunity from financial reporting to the government and from most auditing by the government.[11]

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[9] N.Y. Religious Corporations Law § 5 (McKinney 2004).

[10] *Oversight Is Lacking, A Diocese Concedes*, N.Y. TIMES, July 8, 2002, at A1; Kurt Eichenwald, *Andersen Jury Tells the Judge It's Deadlocked*, N.Y. TIMES, June 13, 2002, at A1; Laurie Goodstein, *Albany Diocese Settled Abuse Case for Almost $1 Million*, N.Y. TIMES, June 27, 2002, at B1; Frank Bruni, *Pope Tells Crowd of A Shame Caused by Abusive Priests*, N.Y. TIMES, July 29, 2002, at A1.

[11] The various religious groups will of course have varying schemes of internal financial auditing. In the Roman Catholic Church, where the formal rules, at least, are published and are publicly available, such internal controls seem extraordinarily loose. The bishop has almost unchecked financial discretion within the boundary of his diocese. The bishop is required to consult a (lay) finance council and a (clerical) college of consultors; in the case of extraordinary expenses, he is even required to obtain the consent of these bodies. The bishop himself presides over both of these bodies, and only he, the bishop, can appoint the other members. *See* 1983 CODE 492, 1983 CODE 493, and 1983 CODE 1277. NEW COMMENTARY ON THE CODE OF CANON LAW (John P. Beal et al. eds. 2000).

[6] The federal religious immunities in the IRC are found in Sections 508(a)(c)(1)(a), 6033, and 7611, and have a long history, going back at least to the beginning of the twentieth century.[12] They are noteworthy because they benefit religious groups and not other non-profit entities (except by way of certain de minimis provisions).

[7] Section 508 immunity provides that new religious groups (and small secular groups that can qualify under a de minimis rule) need not file an application to qualify for tax exemption.[13] Most non-profit groups must file a Form 1023 to obtain recognition as a tax-exempt entity.[14] This form asks searching questions about the group's finances and governance.[15] But churches and synagogues need not file; they are considered tax exempt on their own say-so. This is a very significant exemption from accountability.

[8] However, Form 1023 may be filed by churches on a voluntary basis. A church that takes this route will be asked, in addition to the questions that are applicable to all non-profits, a special group of questions contained in "Schedule A", which are designed to distinguish bona fide churches from illegal schemes.[16] The logic, if any, of Schedule A is not obvious. If a group considers itself a church or synagogue it need not file such information unless it decides to do so voluntarily, in which case it will have its bona fides questioned; those declining the voluntary filing have their bona fides assumed.

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[12] *See generally* Hoff, *supra* note 8. *See id*. at 76-80, for the history of the exemption.

[13] IRC § 508 (2004).

[14] INTERNAL REVENUE SERVICE, INSTRUCTIONS FOR FORM 1023 (Rev. September 1998), http://www.irs.gov/pub/irs-pdf/i1023.pdf.

[15] *Id.*

[16] *Id*.

[9] Nor are the advantages of filing obvious. A publication by the Union of American Hebrew Congregations (the Reform movement) recommends voluntary filing, partly because it results in a listing by the IRS's Publication 78.[17] Such listing does confer more visibility to a group, and perhaps enhances its credibility among prospective donors, but does not enhance a church's tax status or any other legal prerogative. Many churches and synagogues are listed in this mammoth book but many are not. There does not seem to be an easy way to estimate the extent of this voluntary compliance.

[10] The Section 6033 and 7611 exemptions free churches from the periodic financial reporting that is required of other non-profit groups.[18] These exemptions benefit "churches, their integrated auxiliaries, and conventions and associations of churches" (as well as secular groups with annual gross receipts of less than $5000) and are thus more narrowly drawn than certain other definitions of "religion."[19] Obviously, a mosque and a synagogue is a "church" for this purpose, but certain other church-related groups are not.[20]

[11] The § 6033 exemption is particularly significant and far-reaching because it affects not only the targeted groups but also the public at large.[21] At issue is the famous

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[17] Internal Revenue Service, Publication 78, *Cumulative List of Organizations Listed in Section 170(c) of the Internal Revenue Code of 1986*, http://www.irs.gov/charities/article/0,,id=96136,00.html.

[18] IRC §§ 6033, 7611 (2004).

[19] IRC § 6033 (2004).

[20] *See* Charles M. Whelan, *"Church" in the Internal Revenue Code: The Definitional Problems*, 45 FORDHAM L. REV. 885, 891-96 (1977). The author, a Jesuit priest, takes a very strongly accommodationist view.

[21] IRC § 6033 (2004).

IRS Form 990, which for all other non-profit groups affords a revealing and very accessible picture of how non-profit groups manage their money. Secular non-profit groups are required to file this form annually, but churches are not.[22] Most states require that the secular groups operating within their borders also file a copy of the 990 with the state government. Religious groups, however, are generally exempt from these state filings.

[12] The philosophy behind Form 990 is as follows: in return for the many privileges that the government bestows on non-profit organizations -- income tax exemption, exemption from property taxes, and tax deductibility of donations, the government asks for the disclosure of financial information, akin to, but much less extensive than the information required of publicly owned corporations. Since the various tax privileges of these non-profit groups may be considered tax expenditures by government on all levels, non-profit groups may be said to receive considerable public funds and should be held accountable for such funds.[23]

[13] The Form 990 filings of all the major non-profit organizations are now widely available in various publications and on the Internet.[24] They form the basis for ratings given to nonprofit groups by various "watchdog" groups who are interested in how

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[22] Peter Swords, *How To Read Form 990 & Find Out What It Means* (2001), *at* http://www.npccny.org.

[23] *See generally*, STANLEY S. SURREY & PAUL R. MCDANIEL, CENTURY FOUNDATION WORKING GROUP ON TAX EXPENDITURES, BAD BREAKS ALL AROUND (2002); Donna D. Adler, *The Internal Revenue Code, the Constitution, and the Courts: The Use of Tax Expenditure Analysis in Judicial Decision Making*, 28 WAKE FOREST L. REV. 855 (1993).

[24] Jay Tokasz, *The I.R.S. Moves Rapidly To Process New Charities*, N.Y. TIMES, Nov. 12, 2001 at G12.

efficiently the charities and other nonprofit groups are managed.[25] The information required on Form 990 includes total receipts, sources of such receipts, expenditures by type and recipient, salaries of top officials, and information on self-dealing operations among board and staff members. The IRC provides penalties for self-dealing, for example a property sold by a board member to the organization at an inflated price. Churches do not have to file such information. Consequently, it is possible that the inappropriate expenditures surrounding the sex scandal in the Catholic Church could not have been as easily kept secret if the Church had been required annually to file Form 990.

[14] The Form 990 disclosure of salaries has attracted particular attention in a report published in the Chronicle of Philanthropy.[26] This kind of publicity is likely to have a deterrent effect on excessive salaries. Again, this public disclosure is not required of religious bodies. In addition, the § 7611 exemption frees churches from routine auditing by the IRS.[27] The Service can do audits, but only for cause, and then only with restrictions that do not apply to secular groups.[28]

[15] Taken together, these Code exemptions create the impression that Congress regards religious folk as more trustworthy than non-religious folk and less in need of accountability. As we shall see below, most of the states have followed these Federal

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[25] *See* The American Institute of Philanthropy *at* http://www.charitywatch.org.

[26] Thomas J. Billitteri & Debra E. Blum, *Salaries Rise Modestly at Charities*, CHRON. OF PHILANTHROPY, September 24, 1998 at 1.

[27] IRC § 7611 (2004).

[28] BRUCE R. HOPKINS, THE LAW OF TAX-EXEMPT ORGANIZATIONS (1987) at 571; *See also* Internal Revenue Service, *Tax Guide for Churches and Religious Organizations*, *at* http://www.irs.gov/pub/irs-pdf/p1828.pdf, at 22-23.

exemptions from accountability. Concerning the state exemptions, Catherine Knight observes:

> [a] church officer who dips into the collection plate may be held accountable on Judgment Day, but what about a reckoning in this life? . . . The ability of the attorneys general of the various states or of church members to regulate the fiscal decisions of the church's cooperate directors or officers is mired in statutory limitations and constitutional questions. As a result, religious corporations are largely self-regulated.[29]

Was Congress right to assume that, when acting under color of church, man's probity is beyond question? But whether right or wrong on this point, did Congress act Constitutionally?

A. The Constitutionality of the IRC Exemptions

[16] When considering challenges to state action under the Establishment Clause, the Supreme Court must distinguish between 1) what is required (i.e. accommodation to religion required under the Free Expression Clause); 2) what is forbidden under the Establishment Clause, and 3) what is permitted but not required.

[17] In what follows, I wish to focus most particularly on the issue whether an exemption is Constitutionally permitted if it exclusively benefits religious groups; i.e. exemptions enjoyed by religious groups but not by other non-profit organizations. Professor Berg pointed out that "there are hundreds, even thousands, of provisions in federal and state statutes and regulations that accommodate religious practices."[30] But these concessions are generally either identical to benefits enjoyed by all non-profit

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[29] Catherine M. Knight, *Must God Regulate Religious Corporations? A Proposal for Reform of the Religious Corporation Provisions of the Revised Model Nonprofit Corporation Act*, 42 EMORY L. J. 721, 721 (1993).

[30] BERG, *supra* note 3 at 132.

groups, or, at least insofar as they have been recorded, are carefully crafted and circumscribed to avoid unreasonable special privilege to religious over non-religious citizens.[31] The IRC religious exemptions seem to be unique in these regards, at least on the Federal level.

[18] Perhaps the exemptions are not entirely unique. Consider also the Americans with Disabilities Act (ADA), which bears some resemblance to the religious exemptions, particularly that the relevant sections have remained unlitigated.[32] The ADA requires public and private entities (but not the Federal government) to make special provisions for the accommodation of the disabled.[33] For example, the ADA requires that public buildings provide access (special ramps and/or elevators) to those with mobility disability.[34] But § 307 of the ADA exempts "religious organizations or entities controlled by religious organizations" from its provisions.[35]

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[31] Justice O'Connor wrote on this subject as follows: "[e]ven where the Free Exercise Clause does not compel the government to grant an exemption, the Court has suggested that the government in some circumstances may voluntarily choose to exempt religious observers without violating the Establishment Clause." *Wallace v. Jaffree*, 472 U. S. 38, 82 (1985). *See, e.g. Gillette v. U. S.*, 401 U.S. 437, 453 (1971) (dealing with conscientious objectors); *Braunfeld v. B. Brown*, 366 U.S. 599 (1961) (dealing with Sunday closings).

[32] 42 U.S.C. § 12101 (2004).

[33] *Id.*

[34] *Id.*

[35] 42 U.S.C. § 12187. See *Chipkevich v. Univ. of Scranton*, No. 94-7401 (Third Circuit, 1994). An unreported case in the US District Court for the Middle District of Pennsylvania raised the Constitutionality of the ADA exemption. The matter reached the Third Circuit of the U.S. Court of Appeals, where it was dismissed by agreement between the parties on April 12, 1995. For information on this case, see the brief by the U. S. Department of Justice, Deval L. Patrick et al., "Brief of the United States: *Chipkevich v. Univ. of Scranton*"(October 12, 1994) *at* http://www.usdoj.gov:80/crt/foia/pa4.txt.

[19] There are, however, at least two features that distinguish the ADA from the IRS exemptions: 1) the ADA exemption benefits private clubs as well as religious groups,[36] and 2) the ADA § 307 exemption may arguably be required under the Free Exercise clause of the First Amendment. Section 307, it has been argued, "allows [churches] to design their facilities and perform their services in accordance with their religious tenets."[37] There is the counter-argument on this last point that failure to build a ramp for the disabled is less likely to be required by spiritual scruples than by worldly frugality.

[20] An example of state laws that provide (so far unlitigated) religious immunities similar to those of the IRC may be found in New York's Executive Law.[38] Section 172 requires non-profit groups that solicit contributions to register with the Secretary of State.[39] Section 172 (a) exempts religious groups and also provides some very limited exemptions to other groups, provided these (secular) groups confine their solicitations to their own membership.[40] These New York provisions seem close enough to the IRC exemptions that if the latter were ever to be litigated in the Supreme Court the former might well be affected.

[21] In *Larson v. Valente*, a Minnesota provision exempted from registration and reporting obligations those religious organizations that received more than half of their

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[36] 42 U.S.C. § 12101.

[37] Patrick, *supra* note 35 at 11.

[38] N.Y. Exec. Law § 172 (McKinney 2004).

[39] *Id.*

[40] *Id.*

contributions from their own members.[41] Members of the Holy Spirit Association for the Unification of World Christianity ("Unification Church"), who claimed a violation of the Establishment Clause of the First Amendment, contested this apparent favoritism of some religious groups over others.[42] The matter reached the Supreme Court, which held for the Unification Church.[43] But this case did not decipher the broader question of whether favoring religious over non-religious groups is Constitutional. It was not raised by either the Unification Church in their claim or by the Supreme Court in deciding for them. If this larger issue were to reach the Court, how would it decide?

[22] Currently the U.S. Supreme Court does not have easy formulas to resolve problems that arise from the Constitutionally forbidden establishment of religion.[44] Many of the cases have dealt with religion in the schools and are not easily applicable to the different range of problems that concern us here. Any consideration by the Court of the IRC exemptions would be in the context of the broad discussion between "accommodationism" and "separationism."[45] The tension between these approaches, which are not mutually exclusive, arises in part from the well-known tension between the accepted interpretations of the Establishment and Free Exercise Clauses of the First Amendment. The Establishment Clause (which is of course the Non-Establishment

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[41] 456 U.S. 228, 231-232 (1982).

[42] *Id.* at 232-233.

[43] *Id.* at 255.

[44] BERG, *supra* note 3, at 28-31; *Wallace v. Jaffree*, 472 U.S. 38, 68, 91 (1985)(O'Connor and Rehnquist dissenting)(The often cited "*Lemon* test," no longer a predictor of how the Court will decide).

[45] The social context of these disagreements is explored by John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH L. REV. 279 (2001).

Clause) may be seen to prescribe a separation between church and state; the Free Exercise Clause may be seen to prescribe all reasonable aid by state to church. How can both of these desiderata co-exist? In a nutshell, this is the Constitutional dilemma of church and state in America. Those who lean toward accommodationism will put emphasis on the Free Exercise clause; those leaning toward separationism will emphasize the Establishment Clause. Several of the justices, depending on the particular facts of a case, may vote separationist one time and accommodationist another.

[23] Hoff has suggested that "a secular nonprofit organization would have standing to challenge [IRC's religious exemptions from accountability] under the Establishment Clause of the First Amendment."[46] Hoff cited *Texas Monthly, Inc. v. Bullock*,[47] to suggest that such challenges would be successful. It would appear assuming stare decisis, that the text of the IRC exemptions resembles closely situations that have lead to a separationist result in other cases. Again, the most important facts of the IRC matter are that a) only religious groups benefit from the exemption, and that b) there seems to be no prima facie necessity for these exemptions to preserve the free exercise of religion.

[24] The Court in *Texas Monthly* examined whether the State of Texas may exempt only religious periodicals from sales and use taxes.[48] The Court held that the law violated the Establishment Clause, and reached a separationist result.[49] The plurality opinion

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[46] Hoff, *supra* note 8, at 73. With regard to I.R.C. § 7611 exemptions, which free churches from routine IRS auditing, it is also conceivable that an individual taxpayer, who is subject to auditing more or less at the pleasure of the IRS, might sue for equal treatment with churches, which are not.

[47] 489 U.S. 1 (1989).

[48] *Id.* at 5.

[49] *Id.*

written by Justice Brennan carefully stressed the fact that this Texas benefit, like the IRC benefit with which we are concerned, was not available to secular non-profit groups.[50] Thus, Brennan distinguished *Texas Monthly* from *Walz v. Tax Commission of the City of New York*[51], in which the New York City property tax exemption on religious groups was upheld. The two cases are distinguishable since the property tax exemption in *Walz* benefited all non-profit groups, religious and non-religious groups alike.

[25] The separationist majority was made up of Justices Brennan, Marshall, Stevens, White, Blackmun, and O'Connor. The accommodationist minority consisted of Chief Justice Rehnquist and Justices Scalia and Kennedy. The dissent written by Justice Scalia, which was joined by Chief Justice Rehnquist and Justice Kennedy, was scathing: "As a judicial demolition project, today's decision is impressive."[52] Ending with the unadorned "I dissent"[53], it is particularly noteworthy that the dissent read *Walz* very differently from both the majority and most commentators, Justice Scalia saw no significance in the fact that religious groups in New York City are not given any advantage over other non-profit groups.[54] For Justice Scalia, the importance of *Walz* lies in the fact that religious groups may be given a tax exemption; for the majority, the

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[50] *Id.* at 11.

[51] 397 U.S. 664, 680 (1970).

[52] *Texas Monthly, Inc.*, 489 U.S. at 29.

[53] *Id.* at 45.

[54] *See* WITTE, *supra* note 3, at 187, 191.

importance lies in the fact that religious groups are given no more than is given to other non-profit groups.[55]

[26] In 1990, the year following *Texas Monthly*, the Court came to a unanimous separationist conclusion in a case involving a religious claim for exemption from a California sales tax, *Swaggart Ministries v. Cal. Bd. of Equalization*.[56] In *Swaggart Ministries*, Justice Scalia seems to have modified his analysis of *Walz* and endorsed his colleague's characterization of Walz as holding the New York religious tax exemption valid "as part of a general exemption for non-profit groups."[57]

[27] By 2003, all three accommodationist dissenters in *Texas Monthly*, but only two of the majority separationists (Justices Stevens and O'Connor), were still on the Court. Justices Breyer, Souter, Thomas, and Ginsburg were not party to *Texas Monthly*. In *Zelman v. Simmons-Harris*, [58] an Establishment Clause case concerning school vouchers, the accommodationists prevailed by a five-to-four margin. Justice O'Connor now voted with this majority as did Justice Thomas, who had joined the Court in the intervening years, along with the *Texas Monthly* accommodationists, Chief Justice Rehnquist, and Justices Scalia, and Kennedy. The separationists this time were Justice Stevens of the *Texas Monthly* separationist majority, and the newly appointed members of the Court, Justices Souter, Ginsburg, and Breyer. The result of a challenge to the IRC religious exemption in the present Court is difficult to predict, but Chief Justice

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[55] *Texas Monthly, Inc.*, 489 U.S. at 11.

[56] *Jimmy Swaggart Ministries v. Bd. of Equalization of California*, 493 U.S. 378, 380 (1990).

[57] *Id.* at 393.

[58] 536 U.S. 639 (2002).

Rehnquist[59], and Justices Scalia[60], and Thomas[61], have expressed strongly accommodationist views in the contexts of other cases.

[28] Considering Justice O'Connor's possible role as a swing vote, her views on neutrality are particularly interesting. In a 1985 concurring opinion in *Wallace v. Jaffree*, she wrote:

> [T]he Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community. Direct government action endorsing religion or a particular religious practice is invalid under this approach because it sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.[62]

These words were cited, with approval, by Justice Brennan when he wrote for the plurality in *Texas Monthly*.[63]

[29] Even when concurring in the 2002 accommodationist result of *Zelman*, Justice O'Connor's concurring opinion stressed the need for the government to be neutral on any issue between the religious and the non-religious.[64] She paraphrases the views of Justice Black, writing for the Court in *Everson v. Board of Education of the Township of Ewing*

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[59] *See Wallace v. Jaffree*, 472 U.S. 38 (1985), (Rehnquist, CJ., dissenting); *see also Zelman*, 536 U.S. 639.

[60] *See Texas Monthly v. Bullock*, 489 U.S. 1 (1989),(Scalia, J., dissenting).

[61] *See Zelman*, 536 U.S. 639, (Thomas, J., concurring).

[62] *Wallace*, 472 U.S. at 69 (O'Connor, J. concurring).

[63] *Texas Monthly, Inc.* 489 U.S. at 9.

[64] *Zelman*, 536 U.S. at 669 (O'Connor, J. concurring).

[65] "the [First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary."[66]

[30] So there are concerns for "neutrality" between religion and non-religion (or, for that matter, irreligion) in recent Court decisions, and these concerns would argue for a separationist outcome of a test of the IRC exemptions. On the other hand, Justice O'Connor voiced reservations about "neutrality" as a guide to the "solution to the conflict between the Religion Clauses" in 1985.[67] On that same occasion Chief Justice Rehnquist dissented with a bitter attack on the notion that the Court should be neutral between religion and non-religion.[68] Account must also be taken of two "wild cards"[69]: a) the use of history by the Court; and b) the Court's concern over church/state "entanglement".

B. The Uses of History

[31] In *Walz*, the 1969 landmark case that established the constitutionality of a religious exemption from property taxes, Justice Burger, for the Court, wrote:

> It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates. Yet an unbroken practice of according the exemption to churches, openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside. Nearly 50 years ago Mr. Justice Holmes stated: "If a thing has been practised for

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[65] 330 U.S. 1, 18 (1947).

[66] *Zellman*, 536 U.S. at 569 (O'Connor, J., concurring).

[67] *Wallace*, 472 U.S. at 82.

[68] *Id.* at 91.

[69] WITTE, *supra* note 3, at 152, (applying this stricture to the Court's use of history in these cases).

> two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it."[70]

Despite Justice Burger's cautionary words at the beginning of this quotation, the *Walz* Court achieved an accommodationist result primarily by an appeal to history: since the days of the American Revolution, and indeed since much before then, churches (and other charities) have enjoyed exemption from property tax.[71] And as we saw above, the history of the IRC religious exemptions go back more than 100 years.[72]

[32] Many commentators have pointed to the fragility of such arguments from history. The Supreme Court Justices do not necessarily write as scholarly historians when they use snippets of history. Theirs is often a selective appeal, including that which supports, leaving out that which detracts. It is typically the accommodationist arguments that use this approach, stressing those aspects of our history that featured harmony between church and society, ignoring strife among the religions and strife between secularists and religionists. The accommodationist appeal to history also ignores the fact that in the early days of the republic, long before the Court found the Religion Clauses to apply to the States, many of the States had established churches.[73] But valid or not, we know that sometimes accommodationist results can be reached by a Court that uses just such historical arguments.

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[70] *Walz*, 397 U.S. at 678.

[71] NOWAK, *supra* note 3, at 1230; WITTE, *supra* note 3, at 189.

[72] Hoff, *supra* note 8, at 76-80.

[73] NOWAK, *supra* note 3, at 1221-22; WITTE, *supra* note 3 at 191-193.

C. Church-State Entanglement

[33] The other wild card is the Court's concern over "entanglement." This concern was notable in Walz.[74] Mr. Justice Burger wrote for the Court

> We must also be sure that the end result the effect is not an excessive government entanglement with religion. The test is inescapably one of degree. Either course, taxation of churches or exemption, occasions some degree of involvement with religion. Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes.[75]

[34] In that case, since the elimination of the exemption would increase state/church entanglement, it was better to maintain it. This was not the only argument of the Court here, but it was one. In a frequently quoted 1971 case, *Lemon v. Kurtzman*[76], decided without dissent (except in part) with a separationist result, the matter of "entanglement" became one of the three prongs of what then became known as the "*Lemon* test," which can no longer be considered authoritative.

[35] On the face of it, in view of the fact that "entanglement" has been so often cited in this context as something the Court wants to avoid, it may well become an argument in favor of the Constitutionality of the IRC exemptions. Perhaps a future lawyer for the churches, let us call him Mr. A. (for accommodationist), will face a challenge to the religious exemptions. Mr. A's argument may be something like this:

> As the Court noted in Walz, taxing religious groups can lead to intolerable entanglement between church and state. How much more entanglement would there be if we

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[74] *See generally Walz*, 397 U.S. 664 (1970).

[75] *Id.* at 674.

[76] 403 U.S. 602, 613 (1971).

> suddenly, turning a deaf ear to history, were to demand that churches submit to routine audits and to submit regular reports to the IRS? To paraphrase Mr. Justice Burger, such demands would tend to expand the involvement of government in religion by giving rise to financial investigations of churches, prosecutions for fraud, the jailing of clerics perhaps, and the direct confrontations and conflicts that follow in the train of those legal processes.

How much weight would Mr. A's arguments have in the courts? The arguments would not find favor with Professor Witte, who wrote about the "entanglement" issue in *Walz*, i.e. in the context of local property taxation:

> The Court argues that such interactions will result in an unconstitutional "entanglement" between church and state. But the constitutionality of more intrusive and immediate interactions have been consistently upheld against disestablishment clause challenges, when, for example, religious properties are zoned, religious buildings are landmarked, religious societies are incorporated, religious employers are audited, religious broadcasters and publishers are regulated, intrachurch disputes are adjudicated, and many other instances. The expansion of the forms and the functions of the state have made such interactions between the state and religious institutions both inevitable and necessary. The incidental and isolated interaction that would result from the taxation of religious property is trivial by comparison.[77]

Criticism of the "entanglement" criterion is not confined to scholars. The current Chief Justice has shown unhappiness with this "prong".

[36] In *Lemon*, the "entanglement" concept was used for separationist ends, and Justice Rehnquist has criticized the concept in that context. But his criticism of the whole notion of "entanglement" could also be used against Mr. A.:

> The entanglement test in cases like Wolman [1977, forbidding certain kinds of aid to private schools WC] also ignored the myriad state administrative regulations properly

[77] WITTE, *supra* note 3, at 256.

> placed upon sectarian institutions such as curriculum, attendance, and certification requirements for sectarian schools, or fire and safety regulations for churches. Avoiding entanglement between church and State may be an important consideration in a case like Walz, but if the entanglement prong were applied to all state and church relations in the automatic manner in which it has been applied to school aid cases, the State could hardly require anything of church-related institutions as a condition for receipt of financial assistance.[78]

[37] At oral argument, Chief Justice Rehnquist might ask Mr. A: in return for tax deductions and tax exemptions, is it unreasonable for the government to ask for some accounting of church finances? One might conclude, then, that based on the Court's current interpretations of the First Amendment, including that of its accommodationist members, a challenge of the IRC religious exemptions would succeed.[79]

II. STATE INTERFERENCE WITH CHURCH POLITY: SELECTION OF CLERGY

[38] The Religious Corporations Law of New York State (RCL)[80] is in many ways similar to statutes in other States.[81] However, on the matter of hiring and firing clergy, it

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[78] *Wallace v. Jaffree*, 472 U.S. 38, 110 (1985) (Rehnquist, C.J., dissenting).

[79] But this assessment must be tempered by two considerations. First, neither the Court as a whole nor its individual justices are always predictably consistent. ["[S]ome of the Court's opinions [are] rife with casuistry and contradiction" on church/state matters. WITTE, *supra* note 3, at 225. Second, more importantly, the political environment in which the Court now functions is undoubtedly more Conservative-accommodationist and less Liberal-separationist than it has been in previous decades. [*See* Jeffries, *supra* note 3 (On the importance of politics for judicial outcomes).] The weight of accommodationist-minded judges, especially on Establishment cases, has probably increased since the Reagan administration, not to speak of judicial appointments in the administrations of the two Bushes. [GREGG IVERS, TO BUILD A WALL 190 (1995)].

[80] N.Y. Relig. Corp. Law § 1-437 (1990).

[81] *See generally* Paul G. Kauper and Stephen C. Ellis, *Religious Corporations and the Law*, 71 MICH. L. REV. 1500 (1973); *See also* Catherine M. Knight, *Must God Regulate religious Corporations? A Proposal for Reform of the Religious Corporation Provisions*

presents what seems to be a unique feature.[82] For some churches the law prescribes the method by which clergy is selected.

[39] New York's RCL, in contrast to those jurisdictions that have adopted the much more straightforward Model Non-Profit Corporation Act[83], is a baroque accumulation of rules and prescriptions. It is divided into twenty articles, each of which, except for the "Short Title" (Art. 1) and "General Provisions" (Art. 2), and "Laws Repealed" (Art. 12), devoted to one or more religious groups.

[40] Some of the RCL Articles have puzzling sub-divisions. Article 3 deals with the Protestant Episcopal Church, Article 3-A with the "Apostolic Episcopal Parishes or Churches," etc. There are also Articles 3-B and 3-C. In many cases there is no apparent relationship between the main group and the sub-group. Article 8, for example, is entitled "Congregational and Independent Churches," while Article 8-A is devoted to "Churches of the Ukrainian Orthodox Churches of America."

[41] Article 10, "Other Denominations," is a catchall for the hundreds of groups that could not be enumerated in the other Articles.[84] Section 200 of this article contains the prescription for the appointment of clergy: "The trustees of an incorporated church to which this article is applicable, shall have no power to settle or remove or fix the salary

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of the Revised Nonprofit Corporation Act, 42 EMORY L. J. 721 (1993).

[82] Dale R. Agthe, J.D., Annotation, *Judicial review of Termination of Pastor's Employment*, 31 ALR4 851 (a survey of how this issue has been handled in state courts). The survey, essentially a common-law treatment, unfortunately does not give information about state statutory provisions.

[83] REVISED MODEL NONPROFIT CORPORATION ACT (1988); for a discussion of its adoption in various States, *see* Kauper, *supra* note 81, at 1533.

[84] N.Y. Relig. Corp. Law § 190 (1990) reads, after enumerating certain denominations, "This article is applicable to all other denominations." *Id.*

of the minister".[85] A New York State trial court, in a case involving a Jewish congregation, has interpreted this section to mean that only the membership can call or dismiss a rabbi.[86] Section 139 of Article 7, applies nearly identical language to Baptist churches: "The trustees of an incorporated Baptist church shall have no power to settle or remove a minister or to fix his salary."[87] These provisions are repeated for Congregational and Independent Churches.[88] In the case of Free Methodist Churches, probably in deference to Methodist hierarchical structures, these restrictions on the power of trustees are missing.[89] In even more explicit deference to religious doctrine, Article 5, which deals with the Roman Catholic Church, gives full power to the bishop, consistent with Roman Catholic Canon Law.[90]

[42] Assuming that the legislators were mindful of federal Free Exercise requirements when they devised this scheme of classification, they might have reasoned that each religious group was given, in this scheme of church governance, what it wanted. However, the classification of religious groups in the RCL, complex as it is, falls far short of encompassing the complexity of New York religious life. For example, neither

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[85] *Id.* at § 200. Whether or not incorporated under the N.Y. Relig. Corp. Law, it is clear that the law applies to all religious groups. See N.Y. Relig. Corp. Law § 2 (a) (1990)(Application); *See also Kroth v. Chebra Ukadisha*, 430 N.Y.2d 786 (N.Y. 1980).

[86] *Zimbler v. Felber*, 445 N.Y.2d 366 (N.Y. 1981).

[87] N.Y. Relig. Corp. Law § 139 (1990).

[88] *Id.* at § 169.

[89] *Id.* at § 225-k.

[90] *Id.* at § 91. *Filett v. St. Mary*, 305 N.Y.2d 403 (N.Y. 1969) (holding that Article 5 must be read in conjunction with Roman Catholic Canon law).

Jehovah's Witnesses nor Hasidic Jews[91] are separately listed in the law, so they fall perforce under Article 10, "Other Denominations." Even if it were assumed that what is prescribed for the listed groups coincides with the religious desires of these groups and their members, this could not possibly be the case for the variety of groups that fall into the residual category "churches of all other denominations."[92] The RCL provisions that mandate how clergy are to be hired in the "democratic" religions have not been extensively litigated, and not at all beyond the trial level. However, the few cases that are available afford an insight into the effects of this legislation.

[43] A dispute at the Kissena Jewish Center in Queens (New York City) saw two factions, one supporting and the other opposing the reappointment of their rabbi. Both factions were represented on the Board of Trustees, where the anti-rabbi faction was in a slight majority. In the general membership, however, the pro-rabbi faction predominated. The court held in favor of the pro-rabbi faction, citing § 200 of Article 10 of the RCL.[93] Like most cases involving disputes over the employment of clergy, this dispute pitted one group of congregants against another. In the State of New York, then, all the complexities of Jewish religious polity were settled by resort to the secular courts.[94]

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[91] Jews are given separate treatment in sections 207 (number of trustees), 208 (consolidation of two or more congregations) and 209 (more on consolidation). However, section 200 of this article, concerning the appointment of clergy, governs Jewish synagogues together with "churches of all other denominations." N.Y. Relig. Corp. Law §§ 200, 207, 208, 209 (1990).

[92] *Id.* at § 190.

[93] *Zimbler v Feller*, 445 N.Y.2d 366, 367 (N.Y. 1981).

[94] DANIEL J. ELAZAR, COMMUNITY & POLITY: THE ORGANIZATIONAL DYNAMICS OF AMERICAN JEWRY (Revised Edition) (1995); MORDECAI M. KAPLAN, JUDAISM AS A CIVILIZATION: TOWARD RECONSTRUCTION OF AMERICAN JEWISH LIFE (1981); SAMUEL C. HEILMAN, SYNAGOGUE LIFE: A STUDY IN SYMBOLIC INTERACTION (1998).

[44] A more recent case, *Watt Samakki Dhammikaram v. Thenjitto*, involved the Supreme Court of Kings County (a trial court in Brooklyn) in the internal affairs of a Buddhist temple.[95] The case is interesting for two reasons. First, it concerned a group that had never registered under the RCL and in fact denied that it is a religious corporation. The court ruled, citing § 2 (a) of the RCL, that a group that functions as a religious organization is in fact a "religious corporation" for purposes of the law. Second, the court, applying § 200 of the law, the catch-all Other Denominations Article, imposed a democratic form of polity on a Cambodian Buddhist religion whose history and doctrines were not within the court's expertise. There is little question that the court followed the plain-language prescriptions of the law, as well as the several precedents that it cited.

[45] The effect of New York's RCL is most clearly seen by comparing two very similar cases involving Solid Rock Baptist Churches, one in New York and the other New Jersey. In the New York case, *Ward v. Jones*[96] the court ruled that the membership must vote on matters of pastor salary, basing itself on provisions of New York's RCL. In *Solid Rock v. Carlton*, in New Jersey a state that lacks legislative prescriptions on church polity, the appellate court reproached the trial court for trying to impose polity on the church and ruled that the courts must not interfere with whatever polity a religious group sees fit to choose for itself.[97] This New Jersey case is noteworthy for recognizing the obvious fact that a church need not be connected with a hierarchy to be essentially a

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[95] 631 N.Y.2d 229 (N.Y. 1995).

[96] 587 N.Y.2d 94 (N.Y. 1992).

[97] 789 A.2d 149 (N.J. Super. Ct. App. Div. 2002).

dictatorship of clergy over laity; New Jersey is more in line with the Free Exercise Clause than New York.

A. History of New York's RCL

[46] The State of New York enacted the RCL as early as 1784.[98] In this early version, which was good law for about 100 years and which applied equally to all denominations[99], the trustees of religious groups had the power to hire and fire clergy, although, curiously, the trustees' power over the purse was restricted from the beginning.[100] Generally, however, the early RCL applied general principles of corporate governance to religious corporations. Special accommodation to the various Christian groups, particularly the Roman Catholic Church, developed slowly in the course of the 19th Century.[101]

[47] In 1876, the Baptists in New York were the first to obtain legislation that prohibited the trustees of a church from hiring and firing their ministers.[102] This power was reserved to the membership of a congregation. Baptist churches at the time held to a rigorous anti-hierarchical, individual-believer polity.[103] The polity prescriptions of Edward Hiscox[104], originally published in 1859, are to this day cited by certain Baptist

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[98] 1784 N.Y. Laws 18.

[99] N.Y. Relig. Corp. Law § 1 (1990) (Historical Note).

[100] *Petty v. Tooker*, 21 N.Y. 267 (N.Y. 1860).

[101] Kauper, *supra* note 81, at 1520.

[102] 1876 N.Y. Laws 18.

[103] PAUL M. HARRISON AUTHORITY AND POWER IN THE FREE CHURCH TRADITION: A SOCIAL CASE STUDY AT THE AMERICAN BAPTIST CONVENTION, 66 (1959).

[104] Edward T. Hiscox (1965), The Hiscox Standard Baptist Manual Valley Forge: Judson

churches and have figured in court decisions that try to disentangle internal Baptist church squabbles.[105]

[48] When the RCL was revised in 1895, the legislature applied this originally Baptist polity prescription more generally, i.e. to all religious groups not specifically exempt.[106] The Statutory Revision Commission of the NY State Senate commented that "[t]he express prohibition against the power of the trustees to settle or remove a minister, now applicable to Baptist churches, is extended in its application."[107] The idea of democratic elections for ministers seemed in the spirit of the times, particularly the Baptist spirit. The legislators seemed to have no compunction in applying the ideas of political democracy to the religious groups that they felt they should regulate.

B. Assumptions of the RCL: "Hierarchical" Versus "Congregational" church polities

[49] One of the underlying assumptions of the RCL runs approximately as follows: the various schemes of church government can be classified into a small number of types; underlying this typology is the overarching difference between hierarchical and non-hierarchical church groups. By making specific accommodation to this typology in the law, all religious groups are free to practice their own polity, i.e. their own scheme of church government.

[50] In treating "hierarchical" churches differently than those governed by a "congregational" polity, the RCL follows a long tradition in American jurisprudence,

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Press (originally published in 1859).

[105] For instance, *Ward v Jones*, 154 Misc.2d 597 (1992).

[106] 1895 N.Y. Laws 723.

[107] S. DOC. NO. 33, pt .7, Sect. 34, at 44 (N.Y. 1893).

going back more than 120 years to the influential decision in *Watson v. Jones*.[108] When a group is "hierarchical" in organization, for example the Roman Catholic Church, full deference is given to the hierarchical authority of that church. When a group is "congregational," for instance a Baptist church, the membership's will is to rule.

[51] Even when a church has its own rules reflected in tailor-made sections of the law, there is a Constitutional problem of state interference. As Kauper and Ellis have pointed out, *"*[o]nce the law of a church becomes codified by a state, the church loses its ability to modify its own rules, for a change in church structure has no legal effect without a corresponding amendment of the statute."*[109]*

[52] There are several other difficulties in a law-imposed church typology. First, it is difficult to apply such typology to the realities of religious life. American jurists, like the New York legislators who wrote the RCL, have assumed that religious groups divide neatly into certain categories. When considering the examples of Jehovah's Witnesses and Hasidic Jews, life is more complex than courtroom taxonomy. According to Elman, *"*[a] wide range of governing arrangements is possible, and it is not always self-evident which is hierarchical and which congregational. Would an unaffiliated congregation, a storefront church, in which the minister has traditionally ruled autocratically, be hierarchical or congregational?*[110]*"

[53] Moreover, it has been argued that in cases like *Watson v. Jones* and recent similar cases, that the ostensible church hierarchy may have no more intrinsic validity

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[108] 80 U.S. 679, 722-23 (1871).

[109] Kauper and Ellis, *supra* note 81, at 1537.

[110] Ira Mark Ellman, *Driven from the Tribunal: Judicial Resolution of Internal Church Disputes*, 69 Cal. L. Rev. 1378, 1407 (1981).

than a competing faction, and that the courts' interference in such cases amounts to no more than unconstitutional meddling.[111] Even when secular law purports to support authoritative religious doctrine, it does so without religious authority and in ignorance of the religious complexities and conflicts of religious believers.

C. Variety of Religious Polity

[54] The government of religious organizations is at least as varied as that of other groups. Any discussion of this topic must first take account of the large gap that can exist between the nominal governance of a group, what the group and its leaders believe the governance is, and the actual arrangements of power and influence.

[55] Voluntary organizations in America and in most of Europe are notorious for their democratic pretensions. But the German sociologist Robert Michels, writing early in the twentieth century, punctured these pretensions by formulating his famous "iron law of oligarchy."[112] Such groups practice democratic control by their members on paper, and it is actually a small coterie of leaders that makes decisions. Seymour Martin Lipset has shown this "iron law" can be modified primarily through the role of organized oppositions within these voluntary organizations.[113]

[56] Most people who have been members of any of the main-line churches and synagogues have observed that the formal democracy enshrined in the official documents

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[111] Robert C. Casad, *The Establishment Clause and the Ecumenical Movement*, 62 MICH. L. REV. 419, 434-435 (1964).

[112] ROBERT MICHELS, POLITICAL PARTIES 342-354 (Eden and Cedar Paul trans., Transaction Publishers 1999) (1911).

[113] *See generally* SEYMOUR MARTIN LIPSET, POLITICAL MAN: THE SOCIAL BASES OF POLITICS (Doubleday & Co., Inc. 1960); SEYMOUR MARTIN LIPSET ET AL., UNION DEMOCRACY: THE INTERNAL POLITICS OF THE INTERNATIONAL TYPOGRAPHICAL UNION (The Free Press, 1956).

is little more than window-dressing. The decisions are frequently made by the small group of leaders, who perpetuate their rule by co-opting congenial new members in the guise of nominations to a board. Of course, a crisis in the organization is liable to upset such cozy arrangements, primarily through the formation of mutually antagonistic cliques. Such crises are reflected in the reported cases of intra-church litigation.

[57] Hypocritical or not, the nominal democracy of the RCL's Article 10 may well be in accord with the nominal democracy of many of New York's Protestant denominations and most of New York's Jewish synagogues.[114] However, statutory provisions concerning church polity constitute interference with Free Exercise rights, no matter how much in accord they seem with the doctrines of a given religious group. A group is not at liberty to change, modify, evolve, or adjust its polity without legislative approval. Moreover, the lawyers and business executives who often dominate the boards of these denominations may feel more comfortable with the governance of commercial and non-profit corporations, in which board members have unrestricted power to transact business, including the appointment of officials.

[58] These considerations apply *a fortiori* when a group, though covered by Article 10, is not sympathetic with even a nominal democracy. New York is blessed, perhaps even more so than other jurisdictions, with a profusion of strictly dictatorial entities where any hint of disagreement is considered heresy or worse, punishable by "disfellowship," shunning, or expulsion. Four such groups, Jehovah's Witnesses

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[114] *But see* SAMUEL C. HEILMAN, SYNAGOGUE LIFE: A STUDY IN SYMBOLIC INTERACTION 69-108 (Univ. of Chicago Press, 1976); DANIEL J. ELAZAR, COMMUNITY AND POLITY: THE ORGANIZATIONAL DYNAMICS OF AMERICAN JEWRY 423-451 (Jewish Publication Society 1995).

(Watchtower Bible and Tract Society),[115] Bruderhof,[116] Satmar Hasidim,[117] and Lubavitch Hasidim (Chabad)[118] are all registered in New York as "domestic not-for-profit corporations." But their liability under the RCL, including the RCL's prescriptions on how to appoint clergy, is clearly explained in RCL § 2 (a) of the RCL and in court decisions that have arisen under that Section.[119] To the extent that such groups will seem to be in compliance with the RCL prescription on polity, such compliance must be a sham if the group is to remain true to its own (dictatorial) lights.

D. Assumptions of the RCL: The Secular v. The Spiritual

[59] Some of the ideas behind New York's RCL are deeply enshrined in the American jurisprudence regarding religious corporations. An influential text written in 1917 by Carl Zollmann explained that:

> The spiritual entity created by spiritual means can neither be swallowed up not affected by a temporal corporation created under temporal statutes. The corporation can exist without the church, and the church without the corporation. The corporation, created by the state, may continue though the church is dissolved, while the church may continue though its charter has expired or has been cancelled by the state. Each is derived from a different source, has different

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[115] RAYMOND FRANZ, CRISIS OF CONSCIENCE 42-66 (Commentary Press 1983); *See also* M. JAMES PENTON, APOCALYPSE DELAYED: THE STORY OF JEHOVAH'S WITNESSES 49-51 (Univ. of Toronto Press 1985).

[116] JULIUS H. RUBIN, THE OTHER SIDE OF JOY: RELIGIOUS MELANCHOLY AMONG THE BRUDERHOF 68-69 (Oxford Univ. Press 2000).

[117] JEROME R. MINTZ, HASIDIC PEOPLE: A PLACE IN THE NEW WORLD 154-164 (Harvard Univ. Press 1992).

[118] *Id.*; *See generally* WILLIAM SHAFFIR, LIFE IN A RELIGIOUS COMMUNITY: THE LUBAVITCHER CHASIDIM IN MONTREAL (Holt, Reinhart, and Winston 1974).

[119] *See* N.Y. RELIG. CORP. LAW § 2-a (McKinney 1990); *see generally Watt Samakki Dhammikaram v. Thenjitto*, 631 N.Y.S.2d 229 (N.Y. Sup. Ct. 1995).

powers, and is absolutely independent of the other.[120]

Seventy-five years after this writing, a New York court held similarly that churches are viewed in two parts. The first is the spiritual including the church's doctrine and basic beliefs. The second is the temporal including its real property and the income used for its general operations.[121]

[60] Zollmann's "absolute" separation between the spiritual (*ultra vires* to the legislature) and the "temporal" (subject to secular legislation) runs through New York's RCL. In particular, Paragraph 200 gives the trustees of the (not otherwise exempt) groups the power to administer "temporal" affairs. The power to hire and fire clergy defined in Paragraph 2 as directors of "spiritual" affairs, are specifically reserved to the congregation. While the Legislature does not explicitly purport to legislate within the spiritual realm, it does arrogate to itself the definitions of "temporal" and "spiritual" in the life of the church. The Legislature's insistence on this distinction has led the courts to immerse themselves in exactly what all current constitutional doctrine expressly forbids, theological inquiries.

[61] Two Jewish cases are particularly instructive. In *Zimbler v. Felber*,[122] the court quoted both Talmud and Jewish theological literature to decide that a rabbi is a religious rather than a temporal leader. The second case, *New York v. Tuchinsky*, was decided in the criminal courts where the defendant, a Jewish cantor, had been dismissed

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[120] CARL ZOLLMAN, AMERICAN CIVIL CHURCH LAW 75 (1917).

[121] *Ward v. Jones*, 587 N.Y.S.2d 94, 97 (N.Y. Sup. Ct. 1992).

[122] 445 N.Y.S.2d 366, 367 (N.Y. Sup. Ct. 1981).

by the trustees of his synagogue.[123] He refused to leave the premises, based on the RCL requirement that only the congregation can remove a "spiritual leader."[124] The court held that a Jewish cantor is not a spiritual leader and convicted the defendant of criminal trespass.[125]

[62] The "spiritual-temporal" distinction appears to be similar, or perhaps identical, to the "sacred-secular" or "religious-secular" lines drawn at various times and for various purposes. But these lines are shifting and obviously treacherous when enshrined in legislation that purports to regulate religious organization.

[63] Hasting's Dictionary of the Bible,[126] a prominent Protestant reference, explains that "spiritual gifts" for Christians, include "the powers of administration and help in the life of the congregation to render services, such as almsgiving and hospitality." In other words many of the RCL's functions are "temporal." Many Baptists, and other groups as well, have made organizational matters, including the question of how to call clergy, questions of high religious principle.[127] This is of course obvious in the case of Roman Catholics.

[64] While deferring to the Roman Catholics and other groups on polity matters, the RCL makes the naïve and unwarranted assumption that for all "other" religious groups polity is a matter of religious indifference (a "temporality") and therefore can be

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[123] 419 N.Y.S.2d 843, 845 (N.Y. Dist. Ct. 1979).

[124] *Id.*

[125] *Id.*

[126] JAMES HASTINGS, DICTIONARY OF THE BIBLE 935 (2d ed., revised by Frederick C. Grant and H. H. Rowley 1963).

[127] HARRISON, *supra* note 103.

decided by the legislature. Can this assumption square with the Free Exercise Clause of the First Amendment?

E. The Constitutionality of the Hiring Provisions in the RCL

[65] New York's RCL regulates the appointment of clergy in the state's religious organizations and it does so differentially for the various denominations. The constitutionality of these provisions, or rather their lack of constitutionality, seems beyond question. Unlike the question of the IRC provisions' constitutionality, which leaves room for various interpretations by the Supreme Court, the RCL prescriptions do not seem to leave any such room.

[66] Clearly on point is *Kendroff v. St. Nicholas Cathedral*,[128] which is now fifty years old, but its doctrines have never been challenged. The case addressed itself to the amazingly Byzantine power struggles within the American wing of the Russian Orthodox Church. Neither the details of this imbroglio nor the additional extensive litigation concerning this group are relevant here. A relevant section of the RCL was amended in the immediate post-war period in order to favor an American-based faction of the Russian Orthodox Church. New York's Court of Appeals reversed a lower court, by upholding that section. The U.S. Supreme Court reversed, eight to one, giving control of the New York Russian Orthodox cathedral to the Moscow-controlled faction, declaring that the contrary construction of the RCL was unconstitutional.

[67] The Court looked back to *Watson v. Jones* decided in 1871[129] to declare that in a "hierarchical" church all matters of church government must be determined by the

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[128] 344 U.S. 94 (1952).

[129] 80 U.S. 679 (1871).

church's own hierarchy. While the Court may have been remiss in its inquiry into who exactly constituted the hierarchy at that moment, its principle of forbidding government interference with church government is unambiguous and undoubtedly sound from the point of view of American constitutional doctrine.

[68] Narrowly conceived, the case involved only RCL § 5 (A) (the section dealing with the Russian Orthodox Church), but Justice Reed's opinion, speaking for the Court, left little doubt that all RLC sections regarding the appointment of clergy are unconstitutional stating, "[l]egislation that regulates church administration, the operation of the churches, the appointment of clergy prohibits the free exercise of religion."[130] The opinion strikes at the notion, embedded in the RCL, that the legislature can constitutionally write a church's own polity into the law of the land, it stated that although this statute [the RCL] requires the New York churches to "in all other respects conform to, maintain and follow the faith, doctrine, ritual, communion, discipline, canon law, traditions and usages of the Eastern Confession (Eastern Orthodox or Greek Catholic Church)," their conformity is by legislative fiat and subject to legislative will. The invalidity would be unmistakable should the State assert the power to change the statute requiring conformity to ancient faith and doctrine to one establishing a different doctrine.[131] In view of *Kendroff*, litigation attacking the hiring provisions of the RCL should succeed.

III. FAILURE OF REMEDIES I: WHICH BRANCH OF GOVERNMENT ENFORCES THE CONSTITUTION?

[69] Two important statutes, one Federal and one State, offend the constitution.

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[130] *Kedroff*, 344 U.S. at 107-8.

[131] *Id*. at 108.

Why has nothing happened to rectify this?

[70] These statutes originated prior to World War I while the Supreme Court did not articulate its modern church/state doctrines until after World War II.[132] These practices would have been considered perfectly legal at their inception and they have continued, essentially unchallenged, into the modern period where they are now confronted as unconstitutional relics of the past.[133]

[71] Something is awry. For example, it may well be that disregard of the fundamental law of the land lessens respect for law in general, although empirical data for this proposition is lacking. Some would benefit, however, (and others suffer) if the two aforementioned statutes were changed to eliminate their apparently unconstitutional features. There are also those who might favor legal consistency for its own sake. What remedies are there for those who desire such changes?

[72] When there are violations of criminal law, agencies in the executive department of government (prosecutors) are charged with seeking remedies. Remedies are also available to individuals who feel they have been wronged by violations of tort or contract law. But what remedies are available for those who simply wish the Constitution to prevail over the statutes of the land?

[73] In the next section we will consider the remedy of litigation by private parties. Here we will briefly consider the responsibilities of the executive branch of government. We will also explore some general observations on the workings of judicial review of

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[132] WITTE, *supra* note 3, at Ch. 7-8; FRANK J. SORAUF, THE WALL OF SEPARATION: THE CONSTITUTIONAL POLITICS OF CHURCH AND STATE 312 (Princeton Univ. Press 1976).

[133] For other examples of unconstitutional statutes and practices, *see generally*, OLIVER P. FIELD, THE EFFECT OF AN UNCONSTITUTIONAL STATUTE 323-324 (Univ. of Minn. Press 1935); SORAUF, *supra* note 132, at 294.

putatively unconstitutional statutes.

[74] The "plain meaning"[134] of both Federal and State constitutions suggest that the President and governors have some responsibilities in this field. The U.S. Constitution provides that the President, before entering office, swear to "preserve, protect and defend the Constitution of the United States."[135] In what would appear to be an even more pointed admonition, the President is charged to "take care that the laws be faithfully executed."[136] The State of New York, similarly, requires the governor (and also members of the legislature) to swear to "support the constitution of the United States."[137] The governor, like the President of the United States, "shall take care that the laws are faithfully executed."[138]

[75] But these constitutional provisions seem to have little practical consequence. In a brief review of how the presidential oath of office has affected the powers and obligations of the office, the official government Congressional Research Service commented that the oath the President is required to take might be considered to add anything to the powers of the President, because of his obligation to "preserve, protect and defend the Constitution," might appear to be a rather fanciful idea.[139]

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[134] But remember that "The Constitution's text is authoritative but not exhaustive or, even within its sphere, necessarily self-defining. [T]here may be more than one plain meaning." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 35 (Third Edition, West Publishing Co. 1999).

[135] U.S. CONST. art. II, § 1, cl. 8.

[136] *Id*. at art. II, § 3.

[137] N.Y. CONST., art. XIII, ¶ 1.

[138] *Id*. at art. IV, ¶ 3.

[139] Constitution of the United States 436 (Congressional Research Service 1996)

The authors' review of incidents from the administration of Presidents Jackson, Lincoln, and Johnson, and concluded that

"[b]eyond these isolated instances, it does not appear to be seriously contended that the oath adds anything to the President's powers."[140] Nor, it would appear, does this oath add to his (or to a governor's) obligations. There is a history of U.S. presidents occasionally refusing to enforce federal statutes on the ground of unconstitutionality.[141] But the circumstances in these cases are quite different from the aforementioned cases, and in any case, such presidential action is rare and sporadic. There is nothing in American history that suggests that a president or governor routinely, or even frequently, seek confrontation with the legislature regarding the constitutionality of statutes passed long before his days. Nor is it likely such intervention could cure the problem.

[76] If we cannot look to the executive department of government for remedies, what of the judiciary? It is almost seventy years now since Oliver P. Field examined the problem of unconstitutional statutes in American jurisprudence.[142] Field discussed statutes that had been adjudged unconstitutional by the courts. Some of Field's observations, however, are important to examine. Field rightly sees the problem of constitutionality in America as a problem of judicial review. A statute cannot be unconstitutional, in the American system, unless it has been tested and adjudicated in the courts and ultimately in the Supreme Court of the United States.

(available at Library of Congress).

[140] *Id*.

[141] *See*, *e.g.* Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7, 11 (Winter-Spring 2000).

[142] FIELD, *supra* note 133.

[77] From the point of view of consistency between Constitutional and statutory law, the practice of judicial review leaves much to be desired. First of all, the federal courts are limited by what issues they can consider. For example, there is a constitutional doctrine stating that "only actual, ongoing controversies," which must be "substantial," can be adjudicated by the federal courts.[143] There are also technical rules about who may bring a case, i.e. who has "standing." The upshot of these and other limitations is that judicial review cannot function reliably as an enforcer of the Constitution:

> A weakness in judicial review in its application to the federal system is that judicial review is ineffective to regulate governmental relationships because it does not function continuously as an instrument of supervision. Administrative supervision is much more effective than judicial review in adjusting and enforcing territorial distributions of power provided for in the constitution. The inadequacy of judicial review arises not only from the lack of preventive influence but from the nature of judicial review itself. It is essentially sporadic.[144]

[78] In conclusion neither the executive nor the judicial branch of government can reliably furnish the famous "checks and balances" on legislative unconstitutionalism.

IV. FAILURE OF REMEDIES II: WHO WILL LITIGATE? CHURCH/STATE AND THE INTEREST GROUPS

[79] Since the end of World War II, the Supreme Court has made far-reaching changes in a number of its doctrines. Scholars have ascribed much of these changes to the energetic work of pressure groups that represent particular interests.[145] In the field of

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[143] TRIBE, *supra* note 134, at 312-13.

[144] FIELD, *supra* note 133, at 318.

[145] For a review of this literature, *see* IVERS, *supra* note 79, at 7-33 *and* Jeffries and Ryan, *supra* note 3. *See also* SORAUF, *supra* note 132, for an earlier trenchant and comprehensive analysis.

race relations, the work of the NAACP has played a decisive role. In the area of church and state, the major players have been, on the separationist side, the American Civil Liberties Union,[146] the American Jewish Congress and some other Jewish groups,[147] the (mainly Protestant) Americans United for the Separation of Church and State,[148] and, for the accommodationists, some Catholic groups.

[80] For those opposed to the IRC exemptions and the polity prescriptions in New York's RCL, the only practical remedies would seem to depend on involvement by separationist interest groups. But during all the many years in which these apparently unconstitutional statutes have been on the books, no such group has acted.[149] In this section, the reasons for this inaction are explored.

[81] Any individual of requisite standing is theoretically free to commence litigation seeking to strike a putatively unconstitutional statute. Constitutional litigation, however, is complex and costly. Sometimes, particularly in criminal cases, an individual scribbles out an appeal to the Supreme Court, that the justices are enormously impressed by the *in forma pauperis* action, that the Court proceeds to appoint a famous

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[146] SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES. A HISTORY OF THE ACLU 219-227 (Oxford Univ. Press 1990).

[147] IVERS, *supra* note 79 at 34-65.

[148] RONALD JAMES BOGGS, Culture of Liberty: History of Americans United for Separation Church and State (1978) (Unpublished Ph.D. dissertation, Ohio State University).

[149] During the preparation of this article, I sent letters to the major interest groups to inquire into their positions, if any, on IRC and NYSRCL. Americans United replied that it has taken no position on IRC, making no mention of NYSRCL. ACLU declared that it has no position on either. The American Jewish Committee stated that it did not find a Constitutional problem with either statute. No replies were received from the Anti-Defamation League, the American Jewish Congress, or Agudath Israel.

constitutional lawyer to represent the appellant, for example a future Supreme Court justice, and the case results in overturning existing constitutional law. This apparently happened in *Gideon v. Wainwright*.[150]

[82] Exceptional cases aside, it is clear that successful constitutional litigation almost invariably requires resources -- financial, moral, and organizational -- that far exceed those available to individual plaintiffs acting on their own. Thus, interest groups are of great importance.

[83] The literature[151] concerning these groups stresses a number of considerations that go into their decisions to intervene on any given issue. First, there are often sensitive internal and external politics within the group. Each has a constituency, but that constituency is not necessarily monolithic. It happens quite often that one part of a constituency favors a particular issue while other parts do not. These groups tend to form coalitions with other groups, and the politics of such collaboration might require a group to remain quiet when it would otherwise wish to be active. The Jewish groups in particular are often very sensitive to inter-religious considerations.[152] Second, there is the very important matter of finances. Litigation on constitutional matters, which typically proceeds through several levels of appeal, requires more money than is typically available to an individual litigant. The money available to the group is often substantial but by no means unlimited.

[84] Third, the legal expertise necessary for successful constitutional litigation is

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[150] 372 U.S. 335 (1963). *See also* ANTHONY LEWIS, GIDEON'S TRUMPET (Random House 1964).

[151] *See supra* notes 131-134 and accompanying text.

[152] IVERS, *supra* note 79, at 202 *passim*; SORAUF, supra note 132, at 46-47 *passim*.

very high, and seems to be concentrated, to a large extent, in the legal staffs of four or five of the most active interest groups. Finally, there is the matter of priority. Each of these groups encounters a very large number of cases and issues but cannot possibly respond to them all. The groups will generally become involved only in cases that have the highest saliency for them. From the point of view of possible intervention by the interest groups, the NYRCL and the IRC matters present two different sets of circumstances.

A. The IRC exemptions

[85] The IRC exemptions offer substantial advantages to the totality of organized religion in America, and it does not seem that any religiously connected interest group is inclined to challenge them. Even the most separationist churches do not voluntarily decline the privilege of exemption from local property taxes. A resolution introduced in 1967 at the General Assembly of the Unitarian Universalist Association attempted to suggest just such restraint declaring:

> That tax exemption for churches and church property may amount to a government subsidy to religious organizations which is incompatible with the First Amendment of the United States Constitution prohibiting establishment of religion; and declaring also that: Tax exemption for religious groups may have led to abuses The Unitarian Universalist Association recommends that: its Board of Trustees appoint an ad hoc committee to study the practice of tax exemption recommends further that: Individual churches and fellowships initiate studies of the tax exemption.[153]

[153] UUA Archives 1967 (unpublished resolution on file with Andover-Harvard Theological Library) courtesy of Fran O'Donnell, Curator of Archives and Manuscripts, Andover-Harvard Theological Library.

[86] The UUA Board did not favor the adoption of this resolution.[154] At the General Assembly in June 1967, the resolution was referred to committee, where the matter died. The Board meetings for 1968 and 1969 make no further mention of the issue.[155]

[87] This example from the history of Unitarian-Universalism takes it significance from the traditional association of these churches with separationist positions.[156] The position of the UUA on this issue is similar to the liberal Jewish separationist agencies. These groups think of themselves as opposing government subsidies to religion based on their principles. But when it comes to accepting those indirect subsidies to which they have become accustomed since the beginning of the republic, none of the religiously-connected interest groups have shown any willingness to consider a change.

[88] Much of the steam for separationist activism in the past was motivated by rivalries between Catholics on the one hand and Protestants and Jews on the other. The main issue was aid to religious schools, which in the past benefited mostly the Catholics.[157] A challenge to the IRC exemptions, on the other hand, would mean a challenge to a privilege that is enjoyed by all American organized religions. At present, no organized interest groups appear inclined to launch such a challenge.

[89] The positions of the important interest groups can often be seen in their filings of *amici curiae* in Supreme Court cases. An important test came in 1969 when the

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[154] *Id*., UUA Board meeting of March 10-11, 1967.

[155] *Id*.

[156] IVERS, *supra* note 79, at 110; SORAUF, *supra* note 132, at 32-33; HAMBURGER, *supra* note 3, at 195 passim.

[157] Jeffries & Ryan, *supra* note 3, at 281-282.

Walz[158] case was argued. This case, while different from the IRC matter in important respects, had the crucial similarity of it involving the direct material interests of all American religious groups. That reason indicates how the important interest groups might react to any challenge to the IRC exemptions.

[90] Mr. Walz purchased a small piece of property on Staten Island in New York City for the purpose of this litigation. He objected that while he was obliged property taxes, religious groups were not. All religious groups were (and are) so exempt. The New York Courts ruled against Walz, and the Supreme Court, eight to one, affirmed the New York courts. The Court reasoned that religious tax exemptions were of ancient vintage and has never caused harm to church-state relations. The Court also held that the religious property-tax exemption was no more than what secular non-profit organizations enjoy. (This latter feature -- treating religious groups on par with other non-profits -- is what distinguishes the IRC exemptions from *Walz*).

[91] Interestingly in *Walz*, groups usually associated with separationism lined up to support the religious exemption, i.e. to affirm the New York courts against Mr. Walz. The following filed amicus curiae urging such affirmance: Protestant and Other American United for Separation Church and State [now known as Americans United], the National Council of Churches of Christ [the main-line Protestant umbrella organization], the Episcopal Diocese of New York, the Synagogue Council of America, the National Jewish Commission on Law and Public Affairs, and the Baptist Committee on Public Affairs. Similar briefs were filed by the United States Catholic conference, the attorney generals of thirty-five states and the attorney general of Puerto Rico. Only the American

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[158] *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664 (1970).

Civil Liberties Union, Madalyn Murray O'Hair and the Society of Separationists urged reversal.[159] The three secular Jewish organizations most intimately associated with separationist constitutional litigation, the American Jewish Congress being the leader here, but also the American Jewish Committee and the Anti-Defamation League of B'nai B'rith, very conspicuously abstained from signing any amicus curie briefs.

[92] There are some details concerning the varying relationships between the interest groups and the *Walz* litigation.[160] To begin, Mr. Walz was personally a bit eccentric. Few people had ever seen him. He was to be the author of an anti-Semitic tract a couple of years after the case that made him a footnote to history.[161] When the case was argued in the Supreme Court, Mr. Justice Stewart asked for assurance that he really existed, whereupon Mr. Walz's lawyer did assure the Court that he had, indeed, met Walz, "several times."[162] The case was originally argued personally in the New York trial court pro se by Mr. Walz, who was a lawyer. The New York courts, trial and appellate, held against him. When the case was appealed to the federal courts, the leadership of the various groups seems to have been very much opposed to Mr. Walz's case. The general feeling was that the religious tax exemptions have always existed, have not caused harm, and was extremely useful to the life of the churches and synagogues. Even the American Civil Liberties Union was divided.[163]

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[159] *Id*. at 665-66.

[160] What follows is based mostly on account by SORAUF, supra note 132, at 32 *passim*. *See also* WALKER, *supra* note 146, at 319; IVERS, *supra* note 79; BOGGS, *supra* note 148.

[161] Frederick Walz, *New vs. Old* (2nd ed., New and True 1974).

[162] SORAUF, *supra* note 132, at 136-38.

[163] SORAUF, *supra* note 132, at 39; IVERS, *supra* note 79, at 166-7; WALKER, *supra* note

[93] As has been shown, the normally separationist groups with religious connections either filed amicus briefs to oppose Walz or abstained. The American Civil Liberties Union managed to file in support of Walz, but only just, and under circumstances that were peculiar to the case. The towering separationist legal figure in *Walz* was Leo Pfeffer, counsel to the American Jewish Congress. He held strongly separationist views, and was a veteran of many successful Supreme Court cases. By all accounts he was a charismatic leader and also given to autocratic manners. But in *Walz*, he was unable to obtain support for his separationist stand from the American Jewish Congress or any other Jewish group. Utilizing his personal ties in the separationist legal community outside of his own organization, he was able to sway enough members of the ACLU to get that group to file a pro-Walz brief that he, Pfeffer, largely wrote himself.[164] At the time of *Walz*, the ACLU took a separationist stand that went against the economic interests of all churches and synagogues, but in circumstances particular to Mr. Walz and related to the personal and political configuration of the day. Today, Pfeffer is gone, and many circumstances are different. The ACLU will now not comment on its attitudes, or lack thereof, toward either IRC or RCL,[165] but it does not seem likely that it is about to become involved in either of these issues.

[94] The other amicus briefs for Mr. Walz were filed by self-styled atheists. There

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146, at 319.

[164] SORAUF, supra note 132, at 136-138; WALKER, supra note 146, at 315; IVERS, supra note 79, at 166-167; BOGGS, supra note 148.

[165] Letter from Steven R. Shapiro, Legal Director, ACLU, to author (Jan. 27, 2003) (letter on file with author).

was the Society of Separationists, part of the Mrs. Madalyn Murray O'Hair's group,[166] and then, separately, a brief filed by Mrs. O'Hair herself. Mrs. O'Hair liked to boast that she was "the" Atheist in America.[167] The atheist groups are too small, too poorly organized, and too erratic to pull the weight of the large interest groups. By 2003, Mrs. O'Hair's movement having been decimated by scandal, murder, grand larceny, and multiple schisms,[168] does not seem likely to take up either the IRC or the RCL.

[95] With all that, Mrs. O'Hair was able to make her presence count in her day:

> Without holding any office or seeking any, without any formal political support or allies, without, indeed, very much support or status of any kind, and with only modest expenditures and a somewhat inexperienced attorney, she ultimately stopped the use of the Lord's Prayer in the schools of Baltimore and the nation.[169]

Mrs. O'Hair was at least as eccentric as Mr. Walz but a good deal less reticent about it. Before being murdered in 1995, Mrs. O'Hair could fairly be described as flamboyant. The index for her biography has numerous entries under "marriages and romantic relationships," references to her racism, anti-Semitism, profane language, and unbridled exhibitionism.[170] She was also a raucous, aggressive, perpetual litigator on the side of

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[166] BRYAN F. LE BEAU, THE ATHEIST: MADALYN MURRAY O'HAIR 278 (N.Y. Univ. Press 2003).

[167] *Id*. at 131.

[168] *Id*. at 310-313; Interview with Edd Doerr, past president of American Humanist Association (Jan. 29, 2003).

[169] SORAUF, *supra* note 132, at 130.

[170] LE BEAU, supra note 166, at 381.

separation of church and state. Some of her efforts have had lasting impact.[171]

[96] In reviewing the failure to challenge the IRC provisions, the apparent lack of interest or perhaps ambivalence of the powerful interest groups that might be expected to take up the cudgels are stressed. But on the other hand, there are a number of energetic individuals who, acting sometimes alone and sometimes by influencing powerful allies, have made a difference in constitutional litigation. Clarence Earl Gideon (of *Gideon v. Wainwright*), Leo Pfeffer, the charismatic separationist lawyer and legal scholar, and the eccentric Frederick Walz and Madalyn O'Hair, show the sometimes unpredictable path of constitutional history. If the IRC is to be challenged at some time in the future, it might well be as a result of such maverick actors in the judicial system.

B. The RCL Prescriptions

[97] Some of the general factors that make for failure of remedies in the IRC case operate here too, primarily the apparent lack of saliency for any of the important interest groups. But the substance of the case is different. The RCL prescriptions offend the Free Exercise Clause, which would not, on the face of it, be of interest to separationist groups.

[98] Who cares about Free Exercise in this context? In the cases that have arisen under the clergy provisions of the RCL, the underlying issues have almost invariably involved internal dissent in a Protestant church or Jewish synagogue. One faction favors a clergyman and the other opposes him. When the issue reaches trial (so far none of these cases have been litigated above the trial court level), the question is who has the majority of the congregation. If the law were to allow the trustees to make the final

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[171] *Murray v. Curlett*, 374 U.S. 203 (1963) (after consolidating this case with *Abington School District v. Schempp*, the Supreme Court held that mandatory reading from the Bible before school day is unconstitutional).

hiring decision, the issue might then shift to who has the majority on the board. But such a shift would not resolve the underlying difficulty in the congregation, since the position of a clergyman without congregational support would hardly be tenable. A change in the law could not alter the state of affairs materially.

[99] Most of the religious groups affected by he RCL clergy prescription profess the very kind of nominal democracy that is enshrined in the law. The fact that this democracy is only nominal has not prevented such groups from paying lip service to the RCL prescription. As one board member of a synagogue told me, crucial decisions in his congregation are routinely made by a small group of long-time leaders. But they never experience a problem of "obtaining" a pro-forma endorsement by the congregational meeting, which is very sparsely attended.

[100] A former congregational rabbi explained how he was selected: "We were a group of friends. We got together in somebody's living room and decided that I would be rabbi." Nobody seemed to have been even aware of relevant RCL provisions. It certainly does not seem that the RCL has been able to repeal Michel's iron law of oligarchy.[172]

[101] When it comes to dictatorial groups like Jehovah's Witnesses, Hasidim, or Bruderhof, the question is different but similar. Decisions are made by an elite and there is generally not even pretense of democratic forms.[173] Of course there are dissidents. Like dissatisfied stockholders of commercial corporations, dissident members of

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[172] *See supra*, note 54 and accompanying text.

[173] *See supra*, notes 114-118 and accompanying text.

dictatorial religious groups have a "right of exit"[174] -- they have the right to withdraw from the group, and they also have the right, if they have the energy and motivation, to form rival groups. These remedies, rather than actual democracy, are what seem to keep everyone content.

[102] In short, the RCL as currently administered has proven to be something with which all religious groups and the secular interest groups too, can live comfortably. It is not that some future challenge is altogether ruled out. Some confluence of internal dissension in a church, the litigiousness, vanity, or even abstract Constitutional principle of an individual or group -- such factors might yet, some day, impel a challenge.

V. CONCLUSIONS: HOW ORGANIZED IS OUR CONSTITUTIONAL SYSTEM?

[103] The ordinary expectation of ordinary men probably has it that our American jurisprudence, under our Constitution, is so organized that it forms a coherent system inclusive of federal and state statutes. Deviation from this basic constitutionalism may be expected to be but a temporary aberration, to be corrected by a scheme of checks and balances. On the whole and as a rule, the various parts of American jurisprudence are expected to cohere like the pieces of a puzzle in the process of being properly arranged.

[104] But in the IRC and the RCL lie two major examples of federal and state laws at variance with the Constitution, a situation without easy or reliable remedy. From the point of view of legal theory it is a situation of non-congruence. This situation has lasted for the better part of a century and shows no signs of solution.

[105] Absent a direct supervisory role for the federal judiciary over legislation, the

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[174] ALAN WARE, BETWEEN PROFIT AND STATE: INTERMEDIATE ORGANIZATIONS IN BRITAIN AND THE UNITED STATES (Princeton Univ. Press 1989).

courts can only consider cases that come to them. Cases only come before the court when there is the interest and energy to bring them. Sometimes there is neither present. It would seem that American citizens, in their wisdom, have learned to leave good enough alone, Constitution or no.

[106] So the Constitution does not always govern us. Should we be surprised? What social arrangement among men is so clock-like, so much like a machine, that all of the parts always and reliably work together without friction?