The Establishment Clause and Religion-Based Categories: Taking Entanglement Seriously

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Introduction

The Establishment Clause of the First Amendment[1] was first applied to the states in *Everson v. Board of Education*.[2] Since then its interpretation has been a vexing problem of constitutional jurisprudence. Today, Establishment Clause doctrine requires that an enactment have a secular purpose and effect and that it not create excessive entanglement between church and state.[3]

Twenty years ago, when current doctrine was still in its formative stages, Professor Philip Kurland offered the following formulation to guide the application of the religion clauses:

> The freedom and separation clauses should be read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden.[4]

Clearly, his was not the path taken by the Supreme Court.[5]

Although many might agree with Professor Kurland's more recent judgment that the current test and its predecessors have resulted in "ad hoc judgments to which no principle seems applicable,"[6] it is unlikely

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1. "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I.

2. 330 U.S. 1 (1947).

3. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, *reh'g denied*, 404 U.S. 876 (1971).

4. P. KURLAND, RELIGION AND THE LAW 112 (1962).

5. *See infra* text accompanying notes 12-39.

6. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3, 23 (1978). Kurland is not alone in criticizing the Court's decisions in this area for their lack of even a semblance of a rationale.

that the present three-part Establishment Clause test and free exercise doctrine will be swept aside for his proposal. This is not to say, however, that present Establishment Clause doctrine cannot accommodate a requirement of facial neutrality.

In *Walz v. Tax Commission*,[7] the Supreme Court upheld a property tax exemption[8] specifically granted to religious organizations against a challenge based on the Establishment Clause. Some commentators have suggested that *Walz* should be read as indicating that the Court will not hold tax exemptions expressly given to religious organizations to be unconstitutional per se.[9] *Walz* is doctrinally significant, however, because there the Court introduced "excessive entanglements" language into Establishment Clause doctrine. In this article, I shall argue that (1) because the "excessive entanglements" issue was not assessed qualitatively, it was decided incorrectly in *Walz*, and (2) if "entanglement" is measured qualitatively, specific grants of tax exemption for religious organizations, and all religion-based classifications, are unconstitutional per se under the Establishment Clause.

See, e.g., Schotten, *The Establishment Clause and Excessive Governmental-Religious Entanglement: The Constitutional Status of Aid to Nonpublic Elementary and Secondary Schools*, 15 WAKE FOREST L. REV. 207, 248-49 (1979). *See also* Serritella, *Tangling with Entanglement: Toward a Constitutional Evaluation of Church-State Contacts*, 44 LAW & CONTEMP. PROBS. 143 (1981). Even the Court has come close to admitting that there is little that unifies its decisions in this area. Writing for the majority in Wolman v. Walter, 433 U.S. 229 (1977), Justice Blackmun states: "We have acknowledged before, and we do so again here, that the wall of separation that must be maintained between church and state 'is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.' " *Id.* at 236. Justice Powell also writes, "Our decisions in this troubling area draw lines that often must seem arbitrary." *Id.* at 262 (Powell, J., concurring in part, concurring in the judgment in part, and dissenting in part). The Court's most recent admission of its uneasiness about the state of Establishment Clause doctrine is found in Justice White's opinion for the majority in Committee for Public Education v. Regan, 444 U.S. 646, 662 (1980): "But Establishment Clause cases are not easy; . . . we are divided among ourselves, perhaps reflecting the different views on this subject of the people of this country. What is certain is that our decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes. This course sacrifices clarity and predictability for flexibility, but this promises to be the case until the continuing interaction between the courts and the States . . . produces a single, more encompassing construction of the Establishment Clause."

7. 397 U.S. 664 (1970).

8. This exemption was granted under New York law by N.Y. REAL PROP. TAX LAW § 420 ¶ 1 (McKinney 1960), as authorized by N.Y. CONST. art. XVI, § 1. For a survey of the range of exemptions granted to religious organizations by the states, see C. ANTIEAU, P. CARROLL & T. BURKE, RELIGION UNDER THE STATE CONSTITUTIONS 123-69 (1965).

Diffenderfer v. Central Baptist Church, 404 U.S. 412 (1972), raised a similar issue. But since the Florida legislature changed the relevant statute during the pendency of the case, the Supreme Court dismissed *Diffenderfer* as moot.

9. *See, e.g.*, Note, *Constitutional Aspects of Church Taxation*, 9 COLUM. J.L. & SOC. PROBS. 646, 662 (1973).

This examination of establishment doctrine will focus on religion-based classifications within the Internal Revenue Code (IRC). Such classifications have proliferated in the IRC over the last thirty years. While religion-based classifications appear in other areas of the law,[10] the Establishment Clause problems raised by such classifications can most easily be illustrated in connection with the IRC. The actual and potential controversy in this area usually concerns the scope of the classifications, including such questions as what organizations and activities are governed by their provisions. This contrasts with the more frequently litigated Establishment Clause questions concerning the permissible extent of public aid to parochial schools and their students, in which the religious affiliation of the school is not typically at issue.[11]

I. The Development of the Establishment Clause Doctrine and the Entanglement Test

A. The Establishment Clause Doctrine

In its early years, the Supreme Court took the position that it did not have the authority to intervene in disputes over religious liberties between citizens and the states. As a result, the religion clauses of the First Amendment lay virtually dormant for almost ninety years after the ratification of the Bill of Rights. Justice Catron expressed the dominant judicial attitude on this point in *Permoli v. First Municipality*,[12] in which he wrote, "The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws . . . ."[13]

The Free Exercise Clause was the first of the religion clauses to be

10. See, for example, Selective Service Act of 1948, Pub. L. No. 759, § 6(j), 62 Stat. 604, 612-13, which granted conscientious objector status only to those whose opposition to war was grounded in religious training. Subsequent versions of the conscientious objector exemption retained similar language. Section 634.5 of the California Unemployment Insurance Code excludes from its definition of "employment" service performed in the employ of "a church or convention or association of churches" or "an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches." CAL. UNEMP. INS. CODE § 634.5 (West Supp. 1972). Section 2(2) of the National Labor Relations Act, 29 U.S.C. § 152(2) (1976), has been interpreted as not giving jurisdiction to the National Labor Relations Board over church-operated schools. NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 499-507 (1979).

11. *See, e.g.*, Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

12. 44 U.S. (3 How.) 588 (1845).

13. *Id.* at 609. For another early discussion of the church-state relationship, see Vidal v. Girard's Ex'rs, 43 U.S. (2 How.) 126 (1844).

interpreted by the Supreme Court.[14] A few years later the Court decided in *Davis v. Beason*[15] that neither religion clause provided grounds for invalidating an Idaho voter registration statute which required that every registrant affirm by oath that he neither practiced bigamy or polygamy nor belonged to an organization that advocated such practices. In *Bradfield v. Roberts*,[16] the plaintiff argued unsuccessfully that an agreement between the commissioners of the District of Columbia and a hospital operated by members of the Sisters of Charity, a Roman Catholic order, violated the Establishment Clause.

Almost fifty years after *Bradfield*, in *Everson v. Board of Education*,[17] the Court applied the Establishment Clause to the states for the first time.[18] *Everson* arose from a resolution adopted by the Board of Education in the township of Ewing, New Jersey, which directed that parents whose children must ride public buses to school be reimbursed for the amount of the fares. The school board claimed to have authority to take this action under a New Jersey statute which specified that:

14. *See* Reynolds v. United States, 98 U.S. 145 (1878). In *Reynolds*, the conviction of a Mormon resident of the Territory of Utah under a federal statute that made polygamy a crime in the territories was upheld in spite of a "free exercise" challenge. In his opinion affirming the conviction, Chief Justice Waite distinguished between practice and belief in a way that suggested that the latter enjoyed constitutional protection while the former did not. This distinction was restated in Cantwell v. Connecticut, 310 U.S. 296 (1940), in which Justice Roberts, writing for the Court, said, "Thus the Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." *Id.* at 303-04. The trend of modern development has been to provide "action" a degree of constitutional protection by requiring interference with free exercise to be justified by a compelling state interest. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963). Leo Pfeffer provides an analysis of the development of the Free Exercise Clause in Pfeffer, *The Supremacy of Free Exercise*, 61 GEO. L.J. 1115 (1973). For an example of pre-*Reynolds* treatment of state intervention in church disputes, see Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871).

15. 133 U.S. 333 (1890).

16. 175 U.S. 291 (1899). Quick Bear v. Leupp, 210 U.S. 50 (1908), also raised an Establishment Clause issue, but like *Davis* and *Bradfield* it is no longer doctrinally important.

17. 330 U.S. 1 (1947).

18. In doing so, the Court ignored the fact that the Blaine Amendment, H.R. Res. 1, 44th Cong., 1st Sess., 4 CONG. REC. 5190 (1876), which was designed to apply the religion clauses to the states, failed to pass in 1876. 4 CONG. REC. at 5595. This was only eight years after the passage of the Fourteenth Amendment, which the *Everson* Court used to justify application of the clauses to the states. The Blaine Amendment specified that "[n]o State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect or denomination; nor shall any money so raised or lands so devoted . . . be divided between religious sects or denominations." 4 CONG. REC. at 5190.

> [W]henever in any district there are children living remote from any school house, the board of education of the district may make rules and contracts for the transportation of such children to and from school, including the transportation of school children to and from school other than a public school, except such school as is operated for profit in whole or in part.[19]

A taxpayer in the district brought an action claiming that, among other things,[20] the resolution and statute violated the Establishment Clause by forcing citizens to pay taxes to help support schools that were dedicated to, and that taught, the Catholic faith. Writing for the Court, Justice Black argued that the purpose of the Establishment Clause was to erect " 'a wall of separation between church and state.' "[21] By characterizing the New Jersey statute and resolution as "public welfare legislation," however, he managed to avoid finding the statute and resolution unconstitutional.[22] Black's contention was that paying the bus fares of children attending church schools was no more an establishment of religion than having state-paid policemen detailed to protect children going to and from church schools from traffic hazards. In fact, Black suggested that cutting church schools off from the benefits that accrue to them incidentally through public welfare legislation might conflict with the First Amendment: "That 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."[23] Although *Everson* did not provide a comprehensive test for "establishment," it did offer the following three guidelines: (1) direct contributions of money to parochial schools by the state would violate the Establishment Clause; (2) no constitutional violation results if ben-

19. Act of June 9, 1941, 1941 N.J. Laws 589; *see also* N.J. REV. STAT. § 8 (1941).

20. The taxpayer also pressed a due process claim. *See* Everson v. Board of Educ., 330 U.S. at 5-8.

21. *Id.* at 16. Justice Black cited Reynolds v. United States, 98 U.S. 145 (1878), as authority for this Jeffersonian interpretation of the Establishment Clause.

22. "New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation. While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief." Everson v. Board of Educ., 330 U.S. at 16.

23. *Id.* at 18.

efits from public welfare legislation accrue to church schools; and (3) the First Amendment requires that the state remain "neutral" in matters of religion.

The sixteen years following *Everson* saw a vigorous development of Establishment Clause doctrine,[24] which culminated in the test announced in *School District of Abington Township v. Schempp*.[25] At issue in *Schempp* was the constitutionality of a Pennsylvania statute that required that "[a]t least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading . . . upon the written request of his parent or guardian."[26] In striking down the law, the Court held that for legislation "to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[27]

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24. In the period between the *Everson* and *Schempp* cases, the Court decided five Establishment Clause suits: Illinois *ex rel.* McCollum v. Board of Education, 333 U.S. 203 (1948), Zorach v. Clauson, 343 U.S. 306 (1952), McGowan v. Maryland, 366 U.S. 420 (1961), Torcaso v. Watkins, 367 U.S. 488 (1961), and Engel v. Vitale, 370 U.S. 421 (1962).

25. 374 U.S. 203 (1963). The companion case to *Schempp*, Murray v. Curlett, involved a school board rule similar to the Pennsylvania statute challenged in *Schempp*.

26. 24 PA. STAT. ANN. tit. 24, § 15-1516 (Purdon 1962), *amended by* Pub. L. No. 1928 (Supp. 1960).

27. School Dist. of Abington Township v. Schempp, 374 U.S. at 222. In the wake of the Court's involvement with the religion clauses came a reexamination of the premises, *see infra* note 82 and accompanying text, on which the exemptions granted to religious organizations had been based. *See, e.g.*, Kauper, *The Constitutionality of Tax Exemption for Religious Activities*, in THE WALL BETWEEN CHURCH AND STATE 95, 95-116 (D. Oaks ed. 1963); Korbel, *Do the Federal Income Tax Laws Involve an "Establishment of Religion?"*, 53 A.B.A. J. 1018 (1967); Paulsen, *Preferment of Religious Institutions in Tax and Labor Legislation*, 14 LAW & CONTEMP. SOC. PROBS. 144 (1949); Note, *Constitutionality of Tax Benefits Accorded Religion*, 49 COLUM. L. REV. 968 (1949). Those commentators who believed that the granting of such exemptions and other tax benefits violated the Establishment Clause largely based their views on the conviction that such benefits amounted to state support of religion. *See, e.g.*, Korbel, *supra*, at 1018; *see also* Hurvich, *Religion and the Taxing Power*, 35 U. CIN. L. REV. 531 (1966) (arguing that by granting tax exemptions to religious organizations, state and federal governments are, in effect, subsidizing religion).

As appealing as this argument might seem, however, it is seriously flawed. Boris Bittker points out that it is far from clear just how an exemption amounts to a subsidy. Bittker, *Churches, Taxes and the Constitution*, 78 YALE L.J. 1285 (1969). As he puts it, "The anti-exemption case . . . suffers from a crisis of definition." *Id.* at 1296.

The problem of definition shows up in the following way in "the exemption as subsidy" claim. Bittker invites us to consider the following individuals: (1) the British Ambassador to the United States; (2) Mao Tse-Tung; (3) a Mississippi sharecropper whose family income is below the exemption level; (4) the inmate of a home for the aged, who is supported by a charitable organization; (5) a rich Texas oilman whose taxable income after deductions for percentage depletion and charitable contributions is $500; (6) a person whose income of $10,000 consists entirely of tax-exempt interest on municipal bonds. *Id.* at 1303. It is plain that all of these individuals are exempted from the federal income tax. But, is it plausible to

B. The Entanglement Test

The next major development concerning Establishment Clause doctrine came in *Walz v. Tax Commission*.[28] The plaintiff in *Walz* owned real estate in New York City. He brought suit seeking to enjoin the New York City Tax Commission from granting property tax exemptions to religious organizations for properties used exclusively for religious worship. Walz's claim was that the exemptions indirectly required him to contribute to religious organizations and that this violated the religion clauses of the First Amendment.[29] Writing for the majority, Chief Justice Burger applied the two-step test announced in *Schempp* and found no constitutional violation. Concerning the first prong of the test he wrote:

> The legislative purpose of a property tax exemption is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility. New York, in common with the other States, has determined that certain entities that exist in a harmonious relationship to the community at large, and that foster its "moral or mental improvement," should not be inhibited in their activities by property taxation or the hazard of loss of those properties for nonpayment of taxes.[30]

Thus, the New York Legislature's grant of exemption was held to be properly motivated.

The second part of the test—whether the *effect* of the exemption violates the Constitution—Chief Justice Burger evaluated by considering whether exemption gives rise to an excessive "entanglement" of church and state. In finding that it does not, the Chief Justice argued that exempting church property from taxation is a lesser entanglement than taxing it:

> Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church

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regard them as receiving a subsidy by virtue of their exemption? It seems that the "exemption as subsidy" argument, if we try to make sense of it, requires us to regard everything that escapes taxation as a subsidy. Bittker concludes that, "In short, the assertion that an exemption is equivalent to a subsidy is untrue, meaningless, or circular, depending on context, unless we can agree on a "correct' or 'ideal' or 'normal' taxing structure as a benchmark from which to measure departures." *Id.* at 1304.

28. 397 U.S. 664 (1970).

29. This was the first time the Supreme Court had considered this question. In Gibbons v. District of Columbia, 116 U.S. 404 (1886), however, the Court was asked to decide whether certain church property being used to produce income came within a property tax exemption granted by Congress. In finding that it did not, the Court implicitly accepted that Congress had the power to grant exemptions to religious organizations. *See id.* at 408.

30. Walz v. Tax Comm'n, 397 U.S. at 672.

> property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes.
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> Granting tax exemptions to churches necessarily operates to afford an indirect economic benefit and also gives rise to some, but yet a lesser, involvement than taxing them.[31]

The Chief Justice also recognized that "a direct money subsidy would be a relationship pregnant with involvement";[32] however, he rejected the "exemption as subsidy" characterization, stating that "the grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state."[33]

From a doctrinal point of view, the most interesting aspect of *Walz* is the Chief Justice's use of "entanglement" terminology. Until *Lemon v. Kurtzman*,[34] it was unclear whether "excessive entanglement" would be used as a separate test or was merely an elaboration of the "secular effect" criterion. *Lemon* and its companion cases[35] involved a challenge to two state statutes. The Rhode Island Salary Supplement Act[36] authorized a fifteen percent supplement to be paid to teachers in non-public schools whose per pupil average expenditures on secular education were below those of public schools. No instructor teaching courses in religion could qualify for the subsidy under the plan. Moreover, to be eligible, a teacher could only teach courses available in the public schools and had to use the same materials. Under Pennsylvania's Non-Public Elementary and Secondary Education Act,[37] the state was allowed to purchase specified secular educational services from nonpublic schools. Writing for the Court, Chief Justice Burger held that the relationships created by these statutes entailed an exces-

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31. *Id.* at 674. Although the Chief Justice's language hints that taxation of churches might be unconstitutional, the 10th Circuit has stated that "tax exemptions are a matter of legislative grace." Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849, 854 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1973). More recently, the issue of whether tax exemptions of religious organizations can be revoked has been answered in the affirmative in connection with religious organizations that discriminate on the basis of race. *See, e.g.*, Bob Jones Univ. v. United States, 639 F.2d 147 (4th Cir. 1980), *cert. granted sub nom.* Goldsboro Christian Schools, Inc. v. United States, 454 U.S. 892 (1981) (IRS revoked tax-exempt status of university on the basis of university rules prohibiting interracial dating and marriage and its previous policy of refusing to admit unmarried blacks).

32. Walz v. Tax Comm'n, 397 U.S. at 675.

33. *Id.* Justice Brennan, in his concurring opinion, cited Bittker's article, *supra* note 27, and argued that an exemption is not a subsidy. 397 U.S. at 690.

34. 403 U.S. 602 (1971).

35. Early v. DiCenso, and Comm'n. of Educ. v. DiCenso.

36. R.I. GEN. LAWS §§ 16-51-1 to 16-51-9 (Supp. 1970) (repealed 1980).

37. PA. STAT. ANN. tit. 24, §§ 5601-5608 (Purdon 1971) (repealed 1977).

sive entanglement between government and religion. In so doing he also set forth an important analytical framework:

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster "an excessive government entanglement with religion."[38]

This framework now serves as the touchstone for Establishment Clause doctrine.

Two bases for excessive entanglement have been explicitly recognized by the Court. In *Walz*, it was suggested that unconstitutional entanglement would arise from legislation requiring continuing and intrusive administrative oversight by the state. In *Lemon*, the Court identified the divisive political potential of the state aid programs brought before it as constituting "excessive entanglement."[39]

II. Qualitative Analysis of the Excessive Entanglement Test

Although *Walz* involved a property tax exemption, it can be read broadly to stand for the proposition that the granting of tax exemptions to religious organizations, whether by Congress or by state legislatures, is not a per se violation of the Constitution. This article will argue that this position is wrong and that it results from an insufficient consideration of the entanglement issue.

A. Problems with the *Walz* Decision

In his dissent in *Walz*, Justice Douglas framed the issue as being whether those who are organized into religious organizations get tax benefits "merely because they are believers, while non-believers, whether organized or not, must pay the real estate taxes."[40] He opined that "in common understanding one of the best ways to 'establish' one

38. Lemon v. Kurtzman, 403 U.S. at 612-13.

39. *Id.* at 622-23. The Third Circuit Court of Appeals recently found that the City of Philadelphia's expenditure of more than $200,000 to construct a special platform and provide other extraordinary assistance for papal ceremonies at Logan Circle involved "excessive entanglement" of church and state because, inter alia, of its potential for political divisiveness. Gilfillan v. City of Philadelphia, 637 F.2d 924, 932 (1980). Interestingly, the Court took the position that legal actions brought to enjoin the City's assistance were sufficient evidence for finding entanglement on the basis of "potential divisiveness." *Id.* Potential "political divisiveness" as a basis for finding "excessive entanglement" has been strongly criticized. *See, e.g.*, Ball, *What is Religion?*, 8 CHRISTIAN LAW. 1, 11-15 (1979).

40. 397 U.S. at 700.

or more religions is to subsidize them, which a tax exemption does."[41] In sum, Justice Douglas was displeased with the decision because it upheld a law that demonstrates a significant preference for religions and the religious over the nonreligious or the antireligious. This legally expressed preference, he argued, constitutes an establishment of religion. But not all legally expressed preferences concerning religion are objectionable to Douglas:

> There is a line between what a state may do in encouraging "religious" activities . . . and what a state may not do by using its resources to promote "religious" activities . . . or bestowing benefits because of them. Yet that line may not always be clear. Closing public schools on Sunday is in the former category; subsidizing churches, in my view, is in the latter.[42]

Professor Kurland, on the other hand, argues that *Walz*, along with many other Establishment Clause cases, was decided by "[j]udicial discretion, rather than constitutional mandate."[43] He states as follows:

> [The entanglement criterion] is either empty or nonsensical . . . . The word entanglement is only an antonym for separation. The former assures no more guidance than the latter . . . . The primary purpose and the primary effect of the New York tax exemption for church property in *Walz* was to aid the churches or their adherents. That was not only its primary purpose and effect, it was its sole purpose and effect. But it was held to have passed the test.[44]

While the remarks of Justice Douglas and Professor Kurland are cogent criticisms, a more fundamental problem may be found in *Walz*. In applying the entanglement test, the majority failed to evaluate the meaning of entanglement from a qualitative point of view.

Justice Brennan, discussing the entanglement issue, stated that even though exemptions may be a passive form of involvement with religion, their termination would not "*quantitatively* lessen the extent of state involvement with religion."[45] Similarly, when Chief Justice Burger considered the relative degree of entanglement that would result from nonexemption, he merely enumerated several additional tax-related transactions that would take place between churches and the state if no exemptions were provided—such as tax valuation of property and

41. *Id.* at 701.

42. *Id.*

43. Kurland, *supra* note 6, at 20.

44. *Id.* at 19-20 (footnote omitted).

45. Walz v. Tax Comm'n., 397 U.S. at 691 (emphasis added).

tax foreclosures.[46] With the exception of Justice Harlan,[47] it appears that in analyzing the entanglement question, the majority concerned itself exclusively with the number or the extent of the administrative contacts occasioned by exemption, rather than with the nature of the government involvement.

The central question, therefore, is whether measurement of entanglement along such a dimension is appropriate. Let us assume for a moment that there is no provision in the statute that exempts religious organizations and that therefore church property is taxable. Let us also assume that the *Walz* majority is correct in asserting that this would increase the number of tax-related transactions between church and state.[48] What the majority fails to note is that none of these transac-

46. *Id.* at 674. Chief Justice Burger's concern over possible tax valuations, tax liens, and tax foreclosures is somewhat surprising in view of the role courts have played in the vastly more sensitive area of disputes within churches over the control and disposition of church property. *See, e.g.*, Jones v. Wolf, 443 U.S. 595 (1979); Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696, *reh'g denied*, 429 U.S. 873 (1976); Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969); Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871); Protestant Episcopal Church v. Graves, 83 N.J. 572, 417 A.2d 19 (1980), *cert. denied sub nom.* Moore v. Protestant Episcopal Church, 449 U.S. 1131 (1981). In addition to entering into property disputes, at least one state supreme court has also found that no excessive entanglement occurs when a court enforces a statute requiring a church to hold certain books and records open for inspection by church members. *See, e.g.*, Bourgeois v. Landrum, 396 So. 2d 1275 (La. 1981).

47. It should be noted that Justice Harlan stated that the statute granting the exemption was so broad in its grant of exemptions that its administration "need not entangle government in difficult classifications of what is or not religious." Walz v. Tax Comm'n, 397 U.S. at 698. *See also* N.Y. REAL PROP. TAX LAW § 420 (Supp. 1969). It is plain from the statute that Justice Douglas is correct in saying there is no basis for claiming that the statute does not involve government in such classifications. 397 U.S. at 700.

48. In fact, this assumption seems clearly wrong. Determination of which groups and activities are eligible for various exemptions and deductions has apparently led to considerable involvement by the government. In United States v. Holmes, 614 F.2d 985 (5th Cir. 1980), the appellate court held that an IRS summons seeking all documents relating to the organizational structure of the church since its inception, all church correspondence files for a certain period, minutes of all church meetings of officers, directors, trustees, or ministers during a certain period, and a sample of every piece of literature pertaining to the church was overbroad. (The IRS summons was part of an investigation of the church's tax-exempt status and its classification as an organization to which tax deductible contributions could be made under I.R.C. § 170(b)(1)(A)(i). The instructions for the production of documents required 14 numbered paragraphs in the summons. *See* United States v. Holmes, 614 F.2d at 987 n.3.) The court did, however, affirm the right of the IRS to demand documents in its investigation. But any summons seeking the production of documents would have to be narrower than the original.

In United States v. Freedom Church, 613 F.2d 316 (1st Cir. 1979), the appellate court upheld an IRS summons challenged on the ground that, inter alia, the summons was not issued in good faith because it failed to meet the relevancy requirement of United States v. Powell, 379 U.S. 48, 57-58 (1964). The court in *Freedom Church* stated that the relevancy requirement of a summons issued pursuant to 26 U.S.C. § 7602 is "whether the inspection

tions takes place between the state and churches *as such*. That is to say, the fact that the owner of taxable property is a church or other religious organization has no significance vis-à-vis the statute imposing the tax. In contrast, when exemptions are granted specifically to religious organizations the "religious" nature of the organization becomes the operative fact triggering application of the law. By granting an exemption in this manner, the government necessarily assumes the power to determine what constitutes a "religion." Whether the government overtly formulates a definition or does so implicitly through the enforcement of the tax laws is relatively unimportant. In either case, the government can express official approval or disapproval of certain religious practices and beliefs through its power either to grant or to withhold exempt status. The critical factor is the power of definition that necessarily attends the use of a religion-based category. The assumption of this power constitutes the most fundamental and obnoxious form of entanglement.

B. The Court's Analysis of Religion-Based Categories in Non-Tax Statutes

The failure of the Court to take into account the qualitative aspect of the entanglement issue in *Walz* is perplexing.[49] At least as early as *Cantwell v. Connecticut*,[50] the Court displayed an awareness of the fact that investing government officers with the authority to decide what is or is not a religion offends the First Amendment. *Cantwell* involved a

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sought 'might have thrown light upon' the correctness of the taxpayer's returns." 613 F.2d at 321 (citing United States v. Noall, 587 F.2d 123, 125 (2d Cir. 1978), *cert. denied*, 441 U.S. 923 (1979)). The court continued by asserting that the power given to the IRS under § 7602 is so broad that the IRS is "licensed to fish." 613 F.2d at 321 (citing United States v. Giordano, 419 F.2d 564, 568 (8th Cir. 1969), *cert. denied*, 397 U.S. 1037 (1970)). Clearly, the *Noall* test scarcely restrains the IRS from rummaging freely.

In view of the IRS's power to determine the tax-exempt status of an organization on the basis of whether or not it is a church or is adequately church-related, and its power to rummage virtually at will through the records and documents of organizations it investigates, Chief Justice Burger's concern over the degree of entanglement arising from such arm's length matters as tax valuations, liens, and foreclosures seems rather odd.

As a final matter, it should be noted that the appellant in *Freedom Church* attempted to rely on 26 U.S.C. § 7605(c): "Restriction on Examination of Churches." Both the language of § 7605(c) and the Court's reading of § 7602 show that § 7605(c) provides negligible protection.

For an excellent discussion of "church distinctions" in the IRC, see Whelan, *"Church" in the Internal Revenue Code: The Definitional Problems*, 45 FORDHAM L. REV. 885 (1977). Whelan's article specifies in some detail the extent to which special tax treatment of religious organizations involves governmental entanglement with religion.

49. Unfortunately, Walz's attorney did not raise this issue in his brief.

50. 310 U.S. 296 (1940).

statute[51] requiring anyone who wanted to solicit money or valuables for a religious cause to obtain a certificate from a designated state official. In striking down the statute under the Free Exercise Clause, the Court stated:

> It will be noted . . . that the Act requires an application to the secretary of the public welfare council of the State; that he is empowered to determine whether the cause is a religious one; and that the issue of a certificate depends upon his affirmative action . . . . He is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth.[52]

A similar sensitivity was expressed in *United States v. Ballard*[53] about the types of problems involved in official judgments concerning what qualifies as a religion. In *Ballard*, the defendants allegedly used the mails in a fraudulent scheme involving the defendants' religious beliefs. The central issue was whether the district court erred in not submitting to the jury the issue of the truth of the defendants' beliefs. Justice Douglas wrote for the majority:

> Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others . . . . The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain.[54]

Thus, the Court upheld the judgment of the lower court on free exercise grounds.[55]

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51. CONN. GEN. STAT. § 6294 (1930), *amended by* CONN. GEN. STAT. § 860(d) (Supp. 1937).

52. Cantwell v. Connecticut, 310 U.S. at 305. Restrictions on solicitation still receive careful scrutiny from the federal courts under the Free Exercise Clause. *See, e.g.*, Espinosa v. Rusk, 634 F.2d 477 (10th Cir. 1980). The secular purpose test of Establishment Clause doctrine was recently used to affirm the decision of a district court, invalidating a Minnesota statute which created classifications that would have favored efforts by some religious groups to solicit funds over the efforts of other religious groups. Valente v. Larson, 637 F.2d 562 (8th Cir. 1981).

53. 322 U.S. 78 (1943).

54. *Id.* at 86-87.

55. *Id.* at 88. Even though the Court held that the issue of truth or falsity of religious beliefs could not be submitted to a jury, it found that the sincerity of those beliefs was a proper jury question. Two relatively recent cases in which the sincerity issue was adjudi-

As in *Cantwell*, the Court in *Ballard* objected to substantive governmental judgments about religion. But if the government is not allowed to decide what is a "true" religious view, then neither should it have the power to do what is virtually the same thing—to decide whether an organization is truly a religion.[56]

Certain members of the Court have nonetheless recognized that certain actions that merely indicate, or that may be construed to indicate, official approval or sanction also offend the Establishment Clause. As Justice Black wrote in a footnote to his dissent in *Zorach v. Clauson*: "A state policy of aiding 'all religions' necessarily requires a governmental decision as to what constitutes 'a religion.' Thus is created a governmental power to hinder certain religious beliefs by denying their character as such . . . ."[57] Later, speaking for a unanimous Court in *Torcaso v. Watkins*,[58] Black stated: "Neither [the state nor the federal government] can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."[59]

Questions about the constitutional propriety of legislative and bureaucratic use of religion-based categories also arose in the context of the Vietnam War. In *United States v. Seeger*,[60] section 6(j) of the Universal Military Training and Service Act[61] was attacked under the religion clauses. The statute exempted from combatant training and service in the armed forces those persons who were conscientiously op-

cated are Teterud v. Burns, 522 F.2d 357 (8th Cir. 1975), and Theriault v. Silber, 391 F. Supp. 578 (W.D. Tex. 1975).

56. In *Ballard*, the Court acknowledged the propriety of a "sincerity" test. 322 U.S. at 78. In the case of statutes granting exemptions, no statute simply limits the discretion of the deciding official to judgments about "sincerity." For a trenchant, and I believe correct, criticism of the "sincerity" standard, see Justice Jackson's dissent in *Ballard*. 322 U.S. at 92-93.

57. 343 U.S. 306, 318 n.4 (1952).

58. 367 U.S. 488 (1961). *Torcaso* involved an appointee to the office of Notary Public in Maryland, whose commission was denied because he would not declare his belief in God, as required by the Maryland Constitution.

59. *Id.* at 495. The following year in Engle v. Vitale, 370 U.S. 421 (1962), Justice Black, again writing for the Court, expressed the view that "[t]he Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its unhallowed perversion by a civil magistrate." *Id.* at 431-32 (footnote omitted).

60. 380 U.S. 163 (1965).

61. 50 U.S.C. app. § 456(j) (1958) (amended in 1967 to strike provision that required religious training and belief stem from the individual's belief in relation to a Supreme Being involving duties superior to those arising from any human relationship, and to eliminate requirement for a hearing by Department of Justice when there is an appeal from local board decision denying conscientious objector status).

posed to participation in war in any form because of their religous training and belief. The relevant section defined "religious training and belief" as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code."[62] Seeger based his claim for conscientious objector status on opposition to war in any form and on religious belief. He specified in his application for conscientious objector status, however, that he regarded the existence of a Supreme Being as an open question and that he was skeptical about the existence of God. He further specified that he did not have "a lack of faith in anything whatsoever,"[63] but that he had a "belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed."[64]

Seeger's attack on the statute cited its failure to exempt nonreligious conscientious objectors and claimed that it discriminated against different forms of religious expression. The Court avoided the constitutional issues by, in effect, dropping from the statutory definition of "religious training and belief" the requirement of a "belief in a relation to a Supreme Being." The test of "belief in a relation to a Supreme Being," said the Court, "is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."[65] The result of the Court's construction was that one could be denied conscientious objector status only if one's objection to service was based on a moral code "which is not only personal but which is the sole basis for the registrant's belief and is in no way related to a Supreme Being."[66] Consequently, Seeger was within the statutory language, said the Court, since "[h]e did not disavow any belief 'in a relation to a Supreme Being'; indeed he stated that 'the cosmic order does, *perhaps*, suggest a creative intelligence.' "[67]

The next challenge to section 6(j) came in *Welsh v. United States*,[68] which was handed down shortly after *Walz*. Again, the Court demonstrated uneasiness about religion-based classifications. Welsh argued

62. *Id.*

63. United States v. Seeger, 380 U.S. at 166.

64. *Id.*

65. *Id.* This standard was originally formulated by the California Supreme Court. *See* Fellowship of Humanity v. County of Alameda, 153 Cal. App. 2d 673, 315 P.2d 394 (1957).

66. United States v. Seeger, 380 U.S. at 186.

67. *Id.* at 187 (emphasis added).

68. 398 U.S. 333 (1970).

that section 6(j) clearly violated the Establishment Clause. He denied, however, that his objection to service was "religious" and stated that his beliefs were formed by his study in the subjects of history and sociology. Later, he claimed that his views were "religious" in the "ethical sense" of the word.

Though the Court recognized that Welsh's position was partially based on his view of world politics, it nevertheless held that Welsh qualified for conscientious objector status under the statutory language. The Court noted:

> We certainly do not think that section 6(j)'s exclusion of those persons with "essentially political, sociological, or philosophical views or a merely personal moral code" should be read to exclude those who hold strong beliefs about our domestic and foreign affairs or even those whose conscientious objection to participation in all wars is founded to a substantial extent upon considerations of public policy.[69]

The only persons who the Court was willing to say would not fall within the exemption were those "whose beliefs are not deeply held and those whose objections to war do not rest at all on moral, ethical, or religious principle but instead rest solely upon considerations of policy, pragmatism, or expediency."[70] The result of this "construction," as Justice Harlan pointed out in his concurring opinion, was to eliminate the "statutorily required religious content for a conscientious objector exemption."[71] As judicially rewritten, the statute appears to exempt from military service virtually anyone who opposes all war in good faith.[72]

Although the Court refused to face squarely the constitutional issues in *Seeger* and *Welsh*, it demonstrated that when faced with a clear-cut challenge to a religion-based classification, it would go to extraordinary lengths to deny giving effect to the plain terms of the classification.

The unreflective application of the entanglement test in *Walz*, then, is surprising, since both before and after *Walz* the Court has shown itself aware that governmental judgments about religion, even those judgments that simply purport to determine whether an organization is a religion, are fraught with constitutional difficulties. Unfortu-

69. *Id.* at 342.

70. *Id.* at 342-43.

71. *Id.* at 345 (Harlan, J., concurring).

72. Should Congress reinstitute conscription with an exemption for conscientious objectors, *Seeger* and *Welsh* could very likely result in a "loophole" larger than that provided by the student deferment during the Vietnam era draft.

nately, post-*Walz* Establishment Clause cases have advanced the analysis and application of the entanglement criterion little, if at all.[73]

III. Religion-Based Categories in the Internal Revenue Code

As should be apparent, the problem of entanglement is a problem inherent in religion-based classifications per se, and is not limited to the specific exemptions that have been granted to religious organizations in all fifty states. Such classifications arise in state and local laws[74] and regulations as well as at the federal level, but in no part of the law are religion-based classifications more pervasive than in the Internal Revenue Code. As Commissioner Kurtz stated not long ago, "our tax law places the IRS near the forefront in making delicate decisions involving definitions of 'religious' and 'church'."[75]

A. History of Tax Benefits for Religious Organizations

Religions appear to have enjoyed tax exemptions in one form or another for at least as long as there has been a historical record concerning taxation.[76] In the colonial and early post-Revolutionary periods, church property often was immune from taxation since churches frequently had the status of "established" public institutions.[77] By the

73. These cases have typically involved facially neutral statutes that have been challenged as providing subsidies to church-related schools. *See, e.g.*, Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980) (public funds to reimburse nonpublic schools for various services mandated by the state); Wolman v. Walter, 433 U.S. 229 (1977) (various forms of aid to nonpublic schools); Meek v. Pittenger, 421 U.S. 349 (1975), *reh'g denied*, 422 U.S. 1049 (1975) (state provision of "auxillary services" and text book loans to children in nonpublic schools); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (maintenance and repair grants to "qualifying" nonpublic schools and tuition reimbursement and deduction plans); Hunt v. McNair, 413 U.S. 734 (1973) (act creating Educational Facilities Authority to assist institutions of higher education through issuance of revenue bonds); Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472 (1973) (reimbursement of nonpublic schools for various examination and reporting expenses); Tilton v. Richardson, 403 U.S. 672, *reh'g denied*, 404 U.S. 876 (1971) (federal construction grants for college and university facilities); Lemon v. Kurtzman, 403 U.S. 602, *reh'g denied*, 404 U.S. 876 (1971) (acts authorizing salary supplements to teachers in nonpublic schools and purchases of certain secular educational services from nonpublic schools).

74. *See, e.g.*, CAL. UNEMP. INS. CODE § 634.5 (West Supp. 1982).

75. Speech at Practicing Law Institute Conference (Jan. 9, 1978), *reprinted in* Daily Tax Report, Jan. 11, 1978, at J9, col. 2.

76. *See, e.g.*, *Genesis* 47:26 and *Ezra* 7:24. The tradition of tax exemption for Christian churches began in the 4th century A.D. when Constantine exempted church buildings and land surrounding them that was used for church purposes. *See* 3 A. STOKES, CHURCH AND STATE IN THE UNITED STATES 419 (1950). *See also* Zollmann, *Tax Exemptions of Churches*, 14 MICH. L. REV. 646, 648 (1916).

77. *See, e.g.*, Van Alstyne, *Tax Exemption of Church Property*, 20 OHIO ST. L.J. 461-62 (1959). *See also* C. ZOLLMANN, AMERICAN CHURCH LAW 328 (1933).

time the First Amendment was ratified, however, only Connecticut, Maryland, Massachusetts, and New Hampshire still afforded a substantial degree of "establishment" to churches.[78] Not until 1833, however, when Massachusetts amended its constitution to limit religion to voluntary support, was disestablishment complete.[79]

Disestablishment, however, did not bring revocations of property tax exemptions in its wake.[80] In fact, the states, including those that had disestablished their churches, took legislative and constitutional action to exempt church property from property taxes.[81] These exemptions were typically defended on grounds of public policy:

> It is presumed that in the nineteenth century, in a christian land, no argument is necessary to show that church purposes are public purposes, and that the inhabitants of a town have an interest in the ground reserved for such a use. We all know what is meant by the phrase, nor will we indulge in the thought, that the trust will not be carried out in the spirit in which it was originally created. To deny that church purposes are public purposes, is to argue that the maintenance, support and propagation of the christian religion is not a matter of public concern. Our laws, although they recognize no particular religious establishment, are not insensible to the advantages of christianity . . . .[82]

The tradition of exemption of church property has survived, and, although the practice has not been without its critics,[83] churches currently enjoy such exemptions in all fifty states.[84]

Until the early part of this century, the primary tax benefit enjoyed by religious organizations was the property tax exemption. With the adoption of the Sixteenth Amendment[85] and the revolution in public

78. L. PFEFFER, CHURCH, STATE AND FREEDOM 141 (1953).

79. Prior to 1833, the Congregational Church was the established religion in Massachusetts. *See* Ball, *supra* note 39, at 7.

80. *See, e.g.*, Note, *Tax Exemptions, Subsidies and Religious Freedom After* Walz v. Tax Commission, 45 N.Y.U. L. REV. 876, 880 (1970).

81. *Id.* at 881. For a discussion of the evolution of the relationship between church and state on the matter of establishment and church property taxation in New Hampshire, see Franklin Street Soc'y v. Manchester, 60 N.H. 342, 346-51 (1880) (opinion of Allen, J.).

82. City of Hannibal v. Draper, 15 Mo. 634, 639 (1852). *See also* argument by Cross, counsel for plaintiff, in Franklin Street Soc'y v. Manchester, 60 N.H. 342 (1880).

83. President Grant was one of the outspoken critics of the exemptions for church property. *See* Grant's Message to Congress, *reprinted in* 4 CONG. REC. 175 (1875).

84. *See, e.g.*, Walz v. Tax Comm'n, 397 U.S. 664, 685 (1970). In fact, most states have incorporated provisions into their constitutions that either permit or require the exemption of church property from property taxation. *See* Note, *The Establishment Dilemma: Exemption of Religiously Used Property*, 4 SUFFOLK U.L. REV. 533, 535 n.14 (1970).

85. "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." U.S. CONST. amend. XVI.

finance that followed, came important new tax benefits for religious organizations.[86] Included in the Income Tax Act of 1913 was a provision exempting "any corporation or association organized and operated exclusively for religious, charitable, scientific, or educational purposes."[87] A second major benefit was provided by Congress in the Revenue Act of 1917, which declared to be deductible "[c]ontributions or gifts actually made within the year to corporations or associations organized and operated exclusively for religious, charitable, scientific, or educational purposes."[88] Subsequent revisions of the Income Tax Act retained the substance of these provisions. Today, sections 501(c)(3) and 170(a) and (c) are the operative lineal descendants of the original exemption and deduction provisions. While other provisions in the Internal Revenue Code grant benefits to, or place requirements upon, religious organizations,[89] sections 501 and 170 are the most

86. The favorable treatment that the new scheme of income taxation gave churches was not unprecedented. The first federal income tax act, Act of Aug. 5, 1861, ch. 45, 12 Stat. 292, passed to finance the Civil War, was amended in 1864 to exempt "managers . . . of any charitable, benevolent, or religious association" that could demonstrate that the profits would be put to charitable use, Act of June 30, 1864, ch. 173, § 111, 13 Stat. 223, 279. The ill-fated income tax act of 1894 went further by exempting "corporations, . . . or associations organized and conducted solely for charitable, religious, or educational purposes." Act of Aug. 27, 1894, ch. 349, § 32, 28 Stat. 509, 556-57. What was, in effect, the first corporate income tax statute—the Corporation Excise Tax Act of 1909—contained a similar provision. Act of Aug. 5, 1909, ch. 6, § 38, 36 Stat. 11, 112-17.

87. Act of Oct. 3, 1913, ch. 16, § II G(a), 38 Stat. 114, 172.

88. Revenue Act of 1917, ch. 63, § 1201(2), 40 Stat. 300, 330.

89. *See, e.g.*, I.R.C. §§ 107, 511, 6033 (1982). The best-known exemption granted religious organizations under the Internal Revenue Code is that provided by § 501(c)(3). This provision exempts the income of religious and certain other organizations from the income tax. To qualify for the exemption, an organization must be organized and operated exclusively for one or more exempt purposes (*e.g.*, educational, charitable, or religious). "An organization will be regarded as 'operated exclusively' for one or more exempt purposes only if it engages primarily in activities" designed to further the purposes specified in § 501(c)(3). "An organization will not be so regarded if more than an insubstantial part of its activities is not in furtherance of an exempt purpose," Treas. Reg. § 1.501(c)(3)-1(c) (1959). The regulations specifically deny exempt status to "action" organizations, which are described in part as organizations that devote a substantial part of their activities attempting to influence legislation by propaganda or otherwise, Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii) (1959). In addition to meeting these criteria, any organization seeking exemption under I.R.C. § 501(c)(3) must file an application with the Commissioner containing a detailed statement of its proposed activities, which he must then approve. Treas. Reg. § 1.501(c)(3)-1(b)(1)(v) (1959). Following submission of the statement, a successful applicant will receive a "determination" letter informing it of its tax-exempt status. Until that time, the organization must file a return. INTERNAL REVENUE SERVICE, PUB. NO. 557, HOW TO APPLY FOR RECOGNITION OF EXEMPTION FOR AN ORGANIZATION 1 (1976). The exemption is effective from the date of the formation of the organization as long as all its purposes and activities prior to the ruling were those required by law. *Id.* at 2.

I.R.C. § 107 provides another well-known exemption for religious organizations. In this provision the Code states: "In the case of a minister of the gospel, gross income does not

important.

Constitutional challenges have been brought in state and federal courts against the various exemptions enjoyed by religious organizations, but no violation of the First Amendment has been found.[90]

B. Religion-Based Categories in the Internal Revenue Code

The number of religion-based classifications in the Internal Revenue Code has increased significantly in the last thirty years.[91] Professor Charles Whelan has identified fifteen religion-based categories used in the Code.[92] The religious distinctions therein, writes Professor Whelan, are roughly divided into three groups: "those concerned with whether an activity or purpose is 'religious' or 'exclusively religious'; those concerned with clergymen and members of religious orders; and those con-

include (1) the rental value of a home furnished to him as part of his compensation; or (2) the rental allowance paid to him as part of his compensation to the extent used by him to rent or provide a home." In Treas. Reg. § 1.107-1(a) (1982), the IRS specifies that to qualify for the exclusion "the home or rental allowance must be provided as remuneration for services which are ordinarily the duties of a minister of the gospel . . . . [F]or purposes of section 107 [these] include the performance of sacerdotal functions, the conduct of religious worship, the administration and maintenance of religious organizations and their integral agencies, and the performance of teaching and administrative duties at theological seminaries."

In addition to the foregoing, there are a number of other tax benefits given under federal tax laws to religious organizations. *See, e.g.*, Hurvich, *Religion and the Taxing Power*, U. CIN. L. REV. 531, 532 (1966).

90. *See, e.g.*, Walz v. Tax Comm'n, 397 U.S. 664 (1970); Lundberg v. County of Alameda, 46 Cal. 2d 644, 298 P.2d 1 (1956), *appeal dismissed sub nom.* Heisey v. County of Alameda, 352 U.S. 921 (1956).

91. *See* Whelan, *"Church" in the Internal Revenue Code: The Definitional Problems*, 45 FORDHAM L. REV. 885 (1977).

92. The categories Whelan describes are: (1) "religious purposes"; (2) "a religious organization described in § 501(c)(3)"; (3) "church"; (4) "a church or a convention or association of churches"; (5) "church agency"; (6) "church plan"; (7) "integrated auxilliaries" of churches; (8) § 501(c)(3) organizations that are "operated, supervised or controlled by or in connection with a religious organization described in section 501(c)(3)"; (9) an organization "operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches"; (10) "duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry"; (11) "religious and apostolic association"; (12) "religious order"; (13) "exclusively religious activities of any religious order"; (14) "member of a religious order in the exercise of duties required by such order"; and (15) "religious sect" Whelan, *supra* note 91, at 887-89. He also points to other religious terms that appear in the Internal Revenue Code: "Section 107 speaks of a 'minister of the gospel.' Section 512(b)(12) uses the terms 'diocese,' 'province of a religious order,' and 'parish, individual church, district, or other local unit' of a diocese, province of a religious order, or a convention or association of churches. 'Christian Science practitioner' appears in §§ 1402(c)(5) and 1402(e). Section 7701(a)(19)(C)(v) includes 'real property used primarily for church purposes' in the definition of a 'domestic building and loan association.'" Whelan, *supra* note 91, at 889.

cerned with the various categories of church and church-related organizations, including religious orders."[93] The third group, which includes what Whelan calls "church distinctions," is largely responsible for the significant growth of religion-based categories since 1950.[94]

1. Church Distinctions

Professor Whelan's "church distinctions" date from the 1950 enactment of a tax on "unrelated" business income that previously had been exempt from federal income taxation under section 501(a).[95] The tax was enacted out of concern over the operation of various commercial enterprises by exempt organizations that competed with taxpaying businesses. Since then, many of the other distinctions previously listed have been added. The most recent additions have come in ERISA legislation and legislation regulating lobbying by section 501(c)(3) organizations.[96] The impetus for creating these distinctions derives from many sources, but frequently the intent has been to increase the taxation and monitoring of what some consider the more peripheral operations of section 501(c)(3) organizations.[97]

Unfortunately the criteria that have guided the creation of "church distinctions" have been " 'churchness' or 'church-relatedness.' "[98] In effect, the Congress and the IRS have taken it upon themselves to tell churches which of their parts are or are not integral to their church structures. Needless to say, this has created significant conflict between churches and the federal government.[99]

2. The Significance of Church Structure

Part of the problem of determining whether an activity is "church-related" arises from the double structure of churches. The first structure is determined by ecclesiastical law, and the second is determined

93. Whelan, *supra* note 91, at 901 (footnotes omitted).

94. Whelan argues that "church distinctions" are "responsible for the confusion about the meaning of the word 'church' in the Code." *Id.* This group includes distinctions concerning churches, their integrated auxiliaries, religious orders, other kinds of church-related organizations, and conventions and associations of churches. *See id.*

95. *Id.* at 902.

96. *Id.* at 901.

97. See, *e.g.*, remarks of Representative Lynch (N.Y.) during the floor debate on legislation that imposed income taxation on "unrelated business income" of most 501(c)(3) organizations, reprinted in 96 CONG. REC. 9364-69 (1950).

98. *See* Whelan, *supra* note 91, at 923.

99. *See, e.g.*, Treas. Reg. § 1.6033-2(g) (especially 2(g)(5)(ii)) (1982). For a reaction to IRS efforts to define or classify religious organizations according to their "church-relatedness" or "exclusively religious" character, see Ball, *supra* note 39, at 7, 9-14, and Whelan, *supra* note 91, at 891-901.

by American civil law. Ecclesiastical structures are basically of two kinds: hierarchical and congregational.[100] Hierarchical structures such as those of the Roman Catholic or Mormon churches create, through church law, a single church authority.[101] In contrast, churches with a congregational structure, such as the Baptists, do not, strictly speaking, constitute a unified church at all. Rather, each congregation, instead of comprising a division of a unified church, is autonomous.[102] Consequently, there is no Baptist "Church" in the sense that there is a Mormon or a Roman Catholic Church; there are only Baptist churches and conventions or associations of Baptist churches.[103]

Distinctions that are easily made in the Internal Revenue Code regarding corporate structure—such as what is or is not a subsidiary—are not as easily drawn, then, when it comes to defining what is or is not church-related. The difference may well depend less on tax considerations than on the history of the particular denomination. As such, the danger increases that such distinctions will be arbitrarily drawn, or become politically controversial. This leads, in turn, to increased church-state entanglement.[104]

The tax on unrelated income imposed by Congress in 1950 introduced the first "church distinction." This distinction was between "a

100. *See* Whelan, *supra* note 91, at 903.

101. *See* 8 NEW CATHOLIC ENCYCLOPEDIA 525-27 (William J. MacDonald ed. 1967); 12 *id.* at 514-18.

102. *See* 2 *id.* at 75-80.

103. *See* Whelan, *supra* note 91, at 903.

From the perspective of American civil law, the picture is rather different. The ecclesiastical structure of a church often cannot be translated into civil law. Professor Whelan wrote, "In the Roman Catholic Church, for example, the major internal structures are the Holy See, the papacy, the patriarchates, provinces, archdioceses, dioceses and parishes, and the religious orders. Some of these divisions are territorial; others . . . are 'personal' in the sense that ecclesiastical jurisdiction does not depend upon geographical boundaries. In order to establish an identity in American civil law, most of these ecclesiastical entities have created one or more civil law corporations or trusts. But there is no American civil law counterpart to the ecclesiastical unity of the Roman Catholic Church. . . . The fact that these diverse civil law entities generally work together harmoniously is the result of the internal hierarchical structure of the Roman Catholic Church, not the product of American corporate or trust law.

"Thus, from a purely technical point of view, the Roman Catholic Church does not exist as such for federal tax purposes. What does exist is a conglomeration . . . of distinct taxable entities united in religious faith, worship and authority but not in civil law identity or control." *Id.* at 904-05 (footnotes omitted).

104. For a detailed discussion of the inapplicability of tax conventions to church structures, see *id.* at 903-05. On the consequences of incorporating church schools separately from their sponsoring churches, see Little, *How Far is Too Far When the I.R.S. Examines Your Church*, 4 CHRISTIAN L.A. DEFENDER 22 (1981). This article provides some detail on the "fishing expedition" character of IRS investigations.

church, a convention or association of churches," which were exempt from the tax, and religious, charitable, and educational organizations "under church auspices," which were to be subject to the tax.[105] In the course of implementing the distinction, there was considerable skirmishing between churches and the government over the "churchness"[106] of various religious organizations.[107] Since 1950, other church distinctions have bred conflict in varying degrees.[108]

105. Revenue Act of 1950, ch. 944, § 422, 64 Stat. 948 (amending I.R.C. § 101(6) (1939)). See also Whelan, *supra* note 91, at 902 for a discussion of this legislation. Politics, too, has played a role in determinations of "church-relatedness." For example, as a result of a regulation promulgated under I.R.C. § 511 in 1958, the Christian Brothers were forced to pay the unrelated business tax on their wine and brandy business. But the income of WWL-TV, a commercial station operated by Loyola University (New Orleans), a Jesuit institution, was left exempt from the tax. The ostensible reason for this result was the regulation's "sacerdotal functions" test. Religious orders with priests perform sacerdotal functions. Since the Jesuit order contains priests as well as brothers, it passed the test. The Christian Brothers, lacking priests, failed. This strange test and result is more readily understood when it is pointed out that Russell Long and Hale Boggs, Jr., were well-disposed toward Loyola University, and the IRS did not care to antagonize both "an influential member of the House Ways and Means Committee," and "an influential member of the Senate Finance Committee." *See* Whelan, *supra* note 91, at 910-11.

Lest it be thought that such goings-on are a thing of the past, the IRS recently reversed itself in a private ruling and now takes the position that the television income and the football income of institutions such as Notre Dame are not unrelated income! *See* PRIV. RUL. Nos. 7930043 (Nov. 2, 1979), 7948113 (Aug. 31, 1979). For an account of how this came to pass, see Whelan, *Critical Developments in the Vow of Poverty Area and Update on Unrelated Business*, 25 CATH. LAW. 340, 341-42 (1980).

106. This is Professor Whelan's term. *See* Whelan, *supra* note 91, at 900.

107. These sorts of distinctions have assumed considerable importance on the state and local levels. Many fundamentalist churches at present are vigorously resisting efforts of state and local governments to treat church day-care centers, homes for delinquent boys and girls, and schools as businesses or as merely church-supported organizations since such treatment would subject them to licensure and other forms of regulation. The churches contend that these activities are integral parts of their ministries and that therefore the regulatory efforts by local and state governments violate the First Amendment. *See, e.g.*, Note, *Georgia Girls' Home Wins Dispute With Welfare*, 4 CHRISTIAN L.A. DEFENDER 1 (1981); *Missouri Seeks to License Pre-School Ministries*, 4 CHRISTIAN L.A. DEFENDER 12 (1981); Eldridge, *Church Preschool: Business or Ministry?*, 4 CHRISTIAN L.A. DEFENDER 18 (1981); *Hands Off!*, 4 CHRISTIAN L.A. DEFENDER 31 (1981). An excellent discussion of the problems arising out of attempted state regulation of Christian colleges is provided in Kirk, *Shelton College and State Licensing of Religious Schools: An Educator's View of the Interface Between the Establishment and Free Exercise Clauses*, 44 LAW & CONTEMP. PROBS. 169 (1981). Under current First Amendment doctrine, these controversies raise difficult questions concerning the scope and meaning of "religion."

108. *See, e.g.*, Treas. Reg. § 1.6033-2(g)(5)(ii), T.D. 7454, 1977-1 C.B. 367-68; Ball, *supra* note 39, at 7, 9-14; Whelan, *supra* note 91, at 891-901.

3. Administration of Law on Unrelated Income

Through section 6033, the Internal Revenue Code imposes a requirement that exempt organizations file financial returns each year with the Internal Revenue Service. The Tax Reform Act of 1969[109] contained a provision amending section 6033 to eliminate the broad exemption from the yearly filing requirement previously enjoyed by all section 501(c)(3) religious organizations and many other section 501(c)(3) organizations.[110] In place of the broad exemption, the IRS devised a scheme using a plethora of church distinctions. Filing requirements were made to depend on whether an organization could be characterized as: (1) a church, (2) a church-integrated auxillary, (3) a convention or association of churches, (4) the "exclusively religious activit[y] of any religious order," (5) a section 501(c)(3) religious organization, or (6) a section 501(c)(3) organization "operated, supervised, or controlled by or in connection with" a 501(c)(3) religious organization.[111]

In the course of attempting to provide some interpretive guidance in applying these distinctions, the Treasury proposed regulations in February, 1976, that, for example, would have imposed filing requirements on church-related hospitals and orphanages serving the entire community, parochial elementary schools, and church-related old age homes that provide service only to aged members of their respective denominations.[112] The religious community protested vehemently that the proposed regulations were an "attempt by [the] Treasury and the Internal Revenue Service to 'define' the churches almost out of existence, especially with regard to their charitable, educational, and social welfare activities."[113] The proposed regulations eventually were withdrawn. Those that were adopted in their place in January, 1977, differed substantially from the regulations proposed earlier, but they still denied an exemption to *separately incorporated* church-related hospitals, universities, old age homes, and orphanages by denying them status as "integrated auxillaries."[114]

109. Pub. L. No. 91-172, 83 Stat. 487 (1969).

110. Prior to adoption of the Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487, § 6033 exempted from annual filing requirements all § 501(c)(3) religious organizations and other § 501(c)(3) organizations with a substantial connection with a § 501(c)(3) religious organization.

111. I.R.C. §§ 6033(a)(2)(A)(i), (A)(iii), (C)(i), (C)(iv) (1982).

112. *See* Treas. Reg. § 1.6033-2(g)(5), 41 Fed. Reg. 6073 (1976) (proposed Feb. 11, 1976).

113. Whelan, *supra* note 91, at 895.

114. *See, e.g.*, Treas. Reg. § 1.6033-2(g)(5)(iv) (1982) (examples 1-3, 6). Even though the final regulations gave a more favorable treatment to parochial schools, Professor Whelan reported that churches will oppose them "as vigorously as they resisted the proposed regula-

4. Vow of Poverty Ruling

The exemption of members of religious orders from income tax further illustrates the effect of the increase in the number of religion-based categories in the Code. From the adoption of Office Decision 119 in 1919, until the promulgation of Revenue Ruling 77-323 in 1976, members of religious orders who had taken a vow of poverty were exempted from payment of income tax on income received by them as agents of their respective orders. Although the religious were technically subject to the income tax under Office Decision 119, that decision specified that income received by an agent on behalf of a principal was taxable only to the principal.[115] This policy allowed religious orders to escape income tax as long as any revenue they received in excess of actual living expenses was given to their order. Revenue Ruling 77-323 sought to change this situation radically. In effect, the Ruling provided that all members of religious orders would have to pay income tax and FICA on revenues they received unless they were working for their own orders.[116] Not surprisingly, Ruling 77-323 caused a great deal of concern among religious organizations that had orders. In a meeting between lawyers representing the Roman Catholic Church and representatives of the Treasury and the Internal Revenue Service following the issuance of Ruling 77-323, the government was reported to have

> refused to exempt religious who [were] working for a public entity or for another 501(c)(3) organization. For example, the question came up, "How about a religious who is teaching theology at Harvard?" They said, "No way, he would be subject to taxation." They even took the position that if he were a Dominican and he was working as a theology professor, in a Jesuit school, he would be subject to taxes. They said that a member of a religious order who was serving as the chaplain would be subject to income tax.[117]

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tions. The fundamental vice remains: the regulations exclude the traditional educational, charitable and welfare activities of the churches from the tax concept of 'church activities.'" Whelan, *supra* note 91, at 898. In the same vein, Professor Whelan stated: "It should be easier than it has been for Congress and federal tax officials to understand the utter astonishment of the American churches at being told that their educational, charitable and welfare organizations are not integral parts of their church structures. Most American churches would prefer to retain the traditional exemption of these institutions from having to file annual financial reports with the Internal Revenue Service. But they would not fight the imposition of a reporting requirement nearly as hard if the requirement were imposed by legislative language that did not distinguish between the traditional component parts of American churches in terms of their 'churchness' or 'church-relatedness.'" *Id.* at 923.

115. O.D. 119, 1919-1 C.B. 82.

116. Rev. Rul. 77-290, 1977-2 C.B. 26.

117. Reed, *Revenue Ruling 77-290—Vow of Poverty*, 24 CATH. LAW. 217, 218 (1979).

After some months of discussions, a new Revenue Ruling, 77-290, was issued. It provided that if a religious were directed to provide services for another agency of the supervising church or an associated institution, the religious would be deemed an agent of his order and thus exempt from income and FICA taxes.[118]

After Ruling 77-290, some question remained as to whether the agency relationship was the sole determining factor or whether the nature of the work being done was also to be considered in making the determination concerning exemption. Ruling 77-290 purportedly left an earlier Revenue Ruling, 68-123, undisturbed. Ruling 68-123 provided that a religious nurse working in a non-Catholic private hospital would be exempted. Nevertheless, there is reason to believe that service outside the church that produces income for the order falls outside the exemption since this would not be part of the "mission" of the religious order.[119]

The small tempest over the rather exotic issue of exemption from the income tax of those who have taken a vow of poverty again reveals the extent to which the IRS must intrude upon the domain of religions, even in relatively minor matters. In order to make a determination under the rulings mentioned, the IRS might first have to determine what is or is not an "order," a "church," an "associated institution," and the "mission" of an order. The level of entanglement here is scarcely insignificant. When we make a qualitative comparison between this type of government entanglement and that feared by Justice Burger,[120] it is easy to see how this kind of government involvement in the examination and categorization of church structure poses the greater threat to the separation of church and state.

C. The Religious Audit

The enforcement procedures required by the use of religion-based categories in the Code are another facet of the entanglement problem. An ordinary taxpayer who arouses the suspicion of the IRS often is subjected to a financial audit. His records concerning income, expenditures, investments, and other matters are examined to determine whether he has additional tax liability. But the kind of audit the IRS performs for a section 501(c)(3) religious organization is of an entirely

118. Rev. Rul. 77-290, 1977-2 I.R.B. 26.

119. *See, e.g.*, Myers, *Vow of Poverty Ruling*, 24 CATH. LAW. 221, 223 (1979); Whelan, *Critical Developments in the Vow of Poverty Area and Update on Unrelated Business*, 25 CATH. LAW. 340 (1980). *See also* Reed, *supra* note 117, at 217-220 (1979).

120. *See supra* note 46 and accompanying text.

different sort.[121]

The object of an audit of a section 501(c)(3) religious organization is to determine whether a religious organization is "operated exclusively for religious, [or] charitable . . . purposes" and is not "carrying on propaganda, or otherwise attempting, to influence legislation."[122] This, of course, involves a deep probing into the activities of any religious organization being audited. One attorney whose firm represented the National Council of Churches during the course of such an audit in 1970 wrote:

> As to the scope of the audit, IRS said to us: "Unlike the examination of business corporations, in which the focus is primarily upon the examination of receipts and expenditures and the determination of taxable income, the examination of exempt organizations, because compliance with the conditions of their exemption must be verified, requires an audit of virtually all the organization's activities, including its records, evidences of programs, publications, and personnel functions." In other words, they were stating that there was virtually nothing in terms of the National Council's records and functions which was outside the scope of the audit . . . .[123]

On the strength of his experience concerning the audit of the National Council of Churches, the attorney also concluded that not only does the IRS claim the right to audit the religious activities of churches, but it "apparently claims the right to apply its own concepts of what consti-

121. To qualify under § 501(c)(3) an organization must pass *both* an "organizational" and an "operational" test. *See, e.g.*, Levy Family Tribe Found. v. Comm'r, 69 T.C. 615, 618 (1978); Treas. Reg. § 1.501(c)(3)-1(a)(1) (1960). The "organizational" test requires that the organization be established solely for one or more exempt purposes. But even though "religious purposes" qualify for the exemption, the regulations offer no guidelines for identifying such purposes. The "operational" test has four parts: (1) the organization must not engage to more than an insubstantial degree in activities that do not further exempt purposes; (2) the organization must serve a public rather than a private purpose; (3) the organization's net earnings must not inure in whole or in part to the benefit of private shareholders or individuals; and (4) the organization may not be an "action" organization, *i.e.*, it may not attempt to influence legislation by propaganda or by other means. Treas. Reg. § 1.501(c)(3)-1(c) (1960).

Although there has been a reluctance to challenge the exempt nature of the activities of religious organizations, in two recent cases the tax court has revoked exemptions on the ground that the religious organizations engaged in substantial activities that did not further an exempt purpose. *See* Western Catholic Church v. Comm'r, 73 T.C. 196 (1979) (failure to pursue exempt purposes stated in its application for exemption held to be grounds for revocation of exemption); Church in Boston v. I.R.S., 71 T.C. 102 (1978) (inability of church to show that its program of financial grants was directed to needy was found adequate ground for revocation of exemption).

122. I.R.C. § 501(c)(3) (West Supp. 1982).

123. Shaw, *Tax Audits of Churches*, 22 CATH. LAW. 247, 248 (1976).

tutes religious activity."[124] Here the "churchness" issue is raised in a slightly different guise.

The danger posed in the section 6033 context[125] is that on the basis of its conception of "churchness" or "church-relatedness" the IRS can effectively redefine "church" in a way that excludes many of the traditional social welfare functions of churches from the tax concept of a "church" or its "integrated auxillaries." In an audit to determine if a religious organization is being "operated exclusively for charitable purposes," the IRS can exclude from the definition of church activities many of the traditional moral activities of the church by denying their essentially religious nature and recharacterizing them as "propaganda." Churches often, as a matter of religious concern, have been vocal in expressing their views on matters such as civil rights, peace, and abortion.[126] What are questions of spiritual principle for some can also be questions of political principle for others. Under the current scheme of exemption, the IRS constantly must confront the related issues of whether to audit a church because of its moral stands and whether to deem "religious" the church's witnessing of moral or spiritual principles. Certainly interest groups opposed to the positions of various churches on subjects such as civil rights or peace are tempted to try to influence the IRS to revoke the exemptions of these churches. Indeed, it has been reported that pro-abortion groups have been exerting this type of pressure on the IRS with regard to the Catholic Church because of the Church's anti-abortion stand.[127]

Perhaps the point to be made in passing is that the IRS has not created this situation through an excess of perversity or zeal. It is obligated to protect the revenues of the federal government by enforcing the Code. Unfortunately, the IRS must work with a Code littered with religion-based categories that it must construe and apply.[128]

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124. *Id.* at 249, 254. Interestingly, one of the areas of activity of the National Council of Churches that excited the interest of the auditing agents during the fall of 1970 was the Council's efforts for peace in Vietnam.

125. *See supra* note 109 and accompanying text.

126. *See, e.g., U.S. Roman Catholic Leaders Muster Support for Federal Legislation to Outlaw Abortion*, Wash. Post, Jan. 30, 1982, at B6, col. 1; *Archbishop Hunthausen to Withhold One-Half 1981 Income Tax Payment in Protest Against U.S. Arms Policy*, Wash. Post, Jan. 30, 1982, at B6, col. 1.

127. Shaw, *supra* note 123, at 248-49, 254-55.

128. Commissioner Kurtz acknowledged that religion-based categories present serious administrative problems in his Address to the Practicing Law Institute Seventh Biennial Conference, Tax Planning for Foundations (Jan. 9, 1978). *See also* Kurtz, *Difficult Definitional Problems in Tax Administration: Religion and Race*, 23 CATH. LAW. 301 (1978).

IV. The Exemption Issue in the Courts

In addition to the formal and informal confrontations between "mainstream" religious organizations and the IRS over the metes and bounds of the religion-based classifications in the Code, the IRS and other taxing authorities have, on occasion, denied that certain organizations are "religious."

A. The Universal Life Church

In *Universal Life Church v. United States*,[129] the IRS opposed the Universal Life Church's claim to exemption as a religious organization on two grounds. First, the IRS claimed that the issuing of Honorary Doctor of Divinity certificates was contrary to California public policy as expressed in the California Education Code. Second, it argued that "the ordination of ministers, the granting of church charters, and the issuance of Honorary Doctor of Divinity certificates by [the Universal Life Church] are substantial activities which do not further any religious purpose."[130] Based on both the testimony of Church officials, some Church members, expert witnesses, and on the court's reading of the Constitution and the relevant California statute, the court rejected both of the arguments advanced by the IRS and ordered that taxes paid by the Church be refunded.[131]

At the heart of the IRS's position was an objection to the ordaining and chartering activities of the Universal Life Church. For example, Reverend Hensley, head of the Church, had conducted mass ordinations of ministers. Although Reverend Hensley did not require any payment for charters, minister's credentials, or the Honorary Doctor of Divinity certificate, he did request a free-will offering. The court rejected the claim that the granting of the honorary degree violated public policy, citing the expert testimony of an ordained Episcopal priest who testified that Reverend Hensley's use of the Honorary Doctor of Divinity certificate as a kind of stock in trade was a widespread practice among religious organizations.[132] Similarly, the court rejected

129. 372 F. Supp. 770 (E.D. Cal. 1974).

130. *Id.* at 775.

131. *Id.* at 775-76.

132. *Id.* at 772. For a case in which a federal court found an organization not to be an establishment of religion, see United States v. Kuch, 288 F. Supp. 439 (D.D.C. 1968). In *Kuch*, the Neo-American Church was viewed by the Court as a subterfuge designed to provide protection from the enforcement of laws prohibiting the ingestion of psychedelic drugs. The court found the church seal, which had a three-eyed toad in the center with the church's motto, "Victory Over Horseshit" across the bottom, "helpful in declining to rule that the Church is a religion within the meaning of the First Amendment." *Id.* at 445.

the claim that the ordination of ministers, the chartering of churches, and the issuance of the Honorary Doctor of Divinity certificates were substantial activities not furthering any religious purpose. In so doing the court wrote:

> Certainly the ordination of ministers and the chartering of churches are accepted activities of religious organizations . . . . The fact that the Plaintiff distributed ministers' credentials and Honorary Doctor of Divinity certificates is of no moment. Such activity may be analogized to mass conversion at a typical revival or religious crusade.[133]

The Universal Life Church is frequently cited as the canonical example of a sham religious organization. This view seems to be predicated on the Church's antagonism toward the exemption of religious organizations from various forms of taxation. An advertisement for the Universal Life Church states:

> Reverend Hensley . . . doesn't believe in the tax exempt status of churches. However, if the government is going to give a free ride to Billy Graham and the Pope, then why not let everyone participate in these blessings. Furthermore, he backs up his words by offering to defend in court the tax exempt status of his congregations.[134]

Although the literature does express nontax-related values and purposes,[135] tax avoidance and the eventual abolition of tax exemptions for religous organizations is a dominant theme.

What exactly, however, does this emphasis on taxation establish? There is nothing incongruous in a religion having among its tenets an objection to the tax exemptions afforded to religious organizations. Moreover, to urge and support a course of action that would make the system of exemptions unworkable does not demonstrate that the Universal Life Church is a fraud. Many well-known religious organizations have taken positions on public policy issues because those issues touched upon their moral or spiritual concerns.[136] The fact that few people view the exemption of religious organizations from taxation as an important moral issue does not establish that no one could so believe. One's sense of the bizarre is of little use in differentiating between genuine and ersatz religions, for even the creeds of the most staid

133. Universal Life Church v. United States, 372 F. Supp. at 776.

134. REASON MAG., Mar., 1980 (ad appears on inside of magazine cover).

135. For example, honesty, humility, the brotherhood of Man, and other such traditional values were discussed. *Id.*

136. The National Council of Churches, for example, has in recent years not only vocally opposed racial policies in Rhodesia and South Africa, it has also provided money to various "liberation" groups active in or near those countries.

religious groups contain, in the eyes of many, utterly fantastic assertions.

The point here is not to deny the possibility that Reverend Hensley might be a charlatan and his church *merely* a tax avoidance scheme. Rather, it is to stress the difficulties inherent in reaching a judgment about the legitimacy of a religious organization by focusing on one that, although widely considered to be the paradigm of a religious sham, was adjudged legitimate. From the evidence presented to the court—Reverend Hensley's statements, expert testimony, the evidence cited by critics of the Church, and the testimony of some of the Church's members—there seems to be relatively little to support the conclusion that the Universal Life Church is a fraud, at least within the conception of religion endorsed by the Supreme Court in *Seeger* and *Welsh*.[137]

B. The Missouri Church of Scientology

A more ominous note was struck in *Missouri Church of Scientology v. State Tax Commission*.[138] This case resulted from the St. Louis City Assessor's placing of the Church on the city's *ad valorem* tax rolls. The Church took the matter to the State Tax Commission ("Commission"), claiming that it was entitled to tax-exempt status under the Missouri Constitution and state statutes that exempt property "not held for private or corporate profit and used exclusively for religious worship."[139] The commission ruled against the Scientologists, saying:

> [W]hile the appellant has some of the trappings and accouterments of an organized religion, it appears to be more an applied philosophy which has a certain religious connotation, but which falls short of *being devoted to the worship of the Supreme Being*, which this Commission concludes is necessary for the property owner to have its property considered exclusively for religious worship.[140]

The Church next petitioned the St. Louis Circuit Court. The court found error in certain evidentiary rulings and in the test of exemption employed by the Commission.[141] Nevertheless, it affirmed the denial

137. *See supra* notes 60-72 and accompanying text.

138. 560 S.W.2d 837 (Mo. 1977).

139. *See* MO. CONST. art. X, § 6. *See also* MO. REV. STAT. § 137.100 (Vernon Supp. 1981).

140. Missouri Church of Scientology v. State Tax Comm'n., 560 S.W.2d at 840 (emphasis in original) (quoting from Mo. St. Tax Comm'n. Findings). *See id.* at 845.

141. Note, *Constitutional Law—Religion—Belief in the Supreme Being is a requirement for a tax exemption for property used exclusively for religious worship*, 56 U. DET. J. URB. L. 610, 611 (1979).

of exemption on the ground that the Church had not demonstrated that its property was exclusively used for religious activities.[142] The Church next appealed to the Missouri Supreme Court. Not only did the Missouri Supreme Court affirm the denial of exempt status, but it did so using reasoning similar to that of the Commission.[143] In reaching its conclusion, the court found that the decision of the Commission "rests not on the lack of *exclusivity* or *extent* of use, but on the failure to show the character of the use as 'for religious worship.' "[144] Moreover, the court stated that "[t]he term religious worship in the commonly accepted sense includes as a necessary minimum a belief in the Supreme Being of the universe."[145] The Scientologists appealed to the United States Supreme Court, which dismissed the case for want of a substantial federal question.[146] As a result of this sequence of events, Missouri tax officials are now able to separate the "religious" sheep from the "nonreligious" goats on the basis of whether or not the organization involved is theistic. It is not extravagant to claim, then, that as a consequence of its application of a religion-based classification, the State Tax Commission has succeeded in establishing theism in Missouri.

C. The First Libertarian Church

First Libertarian Church v. Commissioner[147] provides a more recent example of the problems associated with the administration of religion-based categories. The First Libertarian Church was founded in 1975. As an organization it was an outgrowth of the Libertarian Supper Club of Los Angeles, which had been founded some three years earlier. The

142. *Id.*

143. *See* Missouri Church of Scientology v. State Tax Comm'n., 560 S.W.2d at 842-44.

144. *Id.* at 840 (emphasis in original).

145. *Id.* The Missouri Supreme Court had distinguished *Seeger*, stating that *Seeger* involved statutory construction rather than "declaring a constitutional standard circumscribing state action in the field of tax exemption." *Id.* at 842.

Interestingly, in Founding Church of Scientology v. United States, 409 F.2d 1146 (D.C. Cir. 1969), the government did not challenge the bona fides of the Church of Scientology as a religion. The case involved the seizure and destruction by the Food and Drug Administration, of several electrical instruments ("E-meters") and a large quantity of literature, "as 'devices' with accompanying 'false and misleading labeling' subject to condemnation under the Food, Drug and Cosmetic Act." *Id.* at 1148. The Scientologists argued that the case against the Church constituted religious persecution and thus violated the First Amendment. The court found that the appellants had made out a prima facie case that Scientology is a religion. More specifically, the court wrote, "[T]he fact that [Scientology] postulates no deity in the conventional sense does not preclude its status as a religion." *Id.* at 1160 (citing United States v. Seeger, 380 U.S. 163 (1965); Washington Ethical Soc'y v. District of Columbia, 249 F.2d 127 (D.C. Cir. 1957)).

146. Missouri Church of Scientology v. State Tax Comm'n, 439 U.S. 803 (1978).

147. 74 T.C. 396 (1980).

Church apparently resulted from the efforts of several club members who had come to realize that no existing denomination was based upon "the 'community of spirit, belief and interest that had developed among some of those who had been attending those [Club] meetings.' "[148] The central doctrine of the Church was "ethical egoism" or "voluntarism," which, in part, "encompasses the idea that the individual has a right to live his own life, for his own sake, and in accordance with his own convictions, and without coercion from outside sources."[149] In addition to holding Church meetings, the Church also sponsored suppers, club meetings, a newsletter, "noncoercive" arbitration of disputes, and a civil rights council.[150] From the Church's founding until April 1976, club and Church meetings were held jointly. Thereafter, Church meetings preceded club suppers.

Shortly after its inception, the Church applied for an exemption under section 501(c)(3). In denying the application, the IRS relied on three related claims: (1) the Church's operations were indistinguishable from those of an "action" organization; (2) the Church had not established that it was organized and operated for religious purposes; and (3) the Church did not establish that its purposes and activities were those of a church.[151]

The tax court characterized the issue before it as being whether the Church was operated "exclusively" for religious purposes, that is, whether it was not operated to more than an insubstantial degree for nonreligious purposes. The tax court found that the newsletter and the club meetings sponsored by the Church were "substantial" activities of the Church that were "nonreligious to more than an insubstantial degree."[152] According to the court, the club meetings were

> primarily social/political events having predominately social and political content and purpose . . . . The religious aspects of such conclaves seem . . . indistinct . . . . We are not convinced that the Church meetings were not in reality merely an extension of the club meetings without any substantive change in content or purpose. Certainly, there is no indication that the primary activity of the evening was to develop and further the doctrine of ethical egoism, even if we assume that such a doctrine can be said to have the place in the lives of libertarians filled by God in those creeds admittedly exempt . . . .

148. *Id.* at 403-04.
149. *Id.* at 399.
150. *Id.* at 402.
151. *Id.*
152. *Id.* at 405.

> Similar reasoning applies to petitioner's publication of the newsletter . . . .[153]

The tax court's holding depended critically upon the finding that the club meetings and the newsletter were more than "insubstantially nonreligious." As evidence of the nonreligious nature of the club and, by extension, the newsletter, the court stated, "The types of discussion at the various meetings were not necessarily religious. They ranged, for example, from a discussion of President Kennedy's assassination, to voluntarist philosophy, to libertarian political topics."[154] The tax court also placed weight on the social content of the club meetings. The court's remark that it suspected that the Church meetings were an extension of the club meetings was presumably meant to express the view that the Church meetings themselves might be "more than insubstantially nonreligious" as a result of being closely connected with the club meetings. These remarks unfortunately reveal the inadequacy of the tax court's analysis, not the nonreligious nature of the Church or the activities that it sponsored.

From the standpoint of a traditionalist conception of religion, the tax court's characterization of club meetings as "more than insubstantially nonreligious" on the basis of the subjects discussed is probably justifiable. No doubt God was not mentioned during any of them. But a traditional conception of religion is not the legal standard. Rather, *Seeger* has come to stand for the proposition that the test of religiosity is functional;[155] namely, the beliefs in question must occupy the same place in the mind of the believer as does the "orthodox belief in God of one who clearly qualifies for the exemption."[156] Although it is ambiguous, the phrase "the same place in the mind of the believer" should roughly be interpreted as requiring that the beliefs in question form the foundation for an individual's moral code or outlook. Certainly, the Church's doctrine of voluntarism performs precisely this function for those who accept it.

If *Seeger* is the appropriate guide, then the tax court's list of topics proves nothing against the Church. First, for the court to say that the discussions at the club were not "necessarily" religious, and to attempt

153. *Id.* at 404-05.

154. *Id.* at 401.

155. Although *Seeger*, 380 U.S. 163 (1965), like *Welch*, 398 U.S. 333 (1970), was decided on the basis of statutory construction rather than on constitutional demands, the IRS views *Seeger* as compelling a "functional" test. *See, e.g.*, IRS MANUAL SUPP. 7 (10) G-37, at 5. For a further discussion of this point, see also Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1063-66 (1978). The author of this note argues that the result in *Seeger* was constitutionally compelled.

156. United States v. Seeger, 380 U.S. at 166.

to buttress this claim with a list of specific topics, simply shows that the tax court looked to *content* rather than *function* as its standard of religiosity. In fact, even though the court made a fleeting reference to *Seeger* at the end of its opinion, it did not provide a functional analysis of the issues before it. Had the court been thinking along "functional" lines, it is unlikely that it would have included "voluntarist philosophy" in its list of nonreligious topics, inasmuch as it constitutes the Church's primary religious doctrine.

The inclusion of "libertarian political topics" in the list is further evidence of the court's failure to think in "functional" terms. Religion, like politics, is concerned with values. As government at all levels expands its sphere of influence, more and more issues concerning values become "politicized." Surely it cannot be claimed that once a controversial matter becomes an object of political action or debate, it therefore ceases to be of ethical or religious significance. It would be palpably absurd to argue, for example, that Quaker services, where the topics of discussion were capital punishment and the Vietnam War, were "more than insubstantially nonreligious" by virtue of the political significance of the topics. Since voluntarist philosophy rejects conventional notions and manifestations of government as coercive and unethical, it is not surprising that many of the subjects of moral concern to the Church members were also "political" topics.[157]

In addition to demonstrating a certain obliviousness as to the functional analysis demanded by *Seeger*, the tax court also displayed a peculiarly ascetic conception of religious organizations when it pointed disapprovingly to the social aspects of the Church-sponsored suppers and club meetings.[158] Only someone to whom religious organizations are rather foreign could fail to know that many church activities are also social activities. Churches often sponsor church socials, suppers, Christian fellowship meetings, lectures, hospital visits, bingo games, and many other functions. That exempt religious organizations engage in such social activities is even a matter of record. In overturning a

157. Even the inclusion of the subject of the Kennedy assassination in the list provided no support for the tax court's position. Whether a discussion of the assassination is religiously significant depends on the use to which the subject is being put. Virtually anyone who attended a church or a synagogue following President Kennedy's assassination, or who has attended religious services on the anniversary of the assassination, knows that it was and is discussed, often as part of a sermon. For some denominations, no doubt, the assassination illustrates "man's inherent sinfulness" and his need for "redemption." So too for "ethical egoists" the assassination could serve as a means of illustrating certain facets of Church doctrine. But the tax court made no attempt at such a functional analysis, and as a result established nothing by mentioning the assassination as a topic of club discussions.

158. 74 T.C. at 400-01.

lower court's denial of a property tax exemption to a secular humanist group in *Fellowship of Humanity v. County of Alameda*,[159] the California Court of Appeals accepted a finding that

> [thirteen] other churches in Oakland, admittedly entitled to tax exemption, conducted in the tax exempt property discussions of topics of current political and economic interest and held social gatherings, as well as authorizing on the property meetings auxiliary to such churches, and occasionally permitted outside organizations to use the tax exempt property for social gatherings, discussion groups, and lectures.[160]

D. Current Problems

Universal Life Church, Missouri Church of Scientology, and *First Libertarian Church* show the burden that religion-based categories in tax statutes impose upon the courts. They also suggest that such categories invite governmental discrimination against novel or unpopular religious groups. Not least of all, they indicate that some courts will indulge in the opportunity afforded by religion-based categories to ex-

159. 153 Cal. App. 2d 673, 315 P.2d 394 (1957). The functional standard used in *Seeger*, 380 U.S. at 176, was taken from this opinion.

160. Fellowship of Humanity v. County of Alameda, 153 Cal. App. 2d at 679-80, 315 P.2d at 398. The exemptions referred to are exemptions from property taxes, but it is virtually certain that the 13 Oakland churches mentioned were also exempt from federal taxes.

As a final matter concerning *Libertarian Church*, the tax court saw something suspect in the close relationship between the Church and the club. Indeed, the Court seemed to suggest that if an organization was once secular, it remains forever so. But consider the following case:

Suppose a group of nonreligious individuals form a Bible discussion group out of interest in Christian philosophy, doctrine, and history. Suppose also that their activities include reading the Bible and secondary sources discussing the Bible, and listening to talks about topics relating to the Bible, its teachings and its history. Because it is convenient, or because it promotes the cohesion of the group, they also have dinner together just before their meetings. Finally, assume that in the course of their studies they discover that they have come to accept a version of Christianity. Since their views are in important ways unlike those of existing denominations, they decide that their religious beliefs would be best served by forming their own church. They do so, and continue their Bible discussion sessions as a church-sponsored activity. Because they are a small, poor group they decide to hold their church services before their usual supper and discussion session.

Such a scenario is not implausible, and there is certainly nothing sinister in the way the new denomination evolved and chose to conduct its activities. What is most important to note, however, is the substantive change in the nature of the discussion sessions. Early in their existence they were clearly secular. But after the change in religious outlook of the participants, the Bible discussions were obviously a form of religious activity, in spite of the fact that the overt content of the activity was unchanged. What was decisive in transforming the nature of the sessions was the change in the beliefs and attitudes of the participants. Thus, it should be clear that the club meetings, though once secular, may legitimately be regarded a religious activity as its members developed their religious views.

press narrow conceptions of religion and hostility toward certain religious organizations.

The potential for such discrimination is also open to the Internal Revenue Service, which has developed a set of criteria that effectively "require[s] a religious organization to be a highly developed denomination before it can qualify as a church."[161] This has the detrimental effect of denying tax exemption to new, small churches while "ignor[ing] the structural complexity of the established denominations."[162]

Although it is instructive to focus on the Internal Revenue Code, religion-based categories have been present in areas of the law as diverse as unemployment and military conscription statutes.[163] Moreover, the problems of categorization are, to a large extent, common to all situations in which local, state, or federal authorities must administer religion-based categories.[164] Generally speaking, those called upon

161. Whelan, *supra* note 91, at 925. The criteria that have been developed are: "(1) a distinct legal existence, (2) a recognized creed and form of worship, (3) a definite and distinct ecclesiastical government, (4) a formal code of doctrine and discipline, (5) a distinct religious history, (6) a membership not associated with any [other] church or denomination, (7) a complete organization of ordained ministers ministering to their congregations and selected after completing prescribed courses of study, (8) a literature of its own, (9) established places of worship, (10) regular congregations, (11) regular religious services, (12) Sunday schools for the religious instruction of the young, and (13) schools for the preparation of its ministers." B. HOPKINS & J. MYERS, THE LAW OF TAX-EXEMPT ORGANIZATIONS 87 (1975). Generally, an organization need not satisfy all of the criteria in order to qualify. *Cf.* Note, *supra* note 141, at 621.

With respect to the Internal Revenue Code, Professor Whelan points out some of the difficulties encountered in its application:

"[T]he Internal Revenue Service must . . . make day-by-day determinations (for various tax purposes) of whether a particular religious organization is a church or not. Over the last twenty years the National Office of the Service has developed a set of criteria for answering this question. To one familiar with religious and tax developments in the last twenty years, these criteria seem based much more on the Service's defensive tactical policy than on empirical and traditional concepts of churches. In effect, the criteria require a religious organization to be a highly developed denomination before it can qualify as a church. There are two difficulties with this requirement. It tends to eliminate new, small churches from the tax treatment that large, established denominations receive; and it ignores the structural complexity of the established denominations themselves." Whelan, *supra* note 91, at 925 (footnotes omitted).

162. Whelan, *supra* note 91, at 925.

163. *See supra* note 10.

164. See, *e.g.*, Theriault v. Silber, 547 F.2d 1279 (5th Cir. 1977), which grew out of a refusal of prison officials to recognize the "Church of the New Song" as a religion. While it is possible that the prison officials had deep theological reasons for their position, one suspects that the prison officials were engaging in a bit of what Professor Whelan calls "defensive tactical policy," Whelan, *supra* note 91, at 925, since members of the religion would be entitled to certain liberties if it were recognized as a religion. The power to *find* practices, beliefs, and organizations "religious" also raises problems. *See, e.g.*, Malnak v. Yogi, 440 F. Supp. 1284 (D.N.J. 1977).

to apply such categories are unlikely to have any expertise in making the kinds of distinctions that are required. In addition, because religious organizations often enjoy partial or total exemption from the authority of governmental bodies, such bodies must frequently view claims to religious status as a threat to the carrying out of their respective governmental roles. But most importantly, use of religion-based categories invites discrimination against unorthodox and unpopular religious groups.[165]

Beyond these considerations, however, there is the issue of Establishment Clause doctrine. As should be apparent by now, religion-based categories cause government to become involved pervasively and continuously with the most fundamental aspects of religion. In light of the kinds of decisionmaking and auditing procedures required to use and enforce religion-based categories, Chief Justice Burger's concern in *Walz* that eliminating property tax exemptions for churches would lead to a greater degree of entanglement because of the need for tax valuations of church property and the possibility of tax liens and foreclosures seems strikingly misplaced. If we were to take the "entanglement" test seriously, the creation and use of religion-based categories by local, state, and federal legislative bodies, agencies, boards, and offices would have no place in our scheme of constitutional government.

165. The Hare Krishna sect, the Unification Church, and the Church of Scientology are perhaps the largest and most well-known of such groups, but there are many others. Members of such groups have often suffered more than verbal and legal harrassment. Kidnapping, for example, has not been uncommon. *See, e.g.*, *Parent-Child Conflict on Religion Now Touches Variety of Groups*, N.Y. Times, Jan. 1, 1978, at 24, col. 1.

After the Jonestown mass suicide and murders, open hostility towards nontraditional religious figures and organizations increased greatly. *See, e.g.*, *Moon Church Seeks U.S. Inquiry on Fire at Group's Upstate Camp*, N.Y. Times, Aug. 10, 1980, § 1 at 20, col. 1; *Denver Hare Krishnas Sue Christian 'Truth Squad'*, N.Y. Times, Dec. 16, 1979, § 1 at 30, col. 6 (Pentecostals were allegedly following Hare Krishnas through airport calling them "poor brainwashed dupes"); *Aide to Rep. Ryan Warns U.S. on Cults*, N.Y. Times, Feb. 6, 1979, at B6, col. 1; *School that Banned Long Hair Now in Dispute Over Banned Book*, N.Y. Times, Feb. 3, 1979, at 7, col. 2; *Some in Congress Seek Inquiries in Cult Activities*, N.Y. Times, Jan. 22, 1979, at A1, col. 2. For an example of the willingness of legislatures and other elective bodies to enact constitutionally doubtful legislation to curb "cults," see *Communities Finding it Difficult to Curb Soliciting by Some Sects*, N.Y. Times, Feb. 5, 1979, at D8, col. 1; *Albany Panel to Weigh Bill on Cult-Member Guardians*, N.Y. Times, May 22, 1981, at B2, col. 5. As an example of the sort of rationalizations offered on behalf of such legislation, see Delgado, *Investigating Cults*, N.Y. Times, Dec. 27, 1978, at A23, col. 2. A blueprint for a campaign of governmental harassment against "cults" is provided by Rudin & Rudin, *Countering the Cults*, N.Y. Times, Sept. 26, 1980, at A35, col. 1.

Conclusion

If the creation and use of religion-based categories by the non-judicial branches of government were held to offend the Establishment Clause, what would be the consequences? While legislative bodies, administrative agencies, and other governmental organs at all levels of government would no longer be empowered to enact laws and regulations containing religion-based categories, or to decide what is or is not a religion, the question of what constitutes a religion would still fall to the judiciary. This is inescapable since the courts must interpret and apply the First Amendment religion clauses. Thus the judiciary would, for example, have to examine even facially neutral statutes when they were challenged, to insure that no clever legislator or bureaucrat has included in his legislation or regulation a "definite description" that refers as uniquely to a specific religious organization or group of religious organizations as "the author of Waverly" refers uniquely to Sir Walter Scott.[166] But by channeling this function and by ridding our legislation and regulations of religion-based categories, we should be better able both to achieve equality of treatment of religious organizations and to scrutinze the exercise of the power to decide what constitutes a religion.

The doctrinal consequences of the proposed change are somewhat unclear. Certainly the entanglement test would operate to require that statutes be facially neutral. What is more difficult is to specify how the new entanglement test would interact with the secular purpose and secular effect tests, since interpreting the entanglement test as requiring facial neutrality does not logically entail abandonment of the secular purpose and secular effect tests.

In general, it seems that there are three basic approaches to reformulating Establishment Clause doctrine that would be compatible with a requirement of facial neutrality: (1) The current three-prong Establishment Clause test could be replaced by a requirement of facial neutrality, with judicial scrutiny being limited to insuring that the legislation or regulations being examined do not contain impermissible "definite descriptions"; (2) facial neutrality could supplant the current test but with a higher level of scrutiny—thus, facially neutral statutes might be struck down if, in spite of their neutrality, they were to violate

166. *See Russell, On Denoting,* XIV MIND 479 (1905). *See also* B. RUSSELL, INTRODUCTION TO MATHEMATICAL PHILOSOPHY 167-80 (1919). No position is taken here concerning how "religion" should be defined for the purposes of the First Amendment. For a discussion of the problem of defining "religion" within the context of the religion clauses, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-6 (1978).

some additional standard of "entanglement"; (3) the secular purpose and secular effect tests could be combined with an entanglement test consisting of the requirement of facial neutrality along with some specified level of judicial scrutiny.

This author prefers the first of these approaches for the reformulation of Establishment Clause doctrine.[167] Not only would this approach provide a principled basis for deciding cases under the Establishment Clause, and thereby end the current ad hoc style of Establishment Clause analysis (of which Professor Kurland so justly complains),[168] but it would also better advance the values of separation of church and state by insuring equal treatment of religious organizations, and governmental neutrality towards religious organizations.

Even though this recommendation is in substance similar to one put forward by Professor Kurland almost twenty years ago,[169] there are clear differences between the two. First, Professor Kurland's proposal—that classification in terms of religion be prohibited if designed either to benefit or impose a burden—was offered as a doctrinal formulation interpreting *both* religion clauses. This author grounds such a prohibition in the entanglement test of Establishment Clause doctrine alone. In addition, unlike Professor Kurland's proposal, this approach has the advantage of leaving the body of Free Exercise Clause doctrine intact.[170] As a consequence, religious organizations and their members would continue to be constitutionally protected against even facially

167. A very different approach to reformulating entanglement doctrine from the one advocated in this article is provided in Serritella, *Tangling With Entanglement: Toward a Constitutional Evaluation of Church-State Contacts*, 44 LAW & CONTEMP. PROBS. 143 (1981). Serritella proposes a "factor analysis" according to which entanglement questions would be decided in light of three considerations: (1) The religious nature of the activity that gives rise to the church-state contacts, (2) the frequency and effect of the contacts, and (3) the governmental interest at stake. *Id.* at 144, 153-62.

168. *See supra* note 6 and accompanying text.

169. Kurland first presented this proposal in his article, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961). He presented his thoughts on the matter in a slightly revised form in his work, RELIGION AND THE LAW (1962).

170. Professor Kurland states that "[t]he principle tendered is a simple one. The freedom and separation clauses should be read as stating a *single precept*: that government cannot utilize religion as a standard for action or inaction because these clauses, *read together as they should be*, prohibit classification in terms of religion either to confer a benefit or to impose a burden. This test is meant to provide a starting point for the solution to problems brought before the Court, not a mechanical answer to them." *Id.* at 96 (emphasis added). He apparently means to replace Establishment Clause and Free Exercise Clause doctrines rather than to supplement them.

The fact that Professor Kurland's proposal would simply do away with the protections afforded by Free Exercise Clause doctrine has been viewed by others as a liability. *See, e.g.*, Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 805, 807-09 (1978).

neutral legislation and regulations that unduly burden the exercise of their beliefs.[171]

If religion-based categories are unconstitutional per se, then as a corollary, so are tax exemptions granted specifically to religious organizations. Of course, adopting the view of "entanglement" suggested in this article would not necessarily end the exemption of church property and income from taxation. For example, federal, state, and local governments would be free to exempt some or all nonprofit organizations from taxation so long as religion-based categories are not used. Similarly, state governments might be able to grant or withhold financial assistance to parochial schools so long as it is the result of a policy of assisting or withholding assistance from private education in general. Because on a practical level the effects of prohibiting religion-based categories are largely indeterminate, the suggested construction of the entanglement test would not necessarily affect any particular burden or benefit that at present accrues to religious organizations through church-state interaction.[172] But it would deny myriads of legislators, bureaucrats, and government officials the role of acting as arbiters of what constitutes a religion.[173]

171. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

172. Congress and the state legislatures have broad discretion in drawing tax classifications. *See* Bell's Gap R.R. Co. v. Pennsylvania, 134 U.S. 232 (1890).

173. A lengthy discussion of the current teaching of the Supreme Court on the meaning of "religion" in the Constitution is set forth in Bowser, *Delimiting Religion in the Constitution: A Classification Problem*, 11 VAL. U.L. REV. 163 (1977). One writer approaches the Sisyphean task of defining "religion" by suggesting that "religion" be given a different interpretation in the Free Exercise Clause than that given it in the Establishment Clause. Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978). Reflections on the appropriate constitutional interpretation of "religion" can also be found in Merel, *supra* note 170, and Boyan, *Defining Religion in Operational and Institutional Terms*, 116 U. PA. L. REV. 479 (1968).