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I. INTRODUCTION

A legal structure is the organizational framework within which the law permits business to be conducted. Over the past four centuries, religious organizations have used various structures to gain legal recognition, status, and rights, particularly the right to acquire and to hold property. During the colonial era, the colonists borrowed extensively from English law in all areas, including the treatment of religious societies. Guided by the prevailing English method of the time, most of the colonies (and subsequently the states) provided legal status and certain rights to religious organizations, as to business corporations, by the granting of special charters.

The purpose of a special charter was to create a corporation for a particular purpose and to assure certain rights or powers. A special charter required an act of the sovereign or legislature. Just as the Crown and the Parliament in England held the power to approve or deny the creation of a corporation, the states similarly continued to maintain the special charter system to which both ecclesiastical and lay corporations were subject. However, abuses inherent in the special charter system, including favoritism and obstruction of the work of legislatures because of the numerous demands for such charters, became apparent during the nineteenth century, and states therefore gradually replaced the special charter system with general incorporation statutes. These general incorporation statutes included within their scope a variety of

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charitable and not-for-profit corporations, including religious organizations.[1]

Despite the inherent differences in the natures of not-for-profit and business corporations, state statutes for not-for-profit corporations often mirror the state statutes for general for-profit business corporations. This similarity may lie in the fact that in the development of American statutory law, business corporations received more attention from legislatures, progressed more rapidly, and were of greater concern to the legal and business communities than not-for-profit corporations.[2] For example, the study and preparation of model acts for business corporations preceded the drafting of a model act for not-for-profit corporations, and the drafters of the Model Non-Profit Corporation Act clearly borrowed heavily from the previously published model and actual business corporation statutes.[3] A second reason for the apparent similarity may be that the same attorneys, coming from corporate business backgrounds, tend to draft both types of statutes.[4] This influence may be seen in those states which use

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1. Paul G. Kauper & Stephen C. Ellis, *Religious Corporations and the Law*, 71 MICH. L. REV. 1499, 1507 (1973).

2. Louis P. Haller, *The Model Non-Profit Corporation Act*, 9 BAYLOR L. REV. 309, 316 (1957).

3. The Conference of Commissioners on Uniform State Laws approved the Uniform Business Corporation Act in 1928 after nearly twenty years of study, while the Model Business Corporation Act was published in its initial form in 1946. *Id.* at 315. On the other hand, the original draft of the Model Non-Profit Corporation Act was not published until 1952 and was subsequently revised in 1957, 1964, and 1987. *Id.* at 320; Henry B. Hansmann, *Reforming Nonprofit Corporation Law*, 129 U. PA. L. REV. 497, 528 (1981).

4. Almost all members of the American Bar Association committees that draft or amend model not-for-profit corporation acts have been corporate business attorneys, although it is possible that, as the number of not-for-profit organizations expands, this may change. HOWARD L. OLECK, NONPROFIT CORPORATIONS, ORGANIZATIONS, AND ASSOCIATIONS 61 (5th ed. 1988). The approach taken by these drafters may be skewed by their business backgrounds. Hansmann, *supra* note 3, at 528. Oleck criticizes the validity of such an approach by business lawyers. Instead, Oleck contends that the drafters should include "philosophers, anthropologists, biologists, statisticians and demographers, theologians, sociologists, economists, psychologists, and the like, plus a few lawyers to crystallize the principles enunciated by the committee into workable rules of law." OLECK, *supra*, at 61.

However, another commentator suggests a possible argument to support the business-oriented approach. Not-for-profit corporation acts which resemble business corporation acts will be easier to use and apply by lawyers who are already familiar with the procedures of the more widely used business corporation acts and with the case law that has developed construing them. Thus, any knowledge of or expertise in the business law area would conceivably help a lawyer work with and

a single act to govern both business and not-for-profit corporations, even though particular provisions may apply to only one type of corporation.[5]

State law is the primary source for the formation, structure, operation, legal rights and duties, non-tax regulation, and dissolution of organizations.[6] Under the different state statutes,[7] the current legal structures available to religious organizations include the charitable trust, the unincorporated association, the corporation sole, religious corporations, and not-for-profit corporations. However, not all of these legal structures are available in every state. According to the recently completed Survey of Regional and National Religious Organizations, conducted by the DePaul University Center for Church/State Studies, the surveyed organizations adopted each of these available structural forms in the following proportions: 8% use the form of an unincorporated association; 3% use the general not-for-profit corporation; 87%

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understand a similarly constructed not-for-profit corporation law. Haller, *supra* note 2, at 320.

5. For example, the not-for-profit corporation laws of Delaware, Kansas, and Oklahoma are embedded in each state's general corporation law. DEL. CODE ANN. tit. 8, §§ 101-398 (1991 & Supp. 1994); KAN. STAT. ANN. §§ 17-6001 to -7404 (1988); OKLA. STAT. ANN. tit. 18, §§ 1001-1143 (West 1986 & Supp. 1992).

6. Two "levels" or sources of law—the federal government and the 50 state governments—regulate business, as well as nonbusiness organizations. As applied to not-for-profit organizations, including charitable organizations, this is significant because different aspects of formation, benefits or favorable treatment, and regulation arise variously from state or federal law. Perhaps the most characteristic feature of not-for-profit organizations is their tax-exempt status and, in the case of charitable organizations, the deductibility of donations for federal income tax purposes of the donor. These benefits arise from federal income tax law and are mirrored, with some variations, in comparable tax benefits at the state level—for example, exemption from state corporate income tax, property taxes and state sales tax. The federal Internal Revenue Service is the primary means of preventing abuses and restricting certain types of activities in which such organizations may engage—primarily political activity, such as campaigning and lobbying, and unrelated business activities. I.R.C. §§ 501(c)(3), 170 (1994).

7. An organization which wishes to obtain various legal rights or privileges, such as federal tax-exempt status, would likely choose to receive a legal status under state law first. However, in the United States, unlike many other nations, it is not necessary for legal status to be acquired or for religious organizations to register in any form before they are able to operate. Many religious organizations in the United States have the status of an unincorporated association or charitable trust, for which no registration or incorporation is required. The purpose of the legal formalities is only to confer certain specific legal benefits on religious organizations and to facilitate the achieving of certain other benefits, such as tax-exempt status, although incorporation is by no means necessary to achieving tax-exempt status.

use the religious not-for-profit corporation form; and 1% each use the charitable or religious trust, a corporation sole, a for-profit corporation, or "some other type of legal structure."[8] It is likely that the 87% that indicated use of the religious not-for-profit corporate form encompasses both the specific religious corporation form and the not-for-profit corporation organized for religious purposes. These results are not necessarily indicative of the distribution of structural forms which would be found at the local level where, although the religious corporation form might still prevail, some of the other forms, particularly the unincorporated association, may appear more frequently.

The primary characteristic (and the one necessary to receive advantageous tax status) of not-for-profit organizations is the "nondistribution constraint."[9] This means that the members, officers and directors of the organization do not receive any profit from the activities of the organization. A "not-for-profit" organization may, in fact, earn a profit; it simply cannot distribute that profit to its membership but must, instead, utilize that "profit" in furthering its not-for-profit purpose.[10] Most state statutes grant an exception to this nondistribution constraint so that "reasonable compensation [can be paid] to members, directors and officers for services rendered."[11]

In addition to being characterized by the non-distribution constraint, most not-for-profit organizations may be categorized as falling into one of two groups—the "mutual" benefit organizations and the "public" benefit organizations. The latter

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8. Judith A. Schejbal, with Paul Lavrakas and John P.N. Massad, *1994 Report on the Survey of Religious Organizations at the National Level* 13, DEPAUL UNIVERSITY COLLEGE OF LAW CENTER FOR CHURCH/STATE STUDIES.

9. Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 838 (1980).

10. State statutes may define a not-for-profit corporation as "a corporation no part of the income or profit of which is distributable to its members, directors or officers." VT. STAT. ANN. tit. 11, § 2302(3) (1993); *see also* MICH. COMP. LAWS ANN. § 450.2108(2) (West Supp. 1994) (defining a not-for-profit corporation as a corporation "incorporated to carry out any lawful purpose or purposes not involving pecuniary profit or gain for its directors, officers, shareholders, or members"). The nondistribution constraint is embodied in Internal Revenue Code § 501(c)(3) (1994).

11. Christine Chute, Comment, *Personal Liability for Directors of Nonprofit Corporations in Wyoming*, 18 LAND & WATER L. REV. 273, 276-77 (1983). Other forms of nonpecuniary benefits, particularly status and prestige, may inure to officers and directors of not-for-profit organizations and are generally considered permissible.

is largely synonymous with the general category of "charitable" organizations; they receive significantly more advantageous tax treatment at the federal and generally also state levels and usually have a religious, educational, or eleemosynary purpose.[12] Charitable organizations also have stricter regulation of their activities and their dissolution processes, and some state laws define the category more narrowly than does federal tax law.[13] The mutual benefit category may include social clubs and trade associations; they have fewer tax advantages but also less strict regulation, and some states permit the distribution of these organizations' assets to their membership upon dissolution. Because virtually all religious organizations would fall into the category of public benefit or charitable not-for-profit organization, this paper will focus exclusively on this not-for-profit form.[14]

This article will first present an explanation of the various associational structures made available to religious organizations under state law, including the unincorporated association, charitable trust, not-for-profit corporation, religious corporation, specific denominational corporation, and finally corporation sole. While some of these structures are available to a wide variety of associations, some are specifically limited to religious organizations and some are even further limited to particular religious denominations. At the conclusion of this section, the article considers the questions of whether a particular religious group can choose its structural form when the state makes more than one form available, and whether a religious group can organize in a state which offers an advantageous structural form but then function in a different state. The second section considers some of the implications for

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12. I.R.C. § 501(c)(3) (1994).

13. *See* UTAH CODE ANN. § 16-6-63 (Michie 1991); Utah County v. Intermountain Health Care, Inc., 709 P.2d 265, 267 (Utah 1985) (holding that, although a property owner is a nonprofit corporation, it is not exempt from property tax under state constitution requiring property to be used exclusively for religious or charitable purposes). Revised regulations, which ensured that the required "element of gift to the community" would be satisfied to qualify as a charitable purpose, were upheld. Howell v. County Bd. *ex rel.* IHC Hosps., Inc., 881 P.2d 880, 884-85 (Utah 1994).

14. In tax code terminology, most religious organizations would qualify as § 501(c)(3) organizations as long as they conform with the other requirements of § 501(c)(3). The typologies used by state statutes vary considerably, however. In one prominent example, California uses a tripartite classification of mutual benefit, public benefit, and religious organizations, thus treating religious organizations as a distinct type of not-for-profit organization.

Free Exercise claims which can be brought by religious organizations in light of these structural choices and recent developments in constitutional jurisprudence.

II. STRUCTURAL FORMS OF RELIGIOUS ORGANIZATIONS

This section will briefly examine the charitable trust and the unincorporated association and then focus on the three forms of corporations available to religious organizations: the not-for-profit corporation, the religious corporation, and the corporation sole.

A. Unincorporated Association and Charitable Trust

The least formal of the organizational structures available to religious groups are the unincorporated association and the charitable trust. While these structures have the advantage of simplicity in their formation, they also have several major disadvantages under the laws of most states. These disadvantages include lack of limits on personal liability for the members and directors; difficulties in the ownership, receipt and succession of property, particularly real property; complications in entering into legal transactions such as contracts and the initiation of lawsuits; and, for trusts, regulation of the trustees by very strict principles of fiduciary duty.

For these reasons, most organizations which are of any size or complexity, which own property, or which desire to gain other advantages from a more formal corporate status choose to incorporate under one of the applicable state incorporation statutes. Even those organizations which operate at the regional or national level and thus across state lines must incorporate in one state, and the law of that state will generally determine any questions involving legal status.

In many states, a religious organization would still have a choice of corporate form. While the most prevalent form available is the not-for-profit corporation with a religious purpose, other available forms include the religious corporation and the corporation sole. Each of these forms will be considered.

B. The Not-for-Profit Corporation with Religious Purpose

1. Statutory scheme of not-for-profit corporation statutes

All states have enacted laws to provide for the incorporation of not-for-profit organizations; while all of these statutes

share certain characteristics, other provisions vary from state to state. The common significant elements include the requirement of a purpose clause, a procedure to incorporate, an enumeration of general powers, a method for merger and consolidation, and a provision for distribution of assets upon dissolution. Some of the characteristics of those elements which are distinctive to not-for-profit organizations and religious organizations in particular will be briefly considered.[15]

The purpose clause of a state statute determines the purposes for which an organization may be formed as a not-for-profit corporation. Throughout the states, two types of statutory provisions prevail. The first type of statute specifically restricts the purposes for which not-for-profit corporations may be formed by enumerating a lengthy list of permissible purposes, which generally includes a religious purpose.[16] The second type of purpose clause simply states that a not-for-profit corporation may be formed for any lawful purpose or purposes and does not include a detailed list of permissible purposes.[17] The

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15. The procedures for incorporation of religious organizations under the general not-for-profit corporation statutes do not raise any issues particular to religious organizations. State statutes generally require one or more individuals to act as incorporators who sign the articles of incorporation, which include basic information concerning the corporation—particularly, the purpose for which the corporation exists—and file them in the office of the secretary of state. Corporate existence usually becomes effective on the date of filing, after which the board may adopt bylaws (the regulations governing the internal affairs of the corporation), elect officers, and transact any other business.

16. For example, the Illinois statute restricts the permissible purposes for which a not-for-profit corporation may be organized to one or more of 30 listed acceptable purposes or similar purposes, including charitable, benevolent, eleemosynary, educational, civic, patriotic, political, religious, social, literary, athletic, scientific, research, agricultural, soil improvement, crops, livestock, trade and professional associations, and certain cooperative and condominium associations. ILL. ANN. STAT. ch. 805, para. 105/103.05 (1994); *see, e.g.*, People *ex rel.* Padula v. Hughes, 16 N.E.2d 922 (Ill. Ct. App. 1938) (holding that incorporation under the not-for-profit corporation act permitted only for those associations which organize for one of the statutorily enumerated purposes). The states of Virginia and West Virginia form exceptions to this discussion in that they do not permit the incorporation of religious organizations; they will be considered later in a separate section.

17. The New Jersey Nonprofit Corporation Act provides an example of a nonrestrictive purpose clause which nonetheless enumerates specific purposes by way of illustration, as follows:

> A corporation may be organized under this act for any lawful purpose other than for pecuniary profit including, without being limited to, any one or more of the following purposes: charitable; benevolent; eleemosynary; educational; cemetery; civic; patriotic; political; religious; social; fraternal; literary; cultural; athletic; scientific; agricultural; horticultural; animal husbandry; volunteer fire company; ambulance, first aid or rescue;

trend in state statutes seems to be toward adoption of the general purpose clause provisions, particularly as illustrated in the current Model Nonprofit Corporation Act.

The general powers granted to not-for-profit corporations are similar to those granted to business corporations,[18] with a few restrictions to ensure compliance with the nondistribution constraint.[19] Some states specifically limit a not-for-profit corporation's ability to merge or consolidate with for-profit corporations; generally, domestic not-for-profit corporations may merge or consolidate with both domestic and foreign corporations with similar purposes.[20]

When a not-for-profit corporation undergoes either voluntary or involuntary dissolution, its assets must be dealt with differently than those of a for-profit corporation. In general, assets must first be used to pay creditors. Second, the not-for-profit corporation must return to donors those contributions which were received and held upon the condition that they would be returned upon dissolution of the corporation. Third, assets must be transferred to another corporation engaged in substantially similar activities if the assets were received and held by the corporation subject to limitations permitting their use only for a particular purpose including charitable, religious, eleemosynary, benevolent or other similar purposes. Finally, in

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professional, commercial, industrial or trade association; and labor union and cooperative purposes.

N. J. STAT. ANN. § 15A:2-1(a) (West 1984).

The difference among states in permissible purposes is not particularly significant for religious organizations, because religion is generally considered a permissible purpose. However, the difference does represent a philosophical dispute as to whether not-for-profit organizations must merely conform to the nondistribution constraint or whether they must be further restricted to particular categories of purposes considered beneficial to society. This disagreement is epitomized in the work of Hansmann and Oleck. *See, e.g.,* OLECK, *supra* note 4, at 57-100; Hansmann, *supra* note 3, at 509-37.

18. Such powers typically include the right to perpetual succession, the ability to own and deal with real and personal property, the right to sue and be sued, the right to borrow and lend money, the right to enter into contracts, the ability to indemnify its officers and directors, and the ability to enact bylaws. *See, e.g.,* VT. STAT. ANN. tit. 11, § 2352 (1993); *see also* Pilgrim Evangelical Lutheran Church of Unaltered Augsburgh Confession v. Lutheran Church-Missouri Synod Found., 661 S.W. 833 (Mo. Ct. App. 1983) (finding that no distinction exists between the powers of a not-for-profit and a for-profit corporation).

19. The most typical distinctions concern the restrictions on the ability to compensate officers and directors, which is generally limited to a "reasonable" amount, and restrictions on the ability to make loans to officers and directors.

20. *See, e.g.,* N.J. STAT. ANN. §§ 15A:10-1, -2, -7 (West 1984).

the case of mutual benefit organizations, assets are to be distributed to members or other persons as required by the articles of incorporation or bylaws. Thus, the assets of a dissolving not-for-profit corporation are typically distributed, in order, to creditors, to contributors who have conditioned their gifts, to another corporation with similar purposes, and to members or other persons when not inconsistent with statutory restrictions. Most gifts to a not-for-profit corporation with a religious purpose would be interpreted as conditioned on use for a similar purpose, and therefore, upon dissolution of such a corporation, the assets would be given to a corporation with a similar purpose.

2. Incorporation under the general not-for-profit corporation statute as a specific type

At least six states and the Revised Model Nonprofit Corporation Act of 1987 (RMNCA)[21] employ statutory schemes whereby an organization is required to incorporate as a specific type of not-for-profit corporation under the general not-for-profit corporation statute. As previously discussed, most states use either a restrictive or nonrestrictive purpose clause. In contrast, these states and the RMNCA distinguish the purposes of a not-for-profit corporation by the use of specific categories. The purpose of this statutory scheme is to provide a single regulatory framework for all not-for-profit corporations while also permitting differences in the treatment of the various types of corporations.

The New York Not-for-Profit Corporation Law (N-PCL)[22] establishes a single supporting statute not only for the different types of not-for-profit corporations which can incorporate under the general statute, but also for those organizations which can incorporate under entirely distinct statutes.[23] Organizations

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21. The New York Not-for-Profit Corporation Law of 1970 was the final result of a 17-year revision of the state's corporation statutes. N.Y. NOT-FOR-PROFIT CORP. LAW §§ 101-1515 (McKinney 1970). California's current Nonprofit Corporation Law took effect in 1980. CAL. CORP. CODE §§ 5000-10841 (West 1990). The RMNCA was adopted in 1987, REVISED MODEL NONPROFIT CORP. ACT (1987), and the Tennessee Nonprofit Corporation Act became law on January 1, 1988. Wyoming, Arkansas, and Florida have more recently adopted the Revised Model Nonprofit Corporation Act. Much of the following discussion is based on Hansmann, *supra* note 3, at 528-37, and Harry G. Henn & Jeffery H. Boyd, *Statutory Trends in the Law of Nonprofit Organizations: California, Here We Come!*, 66 CORNELL L. REV. 1103 (1981).

22. N.Y. NOT-FOR-PROFIT CORP. LAW §§ 101-1515 (McKinney 1970).

23. For example, a religious organization can choose to incorporate as either a

incorporated under the Type B category of not-for-profit corporations, which is equivalent to the public benefit organizations, ares subjected to greater judicial supervision than are the mutual benefit organizations.[24]

The California Nonprofit Corporation Law[25] divides not-for-profit corporations into three separate classifications—public benefit, mutual benefit, and religious corporations—and provides a separate set of provisions to regulate each classification.[26] As with the New York scheme, the purpose of these three categories is to allow different degrees of regulation of the different types of corporations. However, while the public benefit category is subjected to the most extensive

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Type B corporation under the general statute, which category includes charitable, educational, religious, scientific, literary, cultural, and prevention of cruelty to children and animals organizations, or under the specific Religious Corporations statute, in which case it is subjected to the provisions of the N-PCL as a Type D corporation and the N-PCL is used as a default provision for any elements which are lacking under the Religious Corporations Act. N.Y. RELIG. CORP. LAW § 2-b (McKinney Supp. 1990); N.Y. NOT-FOR-PROFIT CORP. LAW § 201(c) cmt. (McKinney Supp. 1994).

24. The classification scheme is designed to allow variation in the degree of regulation of the different classes of not-for-profit corporations, with the amount of regulation determined by the purpose for each classification. *See* Hansmann, *supra* note 3, at 531; Henn & Boyd, *supra* note 21, at 1116. For example, state attorney general approval is required for the incorporation of a Type B organization. N.Y. NOT-FOR-PROFIT CORP. LAW § 404(a) (McKinney Supp. 1994). Type B corporations are subject to inspection visits by the justices of the Supreme Court or their appointees, and the court may require the corporation to make an inventory and accounting when a member or creditor of the corporation claims that the corporation or its directors, officers or agents has engaged in some impermissible activity such as misappropriation of funds or property. *Id.* § 114. Judicial approval is also required for a variety of transactions, including the sale, lease, exchange, or disposal of all or substantially all of the corporation's assets, *id.* § 510(a)(3), merger or consolidation, *id.* § 907(a), and a plan for distribution of assets upon dissolution of the corporation, *id.* § 1002(d).

25. CAL. CORP. CODE §§ 5000-10841 (West 1990).

26. *Id.* §§ 5110-6910 (public benefit corporations); §§ 7110-8910 (mutual benefit corporations); §§ 9110-9690 (religious corporations). The California statute takes a distinctly different approach than that of New York in that the three categories of not-for-profit corporations are each provided a complete and distinct regulatory scheme, while the New York statute attempts to integrate the provisions through default mechanisms, thereby avoiding repetition. The California scheme has been discussed in William T. Fryer, III & David R. Haglund, *New California Nonprofit Corporation Law: A Unique Approach*, 7 PEPP. L. REV. 1, 10-11 (1979); Henn & Boyd, *supra* note 21, at 1133-34; Michael C. Hone, *California's New Nonprofit Corporation Law—An Introduction and Conceptual Background*, 13 U.S.F. L. REV. 733, 736-37 (1979). Hansmann has criticized this trend in both the New York and California approaches to create multiple categories of not-for-profit corporations in that they add ambiguity and reflect "fundamental confusion concerning the proper role and structure for nonprofit organizations." Hansmann, *supra* note 3, at 538.

regulation, the religious corporation category receives the least regulation. This varying degree of regulation is best illustrated by the supervisory role of the state attorney general and the disclosure requirements imposed upon the different types of corporations.[27]

The Revised Model Nonprofit Corporation Act of 1987[28] is similar to the California scheme in that it divides all not-for-profit corporations into public benefit, mutual benefit, and religious corporations, but it does not provide three separate sets of provisions for each of these not-for-profit categories. However, it does follow the California pattern in that it establishes a tripartite regime of regulation with the public benefit corporations receiving the most regulation, the religious corporations receiving the least, and mutual benefit corporations occupying an intermediate position.[29] Tennessee, again, follows a similar pattern but recognizes only two categories: mutual and public benefit corporations. It thus permits a religious corporation to organize as either a mutual or public benefit corporation,[30] but it still subjects religious corporations to the least amount of regulation.[31]

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27. For example, while public benefit corporations are subject to examination at all times by the attorney general, only those assets held subject to a charitable trust by mutual benefit corporations are subject to such supervision. However, the attorney general has the most limited role in terms of supervising religious corporations, presumably to avoid raising First Amendment problems. CAL. CORP. CODE §§ 7140-42, 8510-11, 9230 (West 1991); *see also* Hone, *supra* note 26, at 743-44. Similarly, the disclosure requirements vary in degree according to the type of not-for-profit corporation. Public benefit corporations have the most extensive statutory requirements for record keeping and reporting; religious corporations have the least, and the mutual benefit corporations have an intermediate standard and are treated selectively according to size. CAL. CORP. CODE §§ 6310-24, 9510, 8310-24.

28. REVISED MODEL NONPROFIT CORP. ACT (1987).

29. *Id.* §§ 1.70, 3.04(c), 6.30(f), 7.03(a)(3), 8.31(b)(2), 8.55(d), 11.02(b), 12.02(g), 14.03. In fact, the RMNCA specifically states that

> [i]f religious doctrine governing the affairs of a religious corporation is inconsistent with the provisions of this Act on the same subject, the religious doctrine shall control to the extent required by the Constitution of the United States or the constitution of this state or both.

Id. § 1.80.

30. TENN. CODE ANN. § 48-51-201(31) (Supp. 1994).

31. Sample statutory restrictions placed on public benefit corporations include: purchase of memberships prohibited, *id.* § 48-56-303; notice to the attorney general of derivative suits, *id.* § 48-57-103; attorney general initiation of a court-ordered meeting, *id.* § 48-57-103(a)(1); limitations on mergers, *id.* §§ 48-61-102, -106; notice to the attorney general for the sale of assets other than in the regular course of activities, *id.* § 48-62-102(g); restrictions on voluntary dissolution, *id.* § 48-64-103. On the other hand, religious corporations are specifically exempted from several

C. Corporate Structures Designed Only for Religious Organizations

Some states permit the incorporation of religious organizations in forms other than the not-for-profit corporation. The various statutory schemes that pertain only to religious corporations include general religious corporation laws, special statutes for particular denominations, and corporation sole acts.

1. General religious corporation laws

Twelve states have statutes designed only for the incorporation of religious organizations,[32] while eight additional states have distinct incorporation statutes which encompass particular types of benevolent, educational, and charitable associations, along with religious organizations.[33] Most of these statutes follow a pattern similar to the general not-for-profit corporation statutes discussed previously, except that several of them do not include complete sets of provisions for handling all corporate matters. In general, however, these statutes grant authority and provide procedures for the incor-

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statutory requirements, including those dealing with transfers of memberships, *id.* § 48-56-202; termination of memberships, *id.* § 48-56-302; notice to the attorney general of removal of directors by judicial proceeding, *id.* § 48-58-110(d); the general prohibition of loans to or guarantees for directors and officers, *id.* § 48-58-303; and provision for receivership or custodianship in judicial dissolution, *id.* § 48-64-303. The Tennessee statute also exempts religious corporations from provisions which are inconsistent with religious doctrine, but only to the extent required by the federal and state constitutions. *Id.* § 48-67-102(b).

32. Connecticut, CONN. GEN. STAT. ANN. § 33-264 (West 1987); Delaware, DEL. CODE ANN. tit. 27, § 101 (1989); Illinois, ILL. ANN. STAT. ch. 805, para. 110/35 (1994); Maine, Me. Rev. Stat. Ann. tit. 13, § 2861 (1981); Maryland, MD. CODE ANN., CORPS. & ASS'NS § 5-308 (1985); Massachusetts, MASS. GEN. LAWS ANN. ch. 67, § 22 (West 1988); Michigan, MICH. COMP. LAWS ANN. § 450.159 (West 1990); Minnesota, MINN. STAT. ANN. § 315.01 (West Supp. 1994); New Jersey, N.J. STAT. ANN. § 16:1-2 (West 1984); New York, N.Y. RELIG. CORP. LAW § 2 (McKinney 1990); Wisconsin, WIS. STAT. ANN. § 187.01 (West Supp. 1988); and Wyoming, WYO. STAT. § 17-8-103 (1977).

33. Alabama ("Churches, Public Societies and Graveyard Owners"), ALA. CODE § 10-4-20 (1987); Colorado ("Religious, Educational, and Benevolent Societies"), COLO. REV. STAT. § 7-50-101 (1990); District of Columbia ("Charitable, Educational, and Religious Associations"), D.C. CODE ANN. § 29-1001 (1981); Kansas ("Religious, Charitable and Other Organizations"), KAN. STAT. ANN. § 17-1701 (1980); Missouri ("Religious and Charitable Associations"), MO. ANN. STAT. § 352.010 (Vernon 1966); Ohio ("Religious and Benevolent Organizations"), OHIO REV. CODE ANN. § 1715.01 (Anderson 1986); Oklahoma ("Religious, Charitable and Educational Corporations"), OKLA. STAT. tit. 18, § 543 (1986); and Wyoming ("Charitable, Educational, Religious and Other Societies"), WYO. STAT. § 17-7-101 (1977).

poration of any church or religious organization;[34] they delineate the powers granted to such a corporation, including the rights to acquire, hold, and dispose of real and personal property, to borrow money, to have perpetual succession, to sue and be sued, and to adopt bylaws for their governance.[35] The statutes may be incomplete in that only a few of them specify the ability to merge and consolidate with similar corporations,[36] and even fewer have specific provisions for the dissolution and subsequent distribution of assets of religious corporations.[37]

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34. In its Religious Corporations Law, New York distinguishes a religious corporation from an incorporated church. "A 'Religious Corporations Law corporation' is a corporation created for religious purposes . . . ." On the other hand, an incorporated church "is a religious corporation created to enable its members to meet for divine worship or other religious observances." N.Y. RELIG. CORP. LAW § 2 (McKinney 1990). Some states require that the religious organization consist of a certain number of persons before a corporation may be formed. *See, e.g.*, Connecticut, CONN. GEN. STAT. ANN. § 33-274 (West 1987) (three members); Delaware, DEL. CODE ANN. tit. 27, § 101 (1989) (15 individuals required); District of Columbia, D.C. CODE ANN. § 29-1001 (1991) (three members); Massachusetts, MASS. GEN. LAWS ANN. ch. 67, § 21 (West 1988) (10 members required); Oklahoma, OKLA. STAT. tit. 18, § 562 (1986) (three members). Some states also set a minimum and/or maximum number of trustees (or members of the governing board) of the religious corporation. *See, e.g.*, Michigan, MICH. COMP. LAWS ANN. § 450.159 (West 1990) (Church Trustee Corporations must have a minimum of three and a maximum of nine trustees); Minnesota, MINN. STAT. ANN. § 315.01(2) (West Supp. 1990) (maximum of fifteen trustees).

35. The list of specific powers may be brief, *see, e.g.*, Minnesota, MINN. STAT. ANN. § 315.09 (West Supp. 1994), or lengthy, *see, e.g.*, New Jersey, N.J. STAT. ANN. § 16:1-4 (West 1984).

36. Minnesota, MINN. STAT. ANN. § 315.365 (West Supp. 1994) (merger of religious corporations); Missouri, MO. ANN. STAT. §§ 352.140-.170 (Vernon 1991) (benevolent corporations, including religious corporations, may be merged); New Jersey, N.J. STAT. ANN. §§ 16:1-20 to -21 (West 1984) (consolidation procedure and effect); New York, N.Y. RELIG. CORP. LAW § 13 (McKinney Supp. 1990) (consolidation of incorporated churches); Ohio, OHIO REV. CODE ANN. §§ 1715.08, .21 (Anderson 1992) (consolidation of churches having same form of faith and consolidation with corporation created by representative body); Wisconsin, WIS. STAT. ANN. § 187.14 (West 1992) (consolidation of church corporations or congregations "of the same church, sect, denomination or ecclesiastical connection").

37. *See, e.g.*, Colorado, COLO. REV. STAT. § 7-50-114 (1990); Connecticut, CONN. GEN. STAT. ANN. §§ 33-264e, 33-264f (West 1987); Missouri, MO. ANN. STAT. §§ 352.180-.240 (Vernon 1991); New York, N.Y. RELIG. CORP. LAW § 18 (McKinney 1990). Two states specifically provide for dissolution of a religious society, one by the superior body in which the assets will vest if the society dissolves, MINN. STAT. ANN. §§ 315.37, .38 (West Supp. 1994), and the other upon petition by the governing body if it is a separately incorporated ecclesiastical body, N.Y. RELIG. CORP. LAW § 18. Upon dissolution and after payment of debts, the assets of the religious corporation may revert to those persons who gave or contributed the assets, D.C. CODE ANN. § 29-911 (1991), or they may belong to a superior ecclesiastical body or to another organization with similar purposes, CONN. GEN. STAT. ANN. § 33-264e,

2. *Denominational statutes*

Fifteen[38] states include special statutory provisions for particular religious denominations[39] which thus enable particular religious groups that belong to one of these denominations to match their religious precepts and legal requirements far more closely than may be possible in the absence of such an accommodation. Several reasons have been advanced to explain the existence of the special statutes to particular denominations. First, these statutes may be viewed as a continuation of the special charter system, in which the state authorized legal status to particular churches through the grant of a special charter.[40] Second, special incorporation statutes for particular religious denominations may be an extension of the earlier established status of particular churches.[41] Third, the current

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or they may be distributed according to the constitution of the church, *see* German Evangelical Lutheran St. Johannes Church v. Metropolitan New York Synod of the Lutheran Church in America, 366 N.Y.S.2d 214 (N.Y. App. Div. 1975). The distribution plan must often be approved by a court. *See, e.g.*, MO. ANN. STAT. § 352.210(3); N.Y. RELIG. CORP. LAW § 18.

38. One state, Nevada, repealed its statute.

39. Much of the following discussion is based on Kauper & Ellis, *supra* note 1, at 1533-38. *See infra* notes 44-48 for the specific denominations included in each of these states' statutes.

40. Kauper & Ellis, *supra* note 1, at 1533.

41. *Id.* In 1775, nine of the 13 colonies had established churches. Connecticut, Massachusetts, and New Hampshire had established the Congregational Church; Georgia (in 1758), Maryland (in 1702), New York's lower counties (in 1693), North Carolina (in 1711), South Carolina (in 1706), and Virginia (in 1609) had established the Anglican Church. R.L. CORD, SEPARATION OF CHURCH AND STATE 3-4 (1982). Established churches were generally known as territorial parishes, which were public corporations, and any person who resided within the territorial boundaries of the designated parish had to be a member of that parish. Carl Zollmann, *Classes of American Religious Corporations*, 13 MICH. L. REV. 566, 566-68 (1915). These religious establishments by the state governments were not prohibited by the federal Constitution until the application of the First Amendment religion clauses to the state governments through incorporation by the Fourteenth Amendment in Cantwell v. Connecticut, 310 U.S. 296 (1940) (Free Exercise Clause), and Everson v. Board of Educ., 330 U.S. 1 (1947) (Establishment Clause). However, established churches had been gradually eliminated between 1776 and 1833. The Congregational Church was disestablished in Connecticut in 1818, in New Hampshire in 1819, and in Massachusetts in 1833. North Carolina and New York disestablished the Anglican Church during the Revolutionary War, but disestablishment in Virginia did not occur until 1786. Disagreement exists as to when disestablishment occurred in Georgia, Maryland, and South Carolina, although it probably happened between 1776 and 1789. CORD, *supra*, at 4.

This explanation is partially supported by the fact that most such statutory schemes are found in the older states, particularly among the original colonies, including Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, and Vermont. Kauper & Ellis, *supra* note 1, at 1534. How-

body of statutes regarding particular denominations may represent an unwillingness on the part of legislatures to disrupt any organizations that had formed under earlier statutes.[42] Finally, special provisions for particular denominations may be viewed as necessary because general religious incorporation statutes may not provide a suitable mechanism for some denominations.[43]

The states vary considerably in the number of denominations included in their special statutes. Illinois, Louisiana, Minnesota, and New Hampshire include only one denomination in their special statutory provisions for particular denominations,[44] while New York provides for more than thirty-five different denominations.[45] However, most states include no more

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ever, other historical factors may account for the existence of some particular denominational statutes. For example, the enactment of statutes pertaining to the various Eastern Orthodox churches seems to have occurred during the middle of the twentieth century following the spread of Communism in Central and Eastern Europe and the Soviet Union.

42. Kauper & Ellis, *supra* note 1, at 1533 (noting that "any attempt to impair corporate privilege and powers under earlier statutes might be held invalid as an impairment of the obligation of contracts").

43. William J. Boyer, Jr., *Property Rights of Religious Institutions in Wisconsin*, 36 MARQ. L. REV. 329 (1953) (explaining that the Wisconsin legislature was aware that "certain religious bodies could not readily comply with the uniformity required by the statutes concerning religious corporations without drastically altering their government"); see also WIS. STAT. ANN. § 187.01 (West 1992).

44. ILL. ANN. STAT. ch. 805, para. 110/50 (1993) (Eastern Orthodox Church); LA. REV. STAT. ANN. §§ 12:481-:483 (West 1994) (Orthodox Church); MINN. STAT. ANN. §§ 315.17-.19 (West Supp. 1994) (Protestant Episcopal Church); N.H. REV. STAT. ANN. § 292:15-:17 (1987) (Orthodox Church).

45. All the following citations refer to N.Y. RELIG. CORP. LAW (McKinney 1990): art. 3 (Protestant Episcopal Parishes or Churches); art. 3A (Apostolic Episcopal Parishes or Churches); art. 3B (Parishes or Churches of the Holy Orthodox Church in America); art. 3C (Parishes or Churches of the American Patriarchal Orthodox Church); art. 4 (Presbyterian Churches); art. 5 (Roman Catholic Churches); art. 5A (Christian Orthodox Catholic Churches of the Eastern Confession); art. 5B (Ruthenian Greek Catholic Churches); art. 5C (Orthodox Churches); art. 6 (Reformed Dutch, Reformed Presbyterian, and Lutheran Churches); art. 7 (Baptist Churches); art. 8 (Congregational Christian and Independent Churches); art. 8A (Churches of the Ukrainian Orthodox Churches of America); art. 8B (Churches of the Holy Ukrainian Autocephalic Orthodox Church in Exile); art. 9 (Free Churches); art. 9A (Churches of Christ, Scientist); art. 10 (other denominations, including § 195 (Disciples of Christ), § 201 (United Brethren in Christ), § 202 (United Society of Shakers), § 204 (Evangelical United Brethren), § 204a (Religious Society of Friends), § 206 (Church of Christ (Disciples)), § 207 (Jewish congregations), § 210 (Independent Associated Spiritualist), and § 211 (Spiritualist Science Mother Church, Inc.); art. 11 (Union Churches); art. 11A (Free Methodist Churches); art. 13 (Spiritualist Churches); art. 14 (Churches of the Nazarene); art. 15 (Orthodox Greek Catholic (Eastern Orthodox) Churches); art. 16 (Spiritualist Churches Connected with the National Spiritualist Association); art. 17 (Methodist Churches);

than seven particular denominations.[46] Similarly, the states differ in the particular denominations included. For example, only two states include the Universalist Church,[47] and only three states include Lutheran churches of various kinds.[48] The four most common denominations included in the various statutes are, in order, the Protestant Episcopal Church, Methodist Churches, the Roman Catholic Church, and the Eastern Orthodox Church.[49]

3. *Corporation sole*

a. Introduction. (1) General definition. The third and least common form of corporate structure available to religious organizations is the corporation sole. This corporate form exists in only twenty-six states and is usually available only to religious organizations. The corporation sole has been described as the practical equivalent to the modern one-person corporation[50] in which the office is incorporated and the individual holding the office at a given time has the corporate privileges.[51] Upon the death of the officeholder, the successor

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art. 18 (Churches of the Byelorussian Autocephalic Orthodox Church in America); art. 19 (Unitarian and Universalist Societies); and art. 20 (Assemblies of God Churches).

46. *See, e.g.*, Delaware, DEL. CODE ANN. tit. 27, §§ 114-118 (1989) (two denominations); Kansas, KAN. STAT. ANN. §§ 17-1711-13c, 17-1716a-16c, 17-1732-33, 17-1753-55 (1993) (three denominations); Maryland, MD. CODE ANN., CORPS. & ASS'NS §§ 5-314 to -336 (1993) (four denominations); Massachusetts, MASS. GEN. LAWS ANN. ch. 67, §§ 39-61 (West 1988) (four denominations); Maine, ME. REV. STAT. ANN. tit. 13, § 2982 (West 1981) (three denominations); Vermont, VT. STAT. ANN. tit. 27, §§ 781-944 (1989) (seven denominations); Wisconsin, WIS. STAT. ANN. §§ 187.01-.19 (West 1992) (six denominations). Michigan, however, includes fifteen denominations. MICH. STAT. ANN. §§ 21.1691-.2021 (Callaghan 1993).

47. New York, N.Y. RELIG. CORP. LAW §§ 400-414 (McKinney 1990) (Unitarian and Universalist Societies); Vermont, VT. STAT. ANN. tit. 27, §§ 941-944 (1989) (Universalist Church).

48. Connecticut, CONN. GEN. STAT. ANN. §§ 33-277 to -278, -278a to -278b (West 1987) (Augustana Evangelical Lutheran Church and Lutheran Church in America, respectively); New Jersey, N.J. STAT. ANN. §§ 16:5-1 to -27 (West 1984) (Evangelical Lutheran Church); New York, N.Y. RELIG. CORP. LAW §§ 110-116 (McKinney 1990) (Reformed Dutch, Reformed Presbyterian, and Lutheran Churches).

49. Kauper & Ellis, *supra* note 1, at 1535.

50. OLECK, *supra* note 4, at 20.

51. Kauper & Ellis, *supra* note 1, at 1540. Blackstone defined a corporation sole as "one person only and his successors, in some particular station, who are incorporated by law, in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had." 1 WILLIAM BLACKSTONE, COMMENTARIES *469.

to the office becomes the corporation, thus granting perpetuity to the individual in his or her capacity as an officeholder. In the religious context, a corporation sole is the incorporation of the bishop or other presiding officer of the church for the purposes of administering and managing the affairs, property and temporalities of the church.[52] The principal purpose of a corporation sole is to insure the continuation of ownership of a religious organization's property. At the death of the individual holding the office, church property passes to the successor to the office for the benefit of the religious group, rather than passing to the officeholder's heirs.[53]

The corporation sole is a particularly useful organizational form for hierarchical religions because the organization's legal structure is able to mirror its internal theological structure. For example, in a hierarchical church, the bishop often has control over the church property according to the internal church polity and structure. By incorporating as a corporation sole, the bishop will also have legal authority to deal with church property. Because hierarchical churches are easily able to identify church officials with power and authority, they can easily identify which offices to incorporate as corporations sole.[54]

(2) Historical background. Under English common law, there were two types of corporations sole: civil and ecclesiastical. The ecclesiastical corporation sole is the older form, dating to the mid-fifteenth century, while the civil corporation sole developed 150 years later when the English monarch was deemed to be a corporation sole.[55] The corporation sole developed as a product of early property law principles which did not permit the devise of real property to a church in fee simple absolute. A conveyance to the religious leader (usually a parson or minister) personally thus ran the risk that the property might descend to the leader's heirs or be subject to personal debts or encumbrances.[56] By making the parson and his successors a corporation, the church accomplished the goal

52. *See, e.g.*, CAL. CORP. CODE § 10002 (West 1991).

53. *See, e.g.*, County of San Luis Obispo v. Ashurst, 194 Cal. Rptr. 5, 6-8 (Cal. Ct. App. 1983) (stating that "[t]he creditors of the corporation sole may not look to the assets of the individual holding office, nor may the creditors of the individual look to the assets held by the corporation sole").

54. Kauper & Ellis, *supra* note 1, at 1540.

55. BLACKSTONE, *supra* note 51, at *469; Frederic W. Maitland, *The Corporation Sole*, 16 L.Q. REV. 335, 337 (1900).

56. BLACKSTONE, *supra* note 51, at *469.

of preserving the property of the parsonage for the benefit of the church; because the present officeholder, his predecessor and his successor were deemed by law to be one and the same person, any property given to one was considered the property of the successor. As it developed in the New England colonies, the corporation sole functioned as a municipal corporation, and alienation of property required the consent of the parish.[57]

While the earliest corporations sole came into existence as a product of the common law, after the Reformation in England a corporate charter was required for formation of a corporation sole.[58] While the special charter system was used for corporations sole, as for other corporations, during the nineteenth century, this system was gradually replaced by general corporation statutes. In the case of the corporation sole, however, there was considerable antipathy to the enactment of such legislation, because the corporation sole was viewed as hierarchical and anti-democratic. However, at the urging of primarily the Roman Catholic Church,[59] many states did enact either special legislation permitting the Church to incorporate as a corporation sole or a general incorporation statute permitting corporations sole.[60] Today, slightly more than half of the states permit some form of the corporation sole, and it is a useful organizational form for many religious groups.

(3) States that permit the corporation sole. Twenty-six states permit some form of the corporation sole. Twelve states have explicit corporation sole statutes which permit religious groups to organize as a corporation sole.[61]

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57. Kauper & Ellis, *supra* note 1, at 1504-07.

58. Earlier churches which had operated as a corporation sole before the charter requirement became prevalent were permitted to continue as corporations under the fiction of a "lost grant." Kauper & Ellis, *supra* note 1, at 1504. The Episcopal Church also enjoyed the status of a common law corporation sole in those states where it was established, although this status was lost as the result of the disestablishment process. *See* Terret v. Taylor, 13 U.S. (9 Cranch) 43, 46 (1815) (noting that the minister of a church was seized of the freehold of church property while he held office and was capable of transmitting that property to his successor in the form of a corporation sole).

59. While opposition to the corporation sole was probably based on anti-Roman Catholic sentiment, the Roman Catholic Church favored this corporate form because it most closely mirrored the theological and doctrinal polity of the church and, in particular, it assured that church property would be controlled by the church hierarchy.

60. James B. O'Hara, *The Modern Corporation Sole*, 93 DICK. L. REV. 23, 31 (1988).

61. ALA. CODE §§ 10-4-1 to -9 (1987); ALASKA STAT. §§ 10.40.10-.150 (1989);

These twelve states share similar statutory patterns, although there is variation on specific provisions. An additional three states have statutes which appear to allow some form of the corporation sole in that they either allow a form of organization similar to the corporation sole but not explicitly described as a corporation sole, or limit the corporation sole form to certain religions.[62] Nine states have either passed special legislative acts granting certain religious groups (or certain bodies within a particular religion) the authority to incorporate as a corporation sole or at one time had a corporation sole statute that has since been repealed. The case law in these states describes some religious organizations as corporations sole, but there is no current statute that allows newly organized religious groups

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ARIZ. REV. STAT. ANN. §§ 10-421 to -427 (1988 & Supp. 1994); CAL. CORP. CODE §§ 10000-10015 (West 1991); COLO. REV. STAT. §§ 7-52-101 to -106 (West 1990); HAW. REV. STAT. §§ 419-1 to -9 (1993); MONT. CODE ANN. §§ 35-3-101 to -209 (1993); NEV. REV. STAT. §§ 84.010-.080 (1994); OR. REV. STAT. § 65-067 (Supp. 1994); UTAH CODE ANN. §§ 16-7-1 to -14 (Michie 1991 & Michie Supp. 1994); WASH. REV. CODE ANN. §§ 24.12.010-.040 (West 1994); WYO. STAT. §§ 17-8-101 to -117 (1989).

62. The North Carolina statute is the most similar to the typical corporation sole statute. It allows a duly appointed bishop, minister, or other ecclesiastical officer many of the same powers as a corporation sole, including the power to acquire, hold, or sell church property whenever the laws of the church permit it. In addition, in the event of the transfer, removal, resignation, or death of the officer, such property vests in the duly elected successor to the office. However, the statute does not specifically refer to such an office as a corporation sole. N.C. GEN. STAT. § 61-5 (1989). New Hampshire appears to allow the minister of a church or religious society to act as a corporation sole only in reference to parsonage lands and with the limitation that unless the minister has the consent of the parish, no conveyance made by the minister is valid for longer than the minister continues to hold office. N.H. REV. STAT. ANN. §§ 306:6-:8 (1984).

The Idaho Nonprofit Corporations Act appears to allow a form of organization similar in operation to a corporation sole. According to the statute, corporations sole created under the prior statute will be deemed single director, nonmembership corporations. IDAHO CODE § 30-304 (1980). Thus, it may follow that a church or religious society incorporating under Idaho's current law could organize as a single director, nonmembership corporation which would then be very similar in operation to the corporation sole. *Id.* §§ 30-308, -315, -318(e). By extension, one might further posit that any not-for-profit corporation organizing in Idaho might attain similar advantages by choosing to incorporate as a single director, nonmembership corporation.

Finally, the Michigan statute permits only Roman Catholic bishops and Protestant Episcopal bishops to form corporations sole. The statute grants a Roman Catholic bishop a full set of corporate powers but only grants a Protestant Episcopal bishop authority to deal with property. MICH. COMP. LAWS ANN. §§ 458.1-.2, .271-.273 (West 1994).

to incorporate as a corporation sole.[63] In addition, two states recognize the common law corporation sole.[64]

b. Functioning of a corporation sole. (1) Typical statutory provisions. With only one exception,[65] all states that permit the formation of a corporation sole limit its use to religious organizations. In some cases, the statutes further limit the permissible purposes of a corporation sole to the management of the property of a religious group for such objectives as the benefit of the religion itself, works of charity, and public worship.[66] In general, the presiding officer of any church or religious society is authorized by statute to form a corporation sole if it is done in conformance with the rules and canons of the religious entity and if title to the property of the religious

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63. District of Columbia, *see, e.g.,* Dietrich v. District of Columbia Bd. of Zoning Adjustments, 293 A.2d 470 (D.C. 1972) (Archbishop of Washington described as a corporation sole); Illinois, *see, e.g.,* Fintak v. Catholic Bishop, 366 N.E.2d 480 (Ill. Ct. App. 1977) (Catholic Bishop of Chicago described as a corporation sole); Kentucky, *see, e.g.,* Roland v. Catholic Archdiocese, 301 S.W.2d 574 (Ky. 1957) (Roman Catholic Bishop of Louisville described as a corporation sole); Maine, *see, e.g.,* Parent v. Roman Catholic Bishop, 436 A.2d 888 (Me. 1981) (Roman Catholic Bishop of Portland described as a corporation sole); Maryland, *see, e.g.,* Smith v. Maryland Casualty Co., 229 A.2d 120 (Md. 1966) (Archbishop of Baltimore described as a corporation sole); Massachusetts, *see, e.g.,* Director of the Div. of Employment Sec. v. Roman Catholic Bishop, 420 N.E.2d 322 (Mass. 1981) (Roman Catholic bishop of the diocese of Springfield described as a corporation sole); New Hampshire, *see, e.g.,* Opinion of the Justices, 345 A.2d 412 (N.H. 1975) (Roman Catholic Bishop of Manchester described as a corporation sole); New Mexico, *see, e.g.,* Moya v. Catholic Archdiocese, 587 P.2d 425 (N.M. 1978) (Catholic Archdiocese of New Mexico described as a corporation sole); South Carolina, *see, e.g.,* Decker v. Bishop of Charleston, 147 S.E.2d 264 (S.C. 1966) (Bishop of Charleston described as a corporation sole created by legislative act). Although not permitting incorporation of a new corporation sole, the South Carolina Nonprofit Corporations Act provides for the amendment of the charter of a corporation sole, S.C. CODE ANN. § 33-31-140 (Law. Co-op. 1990).

64. Arkansas, *see, e.g.,* City of Little Rock v. Linn, 432 S.W.2d 455 (Ark. 1968); Florida, *see, e.g.,* Reid v. Barry, 112 So. 846 (Fla. 1927).

65. Arizona permits the formation of a corporation sole for the purpose of acquiring, holding and disposing of the property of scientific research institutions maintained solely for pure research without expectation of pecuniary gain or profit. ARIZ. REV. STAT. ANN. § 10-421 (1993).

66. For example, the Utah statute states: "Corporations sole may be formed for acquiring, holding or disposing of church or religious society property for the benefit of religion, for works of charity and for public worship." UTAH CODE ANN. § 16-7-1 (1991); *see also* ALASKA STAT. § 10.40.010 (1989); ARIZ. REV. STAT. ANN. § 10-421 (1993); NEV. REV. STAT. § 84.010 (1994); WYO. STAT. § 17-8-109 (1989).

Other statutes state the permissible purposes more broadly; for example, the Hawaii statute allows a corporation sole to organize for the purposes of "administering and managing the affairs, property, and temporalities of the church." HAW. REV. STAT. § 419-1 (1993); *see also* CAL. CORP. CODE § 10002 (West 1991).

group is vested in that person.[67] The process of incorporation,[68] the powers granted by statute to the corporation sole,[69] and the methods of dissolution[70] are usually comparable to those delineated for general not-for-profit corporations.[71]

Perhaps the most distinctive area of functioning for a corporation sole is the manner of providing for vacancy in and succession to the corporation sole office. In general, upon the death, resignation, or removal of the person who is the corporation sole, the successor in office is vested with the title of all property held by the officer's predecessor, with the same power and authority over the property and subject to the same legal liabilities and obligations with reference to the property.[72] Some statutes also deal with the particular problems of interim vacancy in the office[73] and the situation of an individual who

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67. For example, the Nevada statute provides:

> An archbishop, bishop president, trustee in trust, president of stake, president of congregation, overseer, presiding elder, district superintendent or other presiding officer or clergyman of a church or religious society or denomination, who has been chosen, elected or appointed in conformity with the constitution, canons, rites, regulations, or discipline of the church or religious society or denomination, and in whom is vested the legal title to property held for . . . the church or religious society or denomination, may make and subscribe written articles of incorporation . . . .

NEV. REV. STAT. § 84.020 (1994); *see also* CAL. CORP. CODE § 10002 (West 1991) (specifying the "bishop, chief priest, presiding elder, or other presiding officer"); OR. REV. STAT. § 65-067 (Supp. 1994) (specifying "any individual").

68. *See, e.g.*, MONT. CODE ANN. § 35-3-202 (1993). A few statutes present variations. For example, Alaska requires the articles of incorporation to state the estimated value of property owned by the corporation at the time of executing the articles of incorporation, ALASKA STAT. § 10.40.040(3) (1989), and California requires a statement explaining the method for filling a vacancy in the incorporated office according to the rules, regulations or constitution of the religious group, CAL. CORP. CODE § 10003(d) (West 1991).

69. *See, e.g.*, ALA. CODE § 10-4-4 (1987). The corporation sole may be explicitly exempted from any general requirement that the membership of the religious group must consent to property transfers. UTAH CODE ANN. § 16-7-7 (1991).

70. *See, e.g.*, ALA. CODE § 10-4-7 (1987); ALASKA STAT. § 10.40.150 (1989); CAL. CORP. CODE § 10012-10015 (West 1991); HAW. REV. STAT. § 419-8 (1993); UTAH CODE ANN. § 16-7-12 (1991).

71. Oregon, for example, explicitly places the corporation sole under its general not-for-profit corporation statute, as a form of religious corporation, and subjects it to the same statutory treatment, differing only in that the corporation sole is managed by a single director without a board of directors. OR. REV. STAT. § 65-067 (Supp. 1994).

72. *See, e.g.*, ARIZ. REV. STAT. ANN. § 10-426 (1988).

73. The incorporated officeholder may appoint an administrator to act in case of temporary vacancy or, in the absence of such an administrator, the superior ecclesiastical authority to whom the officeholder is subject may appoint an administrator. The administrator must file an application for a certificate of

was not formally incorporated as a corporation sole but who, at the time of death, resignation or removal, was holding title to trust property for the use or benefit of a religious group.[74]

(2) Judicial treatment of corporations sole. There seems to be relatively little case law dealing with particular issues involving the corporation sole. Most of the cases merely describe the office involved as a corporation sole but do not treat the corporation sole differently than other legal structures.[75] Occasionally, a tendency to treat the corporation sole with deference does appear in judicial opinions.[76] One area of uncertainty seems to involve the application of the principal/agency theory of liability to a corporation sole. While a corporation sole seems to bear liability on an agency theory when the matter involved is business-related (as would any other corporation), at least one court has held that the corporation sole does not bear liability when the agency issue involves an ecclesiastical, rather than a business, matter.[77]

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administratorship with the secretary of state. *See, e.g.*, ALA. CODE § 10-4-6 (1987); COLO. REV. STAT. § 7-52-104 (1990). On the other hand, Montana permits the superior ecclesiastical authority to appoint a board of advisors to exercise the powers of the corporation or to further delegate the executive and administrative functions of the corporation to an elected administrator. MONT. CODE ANN. § 35-3-208 (1993).

74. These statutes specifically provide that such property shall be deemed to be in abeyance until the vacancy is filled and shall then vest immediately in the successor without any further required act or deed so as to prevent either a reversion of the property to the donor or a vesting of the property in the heirs of the deceased officeholder. *See, e.g.*, ALASKA STAT. § 10.40.120 (1989); ARIZ. REV. STAT. ANN. § 10-427 (1988); COLO. REV. STAT. § 7-52-105 (1990); UTAH CODE ANN. § 16-7-10 (Michie 1991); WYO. STAT. § 17-8-117 (1989). These provisions allow religious groups which have not met the formal statutory requirements for incorporation as a corporation sole to enjoy the most important advantage of this organizational form in that succession to church property is thus permitted.

75. *See, e.g.*, Property Assocs., Inc. v. Archbishop of Guam, No. 93-00003A, 1993 WL 470277 (D. Guam Oct. 12, 1993) (describing archbishop as corporation sole in dispute involving termination of a lease); St. Gregory's Church v. O'Connor, 477 P.2d 540 (Ariz. Ct. App. 1971) (Bishop of the Roman Catholic Church of the Diocese of Tucson described as a corporation sole in a negligence suit); Larson v. Archdiocese of Denver, 631 P.2d 1163 (Colo. Ct. App. 1981) (Archdiocese of Denver described as a corporation sole in a negligence action); Corporation of the President of the Church of Jesus Christ of Latter-day Saints v. Wallace, 590 P.2d 343 (Utah 1979) (church president described as a corporation sole in case involving issuance of a restraining order due to disruptive conduct of the defendant).

76. *See, e.g.*, Hurley v. Werly, 203 So. 2d 530, 534 (Fla. 1967) (reversing a lower court decision which decreed specific performance of a real estate contract against the Bishop of the Diocese of St. Augustine because the Bishop had failed to appear at a deposition and stating that because the corporation sole has protective attributes, the lower court should have, "in deference to his privileged legal status, proceeded more cautiously than precipitately").

77. The Alabama Supreme Court refused to hold a corporation sole liable for

(3) Advantages and disadvantages. The main advantage of the corporation sole is the ability of the legal structure to mirror the doctrinal structure of a religious group in terms of property ownership, authority and control. This advantage makes the corporation sole an attractive option for religious groups with hierarchical polity. The corporation sole is also advantageous because it insures that the property of the religious group will pass to the successor of the corporation sole at the death of the incumbent. It is viewed as a secure method of owning property, free of the risk of members or trustees using their property ownership to pressure the religious group on doctrinal issues. In addition, it is more secure than fee simple ownership by the officeholder, which carries the associated risks that the property may pass to the officer's heirs or creditors rather than remaining with the religious group.

On the other hand, these same advantages may also be considered disadvantages. While the concentration of assets and authority in one person may reflect a religious group's doctrinal structure, it may also lead to confusion between personal and religious assets, difficulty in government monitoring, and lack of accountability or proper controls. The individual who is the corporation sole has extensive powers, and complete authority vests in that person.[78] There is a risk that unlimited authority by one who is not legally subject to the will of the membership of the religious group or other directors could lead to abuses. However, although the corporation sole may have great legal autonomy, there may be safeguards within the church organization to prevent abuses.[79] The corporation sole

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the actions of a priest in damaging an abortion clinic and found that the bishop's relationship with the priest was ecclesiastical in nature. The court relied on the fact that according to Alabama's corporation sole statute, a corporation sole's functions related to conducting business, not to ecclesiastical duties, and thus no liability could be created on the part of the corporation sole unless a business activity were involved. Wood v. Benedictine Soc'y, 530 So. 2d 801, 805 (Ala. 1988). A California appellate court, on the other hand, held a corporation sole liable on an agency theory in a wrongful death action based on a car accident in which a priest was involved, without addressing the question of whether the underlying matter was ecclesiastical or business-related. The court concluded that there was agency liability because the bishop had the right to control the priest's activities within its jurisdiction and the priest was acting within the scope of the agency when the accident occurred. Stevens v. Roman Catholic Bishop, 123 Cal. Rptr. 171, 178 (Cal. Ct. App. 1975).

78. *See, e.g.*, Estate of Zabriskie, 158 Cal. Rptr. 154, 157 (Cal. Ct. App. 1979) (stating that "[t]he will and judgment alone of the presiding officer regulate his acts, like any other individual acting in his own right").

79. O'Hara, *supra* note 60, at 30-31 (stating that in the Roman Catholic

form clearly offers significant advantages to religious groups that find that form the most appropriate for their theological principles.

D. States That Prohibit Incorporation of Religious Organizations

The constitutions of two states, Virginia and West Virginia, bar the granting of a charter of incorporation to any church or religious denomination.[80] The reasons for this anomalous treatment of religious organizations seem to lie in the strong historical tradition of Virginia, a tradition that dates to the Revolutionary period and Virginians Thomas Jefferson and James Madison.[81] The theories of church-state separationism and religious liberty professed by Madison and Jefferson are reflected in Virginia's constitutional ban against the granting of a charter of incorporation to any church or religious denomination. It has also been suggested that these prohibitions are the descendants of English mortmain statutes.[82]

Church, approval of a board of consultors is now required on major property decisions).

80. VA. CONST. art. IV, § 14; W. VA. CONST. art. VI, § 47. The constitution of South Carolina expressly prohibits special laws, but not general laws, relating to the incorporation of religious institutions as well as a variety of other charitable and not-for-profit corporations and business corporations. S.C. CODE ANN. § 33-31-10 (Law. Co-op. 1990). It is not unusual for state constitutions to address matters of concern to religious groups, but these are typically restricted to provisions regarding the free exercise of religion, prohibitions against aid to religious groups, tax exemptions to religious institutions, and protection of civil rights regardless of religious beliefs. Individual state constitutional provisions regarding religion are examined in CHESTER J. ANTIEAU ET AL., RELIGION UNDER THE STATE CONSTITUTIONS (1965); Kauper & Ellis, *supra* note 1, at 1528; Note, *Beyond the Establishment Clause: Enforcing Separation of Church and State Through State Constitutional Provisions*, 71 VA. L. REV. 625 (1985).

81. The development of Virginia's church-state relationship began in 1609 with the establishment of the Anglican Church (later the Episcopal Church), CORD, *supra* note 41, at 4. A disestablishment movement had begun by 1784, led by Thomas Jefferson and James Madison, *id.* at 121. In 1784, the General Assessment Bill was introduced into the Virginia legislature and was intended to raise funds to support "Teachers of the Christian Religion" through compulsory public payments. ROBERT S. ALLEY, THE SUPREME COURT ON CHURCH AND STATE 10 (1988); RICHARD E. MORGAN, THE SUPREME COURT AND RELIGION 18-19 (1972). Madison's well-known pamphlet, "A Memorial and Remonstrance Against Religious Assessments," was authored to oppose the assessment. In the 1785 session of the General Assembly, the legislature defeated the assessment bill and passed Jefferson's Bill for Establishing Religious Freedom, which remains in the Virginia code today. VA. CODE ANN. § 57-1 (Michie 1986); *see also* MORGAN, *supra*, at 19-24; ALLEY, *supra*, at 12-15; GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 37, 149-50 (1987); CORD, *supra* note 41, at 4-47.

82. *See, e.g.*, Osnes v. Morris, 298 S.E.2d 803, 805 (W. Va. 1982) ("The prime

It is also possible to conclude that the constitutional ban was intended to prevent the potential favoritism created by the granting of special corporate charters to religious organizations,[83] rather than to prevent all incorporation of religious organizations. In any case, the Virginia Nonstock Corporation Act now permits an organization to incorporate under it for any lawful purpose[84] and mentions elsewhere religious purpose among the permitted purposes. It appears that several organizations with religious purposes but which are not *per se* churches or other specific denominational organizations do in fact incorporate pursuant to these provisions. In addition, it seems that denominational groups (such as individual church-

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object of mortmain acts was to repress the alarming influence of ecclesiastical corporations, which had, even as early as the Norman conquest, monopolized so much of the land in England, that the Abbot of St. Albans told the conqueror that the reason why he had subjugated the country by the single victory at Hastings was because the land, which was the maintenance of martial men, was given and converted to pious employments and for the maintenance of holy votaries".).

83. The Virginia Constitution states, "The General Assembly shall not grant a charter of incorporation to any church or religious denomination . . . ." VA. CONST. art. 4, § 14, para. 20. Thus, by its literal terms, the constitution only prohibits legislatively created religious corporations but does not seem to prohibit religious corporations created by some other method, as is now the case under the Virginia Nonstock Corporation Act, which is a general incorporation statute. *See* A.E. DICK HOWARD, 1 COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 545-46 (1974) (arguing that these provisions represent a "safeguard against an establishment of religion, since the legislature will not be in a position, by chartering some churches but not others, to give preferment to any denomination or religion").

84. Both Virginia and West Virginia not-for-profit corporation statutes allow not-for-profit corporations to be organized broadly for "any lawful purpose or purposes." VA. CODE ANN. § 13.1-825 (Michie 1994); W. VA. CODE § 31-1-7 (1994) (listing examples of lawful purposes as including, but not limited, to: charitable, benevolent, eleemosynary, educational, civic, patriotic, social, fraternal, literary, cultural, athletic, scientific, agricultural, horticultural, animal husbandry, and professional, commercial, industrial or trade association). Although such a broad statement of permissible purpose would seem to include incorporation of churches or religious denominations, both states have provisions within their state constitutions prohibiting the incorporation of churches or religious denominations. VA. CONST. art. 4, § 14, para. 20 ("[T]he General Assembly shall not grant a charter of incorporation to any church or religious denomination, but may secure title to church property to an extent to be limited by law".); W. VA. CONST. § 47 (stating, "[n]o charter of incorporation shall be granted to any church or religious denomination. Provisions may be made by general laws for securing the title to church property, and for the sale and transfer thereof, so that it shall be held, used, or transferred for the purposes of such church, or religious denomination"). In West Virginia, this constitutional prohibition is specifically included within the previously mentioned "purposes of incorporation" section of the West Virginia code. W. VA. CODE § 31-1-7(c); *see also* Lunsford, Withrow & Co. v. Wren, 68 S.E. 308 (W. Va. 1908) (noting the constitutional prohibition on the granting of articles of incorporation to a church and a church's incompetency to sue or be sued or to enter into contracts).

es, synagogues, or mosques) incorporate funds for the purpose of holding financial assets; yet the denominational group does not itself incorporate.[85] Whether this is the result of a perceived constitutional ban or merely the continuation of a tradition is difficult to determine.

In addition to these apparent or real obstacles to incorporation, the Virginia statutes place a limit on the amount of real and personal property that a religious denomination may

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85. In both Virginia and West Virginia, churches and other denominational groups are able to become involved in not-for-profit incorporation. For example, for purposes of incorporation in West Virginia, a "religious-oriented" organization will not be deemed a "church or religious denomination" if it will have no "ecclesiastical control" of persons engaged in religious worship and will not prescribe the forms of such worship. *See* Op. Att'y Gen. 252 (1957) (permitting a group whose stated purpose was to "win people to Christ" through evangelism and missionary work to incorporate because each individual was free to select the church or denomination of his choice). Auxiliary or para-church organizations have been incorporated with the purpose of maintaining or operating child care centers, retirement homes, education funds, fellowship funds, and preservation funds, even when such groups have an explicit denominational affiliation. Religious groups seem to follow the method of incorporating a fund for the purpose of owning property which is then used to support the activities of the group, but without the group itself formally incorporating. *See, e.g.*, Westminster-Canterbury of Hampton Roads, Inc. v. City of Virginia Beach, 385 S.E.2d 561, 562 (Va. 1989) (describing corporation organized by the Episcopal Diocese and the Presbyterian Church to own and operate a housing and health-care facility as a nonstock corporation "organized exclusively for charitable, religious, educational, and scientific purposes"); St. John's Protestant Episcopal Church Endowment Fund, Inc. v. Vestry of St. John's Protestant Episcopal Church, 377 S.E.2d 375, 376 (Va. 1989) (describing the fund as incorporated in order "to acquire and establish in perpetuity a fund . . . and to appropriate the income therefrom . . . to the preservation, insurance and improvements of the real and [personal] property [of the church] and also to its religious, charitable and benevolent uses"); St. Paul A.M.E. Church House Corp. v. Buckeye Union Ins., 379 F. Supp. 562, 563 (S.D.W. Va. 1974) (stating purpose of church housing corporation was to "build a number of low-cost public apartment house units for rental"); Application of Virginia United Methodist Homes, Inc., No. SEC940121, 1994 WL 725338 (Va. Corporation Commission Nov. 18, 1994) (describing Virginia United Methodist Homes, Inc. as incorporated under the Nonstock Corporation Act in an application to be exempt from securities registration requirements); Application of Southeastern District-LCMS Church Extension Fund, Inc., No. SEC940035, 1994 WL 258467 (Va. Corporation Commission Apr. 28, 1994) (describing religiously affiliated fund as incorporated exclusively for "religious, educational, charitable and benevolent purposes" under the Nonstock Corporation Act in an application for exemption from securities registration requirements); Application of the Christian Broadcasting Network, Inc., No. SEC930080, 1993 WL 359564 (Va. Corporation Commission Aug. 9, 1993) (describing religiously affiliated network as incorporated under the Nonstock Corporation Act with a "religious, educational, and charitable purpose" in an application for exemption from securities registration requirements). Op. Att'y Gen., June 23, 1969 (permitting a West Virginia Christian recreational center, which was nondenominational and nonsectarian, and where no specific church was represented, to incorporate).

own.[86] Despite its origin, to whatever extent this prohibition is retained, it appears outdated in light of the prevailing view that permits incorporation of religious organizations under general incorporation statutes. Furthermore, limitations or obstacles to the ability to incorporate or to own property that are not generally applicable to all charitable or not-for-profit organizations would seem to raise serious questions of constitutionality under the Free Exercise Clause of the First Amendment.

E. The Element of Choice

The myriad of choices offered by the variations in structural forms available to religious organizations in the different states leads to two further issues. The first issue is the extent of flexibility offered to a religious group in choosing a structural form when the applicable state statutes seem to offer more than one possibility, and the extent to which this choice may affect other particular burdens or exemptions that will be granted to the religious group as a result of this choice. The second issue is whether a religious organization that functions primarily in a different state could incorporate in a state that permits the existence of a structural form that is particularly advantageous in that the legal form would more closely mirror the group's religious polity. Both these questions lead to the corollary issue, which will be addressed in the next section, of whether the exclusion of a legal form which best mirrors the theology of a particular religion is a violation of the group's right to free exercise of religion.

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86. Specific statutes permit religious groups to own property. VA. CODE ANN. § 57-7.1 (Michie 1994); W. VA CODE § 35-1-1 (1994). However, in Virginia, the trustees may not hold property for religious purposes which exceeds 15 acres of land in a city or town, or 250 acres outside of a city or town and within the same county. The local government may permit the holding of up to 50 acres within a town or city under certain circumstances. The trustees may not hold personal property which exceeds $10 million in worth. VA. CODE ANN. § 57-12 (Michie 1994). In West Virginia, the statute has recently been amended to permit trustees to hold 10 acres of land within a city, town or village and 60 acres outside of a city, town or village. There is no limitation placed on the amount of personal property which may be owned. W. VA. CODE § 35-1-8 (1994); W.VA. H.B. 2569, 72nd Legislature (1995). These limits are not, however, applicable only to religious groups.

1. Choice of structural forms within a state

With such a great variety of statutory incorporation forms available, not only among the different states but even within the same state, it becomes necessary to consider the extent of choice that a religious organization has when considering the type of legal structure to adopt. In every state except Virginia and West Virginia, a religious organization would have the option of incorporating as a not-for-profit or nonstock corporation. In states whose statutes make no provision for specific forms of religious corporations, this may also be the only choice. However, most states offer more than one statutory model, and so some of the possible variations and choices will now be considered.

A few states require religious organizations to incorporate under the religious corporation or religious societies statute. Although these states have a not-for-profit corporation act, they require the special provisions pertaining to religious corporations to govern the formation of those corporations.[87] On the other hand, most states with more than one type of incorporation statute do not specifically mention whether a religious organization may choose under which statute to incorporate; in the absence of a specific prohibition, the ability to choose would seem apparent.[88]

Yet another variant is offered by those states that include among their statutory models the specific denominational statutes in addition to the more general forms of statutes. Many of these states permit a religious group to incorporate under whichever statute it chooses,[89] but a few states limit the

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87. DEL. CODE ANN. tit. 27, § 101 (1994); MD. CODE ANN., CORPS. & ASS'NS § 5-302 (1994); N.H. REV. STAT. ANN. § 306.4 (1984); N.C. GEN. STAT. § 55-A-3(A)(3) (1990); OHIO REV. CODE ANN. § 1702.03 (Baldwin 1995).

88. Many of the statutes specifically mention that a religious society may incorporate under them. *See, e.g.*, COLO. REV. STAT. §§ 7-20-104, 7-40-106, 7-50-101, 7-51-101 (1995); D.C. CODE ANN. §§ 29-504, -1001 (1994); ILL. ANN. STAT. ch. 805, §§ 105/103.05, 110/35 (1995); KAN. STAT. ANN. §§ 17-1701, 17-6001(b) (1993); MINN. STAT. ANN. §§ 315.01, 315.05 (1995); MO. ANN. STAT. §§ 355.025, 352.010 (1995); OKLA. STAT. ANN. tit. 18, §§ 562, 1002(A) (West 1995). A Missouri statute specifically states that the right of a religious group to organize as it wishes is not affected by the statute. MO. ANN. STAT. § 355.500 (1995).

89. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 67, §§ 23, 40, 44 (West 1995) (permitting a religious group to incorporate under the religious society provisions or under the denominational statutes for Methodist, Episcopal, and Roman Catholic churches); MICH. COMP. LAWS ANN. §§ 450.159, 450.178, 450.3302, 458.262, 458.428 (West 1995) (allowing a choice to religious groups whether to incorporate under trustee corporation provisions, ecclesiastical corporation provisions, not-for-profit

choices available to particular denominations.[90] Those statutes that limit the choices available to specific religious groups, particularly when a group is required to incorporate under a particular denominational provision would probably not be viewed by adherents of that denomination as an infringement on their freedom of religious choice. By the same token, however, the existence of the denominational statutes is presumably the product of a lobbying effort by the denomination itself and may thus raise the question of a preference granted to particular religious groups. It is apparent that those states that do not have denominational provisions or that limit such provisions to a select group of denominations are implicitly limiting the choices of those groups that do not have the benefit of such provisions. Furthermore, the limited presence of the corporation sole as a structural choice raises questions of limitations on a religious group's ability to choose, particularly when that form is best-suited to a group's religious polity.

2. Foreign corporations

It is also necessary to consider the obverse of the question of the element of choice, which involves the ability of a religious group that has been formed in one state to function in a different state. Following the model of the business corporation statutes, many states provide in their general not-for-profit corporation statute or religious corporation statute for the operation of foreign corporations within that state.[91] The issue

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corporation provisions, or specific denominational statutes); N.J. STAT. ANN. §§ 15A:2-1(b); 16:2-12, 16:5-1, 16:3-1, 16:10A-2, 16:11-1, 16:12-1, 16:13-1, 16:10A-2, 16:11-1, 16:12-1, 16:13-1, 16:15-1, 16:16-1, 16:17-3 (West 1995) (allowing religious groups to incorporate as either a not-for-profit corporation or under one of 10 specific denominational statutes); ME. REV. STAT. ANN. tit. 13, §§ 901, 2861, 3021, 2982, 2986 (West 1994) (granting a choice to religious groups).

90. *See, e.g.*, CONN. GEN. STAT. ANN. §§ 33-264a, 33-500, 33-268, 33-279 (West 1995) (generally permitting a choice whether to organize under the Religious Corporation and Societies provision, the specially chartered corporations provision, or the specific denominational provisions, but prohibiting formation as a nonstock corporation); WIS. STAT. ANN. §§ 181.03, 187.01, 187.12, 181.76(3) (West 1995) (generally permitting a choice whether to incorporate as a nonstock corporation or under religious societies statutes but excluding Roman Catholic churches from the religious society provisions).

91. Most states seem to permit foreign not-for-profit corporations to perform the same activities as domestic corporations. In some cases, the foreign corporation may be required to register or obtain a certificate from the secretary of state, *see, e.g.*, WASH. REV. CODE § 24.03.305 (1995), while in other states there are no requirements, *see, e.g.*, WIS. STAT. § 181.66 (1995). Most statutes limit the foreign

that this poses is whether a religious organization that desires to operate in one state, the statutes of which do not expressly provide for the structural model that the organization prefers, could incorporate in a different state that does offer the preferred structure. In an analogy to the Delaware business corporation, a particular religious organization could incorporate in a state that provides for a particular corporate form, such as a denominational form or corporation sole, and then operate and conduct business in a state that does not specifically permit the incorporation of this type of corporation. While there seems to be virtually no case law on this subject, the statutes of many states would seem to permit this arrangement. Whether this would create collateral issues or complications, such as in the ownership of property by a foreign entity, is not clear in the current state of the law.

The one caveat to such an arrangement, however, is that religious organizations need to consider a variety of issues in addition to the availability of particular corporate structures. For example, some states grant exemptions from certain regulations to religious corporations. Perhaps the most common example is the exemption from registration requirements imposed on other types of not-for-profit corporations.[92] A more interesting question arises in those states that exempt volunteer directors and officers of not-for-profit corporations from liability for simple negligence.[93] Such protection would today be considered highly desirable and would thus provide a considerable incentive to incorporate in such a state.

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corporation to acting in ways permitted to similar domestic corporations, and some specifically state that "nothing contained in this chapter shall be construed to regulate the organization or the internal affairs of a foreign corporation." *Id.* § 181.66(1). It would seem to be possible for a particular corporation to organize in a state which permits corporations sole and then to conduct activities in a state which does not but which has such a specific provision.

92. While the considerable majority of states that impose particular requirements under Solicitation Acts exempt religious organizations from those requirements, four states do not. *See* CAL. CORP. CODE §§ 17510-17510.7 (West 1990); LA. REV. STAT. ANN. §§ 51:1901-1907 (West 1995); ME. REV. STAT. ANN. tit. 9 §§ 5001-5016 (West 1980 & Supp. 1994); PA. STAT. ANN. tit. 10, § 162.3 (1994) (exempting religious institutions which comply with I.R.C. § 501(c)(3) and which are supported primarily by government grants and funds solicited from their own membership). A state's ability to regulate solicitation would be restricted to its own jurisdiction but would subject foreign corporations to the same requirements as domestic corporations.

93. *See, e.g.*, ILL. ANN. STAT. ch. 805 § 105/108.70 (1995) (exempting uncompensated officers and directors from liability except for willful and wanton conduct).

III. THE RELATIONSHIP OF INSTITUTIONAL STRUCTURE TO THE FIRST AMENDMENT

This discussion of legal structures available to religious organizations leads to the crux of the dilemma that must be confronted—the relationship between legal structure and the religion clauses of the First Amendment.[94] While it is not necessary for a religious organization to adopt formally any legal structure in order to carry out its religious mission or even to attain favorable tax status, if the religious organization wishes to attain various other advantages, then it must squeeze itself into the mold of one of the legal forms that a particular state chooses to make available, regardless of how well or how poorly the particular mold may fit the theology of the particular religion. Many religious organizations now take those advantages for granted; in fact, they often regard them as necessary to the carrying out of their religious mission. As a result, the question of the extent to which the available forms fit the theology of a particular religious group directly implicates the concerns of the Free Exercise Clause.

On the other hand, those who work (both as practitioners and as legal theoreticians) in the field of not-for-profit and charitable organizations question whether the creation of special exemptions for religious groups, *in their organizational form*, violates the Establishment Clause of the First Amendment. In sum, the question posed is whether religious organizations, as institutions rather than as aggregates of individuals, should be held accountable to both government and society as a whole by the same standards as other charitable organizations or whether they should be largely exempt from such accountability because of the First Amendment.

The question of accountability and responsibility of religious organizations under the law is a complex and intriguing one that illustrates well the conflict between an individual-oriented and an institution-oriented constitutional jurisprudence of civil liberties. The extent to which laws can require or

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94. The First Amendment states: "Congress shall make no law respecting an Establishment of religion or prohibiting the free exercise thereof." U.S. CONST. amend. I. The Supreme Court has generally treated this provision as embodying two distinct clauses and two distinct values pertaining to the status of religion and its relationship to the government. However, their interpretation and interconnectedness are complex and produce little agreement. *See, e.g.*, Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477 (1991).

prohibit conduct that contradicts religious mandate is central to the questions of the relationship among religious institutions, individuals, society and government and brings out a fundamental conflict between two deeply rooted values—the desire to protect freedom of religion and the desire to hold all equally accountable under the law.

The requirement to submit to governmental regulation has always applied in the United States to conduct and not at all to religious belief, the latter being entirely exempt from governmental interference.[95] Individuals and religious organizations are, however, at least to some extent accountable to society for their conduct and activities under governmental regulation.[96] The proponents for an expansive approach to religious free exercise have asserted the need for a "constitutionally compelled" or a "judicially created" exemption from such regulation when the regulation unduly burdens the free exercise of religion.[97] Throughout modern constitutional jurisprudence until 1990, the boundaries of such accountability were determined by requiring a compelling state interest to justify the burden imposed on the free exercise of religion.[98] Through the applica-

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95. The freedom of belief, whether grounded in what would be generally recognized as a religious belief or in a more secular conscientious belief, has been given absolute protection under both the Free Exercise Clause and the Free Speech Clause. *See, e.g.*, School Dist. v. Schempp, 374 U.S. 203, 231 (1963) (Brennan, J., concurring).

96. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 403 (1963); Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940); Intercommunity Ctr. for Justice and Peace v. INS, 910 F.2d 42, 44 (2d Cir. 1990) ("These clauses have been interpreted as providing full protection for religious beliefs but only limited protection for overt acts prompted by those beliefs."). For criticisms of this belief/action dichotomy in First Amendment jurisprudence, see, e.g., Shelley K. Wessels, Note, *The Collision of Religious Exercise and Governmental Nondiscrimination Policies*, 41 STAN. L. REV. 1201, 1207-08 (1989).

97. The argument for such an exemption is essentially that the attempt to impose governmental regulation in conflict with religious mandate creates a violation of the rights guaranteed by the Free Exercise Clause. For a strong presentation in support of a broad interpretation of accommodation and exemptions for religious interests, see Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685 (1992).

98. The extent of this accountability was premised on a three-part test which evaluated: 1) the extent of the governmental interference with sincerely held religious belief, 2) the existence of a compelling state interest to justify the burden imposed on the free exercise of religion, and 3) the extent to which an exemption from the regulation would impede the objectives which the government sought to advance through the regulation. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398, 403 (1963). This formulation is substantially similar to the "compelling government interest" test used to evaluate the legitimacy of governmental interference with other fundamental freedoms, particularly freedom

tion of this test, the Supreme Court has produced an arguably bewildering patchwork of permissible and impermissible forms of governmental regulation.[99]

It was this inconsistent patchwork that led the Supreme Court in 1990, under the leadership of Justice Scalia, to change fundamentally the evaluation of claims to exemption from governmental regulation based on the right to religious free exercise. In 1990, in *Employment Division, Department of Human Resources v. Smith*,[100] the Supreme Court disclaimed the applicability of the compelling government interest test for evaluating laws that make no distinctions based on religion. According to *Smith*, facially neutral governmental regulation which nonetheless had a disproportionate impact on particular religious practices would be evaluated under the lowest level of judicial scrutiny, which requires only that the government have a legitimate interest in the regulation and that the regulation be rationally related to that interest. Because it is rare for a regulation to target only particular religious practices,[101] the

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of speech. *See, e.g.*, Burson v. Freeman, 504 U.S. 191 (1992); Sable Communications v. FCC, 492 U.S. 115, 126 (1989).

99. For example, parents could direct their children's education, *see* Wisconsin v. Yoder, 406 U.S. 205 (1972) (mandating exemption for members of Old Order Amish religious groups from state statute requiring school attendance until age 16), and individuals could not be denied unemployment compensation when their jobs required them to work on their religiously mandated day of rest or employment demands conflicted in other ways with their religious beliefs, *see* Hobbie v. Unemployment Appeals Comm., 480 U.S. 136 (1987) (denial of unemployment benefits because of refusal to work on Sabbath); Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707 (1981) (denial of unemployment benefits to applicant whose religion forbade manufacture of weapons); Sherbert v. Verner, 374 U.S. 398 (1963) (denial of unemployment benefits because of refusal to work on Sabbath). On the other hand, individuals could be required to comply with various government regulations, including social security laws, *see* Bowen v. Roy, 476 U.S. 693 (1986) (federal statute requiring states to use social security numbers in administering welfare programs did not violate Native Americans' religious rights); they could be required to keep their businesses closed on a state-mandated day of rest, *see* Braunfeld v. Brown, 366 U.S. 599 (1961); Gallagher v. Crown Kosher Super Mkt., Inc., 366 U.S. 617 (1961); and the government could construct a road and permit timber-harvesting in a sacred area, *see* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

100. 494 U.S. 872 (1990). Arguably, the Supreme Court had already abandoned the compelling government interest test in, for example, *Lyng*, 485 U.S. 439, and *Bowen*, 476 U.S. 693.

101. In Church of Lukumi Babalu Aye, Inc. v. Hialeah, 113 S. Ct. 2217 (1993), the Supreme Court held that an ordinance which prohibited the killing of animals only in connection with sacrifice and ritual purposes was unconstitutional because it was motivated by anti-religious animus and thus violated the Free Exercise Clause.

impact of *Smith* seemed to be the virtually total elimination of the constitutionally-compelled exemption of individuals from otherwise valid, generally applicable governmental regulation. The application of *Smith* had thus seemed to usher in a new era of accountability for religious organizations in that they would be shielded from such regulation only when it was motivated by an animus against particular religious practices or when it creates a denominational preference.

Although Congress acted in the fall of 1993 to reverse all or most of the effects of the *Smith* decision by enacting the Religious Freedom Restoration Act (or RFRA),[102] the shifts in religion clause jurisprudence prompted by the *Smith* decision should be evaluated as background against which to predict the next stages of development in religion clause jurisprudence. During the period between *Smith* and RFRA, lower courts began the development of a new method of analyzing claims to exemption from governmental regulation and other forms of intrusion upon spheres of religious activity. How this method of analysis is integrated with RFRA will determine the next stage of religion clause jurisprudence.

The aftermath of *Smith* caused a significant analytical shift in religion clause jurisprudence.[103] This shift involved the use of the Establishment Clause to invalidate governmental regulation when it conflicted with religious beliefs, because the Free Exercise Clause had been virtually eliminated as an avenue of relief. Historically,[104] the Establishment Clause was

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102. 42 U.S.C. § 2000bb-1 (1995). RFRA restored the strict scrutiny, or compelling government interest, test to all regulations and government actions which substantially burden a person's exercise of religion. For a fuller consideration of RFRA, see infra notes 115-121 and accompanying text.

103. In addition to the effects of *Smith* on religion clause jurisprudence within the United States, *Smith* had also raised some question about the status of freedom of religion in the United States under international law.

104. The Establishment Clause was, in fact, originally intended to prevent the federal government from interfering with the state religious establishments which existed at the end of the eighteenth and into the first half of the nineteenth centuries. *See* Kauper & Ellis, *supra* note 1, at 1557-64. Thus, unlike many of the other rights guaranteed by the Bill of Rights, the Establishment Clause was not intended to give general protection to individuals or even religious institutions, but rather to protect state-government sponsored religious activity from interference by the federal government. The process of incorporation of the Establishment Clause, which occurred in Everson v. Board of Educ., 330 U.S. 1 (1947), and which applied this restriction to the state governments, thus required a bigger leap than the incorporation of the other fundamental freedoms and, although generally accepted today, is considerably more controversial from a historical perspective. *See* School Dist. of Abington Township v. Schempp, 374 U.S. 203, 254-58 (1963) (Brennan, J., concur-

used primarily to evaluate situations in which the government may create an endorsement or support of a particular religious viewpoint, as in the cases of public religious symbols,[105] prayer in public schools, and other forms of government-sponsored prayer,[106] or to confer a benefit on religious institutions, such as public aid to parochial schools.[107]

However, during the period after *Smith* and before RFRA, the excessive entanglement prong of the Supreme Court's test for evaluating government activity under the Establishment Clause[108] became the primary vehicle for challenges to gov-

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ring); Glendon & Yanes, *supra* note 94, at 480-92 (criticizing incorporation of the Establishment Clause and the reasoning in *Everson*).

105. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668 (1984); County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573 (1989).

106. The subject of religious activity in public schools has been considered by the Supreme Court in several cases. *See* Lee v. Weisman, 112 S. Ct. 2649 (1992) (prohibiting state-sponsored "nondenomination" prayer at public school graduation); Edwards v. Aguillard, 482 U.S. 578 (1987) (striking down statute mandating balanced treatment for evolution science and creation science); Wallace v. Jaffree, 472 U.S. 38 (1985) (permitting silent prayer or meditation in schools); Stone v. Graham, 449 U.S. 39 (1980) (holding that requiring the posting of Ten Commandments in classrooms violated the Establishment Clause); Epperson v. Arkansas, 393 U.S. 97 (1968) (striking down statute which prohibited teaching of evolution in public schools); School Dist. v. Schempp, 374 U.S. 203 (1963) (holding that state-sponsored daily prayer, even if denominationally neutral and voluntary, violated the Establishment Clause because such prayer served to advance religion); Engel v. Vitale, 370 U.S. 421 (1962).

107. The Court has considered various forms of government aid to parochial schools. *See* Aguilar v. Felton, 473 U.S. 402 (1985) (striking down federal funding for salaries of public school employees assigned to provide remedial services to low-income children in parochial schools); School Dist. v. Ball, 473 U.S. 373 (1985) (holding that public funding of full-time parochial schoolteachers to teach secular subjects is unconstitutional); Lemon v. Kurtzman, 403 U.S. 602 (1971) (salary supplements for parochial school teachers); *see also* Zobrest v. Catalina Foothills School Dist., 113 S. Ct. 2462 (1993) (permitting reimbursement for expenses for deaf child attending parochial school); Bowen v. Kendrick, 487 U.S. 589 (1988) (upholding federal grants program to public and private social service agencies, including religious agencies); Mueller v. Allen, 463 U.S. 388 (1983) (upholding a Minnesota tax deduction for parochial school expenses); Everson v. Board of Educ., 330 U.S. 1 (1947) (upholding publicly funded transportation to parochial school). The requiring of equal access to public school and university facilities for religious organizations has been approved in Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993), *reversed on remand*, 17 F.3d 1425 (1994); Board of Educ. of Westwide Community Schools v. Mergens, 496 U.S. 226 (1990); and Widmar v. Vincent, 454 U.S. 263 (1981). In its most recent decision evaluating government activity under the Establishment Clause, the Supreme Court held that the creation of a school district for the exclusive purpose of providing special education to the children of a Satmar Hasidic community insulated from the surrounding non-Hasidic communities was unconstitutional. Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481 (1994).

108. The Supreme Court enunciated a three-part test in Lemon v. Kurtzman,

ernmental regulation of religious organizations. Although not part of a free exercise analysis, the test for excessive entanglement was used to strike down governmental regulation that would otherwise have been permissible under the *Smith* test. Thus, what was intended as a method to evaluate the granting of a governmental benefit to religious organizations became the test for evaluating the imposition of burdens on religious activity,[109] even though it does not address the question of accountability and responsibility under societal norms, as expressed in legislative enactments.

The use of the excessive entanglement test to resolve what were in fact free exercise claims resulted in two further changes in judicial analysis of such issues. The first of these was that only institutions, and no longer individuals, were able to obtain exemptions from government regulation. Excessive entanglement analysis emphasizes almost exclusively the relationship between government and religious *institutions*, not the relationship between government and individuals who are carrying out their religious dictates.[110] The result of the dichotomy of pro-

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403 U.S. 602 (1971), to determine when a government action constitutes an impermissible "establishment" of religion: 1) whether the statute or other government action has a secular purpose, 2) whether its principal or primary effect neither advances nor inhibits religion, and 3) whether the government action creates an excessive entanglement between government and religion. *Id.* at 612-13. Although the viability of the *Lemon* test has been hotly debated, it was specifically reaffirmed in Lee v. Weisman, 112 S. Ct. 2649 (1992). The test for excessive entanglement has itself been split into three factors: 1) the character and purpose of the institution involved, 2) the nature of the regulation's intrusion into religious affairs, and 3) the resulting relationship between the government and the religious authority.

109. For discussions of the use of excessive entanglement to gain exemption from government regulation before the *Smith* decision, see Ira Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391, 409-11 (1987), and William P. Marshall & Douglas C. Blomgren, *Regulating Religious Organizations Under the Establishment Clause*, 47 OHIO ST. L.J. 293 (1986).

110. Even before enactment of RFRA, some commentators had suggested that the right of religious free exercise belongs only to individuals and not to institutions at all. *See, e.g.*, Lupu, *supra* note 109, at 419-31; School Dist. v. Schempp, 374 U.S. 203, 223 (1963) (characterizing the purpose of the Free Exercise Clause as "to secure religious liberty in the individual"). For criticism of this view, see Glendon & Yanes, *supra* note 94, at 495-96. The idea that the Free Exercise Clause protects only individuals and not institutions makes an appealing basis for arguments in favor of increased accountability of religious organizations because it eliminates a category of free exercise challenges to governmental regulation. However, it is difficult to ignore that at times individuals who belong to a group may only be able to fulfill their religious dictates through an organizational structure. Nonetheless, this is not a reason to grant free exercise rights exclusively to reli-

tection to be granted to individuals and institutions under *Smith* is the opposite of what it should be—institutions are granted free exercise rights, although presented in the guise of an excessive entanglement challenge, while individuals are largely denied any right to free exercise based on religious beliefs.

The second corollary was the reversal of another dichotomy inherent in evaluating the fundamental freedoms contained in the Bill of Rights. The protections granted to these fundamental freedoms are generally phrased as negative rights.[111] Thus, the government, primarily through the legislature, cannot interfere with these rights, but it has no affirmative obligation to provide or protect these rights. The judiciary, through its interpretation of the Constitution, can strike down legislative enactments that interfere with these rights. The legislature and, to a large extent, the executive branches are repositories of majoritarian power, and their actions generally reflect the will of the majority. The judiciary represents a countermajoritarian factor and provides the only protection for the minority's right to these fundamental freedoms.[112]

In his *Smith* decision, Justice Scalia largely eliminated the courts as protectors of these minoritarian rights but reiterated that the legislature is still free to create legislative exemptions from such regulation for specific religious practices.[113] Thus, religious groups with large numbers of adherents or with greater amounts of political influence would be able to win protection of their free exercise rights through legislatively-created exemptions. On the other hand, smaller groups and individuals who do not possess equivalent political power would be largely

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gious organizations while effectively denying them on an individual, minoritarian basis, as seems to be the dictate of the *Smith* decision. This tension between the rights of individuals and the rights of institutions becomes even more significant when viewed against the earlier discussion of institutional structures available to religious groups and the concomitant rights and responsibilities which these structures impose upon the religious group.

111. The concept of the "negative" Constitution is more typically used to describe the fact that, with a few exceptions, the government is required only to refrain from interfering with individuals and not to provide specific benefits or protections. *See, e.g.*, Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2273-78 (1990).

112. *See* Charles M. Freeland, *The Political Process as Final Solution*, 68 IND. L.J. 525, 526-27 (1993).

113. *Smith*, 494 U.S. at 890. For a critique of reliance on a majoritarian democratic political process to protect fundamental rights, particularly in the context of *Smith*, see Freeland, *supra* note 112, at 560-62.

unable to achieve either legislatively-created or judicially-created exemptions.

The effects of these analytical shifts may be demonstrated by some lower court decisions between 1990 and 1993. In accord with the dictates of *Smith*, these courts refused to entertain free exercise challenges to the imposition of facially neutral government regulations. For example, in *Black v. Snyder*, a 1991 Minnesota appellate decision, the court rejected a church's claim to be exempted under the Free Exercise Clause from the state's human rights statute when the associate pastor brought claims of employment discrimination, defamation, breach of contract, and retaliatory discharge against her church and the senior pastor.[114] The court dismissed her claims against the church based on the entanglement prong of the Establishment Clause but allowed her suit based on sexual harassment against the senior pastor to continue, explaining that the suit against the pastor was allowed because it related to conduct during the employment relationship rather than to the plaintiff's pastoral qualifications or church doctrine. The church was thus protected, while the pastor was not. Thus, although not part of a free exercise analysis, the excessive entanglement question could be used to strike down governmental regulation that was otherwise considered permissible under the *Smith* formulation of free exercise analysis.

In the fall of 1993, Congress enacted RFRA with the explicit purpose of reversing the effects of the *Smith* decision, providing that the

> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability . . . [unless the government] demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.[115]

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114. Black v. Snyder, 471 N.W.2d 715, 719 (Minn. Ct. App. 1991). In NLRB v. Hanna Boys Center, 940 F.2d 1295 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 2965 (1992), the Ninth Circuit relied in part on *Smith* in denying a religiously affiliated youth center's claim to be exempt from NLRB jurisdiction under the Free Exercise Clause.

115. Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 14888 (1993) (codified at 5 U.S.C. § 504; 42 U.S.C. §§ 1988, 2000bb to 2000bb-4 (1993)).

These provisions clearly represent an attempt to return to the judicial standards utilized to evaluate free exercise claims before the *Smith* decision. However, the statute's provisions concerning "substantial" burdens and, even more significantly, its apparent emphasis on the burdens placed on the individual's free exercise of religion remain to be evaluated. Of even greater interest is the future of RFRA itself. Although several courts have decided matters under RFRA,[116] several commentators have questioned its viability,[117] and one District court

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116. RFRA has been considered in approximately 65 federal cases, most of which implicitly regard it as constitutional or did not consider the question of constitutionality necessary to decide the case. *See, e.g.*, Canedy v. Boardman, 16 F.3d 183, 186 n.2 (7th Cir. 1994) (noting that RFRA raised questions of constitutionality concerning Congress' powers under § 5 of the 14th Amendment but that it was not necessary to decide this issue); Cheema v. Thompson, 1994 U.S. App. LEXIS 24160, *8-*10 (9th Cir. 1994) (finding Free Exercise Clause violation because school district had failed to use least restrictive means of accomplishing school safety as required by RFRA); Rust v. Clarke, 1995 U.S. Dist LEXIS 5584, *31 n.12 (April 26, 1995) (noting that neither party questioned the constitutionality of RFRA); Western Presbyterian Church v. Board of Zoning Adjustment, 862 F. Supp. 538; 849 F. Supp. 77 (D.D.C. 1994) (assuming constitutionality of RFRA).

117. Enactment of RFRA has spawned considerable commentary, much of it presenting general guidelines to RFRA's interpretation and significance. *See, e.g.*, Thomas C. Berg, *What Hath Congress Wrought? An Interpretative Guide to the Religious Freedom Restoration Act.* 39 VILL. L. REV. 1 (1994); Douglas Laycock, *RFRA, Congress and the Ratchet,* 56 MONT. L. REV. 145, 152-69 (1995) (concluding that Congress does have authority under § 5 of the Fourteenth Amendment to enact RFRA); Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act,* 62 FORDHAM L. REV. 883, 895-97 (1994) (discussing RFRA generally); Douglas Laycock & Oliver Thomas, *Interpreting the Religious Freedom Restoration Act,* 73 TEX. L. REV. 209, 253-54 (1994) (discussing lack of clarity in level of judicial scrutiny utilized before *Smith*).

Several commentators have also questioned the constitutionality and wisdom of RFRA. *See, e.g.*, Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute,* 56 MONT. L. REV. 39, 60-79 (1995) (concluding that RFRA is unconstitutional as applied to state and local laws because Congress exceeded its authority under § 5 of the Fourteenth Amendment); Christopher L. Eisgruber & Lawrence G. Sager, *Mediating Institutions: Beyond the Public/Private Distinction: The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious conduct,* 61 U. CHI. L. REV. 1245, 1306-11 (1994) (questioning whether Congress can direct the Supreme Court how to interpret the Constitution); Christopher L. Eisgruber and Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional,* 69 N.Y.U. L. REV. 437, 443-45 (1994) (considering RFRA unconstitutional because it conflicts with principles of religious freedom, Congress overstepped its authority under § 5 of the Fourteenth Amendment in attempting to regulate state law, and RFRA violates separation of powers); Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse under Cover of Section 5 of the Fourteenth Amendment,* 16 CARDOZO L. REV. 357, 363-69 (1994) (concluding that in enacting RFRA, Congress exceeded its constitutional powers); Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power,* 73 TEX. L. REV. 247, 284-307

has recently declared it to be unconstitutional.[118]

The preceding discussion of the various associational structures available to religious organizations and the results of the DePaul University Center for Church/State Studies Survey of Religious Organizations demonstrate that religious organizations choose amongst available legal structures in order to gain certain advantages. One could therefore posit that if a religious organization chooses these advantages and thus acts more like other forms of not-for-profit organizations, a different analysis should be required for those burdens that fall more heavily on the religious organization in its institutional form than on individuals.

For example, one might wish to set up a continuum of types of governmental regulations determined by their relative impact directly on individuals and their relative impact directly on religious institutions. While not all types of regulations would be easily classified, a few examples might demonstrate the application of such a continuum. At one end of the continuum, one could examine some types of landmark and historic preservation ordinances that arguably burden only institutions (most typically the corporate or associational owners of the buildings) and not individuals, except in their roles as members of the institutions.[119] Such ordinances would therefore not be

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(1994) (questioning whether RFRA violates the Establishment Clause and whether Congress exceeded its powers under § 5 of the Fourteenth Amendment); Ira Lupu, *The Lingering Death of Separationism,* 62 GEO. WASH. L. REV. 230, 273-75 (1994) (pointing out possible constitutional difficulties with RFRA); Ira Lupu, *Statutes Revolving in Constitutional Law Orbits,* 79 VA. L. REV. 1, 56-59 (1993) (discussing Congress' power to enact RFRA under the Commerce Clause and § 5 of the Fourteenth Amendment); William P. Marshall, *The Religious Freedom Restoration Act: Establishment, Equal Protection and Free Speech Concerns,* 56 MONT. L. REV. 227 (1995) (questioning the constitutionality of RFRA under the Establishment Clause, Free Speech Clause and Equal Protection Clause and suggesting that RFRA be interpreted to apply only to claims brought by religious institutions and not to claims brought by individuals); James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment,* 78 Va. L. Rev. 1407 (1992) (questioning whether RFRA will succeed in expanding upon religious liberty).

118. Flores v. City of Boerne, 877 F. Supp. 355 (W.D. Tex. 1995) (holding RFRA unconstitutional because it violated separation of powers). *But see* Hamilton v. Schriro, 863 F. Supp. 1019 (W.D. Mo. 1994) (holding RFRA to be constitutional).

119. *See, e.g.,* Rector, Wardens and Members of the Vestry of St. Bartholomew's Church v. City of New York, 914 F.2d 348, 353-56 (2d Cir. 1990) (holding that application of Landmark Law to prevent a church from building an office tower did not violate the Free Exercise Clause because it does not hinder the church's religious and charitable mission). For examples in the labor context, see Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290 (1985) (application of Fair Labor Standards Act to religious organization); King's Garden,

subject to the compelling government interest test established in RFRA, but rather to a lower level of scrutiny.

At the other extreme end of the continuum would fall religious practices that are undertaken largely by individuals separated from the institutional structure adopted by a religious group. The best example here is the factual basis of *Smith*, in which the smoking of peyote, although sometimes engaged in within a group context, bears no relation to the formal structure or corporate aspects of the religious group.[120] A middle ground, and perhaps the thorniest issue, is represented by controversies involving the application of anti-discrimination laws to religious organizations and, in particular, to clergy.[121] In these situations, although the actor seems to be an institution or corporation, the institution may in fact be acting merely as an aggregate of individuals rather than exclusively in its institutional capacity.

This summary of the current law in the United States concludes with a few observations and suggestions for future thought. First, the limited availability of structural forms for religious groups with different theological polities may place an undue or excessive burden on the free exercise of religion, which falls unevenly on religions with different polities. This inequality should prompt states to make available a wider array of structural forms and, in particular, to permit religious organizations to adopt the corporation sole form when they so wish.

An expansion of available structural forms, however, leads to the second question of whether religious organizations should be held to the same standards of accountability as other

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Inc. v. FCC, 498 F.2d 51 (D.C. Cir. 1974) (application of FCC rules to religious organization).

120. One might also note the decision in Society of Jesus v. Boston Landmarks Comm'n, 564 N.E.2d 571, 572-73 (Mass. 1990), which, although involving a landmark ordinance, directly affected the method of worship because the ordinance applied to the internal arrangement of furniture within the church.

121. *See, e.g.*, McClure v. Salvation Army, 460 F.2d 553, 560-61 (5th Cir. 1972), *cert. denied*, 409 U.S. 896 (1972); EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 282-83 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982); Assemany v. Archdiocese of Detroit, 434 N.W.2d 233 (Mich. Ct. App. 1988); Alicea v. New Brunswick Theological Seminary, 608 A.2d 218 (N.J. 1992); Scharon v. St. Luke's Episcopal Presbyterian Hosp., 929 F.2d 360, 362-63 (8th Cir. 1991); Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164, 1168-71 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986); Young v. Northern Ill. Conference of United Methodist Church, 21 F.3d 184 (7th Cir. 1994), *cert. denied*, 1994 U.S. LEXIS 7124 (1994).

types of charitable, not-for-profit organizations. While they clearly should not and cannot be subjected to more regulations, are there circumstances, particularly those which involve compelling or significant government interests, such as protection of children and eradication of employment discrimination, in which religious organizations should be held to the same standard as other charitable and not-for-profit organizations. Such a standard of accountability based on equality norms should, in turn, be tempered by considerations of whether the burden of government regulation falls primarily on individuals or on institutions. Thus, in evaluating the burdens imposed on religious organizations as part of a free exercise analysis, a different standard or level of scrutiny should be utilized depending on whether the burdens seem to fall more on the institutional than on the individual aspects of religious free exercise.