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# CONTENTS

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# WHETHER PIETY OR CHARITY: CLASSIFICATION ISSUES IN THE EXEMPTION OF CHURCHES AND CHARITIES FROM PROPERTY TAXATION

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The law governing tax exemption of church property illustrates the problem of classifying institutions and activities of the independent sector along religious lines. The "independent sector"[1] is comprised of a variety of institutions, like families, schools, charities, churches, corporations, clubs, and others. Religion assumes a variety of forms and functions within these institutions, ranging from the incidental to the indispensable. The law, however, requires that sharp distinctions be drawn between "religious" and "non-religious" institutions and activities.

Such distinctions are required by state statutory law.[2] Historically, two separate bodies of state law governed tax exemption of church property: (1) a

1. For purposes of this essay, I am using the term "independent sector" to describe those institutions that fall between the "private individual" and the "public state," such as churches, families, schools, unions, and others. These institutions have also variously been called "voluntary associations," "mediating structures," and "spheres of justice," and the theory of the independent sector has (also been called a theory of "social pluralism" or "structural pluralism." For samples of different perspectives on the independent sector, see Alexander, "Beyond Positivism: A Theological Perspective," in J. Witte and F. Alexander, eds., *The Weightier Matters of the Law: Essays on Law and Religion* (Atlanta: Scholars Press, 1988), 251; P. Berger and R. Neuhaus, *To Empower People: The Role of Mediating Structures in Public Policy* (Washington: The American Enterprise Institute, 1977); H. Dooyeweerd, *A Christian Theory of Social Institutions*, M. Verbrugge, trans.; J. Witte, ed. (La Jolla, CA: The Herman Dooyeweerd Foundation, 1986); R. McCarthy, et al., *Society, State & Schools: A Case for Structural and Confessional Pluralism* (Grand Rapids, MI: Eerdmans, 1981); J. Maritain, *Man and the State* (Chicago: University of Chicago Press, 1951); J. Skillen, *The Scattered Voice: Christians at Odds in the Public Square* (Grand Rapids, MI: Zondervan Publishing House, 1990), 181ff.; M. Walzer, *Spheres of Justice: An Argument for Pluralism and Equality* (New York: Basic Books, 1983).

2. Property taxation and exemption have always been the exclusive prerogative of state and municipal governments, except in times of war and emergency. See Benson, A History of the General Property Tax, in G. Benson, H. McClelland & P. Thomas, *The American Property Tax: Its History, Administration and Economic Impact* (Claremont, CA: Institute for Studies in Federalism at Claremont, 1965), 11–12.

body of common law, which accorded such exemptions to church properties based upon the *religious* uses to which they were devoted; and (2) a body of equity law, which accorded such exemptions to church properties based upon the *charitable* uses to which they were devoted. Currently, only one body of state statutory law governs such exemptions, yet exemptions remain based on either the religious uses or the charitable uses of a property. State officials are thus required to distinguish between piety and charity, religion and benevolence, to determine whether and on what basis a petitioner's property can be exempted from taxation.

Such distinctions are also required by federal constitutional law. The Constitution of the United States permits government regulations of various non-religious institutions and activities, provided such regulations comply with generally applicable constitutional values. It permits governmental regulation of religious groups and activities, only if they comply with the specific mandates of the establishment and free exercise clauses of the first amendment. State tax exemptions for religious institutions and religious uses of property, therefore, require separate constitutional treatment.

The religion clauses of the first amendment, as currently interpreted, appear to offer conflicting directives on the tax status of church property. The establishment clause has been interpreted to forbid government from imparting special benefits to religious groups. The free exercise clause has been interpreted to forbid government from imposing special burdens on religious groups. Neither the exemption nor the taxation of church property appears to satisfy the principles of both clauses. To exempt church property, while taxing that of other non-religious groups, appears to violate the "no special benefit" principle of the establishment clause. To tax church property, while exempting that of other charitable groups, appears to violate the "no special burden" principle of the free exercise clause.[3] In *Walz v. Tax Commission* (1970), the United States Supreme Court held that tax exemptions of church property, while neither proscribed by the establishment clause nor prescribed by the free exercise clause, are constitutionally permissible. In more recent cases involving federal income taxation and state sale and use taxation, however, the Court has called this precedent into serious question.[4]

This Article retraces the history of tax exemption of church property in America and analyzes current patterns of tax exemption litigation and legislation in light of this history. Part I analyses the common law and equity law sources of tax exemption law, the challenge posed to these laws by early state constitutional provisions, and the rise of the modern theory and law of tax

3. I have treated the Supreme Court's multiple interpretations of the religion clauses in Witte, "The Theology and Politics of the First Amendment Religion Clauses," 40 *Emory Law Journal* 677 (1991).

4. See, e.g., Bob Jones University v. United States, 461 U.S. 574, (1983); Texas Monthly v. Bullock, 489 U.S. 1 (1989); Jimmy Swaggart Ministries v. Board of Equalization, 110 S. Ct. 688 (1990).

exemption of church property that emerged in response to these challenges. Part II analyzes briefly new trends in litigation over the tax exemption of church property, particularly in cases raised by new religious groups, which have sought to avail themselves of the same protections enjoyed by traditional religious groups. Part III poses an alternative to the current reforms of tax exemption law now being debated and analyzes this alternative provisionally in light of historical exemption laws and current constitutional interpretations.

## *I. Tax Exemptions of Church Property in the Past*

Modern American laws of tax exemption of church property are rooted in two traditions, each of considerable vintage: (1) a common law tradition, which accorded such exemptions to established churches that discharged certain governmental burdens; and (2) an equity tradition, which accorded such exemptions to all churches that dispensed certain social benefits.[5] These two traditions have contributed to the widespread development of colonial and, later, state laws that exempt church property from taxation. There are, however, strong tensions between these two traditions as well, which manifest themselves in both historical and contemporary property tax exemption laws. This section analyzes the development of these two traditions in the colonies and illustrates their manifestations in the theory and law of church property exemptions in the nineteenth and early twentieth centuries.[6]

### *A. Sources of Tax Exemption at Common Law and Equity*

1. *Tax Exemptions at Common Law.* The common law that prevailed in most seventeenth century American colonies treated religion as an affair of

5. I am using the term "common law" not as an antonym for "statute" but as a generic term to describe the English and endemic customs and statutes enforced by common law courts. I am using the term "equity" not as a synonym for fairness and justice, but as a generic term to describe the English and colonial American customs and statutes enforced by equity or chancery courts.

6. Two related distinctions that are currently commonplace were not so clear historically. First, the line between property taxation and income taxation was not always sharply drawn. Particularly in rural areas, the income of a person was often so inextricably tied to his property that taxation of one was tantamount to taxation of the other. Second, the distinction between taxation of the property itself and of the person (whether real or fictional) occupying the property was not always sharply drawn. Tax liability sometimes ran with the land and sometimes followed the prior holder. The discussion that follows must thus necessarily intrude on matters of personal income taxation as well. See generally, Jerome R. Hellerstein and Walter Hellerstein, *State and Local Taxation*, 5th ed. (St. Paul, MN: West Publishing Co., 1988), 115–123; Claude W. Stimson, "The Exemptions of Property from Taxation in the United States," 18 *Minnesota Law Review* 411 (1934).

the law and the church as an agency of the state. In the course of the English Reformation a century before, the Tudor monarchs had consolidated their authority over religion and the church and subjected them to comprehensive ecclesiastical laws enforceable by common law and commissary courts.[7] Many of these laws were adopted or emulated in the American colonies—both in the Anglican south and, by the end of the seventeenth century, in the Puritan north.[8] The exemption of church property from taxation was part of this broader set of ecclesiastical regulations.

The common law established orthodox doctrine, liturgy, and morality and proscribed various forms of heathendom, heresy, and hedonism. Communicant status in the established church was a condition for citizenship status in the commonwealth. Religious dissenters, if tolerated, were fore-

7. For a comprehensive treatment of post-Reformation ecclesiastical law in England and a convenient collection of relevant ecclesiastical statutes, see R. Burn, *Ecclesiastical Law*, 6th ed. (London: A. Strahan for T. Cadell and W. Davies, 1787). For other discussion, see E. Coke, *The Second Part of the Institutes of the Lawes of England* (London: The Assigns of R. Atkins and E. Atkins for C. Wilkinson, 1642; repr. ed. 1797), chap. 1; J. Godolphin, *Repertorium Canonicum: or, An Abridgement of the Ecclesiastical Laws of this Realm, Consistent with the Temporal*, 3d ed. (London: n.p., 1687); J. Paterson, *The Liberty of the Press, Speech, and Public Worship* (Littleton, CO: F.B. Rothman, 1985; reprint of 1880 ed.), 349–550. Unless otherwise indicated, citations to English Statutes are from the *Statutes at Large of England* (London: 1787–1867).

8. The following summary is drawn principally from the ecclesiastical laws of the southern Anglican colonies of Virginia, North Carolina, and South Carolina, and the northern Puritan colonies of Massachusetts, Connecticut, and New Hampshire. For much of the seventeenth century at least, the middle colonies of Rhode Island, Pennsylvania, New York, and Maryland went their own way. I have drawn on the following collection of colonial laws and other documents: W. Hening, ed., *The Statutes at Large: Being a Collection of all the Laws of Virginia from . . . 1619* (New York: R. & W. & G. Bartow, 1809–1823).[hereinafter Hening]; T. Wynne and W. Gilman, eds., *Colonial Records of Virginia (1619–1680)* (Richmond, VA: n.p., 1874) [hereinafter Wynne and Gilman]; W. Saunders, ed., *The Colonial Records of North Carolina* (Raleigh, NC: State Printer of North Carolina, 1886–1890) [hereinafter Saunders]; T. Cooper and D. McCord, eds., *The Statutes at Large of South Carolina* (Charleston, SC: State Printer of South Carolina, 1836–1841) [hereinafter Cooper]; J. Easterby, ed., *The Colonial Records of South Carolina* (Columbia, SC: Historical Commission of South Carolina, 1951–1953) [hereinafter Easterby]; M. Farrand, ed., *The Laws and Liberties of Massachusetts . . . 1647* (Cambridge, MA: Harvard University Press, 1929) [hereinafter Farrand]; *The Acts and Resolves, Public and Private, of the Province of the Massachusetts Bay, 1692–1780* (Boston: n.p., 1869–1922) [hereinafter Massachusetts Acts]; N. Shurtleff, ed., *Records of The Governor and Company of the Massachusetts Bay in New England, 1628–1686* (Boston: Free Press of J. Hein, 1853–1854) [hereinafter Massachusetts Records]; J. Trumbull and C. Hoadly, eds., *The Public Records of the Colony of Connecticut, 1636–1776* (Hartford, CT: n.p., 1850–1890) [hereinafter Trumbull]; *Connecticut Historical Society, Collections* (Hartford, CT: Connecticut Historical Society, 1860–1878) [hereinafter Connecticut Collection]; *New Hampshire Historical Society, Collections* (Concord, NH: New Hampshire Historical Society, 1824–1939) [hereinafter New Hampshire Collection].

closed from most political and ecclesiastical offices and various social and economic opportunities.[9]

The common law governed the form and function of the established church polity. It delineated the boundaries of the parishes and the location of the churches. It determined the procedures of the consistories and the prerogatives of the vestries. It defined the duties of clerics and the amount of their compensation. It dictated the form of the church corporation and the disposition of its endowments.[10]

The common law regulated the acquisition and maintenance of established church properties. Magistrates were authorized to purchase or condemn private properties within their domains and to convey them to the established church for meetinghouses, parsonages, cemeteries, and glebe lands.[11] Stern criminal laws sanctioned interference with the enjoyment of these properties. Special property laws prohibited parties from gaining prescriptive or security interests in them.[12] Magistrates levied taxes to maintain the property and the clergy of the established church—"tithe rates"

9. See, e.g., Farrand, 1–2; *Massachusetts Records*, 142ff., 168ff.; *New Hampshire Collection*, 1:326–327; Hening, 1:121ff., 155ff., 532ff.; Saunders, 1:634–644, 885; Cooper, 236ff. For English antecedents and analogues, see 16 Car. 2, ch. 4; 25 Car. 2, ch. 2; 35 Eliz. ch. 1, 2; 31 Hen. 8, ch. 14. The famous English Toleration Act of 1688/89, 1 W. & M. ch. 18, entitled Protestant dissenters to worship without interference, provided they swore oaths of allegiance to the Trinity, Scripture, and the Crown. Roman Catholics and Jews, however, were denied such privileges until well into the nineteenth century. See 10 Geo. 4, ch. 7; 10 Vict., ch. 59. The Toleration Act was made binding on most of the colonies through the colonial charters, that required respect for English liberties, rights, and privileges. See, e.g., Third Charter of Virgina (1611–1612), reprinted in F. Thorpe, ed., *The Federal and State Constitutions: Colonial Charters and Other Organic Laws of the States, Territories, or Colonies* (Washington: Government Printing Office, 1909), 7:3802 [hereinafter, Thorpe]; Charter of Massachusetts Bay (1629), reprinted in id., vol. 3, 1853. The Toleration Act was sometimes also specifically adopted by colonial statute. See, e.g., Hening, at vol. 3, 171.

10. See, e.g., Hening, 1:122ff., 155ff., 204ff., 240ff., 250ff., 433ff.; Cooper, 236ff.; Saunders, 207ff. Prior to the eighteenth century, magistrates in Puritan New England accorded the congregational churches far greater freedom to govern themselves, though no new churches could be formed "unless they shall acquaint the Magistrates . . . and have their approbation therein," and the magistrates were authorized to exercise "their coercive power [against] schismatical and heretical churches." Farrand, 18; Cambridge Synod and Platform (1648), reprinted in W. Walker ed., *The Creeds and Platforms of Congregationalism* (Boston: Pilgrim Press, 1960; reprint of 1893 ed.), chap. 17. See further discussion in Witte, "How to Govern a City on a Hill: The Early Puritan Contribution to American Constitutionalism," 39 *Emory Law Journal*, 41, 55–64 (1990).

11. See, e.g., Hening, 2:261, 3:152.

12. See, e.g., Farrand, 19–20; *Massachusetts Records* 99–101; Hening, 2:121. See the rich historical discussion in R. Tyler, *American Ecclesiastical Law: The Law of Religious Societies, Church Government and Creeds, Disturbing Religious Meetings and the Laws of Burial Grounds in the United States* (Albany, NY: W. Gould, 1866). For English antecedents and analogues, see Burn, *Ecclesiastical Law* 3:180–97, 216–260; Coke, *Institutes* 2–5; Godolphin, *Repertorium*, 134, 142; Paterson, *The Liberty*, 434.

to meet general ecclesiastical expenses, "church rates" to repair or improve existing properties, and a host of minor parish fees.[13] These ecclesiastical taxes, though paid to the established church alone, were levied on all taxable persons in the commonwealth, regardless of their church affiliation. Baptists, Quakers, Catholics, Jews, and other non-conformists were thus forced to pay for the support of churches and clerics that they considered heretical or even heathen.

It was in this broader context of ecclesiastical regulations that the common law governed the taxation of church properties. As in England, so in the colonies, the common law afforded no automatic and unrestricted tax exemption to church properties. All property that lay within the jurisdiction of the Crown and its colonial delegates, including church property, was considered presumptively taxable at common law, unless it had been specially and specifically exempted by legislative act.[14] Colonial legislatures readily accorded such privileges to the properties of political officials and to

13. See, e.g., Farrand, 9–10; *Massachusetts Records*, 1:240ff.; *Connecticut Records*, 1:59ff.; Trumbull, 1:111ff., 6:33ff.; Hening, 1:122, 128, 207, 220, 401.

14. The importance of this new presumption—first articulated after the Protestant Reformation—was noted by Richard Burn:

> The traditional presumption that churches and clergymen are not to be charged with the same general charges as the laity of this realm; neither to be troubled or incumbered, unless they be specifically named and charged by some statute [is no longer accepted.] Now the contrary doctrine prevails, that churches and clergymen are liable to all charges by Act of Parliament, unless they are specially exempted.

Burn, *Ecclesiastical Law*, 3:204, quoting, in part, Godolphin, *Repertorium*, 194–195. See also Coke, *Institutes*, 4 (arguing that because "in times past ecclesiastical persons [sought] to extend their liberties beyond their true bounds, [they] either lost or enjoyed not that which of right belonged to them"); Web v. Bachellor, 3 Keb. 476 (1653) (holding that a "[p]arson is not exempted from any new charge for repairing highways.") 4 W.& M. ch. 1 (declaring that taxes are to be levied on "every person spiritual and temporal of what estate or degree soever" with no "manner of Liberties, Privileges, or Exemptions" granted). See further S. Dowell, *A History of Taxes and Taxation in England* (London: Longmans, Green, 1884), 2:32ff.; P. Adler, *Historical Origin of Tax Exemption of Charitable Property* (Westchester, NY: Chamber of Commerce, 1922), 45ff.; S. Morgan, *The History of Parliamentary Taxation in England* (New York: Moffat, Yard & Co., 1911), 224–227.

Colonial legislatures seem to have accepted this new presumption. They started their tax provisions with instructions to "tax all the lands in the several plantations" (Trumbull, 2:294) or to raise "publique leavies and county leavies . . . by equal proportions out of all the visible estates in the colonies" (Hening, 1:305–6). They then listed copiously the properties and persons "immune" or "exempt" from its payment, including the properties of the government and political officials. See, e.g., Hening, 1:242; Cooper, 3:409ff.; Saunders, 1:185; B. Pruitt, ed., *The Massachusetts Tax Valuation List of 1771* (Boston. G. K. Hall, 1978) [hereinafter Pruitt]. There is little evidence to support the conventional assumption that church properties "were exempt from taxation as public property by the nature of things, and not by the constitution or by statute." C. Zollmann, *American Civil Church Law* (New York: AMS Press, 1969), 239; see also W. Torpey, *Judicial Doctrines of Religious Rights in America* (Chapel Hill, NC: University

those of immigrants, indigents, and incapacitated persons.[15] Three restrictions, however, limited the availability of these privileges to colonial church properties.

First, only certain types of church property were considered exemptible at common law. The properties of incorporated established churches that were devoted to the "religious uses" prescribed by the ecclesiastical laws, such as chapels, parsonages, glebes, and consecrated cemeteries, were generally exemptible. Established church properties, however, that lay vacant, that were devoted to non-religious uses, or that were held by unincorporated religious bodies were generally taxable.[16] Properties of dissenting religious groups were taxed, regardless of their use.[17] Properties held personally by ministers were taxed in some colonies but exempted in others, particularly in the later colonial period.[18] These latter colonies also exempted the properties held personally by political magistrates.

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of North Carolina Press, 1948), 171; D. Robertson, *Should Churches Be Taxed?* (Philadelphia: Westminster Press, 1968), 51. Zollmann's assertion, widely accepted as authoritative, is based upon the undocumented dicta of a few nineteenth century state supreme court cases which upheld church property exemptions against constitutional challenges. See, e.g., Franklin Street Society v. Manchester, 60 N.H. 342, 346–351 (1880); Yale Univ. v. New Haven, 71 Conn. 316, 329–339 (1899); All Saints Parish v. Inhabitants of Brookline, 178 Mass. 404, 411–416 (1901).

15. See, e.g., Saunders, 1:185, 3:409; Hening, 1:242; Pruitt, passim. Exemptions for new immigrants was sometimes required by the founding colonial charter. See e.g., Charter of Massachusetts Bay (1629), reprinted in Thorpe, 3:1859.

16. The statutes often exempted property "under improvement" (that is, those that were built up and occupied). See, e.g., the Massachusetts Taxation Act of 1767, reprinted in Pruitt, 3; *Massachusetts Records*, 4:486. On the restriction of incorporation, see generally, Kauper and Ellis, "Religious Corporations and the Law," 71 *Michigan Law Review* 1499, 1505–1507 (1973) and sources cited therein. For English antecedents and analogues, see Burn, *Ecclesiastical Law*, 3:204; Coke, *Institutes*, 4; Godolphin, *Repertorium*, 194.

17. By the middle of the eighteenth century, legislatures in the northern colonies had exempted Protestant dissenters (though not Catholics or Jews) from these ecclesiastical taxes. In both Puritan Connecticut and Massachusetts, for example, Anglicans were exempted in 1727, Quakers and Baptists in 1729 See W. McLoughlin, *New England Dissent: The Baptists and the Separation of Church and State* (Cambridge, MA: Harvard University Press, 1971), 1:225–243, 263–277; F. Jones, *History of Taxation in Connecticut, 1636–1776* (Baltimore, MD: The Johns Hopkins Press, 1896), 60–64, and the literature cited therein. Such exemptions were not always readily accorded, however, despite the statutes. See, e.g., the case of Green v. Washburn (1769), reported in L. Wroth and H. Zobel, eds., *Legal Papers of John Adams* (Cambridge, MA: Belknap Press, 1965), 2:32–47. The southern Anglican colonies, by contrast, granted no such exemption until after the Revolutionary War. See, e.g., Hening, 9:164.

18. See, for example, Farrand, 10; *Massachusetts Records*, 4:486; *New Hampshire Collection*, 8:33; Hening, 2:359–360. Such personal exemptions to ministers, however, were strictly limited to "such estate as is their one proper estate, & vnder their one custody & improovement." Such exemptions were also conceived as forms of compensation to ministers. Ministers and their families could "by special contract with the toune . . . consent" to the payment of taxes in return for other forms of compensation. *Massachusetts Records*, 4:486; see also Jones, *History of Taxation*, 61–62. For ministers with modest personal estates this was an attractive option.

Second, these established church properties were usually exempted only from the ecclesiastical taxes that were levied for their own maintenance and use. To impose these taxes on established church properties would have been but "an idle ceremony."[19] Other property taxes, however, such as the quit-rents, poll taxes, land taxes, special assessments, hearth taxes, window taxes, and a variety of other rates on realty and personalty were often collected from the properties of the established church as from other properties.[20] A universal exemption for these established church properties from all property taxes appears to have been the exception, rather than the rule, in the colonies.[21]

Third, these tax exemptions could be held in abeyance in times of emergency or abandoned altogether if the tax liability imposed on remaining properties in the community proved too onerous. Thus in times of war, pestilence, poverty, or disaster, established churches and their clergy were required to contribute to the public coffers regardless of their eligibility for exemption.[22]

This common law pattern of tax exemption and subsidy could be readily rationalized when the state was responsible to propagate and protect one established religion to the exclusion of others. Established church corporations were effectively state agencies, their clergy effectively state officials. By devoting their properties to the religious uses prescribed by the common law, church corporations and their clergy were discharging the state's responsibility for the established religion. In return, they received tax support, tax exemptions, and other protections and privileges, like other state agencies. Occasionally the clergy themselves also received such privileges, like other state officials. These privileges could be accorded, however, only if and to the extent that churches adhered to right religion and devoted their properties to prescribed religious uses. Thus the properties of dissenting or wayward

19. Zollman, *American Civil Church Law*, 239.

20. See, for example, Benson, 21–29; B. Bond, *The Quit-Rent System in the American Colonies* (New York: Charles Scribner's Sons, 1919), 221, 255, 300; A. Smith, *The Quit-Rents of Virginia 1704*, 13, 68, 75, 98 (Baltimore, MD: Geneological Publishing Co., 1957). Even a cursory glance of some of the records of the Anglican parishes and Puritan congregations demonstrates such payments were made (or at least budgeted). See, for example, G. Chamberlayne, ed., *The Vestry Book of Saint Peter's, New Kent County, Virginia* (Richmond, VA: n.p., 1905), 170, 175, 222; *Records of the Congregational Church of Hartford* (Hartford, CT, n.p. 1876), 34, 56, 99. 109.

21. In 1702 Connecticut granted exemption to all properties devoted to "ecclesiastical, educational, and charitable uses." *Connecticut Collection*, 8:133. In 1739, South Carolina exempted the properties of churches and "free schools." *Statutes at Large of South Carolina* (1836), 3:528.

22. For example, during King Philip's War in New England the congregational churches were heavily taxed to support the authorities and during Bacon's rebellion in the south, substantial property was taken from the glebes and substantial taxes were imposed on the vestries. See H. Chadworth, *Ecclesiastical Regulations* (New York: C. Pebble Printers, 1839), 12ff., 53ff.

churches and those devoted to non-religious uses were taxable. These privileges also could be accorded only in modest proportion, lest the church grew ostentatious and opulent at the expense of the state and society, as it had prior to the Reformation. Thus the common law limited closely the scope of exemptions once granted.

2. *Tax Exemptions at Equity.* The law of equity, applied by English Chancery courts and their colonial analogues,[23] accorded tax exemptions to church properties with a rather different rationale. Consistent with the common law courts, equity courts treated all church property as presumptively taxable unless specially exempted by statute. Contrary to the common law courts, however, equity courts exempted church properties from taxation not because of the "religious uses" but because of the "charitable uses" to which they were devoted. Church properties could be exempted at equity only if and to the extent that they were used "charitably."

A definition of charity was derived from the famous Elizabethan Statute of Charitable Uses of 1601.[24] The Statute regarded as charitable all activities that supported orphans, apprentices, or scholars, that sustained public works (like highways, prisons, and bridges), that subsidized schools and universities, or that succored indigent, ill, incapacitated, elderly, or "decayed" persons. Through interpretation and application of the Statute over time, equity courts developed a more general definition of charity as any activity that redounded

> "to the benefit of an indefinite number of persons, either by bringing their hearts or minds under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life or by erecting or maintaining public buildings or works or by otherwise lessening the burdens of government."[25]

23. On the development of equity in the colonies, see Wilson, Courts of Chancery in America—Colonial Period, 18 *American Law Review* 226 (1884); J. Story, *Commentaries on Equity Jurisprudence as Administered in England and America*, 7th ed. (Boston: Little Brown, 1857), 1:56ff. The southern and middle colonies generally established chancery courts very early in their development and exercised jurisdiction over similar subjects and persons to that of the chancellor of England, though the general courts often heard equity cases as well. See O. Chitwood, *Justice in Colonial Virginia* (New York: Da Capo, 1971), 48; Wilson, Courts of Chancery, 239–255. The Puritan New England colonies resisted the establishment of separate courts of equity until well into the eighteenth century, but vested equitable jurisdiction in the governor and/or deputy-governor and sometimes also the General Court. See W. Davis, *History of the Judiciary of Massachusetts* (Boston: The Boston Book Co., 1900), 47–48, 55, 68–72. I use the generic term "equity court" to refer to both these equitable institutions.

24. 43 Eliz. ch. 4, repealed ultimately in 1888, 51 & 52 Vict. ch. 42, 13.

25. Jackson v. Phillips, 96 Mass. (14 Allen) 539, 556 (1867). This definition, which distilled numerous early definitions offered by English and American equity courts, has remained standard until well into the twentieth century. See generally Holland, "The Modern Law and

The effect, not the intent, of the activity was critical to determining its charitable character. The charitable activity could be motivated by either piety or pity; it could be meant to serve religious or secular persons or causes—so long as it yielded a distinctly "public benefit" to a sufficiently "indefinite number of persons."[26] Religion and piety were considered acceptable species, not necessary sources, of charity or benevolence.[27]

Those institutions that devoted their properties to one or more such charitable uses, or that had property entrusted to them for such charitable uses, received a variety of equitable privileges. Special trust and testamentary doctrines, like the *cy pres* doctrine, enabled them to receive property by deeds and wills that were defective in form and generally unenforceable at common law. Special property rules enabled them to transfer goods and lands to beneficiaries, free from liens, fees, and excises. Special procedural rules allowed them to bring actions that were otherwise barred by the statute of limitations or by the doctrine of laches.[28] Special tax rules afforded them both tax subsidies and tax exemptions. These charitable institutions received subsidies from the "poor rates," "education rates," and "charity taxes" that the authorities occasionally levied on the community. They received exemptions from taxes on those portions of their property that were "devoted to

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Charities as Derived from the Statute of Charitable Uses," 52 *American Law Register* 201 (1904). On comparable definitions by English Chancery courts that had influence in America, see C. Crowther, *Religious Trusts: Their Development, Scope and Meaning* (Oxford, G. Ronald, 1954), 19ff.

26. See generally, J. Pomeroy, *A Treatise on Equity Jurisprudence as Administered in the United States*, 4th ed. (San Francisco, CA: Whitney Bancroft Co., 1918), SS. 1019–1020; Story, *Commentaries*, S. 1164 and the numerous sources cited therein. See also Crowther, *Religious Trusts*, 29: "The shift from a religious to a public benefit rationale for charity change the focus of the inquiry. Whereas it was previously assumed [before the Statute of Charitable Uses] that any gift of land or money was automaticallly a charitable act, now it was to be decided whether the gift served a proper public purpose. Where the property was used only privately, it could be declared non-charitable."

27. See G. Jeremy, *A Treatise of the Equity Jurisdiction of the High Court of Chancery* (New York: Halstead and Voorhies, 1840), 237; Pomeroy, *Treatise on Equity*, SS. 1021–1024; Story, *Commentaries*, S. 1164. This disassociation of piety and charity was precisely the intent of the drafters of the Statute of Charitable Uses in 1601. See generally, G. Jones, *History of the Law of Charity 1532–1827* (London: Cambridge University Press, 1969), 29ff., 57ff., 76ff.; M. Chesterman, *Charities, Trusts, and Social Welfare* (London: Weidenfeld and Nicolson, 1979), 16ff.; W. Jordan, *Philanthropy in England 1480–1660: A Study of the Changing Patterns of English Social Aspirations* (London: G. Allen & Unwin, 1959), 112ff.

28. See, e.g., White v. White, 28 Eng. Rep. 955 (1688); Moggridge v. Thackwell, 32 Eng. Rep. 15 (1803); Mills v. Farmer, 35 Eng. Rep. 597 (1815), which summarize early modern precedents. See generally, G. Cooper, *A Treatise of Pleading on the Equity Side of the High Court of Chancery* (New York: I. Riley, 1813), xxvi–xxvii, 218–222; L. Shelford, *A Practical Treatise of the Law of Mortmain and Charitable Uses and Trusts* (Philadelphia: John S. Littell, 1842), 512ff., 672ff.; Story, *Commentaries*, SS. 1165–1173; and G. Jones, *History of the Law of Charity*, 57–104. The colonial equity courts based many of these privileges on the authoritative English source G. Duke, *Law of Charitable Uses*, R.W. Bridgman, ed. (London: n.p., 1805; reprint of 1676 ed.), which enjoyed wide circulation and authority.

charitable uses and other public concernments."[29] Both the amount of the subsidy and the scope of the exemption received by these charitable institutions were calculated on a strictly case-by-case basis. Overseers, visitors, or commissioners regulated by the equity courts periodically visited each charitable institution to assess its performance and to determine its needs. Thereafter the regulators recommended to the equity court each charity's entitlement to subsidy and exemption. It was not unusual for the equity court to afford well-established and well-endowed charities only modest subsidies and minimal exemptions but to afford new and impoverished charities plentiful subsidies and plenary exemptions from tax.[30]

This law of equity provided colonial churches with a second basis for receiving tax exemptions and tax subsidies. As religious institutions, they could receive the ecclesiastical tax exemptions and subsidies afforded by the common law. As charitable institutions, they could receive the charitable tax exemptions and subsidies afforded by equity law. While the exemptions and subsidies afforded by the common law were restricted only to established churches, those afforded by equity were available to all churches.

Colonial established churches often served as charitable institutions. Church meetinghouses and chapels were used not only to conduct religious services but also to host town assemblies, political rallies, and public auctions, to hold educational and vocational classes, to maintain census rolls and marriage certificates, to house the community library, and to discharge a number of other public functions. Parsonages were used not only to house the minister's family, but also to harbor orphans and widows, the sick and the handicapped, and victims of abuse and disaster. Glebe lands were farmed not only to sustain the minister and his family but also to support widows, sojourners, and elderly and incapacitated members of the community. Moreover, charitable societies sponsored by the established churches, such as the famous Society for the Propagation of the Gospel in Foreign Parts, helped to found schools, orphanages, hospices, and almshouses throughout the colonies. These acts of public charity were vital parts of the established church's ministry and mission in the colonies. In return, the established churches and the charitable institutions that they founded were entitled to receive charitable tax exemptions and subsidies from the equity courts.[31]

29. Trumbull, 3:158.

30. See generally Shelford, *A Practical Treatise*, 204–282; G. Jones, *History of the Law of Charity*, 39ff.

31. See generally Adler, *Historical Origin*, 76ff.; R. Kelso, *The History of Public Poor Relief in Massachusetts, 1620–1920* (Montclair, NJ: Patterson Smith, 1969; reprint of 1922 ed.); P. Bruce, *Institutional History of Virginia in the Seventeenth Century* (New York and London: G.P. Putnam's Sons, 1910), 1:73–93, 163–193. In the Anglican south, primary responsibility for social welfare fell to the established churches. See, e.g., Hening, 1:242. The annual budgets of the vestries thus included large expenditures for poor relief, education, and other forms of welfare for both members and non-members. See, e.g., the C. Chamberlayne, ed., *Paris*

Established churches, however, held no monopoly on charitable activity. Non-conformist churches and private philanthropic groups under their sponsorship were equally active. The non-conformists often used their meetinghouses and parsonages for night shelters, relief stations, and refuge places. Pennsylvania Quakers and Maryland Catholics were famous for their diligence in establishing day schools, hospitals, hospices, almshouses, orphanages, poor farms, and workhouses all along the Atlantic seaboard, particularly in the middle colonies. Scottish Presbyterians and Irish Catholics helped to form philanthropic groups, like the Scot's Charitable Society and the Charitable Irish Society, which sponsored and subsidized the families of new immigrants and newly emancipated indentured servants. Various religious groups contributed to the establishment and support of some of the great eastern colleges. In return, these non-conformist churches, and the charitable organizations that they established were entitled to receive tax exemptions and subsidies from the equity courts.[32]

These twin traditions of church property exemptions stood sharply juxtaposed on the eve of the American Revolution. Equity courts accorded tax exemptions to any church properties that were devoted to charitable uses. Common law courts accorded tax exemptions to established church properties that were devoted to prescribed religious uses. In some colonies, the sharp contrasts between these two traditions had begun to soften. Equity courts, following English precedents on superstitious uses, had occasionally prevented the formation of charities by religious non-conformists.[33] Colonial

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*Register of Christ Church, Middlesex County, Virginia, 1653–1812* (Baltimore, MD: Geneological Publications Society, 1975); C. Chamberlayne, ed., *Paris Register of St. Peter's, New Kent County, Virginia, 1680–1787* (Baltimore, MD: Geneological Publications Society, 1975); C. Chamberlayne, ed., *Vestry Book of St. Peter's Parish, New Kent County, VA, 1682–1758* (Baltimore, MD: Geneological Publications Society, 1975); C. Chamberlayne, ed., *Vestry Book of Petsworth County, Virginia, 1677–1793* (Baltimore, MD: Geneological Publications Society, 1974). In the Puritan north, primary responsibility for social welfare fell to the municipalities and families. See generally L. Wright, *The Cultural Life of the American Colonies, 1607–1763* (New York: MacMillan & Co., 1957), 23ff.; Kelso, *History of Public Poor Relief*, 89ff. Where churches did engage in social welfare, it was often restricted to congregant members. See, e.g., *Records of the Congregational Church in Suffield, Connecticut, 1710–1836* (Boston: Boston Book Company, 1949).

32. On the charitable activities of dissenting churches in the colonies, see generally Adler, *Historical Origin*, 76ff.; H. Miller, *The Legal Foundations of American Philanthropy, 1776–1844* (Madison, WI: State Historical Society of Wisconsin, 1961), 3–8; D. Schneider, *The History of Public Welfare in New York State, 1609–1866* (Montclair, NJ: Patterson Smith, 1969; reprint of 1969 ed.); A. Jorns, *The Quakers as Pioneers in Social Work* (Montclair, NJ: Patterson Smith, 1969; reprint of 1931 ed.).

33. On the English background to superstitious use doctrine, see G. Jones, *History of the Law of Charity*, 11–15, 82–87; Story, *Commentaries*, S. 1164; Pomeroy, *Treatise on Equity*, S. 1021. On the American development of the doctrine, see H. Desmond, *The Church and the Law, With Special Reference to the Ecclesiastical Law in the United States* (New York: n.p., 1898), 49–56. In general, however, American courts, both before and after the Revolution, spurned the doctrine.

legislatures, responding to widespread popular agitation, had granted to some Protestant dissenting churches the right to exemption from the ecclesiastical taxes levied for the established church—though formidable administrative obstacles often obstructed the exercise of this right, and the ecclesiastical tax revenues were still paid to the established church alone.

### *B. State Constitutional Challenges to the Tax Exemptions of Church Property*

The colonial law of tax exemption of church property continued largely uninterrupted in the early decades of the American republic. This conservatism was constitutionally conditioned. The United States Constitution included no provision on tax exemption, and the religion clauses of the first amendment were binding only on the federal government ("Congress"), not the state governments.[34] The early state constitutions provided simply that "[a]ll the laws which have heretofore been adopted, used, and approved . . . and usually practiced on in the courts of law shall still remain and be in full force, until altered or repealed by the legislature."[35] The states legislatures and judiciaries were further instructed that "all religious societies or bodies of men heretofore united or incorporated for the advancement of religion or learning, or for other pious or charitable purposes, shall be encouraged and protected in the enjoyment of the privileges, immunities, and estates, which they are accustomed to enjoy."[36] Thus, in most states religious bodies that were previously united or incorporated received the traditional exemptions afforded by common law and equity law courts.[37]

Three provisions in the new state constitutions and their amendments, however, provided the ground for challenge to these colonial laws of tax exemption of church property.

1. *Disestablishment of Religion*. The first challenge was posed by state constitutional prohibitions on religious establishment. These prohibitions

34. On the restricted scope of the first amendment religion clauses, see Handy, "Why it Took 150 Years for Supreme Court Church-State Cases to Escalate," in R. White and A. Zimmerman, eds., *An Unsettled Arena: Religion and the Bill of Rights* (Grand Rapids, MI: Eerdmans, 1990), 52; Witte, Theology and Politics.

35. Mass. Const. pt. II, ch. VI, art. VI (1780). Similar language appears in the constitutions of other states. See, e.g., De. Const. art. 25 (1776); N.H. Const. art. XC (1792); N.J. Const. S. 22 (1776); R.I. Const. art. 14, s. 1 (1842); S.C. Const. art VII (1790). On the initial conservative attitude of the states toward colonial and English law, see generally E. Brown and W. Blume, *British Statutes in American Law 1776–1836* (Ann Arbor, MI: University of Michigan Law School, 1964), 47–200.

36. Penn. Const. S. 45 (1776). See similar language in Mass. Const. pt. I, art. III (1780).

37. A convenient summary of the state laws on tax exemption of church personalty and realty is provided in Wolcott, Report on Direct Taxes Communicated to the House of Representatives, December 14, 1796, reprinted in *American State Papers (Finance)* Class 3, 1:414–441 (1858).

undercut the authority of government officials to endorse one religion over another, to prescribe religious beliefs, to mandate church attendance, to levy ecclesiastical taxes, and to govern ecclesiastical polities and properties. Religion was no longer an affair of government and law. The cleric was no longer a political official. The church was no longer a subsidized state agency. The meetinghouse was no longer a public property.[38]

These disestablishment provisions rendered the traditional common law of church property exemptions vulnerable to attack. The establishment rationale on which these exemptions had been based was no longer available. No other rationale had as yet been offered. A small, but persistent group of critics from the 1810s onward thus challenged these common law exemptions as vestiges of religious establishment. Their arguments lie at the heart of the anti-exemption case still today.

Tax exemptions of church property, the critics charged, favor religious groups over non-religious groups. To exempt religious properties from their portion of the cost of state services and protections is not only to subsidize them but also to penalize non-religious properties within the same tax base whose tax burdens are proportionately increased. This form of religious support and subsidy, albeit indirect, cannot be countenanced under the disestablishment clauses of the state constitutions.[39]

Furthermore, such exemptions favor well-vested, traditional religions over struggling, newer religions. Since properties are taxed according to their value, the "humble congregation in a small wooden church," can enjoy only a fraction of the tax savings enjoyed by "the same-sized congregation in the beautiful hewn palace, with painted windows, frescoed ceilings, and silver mounted pews."[40] The disestablishment clauses, if they permit any government supports of religion, mandate uniformity in government treatment of all religious groups. The "inequality and disparity" in the benefits afforded religious groups under exemption laws, therefore, cannot be countenanced.[41]

Finally, the critics argued, such exemptions encourage the conflation of

38. New Jersey was the first of the former colonies to disestablish religion by constitutional provision. See N.J. Const. S. 19 (1776). Massachusetts was the last. See Mass. Const. art. 11 (1833).

39. See, e.g., Orr v. Baker, 4 Ind. 86, 88 (1853); Commonwealth v. Thomas, 119 Ky. 208, 213–214 (1904); Rep. Pettit, in *Official Records of the Indiana Constitutional Convention* (Indianapolis, IN: State Government Printing Office, 1851), 1287–1289; Rep. Buckner, in *Official Report of the Proceedings and Debates of the Kentucky Constitutional Convention* (Lexington, KY: State Government Printing Office, 1890), 2:2402ff. [hereinafter Kentucky Records]; J. Morton, *Exempting the Churches: An Argument Against this Unjust and Unconstitutional Practice* (New York: n.p. 1915), 11ff., 63ff.; J. Parton, *Taxation of Church Property* (n.p., 1873), App., 17; E. Tarr, *Upon the Subject of the Laws Exempting Church Property From Taxation*, quoted and discussed in Robertson, *Should Churches be Taxed*, 67–69.

40. Rep. Sachs in *Kentucky Records*, 2:2425.

41. See especially J. Quincy, *Tax Exemption: No Excuse for Spoliation* (n.p., n.d.), 8.

church and state. The "silent accumulations of [church] property" occasioned by tax exemption and religious corporation laws, James Madison warned, will inevitably result in "encroachments by Ecclesiastical Bodies" upon the public square and the political process.[42] Several decades later, President Grant similarly cautioned that tax exemptions had allowed churches to accumulate such "vast property" and to aggregate such "vast political power" that "sequestration without constitutional authority" and "bloody" confrontation would eventually ensue.[43] "The separation of Church and the State" required that all "legal instruments encouraging ecclesiastical aggrandizement of wealth and power," including tax exemptions, be "expunged."[44]

These criticisms of the traditional exemptions of church property were not just isolated pedantic musings. In the middle decades of the nineteenth century they appeared rather regularly in editorials, pamphlets, and petitions.[45] Legislative assemblies and constitutional conventions in several states debated bills and proposed amendments that would have outlawed such exemptions.[46] President Grant proposed a similar amendment to the United States Constitution that was only narrowly defeated.[47] State and federal courts occasionally faced similar constitutional arguments.[48]

2. *Truncation of Equity.* The second challenge to the colonial law of tax

42. Fleet, "Madison's 'Detached Memoranda'" 3 *William and Mary Quarterly*, 3d. ser. 554–560 (1946). See similar sentiments in G. Hunt, ed., *The Writings of James Madison* (New York: G.P. Putnam's Sons, 1900), 8:132–133.

43. U.S. Grant, State of the Union Message of 1875, in F. Israel, ed., *The State of the Union Messages of the Presidents, 1790–1966* (New York: Chelsea House, 1966), 2:1296.

44. Ibid. President Garfield likewise commented: "The divorce between church and state ought to be absolute. It ought to be so absolute that no church property anywhere, in any state, or in the nation, should be exempt from equal taxation; of if you exempt the property of any church organization, to that extent you impose a tax upon the whole community." Quoted by Morton, *Exempting the Churches*, 63.

45. See the collection of quotations in id., 63ff., Robertson, *Should Churches be Taxed*, 69ff.

46. For a detailed state-by-state account, see C. Antieau, P. Carroll, & T. Burke, *Religion Under the State Constitutions* (Brooklyn, NY: Central Book Co., 1965), 120–172; B. Moll, *Zur Geschichte Vermoegenssteuren* (Berlin: 1911), 33ff.

47. On the debates over the proposed Sixteenth Amendment to the United States Constitution, which would have included provisions concerning church property and taxation, see or at least i on tax exemptions, see 4 Cong. Rec. 5190ff. 5453ff. (1876). See discussion in Meyer, "The Blaine Amendment and the Bill of Rights," 64 *Harvard Law Review* 939 (1951); Witte, Theology and Politics.

48. Though critical of exemptions, none of these opinions held such exemptions unconstitutional under the stage establishment clauses. See, e.g., Congregational Society v. Ashley, 10 Vt. 241, 245 (1838); State v. Collector of New Jersey, 24 N.J.L. 108, 120–121 (1853); Trustees of Griswold College v. State, 46 Iowa 275, 282 (1877). On the other hand, however, courts have persistently treated such exemptions as legislative privileges protected neither by state free exercise nor state impairment of contract provisions. Ibid.; Franklin Street Society v. Manchester, 60 N.H. 342, 349–350 (1880).

exemptions was posed by state constitutional mandates to revise or to revoke English statutes. Most state constitutional conventions had initially ratified such statutes without amendment or emendation, but the state legislatures were empowered to "alter or repeal" such laws as "circumstances demanded."[49] As nationalist sentiment became more strident and judicial criticisms of English law grew more sharp, legislatures began to respond. Several states appointed committees to review English statutes and precedents that had traditionally governed the colonies and territories and to purge that those they found "odious, obsolete, and obnoxious."[50] Many English statutes survived such "purges" only in revised form, if at all.

These constitutional mandates rendered the traditional equity law of ecclesiastical exemptions vulnerable to attack. For one of the casualties of the purges was the English Statute of Charitable Uses of 1601, which undergirded both the charitable jurisdiction of equity courts and the law of charitable institutions that these courts had helped to devise.[51] As a result, several states thus removed charitable institutions from equity jurisdiction and relieved them of their equitable privileges.[52] The special testamentary, procedural, and property privileges previously accorded these institutions at equity were removed. The special tax subsidies and tax exemptions were withdrawn. Courts also developed strict rules for the formation and function of new charitable institutions. Such institutions were required to incorporate, to limit their property holdings, and to divulge in detail their charitable activities. In several cases, donations and devises to religious charities were invalidated, religious groups were denied charitable corporate charters, and religious functions were deemed "inappropriate" as charitable uses.[53]

3. *Universality of Taxation.* A third challenge to traditional ecclesiastical exemptions was posed by state constitutional requirements that property taxes be "universally" applied. In the middle third of the nine-

49. See, e.g., Mass Const. pt. II, ch. VI, art. VI (1780); N.J. Const. S. 22 (1776).

50. Z. Swift, *A System of the Laws of the State of Connecticut* (Windham, CT: John Bryne, 1795), 42. See Brown & Blume, *British Statutes*, 9ff.; H. Berman, Comparative Legal History: Course Materials, IV. 46–108 (unpublished).

51. See the excellent discussion in Miller, *Legal Foundations*, 21–39 on the debate between Chief Justice Marshall, who in Philadelphia Baptist Association v. Hart's Executors, 17 U.S. (4 Wheat) 1 (1819) argued that such jurisdiction was based exclusively upon the Statute and Justice Story, who in Vidal et al. v. Executors of Stephen Girard, 43 U.S. (2 How.) 127 (1844) argued that such jurisdiction was based on long standing custom that antedated the Statute.

52. For a careful state-by-state analysis, see Zollmann, "The Development of the Law of Charities in the United States," 19 *Columbia Law Review* 91, 286 (1919).

53. See, e.g., Trippe v. Frazier, 4 Harris and Johnson 446 (Md. 1819); Dashiell v. Attorney General, 5 Harris and Johnson 392 (Md. 1822); Green v. Dennis, 6 Conn. 293 (1826); Janey's Executor v. Latane, et al. 4 Leigh 351 (Va. 1834); Gass & Bonta v. Wilhite 32 Ky. (2 Dana) 170 (1834). This restrictive policy was inspired, in part, by the Hart's Executors case, in part by a sharp jurisprudential reaction to the equitable doctrines of cy pres. See Fisch, "The Cy Press Doctrine and Changing Philosophies," 51 *Michigan Law Review* 375 (1953).

teenth century, many states thoroughly reformed their property taxation laws. The myriad species of special and sporadic taxes on realty and personalty were consolidated into a general annual property tax. The multiple layers of tax officials were merged into uniform state and municipal tax commissions. The antiquated tax valuation lists were thoroughly revised. The long lists of tax exemptions and immunities inherited from the colonies were cast aside as "unwieldly" and "unfair."[54] These revisions were written into the state constitutions. The constitutional conventions started with the new presumption that "[t]axation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value."[55] The presumption was that all property was to be universally taxed, and tax exemptions, including those for church property, were exceptions. These exemptions could be granted only if the "public welfare" would be advanced or other "good and compelling" reasons could be adduced.

### *C. The Rise of the Modern Theory and Law of Tax Exemption of Church Property*

These three constitutional challenges prompted proponents of ecclesiastical exemptions into action. The establishment argument had to be rebutted. The equitable privileges of churches and their properties had to be restored. The "good and compelling" reasons for exemption had to recited. Later nineteenth century statesmen and churchmen met these constitutional challenges forcefully and developed the core of the modern theory and law of tax exemptions of church property. They did not forsake the common law and equity law traditions of tax exemption in this effort, but fused them. The basic exemption theory of each tradition was preserved but was cast in more generic form. The basic exemption laws of the colonies remained in place but were given more general application.

1. *The Modern Theory of Tax Exemption.* The modern theory of tax exemption of church property was forged in the later nineteenth century in a plethora of judicial opinions, legislative arguments, convention speeches, popular pamphlets, newspaper editorials, printed sermons, and scholarly

54. See generally Benson, "A History of the General Property Tax," 34–47. For more specific state studies, see J. Brindley, *History of Taxation in Iowa* (Iowa City, IA: State Historical Society of Iowa, 1911), 260ff.; *Exemption from Taxation in Massachusetts: History and Documentation* (Boston, Little Brown, 1910); C. McLeish, *The Laws of the State of Texas Affecting Church Property* (Washington: The Catholic University of America Press, 1960), 160ff.; M. Welsh, *The Laws of the State of Nevada Affecting Church Property* (Washington: The Catholic University of America Press, 1962), 130ff.

55. Wa. Va. Const. art. VIII, s. 1 (1861/3). See also Benson, at 34–47. By the end of the Civil War, at least 15 states had written comparable requirements into their state constitutions. Id., at 42. Similar language appears in more than 30 state constitutions today. See M. Bernard, *Constitutions, Taxation, and Land Policy* (Lexington, MA: Lexington Books, 1979).

papers. Though these sources varied widely in quality and cogency, their basic premises and principles admit of rather short summary.

"The policy on which the exemption of church property is granted," declared the Connecticut Supreme Court, "is simply the encouragement of religion" and the churches.[56] For churches serve to the advantage of both society in general and the state in particular.

Churches, exemption proponents argued, dispense intangible, but invaluable, benefits to society through their religious activities. Churches cultivate public spiritedness. They induce citizens to "benevolence, charity, generosity, love of our fellowman, deference to rank, to age and sex, tenderness to the young, active sympathy for those in trouble and distress, beneficence to the destitute and poor." Without such acts and dispositions, a truly "civil society . . . could not long endure."[57] Churches inculcate public morality. They teach chastity and continence, temperance and modesty, obedience and obligation, respect for the person and property of another. They have internal structures of authority to punish parishioners guilty of immorality. Such moral discipline is "probably of as much value to society, in keeping the peace and preserving the rights of property, as the most elaborate and expensive police system."[58] Churches enhance neighborhood values. Their "immaculate" buildings and grounds are aesthetically pleasing. They attract respected citizens. They promote stability of neighborhood populations.[59] Churches foster democratic principles and practices. They inspire citizens to vote for candidates and to participate in the political process. They instruct officials on moral principles and social needs. They preach against injustice by the authorities and insurrection by the masses.[60] "Churches and religion, therefore," a Massachusetts Tax Commissioner put it, "make life and property more secure and promote peace, order, and prosperity in the community." Exemptions are thus granted "not that religion may increase . . . but that society may be benefitted."[61]

56. Town of Hartford v. First Unitarian Society, 66 Conn. 368, 375 (1895); see similar sentiments in Commonwealth v. Y.M.C.A., 116 Ky. 711 (1903).

57. Trustees of the First Methodist Episcopal Church v. City of Atlanta, 76 Ga. 181, 192–193 (1886), rev. on other grounds sub nom., City of Atlanta v. First Presbyterian Church, 86 Ga. 730 (1890).

58. Commonwealth v. Y.M.C.A., 116 Ky. 711, 718 (1903).

59. See, e.g., P. Schaff, *Church and State in the United States* (New York: Arno Press, 1972; reprint of 1844 ed.), 75; H. Foote, *The Taxation of Churches* (n.p., c. 1870), 27–30.

60. See, e.g., Ward v. New Hampshire, 56 N.H. 508 (1876); T. Brown, *Some Reasons for the Exemption of Church Property From Taxation* (Rochester, NY: Scranton, Wetmore & Co., 1881), 12.

61. Quoted by Foote, *The Taxation of Churches*, 19–20. See also A. Bledsoe, *Shall Georgia Tax Church Property?* (Atlanta, Atlanta Litho & Print Co., 1897), 5: "It is upon this principle . . . that church property has heretofore been exempted from taxation, viz: that the exemption was worth more to the state than the taxation. Churches are not built for the purposes of gain. [T]he church is built for the benefit of the public."

Churches not only dispense social benefits through their religious activities, exemption proponents argued, but also discharge state burdens through their charitable activities. They discharge the burdens of education through their parochial schools and colleges, educational and vocational programs, literary and linguistic societies. They discharge burdens of social welfare through their hostels and hospitals, almshouses and nightshelters, counselling and crisis centers, youth camps and retirement homes. They discharge burdens of foreign aid through their programs for foreign missions and disaster relief.[62] Churches, one exuberant pamphleteer wrote, must be considered the "most charitable of charities."[63] Through such voluntary social services, the church saves the state enormous costs that would "otherwise be imposed upon the public . . . by general taxation."[64] Tax exemption, proponents concluded, is a suitable *quid pro quo* for such services.

This new "state burden" and "social benefits" theory of tax exemption skillfully blended traditional arguments. The traditional common law theory had taught that religious use exemptions were accorded to properties that discharged state burdens for the established religion. The traditional equity law theory had taught that charitable use exemptions were accorded to any properties that dispensed social benefits. These arguments were now reversed and softened. Religious use exemptions, no longer justifiable on establishment grounds, were now justified on the basis of the distinctive social benefits dispensed by all religious groups. Charitable use exemptions, no longer justifiable on unspecified social benefit grounds, were now justified on the basis of the specific state responsibilities discharged by all religious groups. The new theory of tax exemptions thus captured the traditional arguments but recast them to broaden an unduly narrow category of religious use exemptions and to narrow an unwieldily broad category of charitable use exemptions.

2. *The Modern Law of Tax Exemption*. Not only the theory but also the law of tax exemptions of church property was transformed in the latter half of the nineteenth century and the early part of the twentieth. Such exemptions no longer turned on the isolated statutes and equitable customs inherited from colonial times. Nearly one third of the states developed new constitutional provisions that guaranteed such exemptions to all religious groups.[65]

62. See C. Tobin, *The Exemption from Taxation of Privately Owned Real Property Used for Religious, Charitable, and Educational Purposes* (Albany, NY: William E. Hannan & Leland L. Tolman, 1934), 20–27. Among cases, see Seminary of our Lady of Angels v. Barber, 49 N.Y. Sup. Ct. 27 (1886); M.E. Church, South v. Hinton, 92 Tenn. 128 (1893); Y.M.C.A. v. Douglas County, 60 Neb. 642 (1900).

63. Bledsoe, *Shall Georgia Tax Church Property*, 5.

64. Y.M.C.A. v. Douglas County, 60 Neb. 642, 646 (1900).

65. See Ala. Const. art. IV, S. 91 (1901); Ark. Const. art. XVI, S. 5 (1874); Cal. Const. art. XIII, S.1.5 (1875; amended 1900); Colo. Const. art. X, S. 5 (1876); Kan. Const. art. XI, S. 1 (1859); Ky. Const. S. 170 (1890); La. Const. S. 230 (1898); Minn Const. art. XI, S. 1 (1857); N.D.

The remainder of the states developed comprehensive statutory schemes that were either mandated by or validated under state constitutions.[66]

Consistent with the common law tradition, virtually all states exempted properties "devoted to religious uses" or "used for religious purposes." Most states insisted, however, that such property uses be "actual" and "real." Properties that had been abandoned or sporadically used for religious purposes in the past or that were merely purchased or planned for religious uses in the future were generally taxable.[67] Most states also insisted that such properties be owned by a "religious association"; a few states, particularly in earlier decades, insisted further that such religious associations be incorporated under local state law as religious corporations.[68] A few states took no account of the identity of the property owner, so long as the exempt property was devoted to religious uses. This allowed investors to receive property exemptions by leasing their properties to churches.[69]

The definition and delimitation of the phrase "religious use" was the subject of considerable legislation and litigation. Tax assessors and judges could no longer simply look to the uses prescribed by the establishment law, as they had done in colonial and early republican times. They could no longer simply consider the property uses of the one established church. A

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Const. art. XI, S. 176 (1889); Okla. Const. art. X, S. 6 (1907); S.C. Const. art. X, S. 4 (1895); S.D. Const. art. X, S. 6 (1889); Utah Const. art. XIII, S. 2 (1896); Va. Const. S. 1902 (1902); Wyo. Const. art. XV, S. 10 (1889).

66. See Ariz. Const. art. X, S. 2 (1912); Del. Const. art. VIII, S. 1 (1879); Fla. Const. art. IX, S. 1 (1885); Idaho Const. art. VII, S. 5 (1889); Ill. Const. art. IX, S. 3 (1848; amended 1870); Ind. Const. art. X, S. 1 (1851); Mo. Const. art. X, S. 6 (1875); Mont. Const. art. VII, S. 2 (1889); Nev. Const. art. X, S. 1 (1864); N.C. Const. art. V, S. 5 (1876); Ohio Const. art. XII, S. 5 (1851); Pa. Const. art. VIII, S. 2 (1873); Tenn Const. art. II, S. 28 (170); Tex. Const. art. VIII, S. 2 (1876); W. Va. Const. art. X, S. 1 (1872); Wyo. Const. art. XV, S. 12 (1889).

67. See, e.g., Gibbons v. District of Columbia, 116 U.S. 404 (1886); Trinity Church v. New York, 10 How. Prac. 138 (N.J. 1854); All Saints Parish v. Brookline, 178 Mass. 404 (1901). Later, courts softened this latter requirement and exempted properties that were clearly intended for, or under construction for, religious uses. See, e.g., Harrison v. Guilford County, 218 N.C. 718 (1940).

68. These requirements of both ownership and use of an exempt property were usually imposed by statute or judicial interpretation, rather than by express constitutional provision. See, e.g., Wisconsin Statutes Annotated, Sec. 70.11. The requirement of incorporation of the religious association was imposed by judicial interpretation. See, e.g., Evangelical Baptist Benevolent & Mission Society, 204 Mass. 28 (1910); Christian Business Men's Comm'n v. State, 228 Minn. 5489 (1949); People ex re. Unity Congregational Society v. Mills, 189 Misc. 774 (N.Y. 1947); Harrisburg v. Ohev Sholem Congregation, 32 Pa. Co. 589, 9 Daugh Co. 184 (1906). The requirement of incorporation of the religious association was imposed by judicial interpretation. See, e.g., Manresa Inst. v. Norwalk, 61 Conn. 228 (1891); Church of Saint Monica v. Mayor of New York, 119 N.Y. 91 (1890); United States National Bank v. Poor Handmaids, 148 Wisc. 613 (1912); Franke v. Mann, 106 Wisc. 118 (1900).

69. See, e.g., Horwell v. Philadelphia, 8 Pa. 280 (1853); Church of Epiphany v. Raine, 10 Ohio Dec. Repr. (n.d.); People v. Salvation Army, 305 Ill. 545 (1922); Willard v. Pike, 59 Vt. 202 (1886).

more generic and pluralistic definition of religious use was required. Over time, a vast spectrum of "religious use" exemptions emerged among the states.

All states exempted sanctuaries, synagogues, and other properties devoted to religious worship services, together with the driveways, walkways, parking lots and other appurtenant lands necessary for the reasonable use of these improvements.[70] Two conditions, however, were often imposed. First, the religious worship that occurred in those buildings had to be "public" in character. Thus secluded cloisters and monasteries, private chapels in hospitals, orphanages, or schools, and the worship facilities of small, exclusive cults or those who engaged in private meditation or family worship were generally not eligible for religious use exemptions.[71] Second, the property usually had to be "improved." Thus agrarian communal religions, youth retreat groups, or naturalist religions that worshipped in crude temporary shelters or in designated regions of the countryside generally did not receive religious use exemptions.[72]

A few states, like Pennsylvania and Illinois, limited their religious use exemptions to these public worship facilities alone. Most states, however—either by express statutory provision or, more frequently, through judicial interpretation—extended the scope of such exemptions well beyond this core.

First, religious use exemptions were generally accorded to the properties that supported the ministry of the exempted church. Church buildings annexed to or near the sanctuary or synagogue and used for catechization, fellowship, weddings, storage, and comparable functions were usually exempted in such states, though acreage and space limitations were sometimes imposed.[73] Separate church properties, however, that housed denominational printing facilities, mission and evangelism centers, administrative and governmental offices, or religious educational and vocational facilities were often not eligible for religious use exemptions, though in some states, they could be eligible for charitable use exemptions. Second, more than half the states accorded religious use exemptions to parsonages and other living quarters of ministers and their families, though strict limitations were often

70. There are a few extreme cases, where courts have exempted the building, but not the property that it occupies, but these are exceptions. See, e.g., Lefevre v. Detroit, 2 Mich. 586 (1853).

71. See, e.g., St. Joseph's Church v. Providence, 12 R.I. 19 (1878); Association for Benefit of Colored Orphans v. New York, 104 N.Y. 581 (1887); In re City of Pawtucket, 24 R.I. 86 (1902); People ex rel. Carsen v. Muldoon, 306 Ill. 234 (1923); Layman's Weekend Retreat League v. Butler, 83 Pa. Super. 1 (1924).

72. See, e.g., People ex rel. McCullogh v. Deutsche Evangelische Lutherische Jehovah Gemeinde, 249 Ill. 132 (1911).

73. See, e.g., In re Bond Hill-Roselawn Hebrew School, 151 Ohio St. 70 (1949); Saint Barbara's Roman Church v. City of New York, 277 N.Y.S. 538 (1935).

imposed on the size and value of such quarters.[74] A few states insisted further that such quarters be actually occupied by an ordained cleric serving the church that owned the parsonage, not merely a retired minister, church administrator, or custodian.[75] Third, a small minority of states went even further and extended religious use exemptions to church properties that provided "auxiliary religious services" to their parishioners. In these states, church-run parochial schools, cemeteries, counselling centers, summer camps, retirement homes, retreat centers, restaurants, and even recreation facilities were granted religious use exemptions.[76]

Consistent with the equity tradition, all states also exempted properties that were devoted to "charitable," "benevolent," or "eleemosynary" uses or purposes. The colonial definition of charity remained in effect: any use of property that provided distinctive public services to a sufficiently indefinite number of persons was considered charitable. The conditions that were imposed on religious use exemptions were also imposed on charitable use exemptions. The charitable use had to be "actual" and "public," and the exempt property usually had to be owned by a charitable association.[77]

Religious associations could readily avail themselves of these charitable use exemptions for their properties. Aside from "purely sacerdotal associations," most religious associations were also considered to be charitable associations.[78] Aside from religious worship services, most religious uses of property were also considered to be charitable uses of property. Though the core "religious uses" and core "charitable uses" of church property remained distinctive, most uses of church property could be considered at once

74. A few states interpreted vague constitutional or statutory provisions on "religious use" and "church property" to include parsonages and other clerical residences. See, e.g., Church of Holy Faith v. State Tax Comm'r, 39 N.M. 403 (1935); Wilmington v. Saint Satnislaus Kostka Church, 49 Del. 5 (1954). Most states, however, have consistently denied exemptions for parsonages, arguing that the primary use of parsonages is for room and board, not worship. See, e.g., M.E. Church v. Ellis, 38 Ind. 3 (1871); People ex rel. Thompson v. First Congregational Church of Oak Park, 232 Ill. 158 (1907); State v. Union Congregational Church, 173 Minn. 40 (1927). Courts have insisted on this interpretation, even where the parsonage is used in part for religious services, church meetings, and storage of items used in the sanctuary. Ramsey County v. Church of the Good Shepherd, 45 Minn. 229 (1891); Watterson v. Halliday, 77 Ohio St. 150 (1907); Gerke v. Pucell, 25 Ohio St. 229 (1874); St. Joseph's Church v. Assessors of Taxes, 12 R.I. 19 (1909).

75. Ibid. See also Broadway Christian Church v. Commonwealth, 112 KY. 448 (1902); Saint Matthew's Lutheran Church for the Deaf v. Division of Tax Appeals, 18 N.J. Super. 552 (1952).

76. See generally Zollmann, *American Civil Church Law*, 270–275; Van Alstyne, "Tax Exemption of Church Property," 20 *Ohio State Law Journal* 461, 490–503 (1959).

77. See generally, Zollmann, "Religious Charities in the American Tax Law," 7 *Marquette Law Review* 131 (1922–23); Zollmann, "Tax Exemption," in *American Law of Charities* (Boston: Little Brown, 1924), 16.71.

78. See, e.g., Carter v. Eaton, 75 N.H. 560 (1910); Glaser v. Congregation Kehillath Israel, 263 Mass. 435 (1928); Betts v. Young Men's Christian Association of Erie, 83 Pa. Super. 545 (1924).

"religious" and "charitable" under state exemption laws. Thus a variety of church property uses and improvements were exempted under charitable use categories—the properties occupied and used by church administrative centers, seminaries, Bible societies, missionary societies, religious publishers, church youth camps and retreat centers, parochial schools, Sunday schools, church women's societies, and many others.[79]

Three exemption patterns emerged as a result of these overlapping categories of exempt uses of church property. First, most states allowed religious associations to mix both religious uses and charitable uses of their properties, and to choose either one or both forms of exemption for such uses.[80] Religious use exemptions were often more attractive, since they required only an annual petition for renewal to the local tax assessor. Charitable use exemptions required not only such a petition, but also subjected the association to the supervisory jurisdiction of the attorney general or a charitable commissioner or visitor. Second, several states required religious associations to make one such use of their properties "primary" or "predominant," and to petition for exemption of their property based on that use alone. If an association could demonstrate that most of the property was devoted to one such exempt use for the majority of the time an exemption was granted—even if the property was also put to other incidental exempt and non-exempt uses.[81] Third, a few states required either exclusive religious use *or* exclusive charitable use of the exempt property. Under such a wooden classification system, religious organizations had to choose either to truncate or to bifurcate their activities. Those organizations that resisted such a choice—for reasons of ideology or economics—on occasion were denied exemption altogether.[82]

This modern law of ecclesiastical exemptions reflects both the common

79. See, e.g., Appeal Tax Court v. Grand Lodge of Masons, 50 Md. 421 (1879); Board of Home Missions Church Extension of the M.E. Church v. Philadelphia 266 Pa. 405 (1920); Woman's Home Missionary Society v. Taylor, 173 Pa. 456 (1896); Maine Baptist Missionary Convention v. Portland, 65 Me. 92 (1876); Ferry Beach Park Association of Universalists v. City of Saco, 127 Me. 136 (1928); M. E. Church, South v. Hinton, 92 Tenn. 188 (1893); Y.M.C.A. v. Douglas County, 60 Neb. 642 (1900); Davis v. Cincinnati Camp Meeting Association, 57 Ohio St. 257 (1897); American Sunday School Union v. Philadelphia, 161 Pa. 307 (1894); Catholic Women's Club v. City of Green Bay, 180 Wisc. 102 (1923).

80. See, e.g., Congregational Sunday School & Publishing Soc'y v. Board of Review, 290 Ill. 108 (1919); Commonwealth v. Y.M.C.A. 116 Ky. 711 (1903); Assessors of Boston v. Lmason, 316 Mass. 166 (1944); Association for the Benefit of Colored Orphans v. Mayor of New York, 104 N.Y. 581 (1887).

81. See, e.g., First Unitarian Society v. Hatford, 66 Conn. 368 (1895); In re Bond Hill-Roselawn Hebrew School, 151 Ohio St. 70 (1949); St. Mary's Church v. Trippp, 14 R.I. 307 (1883). See further discussion in T. Cooley, *The Law of Taxation*, 4th ed. (Chicago, IL: Callaghan & Co., 1924), S. 725.

82. See, e.g., People v. Muldoon, 306 Ill. 234 (1922); People ex rel McCullough v. Deutsche Evangelische Lutherische Jehovah Gemeinde Ungeaenderter Augsburgischer Confession, 249 Ill. 132 (1911); Commonwealth v. Thomas, 119 Ky. 208 (1904); Evangelical Baptist Benevolent & Missionary Soc'y v. Boston, 204 Mass. 28 (1910); Evangelical Lutheran Synod & Hoehn, 355 Mo. 257 (1946).

law and equity traditions, and the tensions between them. It reflects the traditional common law concern to exempt property devoted to religious uses, to predicate such exemptions on explicit statutory authority, to limit the scope of exempt religious uses, to restrict the size and value of properties that fall within this scope, and to restrict the discretion of officials who award exemptions. It also reflects the traditional equity law concern to exempt property devoted to charitable uses, to engage in inventive exegesis of exemption statutes, to expand the scope of exemptions well beyond their original core, and to accord broad discretion of officials to make case-by-case determinations of whether, and to what extent, a given property can be exempted.

## *II. Tax Exemptions of Church Property at Present*

Both the theory and the law of ecclesiastical exemptions that emerged in the late nineteenth century remain firmly in place among the states today. Judicial opinions continue to recite faithfully the social benefit and social burden arguments in favor of such exemptions.[83] Many of the constitutional and statutory exemption provisions drafted in the late nineteenth and early twentieth centuries remain the state law today, although they have been heavily amended and subject to broad judicial interpretation. The Supreme Court declared such exemptions laws constitutionally permissible in the landmark case of *Walz v. Tax Commission* (1970).[84] Yet litigation—in both traditional and novel forms—concerning such exemptions has continued apace for the past two decades. Such exemption stems in part from the terseness of state exemption provisions and the ambiguity of judicial precedents interpreting them, in part from the exponential rise of new religious groups that have sought to avail themselves of such exemptions.

### *A. New Trends in Litigation Involving Tax Exemption of Church Property*

The tax exemption provisions adopted by most states are cryptic and often devoid of definitions. Judicial precedents interpreting these provisions are copious and often disconcordant. Churches that have been denied property tax exemptions have not been hesitant to exploit these ambiguities and to seek judicial redress. This has given rise to scores of state court cases on tax exemption of church property in the past two decades. The cases are too few in number and too broad ranging in result to discern any consistent pattern or integrated law. Several trends, however, are apparent in this recent litigation. These trends, taken together, have tended to expand the

83. For a recent case, citing virtually all the arguments for and against exemptions, see Murray v. Comptroller of the Treasury, 241 Md. 383 (1966), cert. den. 385 U.S. 816 (1966).

84. 397 U.S. 664 (1970). See discussion and criticism of the case in Witte, Tax Exemption, 364–368.

availability of tax exemptions for church properties, and to exacerbate some of the abuses inherent in traditional tax exemption laws.[85]

First, the requirement that the property be "actually" used for exempt purposes has been considerably softened. Traditionally, courts did not hesitate to deny exemptions to church properties whose exempt uses were merely planned for the future or were held in abeyance for financial or other reasons. Today the majority of state courts and legislatures have become less churlish. Most states exempt church properties as soon as construction of improvements thereon has begun. In a few states, mere purchase of the property and good faith planning of a religious or charitable use thereon is sufficient to warrant an exemption from property tax. Most states also retain exemptions for properties that churches or charities can afford to use only partly or sporadically; complete abandonment of the property, however, still renders it taxable.

Second, the requirement that the religious use of the property be "public" in nature is not so stringently enforced. Traditionally, courts struck down exemptions for religious or charitable uses of property that did not work a sufficiently "public benefit." Today courts and legislatures have softened this public benefit requirement and have allowed for the exemption of monasteries, convents, religious communes, retreat centers, youth homes, missionary furlough stations, summer camps, and similar secluded and segregated properties.

Third, several courts have come to interpret rather broadly the type and amount of contiguous property that is "reasonably necessary" for the religious or charitable use of a property. Traditionally, many states limited exemptions to improved properties together with the driveways, walkways, parking lots, and other immediately surrounding properties that facilitated the use of the improvement. Today courts in some states grant exemptions for large tracts of unimproved land that surrounding a church or charity on grounds that such lands provide a buffer against residential or industrial encroachment or traffic, enhance the aesthetic appeal of the church, or foster a tranquil setting more conducive to religious worship and spiritual reflection. Courts in other states have exempted convents and communes, residential religious centers, missionary furlough stations, and parsonages with their surrounding properties on grounds that they are "reasonably necessary for the accomplishment and fulfillment of the . . . charitable institution."

Fourth, state courts and legislatures have become sharply split over the requirements regarding the nature of the owner of the exempt property. Traditionally, all but a few states insisted that properties exempted for religious uses be owned by religious organizations and that properties exempted for charitable uses be owned by charitable organizations. Today, a

85. The following paragraphs are a summary of the more detailed treatment of recent case and statutory law in id., 395ff. and the cases cited and discussed therein.

growing minority of states take no account of the identity of the owner of the property so long as the property is devoted to charitable or religious uses. This allows investors and for-profit organizations to receive property tax exemptions by leasing the properties to churches or charities. Though the majority of states still continue to require that property that is accorded a religious use or a charitable use exemption be owned by a religious or charitable organization, the nature of the owner and the use need not match. Religious organizations can receive charitable use exemptions, and charitable organizations can receive religious use exemptions. Indeed, the definition of a "religious" organization often bears little resemblance to the definition of a "religious" use. This permitted asymmetry of ownership and use has invited protracted litigation. Religious groups that are denied religious use exemptions have thereafter sought charitable use exemptions for the same property. New religious groups or well-established religious groups that have added new properties have often spent years litigating the tax status of their properties.

Fifth, virtually all states now grant exemptions based on the primary or predominant use to which a property is devoted. Traditionally, some states allowed parties to mix religious and charitable uses and choose freely their category of exemption. Today courts have become more inclined to deem either the religious use or the charitable use to be primary and determine the exemption status based on that categorization. Traditionally, other states forced parties to devote their properties exclusively to religious uses or exclusively to charitable uses; any mixture of uses was fatal to a claim for exemption. Today such a wooden classification system has been largely abandoned; if either the religious use or charitable use is predominant, parties can make other incidental exempt uses of their properties.

Sixth, many states also permit parties to make incidental nonexempt uses of their properties. Traditionally, many states denied exemptions to church properties that in any way mixed exempt and nonexempt uses. Even incidental profiteering was fatal to a claim for exemption. Today courts and legislatures grant partial exemptions based on the percentage of space or time devoted to such exempt uses.

Finally, the scope of religious use exemptions has tended to narrow while the scope of charitable use exemptions has tended to broaden. Traditionally, courts interpreted both religious use and charitable use exemptions rather broadly, allowing for a considerable amount of overlapping treatment. Today courts have begun to limit religious use exemptions to the sanctuary and the synagogue, the mosque and the meetinghouse, thereby forcing churches to seek charitable use exemptions for many of their properties. Correspondingly, many courts have broadened the definition of charitable uses to include a variety of forms of religious education, catechization, fellowship, liturgy, recreation, mission work, communal living, and auxiliary services in support of religious groups.

These trends in recent cases have tended to expand the availability of tax exemptions for church properties. The softened definition of an "actual" and "public" exempt use has rendered a number of undeveloped and secluded religious properties eligible for exemption. The broadened definition of what property is considered "reasonably necessary" to support the exempt use has allowed religious organizations to surround their developed properties with considerable tracts of unimproved land. The permitted admixture of two or more exempt uses on one property has made exemptions available to the properties of non-profit organizations that offer multiple services.

These trends have also, however, permitted some abuses of exemption laws. The lack of any necessary correlation between the nature of the owner and the nature of the use of an exempt property has allowed nonprofit organizations to gain exemptions through lease of their properties to religious or charitable organizations. The permitted admixture of predominant exempt uses and incidental nonexempt uses has allowed religious and charitable groups to engage in short-term or occasional profiteering with no adverse property tax consequences.

### *B. Tax Exemptions for the Properties of New Religious Groups*

The exponential rise of new religious groups has tested the edges, and the efficacy, of religious use exemptions. In the past two decades, various new religious groups have petitioned state commissioners and courts for the same property tax exemptions enjoyed by traditional religious groups. Such petitioners range from large, highly organized groups like Moonies, Scientologists, and various oriental cults to small, highly selective communitarian religions, faith families, personality cults, and other sects. Courts and commissioners have had few criteria at their disposal to evaluate these petitions for exemption. State property tax laws, unlike federal income tax laws, generally offer no definition of a "religious" association or a "religious" use. State and federal constitutional laws offer only rudimentary and inconsistent definitions of religion. Thus state courts and legislatures have recently developed at least four tests to evaluate these petitions. These can be called the commonsense, deference, minimalist theism, and multifactual analysis tests, respectively. The first two tests guard jealously the independence of the petitioner, and make no inquiry into the petitioner's religious beliefs. The other two tests scrutinize these religious beliefs more closely. Application of these tests has led to widely varying results.

Courts in some jurisdictions have adopted a simple "commonsense" test to evaluate petitions for tax exemption. They view the "objective facts" of the petitioner's property uses but studiously avoid any inquiry into the petitioner's religious inspirations or motivations. They then make a commonsense judgement regarding whether such uses are religious or secular. This test is applied primarily in cases involving seemingly specious petitions for

exemption. In *Golden Writ of God v. Department of Revenue*, the Supreme Court of Oregon, for example, was asked to determine the tax status of some 230 acres of largely untilled farmland, occupied by a large house and barn. The property was owned by a nonprofit organization consisting of a dozen members who lived in the house and who had recently conveyed their own property to the organization. Members of the organization regarded the property as a tabernacle, its plants as symbols of divine attributes, its animals as sacred creatures. They also regarded work on the property as a form of spiritual discipline. The court denied the religious use exemption, arguing that the "objective facts demonstrate non-religious use of the property." "The farmland with a house and barn were just that," the court reasoned. "The house was primarily used for living quarters, . . . the untilled farmland was otherwise uncultivated and possessed no unusual attributes other than being a nice place to run horses, to study nature and to meditate and pray."[86] Courts in other jurisdictions have used similar arguments to deny exemptions to open lands that are consecrated as spiritual havens, farms and ranches that are dedicated to spiritual catharsis, or private homes that petitioners deem to be shrines, cathedrals, or other places of religious worship.

While the commonsense test relies heavily on a court's characterization of the petitioner's beliefs and property uses, the "deference" test relies heavily on the petitioner's self-characterization. In *Holy Spirit Association for Unification v. Tax Commission*, the New York Court of Appeals formulated the test as follows:

> In determining whether a particular ecclesiastical body has been organized and [uses its property] exclusively for religious purposes the courts may not inquire into or classify the content of the doctrine, dogmas, and teachings held by that body to be integral to its religion but must accept that body's characterization of its own beliefs and activities . . . so long as that characterization is made in good faith and is not sham.

The court applied this test to determine the tax status of the administrative headquarters, missionary residence, and storage facilities owned and operated by the Reverend Sun Myung Moon. Both the New York tax commissioner and lower state courts had denied the exemption on grounds that the Unification doctrine was "so inextricably interwoven with political motives and activities" that it could not be regarded as religious, regardless of the sincerity of the church's members. The New York Court of Appeals reversed. After quoting at length from the religious organization's own description of its beliefs and purposes, the court concluded that "what have been characterized below as political and economic beliefs and activities are

86. 300 Or. 479 (1986).

in view of the Church integral aspects of its religious doctrine and program." Because the church's properties are integral to the successful maintenance and dissemination of its religion, the court felt that the property had to be exempt from taxation.[87]

Other courts have adopted a "minimalist theism" test to evaluate petitions submitted by new religious groups. Petitioners must at least "exhibit the minimal requirements of religion." Such requirements are defined as "a sincere and meaningful belief in God occupying in the life of its possessors a place parallel to that occupied by God in traditional religions and dedicat[ion] to the practice of that belief."[88] Property used in support of such religious beliefs is eligible for exemption.

The minimalist theism test has been applied both to affirm and to deny petitions for tax exemption. In *Roberts v. Ravenwood Church of Wicca*, for example, the Supreme Court of Georgia upheld the tax exempt status of a two-storey suburban home owned and operated by the Wiccan church. The Wiccan church believed in a "primordial, supernatural" force that created the world and sustained its creatures in a "karmic circle." Members of this religion were seen as divine sparks of this supernatural force with moral responsibilities to themselves and nature. The church observed eight formal Sabbaths per year and celebrated communion, marriage, and other religious rituals. The two-storey home was used both for weekly services and for the residence of the church founder, her petitioners, and some non-parishioner tenants. Convinced that the church was sufficiently and sincerely theistic, the court concluded that its property was being used for religious worship and was therefore exempt from taxation.[89] By contrast, in *Religious Society of Families v. Assessor*, the New York Supreme Court denied tax exemption for property of the Religious Society of Families, a new cult founded by one "Calvin of the Universe." The society was professedly this-worldly in orientation, believing in a variety of ecological and political causes, eugenics, scientific humanism, monogamous relationships, and death by suicide. It was organized as a neo-monastic community devoted to agricultural production. Upon rehearsing theistic definitions in dictionaries and earlier cases, the court concluded that the society was "not religious as religion is traditionally defined" and declared its property taxable.[90]

At least one court has developed a rather comprehensive "multifactual analysis" test to evaluate petitions for exemption. In *Ideal Life Church of Lake Elmo v. County of Washington*, the Supreme Court of Minnesota rejected simple litmus tests and dictionary definitions of religion and insisted that each petition must be subjected to a multifactual analysis. Under this

87. 55 N.Y. 2d 512 (1982).
88. Roberts v. Ravenwood Church of Wicca, 249 Ga. 348, 350 (1982).
89. Ibid.
90. 73 Misc. 2d 923 (1973).

analysis a court or commissioner must consider such factors as the motives for the formation of the religious organization, the presence of a supreme being or something in lieu thereof in the belief system, the presence and sophistication of religious doctrine, the practice and celebration of religious liturgies or rites, the degree of formal religious training required for the religious leaders, the strictures on the ability of members simultaneously to practice other religions, and other factors. Thereafter, the court must make a reasoned determination whether the petitioner is a religious group and/or whether its property is devoted to religious uses. In the case at bar, the court used such an analysis to reject the exemption petition of the Ideal Life Church. The church had been chartered and the minister had been ordained by the Universal Life Church of Modesto, California upon petitioner's payment by mail of 70 dollars. The church was comprised of some 18 members, most of whom were members of the same family and each of whom accepted the principles of freedom, fraternity, and choice. The church was theistic in orientation but professed no formal religious doctrine, celebrated no formal religious rites, and imposed no prohibitions against its members' practice of other faiths. The church building was previously a private home, which family members had donated to the church immediately after its organization. It was used both for the family residence and for the monthly public religious meetings. Regardless of the petitioner's characterization of itself as a sincere, bona fide religious organization, the court denied its petition.[91]

These four tests strike different balances between sophistication of analysis, on the one hand, and intrusiveness of inquiry, on the other. The deference test avoids intrusive inquiry into the beliefs of the petitioner but does so at the cost of analytical sophistication. The multifactual analysis test affords sophisticated and sensitive analysis of each petition, but does so at the cost of intrusion on the independence of the religious organization. The commonsense test is neither sophisticated nor intrusive; the minimalist theism test is both more sophisticated and more intrusive.

### *III. Tax Exemptions of Church Property in the Future*

Opponents and proponents of tax exemption of church property have thus far found little common ground. Opponents insist that such exemptions are subsidies of religion that are proscribed by the establishment clause and its principle of state separation from the church.[92] Proponents argue that

91. 304 N.W. 2d 308 (Minn. 1981).

92. See, e.g., West, "The Case Against the Right to Religion-Based Exemptions," 4 *Notre Dame Journal of Law, Ethics & Public Policy* 591, 600–613 (1990); id., Religious Exemptions, in T. Robbins and R. Robertson, eds., *Church-State Relations: Tensions and Transitions* (New Brunswick, NJ: Transactions Books, 1987), 103–108; Note, "Religious Tax Exemptions: A Challenge to Walz v. Tax Commission," 13 *Southwestern University Law Review* 129 (1982); L. Pfeffer, *Church State and Freedom*, rev. ed. (Boston: Beacon Press, 1967), 210–219.

such exemptions are supports of religion that are prescribed by the free exercise clause and its principle of state accommodation of the church.[93] Opponents look to the future and portend with alarm the further erosion of the municipal tax base and the further aggrandizement of church wealth and power.[94] Proponents look to the past and portray with approval the long tradition of mutual support and cooperation between church and state in serving society. Enmeshed as it is in this dialectic of separatism and accommodationism, the controversy over the constitutionality of tax exemption of church property will not admit of swift or easy resolution.

A fresh understanding of the history of tax exemption of church property suggests a *via media* between the wholesale eradication of exemptions proposed by their opponents and the blanket endorsements of exemptions proffered by their proponents. Neither opponents nor proponents have recognized sufficiently that modern exemptions of church property are rooted in both common law and equity law traditions, that historically they were granted on account of both the "religious uses" and the "charitable uses" to which church properties were devoted. Thus besides the all-or-nothing approaches currently debated in the academies, a third alternative is to remove tax exemptions for church property that are based on religious uses, but to retain those that are based on charitable uses. Church properties would thus be exempted from taxation not because of the internal, cultic, sacerdotal uses but because of the external, cultural, social uses to which they are devoted.

This alternative is less radical than it may initially appear. The term "charity" has always been broadly enough defined to include most aspects of religious life. Most religious institutions, save the most austere and ascetic cults, can thus as be considered charitable institutions. Most religious uses of property, save the most sacramental and ritualistic, can also be considered charitable uses. Most states allow parties to mix two or more exempt uses. Most, if not all, religious organizations would find little difficulty in retaining their property tax exemptions, albeit on different grounds.

93. See, e.g., D. Kelly, *Why Churches Should Not Pay Taxes* (New York: Harper & Row, 1977); *Taxation and the Free Exercise of Religion: Papers and Proceedings of the Sixteenth Religious Liberty Conference* (Washington: 1978).

94. See, e.g., A. Balk, *The Free List* (New York: MacMillan & Co., 1971); M. Larson & C. Lowell, *Praise the Lord for Tax Exemptions: How the Churches Grow Rich—While the Cities and You Grow Poor* (Washington: R.B. Luce, 1969); Bennett, "Real Property Tax Exemptions of Non-Profit Organizations," 16 *Cleveland-Marshall Law Review* 150 (1966).

95. See generally Berman, "Religious Freedom and the Challenge of the Modern State," 39 *Emory Law Journal* 149, 159–164 (1990).

96. P. Kurland, *Religion and the Law* (Chicago: Aldine Publishing Co., 1962), 16–18; Kurland, "The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court," 24 *Villanova Law Review* 1, 23–27 (1979). See evaluation in Tushnet, "Of Church and State and the Supreme Court: Kurland Revisited," 1989 *Supreme Court Review* 373 (1989).

This alternative has considerable intuitive appeal. First, it stands on firmer historical ground than the current pattern of exemption laws. Religious use exemptions are rooted in an establishment theory that the First Amendment prohibits and in a "social benefits" theory that today often defies reality. Many modern churches simply do not cultivate public spiritedness or public morality and do not promote neighborhood values and democratic ideals as the traditional social benefits theory teaches. Charitable use exemptions, by contrast, are rooted in an equitable theory that still commands assent and a "state burden" argument that the rise of the modern welfare state has rendered even more persuasive. The modern state has come to bear much of the burden of education, poor relief, and other forms of social welfare. Whatever charitable and other services churches and other organizations render relieve the state of a portion of that burden.

Second, this alternative promotes greater governmental neutrality toward, and equality in treatment of, religion. It spares officials the task of distinguishing between religious groups and secular groups in determining whether a party has standing to claim tax exemption. It spares officials the task of distinguishing between piety and charity, catechization and education in determining whether a property is being sufficiently devoted to "religious uses." It removes the disparity in benefits accorded to different churches under current exemption laws. Philip Kurland once wrote that the religious clauses of the First Amendment "should be read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because [the clauses] read together . . . prohibit classification in terms of religion either to confer a benefit or confer a burden." Although Kurland's principle has been sharply criticized in other contexts, it finds ready application to the issue of tax exemptions of church property.

Third, this alternative shifts the economic priorities of the church. Since its tax exempt status would turn not on the religious uses but on the charitable uses of its property, a church would be encouraged to devote its resources not only to building crystal cathedrals, prayer towers, and theme parks, but also to furnishing soup kitchens, youth houses, and night shelters.

This alternative, however, is not free from difficulty.

First, the alternative raises logistical concerns. The value of church property is not always too easy to assess for purposes of taxation. An improved church property can rarely be converted to private use and is not often sold to other religious groups. Traditional market criteria, therefore, cannot be so readily used. Moreover, in states that permit "mixed" religious, charitable, and other uses of church properties, it is not always easy to calculate the percentage of church property use that is charitable, and thus exempt. Tax commissioners, however, would hardly be daunted by such logistical concerns. They regularly assess the values of other properties devoted to highly specialized and unique uses, such as wineries, galleries, and factories. They readily distinguish between the profitable (and thus

taxable) uses and non-profitable (and thus exempt) uses of charitable properties. While logistical concerns may have been formidable in earlier decades, they have become less of a concern as the science of tax assessment has grown more refined.

Second, this alternative raises free exercise concerns. Although it may appear neutral on its face, the alternative will inevitably lead to taxation of certain church groups. Religious groups whose faith is world affirmative and socially active can readily receive charitable use exemptions for their properties. Religious groups whose faith is world avertive and socially inactive cannot. Although the Supreme Court has held that tax exemption of a church might be permissible under the establishment clause, it has not yet determined whether taxation of church property is permissible under the free exercise clause.

The United States Supreme Court has developed an array of rather disconcordant lines of interpretation of the free exercise clause, three of which are relevant here.[97] This alternative is consistent with all three lines of interpretation.

In one line of cases, the Court has consistently upheld a variety of general safety and welfare regulations that indirectly burden the religious exercise of some individuals or groups. The government must demonstrate that such regulations promote a compelling or overriding state interest, are narrowly tailored to achieve that interest, and are non-religious discriminatory on their face or in application. Thus the Court has upheld general license, permit, and tax requirements for solicitation, distribution, or sale of religious articles even though such measures indirectly burden the proselytizing efforts of certain groups. It has upheld general criminal laws against the use of child labor or narcotic substances, even though such uses are considered spiritually wholesome by certain religious groups. It has upheld general military dress codes, even though they obstruct a Jewish soldier's wearing of his yarmulke. It has required compliance with social security regulations, even though certain religious individuals are conscientiously opposed to social security. It has sustained the development of federal land, even though portions of such lands are considered sacred by native American Indians. The logic of these cases could be applied to rebut free exercise objections to the alternative proposed here. The charitable use exemptions promote a governmental policy of supporting and encouraging charity and are narrowly tailored to achieve that end. Such regulations scrupulously avoid any facial discrimination.

In a second line of cases involving church property disputes, the Court has distinguished between the "sacred" and "civil" attributes and activities of churches and between the right of free exercise of religion itself and the right

97. For citations and further discussion see Witte, "Theology and Politics," 689–698; Witte, "Tax Exemption," 412–414.

to the means and instruments used to facilitate and support such exercise. Church property, it can be argued, is among the civil attributes of the church, among the means used to facilitate and support the exercise of religion. Church property can thus be subjected to a considerable degree of state regulation and control without violating the free exercise clause. Lower courts have used this logic to uphold various onerous zoning, historic preservation, property registration, and other regulations of church property. The Supreme Court has very recently used similar logic to uphold the imposition of sale and use taxes on religous groups and activities. Such logic may also serve to rebut against the alternative tax exemption policy proposed here.

In a third line of cases, the Court has used the free exercise clause to support religiously-based exemptions. In these cases, parties have been exempted from general regulations that compel them to violate their sincerely held religious beliefs. Thus the Amish have been exempted from full compliance with compulsory school attendance laws for children. Petitioners for unemployment compensation have been exempted from regulations that compel them to work on their Sabbath or to participate in the production of military hardware. Conscientious objectors have been exempted from active service in the military. Such cases, however, are distinguishable. Mainline religious groups have no inherent religious aversion to the payment of taxes. The Bible enjoins Christians to "[r]ender . . . to Caesar the things that are Caesar's" and to pay "taxes to whom taxes are due, revenue to whom revenue is due."[98] The Talmud teaches the principle of *dina de-Malkhuta dina*, which, among other things, compels payment of uniformly administered taxes imposed by a recognized sovereign.[99] Arguments for the free exercise right to exemption from taxes, therefore, appear ill-founded.

Finally, and perhaps most importantly, this alternative raises questions of symbolism. Tax exemptions have long been regarded as signs of the state's "benevolent neutrality"[100] toward the church—"a fit recognition by the state of the sanctity of religion," as one official put it.[101] Taxes would be regarded by many as signs of the state's malevolent adversity toward the church—a reminder of earlier eras of religious persecution, and a foretaste of religious repression to come. To give the state the power to tax the church would for

98. Matthew 22:21 (RSV); Romans 13:7 (RSV).

99. Talmud, BK 113a, quoted and discussed in G. Graff, *Separation of Church and State: Dina de-Malkhuta Dina in Jewish Law 1750–1848* (University, AL: University of Alabama Press, 1985), 8–29, 140–141.

100. The phrase is from Walz, at 669.

101. Massachusetts State Tax Commission (1897), quoted by Roberston, *Should Churches be Taxed*, 191. See also Hornell v. Philadelphia, 8 Pa. 280 (1870); J. Bennett, *Christians and the State* (New York: Charles Scribner's Sons, 1958), 234–235 (tax exemptions are "the most remarkable of all forms of aid to religious bodies"); W. Sperry, *Religion in America* (Cambridge: Cambridge University Press, 1963), 60. ("The most important governmental recognition of religion made in America is the exemption of church property from taxation—at least so much of it as is used for purposes of worship and religious education.").

many be tantamount to giving it the power to destroy the church. It was the fear of ecclesiastical condemnation and political retaliation that compelled many nineteenth century legislators and judges to maintain church property exemptions. The same fear may well be what has stayed the hand of contemporary legislatures and courts, including the Supreme Court.

The catalyst for reform of church property exemptions must thus come not from the state but from the church. Churches must consider the costs of exemption—not so much the incremental financial costs to other taxpayers as the important symbolic costs to themselves. For many people—adherents and antagonists alike—tax exemptions and other legal privileges have rendered the contemporary church too mercenary, too opulent, and too self-indulgent. The church's voluntary renunciation of one of its privileges would do much to allay the anxieties of its adherents and to parry the attacks of its antagonists.