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HISTORICAL ANOMALY OR VALID
CONSTITUTIONAL PRACTICE?

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Let an untaxed Gospel be preached, in an untaxed churchhouse, from an untaxed pulpit; let the emblem of a crucified, but risen Christ be administered from an untaxed altar, and, as the spire points Heavenward, ... let it stand forever untaxed.

Representative Whitaker, 1890

It is easier to admire the motives for such exemption than to justify it by any sound argument.

Indiana Supreme Court, 1853

I. INTRODUCTION

The controversy over the constitutionality of state tax exemptions of church property reveals the tension that has emerged between the religion clauses of the first amendment under recent judicial interpretation.

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1. 2 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES OF THE KENTUCKY CONSTITUTIONAL CONVENTION 2397 (1890) [hereinafter KENTUCKY RECORDS].


3. This Article focuses on the exemption of churches from real property taxation, not income taxation. Property taxation has 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 11, 11-12 (1965). Property taxes or general assessments,
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 nonreligious groups appears to violate the "no special benefit" principle of the establishment clause. To tax church property while exempting that of other nonprofit groups appears to violate the "no special burden" principle of the free exercise clause. The controversy thus falls within the terra incognita between the religion clauses.

In the 1970 case of *Walz v. Commission*, the United States Supreme Court charted a "course between the two Religion Clauses" and upheld the constitutionality of such state property tax exemptions. At issue in *Walz* was a New York law, representative of laws in other states, that exempts "real or personal property used exclusively for religious, educational or charitable purposes as defined by law and owned by any [non-

which are levied annually, must be distinguished from special assessments, which are levied periodically to fund the maintenance and repair of public works, like roads and bridges. All properties that lie contiguous to such public works are subject to special assessments; no exemptions are generally afforded, even to church properties. *See* W. TORPEY, JUDICIAL DOCTRINES OF RELIGIOUS RIGHTS IN AMERICA 194-97 (1948).

5. *See infra* notes 161-68 and accompanying text.
7. *See infra* notes 169-183 and accompanying text.
9. *Id.* at 668. *Walz* is the only Supreme Court case to address directly the constitutionality of state property tax exemptions. Prior to *Walz* the Supreme Court had foregone three opportunities to review comparable state constitutional and statutory provisions. *See* Murray v. Goldstein, 385 U.S. 816, *denying cert. to* 241 Md. 383, 216 A.2d 897 (1966); General Fin. Corp. v. Archetto, 369 U.S. 423 (1962), *dismissing appeal from* 93 R.I. 392, 176 A.2d 73 (1961); Heisey v. County of Alameda, 352 U.S. 921, *dismissing appeal from* Lundberg v. County of Alameda, 46 Cal. 2d 644, 298 P.2d 1 (1956). The dicta of several earlier cases had at least presaged the result in *Walz*. *See*, e.g., Bell's Gap Ry. Co. v. Pennsylvania, 134 U.S. 232, 237 (1890) (The equal protection clause of the fourteenth amendment "was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions."); Gibbons v. District of Columbia, 116 U.S. 404, 408 (1886) ("[C]ongress, like any State legislature unrestricted by constitutional provisions, may, at its discretion, wholly exempt certain classes of property from taxation, or may tax them at a lower rate than other property."). *See also* Rogers v. Hennepin County, 240 U.S. 184, 192 (1916) (The Court allowed taxation of membership in an exchange, noting that such decisions are local and not prevented by the Constitution.); Magoun v. Illinois Trust & Sav. Bank, 170 U.S. 283, 295 (1898) (Upholding Illinois inheritance tax, the Court said states are free to classify property and create exemptions.).
In a majority opinion written by Chief Justice Burger, the Court upheld the New York law, with arguments from neutrality, separatism, and history. First, the Court declared, such exemptions are accorded in a "neutral manner" not only to religious groups but also to a broad class of charitable groups. The exemption affords these groups only "indirect" support, not a direct subsidy. Such neutrally allocated, indirect support neither establishes religious groups nor "converts" them "into arms of the state." Second, the Court declared, such exemptions ensure a "minimal and remote involvement between church and state." Taxation, by contrast, would "tend to expand" such involvement through tax valuations and assessments of, and government liens and foreclosures on, church property. The creation of such new channels of cooperation and confrontation would cause too "excessive [an] entanglement" between church and state to be countenanced by the establishment clause. Third, the Court declared, tax exemptions of church property are the product of an "unbroken" history that "covers our entire national existence and indeed predates it." Such exemptions were customarily accorded by the colonists, and they were sanctioned by Congress and state legislatures for more than two centuries. They have not "led to an established . . . religion" but have "operated affirmatively to help guarantee the free exercise of all forms of religious belief." To disinter a practice so "deeply embedded" in our culture and so widely accepted by "common consent" requires a more compelling case. From these arguments, the Court concluded that tax exemptions of church property, while neither proscribed by the establishment clause nor prescribed by the free exercise clause, are, nonetheless, constitutionally permissible.

10. N.Y. CONST, art. 16, § 1 (1938). This constitutional exemption provision is elaborated in NEW YORK REAL PROPERTY TAX LAW § 420.1 (1972).
11. Walz, 397 U.S. at 674-75.
12. Id. at 676.
13. Id. at 675-76.
14. Id. at 678.
15. Id.
16. Id. at 676-78 (quoting Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922)).
17. Despite its broad dicta, the Court limited its holding "to the New York statute." Id. at 680. In recent cases involving exemptions from federal income tax and from state sales and use taxes, the Court has emphasized the narrowness of the Walz holding. See Jimmy Swaggart Ministries v. Board of Equalization, 110 S. Ct. 688 (1990); Texas Monthly v. Bullock, 489 U.S. 1 (1989); Bob Jones Univ. v. United States, 461 U.S. 574 (1983). The constitutional status of state tax exemptions of church property is thus not so hermetically sealed as some contemporary commentators seem to believe.
While the Court's conclusion on so tender and tempestuous an issue may have been inevitable, its arguments are not ineluctable.

The Court's neutrality argument does not address whether an exemption given for religious uses of church property is constitutionally permissible. The Court argues that, because the state exempts properties devoted to charitable and other welfare uses, its exemption of church property devoted to religious uses is also constitutionally permissible. The United States Constitution, however, permits government establishments of charity. It forbids government establishments of religion. That exemptions are accorded in a neutral manner for various nonreligious uses of property, therefore, has little bearing on the constitutionality of exemptions for religious uses of property.

The Court's separatism argument is contrived. The Court divines a list of interactions between church and state that taxation of church property may occasion—tax valuations, foreclosures, and others. But one can devise a list of interactions that tax exemption does occasion—reapplications for exemption, reviews of past uses, reports on present uses, and others. The Court argues that such interactions will result in an unconstitutional "entanglement" between church and state. But the constitutionality of more intrusive and immediate interactions between the two institutions has been consistently upheld against establishment clause challenges, when, for example, church properties are zoned, church buildings are landmarked, church societies are incorporated, church employers are audited, church broadcasters and publishers are regulated, and intrachurch disputes are adjudicated. The expansion of

18. Numerous cases have upheld various regulations of churches against both establishment clause and free exercise challenges. See, e.g., Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290 (1984) (finding a religious foundation subject to the Fair Labor Standards Act); Jones v. Wolf, 443 U.S. 595 (1979) (allowing intrachurch property disputes to be resolved based on neutral principles of property law); First Assembly of God v. City of Alexandria, 739 F.2d. 942 (4th Cir.), cert. denied, 469 U.S. 1019 (1984) (revoking parochial school's special use permit for failure to obey zoning restrictions); Lakewood Ohio Congregation of Jehovah's Witnesses v. City of Lakewood, 699 F.2d 303 (6th Cir.), cert. denied, 464 U.S. 815 (1983) (upholding a general zoning ordinance that excluded churches from a large portion of residential areas); Scott v. Rosenberg, 702 F.2d 1263 (9th Cir. 1983) (holding a church pastor subject to FCC rules); Equal Employment Opportunity Comm'n v. Pacific Press Publishing Ass'n, 676 F.2d 1272 (9th Cir. 1982) (holding a religious publisher subject to Title VII restrictions against sexual discrimination); United States v. Coates, 692 F.2d 629 (9th Cir. 1982) (requiring a church to produce financial records and corporate minute books for an IRS audit); United States v. Norcutt, 680 F.2d 54 (8th Cir. 1982); Costello Publishing Co. v. Rotelle, 670 F.2d 1035 (D.C. Cir. 1981) (subjecting a religious organization to general antitrust laws); King's Garden v. FCC, 498 F.2d 51 (D.C. Cir.), cert. denied, 419 U.S. 996 (1974) (holding a religious broadcaster subject to the license restrictions set by the FCC); Amico v. New Castle County, 101 F.R.D. 472 (D. Del.), aff'd, 770 F.2d 1066 (3d Cir. 1984) (upholding a zoning ordinance that protected churches and schools from adult entertainment centers); Dolter v. Wahlert High School, 483
the forms and the functions of church and state has made such interactions between these two institutions both inevitable and necessary. The incidental and isolated interaction that would result from the taxation of church property is trivial by comparison.

The Court's historical argument depends too heavily upon questionable assertions of fact and selective presentation of evidence. The Court asserts that tax exemptions of church property have been adopted by common consent for more than two centuries. But a strong vein of criticism has long accompanied the practice in America. The Court asserts that such exemptions have not "led to" an establishment of religion. But historically these exemptions were among the privileges of established religions, while dissenting religions were taxed; the issue is whether such exemptions have shed the chrysalis of establishment. The Court adduces numerous examples of earlier tax laws that exempt church property. But it ignores the variety of theories that supported these laws. The Court asserts that such exemption laws "historically reflect the concern of [their] authors" to avoid the "dangers of hostility to religion inherent in the imposition of property taxes." But little evidence from congressional and constitutional debates on tax exemption supports this assertion.

F. Supp. 266 (N.D. Iowa 1980) (holding a sectarian high school subject to Title VII restrictions against discrimination based on sex, race, color, or national origin).


19. Walz, 397 U.S. at 678.
20. See infra notes 62-71 and accompanying text.
21. Walz, 397 U.S. at 678.
22. See infra notes 28-44 and accompanying text.
23. At one point in its opinion, the Court specifically disavowed one of the main traditional theories supporting these exemptions:

We find it unnecessary to justify the tax exemption [of church property] on the social welfare services or "good works" that some churches perform for parishioners and others... Churches vary substantially in the scope of such services... To give emphasis to so variable an aspect of the work of religious bodies would introduce an element of governmental evaluation and standards as to the worth of particular social welfare programs, thus producing the kind of continuing day-to-day relationships which the policy of neutrality seeks to minimize.

Walz, 397 U.S. at 674. Cf. infra notes 80-88 and accompanying text (on the "social benefits" theory of tax exemption).

24. Walz, 397 U.S. at 673.
This Article briefly retraces the history of tax exemption of church property in America and reconsiders the constitutionality of such exemptions in light of recent first amendment opinions and commentaries. Part II argues that contemporary laws of tax exemption of church property are rooted in both a common law tradition and an equity law tradition and analyzes the tension that this dual pedigree has introduced into such exemption laws. Part III analyzes new trends in litigation over the tax exemption of church property, particularly in cases raised by new religious groups who have sought the same exemptions enjoyed by traditional religious groups. Part IV poses an alternative to the current reforms of tax exemption of church property and analyzes the alternative provisionally in light of recent interpretations of the first amendment religion clauses.

II. 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 law tradition, which accorded such exemptions to all churches that dispensed certain social benefits. 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 that manifest themselves in both historical

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26. I am using the term “common law” not as an antonym for “statute” but as a generic term to describe the English and colonial American customs and statutes enforced by various 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. *See also infra* note 45 (discussing colonial equity).
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and contemporary property tax exemption laws. The following section analyzes the development of these two exemption traditions in the American colonies in light of English precedents and illustrates their manifestations in the theory and law of church property exemptions in the nineteenth and early twentieth centuries.\(^{27}\)

A. TAX EXEMPTIONS OF CHURCH PROPERTY IN THE COLONIES

1. Tax Exemptions at Common Law

The common law that prevailed in most seventeenth century American colonies treated religion as an affair of 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 both common law and commissary courts.\(^{28}\) 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.\(^{29}\) Tax exemption of church property was part of this broader set of ecclesiastical regulations.

27. Two related distinctions that are currently commonplace were not so clear historically. First, the line between property taxation and income taxation was not always so sharply drawn. Particularly in rural areas, the income of persons was often so inextricably tied to their property that taxation of one was tantamount to taxation of the other. Second, the distinction between taxation of the property itself \((in \text{ rem})\) taxation) and of the person or entity occupying the property \((in \text{ personam})\) taxation) was not always sharply drawn. Tax liability sometimes ran with the land and sometimes followed the prior holder. The following discussion therefore treats certain aspects of personal income taxation as well. See generally J. Hellerstein & W. Hellerstein, State and Local Taxation: Cases and Materials 115-20 (5th ed. 1988) (providing brief historical discussion of the development of property taxation in the United States); Stimson, The Exemption of Property from Taxation in the United States, 18 Minn. L. Rev. 411 (1934) (providing historical and empirical analysis of property tax exemptions in the United States).


29. The following summary is drawn principally from the English sources cited supra note 28 as well as 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. I have drawn on the following collection of colonial laws and other documents: The Public Records of the Colony of Connecticut, 1689-1706 (C. Hoadly ed. 1868) [hereinafter Connecticut Records]; Connecticut Historical Society, Collections of the Connecticut
The common law prescribed 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 foreclosed from most political and ecclesiastical offices and various social and economic opportunities.30

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 vestries and the prerogatives of the consistories. It defined the duties of the clerics and the amount of their compensation. It dictated the form of the church corporation and the disposition of its endowments.31

30. See, e.g., LAWS OF MASSACHUSETTS, supra note 29, at 1-2, 24, 26; 1 MASSACHUSETTS RECORDS, supra note 29, at 87, 142, 168; 2 id. at 320; 1 NEW HAMPSHIRE COLLECTION, supra note 29, at 326-27; 1 RECORDS OF NORTH CAROLINA, supra note 29, at 634-44, 885; STATUTES OF SOUTH CAROLINA, supra note 29, at 236; 1 STATUTES OF VIRGINIA, supra note 29, at 121-23, 155, 532-33. 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, 1 W. & M., ch. 18, entitled Protestant dissenters from the established Church of England to worship without interference, provided they swore oaths of allegiance to the Trinity, Scripture, and the Crown. Roman Catholics and Jews 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 charter provisions that required officials to respect "all and singular Freedoms, Liberties, Franchises, Privileges, Immunities, Benefits, Profits, and Commodities" then or thereafter existing. Third Charter of Virginia—1611-1612, reprinted in 7 THE FEDERAL AND STATE CONSTITUTIONS: COLONIAL CHARTERS AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, ANDColonies 3802 (F. Thorpe ed. 1909) [hereinafter COLONIAL CHARTERS]. See similar language in Charter of Massachusetts Bay—1629, reprinted in 3 id. 1846, 1853, and the other colonial charters. See further discussion in E. BROWN & W. BLUME, BRITISH STATUTES IN AMERICAN LAW 1776-1836 (1964) (discussing Toleration Act). The Toleration Act was sometimes also specifically adopted by colonial statute. See, e.g., 3 STATUTES OF VIRGINIA, supra note 29, at 171.

31. RECORDS OF NORTH CAROLINA, supra note 29, at 207; STATUTES OF SOUTH CAROLINA, supra note 29, at 236; 1 STATUTES OF VIRGINIA, supra note 29, at 122, 155, 204, 240, 250, 433. Prior to the 18th century, magistrates in Puritan New England accorded the congregational
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 these properties to the established church for meetinghouses, parsonages, cemeteries, and glebe lands.\(^{32}\) Stern criminal laws sanctioned interference with the enjoyment of these properties. Special property laws prohibited parties from gaining prescriptive or security interests in them.\(^{33}\) Magistrates levied various taxes to maintain the property and support the clergy of the established church, such as “tithe rates” to meet general ecclesiastical expenses, “church rates” to pay for the repair or improvement of existing properties, and a host of minor parish fees.\(^{34}\) 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 nonconformists were thus forced to pay for the support of churches and clergies that they considered heretical or even heathen.

The common law also governed the taxation of church properties. In both England and 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 presumptively taxable at common law, unless it had been specifically exempted by legislative act.\(^{35}\) Colonial legislatures readily accorded such privileges to the properties of political 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.” \textit{Laws of Massachusetts, supra note 29, at 18; Cambridge Synod and Platform (1648), reprinted in The Creeds and Platforms of Congregationalism ch. 17 (W. Walker ed. 1893).} For English antecedents and analogues, see the excellent discussion in J. Paterson, \textit{supra note 28, at 370-426.}

\(^{32}\) See, e.g., \textit{2 Statutes of Virginia, supra note 29, at 261; 3 id. at 152.}


\(^{34}\) See, e.g., \textit{Connecticut Records, supra note 29, at 59; 1 id. at 111; Laws of Massachusetts, supra note 29, at 9-10; 1 Statutes of Virginia, supra note 29, at 122-23, 128, 159, 207, 220, 401.} For English antecedents, see 2 & 3 Edw. 6, ch. 13; 1 Eliz., ch. 4; 26 Hen. 8, ch. 3. For discussion of the complex system of tithing in England, see 3 R. Burn, \textit{supra note 28, at 373-502; J. Godolphin, supra note 28, at 344-464.}

\(^{35}\) The importance of this new presumption—first articulated at common law after the Protestant Reformation—was noted by Richard Burn:
officials and to those of immigrants, indigents, and incapacitated persons. 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 appropriate “religious uses” prescribed by ecclesiastical law, such as chapels, parsonages, glebes, and consecrated cemeteries, were generally exemptible. Established church

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. 3 R. BURN, supra note 28, at 204 (quoting J. GODOLPHIN, supra note 28, at 194-95). See also Web v. Bachellor, 3 Keb. 476 (1674) (Hale, C.J., holding that a “[p]arson is not exempted from any new charge for repairing highways”); E. COKE, supra note 28, at 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”); 4 W. & M., ch. 1 (taxes levied on “every person spiritual and temporal of what estate or degree soever” with no “manner of Liberties, Privileges, or Exemptions” granted). See further discussion of the new presumption that the property and the clergy of all churches be taxed in Adler, supra note 25, at 45; 2 S. DOWELL, A HISTORY OF TAXES AND TAXATION IN ENGLAND FROM THE EARLIEST TIMES TO THE YEAR 1885 32 (1884); L. ECHARD, HISTORY OF ENGLAND 129-30 (1718); S. MORGAN, THE HISTORY OF PARLIAMENTARY TAXATION IN ENGLAND 224-27 (1911).

Colonial legislatures apparently accepted this new English presumption. They started their tax provisions with instructions to “tax all the lands in the several plantations,” 2 CONNECTICUT RECORDS, supra note 29, at 294, or to raise “publique leavies and county leavies . . . by equal proportions out of all the visible estates in the colonies,” 1 STATUTES OF VIRGINIA, supra note 29, at 305-06. They then listed copiously the properties and persons “immune,” “relieved,” or “exempt” from payment of the tax, including the properties of the government and of political officials. See, e.g., 2 MASSACHUSETTS RECORDS, supra note 29, at 239-40; 3 id. at 125; THE MASSACHUSETTS TAX VALUATION LIST OF 1771 (B. Pruitt ed. 1978) [hereinafter MASSACHUSETTS TAX]; 1 RECORDS OF NORTH CAROLINA, supra note 29, at 185; 3 STATUTES OF SOUTH CAROLINA, supra note 29, at 409; 1 STATUTES OF VIRGINIA, supra note 29, at 242.

I have found 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 239 (reprint ed. 1969); accord D. ROBERTSON, SHOULD CHURCHES BE TAXED? 51 (1968); see also W. TORPEY, supra note 3, at 171 (“The unwritten custom of church exemption preceded any legal formulation of the doctrine through constitutional or statutory provisions.”). Zollmann’s assertion, widely accepted as authoritative by courts and commentators alike, is based upon the undocumented dicta of a few 19th-century state supreme court cases that upheld church property exemptions against constitutional challenges. See, e.g., Yale Univ. v. Town of New Haven, 71 Conn. 316, 329-39, 42 A. 87, 91-95 (1899); All Saints Parish v. Inhabitants of Brookline, 178 Mass. 404, 411-16, 59 N.E. 1003, 1003-04 (1901); Franklin St. Soc’y v. Manchester, 60 N.H. 342, 346-51 (1880).

36. See, e.g., 3 RECORDS OF NORTH CAROLINA, supra note 29, at 409; 1 id. at 185; 1 STATUTES OF VIRGINIA, supra note 29, at 242; MASSACHUSETTS TAX, supra note 35, passim. Exemptions for new immigrants were sometimes required by the founding colonial charter. See, e.g., Charter of Massachusetts Bay—1629, reprinted in 3 COLONIAL CHARTERS, supra note 30, at 1846, 1859.
properties, however, that lay vacant, that were devoted to nonreligious uses, or that were held by unincorporated religious bodies were generally taxable.\(^{37}\) Properties of dissenting religious groups were taxed regardless of their use.\(^{38}\) Properties held personally by ministers were taxed in some colonies but exempted in others, particularly in the later colonial period.\(^{39}\) These latter colonies also exempted the properties held personally by political magistrates.\(^{40}\)

Second, these established church properties were given general exemptions only from the ecclesiastical taxes that were levied for the church's own maintenance and use. To impose these taxes on established church properties would have been but "an idle ceremony."\(^{41}\)

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\(^{37}\) The statutes often exempted property "under improvement," that is, property that was built up and occupied. See, e.g., 4 MASSACHUSETTS RECORDS, supra note 29, at 486; the Massachusetts Taxation Act of 1767, reprinted in MASSACHUSETTS TAX, supra note 35, at 3. On the restriction of incorporation, see generally Kauper & Ellis, Religious Corporations and the Law, 71 MICH. L. REV. 1499, 1505-07 (1973). For English antecedents and analogues, see 3 R. BURN, supra note 28, at 204; E. COKE, supra note 28, at 4, 709; J. GODOLPHIN, supra note 28, at 194.

\(^{38}\) By the middle of the 18th century, legislatures in the northern colonies had exempted Protestant dissenters (though not Catholics, Jews, or other non-Protestant religious groups) from these ecclesiastical taxes. In Puritan Connecticut and Massachusetts, for example, Anglicans were exempted in 1727 and Quakers and Baptists in 1729. See Jones, History of Taxation in Connecticut, 1636-1776, 14 JOHNS HOPKINS U. STUD. HIST. & POL. SCI. 1, 401 n.1 (1896); see also 1 W. MCLoughlin, NEW ENGLAND DISSENT 1630-1833: THE BAPTISTS AND THE SEPARATION OF CHURCH AND STATE 225-43, 263-77 (1971) (discussing the first laws exempting dissenters and Connecticut's exemption from religious taxes). Such exemptions were not automatically accorded, however, despite the statutes. See, e.g., Green v. Washburn (1769), reported in 2 LEGAL PAPERS OF JOHN ADAMS 32-47 (L. Wroth & H. Zobel ed. 1965). The southern Anglican colonies, by contrast, granted no such exemptions to Protestant dissenters until after the Revolutionary War. See, e.g., 9 STATUTES OF VIRGINIA, supra note 29, at 164.

\(^{39}\) See, e.g., LAWS OF MASSACHUSETTS, supra note 29, at 10; 4 MASSACHUSETTS RECORDS, supra note 29, at 486; 8 NEW HAMPSHIRE COLLECTION, supra note 29, at 25 (discussing minister's salaries and exemptions). For those ministers with modest estates, this was an attractive option. The exemption of the property held privately by ministers was not, as some commentators have argued, equivalent to the exemption of the property held corporately by the church. Both English and colonial law drew a sharp distinction between the private property a minister held as "a person" and the corporate property he held as "a religious corporation sole." See J. GODOLPHIN, supra note 28, passim; Kauper & Ellis, supra note 37, at 1506; C. Zollmann, supra note 35, at 43.

\(^{40}\) See, e.g., LAWS OF MASSACHUSETTS, supra note 29, at 10; 4 MASSACHUSETTS RECORDS, supra note 29, at 486; 8 NEW HAMPSHIRE COLLECTION, supra note 29, at 33; 2 STATUTES OF VIRGINIA, supra note 29, at 359-60.

\(^{41}\) C. Zollman, supra note 35, at 239.
special assessments, hearth taxes, window taxes, and other occasional rates on realty and personality, were often collected from the properties of the established church as from other properties. 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.

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.

This common law pattern of tax exemptions and subsidies could be readily rationalized when the state was responsible for the propagation and protection of one established religion to the exclusion of others. Established church corporations were effectively state agencies, and their

42. See, e.g., Benson, supra note 3, at 21-29; B. Bond, The Quit-Rent System in the American Colonies 221, 255, 300 (1919); A. Smith, The Quit-Rents of Virginia 1704 13, 68, 75, 98 (1957). Even a cursory glance at some of the records of the Anglican parishes and Puritan congregations suggests that such tax payments were made or at least budgeted. See, e.g., Records of the First Congregational Church of Hartford 34, 56, 99, 109 (1876); The Vestry Book of Saint Peter's, New Kent County, Virginia 170, 175, 222 (G. Chamberlayne ed. 1905). In post-Reformation England the established Anglican church and its clergy were subject to both special ecclesiastical and general civil taxes. Ecclesiastical first-fruits and tenths, which traditionally had been paid to the Pope, were paid to the English Crown, and a special civil court, the Court of First-Fruits and Tenths, was established to oversee collection of this rate. Civil taxes were levied on the fees collected by the church for baptisms, marriages, memorial services, and burials. Acts of Parliament included the properties of both the established and dissenting churches among those subject to the general poll, hearth, and land taxes. Municipal regulations included church properties among those subject to assessments levied for the construction and maintenance of public works. The repeated demands, especially by the Stuart monarchs, for "subsidies," forced loans, and other "extraordinary royal exactions" sometimes fell even more heavily on the clergy and church properties than on other subjects and their properties. See, e.g., 3 R. Burn, supra note 28, at 205; E. Coke, supra note 28, at 709; 1 W. Hawkins, Abridgement of the First Part of Coke's Institutes 204 (1711); Morgan, The History of Parliamentary Taxation in England, in Williams College David A. Wells Prize Essays 224-30 (1911).

43. In 1702 Connecticut granted exemption to all properties devoted to "ecclesiastical, educational, and charitable uses." 8 Connecticut Collection, supra note 29, at 133. In 1739 South Carolina similarly exempted from assessment "lands whereon any churches or other buildings for divine worship or for free schools are erected or built, and lands appurtenant to such churches and buildings and free schools." Stimson, The Development of Tax Exemption in South Carolina, 4 S.C.L.Q. 396, 400 (1952) (quoting 3 Statutes at Large, of S.C., Columbia, 1836, at 528).

44. 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 12-53 (1839). Similarly, in England church properties were often subject to taxes, and the clergy was often subject to forced loans and subsidies during times of war. See supra note 42 and accompanying text.
clergy were 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, the church corporations received the tax support, tax exemptions, and other protections and privileges normally afforded to 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 the established religion and devoted their properties to prescribed religious uses. Thus, the properties of dissenting or wayward churches and those properties devoted to nonreligious uses were taxable. These privileges also could be accorded only in modest proportion lest the established church grow 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\(^{45}\) 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 specifically 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 (the "Statute"). The Statute regarded

\(^{45}\) On the development of equity courts in the colonies, see the carefully documented study in Wilson, Courts of Chancery in America—Colonial Period, 18 AMERICAN L. REV. 226 (1884); see also 1 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA 56 (7th ed. 1857) (discussing colonial equity court development). 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 in England, although the general courts often heard equity cases as well. See O. CHITWOOD, JUSTICE IN COLONIAL VIRGINIA 48 (reprint ed. 1971); Wilson, supra, at 239-55. The Puritan New England colonies apparently were more fearful of the discretion of traditional chancery courts in England and thus resisted the establishment of separate equity courts in their jurisdictions until the end of the 17th century. Equitable powers, however, were vested in the governor and deputy-governor as well as the Court of Assistants and the General Council and their delegations. See W. DAVIS, HISTORY OF THE JUDICIARY OF MASSACHUSETTS 47-48, 55, 68-72 (1900); Wilson, supra, at 226-39. To economize the language, I use the generic term "equity court" here to refer to both formal chancery courts and other institutions and officials that exercised equitable powers in the colonies.
as charitable all activities that supported orphans, apprentices, or scholars, sustained public works such as highways, prisons, and bridges, subsidized schools and universities, or 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, which included any activity that redounded to the benefit of an indefinite number of persons, either by bringing their minds or hearts 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 otherwise lessening the burdens of government.

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

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46. 43 Eliz., ch. 4, repealed in 51 & 52 Vict., ch. 42, § 13.
48. J. Pomeroy, *A Treatise on Equity Jurisprudence as Administered in the United States of America* §§ 1019-1020 (5th ed. 1941); see also C. Crowther, supra note 47, at 29 ("The shift from a religious to a public benefit rationale for charity changed the focus of the inquiry. Whereas it was previously assumed [before the Statute of Charitable Uses] that any gift of land or money to charity was automatically 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."); J. Story, *supra* note 45, § 1164 (citing numerous American and English cases).
49. See G. Jeremy, *supra* note 47, at 237; J. Pomeroy, *supra* note 48, §§ 1021-1024; J. Story, *supra* note 45, § 1164. See also Gilmour v. Coats, 1949 A.C. 426, 457 ("If the law before the Reformation accepted gifts for religious purposes as charitable simply because of their piety and without further consideration of the question of public benefit I think that it did so on grounds which are no longer available."). The drafters of the Statute of Charitable Uses intentionally distinguished charitable uses from religious uses. This was done in part to circumvent the infamous Chantryes Act of 1547, 1 Edw. 6, ch. 14, which authorized the confiscation and reallocation of all property devoted to "superstitious uses." "[Religious uses were thus] on purpose omitted in the penning of the act," wrote Sir Francis Moore in his famous reading on the Statute of Charitable Uses, "lest the gifts intended to be employed in purposes grounded on charity might, in change of time, contrary to the mind of the giver, be confiscated into the king's treasury; for religion, being variable according to the pleasures of succeeding princes, that which at one time is held for orthodox may, at another be accounted superstitious; and then such lands are forfeited as appears in 1 Ed. VI c. 14." G. Duke,
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 the institutions 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.  

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 charitable uses and other public concerns." 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, commissioners, or attorneys general 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 in any given year for the equity court to afford well-established and well-endowed charities only modest subsidies and minimal  

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52. 3 CONNECTICUT RECORDS, supra note 29, at 158.
exemptions but to afford new and impoverished charities plentiful subsidies and plenary exemptions from tax.\textsuperscript{53}

This law of equity provided colonial churches with a second basis for receiving tax exemptions for their properties and tax subsidies for their activities. 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 in many 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 at equity.\textsuperscript{54}

\textsuperscript{53} See L. SHELFORD, supra note 50, at 204-82; G. JONES, supra note 49, at 39.

\textsuperscript{54} See Adler, supra note 25, at 76; 1 P. BRUCE, supra note 51, at 73-93, 163-93; R. KELSO, THE HISTORY OF PUBLIC POOR RELIEF IN MASSACHUSETTS 1620-1920 (1922). In the Anglican South primary responsibility for social welfare fell to the established churches. See, e.g., 1 STATUTES OF VIRGINIA, supra note 29, at 242. The annual budgets of the vestries thus included large expenditures for poor relief, education, and other forms of welfare for both parishioners and nonparishioners of the church. See, e.g., PARISH REGISTER OF CHRIST CHURCH, MIDDLESEX COUNTY, VIRGINIA 1653-1812 (C. Chamberlayne ed. 1975); PARISH REGISTER OF ST. PETER'S, NEW KENT COUNTY, VIRGINIA 1680-1787 (C. Chamberlayne ed. 1975); VESTRY BOOK OF PETSWORTH COUNTY, VIRGINIA 1677-1793 (C. Chamberlayne ed. 1933); VESTRY BOOK OF ST. PETER'S PARISH, NEW KENT COUNTY, VIRGINIA 1682-1758 (C. Chamberlayne ed. 1975). In the Puritan North primary responsibility for social welfare fell to the municipalities and families, though the congregational churches afforded some relief to parishioners in peril. See L. WRIGHT, THE CULTURAL LIFE OF THE AMERICAN COLONIES, 1607-1763 23 (1957); R. KELSO, supra, at 89.
Established churches, however, held no monopoly on charitable activity. Nonconformist churches and private philanthropic groups under their sponsorship were equally active. The nonconformists often used their meetinghouses and parsonages for night shelters, relief stations, and refuge places. Pennsylvania Quakers and, later, Roman 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 later support of some of the great eastern universities and colleges. In return, these nonconformist churches and the charitable organizations that they established received tax exemptions and subsidies from the equity courts.55

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 nonconformists.56 Colonial 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

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56. Various statutes dating from the reign of Edward VI authorized the Crown and the chancellor to direct and appoint any property donated in support of “superstitious” (false or nonestablished) religious uses to “proper” charitable purposes. Superstitious uses included donations in support of priests or chaplains to say mass, to have or maintain perpetual obits, lamps, or torches to support someone to pray for the soul of a dead person, and similar uses. On the English background, see G. Jones, supra note 49, at 11-15, 82-87; J. Pomeroy, supra note 48, § 1021; J. Story, supra note 45, § 1164. 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 49-56 (1898). In general, however, American equity courts both before and after the American Revolution spurned the doctrine.
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.57 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."58 Accordingly, the state legislatures and judiciaries were instructed that "all religious societies or bodies of men heretofore united or incorporated for the advancement of religion or learning, or for other pious and charitable purposes, shall be encouraged and protected in the enjoyment of the privileges, immunities, and estates, which they were accustomed to enjoy."59 Thus, in most states religious bodies that were previously united or incorporated received the traditional exemptions afforded by the common law and equity law courts.60

57. See U.S. CONST, amend. I, cl. 1 ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"). In Cantwell v. Connecticut, 310 U.S. 296 (1940), the free exercise clause was incorporated into the due process clause of the fourteenth amendment and made applicable to the states. In Everson v. Board of Education, 330 U.S. 1 (1947), the establishment clause was similarly incorporated.

58. MASS. CONST, pt. II, ch. VI, art. VI (1780), reprinted in 3 COLONIAL CHARTERS, supra note 30, at 1910. Similar language appears in the early constitutions and statutes of other states. See, e.g., DEL. CONST. art. 25 (1776); N.H. CONST. art. XC (1792); N.J. CONST. § 22 (1776); R.I. CONST. art. 14, § 1 (1842); S.C. CONST. art. VII (1790). For an exhaustive analysis of these and other provisions, see E. BROWN & W. BLUME, supra note 30, at 47-200.


60. For a detailed state-by-state analysis of the restrictions on religious incorporation, see R. TYLER, AMERICAN ECCLESIASTICAL LAW: THE LAW OF RELIGIOUS SOCIETIES, CHURCH GOVERNMENT AND CREEDS, DISTURBING RELIGIOUS MEETINGS, AND THE LAW OF BURIAL GROUNDS IN THE UNITED STATES 44-349 (1866). See also Kauper & Ellis, supra note 37, at 1505. A convenient summary of the state laws on tax exemption of church personality and realty is provided in Wolcott, Report on Direct Taxes Communicated to the House of Representatives, December 14, 1796, reprinted in 1 AMERICAN STATE PAPERS (FINANCE), Class 3, 414-41 (1858).

Despite its enthusiastic endorsement of religious freedom, the state of Virginia did not deal kindly with the Episcopal successors of the Anglican church. Prompted by Baptist groups who sought to extirpate all vestiges of establishment, the Virginia legislature revoked the new corporate charter of the Episcopal Church in 1786 and ordered the confiscation of several thousand of acres of glebe lands in 1799. The corporate charter was never restored; indeed, religious corporate charters
Three provisions in the new state constitutions and their amendments, however, ultimately provided the ground for challenge to the colonial pattern of tax exemption of church property.

1. **Disestablishment of Religion**

   The first challenge was posed by state constitutional prohibitions on religious establishment. These prohibitions undercut the authority of government officials to support 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 public official. The church was no longer a subsidized state agency. The meetinghouse was no longer a public property.61

   These disestablishment provisions rendered the traditional common law exemptions of church property vulnerable to attack. The establishment rationale on which these exemptions had been based was no longer available, and no other consistent 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 antiexemption case still today.

   Such exemptions, the critics argued, favor religious groups over nonreligious groups. To exempt owners of religious properties from their portion of the cost of state services and protections is not only to subsidize them but also to penalize the owners of nonreligious properties whose tax burdens are proportionately increased. This form of religious

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61. New Jersey was the first of the former colonies to disestablish religion by constitutional provision. *See* N.J. CONST. § 19 (1776). Massachusetts was the last. *See* MASS. CONST. art. 11 (1833). The religion clauses of the first amendment to the United States Constitution had no effect on state tax exemption policies, for the first amendment was understood to be binding only on the federal government ("Congress") alone. *See*, e.g., Letter from Thomas Jefferson to Rev. Samuel Miller, *reprinted in 11 The Works of Thomas Jefferson* 7-9 (P. Ford ed. 1904-05); Permoli v. Municipality No. 1 of New Orleans, 44 U.S. (3 How.) 589, 609 (1845). Indeed, in 1875 the proposed Blaine Amendment to the United States Constitution, which would have provided that "no state shall make any law respecting an establishment of religion or prohibiting the free exercise thereof" and would have prohibited tax exemptions of church property on its face was rejected. *See* Meyer, *The Blaine Amendment and the Bill of Rights*, 64 Harv. L. Rev. 939, 941 (1951) (emphasis added).
subsidy and support, albeit indirect, could be countenanced under the disestablishment provisions of the state constitutions.62

Furthermore, the critics averred, 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.”63 The disestablishment provisions, if they permit any government benefits to religion, mandate uniformity and neutrality in such beneficial treatment. The inequality and disparity in the benefits afforded religious groups under property tax exemption laws, therefore, cannot be countenanced.64

Finally, the critics argued, such exemptions encourage the conflation of church and state. The “silent accumulations of [church] property” occasioned by the laws of tax exemption and religious incorporation, James Madison warned, will inevitably result in “encroachments by Ecclesiastical Bodies” upon the public square and the political process.65 Several decades later, Ulysses S. Grant similarly cautioned that tax exemptions had allowed churches to accumulate such “vast amounts of untaxed property” and to aggregate such vast political power that “sequestration without constitutional authority” and “bloody” confrontation would eventually ensue.66 “The separation of


63. KENTUCKY RECORDS, supra note 1, at 2425 (comments of Rep. Sachs).

64. See J. QUINCY, TAX EXEMPTION: NO EXCUSE FOR SPOLIATION 8 (n.d.).

65. Fleet, Madison’s “Detached Memoranda,” 3 WM. & MARY Q., 554-60 (1946). Madison manifested similar fears as fourth president of the United States. In a message accompanying his veto of a bill to incorporate the Protestant Episcopal Church in Alexandria, Virginia, Madison wrote,

The bill exceeds the rightful authority to which governments are limited by the essential distinction between civil and religious function. [T]he bill vests in the said incorporated church an authority to provide for the support of the poor and the education of poor children of the same, an authority which . . . would be a precedent for giving to religious societies as such a legal agency in carrying into effect a public and civil duty.


Church and the State" required that all "legal instruments encouraging ecclesiastical aggrandizement of wealth and power," including tax exemptions, be "expunged."  

These criticisms of the traditional exemptions of church property were not just isolated musings. In the middle decades of the nineteenth century, these criticisms appeared rather regularly in editorials, pamphlets, and petitions. Legislative assemblies and constitutional conventions in Virginia, Pennsylvania, Massachusetts, Ohio, Indiana, Kentucky, and South Carolina debated proposed bills and constitutional amendments that would have outlawed such exemptions. Representative James G. Blaine of Maine proposed a similar amendment to the United States Constitution that was narrowly defeated. State courts occasionally faced similar constitutional arguments—despite the difficulty plaintiffs encountered in gaining standing to litigate such constitutional claims.

paid no taxes, municipal or State, amounted to about $83,000,000. In 1860 the amount had doubled; in 1875 it is about $1,000,000,000. By 1900, without check it is safe to say this property will reach a sum exceeding $3,000,000,000. So vast a sum, receiving all the protection and benefits of Government without bearing its proportion of the burdens and expenses of the same, will not be looked upon acquiescently by those who have to pay the taxes."  


67. Grant Message, supra note 66. President Garfield made a similar comment: "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; for if you exempt the property of any church organization, to that extent you impose a tax upon the whole community." Quoted by J. Morton, supra note 62, at 63.

68. See J. Morton, supra note 62, at 63; D. Robertson, supra note 35, at 69.

69. For a detailed state-by-state account, see C. Antieau, P. Carroll & T. Burke, Religion Under the State Constitutions 120-72 (1965); B. Moll, supra note 25, at 33.

70. The House of Representatives approved Rep. Blaine's original proposed 16th amendment, which provided, inter alia, that "no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect or denomination; nor shall any money so raised or lands so devoted be divided between religious sects or denominations." 4 Cong. Rec. 5190 (1876). The representatives seemed to have assumed in their debate that such amendment would prohibit any forms of direct tax subsidies and indirect tax exemptions for religious groups. Id. at 5190-94. The Senate, accordingly, appended the proposed amendment with the caveat that "it shall not have the effect to impair the rights of property already vested." 4 Cong. Rec. 5453 (1876). After considerable debate, the proposed amendment was ultimately defeated in the Senate. Id. at 5595. See further discussion in Meyer, supra note 61. Though it failed in Congress, various portions of the Blaine Amendment ultimately found their way into 29 state constitutions between 1877 and 1917. See Gross, Relationship of Church and State, Wilson Libr. Bull. 3, March 1967.

71. Though critical of exemptions, none of these opinions held such exemptions unconstitutional under the state establishment clauses. See, e.g., Trustees of Griswold College v. State, 46 Iowa 275, 282 (1877); State v. Collector of New Jersey, 24 N.J.L. 108, 120-121 (1853); Congregational
2. **Truncation of Equity**

The second challenge to the colonial law of tax exemption of church property was posed by state constitutional mandates to revise or revoke English statutes. Most state constitutional conventions had initially received and ratified such statutes without amendment or emendation, but the state legislatures were empowered to “alter or repeal” such statutes “as circumstances demanded.” As nationalist sentiment became more strident and judicial criticisms of English law grew more sharp, legislatures began to respond. Virginia, Maryland, Delaware, New York, New Jersey, Ohio, Kentucky, and Michigan appointed committees to review English statutes and precedents that had traditionally governed the colonies and to purge those that were found to be “odious, obsolete, or obnoxious.”

Many British 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. 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 these courts had helped to devise. As a result, several states removed charitable institutions from the jurisdiction of equity courts and relieved these institutions of their equitable privileges. The special testamentary, procedural, and property privileges previously accorded charities were removed. The special tax subsidies

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Soc'y v. Ashley, 10 Vt. 241, 245 (1838). These and other courts, however, have persistently treated such exemptions as legislative privileges protected neither by state free exercise nor state impairment-of-contract provisions. See, e.g., Franklin St. Soc'y v. Manchester, 60 N.H. 342, 349-350 (1880).

72. See, e.g., MASS. CONST, pt. II, ch. VI, art. VI (1780); N.J. CONST. § 22 (1776).


74. The extent to which the equity courts' jurisdiction over charity was predicated on the Statute of Charitable Uses was the subject of considerable dispute in the early 19th century, particularly between United States Supreme Court Chief Justice Marshall and Justice Story. In Philadelphia Baptist Ass'n v. Hart's Executors, 17 U.S. (4 Wheat) 1 (1819), Chief Justice Marshall declared that such jurisdiction was based exclusively upon the Statute. In Vidal v. Executors of Stephen Girard, 43 U.S. (2 How.) 127 (1844), Justice Story sharply criticized Marshall's opinion and declared that such jurisdiction was based on long-standing custom that antedated the Statute. See H. MILLER, supra note 55, at 21-39.

75. For a careful state-by-state analysis, see Zollmann, The Development of the Law of Charities in the United States, 19 COLUM. L. REV. 91, 286 (1919). The Statute of Charitable Uses was ultimately revoked in California, Delaware, the District of Columbia, Indiana, Maryland, Michigan, Mississippi, New Jersey, New York, South Carolina, Tennessee, Virginia, and West Virginia. See generally Holland, supra note 47, at 207.
and tax exemptions were withdrawn. Courts also developed strict rules for the formation and functioning of new charitable institutions. Such institutions were required to procure corporate charters, provide detailed annual reports of their charitable activities, and limit severely their property and endowment holdings. 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.  

3. *Universality of Taxation*

A third challenge to the colonial law of tax exemption of church property was posed by state constitutional requirements that property taxes be "universally" applied. In the middle third of the nineteenth century, many state constitutional conventions thoroughly reformed their property taxation laws. The myriad species of special and sporadic taxes on realty and personalty were consolidated into a general annual tax on real property and a general *ad valorem* tax on various forms of personalty. The multiple layers of tax officials and tax offices were merged into more uniform state and municipal tax commissions. The antiquated tax valuation and tax assessment lists were thoroughly revised. The long lists of tax exemptions and immunities inherited from the colonial period were cast aside as unwieldy and unfair. The constitutions now started with the provision 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." The presumption was that all property was to

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


78. W. VA. CONST, art. VIII § 1 (1861/3); accord, Benson, *supra* note 3, at 34-47. By the end of the Civil War, at least 15 states had written such "universality" requirements into their constitutions. *Id.* at 42. Similar language appears in over 30 state constitutions today. See, e.g., M. BERNARD, *CONSTITUTIONS, TAXATION, AND LAND POLICY* (1979).

The presence of these "universality" provisions considerably weakens an argument that recent proponents of property tax exemptions have derived from Borris Bittker's famous analysis of income tax exemptions for religious groups. Concerning these income tax exemptions, Bittker argued: There is no way to tax *everything*; a legislative body, no matter how avid for revenue, can do no more than pick out from the universe of people, entities, and events over which it has
be universally taxed, and tax exemptions, including those for church properties, were clearly exceptions to generally applicable levies. These exemptions could be granted only if the "public welfare" would be advanced or if other "good and compelling reasons" could be adduced.79

C. THE RISE OF THE MODERN THEORY AND LAW OF TAX EXEMPTION OF CHURCH PROPERTY

The challenges posed by these state constitutional developments spurred proponents of tax exemption of church property into action. The establishment arguments against such exemptions 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 be 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 traditions of tax exemption in this effort but fused them. The basic exemption theory of each tradition was preserved but was cast in a more generic form. The basic exemption laws inherited from colonial times remained in place but were given more general application.

1. The Modern Theory of Tax Exemption of Church Property

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

jurisdiction those that, in its view, are appropriate objects of taxation. . . . Leaving churches outside the taxing boundary is no more an automatic violation of the establishment clause . . . than locating them within the taxing statute is an automatic violation of the free exercise clause.

Bittker, Churches, Taxes and the Constitution, 78 YALE L.J. 1285, 1288 (1969). Several writers have adduced this argument in support of property tax exemptions. See, e.g., Kelly, Tax Exemption and the Free Exercise of Religion, in RELIGION AND THE STATE: ESSAYS IN HONOR OF LEO PFEFFER 323 (J. Wood ed. 1985); P. SWORDS, CHARITABLE REAL PROPERTY TAX EXEMPTIONS IN NEW YORK STATE: MENACE OR MEASURE OF SOCIAL PROGRESS? 200 (1981). Bittker's argument, however applicable to income tax exemptions, does not apply so readily to property tax exemptions. The "universality" provisions in state constitutions require legislatures to tax all property and to justify all exemptions.

79. Benson, supra note 3, at 37.
"The policy on which the exemption of church property is granted," declared the Connecticut Supreme Court, "is simply the encouragement of religion." Churches served 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 or distress, beneficence to the destitute and poor"; without such acts and dispositions, a truly "civil society . . . could not endure." Churches inculcate public morality and teach chastity and continence, temperance and modesty, obedience and obligation, and 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." Churches enhance neighborhood values. Their "immaculate" buildings and grounds are aesthetically pleasing. They attract respected citizens and promote stability of neighborhood populations. Churches foster democratic principles and practices. They inspire citizens to participate in the political process and to vote for candidates. They instruct officials on moral principles and social needs. They preach against injustice by the authorities and insurrection by the masses. "Churches and religion, therefore," a Massachusetts tax commissioner wrote, "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."

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81. Trustees of the First Methodist Episcopal Church South v. City of Atlanta, 76 Ga. 181, 192-93 (1886), rev'd on other grounds sub nom., City of Atlanta v. First Presbyterian Church, 86 Ga. 730, 13 S.E. 252 (1890).
82. YMCA, 116 Ky. at 718, 76 S.W. at 523.
83. See, e.g., H. Foote, The Taxation of Churches 27-30 (1870); P. Schaff, Church and State in the United States 75 (1844).
84. See, e.g., Ward v. New Hampshire, 56 N.H. 508 (1876); T. Brown, Some Reasons for the Exemption of Church Property from Taxation 12 (1881).
85. H. Foote, supra note 83, at 19-20. See also A. Bledsoe, Shall Georgia Tax Church Property? 5 (1897) ("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 purposes of gain. [T]he church is built for the benefit of the public." (emphasis in original)).
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, and literary and literature societies. They discharge burdens of social welfare through their hostels and hospitals, almshouses and night shelters, counseling and crisis centers, and youth camps and retirement homes. They discharge burdens of foreign aid through their programs for foreign missions and disaster relief.\textsuperscript{86} One exuberant pamphleteer wrote that churches must be considered "the most charitable of charities."\textsuperscript{87} Through their voluntary social services, churches save the state enormous costs that "would otherwise be imposed upon the public . . . by general taxation."\textsuperscript{88} Tax exemption, proponents concluded, is a suitable quid pro quo for such services.

These new "state burden" and "social benefits" arguments in favor of tax exemption skillfully blended traditional arguments. The traditional common law theory taught that religious use exemptions were accorded to properties that discharged state burdens for the established religion. The traditional equity law theory 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 unwieldy broad category of charitable use exemptions.

\textsuperscript{86} See YMCA v. Douglas County, 60 Neb. 642, 83 N.W. 92 (1900); People ex rel. Seminary of Our Lady of Angels v. Barber, 49 N.Y. Sup. Ct. 27 (1886); M.E. Church, South v. Hinton, 92 Tenn. 128, 21 S.W. 321 (1893); C. Tobin, \textit{The Exemption from Taxation of Privately Owned Real Property Used for Religious, Charitable, and Educational Purposes} 20-27 (1934).

\textsuperscript{87} A. Bledsoe, supra note 85, at 5. Bledsoe later argues that "[t]he State regarded the church as a reform institution, as a charitable organization, as a free school; whose services to the government, in the three great departments of reformation, charity, and education, in preventing and diminishing crime, pauperism, and ignorance, were of incalculably more value to the people, than the amount to be raised by a tax upon the church edifices." \textit{Id.} at 6.

\textsuperscript{88} \textit{YMCA}, 60 Neb. at 646.
2. The Modern Law of Tax Exemption of Church Property

Not only the modern theory but also the modern law of tax exemption of church property was forged in the latter half of the nineteenth century and the early part of the twentieth. Such exemptions no longer turned on 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. The remainder of the states developed systematic statutory schemes that were either mandated by or validated under state constitutions.

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." Thus, 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. 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 state law.

89. See Ala. Const. art. IV, § 91 (1901); Ark. Const. art. XVI, § 5 (1874); Cal. Const. art. XIII, § 1.5 (1879, amended 1900); Colo. Const. art. X, § 5 (1876); Kan. Const. art. XI, § 1 (1859); Ky. Const. § 170 (1890); La. Const. § 230 (1898); Minn. Const. art. IX, § 1 (1857); N.D. Const. art. XI, § 176 (1889); Okla. Const. art. X, § 6 (1907); S.C. Const. art. X, § 4 (1895); S.D. Const. art. X, § 6 (1889); Utah Const. XIII, § 2 (1896); Va. Const. § 1902 (1902); Wyo. Const. art. XV, § 10 (1889). These state constitutional provisions are collected in Colonial Charters, supra note 30.

90. See Ariz. Const. art. X, § 2 (1912); Del. Const. art. VIII, § 1 (1879); Fla. Const. art. IX, § 1 (1885); Idaho Const. art. VII, § 5 (1889); Ill. Const. art. IX, § 3 (1848, 1870); Ind. Const. art. X, § 1 (1851); Mo. Const. art. X, § 6 (1875) (Exemptions were made mandatory in the 1945 revision of the constitution.); Mont. Const. art. VII, § 2 (1889); Nev. Const. art. X, § 1 (1864); N.C. Const. art. V, § 5 (1876); Ohio Const. art. XII, § 2 (1851); Pa. Const. art. VIII, § 2 (1873); Tenn. Const. art. II, § 28 (1870); Tex. Const. art. VIII, § 2 (1876); W. Va. Const. art. X, § 1 (1872); Wyo. Const. art. XV, § 12 (1889). The constitutions of the remaining states were silent on the question until well into the 20th century.

91. See, e.g., Ind. Const. art. 10, § 1 (1851); N.C. Const. art. V, § 6 (1868). Other common phrases include "used and operated for religious purposes" and "used for pious purposes." Some states granted exemptions more specifically to the property of "churches used as such," Ark. Const. art. XVI, § 5 (1874), "lots, with the buildings thereon, if said buildings are used solely and exclusively for religious worship," Col. Const. art. X, § 5 (1876), "all churches, church property and houses of worship," Minn. Const. art. 9, § 1 (1857), or "places for actual religious worship," Mont. Const. art. XII, § 2 (1889); accord Ohio Const. art. VII, § 2 (1851); Pa. Const. art. IX, § 1 (1874) ("actual places for religious worship").

92. See, e.g., Gibbons v. District of Columbia, 116 U.S. 404 (1886); Trinity Church v. New York, 10 How. Pr. 138 (N.J. 1854); All Saints Parish v. Brookline, 178 Mass. 404, 59 N.E. 1003 (1901). Later courts, however, softened this requirement and accorded exemptions to properties that are clearly intended for or are under construction for religious uses. See, e.g., Harrison v. Guilford County, 218 N.C. 718, 12 S.E.2d 269 (1940).
as religious corporations.93 A few states took no account of the identity
of the property owner if the exempt property was devoted to religious
uses. This allowed investors to receive property exemptions by leasing
their properties to churches.94

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 establish-
ment laws as they had done in colonial and early republican times; nor
could they simply consider the property uses of the one established
church. A more generic and pluralistic definition of religious use was
required. Over time, a vast spectrum of religious use exemptions
emerged among the states, ranging from the extremely narrow definitions
adopted by Pennsylvania and Illinois to the expansive definitions adopted
by Kentucky and California.

All states exempted sanctuaries, synagogues, and other properties
devoted to religious-worship services, including the driveways, walk-
ways, parking lots, and other appurtenant lands necessary for the reason-
able use of the property.95 Two conditions, however, were imposed in

93. These requirements of both ownership and use of a tax-exempt church property were usu-
ally imposed by statute or judicial interpretation, rather than by constitutional provision. See, e.g.,
Evangelical Baptist Benevolent & Missionary Soc'y v. Boston, 204 Mass. 28, 90 N.E. 572 (1910);
Christian Business Men's Comm'n v. State, 228 Minn. 549, 38 N.W.2d 803 (1949); People ex rel.
Unity Congregational Soc'y v. Mills, 189 Misc. 774, 71 N.Y.S.2d 873 (1947); Harrisburg v. Ohev
Sholem Congregation, 32 Pa. C. 589, 9 Daugh Co. 184 (1906); Wis. STAT. ANN. § 70.11 (1912).
The requirement of incorporation of the religious association was imposed by judicial interpretation.
See, e.g., Manresa Inst. v. Norwalk, 61 Conn. 228, 23 A. 1088 (1891); Church of Saint Monica v.
Mayor of New York, 119 N.Y. 91, 23 N.E. 294 (1890); United States Nat'l Bank v. Poor Hand-
maids, 148 Wis. 613, 617, 135 N.W. 121, 122 (1912); Franke v. Mann, 106 Wis. 118, 81 N.W. 1014
(1900). But cf. In re Cooper's Estate, 229 Iowa 921, 295 N.W. 448 (1940) (holding that exemption
from taxation must come from express waiver by the sovereign); accord Ham Evangelistic Ass'n v.
Matthews, 300 Ky. 402, 189 S.W.2d 524 (1945). For further discussion, see Kauper & Ellis, supra
note 37, passim.

94. See, e.g., Louisville v. Werne, 25 Ky. 2196, 80 S.W. 224 (1904); Church of Epiphany v.
Vt. 202, 9 A. 907 (1887); Wesley Found. v. King County, 185 Wash. 12, 52 P.2d 1247 (1935),
overruled by Corporation of the Catholic Archbishop v. Johnson, 89 Wash. 2d 505, 509, 573 A.2d
793, 795 (1978) (based on a 1969 statutory amendment). See also Detroit Young Men's Soc'y v.
Mayor of Detroit, 3 Mich. 172 (1854) (dicta); Sisters of Charity v. Detroit, 9 Mich. 94 (1860) (dicta).
Some states granted such exemptions only if the properties were subject to long-term leases that were
considered tantamount to conveyances of ownership. See, e.g., Hebrew Free School Ass'n v. New
N.Y. 488, 2 N.E. 399 (1885) (holding that premises used by a religious society as simple lessee are
not exempt from taxation).

95. There are a few extreme cases where courts have exempted the building but not the prop-
erty that it occupies, but these cases are aberrational. See, e.g., Lefevre v. Mayor of Detroit, 2 Mich.
586 (1853).
most states. First, the religious worship that occurred in these 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 or exclusive cults or lodges or those who engaged in private meditation or family worship were generally not eligible for religious use exemptions.96 Second, the property devoted to religious uses 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.97

A few states limited religious use exemptions to these public worship facilities alone and subjected other church properties to taxation, even if the properties were occasionally used for religious services.98 Most states, however—either by express statutory provision or, more frequently, through judicial interpretation—extended the scope of such exemptions well beyond this narrow core.

First, religious use exemptions were generally accorded to the properties that supported the ministry of the exempted church. Thus, these states usually exempted church buildings annexed to or near the sanctuary or synagogue and used for catechization, fellowship, weddings, sanctuary storage, and comparable functions, though acreage and space limitations were sometimes imposed.99 However, separate church properties that housed denominational printing facilities, mission and evangelism centers, administrative and governmental offices, or religious educational and vocational facilities often were not eligible for religious use exemptions, though in some states they could be eligible for charitable use exemptions.100 Second, more than half of the states accorded religious use exemptions to parsonages, rectories, glebe houses, and other

98. See W. TORPEY, supra note 3, at 181-85; C. ZOLLMAN, supra note 35, at 253-58.
100. Some state statutes required that such properties be "annexed," "attached to," or "contiguous to the place of public worship" and "necessary for the proper occupancy, use, and enjoyment of
living quarters of clergy and their families, though strict limitations were sometimes imposed on the size and value of such quarters.\textsuperscript{101} 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.\textsuperscript{102} 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, counseling centers, summer camps, retirement homes, retreat centers, publication and distribution centers, and even recreation and restaurant facilities were granted religious use exemptions.\textsuperscript{103}

Consistent with the equity law tradition, all states also exempted properties that were devoted to charitable, benevolent, or eleemosynary

\textsuperscript{101} A few state courts have 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, 48 P.2d 777 (1935); Wilmington v. Saint Stanislaus Kostka Church, 49 Del. 5, 108 A.2d 581 (1954). Most state courts, however, have consistently denied tax exemption for parsonages absent statutory authority, arguing that the primary use of parsonages is for room and board, not worship. See, e.g., People ex rel. Thompson v. First Congregational Church, 232 Ill. 158, 83 N.E. 536 (1907); Methodist Episcopal Church v. Ellis, 38 Ind. 3 (1871); State v. Union Congregational Church, 173 Minn. 40, 216 N.W. 326 (1927). Courts have insisted on this interpretation even where the parsonage is used in part for religious services, church meetings, catechismal instruction, storage of sanctuary furniture, and other purposes that clearly support the ministry and mission of the religious association. See, e.g., Ramsey County v. Church of the Good Shepherd, 45 Minn. 229, 47 N.W. 783 (1891); Watterson v. Halliday, 77 Ohio St. 150, 82 N.E. 962 (1907); Gerke v. Purcell, 25 Ohio St. 229 (1874); Philadelphia v. Saint Elizabeth's Church, 45 Pa. Super. 363 (1911); In re Second Reformed Church of Harrisburg, 25 Pa. 570 (1901); Saint Joseph's Church v. Providence, 12 R.I. 19 (1878).


uses or purposes.\textsuperscript{104} 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 generally the same as those 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.\textsuperscript{105}

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.\textsuperscript{106} Except for purely 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 both “religious” and “charitable” under state exemption laws. Thus a variety of uses and improvements of church property that clearly served the religious ministry and mission of the church 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.\textsuperscript{107}

Three exemption patterns emerged as a result of these overlapping categories of religious uses and charitable uses of church property. First, several states allowed religious associations to mix religious uses and charitable uses of their properties and to choose either one or both forms

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107. See, e.g., Appeal Tax Court v. Grand Lodge of Masons, 50 Md. 421 (1879); Ferry Beach Park Ass’n of Universalists v. City of Saco, 127 Me. 136, 142 A. 65 (1928); Maine Baptist Missionary Convention v. Portland, 65 Me. 92 (1876); Methodist Episcopal Church, South v. Hinton, 92 Tenn. 188, 21 S.W. 321 (1893); YMCA v. Douglas County, 60 Neb. 642, 83 N.W. 924 (1900); Davis v. Cincinnati Camp Meeting Ass’n, 57 Ohio St. 257, 49 N.E. 401 (1897); Board of Home Missions & Church Extension of the Methodist Episcopal Church v. Philadelphia, 266 Pa. 405, 109 A. 664 (1920); Woman’s Home Missionary Soc’y v. Taylor, 173 Pa. 456, 34 A. 42 (1896); Catholic Woman’s Club v. City of Green Bay, 180 Wis. 102, 192 N.W. 479 (1923). See further discussion in Zollman, supra note 75, passim.
\end{flushright}
of exemption for such uses. Religious use exemptions were often more attractive, since they required only an annual petition to the local tax assessor for renewal.\textsuperscript{108} Charitable use exemptions not only required such a petition but also subjected the association to the supervisory jurisdiction of the attorney general or a charitable commissioner or visitor. Second, several other states required religious associations to decide whether religious or charitable uses of their properties were "primary" or "predominant" and to petition for exemption of their property based on that primary or predominant 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 nonexempt uses.\textsuperscript{109} 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—were occasionally denied exemption altogether.\textsuperscript{110}

This modern law of tax exemption of church property reflects both the common law tradition and the equity law tradition as well as the tensions between them. Modern exemption law 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 through strict interpretation of these statutes, 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

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\footnotetext[109]{See, e.g., First Unitarian Soc'y v. Hartford, 66 Conn. 368 (1895); First Congregational Church v. Board of Review, 254 Ill. 220, 98 N.E. 275 (1912), overruled by McKenzie v. Johnson, 98 Ill. 2d 87, 456 N.E. 2d 73 (1983); In re Bond Hill-Roselawn Hebrew School, 151 Ohio St. 70, 84 N.E. 2d 270 (1949); Saint Mary's Church v. Tripp, 14 R.I. 307 (1883). See the numerous cases discussed in T. COOLEY, supra note 108, § 725. Where only a portion of a property was used for exempt purposes, however, courts held only that portion of the property tax exempt and taxed the rest of the property. See, e.g., YMCA v. Douglas County, 60 Neb. 642, 83 N.W. 924 (1900).}
\footnotetext[110]{See, e.g., People ex rel. Carson v. Muldoon, 306 Ill. 234, 137 N.E. 863 (1922); People ex rel. McCullough v. Deutsche Evangelische Luthersche Jehovah Gemeinde Ungeaenderter Augsburgischer Confession, 249 Ill. 132, 94 N.E. 162 (1911); Commonwealth v. Thomas, 119 Ky. 208, 83 S.W. 572 (1904); Evangelical Baptist Benevolent & Missionary Soc'y v. Boston, 204 Mass. 28, 90 N.E. 572 (1910); Evangelical Lutheran Synod v. Hoehn, 355 Mo. 257, 196 S.W.2d 134 (1946).}
\end{footnotes}
charitable uses, to engage in inventive exegeses of exemption statutes, to expand the scope of exemptions well beyond their original core, and to accord broad discretion to officials to make case-by-case determinations of whether, and to what extent, a given property can be exempted.

III. TAX EXEMPTIONS OF CHURCH PROPERTY

AT PRESENT

Both the theory and the law of tax exemption of church property forged in the late nineteenth and early twentieth centuries remain firmly in place among the states today. Judicial opinions continue to recite faithfully the social-benefit and government-burden arguments that support such exemptions.111 The inherited constitutional and statutory exemption provisions remain the state law today, although they have been heavily amended and subjected to broad judicial interpretation. The Walz case has discouraged most establishment clause challenges to these theories and laws.112 Yet litigation concerning such exemptions has continued apace since the Walz decision in 1970 in part because of the terseness of state exemption provisions and the ambiguity of judicial precedents interpreting them, in part because of 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

111. See Murray v. Comptroller of Treasury, 241 Md. 383, 216 A.2d 897 (1966) (citing virtually all the arguments for and against exemptions), cert. denied, 385 U.S. 816 (1966). Recent courts have not required, however, that "a church or predominantly religious organization must relieve a burden of government in order to qualify as a charitable institution . . . since . . . government is not in the business of religion." Christian Reformed Church v. City of Grand Rapids, 104 Mich. App. 10, 19, 303 N.W.2d 913, 918 (1981); see also General Conference of the Church of God v. Carper, 192 Colo. 178, 557 P.2d 832 (1976) (showing benefit to people of the state is not a condition for property tax exemption for a religious organization).

provisions are copious and often discordant. Churches and other religious organizations that have been denied property tax exemptions have not been hesitant to exploit these ambiguities and 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 reasoning and result to discern any consistent pattern or integrated law. Several trends, however, are apparent in this recent litigation. Taken together, these trends have tended to expand the availability of tax exemptions and to exacerbate some of the abuses inherent in current tax exemption laws.

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 far 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 and charities can afford to use only partly or sporadically; complete abandonment of the property, however, still leads to taxation.

113. For examples of literal “actual use” requirements, see Sisters of Charity v. Greater Anchorage Area Borough, 8 ALASKA L.J. 272 (1970); Seventh Day Adventists Kansas Conference Ass’n v. Board of County Comm’rs, 211 Kan. 683, 508 P.2d 911 (1973).


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 secluded cloisters, private chapels, communal farms, spiritual retreat centers, and other religious settings that did not provide a sufficiently "public benefit" to society. Today courts and legislatures have softened the public benefit requirement and have become more inclined to grant exemptions to properties that are secluded and segregated. Thus, monasteries, convents, religious communes, retreat centers, youth homes, missionary furlough stations, summer camps, and similar properties have been exempted.116

Third, several courts have come to interpret rather liberally the type and amount of contiguous property that is "reasonably necessary" for the religious or charitable use of an exempt property. Traditionally many states limited exemptions to improved properties together with the driveways, walkways, parking lots, and other immediately surrounding properties that facilitated use of the improvement. Today courts in at least some states grant exemptions for large tracts of unimproved land surrounding a church or charity on grounds that such lands provide a buffer against residential and industrial encroachment or traffic, enhance the aesthetic appeal of the church, or foster a tranquil, serene setting more conducive to religious worship and spiritual reflection.117


other states have exempted covenants and communes, residential religious education 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." 118

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 growing minority of states take no account of the identity of the ownership of the property if the property is devoted to either religious or charitable uses. 119 This allows investors and for-profit organizations to receive property tax exemptions by leasing the property to churches or charities. 120 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, 121 the nature of the owner and the use need not necessarily match. Religious organizations can receive charitable use exemptions and charitable organizations can receive religious use exemptions. 122 Indeed, the definition of a "religious" organization often bears little resemblance to the definition of a

Texas Encampment Ass'n, 673 S.W.2d 256 (Tex. Ct. App. 1984) (holding that lots across the street from the place of worship are not tax exempt).


120. See, e.g., Madison Gen. Hosp. Ass'n v. City of Madison, 92 Wis. 2d 125, 284 N.W.2d 603 (1979). In close cases, however, courts will consider the character of the owner to "illuminate the purposes for which the property is used." See, e.g., West Brandt Found. v. Carper, 652 P.2d 564, 567-68 (Colo. 1982).


122. See, e.g., Christ the Good Shepherd Lutheran Church v. Mathiesen, 81 Cal. App. 3d 355, 146 Cal. Rptr. 321 (1978); Childrens Development Center v. Olson, 52 Ill. 2d 332, 288 N.E.2d 388 (1972); Retirement Branch v. Curry County Valuation Protest Board, 89 N.M. 42, 546 P.2d 1199 (1976); German Apostolic Christian Church v. Department of Revenue, 279 Or. 637, 569 P.2d 596
“religious” use.\textsuperscript{123} This permitted asymmetry of ownership and use has served as an open invitation to protracted litigation. Religious groups that are denied religious use exemptions have thereafter sought charitable use exemptions for the same property.\textsuperscript{124} New religious groups or well-established religious groups that have added new properties have often spent years litigating the tax exempt status of their properties.\textsuperscript{125}

Fifth, virtually all states now grant exemptions based on the primary or predominant use to which the property is devoted.\textsuperscript{126} Traditionally some states would allow parties to mix religious and charitable uses and choose freely the category of exemption they deemed most convenient. Today courts have become more inclined to deem either the religious use or the charitable use to be primary and determine the exemption status of the property based on that categorization.\textsuperscript{127} 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 their claim for exemption. Today such a wooden classification system has been sharply criticized and largely abandoned—if either the religious use or the charitable use is predominant, parties can make other incidental exempt uses of their properties.\textsuperscript{128}
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 have become far less stringent. A property devoted to religious or charitable uses can now receive a partial exemption based on the percentage of space or time devoted to such exempt uses.  

Seventh, the scope of religious use exemptions has tended to narrow, while the scope of charitable use exemptions has tended to broaden. Traditionally courts and legislatures interpreted both religious use and charitable use categories 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, and recreation, mission...
work, communal living, and auxiliary services in support of religious groups. Courts have granted charitable use exemptions to church fellowship halls, parish centers, monasteries, retreat centers, summer camps, communal farms, publication centers, administrative buildings, and storage facilities that clearly support only one church or denomination and afford only the most attenuated benefits to nonmembers.¹³¹

These trends in recent cases have expanded the availability of exemptions for church properties. The softened definition of an "actual" or "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 an exempt use has allowed religious organizations to surround their improvements with substantial tracts of unimproved land. The permitted admixture of two or more exempt uses on one property has made exemptions available to the properties of nonprofit 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 on a variety of different bases and allowed for-profit investors to gain exemptions through lease of their properties to nonprofit organizations. The permitted admixture of predominant exempt uses and incidental nonexempt uses has allowed religious groups to engage in short-term or occasional profiteering on their properties with no adverse 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

¹³¹ For cases that subsume "religious uses" within "charitable uses," see, for example, House of Good Shepherd v. Department of Revenue, 300 Or. 340, 710 P.2d 778 (1985); German Apostolic Christian Church v. Department of Revenue, 279 Or. 637, 569 P.2d 596 (1977); Archdiocese of Portland v. Department of Revenue, 266 Or. 419, 513 P.2d 1137 (1973). For evidence of the effect of this broadened definition of "charitable uses" on the exemption of the properties of religious groups, see the numerous cases cited supra notes 116-18.
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.\footnote{132} 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,\footnote{133} 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.”\footnote{134} Thus, state courts and commissioners have recently developed at least four tests to evaluate these petitions. These can be called the (1) “commonsense,” (2) “deference,” (3) “minimalist theism,” and (4) “multifactual analysis” tests, respectively. The first two tests make no inquiry into a petitioner’s religious beliefs. The other two tests scrutinize the religious beliefs more closely. Application of these tests has produced widely varying results.


[A] common scheme calls for an individual taxpayer to obtain minister’s credentials and a church or religious order charter by mail for a fee. [P]rofession of adherence to a creed, dogma, or moral code may or may not be required and duties of fiduciary responsibilities may or may not be undertaken in order to receive and administer these charters or credentials. The individual sets up an organization that purports to be a church, religious order, or other religious organization. The plan then calls for the individual to take “a vow of poverty” and to assign the individual’s assets—house, car, savings account, etc.—and the income earned from current employment to the new organization. The income assigned is expended for housing, food, clothing, personal transportation and other living expenses incurred by the individual, and for his or her occasional “spiritual retreats” to traditional vacation areas.

See further discussion in Slye, \textit{supra}, at 222-23, 242-45.}

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 judgment" regarding whether such uses are religious or secular. This test is applied primarily in cases raising seemingly specious and spurious petitions for exemption. In *Golden Writ of God v. Department of Revenue*,\(^\text{135}\) for example, the Supreme Court of Oregon was asked to determine the tax status of some two hundred thirty acres of largely untilled farmland, occupied by a large house and a 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, and 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 a 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 or pray."\(^\text{136}\) Courts in other jurisdictions have used similar commonsense 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.\(^\text{137}\)

While the commonsense test relies heavily on the 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 of World Christianity v. Tax Commission,\(^\text{138}\) 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.\(^\text{139}\)

The court applied this test to determine the tax status of the administrative headquarters, missionary residence, and storage facilities owned and operated by the Unification Church, founded by the Reverend Sun Myung Moon. Both the New York tax commissioner and lower courts had denied the exemption because they felt 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.\(^\text{140}\) 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 in view of the Church integral aspects of its religious doctrine and program.”\(^\text{141}\)

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.\(^\text{142}\)

Other courts have adopted a “minimalist theism” test to evaluate petitions for exemption submitted by new religious groups. Petitioners must at least “exhibit the minimal requirements of a 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

\(^{139}\) Id. at 518.
\(^{140}\) Id. at 520. The Special Referee assigned to the case to determine the tax status of the petitioner’s property found further that “the petitioner’s theological doctrines bind petitioner to a course of political activism,” that “religion and economy relate to social life through politics,” and that “it is petitioner’s religious tenet that the republican form of government . . . is a Satanic principle and that [the] three governmental branches . . . must be brought under a single controlling force as a condition for the second coming of the Messiah.” Id.
\(^{141}\) Id. at 526.
\(^{142}\) Id.
belief." Property used in support of such religious beliefs is eligible for exemption.

This 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-story 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-story home was used both for weekly religious services and for the residence of the church founder, her parishioners, and some nonparishioner 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. By contrast, in *Religious Society of Families v. Assessor*, the New York Supreme Court denied tax exemption for the 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 of religion in dictionaries and earlier cases, the court concluded that the society was "not religious as religion is traditionally defined" and declared its property taxable.

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145. Id. at 348-51.
146. 73 Misc.2d 923, 343 N.Y.S.2d 159 (1973).
147. Id. at 924-26.
148. Id.; see also Oakknoll v. Commissioner, 69 T.C. 770 (1978), aff'd, 79-1 U.S. Tax Cas. (CCH) ¶ 9328 (1979) (where the same petitioner was denied income tax exemption with a comparable argument); Missouri Church of Scientology v. State Tax Commission, 560 S.W.2d 837, 840 (Mo. 1977) (where the Supreme Court of Missouri denied tax exemption to the property of Scientologists with the argument that "while the [petitioner] has some of the trappings and accouterments of an organized religion, it appears to be more an applied philosophy which has a certain religious connotation, but which falls short of being devoted to the worship of the Supreme Being"); Parshall Christian Order v. Board of Review, 315 N.W.2d 798 (Iowa 1982); Church of Scientology v. Tax Comm'n, 124 Misc. 2d 720, 477 N.Y.S.2d 263 (1984), vacated, 120 A.D.2d 376, 501 N.Y.S.2d 863 (1986).
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*, 149 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 test 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. 150 Thereafter, the court must make a reasoned decision whether the petitioner is a religious group and whether its property is devoted to religious uses. In the case at bar, the court used such 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 seventy dollars. The church was comprised of some eighteen members, most of whom were also members of one 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 religious rituals, 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's residence and for the monthly religious meetings, which were open to the public. Regardless of the petitioner's characterization of itself as a sincere, bona fide religious organization, the court denied the church's petition.

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 analytical test affords sophisticated and sensitive analysis of each petition but does so at the cost of religious intrusion. The commonsense test is

149. 304 N.W.2d 308 (Minn. 1981). This test has found more ready application in income tax exemption cases. See, e.g., People v. Life Science Church, 113 Misc. 2d 952, 450 N.Y.S.2d 664 (1982) and the numerous cases cited and discussed therein. See also supra note 133 on the multifactual analysis test developed by the Internal Revenue Code and Internal Revenue Service.

150. *Ideal Life*, 304 N.W.2d at 315 (quoting in part from the opinion of the Tax Court below).
neither sophisticated nor intrusive; the minimal theism test is both more sophisticated and more intrusive.

These four tests also produce widely divergent results. The *Golden Writ* petitioners, for example, may not have satisfied the commonsense or multifactual analysis tests but may well have satisfied the deference and minimal theism tests. The *Holy Spirit* petitioners may well have satisfied the deference and minimalist theism tests but would probably not have survived the commonsense and multifactual analysis tests. The *Ravenwood* and *Ideal Life* petitioners may have survived the minimalist theism test but would probably not survive any of the other three tests.

Given this diversity of tests and the disparity of treatment of new religious groups that has resulted from their application, the Supreme Court may well select its next case on church property tax exemptions from among these types of cases.

IV. TAX EXEMPTIONS OF CHURCH PROPERTY IN THE FUTURE

A. A THIRD ALTERNATIVE

Opponents and proponents of tax exemptions 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. Proponents argue that such exemptions are supports of religion that are prescribed by the free exercise clause and its principle of state accommodation of the church. Opponents look to the future and portend with alarm the further erosion of the state tax base and the further aggrandizement of church wealth and power. Proponents look to the past and

153. See, e.g., A. BALK, THE FREE LIST (1971); M. LARSON & C. LOWELL, PRAISE THE LORD FOR TAX EXEMPTION: HOW THE CHURCHES GROW RICH—WHILE THE CITIES AND YOU GROW POOR (1969); 1 U.S. ADVISORY COMMITTEE ON INTERGOVERNMENTAL RELATIONS, THE ROLE OF THE STATES IN STRENGTHENING THE PROPERTY TAX 75 (1963); Bennett, Real Property Tax Exemptions of Non-Profit Organizations, 16 CLEV.-MAR. L. REV. 150 (1966). The rhetoric in opposition to such exemptions has often led to doleful predictions. Eugene C. Blake, General Secretary of the World Council of Churches, once declared the following:
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 more nuanced understanding of the history of tax exemption of church property suggests a via media between the wholesale eradication of such exemptions proposed by opponents and the blanket endorsements of exemptions proffered by proponents. Neither group has recognized sufficiently that modern tax exemptions of church property are rooted in both a common law tradition and an equity law tradition or that historically the exemptions 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, 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 defined to include most aspects of religious life. Most religious institutions, save the most austere and ascetic cults, can thus also 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, therefore, would find little difficulty in retaining their property tax exemptions, albeit on different grounds.

B. PROVISIONAL REFLECTIONS

A thorough analysis of the mechanics and the merits of this alternative would require another article, considerably longer than this one.

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When one remembers that churches pay no inheritance tax (churches do not die), that churches may own and operate business and be exempt from ... corporate income tax, and that real property used for church purposes (which in some states are most generously construed) is tax exempt, it is not unreasonable to prophesy that with reasonably prudent management, the churches ought to be able to control the whole economy of the nation within the predictable future.


154. See supra notes 46-49 and accompanying text for various definitions of charity.

155. See supra notes 122-31 and accompanying text.
What follows are some provisional reflections that will perhaps suggest the possibility, if not cogency, of this alternative.

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 in the manner assumed by the traditional social benefits theory.156 Charitable use exemptions, by contrast, are rooted in an equitable theory that still commands assent and in 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, relief for the poor, and other forms of social welfare. Whatever charitable services churches and other organizations render relieve the state of a portion of that burden.157

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 devoted to "religious uses."158 It removes the great 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 . . . 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 [to impose] a burden."159 Although Kurland's principle has been sharply criticized

156. For an incendiary argument to that effect, see A. BALK, THE RELIGION BUSINESS (1968); M. LARSON & C. LOWELL, supra note 153. See supra notes 81-85 and accompanying text (on the traditional social benefits theory).

157. See Berman, Religious Freedom and the Challenge of the Modern State, 39 EMORY L.J. 149, 159-64 (1990). Berman argues, "Whereas two centuries ago, in matters of social life which have a significant moral dimension, government was a handmaid of religion, today religion, in its social responsibilities, as contrasted with personal faith and collective worship, is the handmaid of government." Id. at 152. See supra notes 86-88 and accompanying text (on the traditional state burden theory).

158. See supra notes 91-110 and accompanying text.

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 is not free from difficulty, however. First, the alternative raises logistical concerns. The value of church property is not always 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 nonprofitable (and thus exempt) uses of charitable properties. While logistical concerns may have been formidable in earlier eras, they have become less of a concern as the science of tax assessment has grown more refined.

Second, this alternative raises first amendment concerns. The Supreme Court has made it clear in *Wald* and subsequent cases that tax exemption of church property is constitutionally permissible. It has not made clear, however, whether taxation of church property would be permissible under either the establishment clause or the free exercise clause.

On the one hand, this alternative raises establishment clause concerns. Although the test for charitable use exemptions is religiously neutral, the application of the test is not. 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 averse and socially inactive cannot. Such disparity in treatment of religions does not seem consistent with the establishment clause.

160. See supra note 9 and accompanying text.
This differential impact on religious groups is not necessarily fatal under the establishment clause. The Supreme Court has consistently upheld regulations that on their face are neutral but in application incidentally and indirectly benefit some religious groups and burden others.\textsuperscript{161} Regulations that, on their face, directly support religious rituals, prayers, officials, or creeds are, of course, struck down.\textsuperscript{162} Facially neutral regulations that, in application, inure principally or exclusively to the benefit of religious groups and not secular groups are also struck down.\textsuperscript{163} But the Court has upheld general Sabbath Day laws, despite their indirect benefit to Christians and their indirect burden on Jews, Seventh Day Adventists, and Muslims.\textsuperscript{164} It has upheld criminal laws against polygamy, even though they indirectly benefit Christian monogamists and burden Mormon polygamists.\textsuperscript{165} It has upheld government support of Christian creches and Jewish menorahs, even though Jews and Christians may, in turn, be offended.\textsuperscript{166} It has upheld various appropriations that incidentally support religious schools\textsuperscript{167} or religious welfare institutions,\textsuperscript{168} even though religious groups that have no educational or welfare institutions receive no appropriations.

\textsuperscript{161} See Bowen v. Kendrick, 487 U.S. 589 (1988), for the source of this distinction between a regulation "on its face" and "as applied." For analysis of the third prong of "excessive entanglement," see supra note 18 and accompanying text. The Court has severely deprecated and diluted the excessive entanglement test in several recent cases. See Jimmy Swaggart Ministries v. Board of Equalization, 110 S. Ct. 688, 697-99 (1990); Bowen v. Kendrick, 487 U.S. 589, 615-17 (1988) and cases discussed therein.


\textsuperscript{165} See Reynolds v. United States, 98 U.S. 145 (1879); Davis v. Beason, 133 U.S. 333 (1890).


\textsuperscript{167} See, e.g., Roemer v. Maryland Board of Public Works, 426 U.S. 736 (1976) (permitting annual governmental subsidies to religious and secular colleges and universities); Hunt v. McNair, 413 U.S. 734 (1973) (permitting state benefits to religious and secular institutions of higher learning); Tilton v. Richardson, 403 U.S. 672 (1971) (permitting government-sponsored construction grants to religious and secular colleges and universities); Board of Educ. v. Allen, 392 U.S. 236 (1968) (permitting government delivery of secular textbooks for religious and secular schools).

The logic of these cases could well rebut establishment arguments against the alternative suggested here for property tax exemptions. A charitable use exemption is neutral on its face. It is widely available to religious and nonreligious groups alike. It confers only indirect benefits, not direct subsidies, on religious groups. Its differential impact on those religious groups is incidental.

This alternative also raises free exercise concerns. Successful implementation of it will inevitably lead to taxation of some church properties that have hitherto been exempt. Taxation will obstruct, if not destroy, the religious uses to which the religious group has put its property. Such obstruction of the exercise of religion does not seem consistent with the free exercise clause.

The Supreme Court has offered an array of interpretations of the free exercise clause, at least three of which are relevant to this alternative. The alternative is consistent with two lines of interpretation, less consistent with a third. 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 need only demonstrate that the regulations promote a compelling or overriding interest, are narrowly tailored to achieve that interest, and are not religiously discriminatory on their face or in application.169 Thus the Court has upheld various general licensing and permit requirements for solicitation or distribution of literature, even though they indirectly burden the proselytizing efforts of certain religious groups.170 It has upheld general criminal laws against the use of child labor or the use of narcotic substances, even though such uses are considered spiritually wholesome by certain religious groups.171 It has upheld general military dress codes, even though they obstruct a Jewish soldier's wearing of his yarmulke.172 It has required compliance with social security regulations and payment of social security taxes, even though certain religious individuals are conscientiously opposed to social security.173 It has sustained the development of federal land, even though portions of such lands are considered sacred by native American Indians.174 The logic of these cases could

169. This classic test was first developed in Cantwell v. Connecticut, 310 U.S. 296 (1940), and has reappeared in full or vestigial form in numerous cases thereafter.


well 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 against religion—no religious classification is used.

In a second line of cases involving church property disputes, the Court has distinguished between the "sacred" and the "civil" attributes and activities of churches and between the right to free exercise of religion itself and the right to the means and instruments used to facilitate and support such exercise. The sacred attributes of the church receive more free exercise protection than its civil attributes. The exercise of religion receives more protection than the instruments used to facilitate that exercise.\textsuperscript{175} Church property, it can be argued, is among the civil attributes of the church and 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.\textsuperscript{176} The Supreme Court has very recently used similar logic to uphold the imposition of sale and use taxes on religious groups and activities.\textsuperscript{177} Such logic may also serve to rebut arguments against the alternative tax exemption structure proposed here.


\textsuperscript{176} See, e.g., Islamic Center of Mississippi v. Starkville, 840 F.2d 293 (5th Cir. 1988); Grosz v. City of Miami Beach, 721 F.2d 729 (11th Cir. 1983), cert. denied, 469 U.S. 827 (1984); Lakewood Ohio Congregation of Jehovah's Witnesses v. City of Lakewood, 699 F.2d 303 (6th Cir. 1983); Reynolds, Zoning the Church: Police Power Versus the First Amendment, 84 B.U.L. REV. 767 (1985); Ziegler, Local Land Control of Religious Uses and Symbols, in ZONING AND PLANNING LAW HANDBOOK 331 (J. Gailey ed. 1985); Comment, Zoning Ordinances Affecting Churches: A Proposal for Expanded Free Exercise Protection, 132 U. PENN. L. REV. 1131 (1984). The Supreme Court has long recognized this distinction in adjudicating cases that involve intrachurch disputes over property. See, e.g., Jones v. Wolf, 443 U.S. 595, 602-03 (1979) (While "the First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice," it permits resolution of such disputes based on "neutral principles of law," which include "the language of the deeds, the terms of the local church charters, the state statutes governing the holding of church property, and the provisions in the constitution of the general church concerning the ownership and control of church property."); Watson v. Jones, 80 U.S. (13 Wall.) 679, 713 (1872) ("Religious organizations come before us in the same attitude as other voluntary associations . . . and their rights of property, or of contract, are equally under the protections of the law, and the actions of their members subject to its same restraints.").

In a third line of cases, however, the Supreme 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.\footnote{178} Petitioners for unemployment compensation have been exempted from regulations that compel them to work on their Sabbath or to participate in production of military hardware.\footnote{179} Conscientious objectors have been exempted from active service in the military.\footnote{180} Such cases, however, are distinguishable. Mainline religious groups have no inherent religious aversion to payment of taxes. The Bible enjoins Christians to “[r]ender ... to Caesar the things that are Caesar’s”\footnote{181} and to pay “taxes to whom taxes are due, revenue to whom revenue is due.”\footnote{182} The Talmud teaches the principle of “dina de-Malkhuta dina,” which, inter alia, compels payment of uniformly administered taxes imposed by a recognized sovereign.\footnote{183} Arguments for the free exercise right to exemption from taxes, therefore, appear ill-founded.

Third, and perhaps most important, this alternative raises questions of symbolism. Tax exemptions have long been regarded as signs of the state’s “benevolent neutrality”\footnote{184} toward the church—“a fit recognition by the state of the sanctity of religion,”\footnote{185} as one official put it. 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 many be tantamount to giving it the

\footnotesize{\begin{itemize}
\item \footnote{178} Wisconsin v. Yoder, 406 U.S. 205 (1972).
\item \footnote{181} Matthew 22:21 (RSV).
\item \footnote{182} Romans 13:7 (RSV).
\item \footnote{184} Walz v. Commissioner, 397 U.S. 664, 669 (1970).
\item \footnote{185} D. Robertson, supra note 35, at 191 (quoting Massachusetts State Tax Comm’n (1897)). See also J. Bennett, Christians and the State 234-35 (1958) (referring to tax exemptions as “the most remarkable of all forms of aid . . . to religious bodies”); W. Sperry, Religion in America 60 (1963) (“The most important governmental recognition of religion made in America is the exemption of church property from taxation.”).}
\end{itemize}}
power to destroy the church. It was the concern for 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.

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 itself. 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.

187. This temerity is particularly pronounced in the debates concerning constitutional prohibitions on tax exemption. See, e.g., Indiana Records, supra note 62 (comments of Rep. Colfax); Kentucky Records, supra note 1, at 2390 (comments of Rep. Spalding).