

Religious Autonomy and the Exemption of Religious Organizations from Federal Taxation in the United States

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Introduction: Tax Exemption as a Way of Respecting Church Autonomy

One of the most significant ways in which America expresses its respect for the autonomy of religious communities is by leaving them alone, or more specifically, by refraining from taxing them. Thus when Congress wrote the first modern income tax statutes, the Revenue Act of 1894 and the Revenue Act of 1913, only "net income" was to be taxed. It intentionally excluded all nonprofit organizations, which have no "net income" precisely because they are not organized for the purpose of making a profit on their activities. Senator Cordell Hull, principal author of the 1913 Act, resisted explicit categories of exemption because the law was designed to impose explicit categories of *taxation*, and all not listed would be exempt: "Of course any kind of society or corporation that is not doing business for profit and not acquiring profit would not come within the meaning of the taxing clause.... I see no occasion whatever for undertaking to particularize...."¹

Americans pride themselves on being "taxpayers" -- a fact that seems curious in many other cultures -- or at least we insist on the point when we expect to receive some benefit from the government, or to be relieved of a burden that the government might impose. For this very reason, it is important at the outset to recall that nonprofit organizations are *not taxpayers* for a variety of good reasons grounded in our commitment to the value of associational freedom. As Chief Justice Burger wrote in the leading case on tax exemption for religious property:

[The State] has not singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups. The State has an affirmative policy that considers these groups as beneficial and stabilizing influences in community life and finds this classification useful, desirable, and in the public interest.²

Although all nonprofit organizations enjoy the benefit of exemption from taxation, the focus of this report is on one particular kind of nonprofit organization, the religious organization. I explore in this report three questions of considerable importance for religious communities. First, where did we get the tradition of refraining from taxing churches? Second, if churches are not generally taxed, should their tax-exempt status form a sufficient predicate for governmental regulation of religion? Third, does either exemption or regulation of churches depend upon their organizational form or structure?

I. Exemption of Religion from Taxation in History

To ask whether churches should be taxed is to ask a normative question. The value of religious freedom that underlies the practice of exempting churches from taxation is a value at the very core of the American constitutional order. This value is, in turn, deeply imbedded within the traditions and practices of the American people. One purpose of this report is to describe these traditions, to narrate the central themes of these historical practices, in broad outline. In this way, I hope to relate materials from the past to the current question of exempting churches from the payment of taxes. Since the dawn of recorded history, taxation has been the most constant

¹ 50 Cong. Rec. 1306 (1913).

² *Walz v. Tax Commission of the City of New York*, 397 U.S. 664, __ (1970).

and pervasive form of governmental control both of individuals and with groups. For this very reason the ways in which various societies have refrained from collecting revenue from some persons or groups are telling indicators of the self-understandings of these societies. Practices of exemption from taxation are constitutional in the sense that they reflect core beliefs of society. They embody what the Canadian philosopher Bernard Lonergan called "constitutive meaning."³ Both the federal government and all fifty states maintain a system of general exemption of religion from the payment of most forms of taxation. This form of religious exemption is not a recent invention. On the contrary, this widespread American practice is rooted deeply in practices that long antedate the republic. Because the practice has recently come under attack,⁴ it is important to understand the principal rationales offered throughout history for the practice.

As soon as one identifies this task, one is confronted with the hermeneutical question. Texts do not speak. They are read by a conscious subject who is immersed in her own culture and modes of perception. Awareness of this dimension of all interpretation does not foreclose the possibility of meaningful engagement with the past. It simply renders the exploration of history a difficult one in which the modern interpreter must ever be careful to avoid the danger of anachronism or of managing to find in the past things that -- like Oakland -- are not there when you get there.

³ See BERNARD J.F. LONERGAN, *METHOD IN THEOLOGY* __ (19__).

⁴ See, e.g., John Witte, *Tax Exemption of Church Property: Historical Anomaly or Valid Constitutional Practice?* 64 S. CAL. L. REV. 363 (1991). Professor Witte traces the practice of tax exemption of church property to its roots in the common law and in the equity tradition that favored such exemptions on account of both the "religious uses" and the "charitable uses" to which church properties were devoted." *Id.* at 408. He proposes "a via media between the wholesale eradication of such exemptions proposed by opponents and the blanket endorsements of exemptions proffered by proponents." His alternative is "to remove tax exemptions for church property that are based on religious [internal, cultic, sacerdotal] uses but to retain those that are based on charitable, external, cultural, social uses to which they are devoted." *Id.* Earlier attacks on tax exemption of churches were not as subtle or nuanced as Witte's. See, e.g., MARTIN A. LARSON AND C. STANLEY LOWELL, *THE RELIGIOUS EMPIRE: THE GROWTH AND DANGER OF TAX-EXEMPT PROPERTY IN THE UNITED STATES* (1976); MARTIN A. LARSON AND C. STANLEY LOWELL, *THE CHURCHES: THEIR RICHES, REVENUES, AND IMMUNITIES: AN ANALYSIS OF TAX-EXEMPT PROPERTY* (1969); D.B. ROBERTSON, *SHOULD CHURCHES BE TAXED?* (1968).

For example, in modernity and postmodernity we are accustomed to differentiating between sacred and profane, religious and secular. These distinctions are not problem-free even in our own world. To paraphrase Shakespeare, there is nothing sacred but sacred thinking makes it so, and there is nothing secular but secular thinking makes it so. Thus in the eyes of the religious beholder, the world is not merely secular, but -- to quote the famous Victorian poet, Gerard Manley Hopkins -- is "charged with the grandeur of God."⁵ Hopkins was not the first person to think this way. For example, the anonymous author of the long poem of creation in the first chapter of the Bible has the Creator rejoicing in the world at the close of each day, declaring each aspect of creation "good" (Gen. 1:4,8,12,21,25) and finally all that he had made "very good" (Gen. 1:29).

In that ancient world, or at least in many of the ancient cultures whose cities are now open to us and whose poetry and laws we can now read, there was no sharp differentiation between the sacred and the profane. The profane stood not for the non-religious, but simply designated a geographical border demarcating that which lay beyond the temple, in Latin the *profanum*. Religion was part and parcel both of ordinary daily life and of major festive celebrations.

The law made special provision for religious functionaries such as temple priests and priestesses. But especially in homogenous societies such as ancient Egypt or Israel or Assyria or Babylon, no thought was given to granting exemptions from generally applicable laws to religious communities, for the obvious reason that there was no religious pluralism within such communities. The problem of what to do about religious exemptions arises in the ancient world only in an imperial context such as ancient Greece or Rome, where more than one mode of religious beliefs and practices coexisted in vast territories with important regional differences. The Roman response to this early pluralism was an early adumbration of what we now call federalism or subsidiarity. For example, the Roman authorities generally required adherence to the imperial cult, but allowed a local cult to flourish as a *religio licita*.

Thus religious exemptions were not invented in the modern world. They just became essential in the American experience because of the increasing pluralism of religious beliefs and practices in our country that led to disestablishment as a means of promoting the free exercise of religion. In a sense tax exemptions for religious communities is a very modern problem because of the complicated forms of taxation that only came to pass in this century. As I have suggested, however, this modern practice in American law has deep roots in the ancient and medieval world.

A. The Ancient World

In the modern American context, the issue of tax exemption for religion is bifurcated into two questions, each with conflicting answers. Does tax exemption constitute an impermissible benefit to religion that constitutes an *establishment of religion*?⁶ And is exemption from governmental taxes grounded in the *free exercise of religion*?⁷ In the ancient world tax

⁵ GERARD MANLEY HOPKINS, "God's Grandeur" THE POEMS OF GERARD MANLEY HOPKINS 70 (New York: Oxford University Press, 1967).

⁶ *Contrast, e.g.,* Walz v. Tax Commission of the City of New York, 397 U.S. 664 (1970) (exemption of houses of worship from ad valorem property tax does not violate the establishment clause), *with* Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (exemption of distribution of religious literature from sales and use tax violates the establishment clause).

⁷ *Contrast, e.g.,* Murdock v. Pennsylvania, 319 U.S. 105 (1943) (imposition of tax on door-to-door sale of religious literature by Jehovah's Witnesses violates free exercise clause) *with*

exemption for religion focused primarily on whether the State could demand financial tribute from believers if doing so placed them in conflict with a religious obligation. Answers to this question varied over time, and the theme is rich and complex, involving what we would now characterize both as establishment and free exercise concerns.

Two legal systems in the ancient world -- biblical law and Roman law -- had a profound influence on the development of legal systems in Europe that most directly influenced the practice of tax exemption for religious communities in America. Since these two legal systems held sway long after the destruction of Jerusalem by the Roman army in 70 A.D. and the fall of Rome to Aleric, king of the Visigoths in 410 A.D., a few examples from these two legal systems help to illustrate the origins of this theme in the ancient world.

1. The Hebrew Bible on Tribute and Taxation

The Hebrew Bible includes traditions providing for support of religious institutions such as the priesthood through offerings of the first fruits of agricultural harvests (Exod. 23:29; Deut. 26:2-10) and of tithes (Lev. 27:30; Num. 18:21-32; Deut. 14:22-29). Wars and threats of war are associated with the payment of tribute money to the more powerful nation. For example, King David established the city of Jerusalem around 1000 B.C. by means of tribute collected from the surrounding peoples of Moab, Aram, and Hamath (2 Sam. 8). His son, King Solomon, initiated vast public works projects, including the construction of the Temple and a lavish royal palace, which was supported by the creation of a new internal taxation system (I Kings 4:7-19, 22-23, 27-28), by a forced labor system and by military conscription (I Kings 5:13-14). These innovations are identified in one narrative as the basis for a tax revolt that led to the division of the northern kingdom of Israel from the southern kingdom of Judah after death of Solomon. (1 Sam. 8:11-17; 1 Kings 12). A century later both Israel and Judah were forced to pay one-time tribute money to hold off foreign attack (1 Kings 15:19; 20:3-7; 2 Kings 12:18; 15:19-20; 16:8; 18:14-16). One-time payments soon became annual payments (2 Kings 17:4; 2 Kings 24:1,17-18). Regular payment of tribute led eventually to complete absorption by the dominant State. The ten northern tribes -- the kingdom of Israel -- fell to the Assyrian empire in the eighth century B.C. The southern kingdom of Judah fell to the Babylonians, who destroyed Jerusalem -- including the Temple of Solomon -- and took the Judeans into captivity in Babylon in the early sixth century.

In 538 B.C. Cyrus the Persian allowed the exiles to return to Judea to rebuild Jerusalem, and the Persians allowed the Jews considerable freedom to observe their distinctive religious practices. The Hellenists who defeated the Persians in the fourth century B.C. also granted considerable latitude to the Jews. This policy prevailed until the second century B.C., when the struggle between two Hellenistic dynasties -- the Ptolemies and the Seleucids -- over control of Israel led to increased taxation of Jews by their Hellenistic overlords. The power to tax soon led to the power to destroy. Antiochus IV Epiphanes (176-163 B.C.E.), a strong devotee of Greek culture committed to a systematic program of Hellenization, encouraged and then demanded conformity by the Jews to pagan practices (1 Mac. 1:10-15). Far from exempting Jews from laws of general applicability, he desecrated the Jerusalem Temple (1 Mac. 1:19-24; 2 Mac. 5:15-16) by erecting the "abomination of desolation" (Dan. 11:31), a statue of the Olympian deity Zeus, within its sacred precincts (1 Mac. 1:54). Far from exempting Jews from the payment of taxes to

Jimmy Swaggart Ministries v. California Bd. of Equalization, 493 U.S. 378 (1990) (imposition of sales and use tax on distribution of religious literature by TV evangelist does not violate the free exercise clause).

support pagan religion, he raided the treasury of the Temple, confiscating the funds used for its support. This direct assault on Jewish worship was coupled with a program of enforced assimilation presenting the gravest threat to the religious freedom of the Jews. It was followed by a threat of total annihilation of the Jews that sparked the successful rebellion of the Maccabees. Thus tax systems, both internal and external, are remembered negatively in the Hebrew Bible as a source of corruption and oppression.

The first written text describing a pattern of exemption of religion from a tax system is found in the Book of Genesis. Within the saga of the ancestors, the Joseph story (Gen. 37-48) has the narrative function of setting the stage for the central event of Israelite history, the exodus, by locating the descendants of Jacob-Israel in Egypt. The pattern of liberation from slavery is central to this narrative, in which Jacob's sons are surprised to learn that the royal official with whom they must deal is none other than their brother Joseph, whom they had sold into slavery but who rescues them in their time of dire need. Through his remarkable ability to interpret dreams, Joseph rises to a place of prominence in the court of the Pharaoh, where he is given the position of grand vizier of Egypt, with responsibility for developing a policy that will enable Egypt to survive a long period of famine. Joseph designs a series of radical reforms that would make the New Deal seem paltry by comparison. First, he stores up abundant agricultural supplies in granaries to have sufficient reserves for the hard times to come (Gen. 41:46-49). When famine hits, he appropriates for the Pharaoh all the people's money in exchange for grain (Gen. 41:53-57; 47: 13-14). Next, he takes their cattle in exchange for food (47:15-17). Finally, when the Egyptians offer themselves and their land to the Pharaoh, the concentration of power is completed; in order to survive, the people become state slaves in a feudal land tenure system (47: 18-25). One fifth of the land and of its fruits is set aside for the Pharaoh. The land of the priests, however, is exempted from this general plan (Gen. 47:22, 26).

In this detail, the story reflects the practice in the ancient world of exempting temples and temple personnel from various forms of internal taxation.⁸ This system of exemption of the Egyptian priesthood lasted until the first century B.C., when -- according to one estimate -- the priests owned a third of the land, paid no taxes, and were second only to the king.⁹ The accumulation of such vast wealth invited a struggle. Queen Cleopatra VII looted the temples after her lover Mark Anthony lost the battle of Actium in 31 B.C.; the Roman victors who pursued Cleopatra then seized these assets as part of the spoils of battle.¹⁰ A precedent was set for Roman looting of the treasury of the Jerusalem temple a century later.

2. Roman Law: Tax Exemption as *Privilegium* and *Immunitas*

(a) Taxation of the Jews

Roman law can be invoked both for exempting Jews from taxation and for taxing them in a way that directly violated their religious beliefs. The most significant events relating to tax exemption in the Second Temple period were situated in the Jewish struggle for survival under

⁸ According to Deut. 18:1, the Levitical priests did not hold land; hence this form of exemption did not arise, at least during the period described in this book.

⁹ See ROBERT M. GRANT, *EARLY CHRISTIANITY AND SOCIETY: SEVEN STUDIES* 57 (San Francisco: Harper & Row, 1977).

¹⁰ *Id.*; the Egyptian priests continuously sought exemption from the Roman poll tax; *id.* at 57-60.

Antiochus Epiphanes described above. Escaping annihilation at the hands of the Hellenists, the Jews led by Judas Maccabee turned to the new emerging power at the time -- imperial Rome -- for protection. This overture to the Romans led to one of the most important examples of religious exemptions in the ancient world. Eager to expand into Syria, the Romans entered into a pact of friendship with the Jews, to whom they granted Jews special "privileges and immunities."¹¹ Roman emperors issued a series of "official edicts and letters to Greek cities in the East instructing them to permit resident Jews to observe their traditional religion."¹² The single most important "privilege" extended to Jews under Roman law was the explicit protection of their freedom to form religious associations (*collegia*) throughout the empire. This enabled Jews to travel throughout the Mediterranean world without abandoning their religious practices. The establishment of synagogues in virtually every province of the empire proved critical for the survival of Judaism in the diaspora communities outside of Judea. In addition to conferring this special "privilege" on Jews, Roman law also provided a crucial "immunity" or exemption to Jews from many external acts of the Roman cult, and from all public activities on their Sabbath. Jews were only required to offer prayers for the emperor, which did not conflict with any of their religious duties. Before the Christian era began, Judaism was recognized as the "only *religio licita* in the empire save the imperial cult itself."¹³

The practice of tax exemption must be examined against the background of these generous privileges and immunities. As noted above, the Romans exacted a general revenue or poll tax. It was a modest tax of one denarius (a day's wage) per year, and no one was exempted from this tax. But the Romans did grant the Jews an exemption from the payment of the special tax designed to support the temples in Rome. This exemption lasted until the First Jewish War of rebellion against Roman rule (66-73 A.D.), which was triggered by the raiding of the Temple treasury by the Roman procurator Florus (64-66 A.D.). At the climax of this war, the Roman army destroyed the city of Jerusalem, including the Temple, towards the end of August in 70 A.D. Aware of the Jewish practice of sending a half-shekel annually to Jerusalem to support the Temple,¹⁴ the Romans began to collect the same sum from Jews throughout the empire, a half-shekel, but sent it to Rome as a *fiscus judaicus* or "Jewish tax" to finance the temple of Jupiter Capitoline. With the imposition of this tax, the Romans implicated Jews in support of pagan deities in violation of the first and most basic command of Judaism -- "You shall have no other gods to set against me" (Deut. 5:7). Thus Roman law provides an example both of accommodation of biblical faith through an exemption of Jews from taxation targeted for pagan worship, and of an imposition of a special tax imposed upon Jews to implicate them directly in the support of the imperial cult.

¹¹ This phrase made its way into the United States Constitution, Art. IV, § 1, and Amend. XIV, § 1.

¹² PETER GARNSEY & RICHARD SALLER, *THE ROMAN EMPIRE: ECONOMY, SOCIETY AND CULTURE 169-70* (Berkeley: University of California Press, 1987).

¹³ EDWARD H. FLANNERY, *THE ANGUISH OF THE JEWS: TWENTY-THREE CENTURIES OF ANTI-SEMITISM* 16 (New York: Paulist Press, 2d ed. 1985).

¹⁴ In a Gospel narrative (Mt. 17:24-27) Jesus upheld the obligation of Jews to pay this tax in support of the Temple in Jerusalem. See David Daube, *Responsibilities of Master and Disciples in the Gospels*, 19 *NEW TESTAMENT STUDIES* 13 (1972); and J. DUNCAN M. DERRETT, *LAW IN THE NEW TESTAMENT* 247-65 (London: Darton, Longman & Todd, 1970).

(b) New Testament Teaching on Tax Compliance

In the first text in the New Testament dealing with taxation, the Apostle Paul urged the Christians in Rome: "Pay each what you owe him -- the tax to whom you owe the tax, the tribute to whom you owe the tribute, fear to whom you owe fear, honor to whom you owe honor." (Romans 13:6-7). This support for a general duty of tax compliance is, moreover, harmonious with two texts within the Gospels, written much later. The first passage, known as Caesar's coin, is found in all three of the Synoptic Gospels (Mark 12:13-17; Luke 20-26; and Matt. 22: 15-22). In all three versions of the story adversaries of Jesus attempt to trip him up with a question about the payment of general revenue to the emperor. If Jesus were to teach that the tribute should be paid, he would fall out of favor with the Zealots opposed to Roman rule. If he were to deny the payment of tribute, he could be denounced to the Romans as an enemy of the emperor. Calling for his adversaries to produce a tribute coin, Jesus answered their question with another question about the image of caesar on the coin. His reply -- "What are Caesar's give back to Caesar and what are God's to God"-- seems neutral on the surface, but the emphasis in this saying and in the life of Jesus is on giving to God what is God's.¹⁵ The second, the story of the coin in the fish's mouth (Matt. 17:24-27), is unique to the Gospel according to Matthew, generally thought to be written a decade or so after the destruction of Jerusalem referred to above. Several details in the story had led commentators to conclude that, if the story describes an event in the life of Jesus, it has been modified to teach Jewish Christians after the destruction of the Jerusalem temple to pay the *fiscus judaicus*, even if it goes to the Temple of Jupiter on the Capitol in Rome.¹⁶

(c) Roman Law and Religious Exemptions for Christians

As noted above, Roman law provided important exemptions for Jews both from taxation in support of pagan temples and from participation in the imperial religion. Throughout the first three centuries of Christianity, however, Christians enjoyed no similar exemption from generally applicable laws about participation in Roman religion, including emperor worship.¹⁷ On the other hand, there was no specific law targeting Christians in a particular way. Occasionally Christians

¹⁵ *Id.* at 313-38 (1970). According to Lk. 23:2, the opponents of Jesus twist his teaching into a flat command not to "pay taxes to Caesar" and make this a principal charge against him before Pilate. The Lucan version of the coin tribute story may thus have an apologetic purpose, to explain to Roman authorities in the late first century that Christians were taxpayers. *See* Derrett, "Luke's Perspective on Tribute to Caesar," in RICHARD CASSIDY AND PHILIP SCHARPER, EDS., *POLITICAL ISSUES IN LUKE-ACTS 38-48* (Maryknoll, N.Y.: Orbis, 1983). Since Luke's Gospel stresses a social pattern of care for the needy, the Lucan version of this story may also ground the belief that "the only areas in which Caesar can expect allegiance are those in which his patterns are in conformity with God's desired patterns." RICHARD CASSIDY, *JESUS, POLITICS, AND SOCIETY* 58 (Maryknoll, N.Y.: Orbis, 1978).

¹⁶ *See, e.g.*, Hugh Montefiore, *Jesus and the Temple Tax*, 11 *NEW TESTAMENT STUDIES* 60-71 (1964-65); and see Benedict Viviano, "The Gospel according to Matthew," in RAYMOND BROWN, JOSEPH FITZMYER, AND ROLAND MURPHY, EDS., *NEW JEROME BIBLICAL COMMENTARY* 661 (Englewood Cliffs: Prentice-Hall, 1990).

¹⁷ *See, e.g.*, Robert M. Grant, *Emperor-worship* in 2 *INTERPRETER'S DICTIONARY OF THE BIBLE* 98-99 (Nashville: Abingdon Press, 1962); L. R. TAYLOR, *THE DIVINITY OF THE ROMAN EMPERORS* (1931); KENNETH SCOTT, *THE IMPERIAL CULT UNDER THE FLAVIANS* (New York: Arno, 1975).

would be subjected to sporadic persecution as the laws governing participation in the religion of the empire were enforced with greater rigor. The administrative reforms under the emperor Diocletian (284-305 A.D.) -- doubling the number of provinces in the empire and overhauling the imperial army to guard the frontiers -- entailed new forms of taxation based on agriculture. The church enjoyed no exemption from the payment of such taxes and tribute. Indeed, far from enjoying any special privileges during this period, the church was subjected to special burdens. With the sweeping administrative reforms of Diocletian came a revival of paganism and an intensification of the imperial cult. In 295 Diocletian attempted to purge the army of Christians. In 303 he mounted an intense and violent persecution of Christians, ordering the destruction of all Christian churches and books, because of the deliberate separation of the Christian community from Roman mores. The culmination of this persecution was an edict in 304 prescribing death for Christians for refusing to offer pagan sacrifice.¹⁸

With the death of Diocletian in 305, a major historical shift began to unfold in the fourth century that continues to have profound ramifications to this day. The first phase of this shift was centered on the *toleration* of Christianity under Roman law. In 311 Diocletian's successor, Galerius, issued an Edict of Toleration for Christians.¹⁹ On October 28, 312, Constantine won supreme power in the West by his victory at the Milvian bridge on the Tiber. He was convinced that his victory was due to divine inspiration and achieved under the sign of the cross of Christ.²⁰ In 313 Constantine met in Milan with his co-emperor in the East, Licinius; both agreed to a document known as the "Edict of Milan."²¹ Through a series of measures throughout his long reign (312-35) Constantine promoted the toleration of Christianity as a *religio licita*.²² The

¹⁸ See, e.g., MICHAEL GRANT, HISTORY OF ROME 300-24 (New York: Scribner's, 1978); KARL BAUS, FROM THE APOSTOLIC COMMUNITY TO CONSTANTINE 396-404 (New York: Herder & Herder, 1965).

¹⁹ JOHN LOUTH, ED., EUSEBIUS, THE HISTORY OF THE CHURCH FROM CHRIST TO CONSTANTINE (New York: Penguin, 1985), 8.16.9.

²⁰ See EUSEBIUS, THE LIFE OF THE BLESSED EMPEROR CONSTANTINE 1, 27-32 (London: Bagster, 1845).

²¹ The Edict of Milan was not technically an imperial edict, but it had broad impact, instructing provincial officials throughout the empire that Christians within their jurisdiction were to be tolerated as practicing a *religio licita* and that the churches should receive back property that had been confiscated. The Edict of Milan made sense politically as Christians became more numerous, but Lactantius, a third century Latin writer, saw a deeper meaning in this document. Since, he noted, toleration is rooted in religious choice as a distinctively human activity, coercion about matters of the heart makes no sense. LACTANTIUS, THE DEATHS OF THE PERSECUTORS, 44; J.P. MIGNE, ED., 7 PATROLOGIA LATINA col. 261.

²² As one historian notes, "The policy of Constantine was one of toleration. He did not make Christianity the sole religion of the state. That was to follow under later Emperors. He continued to support both paganism and Christianity.... To the end of his days he bore the title of *pontifex maximus* as chief priest of the pagan state cult. The subservient Roman Senate followed the long-established custom and classed him among the gods. He did not persecute the old [pagan] faiths." KENNETH SCOTT LATOURETTE, A HISTORY OF CHRISTIANITY 92 (New York: Harper & Row, 1953). On the other hand, Constantine did use his office to promote the end of the Donatist

political unification of the empire impelled Constantine to seek the doctrinal unity of Christians as a means of cementing political unity. In 325 Constantine became the sole emperor of East and West, convened the first ecumenical or general council of the Church, and even presided in person over the council when it assembled in Nicaea. Under Constantine Christians confronted a new phenomenon: an empire whose head was actively pro-Christian. Of significance for the theme of this report, for the first time in the Christian period, Constantine exempted the church from the payment of local taxes.²³

The second phase of this historical shift gradually resulted in the *establishment* of Christianity as the official, preferred religion of the empire. During the brief reign of Julian (361-63) the emperor interrupted imperial support for the church, and returned to the policy of general toleration of all religions, including pagans and Jews. The next period, especially during the reign of the emperor Theodosius (379-395), solidified the position of Christianity as the officially preferred or established religion, at least within the ruling class. A measure in 355 providing that a bishop could be sued only before another bishop²⁴ is an incipient form of clerical immunity from the jurisdiction of the imperial courts. A decree in 412 extended the immunity to all clerics, who could be accused only before a bishop.²⁵ And bishops and other clerics were granted exemptions from public service.²⁶ These decrees may be viewed as ancient precedents establishing the principle that religious communities are entitled to deference from civil authorities with respect to the structural form of their organization, in this case an episcopal or hierarchical form. Roman law may thus be seen to adumbrate what we now call protection for the free exercise of religion. So emboldened indeed was the church in this period that a leading bishop, St. Ambrose of Milan, excommunicated the Roman Emperor Theodosius for ordering a massacre in Thessalonica in retaliation for an unrelated riot. Ambrose refused to admit the Emperor to participate in the prayer life of the Christian community until he had formally repented of his crime.²⁷

Soon, however, the emphasis in imperial decrees began to create what we now refer to as the problem of an established religion. For example, in 380 a decree of Valentinian, Theodosius, and Arcadius announced the emperors' will that all the people they ruled should "practice that religion which the divine Apostle Peter transmitted to the Romans.... We command that those persons who follow this rule shall embrace the name of Catholic Christians. The rest, however,

schism in Africa; EUSEBIUS, *HISTORY OF THE CHURCH*, note 19 above, 10.5.11-20. He used bishops such as Eusebius as counselors of state. In 318 he gave legal force to the bishops' decisions in civil cases; *THE THEodosian CODE*, 1.27.1. (Clyde Pharr, trans.; Princeton: Princeton University Press, 1952). He recognized the legitimacy of leaving legacies to the church; *id.* 16.2.4. And he declared Sunday a holiday in the courts; *id.* 2.8.1.

²³ MICHAEL GRANT, *HISTORY OF ROME*, note 18 above, at 311.

²⁴ *THEodosian CODE*, note 22 above, 16.2.12.

²⁵ *THEodosian CODE*, note 22 above, 16.2.41.

²⁶ *THEodosian CODE*, note 22 above, 16.2.1-3.

²⁷ "Ambrose, St.," in F.L. CROSS & E.A. LIVINGSTONE, EDs. *THE OXFORD DICTIONARY OF THE CHRISTIAN CHURCH* 40 (New York: Oxford University Press, 2d ed. 1973).

whom We adjudge demented and insane, shall sustain the infamy of heretical dogmas, their meeting places shall not receive the name of churches, and they shall be smitten first by divine vengeance and secondly by the retribution of Our own initiative, which we shall assume in accordance with the divine judgment."²⁸ Some forms of imperial protection of the church came at the very high cost of departure from the message of Jesus on nonviolence. For example, illegal entry into a Christian church was to be capitally punished.²⁹ Similarly, the prayer of Jesus for the unity of his disciples (John 17) was badly distorted as a proof text supporting the resort to imperial force coercing both heretical Christians³⁰ and pagans³¹ to abandon their beliefs in post-Theodosian establishment of Christianity. It is in this climate of establishment of Christianity that

²⁸ THEODOSIAN CODE, note 22 above, 16.1.2.

²⁹ THEODOSIAN CODE, note 22 above, 16.2.31.

³⁰ In the effort to build a Christian society, both civil and religious leaders placed great value on doctrinal unity within the church. See OLIVER O'DONOVAN, *THE DESIRE OF NATIONS: REDISCOVERING THE ROOTS OF POLITICAL THEOLOGY* (1996). The empire actively intervened in doctrinal disputes with decrees favoring those who confessed that the Father, Son, and Holy Spirit are "of the same glory," THEODOSIAN CODE, note 22 above, 16.1.3; and it intervened in the internal discipline of the church, prohibiting priests to have unrelated women in their homes, *id.* 16.2.44. All privileges were denied "heretics and schismatics," *id.* 16.5.1. Indeed, imperial law forbade "all heresies," *id.* 16.5.5. Extensive legislation was enacted against the Manichees, depriving them of the right to bequeath or to inherit, *id.* 16.5.7. Apollinarians, Arians, Donatists, Eunomians, Macedonians, Montanists, Phrygians, and Priscillianists were all subjected to penalties as heretics, *id.* 16.5.12, 25, 34, and 38-39.

³¹ Under Constantine and other Christian emperors in the first half of the fourth century, pagans continued to hold high office. By the mid-century the tide had begun to turn against pagans. An edict under the emperors Constantius and Constans sought to "eradicate completely all superstitions," but allowed pagan temples outside of Rome to remain untouched so that plays, circus performances, contests, and other "long established amusements" could continue to be performed. THEODOSIAN CODE, note 22 above, 16.10.3. In 356 Constantius ordered that any persons proven to devote their attention to pagan "sacrifices or to worship images" would be subject to capital punishment, *id.* 16.10.6. By 392 Theodosius prohibited not only public worship through pagan sacrifices "to senseless images in any place at all or in any city," but also forbade the observance of ancient pagan religion in the home, including burning lights or placing incense before statues of the deities or suspending wreaths for them, *id.* 16.10.12. Three years later the emperors Arcadius and Honorius directed the provincial governors to enforce the decrees prohibiting access to any pagan shrine or temple throughout the empire, *id.* 16.10.13. They revoked the privileges of the "civil priests" or ministers of the ancient pagan religion, *id.* 16.10.14. And finally in 399 they ordered pagan temples "in the country districts" to be torn down so that "the material basis for all superstition [would] be destroyed." *id.* 16.10.16. By the dawn of the fifth century, after decades of preferential treatment of Christians, no one could doubt that Christians played the major part in governing the empire. "God does not reject the powerful, because He is powerful," Jerome mistranslated Job 36:5 _ a significant mistranslation that, as part of the Latin Vulgate, was to assure Christian officeholders, and reflect their belief, that God was with them in the exercise of governmental power.

a variety of tax exemptions for the church became codified in Roman law.³²

The church historian Karl Baus notes the irony that the establishment of the Christian church during this period not only burdened non-members of the church, but also threatened the freedom of the church itself. "It must have been a temptation for many bishops especially in the East, after being oppressed for so long, to sun themselves in the imperial favour and so lose their freedom. More dangerous was the tendency, deriving from the emperor's view, not to consider the Church as a partner *sui generis*, but to make her serviceable to the interests of the State and so to stifle her independence and necessary freedom in the realm of internal Church affairs."³³

Problems that emerged under Roman law may still linger on, especially if they are not clearly identified. One way of identifying the dangers of the tax exemption scheme enjoyed by the church under Roman law is to classify them, somewhat anachronistically, under the rubrics familiar to American constitutional law, established religion and free exercise of religion. Thus Roman law both established Christianity as the official religion of the state and inhibited the free exercise of religion by non-members of this community (such as Jews) and even by members whose orthodoxy ("correct belief") was suspicious in the eyes of Christian authorities (such as the heretics mentioned in the Theodosian Code).³⁴ Latent within the exemption of religion from taxation, moreover, is the possibility that the cost of this benefit for the church may be too high. Whenever the state assumes that it may exact from the church anything like total compliance to its decrees, the coin tribute story may be invoked for the proposition that the church must protect its freedom, reserving ultimate obedience for God alone. Centuries would intervene between the Roman period and the modern period before a constitution would expressly prohibit the government from establishing a religion or from inhibiting its free exercise. Judge Noonan writes: "Free exercise--let us as Americans assert it--is an American invention. How foolish it would be to let a false modesty, a fear of chauvinism, obscure the originality."³⁵

B. The Middle Ages: Complicated Relationships between Church and State

Long after the fall of the Roman empire in the fifth century to barbarian tribes such as the Vandals and the Goths, Roman law continued to have a powerful influence on western civilization. Owing perhaps in some part to this influence, a similar phenomenon of establishment of religion and violation of its free exercise occurred in England, and this history had a direct impact on the history of the American colonies. Only after centuries of complicated interaction between church and state in the early and high Middle Ages, and only after the Reformation had shattered the unity of the church in the West would a fully articulated theory of exemption of religion from taxation emerge.

There are some English antecedents for tax exemption of religious bodies, principally the exemption of charities, which included monasteries, hospices and schools operated by religious communities. But English legal history is not a fruitful ground in which to search for anything like a solid precedent for our current arrangements on tax exemption. Nonetheless, it is important to explore the complexities of the relationship between church and state in medieval England as

³² THEODOSIAN CODE, note 22 above, 16.2.8, 10 and 36.

³³ BAUS, FROM THE APOSTOLIC COMMUNITY TO CONSTANTINE, note 18 above, at 432.

³⁴ See note 30 above.

³⁵ JOHN T. NOONAN, JR., THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM 2 (BERKELEY: UNIVERSITY OF CALIFORNIA PRESS, 1998).

the necessary prologue to the later practice of tax exemption of religious bodies in America.

It is necessary at the outset to reject some historical falsehoods. It is not correct, for example, to claim that the church in England was generally exempt from the payment of taxes to the crown throughout the medieval period. On the contrary, the bishops were expected to levy a large tribute for the crown when they gathered in their assembly or Convocation, just as the laity was expected to support the crown through Parliamentary subsidies.³⁶ Even the mechanisms relied upon by the local parish church for eliciting financial support from the people -- such as tithes (donation of the tenth part of the harvest to the local church) and glebe lands (territory set apart for the support of the local church) -- were deemed a grant from kings and other lay magnates.³⁷

Neither is it correct to describe the church as an autonomous body with separate jurisdiction or power to govern itself as an independent sovereign. This view of church autonomy was asserted in the canon law, but not in the law of England as determined by its lay representatives acting in the House of Commons. Church autonomy eventually emerged as a central principle of American constitutional law,³⁸ but it is not descriptive of actual practice in the medieval period. On the contrary, these centuries are marked by seemingly continuous struggle between church leaders and laymen interested in the expansion of their respective influence and power.

To put a complicated matter simply, there was considerable overlap in the ways in which ecclesiastical and royal authority related to one another in medieval England.³⁹ To put it another way, there was no sharp distinction between church and state, as we currently use those terms. The principal distinction was between clerics or spiritual rulers (such as bishops and abbots) and laypersons or secular rulers (such as kings, earls, barons, and other nobles), all of whom were members of the same church. Even this distinction was muddled. Church leaders were also

³⁶ See, e.g., ROBERT E. RODES, JR., *ECCLESIASTICAL ADMINISTRATION IN MEDIEVAL ENGLAND* (Notre Dame: University of Notre Dame Press, 1977); and ROBERT E. RODES, JR., *LAY AUTHORITY AND REFORMATION IN THE ENGLISH CHURCH: EDWARD I TO THE CIVIL WAR 8-11* (1983).

³⁷ As far as the church was concerned the practice of tithing had scriptural warrant; see, e.g., Num. 18:21,24,26; Deut. 12:17; 14:22,23-28; 26:12; 2 Chron. 31:5-6; Neh. 10:38;13:12; Mal. 3:10; Sir. 35:11. As far as the crown was concerned, the ability of the church to have this portion of the land of England dedicated to church use in this way was purely royal grace; the crown was obligated to support the church, but could have chosen other ways of doing so. In this sense the church was said to be "founded"(i.e., funded) by the king and lay magnates. ROBERT E. RODES, *LAY AUTHORITY AND THE REFORMATION*, note 36 above, at 2.

³⁸ Some scholars identify church autonomy as an aspect of free exercise of religion; see, e.g., Douglas Laycock, *Towards a General Theory of the Religious Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981); other scholars view church autonomy as a benefit of disestablishment; see, e.g., Carl Esbeck, __, __ IOWA L. REV. 1 (forthcoming 1999).

³⁹ For an account of these relationships, see, e.g., ROBERT E. RODES, *LAY AUTHORITY AND REFORMATION IN THE ENGLISH CHURCH: EDWARD I TO THE CIVIL WAR 1-66* (Notre Dame: University of Notre Dame Press, 1982).

secular magnates who wielded considerable power. For this very reason, the crown became keenly interested in the issue of who would wield such power.⁴⁰ The sheriff was empowered to enforce judgments of the church courts, which exercised jurisdiction over important aspects of human life, such as family law, that we now assume to be within the control of the secular authorities. Because ordained clerics (from which we derive the term, "clerks") were literate, they served the crown as the bureaucrats who carried out the administration of the king's laws. And the king rewarded faithful service by these clerks by awarding benefices of the church, such as the revenues of a parish priest, or even of a bishop or an abbot.⁴¹ On the other hand, the church insisted upon the jurisdiction to try the clergy for crimes.⁴²

Thus the relationships between the church and the crown were anything but tidy and were most emphatically not divided by a metaphorical "wall of separation."⁴³ That phrase is usually understood in the modern American constitutional context to describe the value of

⁴⁰ "Before the canonical election process was formalized in the early thirteenth century, the king often played an active personal part in [the process of their selection], convening the electors, or even exercising some discretion over who was to participate." *Id.* at 4.

⁴¹ *Id.* at 5.

⁴² This claim had its origins in Roman law. For example, an imperial decree issued in 384 holds that clerics may not be haled before a public court in ecclesiastical cases; Sirmundian Constitutions, Title 3, in *The Theodosian Code*, note 22 above, at 478. Another decree issued in 425 prohibits clerics from litigating in secular courts; Sirmundian Constitutions, Title 6, *id.* at 479-80.

⁴³ *Everson v. Board of Education*, 330 U.S. 1, 16 (1947), citing *Reynolds v. United States*, 98 U.S. 145, 164 (1878). This metaphor is taken from a letter from Thomas Jefferson to the Baptist Association of Danbury, Connecticut dated January 1, 1802. MERRILL D. PETERSON, ED., *JEFFERSON: WRITINGS* 510 (New York: Library of America, 1984). Jefferson had received a communication from these Baptists in October of 1801. His chief political advisors on New England were his Postmaster General, Gideon Granger, and his Attorney General, Levy Lincoln. He shared a draft of a reply with both of them. The draft expressed the view that since Congress was inhibited by the Constitution from enacting legislation "respecting religion" [*sic*], and the executive was authorized only to execute their acts, he had refrained from prescribing "even occasional performances of devotion," such as the proclamations of thanksgiving or fasting that his predecessors had done. *See* George Washington's Proclamation of a National Day of Thanksgiving, October 3, 1789, and John Adams's Proclamation of Day of Humiliation, Fasting, and Prayer, March 23, 1798, reprinted in JOHN T. NOONAN, JR., ED., *THE BELIEVER AND THE POWERS THAT ARE* 128-29 (New York: Macmillan, 1985; 2d rev. ed. forthcoming). On December 31, 1801, Granger wrote to Jefferson urging him to send the letter as drafted. Jefferson wrote to Lincoln on January 1, 1802, and received a reply from Lincoln on the same day, cautioning against the language about thanksgivings since this might give uneasiness "even to Republicans" in the eastern states, where they had long been accustomed to proclamations of thanksgiving by their governors. Jefferson followed the advice of his Attorney General, and sent the letter to the Danbury Baptists that day, deleting the reference to thanksgiving days. *See* DUMAS MALONE, *JEFFERSON THE PRESIDENT: FIRST TERM, 1801-1805* 109 (Boston: Little, Brown, 1970).

nonestablishment of religion. In the Middle Ages, however, the phrase had a much different resonance, used in a papal letter to describe the desire of the papacy to limit the participation of lay princes in the selection of bishops.⁴⁴

The struggles of the church and the crown over the extent of their respective "rights and privileges" were complicated and continuous. These struggles were not over an abstract matter of political theory, but were intensely practical, with important consequences for tax policy. I focus now on two of these struggles -- the freedom of the church to select its leaders and to discipline its clergy -- as illustrations of the broader conflict that eventually resulted in the practice of tax exemption.

As with the ancient priests of Egypt mentioned above, bishops and abbots of monasteries came to control vast possessions and to enjoy popular influence that invited greater attention by the crown. As noted above, in many parts of Europe the lay authority extended its influence over society by involving itself in the selection of religious leaders, even to the extent of arranging that their own candidate be chosen for these church offices. This practice, which resulted in the "bestowal of ecclesiastical offices on entirely unqualified persons"⁴⁵ met strong opposition from papal reformers, notably Pope Gregory VII (1073-85)⁴⁶ and Pope Paschal II (1099-1118).⁴⁷

⁴⁴ In early Christianity liturgical worship emphasized the communal dimension of the people gathered to hear the scriptures and to celebrate the sacrament of the Eucharist. A leader presided over this prayer, but priests were not exalted over laypersons, all of whom were viewed as part of the holy people (in Greek, *laos*) of God. Situated in the power struggles of the medieval period, the term "layperson" or "laity" came to have a negative connotation: not priestly, not clerical. With the sacralization of the priesthood, priests were regarded as members of a different and "higher order." The Protestant Reformers, principally Martin Luther and John Calvin, challenged these views both by regarding the clergy as ministers approved by the community and by placing emphasis in their teaching on the priesthood of all believers.

⁴⁵ "Gregory VII," in CROSS & LIVINGSTONE, THE OXFORD DICTIONARY OF THE CHRISTIAN CHURCH, note 27 above, at 584.

⁴⁶ Shortly after his election in 1073 as Pope Gregory VII, Hildebrand issued a decree against greedy (simoniacal) clergy. In 1075 he forbade the practice of lay investiture. The Holy Roman Emperor Henry IV resisted the decree on the continent, and William the Conqueror resisted it in England. William escaped excommunication by complying zealously with other Gregorian reforms, but Henry was excommunicated, in part because he had ordered the pope deposed. In 1076 Gregory replied by issuing a decree known as *Dictatus papae* ("Pronouncements of the Pope"), which claimed not only that the pope has the power to transfer a bishop from one diocese to another under pressure of pastoral need, but also that the pope has the power to depose emperors. He then deposed Henry and freed his subjects of their allegiance to the emperor. The stand-off between pope and emperor came to a dramatic halt a year later, with the emperor kneeling penitentially in the snow at Canossa and promising submission before being absolved. In 1080 the pope again excommunicated the emperor for failing to live up to the promises made in Canossa. The emperor again deposed Gregory, named a rival candidate or antipope, and occupied Rome after a two-year siege. The pope died in exile in Salerno in 1085. "Gregory VII, St.," in CROSS & LIVINGSTONE, EDS. THE OXFORD DICTIONARY OF THE CHRISTIAN CHURCH, note 27 above, at 584-85; for a study of the impact of the Gregorian reform on the development of Western legal science, see HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE

The practice of "lay investiture" -- whereby a prince gave to a bishop the emblems of church office, a ring and a crozier (a staff indicating spiritual authority) -- was condemned at the First Lateran Council in 1123.⁴⁸ Implicated in this symbolic gesture was a deeper political reality. The formal resolution of this conflict, however, had little practical impact on the continuous political practice of lay involvement in appointment of religious leaders. Sometimes the papal reformers claimed jurisdiction not only over spiritual matters such as episcopal appointments, but also over temporal matters such as whether a prince was fit to govern. These exaggerated claims of papal authority over the secular order were ultimately unsuccessful, and it would be centuries before the church would eventually prevail on the issue of its own freedom to appoint its leaders without the interference of lay princes.

However one regards these conflicts, there is no denying that the pope was an international figure with whom princes had to reckon. As early as the pontificate of Gregory I (590-604) the church had erected a curia or court in Rome. By the time of Urban II (1088-99) the papal bureaucracy rivalled the organizational structure of the Holy Roman Empire. The pope thus sat as acknowledged head of a judicial and administrative system that extended to every corner of Europe from Ireland in the West to Hungary in the East. By maintaining its independent ability to promulgate laws governing all Christians in the West, the church began to wield political power it had previously lacked. More importantly, it began to shape the legal culture of Europe through a jurisprudence grounded in the interpretation and application of its canons rather than on competing systems of Frankish or Saxon local tribal customs, including the common law of England.⁴⁹

Perhaps the sharpest example of a conflict over church autonomy in English history is the twelfth-century confrontation between Henry II and Thomas Becket, Archbishop of Canterbury.⁵⁰ Thomas had served as the king's chancellor, but -- to the king's chagrin -- resigned the post when -- at the king's urging -- the monks of Christ Church, Canterbury, chose Thomas as their archbishop in 1162. Henry is best known for his desire to create an efficient court system. The

WESTERN LEGAL TRADITION 85-119 (Cambridge: Harvard University Press, 1983).

⁴⁷ For an account of the clash between Paschal II and Emperor Henry V, *see* "Paschal II," *id.* at 1020.

⁴⁸ GERD TELLENBACH, CHURCH, STATE, AND CHRISTIAN SOCIETY AT THE TIME OF THE INVESTITURE CONTEST (OXFORD: BLACKWELL, 1940); GERD TELLENBACH, LIBERTAS: KIRCHE UND WELTORDNUNG IM ZEITALTER DES INVESTITURSTREITES (Stuttgart: Kohlhammer, 1996); GERD TELLENBACH, THE CHURCH IN WESTERN EUROPE FROM THE TENTH TO THE EARLY TWELFTH CENTURY (New York: Cambridge University Press, 1993); KARL SCHMID, ED., REICH UND KIRCHE VOR DEM INVESTITURSTREIT: VORTRÄGE BEIM WISSENSCHAFTLICHEN KOLLOQUIUM AUS ANLASS DES ACHTZIGSTEN GEBURTSTAGS VON GERD TELLENBACH (Sigmaringen: Thorbecke, 1985); GERD TELLENBACH, DIE BISCHÖFLICH PASSAUISCHEN EIGENKLÖSTER UND IHRE VOGTEIEN (Berlin: Eberin, 1928).

⁴⁹ *See, e.g.,* BERMAN, LAW AND REVOLUTION, note 46 above, 199-224.

⁵⁰ This account of the Becket controversy is drawn from NOONAN, THE BELIEVER AND THE POWERS THAT ARE, note 43 above, at 22-27; *see also* DAVID KNOWLES, THOMAS BECKET (Stanford: Stanford University Press, 1971).

expanding jurisdiction of the royal courts led to conflict with the barons, who had previously dominated the administration of justice. In 1164 Henry won a major concession from Thomas and the other bishops, who agreed at first to observe the Constitutions of Clarendon, ceding to royal courts the power to punish clerics convicted of a crime by a church court.⁵¹ Almost instantly Thomas repented his surrender of the church's immunity from the crown's jurisdiction over the discipline of the clergy, and asked Pope Alexander III (1159-1181) to be absolved from his oath to the king.⁵² Henry retaliated by summoning Thomas to answer in the royal courts a charge against him by one of his tenants. When Thomas failed to appear, he was fined for contempt of the king's court, and the king went on to have his barons try Thomas for not accounting for all the funds he had received as chancellor. In October 1164 he was found guilty.⁵³ The king thought he would prevail over Thomas by holding him accountable in courts where the king set the rules. In Thomas's view this very fact violated the tradition of a bishop's immunity from civil suit, grounded in Roman law. Thomas appealed to the pope to overturn the verdicts. The other bishops filed a separate appeal with the pope, asking him to condemn the archbishop or at least to let the case be tried by a papal legate in England.⁵⁴

For the next six years the only litigation that went on was in the canonical system with the pope as supreme judge acting in person or by legates. Thomas issued excommunications against various bishops, clerics, and royal officials, but not against the king himself.⁵⁵ After a long exile from his see while the appeals before the pope were pending, Thomas returned to England in 1170. When he renewed an excommunication of three bishops, he roused again the wrath of Henry, who was heard to ask at court, "Who will rid me of this priest?". On the afternoon of December 29, 1170, four of Henry's knights burst into Canterbury cathedral and murdered the archbishop.⁵⁶ The pope imposed discipline on the king for the "murder in the cathedral," and for

⁵¹ "Clarendon, The Constitutions of," in CROSS AND LIVINGSTONE, EDs., OXFORD DICTIONARY OF THE CHRISTIAN CHURCH, note 27 above, at 294-95; *see also* BERMAN, LAW AND REVOLUTION, note 46 above, 255-69.

⁵² KNOWLES, BECKET, note 54 above, at 92-93.

⁵³ KNOWLES, BECKET, note 54 above, at 94, 98.

⁵⁴ KNOWLES, BECKET, note 54 above, at 97-98, 104.

⁵⁵ GRATIAN, CONCORDIA DISCORDANTIUM CANONUM (HARMONY OF THE UNHARMONIOUS CANONS) 17.4.29.

⁵⁶ Noonan notes that to see this controversy as "Church versus State" is an anachronism. "The Church was divided. As noted above, some bishops sided with the king, and the pope was indecisive. On the "state" side of the controversy, the king was not a modern bureaucracy ideologically hostile to the Church's claims. Henry was responding at least in part to what he saw as pride and disloyalty in Becket. That the bishops were divided was important to the king politically, for he could say in good conscience that he was not attacking the Church when learned churchmen were on his side. But from the viewpoint of the universal Church, Thomas died for his defense of its claims. Two years and two months after his death, he was proclaimed a saint, canonized by Alexander III himself. During the next 600 years the Church was often to be in conflict with Christian monarchs who had their own ideas as to how to limit the jurisdiction of the Church. For popes or bishops involved in any of these encounters Thomas was an exemplar

centuries afterwards pilgrims such as those described in Chaucer's *Canterbury Tales* flocked to do homage at the grave of Becket at Canterbury, not to the final resting place of the king. One of the consequences of the Becket controversy that was to endure for centuries is that lay courts were deprived of most jurisdiction over clerics in criminal cases. This modest acknowledgement of the church's jurisdiction would, in time, become the basis for a fuller understanding of church autonomy. Before this was to happen, though, the momentous events of the Reformation dramatically changed the way in which church and state were thought to relate.

The English Reformation: Supremacy of the Crown and Establishment of the Church

The most obvious political consequence of the sixteenth century Reformation is that it shattered the unity of the western church. The Reformation in England proceeded on a very different path from that blazed by the two principal continental reformers, Martin Luther and John Calvin, who attacked the papacy as an institution and called for a through-going reform of the church. To render a complicated story simpler, the Reformation in England basically left the structure of the church intact, but replaced the pope with the crown as the supreme leader of the church. This major shift in the theory and practice of church law in England occurred during the long reign of the second Tudor monarch, Henry VIII (1509-47). When the pope refused to grant the king's request for an annulment of his marriage to Catherine of Aragon, Henry had the "Reformation Parliament" of 1532 enact statutes forbidding the payment of funds to support the papacy.⁵⁷ Henry then imposed upon the Convocation of the Clergy a severe criminal penalty on a trumped up charge. Then -- in a manner reminiscent of conquering emperors punishing ancient Israel -- he exacted a huge sum of money from the bishops as tribute to the crown under the pretext of securing a royal pardon for their alleged misdeeds.⁵⁸ Within two years the Reformation in England took a more radical turn. In 1534 the King was declared "supreme head of the church in England"⁵⁹ and the church, in effect, became an arm of the crown.

Under that premise, it was a small step for Henry VIII to seek and gain from a compliant Parliament statutes in 1536 and 1539 allowing the crown to dissolve the monasteries.⁶⁰ Given the wide acceptance of the principle of Parliamentary sovereignty, these enactments are not generally

of adherence to principle and resistance to royal pretensions. By his life and by his death he had an impact on European views of the relation of bishop to prince." NOONAN, *THE BELIEVER AND THE POWERS*, note 43 above, at 27.

⁵⁷ Annates, the first year's revenue from a church benefice, such as a diocese or headship of a monastery, were paid to the Roman curia. *See, e.g.*, W.E. LUNT, *PAPAL REVENUES IN THE MIDDLE AGES* 1:93-99; AND 2:315-72 (New York: Columbia University Press, 1934). In 1532 Parliament conditionally restrained the payment of Annates; in exchange for papal documents sought by the Crown, Henry refused the royal assent to the statute. Two years later, however, Parliament transferred annates to the Crown, *Restraint of Annates*, 25 Hen. VIII, c. 20 (1534); and it forbade the ecclesiastical practice of sending a small head tax to the Pope, *Act Forbidding the Payment of Peter's Pence*, 25 Hen. VIII, c. 21 (1534).

⁵⁸ *See, e.g.*, DAVID HARRISON, *TUDOR ENGLAND* (London: Cassell, 1953).

⁵⁹ *Act of Supremacy*, 26 Hen. VIII, c. 1 (1534).

⁶⁰ *Act for the Dissolution of Smaller Monasteries*, 27 Henry VIII, c. 28 (1536); *Act for the Dissolution of the Greater Monasteries*, 31 Henry VIII, c. 13 (1539).

regarded as "unconstitutional" as they would be in a system like ours with judicial review. But one leading commentator on the Tudor period has described this confiscation of church property for the private good of the crown (and, more venally, of the King's toadies)⁶¹ as a violation of the unwritten constitution of England.⁶² In any event, the dissolution of the monasteries had devastating consequences for charity, the arts, and learning generally.⁶³

As on the continent, the Reformation in England represented an assault on the universal authority of the pope, but in several respects the English Reformation left intact the arrangements that had governed the relationship between church and state throughout the Middle Ages. The most significant difference was that in the pre-Reformation period nearly everyone in England belonged to the same religious community. With the shattering of church unity, the twin

⁶¹ See, e.g., DAVID KNOWLES, *BARE RUINED CHOIRS: THE DISSOLUTION OF THE ENGLISH MONASTERIES* (New York: Cambridge University Press, 1976); DAVID KNOWLES & R. NEVILLE HADCOCK, *MEDIAEVAL RELIGIOUS HOUSES, ENGLAND AND WALES* (New York: St. Martin's Press, 1973); DAVID KNOWLES, *3 THE RELIGIOUS ORDERS IN ENGLAND: THE TUDOR AGE* (Cambridge: Cambridge University Press, 1959); GEORGE WILLIAM OTWAY WOODWARD, *THE DISSOLUTION OF THE MONASTERIES* (London: Blandford Press, 1966); JOYCE A. YOUNGS, *THE DISSOLUTION OF THE MONASTERIES* (London: Allen and Unwin; New York: Barnes and Noble, 1971). One writer of the period notes: "Overall the destruction of the monasteries unleashed a degree of greed far greater than any the corrupt monks had ever displayed. It embittered many among the devout without consolidating the loyalty of any segment of the population." CAROLLYN ERICKSON, *BLOODY MARY: THE REMARKABLE LIFE OF MARY TUDOR 174-75* (1978).

⁶² G.R. ELTON, *STUDIES IN TUDOR AND STUART POLITICS AND GOVERNMENT* (Cambridge, Mass.: Harvard University Press, 1974); see also Elton, *REFORM AND RENEWAL: THOMAS CROMWELL AND THE COMMONWEAL* (Cambridge: Cambridge University Press, 1973), Elton, *POLICY AND POLICE: THE ENFORCEMENT OF THE REFORMATION IN THE AGE OF THOMAS CROMWELL* (Cambridge: Cambridge University Press, 1972). "Spasmodic attempts at reform [of the English monasteries] had met with little success and various small suppressions had taken place." "Dissolution of the Monasteries, The." CROSS & LIVINGSTONE, *EDS. OXFORD DICTIONARY OF THE CHRISTIAN CHURCH*, note 27 above, at 411. Perhaps this is what one legal historian had in mind when he casually suggested that there was "mediaeval precedent for the confiscation of monastic property." THEODORE PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 41 (1965). For example, Henry VII had responded to situations where a small monastery had decayed to virtual abandonment, but that was not a precedent for the wholesale expropriation of church property by his son, Henry VIII.

⁶³ However much the monasteries were in need of reform, the royal "remedy" was deeply harmful to the spiritual and intellectual life of the country. The libraries at the monasteries were destroyed, along with the chapels where the people had gathered to pray. "The incidental losses to charity, art, and learning were considerable, many precious MSS. and church furnishings perishing through destruction and decay." CROSS AND LIVINGSTONE *EDS.*, *OXFORD DICTIONARY OF THE CHRISTIAN CHURCH*, note 27 above, at 411. See also Maria Renata Daily, *THE EFFECT ON FEMININE EDUCATION IN ENGLAND OF THE DISSOLUTION OF THE MONASTERIES UNDER HENRY VIII*. (M.A. Diss. Notre Dame, Ind., 1934); BENJAMIN KIRKMAN GRAY, *A HISTORY OF ENGLISH PHILANTHROPY FROM THE DISSOLUTION OF THE MONASTERIES TO THE TAKING OF THE FIRST CENSUS* (London: P. S. Kingson, 1905).

problems of establishment and violation of free exercise became acute, at least for non-members of the Church of England. By the close of the long reign of Henry's daughter, Elizabeth I (1558-1603) Parliament had woven a web of statutory preferences for the Anglican church, with severe penalties for nonconformity. This pattern of special benefits and burdens would come to define precisely what we now refer to as an "established church." The "privileges and immunities" extended to the Christian church either by Roman law during the late fourth and early fifth centuries or by royal decrees after William I in England were now limited to the local Anglican diocese and parish, and were not extended evenhandedly to outsiders. This inequality led to the realization that tax exemption was a serious issue needing major rethinking, work that was to take place primarily in the American colonies. A decade before the Reformation in England people took for granted a variety of mechanisms for supporting the church because there was consensus on what was meant by the term, "church." Once this consensus was challenged and eventually disappeared, it became deeply offensive to Recusant Catholics or dissenting Protestants to be required to pay taxes to support a religious community, "the Church of England as by law established,"⁶⁴ with which these nonmembers deeply disagreed on various doctrinal grounds. One of the markers of a religious establishment is coercive taxation imposed upon non-members of the church. This pattern of discriminatory tax benefits and tax burdens was to last in England until well into the nineteenth century.⁶⁵

The first two Stuart monarchs, James I (1603-25) and Charles I (1625-49), asserted novel claims of royal power to impose taxes without the authority of Parliament. The bloody civil war that ensued led to the firm establishment of the principle of Parliamentary control over the taxing and spending power in British constitutional law. After the Restoration of the monarchy under Charles II (1660-85) the clergy no longer insisted on its prerogative of taxing itself in Convocation as its means of providing subsidies to the crown, but subjected itself to Parliamentary enactments on taxation.⁶⁶ Hence all tax exertions and exemptions -- whether

⁶⁴ The phrase "established church" derives not from an Act of Parliament, but from Canon 10, an ecclesiastical rule for separating Catholics and dissident Protestants from the Church of England, described in canon 10 as "by law established." These canons were formulated by the Archbishop of Canterbury, Richard Bancroft, and were adopted by the Convocation in 1604. See J.V. BULLARD, ED., CONSTITUTIONS AND CANONS ECCLESIASTICAL, 1604 (London: Faith Press, 1934); and ROBERT E. RODES, JR., LAW AND MODERNIZATION IN THE CHURCH OF ENGLAND: CHARLES II TO THE WELFARE STATE 85 (Notre Dame: University of Notre Dame Press, 1991). Rodes notes that "[b]y the late eighteenth century, it was widely accepted that it was one thing to set up a church and an entirely different thing to 'establish' it." *Id.* at 318. In an influential treatise, ALLIANCE BETWEEN CHURCH AND STATE (London, 1736) the Anglican Bishop, William Warburton, wrote that churches are "set up" by anyone who cares to. Rodes summarizes Warburton's views as follows: "Then, if the civil magistrate, looking at the churches on the market, finds one that commands the allegiance of most of the people, he may choose to make an alliance with it for mutual benefit. An established church is one with which such an alliance has been negotiated; a Dissenting church is any other." *Id.*

⁶⁵ See, e.g., Robert E. Rodes, Jr., LAW AND MODERNIZATION IN THE CHURCH OF ENGLAND: CHARLES II TO THE WELFARE STATE 96-112 (1991).

⁶⁶ ROBERT E. RODES, JR., LAW AND MODERNIZATION IN THE CHURCH OF ENGLAND: CHARLES II TO THE WELFARE STATE (Notre Dame,.: University of Notre Dame Press, 1991).

respecting the church or even the crown itself⁶⁷ -- are now viewed as Parliamentary prerogatives. Although both the church and the crown may be viewed as "autonomous" within their own spheres in the unwritten English constitution, they are so by legislative grace.

D. Colonial America: Local Religious Establishments and Tax Rebellion

In modern American constitutional theory, the government may neither establish a religion nor inhibit its free exercise. These constitutional goals are not polar opposites in tension with one another, as the Court⁶⁸ and many modern American commentators imagine,⁶⁹ but are complementary aspects of freedom.⁷⁰ This conclusion seems correct when the history of colonial America is attended to with care.

The disparate treatment of dissenting Protestants -- religious communities who were not part of the official state religion, the Church of England -- was one of the causes impelling people to leave England in the Tudor and Stuart periods, and go to the colonies in search of religious freedom. Some colonists were happy to extend the protection of religious freedom to all within their territory. The most notable examples were William Penn in Pennsylvania, Roger Williams in Rhode Island, and the Calverts in Maryland. Elsewhere in the American colonies religion appeared in the guise of an established state church, generally Congregationalist in New England, and generally Anglican in the middle and southern colonies.⁷¹ This led ironically to the very practices of religious preferences for members of the official church and to penalties on nonconformity that had prompted many of the colonists to flee England in the first place.

Details varied from colony to colony, but religious establishments in the American colonies had the following general characteristics:

[a] state church officially recognized and protected by the sovereign; a state church whose members alone were eligible to vote, to hold public office, and to practice a profession; a state church which compelled religious orthodoxy under penalty of fine and imprisonment; a state church willing to dispel dissenters from the commonwealth; *a state church financed by all members of the community*; a

⁶⁷ To avoid the possibility of legislation that would have imposed a tax upon the wealth of the crown, Elizabeth II recently made a voluntary contribution on the order of £ __ million to the state. *New York Times* (199__).

⁶⁸ See, e.g., *Walz v. Tax Commission*, 397 U.S. at 668-69.

⁶⁹ See, e.g., Suzanna Sherry, *Lee v. Weisman: Paradox Redux*, 1992 SUPREME COURT REV. 123.

⁷⁰ The Williamsburg Charter, a bicentennial document celebrating religious freedom states that the First Amendment provisions on religion are "mutually reinforcing provisions [that] act as a double guarantee of religious liberty." *The Williamsburg Charter*, 8 J.L. & RELIG. 5, 6 (1980).

⁷¹ After the Glorious Revolution led to the rejection of the last Stuart king, James II, because he was a Catholic, the Protestant majority in Maryland seized the government in 1689 and limited the practice of religious toleration exclusively to Protestants. See THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* 47 (New York: Oxford University Press, 1986). These events were entirely consistent with the narrow view of permissible toleration advanced by John Locke in his 1688 *Letter Concerning Toleration*, which expressly excluded Catholics, Muslims, and atheists from religious toleration.

state church which alone could freely hold public worship and evangelize; a state church which alone could perform valid marriages [and] burials.⁷²

By the same token, the movement for disestablishment embraced the following objectives: [a]n equal opportunity to hold public office and exercise political rights, regardless of religious beliefs; *an end to taxes for the support of a particular religious faith to which the taxpayer did not subscribe*; termination of laws requiring dissenters to attend services of the dominant faith; equal economic opportunities for dissenters and an end to advantages and preferences possessed by the members of the dominant faith; and end not only to "exclusive establishments," such as Anglican or Congregationalist, but also to "multiple establishments, such as Protestantism; toleration and equal opportunity to practice a faith, so long as it did not jeopardize the equal rights of others or imperil the common good."⁷³

As the characteristic of an established church and the objective of disestablishment italicized above suggest, taxation and exemption of religion from taxation proved to be a critical means of taking the constitutional measure of a society. In the context of an established religion, it is unsurprising that there is scant documentary evidence of exempting the church from payments to the government of the colony, for there was no adequate distinction between the one and the other. "The properties of the state church were in effect public property and 'could not but be exempt from taxation.'"⁷⁴ Even in the context of official establishments, however, there is evidence of tax exemption of religion. For example, throughout the eighteenth century Connecticut provided that:

all lands, tenements and hereditaments, and other estates that either had been given or hereafter to be given and granted by the General Assembly, colony, or by any town, village or particular person or persons for the maintenance of the ministry of the gospel ... shall be exempted out of the general list of estates, and free from the payment of rates.⁷⁵

Taxation in support of religion tended also to reflect a bias in favor of the established church. For example, in the New England colonies, the inhabitants paid taxes to support the local

⁷² CHESTER JAMES ANTIEAU, ARTHUR T. DOWNEY, AND EDWARD C. ROBERTS, *FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES 1-2* (Milwaukee: Bruce, 1964) (emphasis added); each of these characteristics of an established church is discussed *id.* at 2-29; the requirement of financing the established church through coercive taxation is discussed *id.* at 20-24. *See also* CURRY, *THE FIRST FREEDOMS*, note 71 above, at 105-33.

⁷³ ANTIEAU, DOWNEY AND ROBERTS, *FREEDOM FROM FEDERAL ESTABLISHMENT*, note 72 above, at 31; the struggle to be free from taxes to support a particular religion to which a taxpayer did not subscribe is discussed *id.* at 31-41; *see also* CURRY, *THE FIRST FREEDOMS*, note 71 above, at 137-48 (discussing Virginia) 168, 171, 181-88 (discussing Massachusetts and Connecticut).

⁷⁴ ANTIEAU, DOWNEY, AND ROBERTS, note 72 above, at 73, citing CARL ZOLLMAN, *AMERICAN CIVIL CHURCH LAW* 239 (St. Paul: West, 1917).

⁷⁵ *Id.* at 73, citing 66 Connecticut Rev., 1702.

"teacher of Christian religion," irrespective of whether they were members of the same church as that pastor. The phrase, "taxation without representation is tyranny," resonates as a slogan of the American revolution, viewed as a tax rebellion against the imposition of duties by a Parliament in which the colonists had neither voice nor vote. Before Tom Paine used the slogan in his famous pamphlet *Common Sense*, however, this basic idea had been voiced repeatedly by the famous preacher, Isaac Backus, to describe Baptist protest against the imposition of local taxes in New England to support the Congregational establishment. Thus in a long pamphlet entitled "An Appeal to the Public for Religious Liberty, Against the Oppressions of the present Day," Backus explained in 1773 why he would no longer submit certificates (which were themselves taxed at a moderate rate) seeking exemption for Baptists from payment of taxes for the support of a Congregational minister: "You do not deny the right of the British Parliament to impose taxes within her own realm; only complain that she extends her taxing power beyond her proper limits. And have we not as good right to say you do the *same thing*?.... Can three thousand miles possibly fix such limits to taxing power as the difference between civil and sacred matters has already done?"⁷⁶ In the following year Backus drafted a long letter explaining the same matter as follows: "The reasons why the leaders of our society [Baptists] did not conform to that law, were not any disregard to civil government, to which in its proper place we trust that we are as good subjects as you are, but because upon close examination of the case they were convinced that for civil rulers to assume a *power to impose taxes for religious worship* is *contrary* to the word of God, contrary to the charter of this province, and *to the very nature of true liberty and equity among mankind*."⁷⁷ Four years later Backus wrote in a pamphlet entitled "Government and Liberty Described; and Ecclesiastical Tyranny Exposed": "I need not inform you that all America are in arms against being taxed where they are not represented. But it is not more certain that we are not represented in the British Parliament than it is, that our *civil* rulers are not our representatives in *religious* affairs."⁷⁸

⁷⁶ WILLIAM G. MCLOUGHLIN, ED., ISAAC BACKUS ON CHURCH, STATE, AND CALVINISM: PAMPHLETS, 1754-1789 338 (Cambridge: Harvard University Press, 1968) ("PAMPHLETS"). In the same pamphlet, Backus again drew a parallel between the injustice of American submission to the British taxing power and "our [Baptist] greatest difficulty at present ... submitting to a taxing power in ecclesiastical affairs." *Id.* at 340.

⁷⁷ WILLIAM G. MCLOUGHLIN, ED., II THE DIARY OF ISAAC BACKUS 899 (Providence: Brown University Press, 1979) (emphasis added); for the definitive study of the Baptist protest against the established religion in New England, see WILLIAM G. MCLOUGHLIN, NEW ENGLAND DISSENT, 1630-1833: THE BAPTISTS AND THE SEPARATION OF CHURCH AND STATE (Cambridge: Harvard University Press, 2 vols., 1971).

⁷⁸ WILLIAM G. MCLOUGHLIN, ED., ISAAC BACKUS PAMPHLETS, note 76 above at 357 (emphasis in original). Backus also wrote: "Our real grievances are that we, as well as our fathers, have from time to time been *taxed on religious accounts where we were not represented*.... Is not all America now appealing to Heaven against the injustice of being taxed where we are not represented, and against being judged by men who are interested in getting away our money? And will heaven approve of your doing the same thing to your fellow servants? No, surely. We have no desire of representing this government as the worst of any who have imposed religious taxes; we fully believe the contrary. Yet, as we are persuaded that an entire freedom from being taxed by civil rulers to religious worship is not a mere favor from any

E. The American Republic: The Emergence of the Free Exercise Principle

As Thomas Curry notes, coerced public support for a particular religion was viewed in colonial America as an "establishment of religion," but the practice was opposed "primarily as a violation of free exercise of religion."⁷⁹ Thinking of "establishment" and "free exercise" as precise and distinct categories in tension with one another is a modern invention. The terms "nonestablishment" and "free exercise of religion" were not mutually opposed, but were used almost interchangeably in late eighteenth century America at the time of the framing of the First Amendment. According to Curry, "[t]o examine the two [religion] clauses ... as a carefully worded analysis of Church-State relations would be to overburden them. Similarly, to see the two clauses as separate, balanced, competing, or carefully worded prohibitions designed to meet different eventualities would be to read into the minds of the actors far more than is there."⁸⁰

The principal drafter of the First Amendment, James Madison, most assuredly did not think of disestablishment and free exercise as competing values. For Madison the point of the amendment was to secure basic freedoms -- of religion, speech, press, peaceable assembly, and petition for redress of grievance. As to religious freedom, Madison had clarified in debates in the Virginia House of Burgesses that mere toleration was not enough; something more -- free exercise -- was required.⁸¹ There is something distinctively American about the resolution of the problem of an established religion through the promotion of free exercise of religion. In the Madisonian scheme of protecting religious freedom, any official preference or establishment of a religion was also to be avoided, at least at the federal level. But the purpose or teleological goal of nonestablishment was to guarantee free exercise of religion.⁸²

Although the terms "establishment" and "free exercise" certainly had overlapping meanings, it is fair to describe historic instances of established religions in sixteenth-century Europe and seventeenth-century America as both *advancing* that religion through benefits available to that religion and not to others⁸³ and *inhibiting* that religion by making it more

man or men in the world but a right and property granted us from God, who commands us to stand fast in it, we have not only the same reason to refuse an acknowledgment of such a taxing power here, as America has the abovesaid power, but also, according to our present light, we should wrong our consciences in allowing that power to men, which we believe belongs only to God."(emphasis added).

⁷⁹ CURRY, FIRST FREEDOMS, note 71 above, at 192.

⁸⁰ *Id.* at 216.

⁸¹ See NOONAN, THE BELIEVER AND THE POWERS THAT ARE, note 43 above, at 97; see also NOONAN, LUSTRE OF OUR COUNTRY, note 35 above, at 2, 4, 46-47, 69.

⁸² For a discussion of the textual unity of the nonestablishment principle and the free exercise principle, see NOONAN, LUSTRE, note 35 above, at 357; John T. Noonan, Jr., *The End of Free Exercise?*, 42 DEPAUL L. REV. 567 (1992); see also Richard John Neuhaus, *Contending for the Future: Overcoming the Pfefferian Inversion*, 8 J. L. & RELIG. 115 (1990).

⁸³ See, e.g., ANTIEAU, DOWNEY, AND ROBERTS, FREEDOM FROM FEDERAL ESTABLISHMENT, note 72 above, at 1-29 (describing general characteristics of establishments in colonial America).

complacent and by tending to reduce it to banal inoffensiveness.⁸⁴ In this setting, moreover, the "primary and principal effect" of an established religion was the savage inhibition of the religion of those outside the communion of the "the Church of England ... by law established"⁸⁵ in Tudor and Stuart England.⁸⁶ It is this understanding of "inhibition" to which Justice O'Connor refers in her elaboration of an "endorsement" test, according to which official preference for an established religion send "a message to nonadherents that they are outsiders, not full members of the political community" and in this way treated as second-class citizens.⁸⁷

However the correlated concepts of disestablishment and free exercise were conceived of in the early republic, it seems clear that strong supporters of disestablishment in Virginia, such as Thomas Jefferson and James Madison, did not equate religious tax exemption with an establishment of religion. As Justice Brennan noted in his concurring opinion in *Walz*, Jefferson was President when tax exemption was first given Washington churches, and Madison sat in the Virginia General Assembly that voted exemptions for churches in Virginia.⁸⁸ Further evidence of the practice of religious tax exemption in the early republic includes the following examples. In 1781 Massachusetts exempted ministers of the Gospel from a poll tax.⁸⁹ In 1786 Rhode Island exempted ministers from an excise tax on carriages; and in 1789 it exempted all real estate granted or purchased for religious uses.⁹⁰ In 1787 South Carolina exempted ministers from a Charleston tax on professions,⁹¹ and in 1788 South Carolina exempted from taxation "lands

⁸⁴ The phenomenon of secularization provides one explanation of the decline of religious belief and practice in European establishments such as the Church of England and the Lutheran Church in Sweden. The very fact of their status as establishment may also explain their decline in numbers of adherents.

⁸⁵ The phrase comes not from an Act of Parliament, but from Canon 10, one of the religious rules for excommunicating Catholics and dissident Protestants from the Church of England. These canons were formulated and promulgated by the Archbishop of Canterbury, Richard Bancroft, in 1604. See J.V. BULLARD, ED., CONSTITUTIONS AND CANONS ECCLESIASTICAL, 1604 (Faith Press, 1934); and ROBERT E. RODES, JR., LAW AND MODERNIZATION IN THE CHURCH OF ENGLAND: CHARLES II TO THE WELFARE STATE 84 (Univ. of Notre Dame Press, 1991).

⁸⁶ See, e.g., Act against Jesuits and Seminary Priests, 27 Eliz. I c. 2 (1585); Act against Seditious Sectaries, 35 Eliz. I c. 1 (1593); Act against Popish Recusants, 35 Eliz. I c. 2 (1593); Act concerning Jesuits and Seminary Priests, 1 & 2 James I c. 4 (1604); Act of Uniformity, 14 Chas. II c. 4 (1662); The Five Mile Act, 17 Chas. II c. 2 (1664); The Conventicle Act, 22 Chas. II c. 1 (1670); Test Act, 25 Chas. II c. 2 (1673); and The Second Test Act, 30 Chas. II c. 1 (1678).

⁸⁷ See *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). A majority of the Court adopted this approach in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

⁸⁸ See, e.g., *Walz*, at 684-85 (Brennan, J., concurring), citing E. SWEM & J. WILLIAMS, A REGISTER OF THE GENERAL ASSEMBLY OF VIRGINIA, 1776-1918, 53 (1918); JOURNAL OF THE HOUSE OF DELEGATES OF THE COMMONWEALTH OF VIRGINIA 94, 98 (1799--1800).

⁸⁹ Acts and Resolves of 1781, c. 16.

⁹⁰ EDWARD FIELD, HISTORY OF RHODE ISLAND I:553, III: 238, 232 (1902).

whereon any churches or other buildings for divine worship, or free schools, are erected."⁹²

Several amicus briefs in *Walz* offered extensive discussion of the history supporting the practice of religious tax exemption.⁹³ In his opinion for the Court, Chief Justice Burger noted the impressive historical pedigree of the practice, describing it as "a national heritage with roots in the Revolution itself." Burger concluded: "[A]n unbroken practice of according the exemption to churches, openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside."⁹⁴ Describing the practice as "unbroken" subjected Burger to scholarly criticism.⁹⁵ But even if the practice of religious tax exemption was not in fact "unbroken," and even if some of its earlier manifestations emerged in the context of an established religion, it is important to recall that the granting of exempt status on an evenhanded basis to all religious communities is the achievement of the distinctively Madisonian contribution to constitutional jurisprudence, the emphasis on free exercise of religion.

F. Tax Exemption as a Statutory Privilege with Deep Constitutional Roots

However confused the current constitutional doctrine on religious freedom has become in modern jurisprudence, in the founding period the impetus for exempting religious organizations from the payment of various forms of taxation was grounded in the desire to safeguard free exercise of religion.⁹⁶ Thus Chief Justice Burger noted in *Walz* that the Court, "reflecting more than a century of our history and uninterrupted practice, accepted without discussion the proposition that federal or state grants of tax exemption to churches were not a violation of the

⁹¹ SOUTH CAROLINA ACTS OF ASSEMBLY (1788) P.L. 435

⁹² STATE GAZETTE OF SOUTH CAROLINA, Apr. 12, 1788.

⁹³ See, e.g., Brief Amicus Curiae of United States Catholic Conference; and see CHESTER JAMES ANTIEAU, PHILLIP MARK CARROLL, AND THOMAS CARROLL BURKE, RELIGION UNDER THE STATE CONSTITUTIONS 120-72 (1965).

⁹⁴ 397 U.S. 664, 678 (1970).

⁹⁵ For a powerful critique of Chief Justice Burger's use of history in *Walz*, see John Witte, *Tax Exemption of Church Property*, note 4 above, at 367. For Witte, "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"(footnotes omitted).

⁹⁶ See, e.g., CURRY, FIRST FREEDOMS, note 71 above, at 192; see also WILLIAM G. MCLOUGHLIN, NEW ENGLAND DISSENT, note 77 above.

Religion Clauses of the First Amendment."⁹⁷ Although this statement appeared on the face of it to invoke both establishment and free exercise concerns, the rationale elaborated by Burger in *Walz* focused almost exclusively on establishment concerns, thus leaving the granting of tax-exempt status not as a matter of constitutional necessity, but as something within the scope of permissible legislation. Recent developments relating to exemption of religion from taxation under state law have reemphasized the dependence of religious organizations upon the legislatures rather than upon the courts for the "grace" of tax exemption.⁹⁸

This view of exemption is consonant with legislative control over the taxing and spending power, a theme central to English and American jurisprudence since the early period of the Stuart monarchy. But the history of the practice of religious tax exemption sketched above underscores a tradition deeply rooted in the customs and traditions of the American people,⁹⁹ with roots going back to the Middle Ages and even to the ancient world.¹⁰⁰ In the face of this history, this practice reflects what Lonergan calls "constitutive meaning," and is constitutional at least in this sense. To quote Burger's opinion in *Walz* again:

The legislative purpose of the property tax exemption is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility. New York, in common with the other States, has determined that certain entities that exist in a harmonious relationship to the community at large, and that foster its "moral or mental improvement," should not be inhibited in their activities by property taxation or the hazard of loss of those properties for nonpayment of taxes.... Grants of exemption historically reflect the concern of authors of constitutions and statutes as to the latent dangers inherent in the imposition of property taxes; exemption constitutes a reasonable and balanced attempt to guard against those

⁹⁷ *Walz*, 397 U.S. at 680.

⁹⁸ See e.g., *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), and *Jimmy Swaggart Ministries v. California Bd. of Equalization*, 493 U.S. 378 (1990), discussed in chapter on exemption from state taxation.

⁹⁹ For the view that courts have "no basis for proscribing as unconstitutional practices that do not violate any explicit text of the Constitution and that have been regarded as constitutional ever since the framing," see *Board of County Commissioners, Waubausee County v. Umbehr*, 518 U.S. 668, 116 S.Ct. 2361, 2362 (1996) (Scalia, J., dissenting); *United States v. Virginia*, 518 U.S. 515, 567-70 (Scalia, J. dissenting); *Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 752 (1994) (Scalia, J., dissenting) (Establishment Clause should not be used to "repeal our Nation's tradition of religious toleration"); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 95 (1990) (Scalia, J., dissenting) ("when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down"); *Burnham v. Superior Court of Cal., County of Marin*, 495 U.S. 604 (1990) (plurality opinion of Scalia, J.). And see ANTONIN J. SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Princeton: Princeton University Press, 1997).

¹⁰⁰ See James J. McGovern, *The Exemption Provisions of Subchapter F*, 29 *TAX LAWYER* 523, 527 (1976) (the "history of mankind reflects that our early legislators were not setting precedent by exempting religious or charitable organizations").

dangers.¹⁰¹

The history sketched above suggests that, as a normative matter, our society has generally given a negative answer to the question whether churches should be taxed, whether by the federal government or by the states. I turn now to explore more closely the exemption of religious organizations from federal taxation.

II. General Statutory Principles Governing Exemption of Religious Organizations

Section 501(c)(3) of the Internal Revenue Code [hereafter IRC] provides that several kinds of organizations are exempt from payment of federal income taxation if they meet various tests set forth in the statute. Among these exempt organizations are religious organizations. Four other provisions of the tax code refer to religious organizations under the rubric "church" or "association of churches." Section 170(b)(1)(A)(i) lists churches first in the catalog of organizations contributions to which are deductible from taxable income. Section 508(c)(1)(A) gives churches a mandatory exception from the presumption of being a "private foundation." Section 6033(a)(2)(A) gives a mandatory exception from the requirement that most exempt organizations must file annual informational returns (Form 990) with the Internal Revenue Service [hereafter IRS]. And section 7605(c) limits the IRS in auditing or examining religious organizations.

IRC § 501(c)(3) states that a charitable entity must be both "organized and operated" exclusively for exempt purposes. These two verbs in the statute have given rise to two distinct tests, the organizational test and the operational test. In order to qualify as an exempt organization, a church must meet both tests.¹⁰²

Recognition as a "Religious Organization": Organizational Test

The organizational test requires that a religious organization must be expressly limited to a religious purpose.¹⁰³ This test can be described as a "paper requirement." By this I do not mean the colloquial sense that there is nothing to this requirement. I simply mean that the IRS only looks at a "creating document" (such as its corporate charter, articles of association, or trust instrument) to determine whether this test is met.¹⁰⁴ The written instrument creating the organization must specify that the entity is organized exclusively for one or more tax-exempt, charitable purposes.¹⁰⁵ There is no magic formula for meeting the organizational test. For

¹⁰¹ *Walz*, 397 U.S. at 672-73.

¹⁰² Reg. § 1.501(c)(3)-1(a); *Levy Family Tribe Foundation v. Commissioner*, 69 T.C. 615, 618 (1978).

¹⁰³ See Reg. § 1.501(c)(3)-1(d).

¹⁰⁴ "[T]he organizational test cannot be met by reference to any document that is not the creating document. In the case of a corporation, the bylaws cannot remedy a defect in the corporate charter. A charter can be amended only in accordance with state law, which generally requires filing of the amendments with the chartering authority. In the case of a trust, operating rules cannot substitute for the trust indenture. In the case of an unincorporated association, the test must be met by the basic creating document and the amendments thereto, whatever that instrument may be called. Subsidiary documents that are not amendments to the creating document may not be called on." *Colorado State Chiropractic Society v. Commissioner*, 93 T.C. 487 (1989).

¹⁰⁵ Int. Rev. Reg. § 1.501(c)(3)-1(b)(2).

example, the articles of incorporation may specify that the organization is formed "for religious or charitable purposes within the meaning of section 501(c)(3) of the Internal Revenue Code."¹⁰⁶ In at least one instance a court suggested that it would be "myopic" to consider only the articles of incorporation and found that appropriate language in the bylaws satisfied the organizational test.¹⁰⁷

To restate this test negatively, the originating document may not expressly empower the organization to engage, otherwise than as an insubstantial part of its activities, in activities that in themselves are broader than or not in furtherance of an exempt purpose.¹⁰⁸ In other words, the written instrument creating a religious organization may not authorize the organization to carry on substantial nonexempt activities.¹⁰⁹ The statute expressly prohibits two specific activities that I discuss below: (1) devoting more than an insubstantial part of its activities to lobbying or attempting to influence legislation; and (2) any kind of electioneering, i.e., participating in (including the publishing or distributing of statements) any political campaign on behalf of or in opposition to any candidate for public office. For now, it suffices to note that the originating documents of a religious organization may not authorize either of these purposes.

Even though a particular organization has actually operated to further an exempt purpose -- the heart of the operational test -- it will not qualify as an exempt organization if its originating documents could be reasonably construed to permit activities broader than the specified charitable purposes. Hence a highly regarded practitioner in the field of exempt organization law, Bruce Hopkins, counsels: "An organization wishing to qualify as a charitable entity should not provide in its articles of organization that it has all of the powers accorded under the particular state's nonprofit corporation act, since those powers are likely to be broader than those allowable under federal tax law."¹¹⁰ A church will fail the organizational test if it is organized for both exempt and nonexempt purposes.¹¹¹

Another aspect of the organizational test is the requirement that the assets of a church must be dedicated to an exempt purpose. Thus the founding papers must attend to the distribution of a church's assets to an exempt purpose in the event of its dissolution.¹¹² A church does not

¹⁰⁶ Reg. § 1.501(c)(3)-1(b)(1)(ii).

¹⁰⁷ IRS Exempt Organizations Handbook (IBM 7751) § 332(2).

¹⁰⁸ Reg. § 1.501(c)(3)-1(b)(1)(i).

¹⁰⁹ Rev. Rul. 69-279, 1969-1 C. B. 152; Rev. Rul. 69-256, 1969-1 C.B. 151. Int. Rev. Reg. § 1.501(c)(3)-1(b)(iii). *See also* *Interneighborhood Housing Corporation v. Commissioner*, 45 T. C. M. 115 (1982); *Santa Cruz Building Association v. United States*, 411 F. Supp. 871 (E.D. Mo. 1976).

¹¹⁰ BRUCE HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 110 (New York: Thomas Riley, 3d ed. 1993) citing IRS General Counsel Memorandum 39633.

¹¹¹ Rev. Rul. 69-256, *supra*, n. 8; Rev. Rul. 69-279, *supra*, n. 8.

¹¹² In *Universal Church of Scientific Truth, Inc. v. United States*, 74-1 U.S.T.C. ¶ 9360 (N.D. Ala. 1973), however, the court ruled that the absence of a provision for dissolution of a religious organization's assets upon dissolution would not, without more, suffice to render the church ineligible for exempt status.

meet this aspect of the organizational test if its founding documents provide that its assets would, upon dissolution, be distributed to its founders or members.¹¹³ In most situations involving the dissolution of a religious organization, the assets will be transferred to another religious organization. In the unusual situation where this is not the case, the organizational test is met when the assets are transferred for charitable purposes, whether or not it is to another charitable organization.¹¹⁴ The trust law of most states includes the doctrine of cy pres, according to which a court may distribute the assets of a charitable trust to another organization to be used in a manner that will accomplish the religious or charitable purposes for which the dissolved organization was organized.¹¹⁵ If a church is organized in a state that has not adopted the cy pres doctrine, it must have an express provision such as the following "upon the dissolution of [this organization], assets shall be distributed for one or more exempt purposes within the meaning of section 501(c)(3) of the Internal Revenue Code, or corresponding section of any future Federal tax code, or shall be distributed to the Federal government, or to a state or local government, for a public purpose."¹¹⁶

In summary, the federal tax regulations require the articles of organization of a charitable organization to (1) limit its purposes to one or more exempt purposes, (2) not expressly empower it to engage (other than insubstantially) in nonexempt activities, and (3) provide that upon dissolution its assets will be distributed for one or more exempt purposes.

Bruce Hopkins, the tax practitioner cited above, suggests that the articles of organization or bylaws of a charitable organization might contain provisions such as the following:

No part of the net earnings, gains or assets of the corporation [or organization] shall inure to the benefit of or be distributable to its directors [or trustees], officers, other private individuals, or organizations organized and operated for a profit (except that the corporation [or organization] shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes as hereinabove stated). No substantial part of the activities of the corporation [or

¹¹³ Int. Rev. Reg. § 1.501(c)(3)-1(b)(4). See, e.g., *Chief Steward of the Ecumenical Temples and the Worldwide Peace Movement and His Successors v. Commissioner*, 49 T.C.M. 640 (1985); *Bethel Conservative Mennonite Church v. Commissioner*, 746 F.2d 388 (7th Cir. 1984); *Church of Nature in Man v. Commissioner*, 49 T.C.M. 1393 (1985); *Stephenson v. Commissioner*, 79 T.C. 995 (1982); *Truth Tabernacle v. Commissioner*, 41 T.C.M. 1405 (1981); *Calvin K. of Oakknoll v. Commissioner*, 69 T.C. 770 (1978), aff'd, 603 F.2d 211 (2d Cir. 1979); *General Conference of the Free Church of America v. Commissioner*, 71 T.C. 920 (1979).

¹¹⁴ IRS General Counsel Memorandum 37126, clarifying IRS General Counsel Memorandum 33207. Moreover, the absence of a dissolution clause has been held to not be fatal to IRC § 501(c)(3) status, in

¹¹⁵ For a general discussion of the religious or charitable trust, see WILLIAM W. BASSETT, *RELIGIOUS ORGANIZATIONS AND THE LAW*, ¶¶3:43 to 3:70 (Deerfield, IL: Clark Boardman Callaghan, 1997, Supp. 1998); for a more particular discussion of the cy pres doctrine, see, e.g., Revised Model Nonprofit Corporation Act, § 14.06(a)(6); and *In re Los Angeles County Pioneer Society*, 40 Cal. 2d 852, 257 P. 2d 1 (1953).

¹¹⁶ *Ibid.* § 3.05.

organization] shall be the carrying on of propaganda or otherwise attempting to influence legislation, and the corporation [or organization] shall be empowered to make the election authorized under section 501(h) of the Internal Revenue Code of 1986. The corporation [or organization] shall not participate in or intervene in (including the publishing or distribution of statements) any political campaign on behalf of or in opposition to any candidate for public office. Notwithstanding any other provision herein, the corporation [or organization] shall not carry on any activities not permitted to be carried on—

(a) by an organization exempt from federal income taxation under section 501(a) of the Internal Revenue Code of 1986 as an organization described in section 501(c)(3) of such Code, or

(b) by an organization, contributions to which are deductible under sections 170(c)(2), 2055(a)(2), or 2522(a)(2) of the Internal Revenue Code of 1986.

References herein to sections of the Internal Revenue Code of 1986 are to provisions of such Code as those provisions are now enacted or to corresponding provisions of any future United States revenue law.¹¹⁷

Hopkins writes that, in order to satisfy the organizational requirement, an organization *must* have in its articles of organization provisions substantially equivalent to the following:

The corporation [or organization] is organized and operated exclusively for [charitable, educational, etc.] purposes within the meaning of section 501(c)(3) of the Internal Revenue Code of 1986.

In the event of dissolution or final liquidation of the corporation [or organizations, the board of directors [or trustees] shall, after paying or making provision for the payment of all the lawful debts and liabilities of the corporation [or organization], distribute all the assets of the corporation [or organization] to one or more of the following categories of recipients as the board of directors [or trustees] of the corporation [or organization] shall determine:

(a) a nonprofit organization or organization which may have been created to succeed the corporation [or organization], as long as such organization or each of such organizations shall then qualify as a governmental unit under section 170(c) of the Internal Revenue Code of 1986 or as an organization exempt from federal income taxation under section 501(a) of such Code as an organization described in section 501(c)(3) of such Code; and/or

(b) a nonprofit organization or organizations having similar aims and objects as the corporation [or organization] and which may be selected as an appropriate recipient of such assets, as long as such organization or each of such organizations shall then qualify as a governmental unit under section 170(c) of the Internal Revenue Code of 1986 or as an organization exempt from federal income taxation under section 501(a) of such Code as an organization described in section 501(c)(3) of such Code.¹¹⁸

Hopkins notes that some courts have adopted a sensible rule of construction respecting charitable exemptions that resolves ambiguities in favor of the exempt organization and that

¹¹⁷ HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS*, note 110 above, at 113.

¹¹⁸ *Id.* at 113-14.

refuses to exalt form over substance.¹¹⁹ Nevertheless, Hopkins concludes that "prudence dictates compliance with the organizational test whenever possible. There are many barriers to tax-exempt status and the organizational test is one of the easiest to clear.... Even if doing battle with the IRS over the tax-exempt status of an organization appears inevitable, presumably the struggle can be joined over matters of greater substance."¹²⁰

Recognition as a "Religious Organization": Operational Test

The IRS regulations also specify that a church must be operated as an exempt organization. The focus of the operational test is on the ongoing activities of a church, but a church will be deemed to fail this test if its originating documents -- let alone its activities -- permit private inurement by its founders.¹²¹ Sometimes the technical distinction between the organizational test and the operational test blurs, as when a court views the organizational test in the light of the way that a religious organization actually operates.¹²²

The First Amendment requires the government to acknowledge the hierarchical control of a church as a legitimate form of church polity.¹²³ Thus the Court of Claims has recognized that the control of a church by its founder does not, on that ground alone, constitute a failure to meet the operational test.¹²⁴ In another case, however, the tax court reached the remarkable conclusion that a church's organizational structure disqualified it from exempt status because an individual's control of the operations of the church was not checked by any other governing body.¹²⁵

The tax court has construed the operational test to deny exempt status to a religious organization involved in commercial enterprises that compete with other businesses. In *Living Faith, Inc. v. Commissioner*,¹²⁶ the tax court adopted the position that "[c]ompetition with

¹¹⁹ HOPKINS, THE LAW OF TAX-EXEMPT ORGANIZATIONS, note 110 above, at 116, citing *Samuel Friedland Foundation v. United States*, 144 F. Supp. 74, 84 (D.N.J. 1956); *Peoples Translation Service/Newsfront International v. Commissioner*, 79 T. C. 42, 48 (1979).

¹²⁰ HOPKINS, THE LAW OF TAX-EXEMPT ORGANIZATIONS, note 110 above, at 117.

¹²¹ Reg. §§ 1.501(c)(3)-1(c)(2), 1.501(a)-1(c). *See, e.g.*, *Athenagoras I Christian Union of the World, Inc. v. Commissioner*, 55 T.C.M. 781 (1988); *Levy Family Tribe Foundation v. Commissioner*, 69 T.C. 615 (1978). For an extended discussion of private inurement, see HOPKINS, THE LAW OF TAX-EXEMPT ORGANIZATIONS, note 110 above, at 264-99.

¹²² *See, e.g., Passaic United Hebrew Burial Association v. United States*, 216 F. Supp. 500 (D.N.J. 1963).

¹²³ *See* discussion of *Watson v. Jones* in text accompanying notes 211-15 below; *see also* "GOD ALONE IS LORD OF THE CONSCIENCE": A POLICY STATEMENT ADOPTED BY THE 200TH GENERAL ASSEMBLY (1988) (Louisville: Office of the General Assembly, The Presbyterian Church (U.S.A.), 1989), reprinted in 8 J. LAW & RELIG. 331, at 337-43.

¹²⁴ *See The Church of the Visible Intelligence That Governs the Universe v. United States*, 83-2 U.S.T.C. ¶ 9726 (Cl. Ct. 1983)

¹²⁵ *Chief Steward of the Ecumenical Temples and the Worldwide Peace Movement and His Successors v. Commissioner*, 49 T.C.M. 640 (1985).

¹²⁶ *Living Faith, Inc. v. Commissioner*, 60 T.C.M. 710, 713 (1990).

commercial firms is strong evidence of a substantial nonexempt commercial purpose."¹²⁷ On this standard the court denied exempt status to an organization associated with the Seventh-day Adventist Church that operated vegetarian restaurants and health food stores in furtherance of the church's teachings on dietary requirements, finding that the organization's "activity was conducted as a business and was in direct competition with other restaurants and health food stores." This conclusion seems excessive, since religious organizations are not exempt from the payment of tax on income unrelated to its exempt purposes.¹²⁸ It is doubtful that the court would have reached a similar conclusion with respect to rabbinical councils that pass on the kosher slaughter of animals. Indeed, in the seminal case that established that it is the source of the income not its goal which determines whether the income is related to an exempt purpose, the government did not seek to revoke the exempt status of a teaching order known as the Christian Brothers because this religious community operates a well known winery in the Napa valley, but simply insisted that the brothers had to pay tax on the income derived from the operation of the winery.¹²⁹ Similarly, in the late 1970s, the severe penalty of loss of exempt status was not imposed on Trappist monasteries that sustain themselves in part by the sale of jams and jellies or liturgical vestments, because a mutually satisfactory understanding was reached with the Internal Revenue Service on these matters.

The most significant aspect of the operational test is that an exempt organization may not engage in activities that characterize it as an "action organization."¹³⁰ This term refers to an organization involved in politics either through devoting a substantial part of its activities to

¹²⁷ *Id.* at 713. The commerciality doctrine is related to the principle that a religious organization is not exempt from payment of tax on business income unrelated to its exempt purpose.

¹²⁸ As Dean Kelley noted, "Until 1969, churches were unique among entities exempt under section 501(c)(3) of the Internal Revenue Code in not having to pay corporate income tax on 'unrelated business income'.... But in 1969, the National Council of Churches and the U.S. Catholic Conference jointly asked the House Ways and Means Committee to *close* that loophole, and it was closed by the Tax Reform Act of 1969 (with a five-year period of grace for existing church-owned businesses to be phased out, which expired on January 1, 1976).... It is not often that great institutions ask Congress to end the tax advantages from which they ostensibly benefit.... The churches did not want a tax advantage they did not think was right, and they voluntarily took action to eliminate it." DEAN KELLEY, *WHY CHURCHES SHOULD NOT PAY TAXES* 17-18 (New York: Harper & Row, 1977). For an extended discussion of the rules governing the taxation of unrelated income, the definition of unrelated trade or business, exceptions to unrelated income taxation, and unrelated debt-financed income, see BRUCE HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS*, note 110 above, at 827-975; and JOSEPH M. GALLOWAY, *THE UNRELATED BUSINESS INCOME TAX* (1982).

¹²⁹ See *De La Salle Institute v. United States of America*, 195 F. Supp. 891 (N.D. Calif. 1961) (schools and novitiate operated by nonprofit corporation composed of nonclerical members of religious order were not 'churches', and corporation's income from winery was taxable as unrelated business income, even though schools and novitiate maintained chapels and canon law viewed teaching as church function).

¹³⁰ Reg. § 1.501(c)(3)-1(b)(3).

attempts to influence legislation or through participating or intervening, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office. The restraints on lobbying and the prohibition of political activities are discussed below.

III. Specific Provisions in the Internal Revenue Code Relating to Religious Organizations **Federal Employment Taxes**

The regulation of employees of churches is most closely analogous to the medieval controversies over the independence of the church in the selection and discipline of the clergy. As was noted above, these controversies affected not only the general theory of church autonomy, but the more particular matter of whether the church should be taxed. I do not offer here a detailed analysis of the impact of federal and civil rights laws on the employment practices of the churches,¹³¹ but focus briefly on the impact of federal employment taxes -- primarily social security and unemployment tax -- on the churches.

The Social Security Act was one of the most significant pieces of New Deal legislation.¹³² It provides a system of old-age and unemployment benefits, which are supported by various taxes, including taxes under the Federal Insurance Contributions Act (FICA) and the Federal Unemployment Tax Act (FUTA). The FICA tax is paid in part by employees through withholding,¹³³ and in part by employers through an excise tax.¹³⁴ The FUTA tax is an excise tax imposed only on employers.¹³⁵ Both taxes are based on the wages paid to employees, and the recordkeeping and transmittal of funds are obligations of the employer. Only the FICA tax is collected from self-employed individuals. In both instances there are some legislative exceptions for religion.

The initial social security legislation provided an exemption from FICA taxes for service performed in the employment of a religious organization. In 1983 Congress removed this exemption, extending Social Security coverage to all employees of churches except individual members of the clergy who met specific requirements as self-employed persons.¹³⁶ The statute survived a constitutional challenge brought in *Bethel Baptist Church v. United States*.¹³⁷ The court rejected the argument that the 1983 amendment violated the free exercise principle.¹³⁸ The

¹³¹ See, e.g., Edward McGlynn Gaffney, Jr. and Philip R. Moots, GOVERNMENT AND CAMPUS: FEDERAL REGULATION OF RELIGIOUSLY AFFILIATED HIGHER EDUCATION 32-82 (1982).

¹³² 26 U.S.C. §§ 3101-3126; Titles II & VIII were sustained in *Helvering v. Davis*, 301 U.S. 619 (1937) (exclusively federal aspect of Social Security pension program permissible exercise of taxing and spending power); Title IX was sustained in *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937) (federal assistance to state in administration of their unemployment compensation laws permissible exercise of taxing and spending power).

¹³³ 26 U.S.C. § 3101.

¹³⁴ 26 U.S.C. § 3111.

¹³⁵ 26 U.S.C. § 3301.

¹³⁶ 26 U.S.C. § 1401.

¹³⁷ 822 F. 2d 1334 (3d Cir. 1987), cert. denied, 485 U.S. 959 (1988).

¹³⁸ 822 F.2d at 1338-39. The court resolved the free exercise claim primarily in the light of

court also rejected the claim that compliance with the statutory reporting requirements constituted excessive entanglement with religion violative of the nonestablishment principle.¹³⁹ Although a sound argument can be made for treating clergy and employees of other organizations alike for social security purposes,¹⁴⁰ the court also rejected the claim that the provisions governing the self-employment income of ministers violated equal protection if not extended to all employees of religious organizations.¹⁴¹

Congress later restored the previous exemption, but only as to "a church, a convention or association of churches, or an elementary school which is controlled, operated, or principally supported by a church, a convention or association of churches."¹⁴² By filing Form 8274, a church can permanently exempt itself from the payment of social security tax by stating that it is opposed to this tax for religious reasons.¹⁴³ Employees of such a church are not themselves exempt from the payment of social security taxes, but are subject to the self-employment tax.¹⁴⁴

FUTA also exempts from federal unemployment tax service performed in the employment of churches or organizations controlled by churches.¹⁴⁵ In most instances -- Oregon is exceptional -- this service is also exempted under parallel state unemployment tax schemes.¹⁴⁶ The principal instance in which this issue has been of concern to religious organizations is with respect to teachers in church-operated schools. After repeated efforts of the Department of Labor to collect federal unemployment tax from religious schools, the Court clarified in *St. Martin Evangelical Lutheran Church v. South Dakota*,¹⁴⁷ that employees working within such schools are "in the employ of ... a church" for purposes of the statutory exemption. Although the schools at issue in *St. Martin* were unincorporated elementary and secondary schools, that fact should not be dispositive, even though the Court declined to rule on that precise point in a case involving employees at religious elementary and secondary schools that were separately incorporated but

United States v. Lee, discussed in text accompanying notes 149-55 below.

¹³⁹ *Id.* at 1340.

¹⁴⁰ *See, e.g.*, "GOD ALONE IS LORD OF THE CONSCIENCE," note 123 above, 8 J. LAW & RELIG. 331, at 366-67 (urging that the value of clergy housing should be determined by the same provisions that apply to employees of other organizations).

¹⁴¹ 822 F. 2d. at 1341-42. The court offered three secular reasons for the distinction drawn in the tax code: avoidance of a church-state problem, ensuring that the general rule would not be swallowed up by a host of exemptions, and avoiding unnecessary taxation.

¹⁴² 26 U.S.C. §3121(w)(3).

¹⁴³ IRS Gen. Counsel Memorandum 39,782 (Feb. 17, 1989).

¹⁴⁴ 26 U.S.C. §3121(b)(8)(B).

¹⁴⁵ IRC §3309(b).

¹⁴⁶ IR-92-57 (May 4, 1992).

¹⁴⁷ 451 U.S. 772 (1981).

controlled by a church.¹⁴⁸

In *United States v. Lee*¹⁴⁹ the Court ruled that it could not allow any religious exemption further than that expressly mandated by the Congress. As noted above, the tax code has special provisions dealing with self-employed persons. FICA specifically exempts from social security taxes self-employed Amish and self-employed members of other religious groups with similar beliefs opposing the social security system.¹⁵⁰ The Court ruled that this statutory exemption is available only to self-employed individuals and does not apply to Amish employers or their employees.¹⁵¹ Edwin Lee, an Amish farmer was thus exempt from paying social security taxes on his own wages, but was required to pay these taxes for other members of the Amish community who assisted him on his farm and carpentry shop. He sued for a refund of taxes, claiming that imposition of social security taxes violated his free exercise rights and those of his Amish employees. Relying in part on the famous Amish case, *Wisconsin v. Yoder*,¹⁵² decided a decade earlier, the district court held that statutes requiring employer to pay social security and unemployment insurance taxes were unconstitutional as applied to the Amish as employers.¹⁵³

Chief Justice Burger wrote the opinion of the Court in *Yoder*, noting the Amish's history of "three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society ... the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization, and the hazards presented by the State's enforcement of a statute generally valid as to others."¹⁵⁴ Nothing had changed on any of these scores since the Court ruled in favor of the Amish in *Yoder*. The religious duty at issue in *Yoder* was that of parents to provide for the education of their own children in a manner that safeguards them from harmful contact with secular influences. The religious duty at issue in *Lee* is the responsibility of the Amish community to care for their own members as they grow older. The Court, however, rejected the Amish claim in *Lee*.

Burger again wrote the opinion of the Court, agreeing at the outset that since payment of taxes or receipt of benefits violated Amish religious beliefs, compulsory participation in social security system interfered with their free exercise rights. But the Court found that the government has a compelling interest in the uniform application of the tax code, an assertion belied by the statutory exemption that the Court cited and then ignored. Burger wrote: "religious belief in conflict with payment of taxes affords no basis for resisting tax imposed on employers to support social security system, which must be applied uniformly to all except as Congress provides

¹⁴⁸ *Grace Brethren Church v. United States*, 457 U.S. 393 (1982).

¹⁴⁹ 455 U.S. 252 (1982).

¹⁵⁰ 26 U.S.C. § 1402(g).

¹⁵¹ 455 U.S. at 256.

¹⁵² 406 U.S. 205 (1972).

¹⁵³ 497 F.Supp. 180 (W.D. Pa. 1980).

¹⁵⁴ 406 U.S. at 235.

explicitly otherwise."¹⁵⁵

The result in *Lee* seems needlessly crabbed and ungenerous in construing the free exercise provision in light of the facts before it. The free exercise claim in *Lee*, moreover, was stronger than in *Bethel Baptist*. In *Lee*, the Amish had to pay a tax for a system from which they would never derive any benefit. If the fiscal stability of the social security system is in jeopardy, that problem cannot be laid at the feet of the Amish for the obvious reason that, as a matter of conscience, they have never sought or received any benefit from this program. In *Bethel Baptist* both the clergy and other employees of the church will receive social security benefits when they retire. Since the social security tax for the clergy and for other employees of the Baptist church was to be paid from the same source -- the free-will offerings of the church members -- it is difficult to see how the church's free exercise was burdened, either more or less, by the method of payment called for in the statute.

Although the provisions in the tax code maintain some dubious distinctions (e.g. self-employed clergy and clergy employed by the church), they at least do not discriminate overtly for or against a particular religious community because of the community's beliefs or organizational structure. Hence the courts have allowed these provisions to survive. This result -- affirming the decisions of the political branches -- is perhaps unsurprising since the principal point of the English Civil War was to restore Parliamentary control over the power of the purse, which in our constitution is expressly committed to the Congress.¹⁵⁶

The same result might even obtain if a challenge were brought to a provision that has much less plausible justification than an exemption from employment taxes for church employees, a provision of the tax code that permits ministers of the gospel to exclude from taxable income a housing allowance or the value of the free use of a parsonage provided to them.¹⁵⁷ The exclusion applies to ordained persons who are educators, administrators, and other church functionaries as well as to retired clergy.¹⁵⁸ Another section of the code permits employees of other organizations to exclude the value of housing furnished to them for the convenience of their employer at the place of employment,¹⁵⁹ but the clergy deduction applies whether or not the minister has any equity in the parsonage. If the value of clergy housing is to be determined by the same provisions that apply to employees of other organizations, the pattern

¹⁵⁵ 455 U.S. at 261.

¹⁵⁶ U.S. CONST. Art. I, §8.

¹⁵⁷ IRC § 107 provides: "In the case of a minister of the gospel, gross income does not include-- (1) the rental value of a home furnished to him as part of his compensation; or (2) the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home."

¹⁵⁸ See generally Treas. Reg. §1.107-1(a). Rev.Rul. 63-156, 1963-2CB 79 permits the allowance to be paid to a retired minister in recognition of past services. A later ruling clarified that it may not be paid as a retirement to the minister's spouse. Rev.Rul. 72-249, 1972-1 CB 36.

¹⁵⁹ IRC §162 includes among deduction for business expenses: "rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity."

disclosed in the cases discussed above suggests that Congress rather than the courts will have to attend to this apparent imbalance of tax equities.¹⁶⁰

Audit Procedures

I have suggested above that there are powerful reasons why the federal government has refrained from taxing the income derived from voluntary contributions to religious organizations by their members. Occasionally, religious organizations involved in issues of tax exemption and tax liability have asserted either on nonestablishment or free exercise grounds a complete immunity from a summons or any compulsory process to enable the government to probe the legitimacy of a tax issue. This argument proves too much, and the courts have uniformly rejected the claim that any supervision or auditing of church records by the IRS constitutes impermissibly excessive entanglement between government and religion.¹⁶¹ On the other hand, IRS agents have sometimes been ham-handed in carrying out the delicate task of exploring such issues as whether an organization qualifies for exemption, or is carrying on an unrelated business, or is otherwise subject to taxation. After conducting hearings into this matter, Congress struck an intelligent balance in the Church Audit Procedure Act,¹⁶² which governs a "church tax inquiry" by the IRS.¹⁶³ The government is not precluded from conducting an investigation merely because it describes itself as religious, but the government is cautioned, for example, to limit a church examination to records necessary to determine the organization's qualification for exempt status or its liability for taxes, and the government is limited in the number of examinations it may conduct.¹⁶⁴ The Church Audit Procedure Act is neutral on its face, and does not allow disparate treatment of religious communities according to their different organizational forms.

¹⁶⁰ See, e.g., *Kirk v. C. I. R.*, 425 F.2d 492, 138 U.S. App. D.C. 61, cert. denied, 400 U.S. 853 (1970) (where challenge to §107 was instituted in Tax Court by petition for redetermination of deficiency determined by Commissioner of Internal Revenue and plaintiff would not be entitled to the exclusion in any event, the courts could not consider constitutional challenge).

¹⁶¹ See, e.g., *United States v. Church of Reflection, Inc.*, 692 F. 2d 629 (9th Cir. 1982) (IRS summons for production of books of account and corporate minute books of a church to determine its eligibility for tax-exempt status is not excessive entanglement with religion); and *United States v. Grayson County State Bank and First Pentecostal Church*, 626 F. 2d 1070 (5th Cir. 1981) (IRS may enforce administrative summons issued to secure access to bank records pertaining to a church, as to which taxpayer, the minister of the church, had signature privileges or trustee assignment, and statute restricting examination by IRS of "the books of account of a church" was not applicable); see also *South Ridge Baptist Church v. Industrial Commission of Ohio*, 911 F. 2d 1203, 1210 (6th Cir. 1990) (state agency may require church to maintain records of payroll and wage expenditures and may inspect these church records without excessive entanglement in religion since audits and investigations do not seek information about the religious beliefs of the clergy or congregation and the bureau does not seek to interfere with the workings of the church or the school).

¹⁶² IRC §7611.

¹⁶³ Treas. Reg. §301.7611-1; 1992 EO Technical CPE.

¹⁶⁴ See, e.g., FRANCES R. HILL & BARBARA L. KIRSCHTEN, *FEDERAL AND STATE TAXATION OF EXEMPT ORGANIZATIONS*, ¶4.06[7], 4-51 TO 4-53 (WARREN, GORHAM & LAMONT, 1994).

IV. Exemption as a Predicate for Governmental Regulation

The second large issue explored in this report is the regulation¹⁶⁵ of religious bodies that arises from the fact that they are exempt from various forms of taxation. Specifically, I explore two restraints imposed on political activity by churches because they are exempt organizations: limits on attempts to influence legislation, and a complete ban on electioneering. I explore the duty of church-related schools to conform to the public policy against racial discrimination, and differentiate that duty from the freedom of religious communities to decide for themselves whether women should be ordained as ministers. And I address the danger and the necessity of governmental definition of religion.

A. Political Activity

In the discussion of the organizational test above, I mentioned that the definition of an exempt organization in the tax code prohibits an organization from devoting more than an insubstantial part of its activities to lobbying activity, or from engaging in any kind of electioneering or political campaign. I explore each of these restraints upon the political activity of religious and other exempt organizations.¹⁶⁶ One consequence of these provisions is that

¹⁶⁵ The term "regulation" refers to all forms of administrative rules. Tax rules descend through decreasing ranks or stages. The legislation itself -- the Internal Revenue Code -- obviously enjoys the broadest authority. These rules can obviously be changed only by court order or legislation amendment or repeal. Then come the Internal Revenue Regulations, which are issued under the authority of the Secretary of the Treasury. Next are Revenue Procedures, which may be promulgated by the Commissioner of Internal Revenue. Then come Revenue Rulings. Finally, there are Private Letter Rulings, or letters from the National Office of the IRS to a District Director of the Service stating an opinion as to how a tax matter should be resolved. With the deletion of the identification of the taxpayer or exempt organization, a private letter ruling may be "discovered" under the Freedom of Information Act but may not be cited as a precedent, I.R.C. § 6110(j)(3), and is subject to change as the National Office sees fit.

When all is said and done about this hierarchy of regulations, however, a rule looks like a rule and feels like one to a taxpayer or a regulated exempt organization, no matter what the status of the rule is within the pecking order of the IRS. The technical way of saying this is that administrative regulations have the same force of law as acts of Congress. *United States ex ref. Accardi v. Shaughnessy*, 347 U.S. 363 (1957). The chief difference among the graduated forms of rules is an inverse proportion between flexibility and the level of governmental power involved in the issuance of the rule in the first instance. Thus when the Service came to agree that its rules about an "integrated auxiliary of a church" -- discussed below -- were no longer defensible, it could not change that rule even though it wanted to do so, because the offending rule had been issued in the form of a Revenue Regulation by the Secretary of the Treasury. Since there were hundreds of formal Regulations already in the hopper awaiting the attention of the Secretary, the best the Service could do under the circumstances was to offer to religious organizations a new Revenue Procedure, which is within the authority of the Commissioner of Internal Revenue to promulgate, coupled with a promise to initiate the complicated process of changing the Regulation itself. *See News Release, IRS Announces that Church-Affiliated Organizations Need Not File Forms 990*, IRS 86-63 (May 6, 1986). The Regulation promised in 1986, Rev. Proc. 86-23, 1986-1, CB 564, was finally promulgated a decade later, Rev. Proc. 96-10, 1996-1 C.B. 577, 1996-2 IRB 17.

¹⁶⁶ For a discussion of the history of these two provisions in the tax code, and an argument

donors may not deduct from their taxable income contributions to an organization held to be violating these provisions.¹⁶⁷

(a) Limitation on Substantial Attempts to Influence Legislation

The tax code denies exempt status to any organization that spends a "substantial part of [its] activities in carrying on propaganda, or otherwise attempting, to influence legislation."¹⁶⁸ When added to the tax code in 1934, this provision did not target religious organizations at all, but sought to deny exempt status to "sham" organizations that were really a "front" for lobbying on behalf of wealthy donors' private interests.¹⁶⁹

One difficulty with the regulation of "substantial" activities is its vagueness. How much is too much? Neither the statute nor the Treasury regulations offer a clear answer to this obvious question. One case allowed exempt status to an organization that spent approximately 5% of its budget to attempt to influence legislation.¹⁷⁰ Another case revoked the exempt status of an organization for spending approximately 20% of its budget on lobbying efforts.¹⁷¹ The case law discloses only that 5% is not substantial and that 20% is.

Exempt status may be revoked, moreover, without any attention to the percentage of an organization's budget spent on lobbying activities. In the leading case applying this provision to a religious organization, the court sustained the IRS revocation of exempt status from the Christian Echoes National Ministry on the ground that a radio evangelist named Billy James Hargis spoke frequently about political events in Washington and freely voiced his views on pending legislation.¹⁷² According to the court, the "activities of Christian Echoes in influencing or attempting to influence legislation were not incidental, but were substantial and continuous."¹⁷³

that the provisions are unconstitutional, *see* Edward McGlynn Gaffney, Jr., *On Not Rendering to Caesar: The Unconstitutionality of Tax Regulation of Activities of Religious Organizations Relating to Politics*, 40 DEPAUL L. REV. 1 (1990); *see also* Gerald Stephen Endler, *The Possible First Amendment Argument Against the Denial or Revocation of Section 501(c)(3) Tax-Exempt Status*, 7 GEO. MASON U. L. REV. 305 (1984).

¹⁶⁷ IRC § 170(c)(2)(D).

¹⁶⁸ IRC § 501(c)(3). For a discussion of this limitation, *see* BRUCE HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS*, note 110 above, at 300-26.

¹⁶⁹ For example, Senator Pat Harrison, floor manager for the bill, remarked: "I may say to the Senate that the attention of the Senate Committee was called to the fact that there are certain organizations which are receiving contributions in order to influence legislation and carry on propaganda. The committee thought there ought to be an amendment that would stop that, so that is why we have put this amendment in the bill." 78 Cong. Rec. 5959 (1934).

¹⁷⁰ *Seasongood v. Commissioner*, 227 F.2d 907 (6th Cir. 1955).

¹⁷¹ *Haswell v. United States*, 500 F. 2d 1133 (Ct. Cl. 1974), cert. denied, 419 U.S. 1107 (1975).

¹⁷² *Christian Echoes National Ministry, Inc. v. United States*, 470 F. 2d 849 (10th Cir. 1972), cert. denied, 414 U.S. 864 (1973).

¹⁷³ *Id.* at 856.

The net result is that this provision of §501(c)(3) may have a serious chilling effect on the exercise of protected political speech. It may also have differing effects on religious organizations not because of their formal organizational structure, but because of their different convictions about how to translate religious concerns into comments about the practical order of this-worldly politics.¹⁷⁴ As one prominent commentator on church-state relations wrote: "The undefined word `substantial' thus stands as an enigmatic threat to any public charity contemplating action on any legislative issue, and often has the `chilling effect' of persuading it that the only really safe course is to refrain from such activity entirely. It serves to muzzle, immobilize, or emasculate public charities with respect to affecting public policy, even though their charitable purposes may be fully effectuated only by obtaining changes in public policy and, more importantly, the public dialogue may be impoverished without their free participation."¹⁷⁵

(b) Complete Ban on Political Activity or Electioneering

In 1954 Senator Lyndon B. Johnson added another provision to the tax code, denying exempt status to any organization that "participate[s] in, or intervene[s] in (including the publishing or distribution of statements), any political campaign on behalf of any candidate for public office."¹⁷⁶ Once again, the original purpose of the amendment was not targeted at religious organizations, but at a charitable foundation in Texas that had provided funds to someone who had the temerity of challenging Johnson in the Democratic primary.¹⁷⁷ This provision came into the law without hearings either in the House or the Senate. It was accepted by an unrecorded voice vote in the Senate, and then acceded to in the Conference Committee without any discussion of the provision.¹⁷⁸ That committee understandably had more pressing issues to attend to in the major revision of the Internal Revenue Code that occurred in 1954.

¹⁷⁴ For example, in 1988 the General Assembly of the Presbyterian Church USA stated: "Since the time of Calvin, Reformed Protestants have felt called to share their vision of God's intended order for the human community, and Presbyterians have recognized and acted on the responsibility to seek social justice and peace and to promote the biblical values of freedom and liberty as well as corporate responsibility within the political order.... In `attempting to influence legislation' churches speak to the moral aspects of political issues. Such witness flows directly from fundamental faith and is integral to its free exercise. It is essential to the church's identity and mission, and to the moral authority of its pronouncements, that it speak as `church' through its religious structures and leaders." "GOD ALONE IS LORD OF THE CONSCIENCE," note 123 above, 8 J. L. & RELIG. 331, at 335. *See also* LEGISLATIVE ACTIVITY BY CERTAIN TYPES OF EXEMPT ORGANIZATIONS, HEARINGS BEFORE THE HOUSE WAYS AND MEANS COMMITTEE, 92d Cong., 2d Sess. 99 (1972) (statement by National Jewish Community Relations Advisory Council, whose mandate "requires those who adhere to the principles of Judaism to let their views be heard in support of justice for all"). And *see* Thomas C. Berg, *Church-State Relations and the Social Ethics of Reinhold Niebuhr*, 73 N.C. L. REV. 1567 (1995).

¹⁷⁵ KELLEY, WHY CHURCHES SHOULD NOT BE TAXED, note 128 above, at 72.

¹⁷⁶ IRC §501(c)(3). For a discussion of this limitation, *see* BRUCE HOPKINS, THE LAW OF TAX-EXEMPT ORGANIZATIONS, note 110 above, at 327-51.

¹⁷⁷ 100 Cong. Rec. 9604 (1954).

¹⁷⁸ *See* H. Report No. 2543, 83d Cong., 2d Sess. (1954).

This provision has been more problematic for religious organizations than the restrictions on lobbying activities. As with the restriction on lobbying, the ban on electioneering came into the law without any focus on religious organizations, indeed without much congressional deliberation at all. Unlike the limitation on "substantial" lobbying activities, which creates problems because the IRS has never informed exempt organizations how much time and effort in lobbying efforts constitutes a "substantial" activity that may trigger revocation of exempt status, the ban on electioneering is absolute. Thus in the case discussed above, the *Christian Echoes* court found no difficulty finding that "[i]n addition to influencing legislation, Christian Echoes intervened in political campaigns" because although Pastor Hargis generally did not formally endorse specific candidates for office, his ministry used "its publications and broadcasts to attack candidates and incumbents who were considered too liberal."¹⁷⁹

Sometimes, however, the definition of electioneering lacks clarity. To resolve ambiguity of this sort, the IRS has issued regulations with remarkable regularity -- corresponding rather precisely to the congressional election seasons -- proscribing with greater particularity the kind of information that an exempt organization may publish and distribute. For example in 1978 the IRS issued a Revenue Ruling that bans voter education efforts by exempt organizations which compile and publish voting records of all Members of Congress, if the votes reported are not on a wide range of topics but are limited to selected issues of interest to the organization, or if there is even an implied indication of the organization's approval or disapproval of the voting records, or so much as an editorial comment offered by the organization.¹⁸⁰ Two years later the IRS issued another ruling that allows the publication of congressional voting records on selected issues with an indication of whether those votes correspond to the organization's views.¹⁸¹ What might seem like progress is conditioned by the criteria the IRS announced it would consider to conclude whether an exempt organization had engaged in prohibited electioneering activity:

- (1) the voting records of all incumbents will be presented,
- (2) candidates for reelection will not be identified,
- (3) no comment will be made on an individual's overall qualifications for public office,
- (4) no statements expressly or impliedly endorsing or rejecting any incumbent as a candidate for public office will be offered,
- (5) no comparison of incumbents with other candidates will be made,
- (6) the organization will point out the inherent limitations of judging the qualifications of an incumbent on the basis of certain selected votes, by stating the need to consider such unrecorded matters as performance on subcommittees and constituent service,
- (7) the organization will not widely distribute its compilation of incumbents' voting records,
- (8) the publication will be distributed to the organization's normal readership (who number only a few thousand nationwide), and
- (9) no attempt will be made to target the publication toward particular areas in

¹⁷⁹ 470 F. 2d at 856. The court noted that *Christian Echoes* "attacked President Kennedy in 1961 and urged its followers to elect conservatives like Senator Strom Thurmond and Congressmen Bruce Alger and Page Belcher. It urged followers to defeat Senator Fulbright and attacked President Johnson and Senator Hubert Humphrey. The annual convention endorsed Senator Barry Goldwater. These attempts to elect or defeat certain political leaders reflected *Christian Echoes*' objective to change the composition of the federal government." *Id.*

¹⁸⁰ Rev. Ruling 78-248; 1978-1 C.B. 154.

¹⁸¹ Rev. Ruling 80-282.

which elections are occurring nor to time the publication to coincide with an election campaign.¹⁸²

These criteria not only favor incumbency, but also needlessly shrink the protection of the First Amendment to political activity that is feeble and ineffective. In neither case are they the sort of responsibilities normally associated with the tax-collecting function of the IRS. As noted above, these regulations are neutral on their face, but they obviously have a very different impact on a church that takes seriously an obligation for public witness to the surrounding culture, including our political life than for a more quietist religious organization.¹⁸³

Two religious organizations that differ considerably from one another illustrate the difficulties a church can encounter under the absolute ban on electioneering. First, a group of plaintiffs known as the Abortion Rights Mobilization sued the Secretary of the Treasury, seeking

¹⁸² *Id.*

¹⁸³ *See, e.g.,* J. RICHARD NIEBUHR, *CHRIST AND CULTURE* (New York: Harper & Row, 1975).

For example, one prominent commentator has written that the purpose of the law is "to prevent harm, resolve conflicts, and create means of cooperation. Its premise, from which it derives its perceived legitimacy and therefore its authority, is that it strives to anticipate and give expression to what a people believes to be its collective destiny or ultimate meaning within a moral universe." RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE* 253 (1983). Neuhaus argues that a democracy that cherishes its commitment to pluralism would welcome religion as one of the guiding influences of the political discourse within which the law takes shape: "[T]he public square cannot and does not remain naked. When particularist religious values and the institutions that bear them are excluded, the inescapable need to make public moral judgments will result in an elite construction of a normative morality from sources and principles not democratically recognized by the society. The truly naked public square is at best a transitional phenomenon. It is a vacuum begging to be filled. When the democratically affirmed institutions that generate and transmit values are excluded, the vacuum will be filled by the agent left in control of the public square, the state. In this manner, a perverse notion of the disestablishment of religion leads to the establishment of the state as church." *Id.* at 86.

an order requiring the IRS to revoke the tax-exempt status of the Catholic church because of various public pronouncements of church officials relating to abortion. The district court ruled that the plaintiffs had standing in their capacities as voters and members of the clergy, on the ground that by failing to revoke the church's exempt status, the IRS had allegedly "denigrated" the plaintiffs' religious beliefs and "frustrated" their ministry by giving "tacit government endorsement of the Roman Catholic Church view of abortion."¹⁸⁴ The district court subsequently held the church in civil contempt and imposed fines in the amount of \$ 100,000 a day on the church for its refusal to hand over massive amounts of sensitive internal documents to outsiders.¹⁸⁵ The Supreme Court ruled unanimously that the church was at least entitled to challenge the jurisdiction of the district court.¹⁸⁶ On remand, the court of appeals reversed the district court on the standing issue and dismissed the case for lack of jurisdiction; the Supreme Court denied review.¹⁸⁷ The litigation lasted over a decade and was very costly for the church. It at least illustrated that virtually all religious organizations -- including groups that strongly disagree with the Catholic church on abortion -- were united in repudiating the use of the courts by private litigants to attack a church's exempt status in this way.¹⁸⁸

Although this case lodges authority for enforcement of §501(c)(3) exclusively within the IRS, that does not guarantee that the regulation will be evenhanded. For example, the IRS concluded that Jimmy Swaggart Ministries [JSM] had jeopardized its exempt status when its leading pastor Jimmy Swaggart, endorsed Pat Robertson's candidacy for the Republican nomination for President in the 1988 election.¹⁸⁹ The conduct by JSM¹⁹⁰ leave no doubt that the

¹⁸⁴ *Abortion Rights Mobilization, Inc. v. Regan*, 544 F. Supp. 471 (S.D.N.Y. 1982) (standing as voters to challenge exempt status of church); *Abortion Rights Mobilization, Inc. v. Regan*, 552 F. Supp. 364 (S.D.N.Y. 1982) (denying petition of federal defendants for interlocutory appeal on standing of plaintiffs); *Abortion Rights Mobilization, Inc. v. Regan*, 603 F. Supp. 970 (S.D.N.Y. 1985) (denying church's motion for dismissal of suit for lack of standing by plaintiffs, but dismissing church as party defendant); *In re Baker* 788 F. 2d 3 (2d Cir. 1986) (denying petition of Sec. of Treasury for interlocutory appeal), cert. denied, 479 U.S. 184 (1986).

¹⁸⁵ *Abortion Rights Mobilization, Inc. v. Baker*, 110 F.R.D. 337 (S.D.N.Y. 1986) (holding church in contempt for failure to comply with discovery order); *In re United States Catholic Conference*, 824 F. 2d 156 (2d Cir. 1987) (denying church's appeal on ground that it was a witness, not a party, in the suit).

¹⁸⁶ *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988).

¹⁸⁷ *In re United States Catholic Conference*, 885 F. 2d 1020 (2d Cir. 1989), cert. denied, 495 U.S. 918 (1990).

¹⁸⁸ The following religious organizations filed a joint brief amicus curiae supporting the United States Catholic Conference: National Council of Churches of Christ in the U.S.A., James E. Andrews and Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.), the Baptist Joint Committee on Public Affairs, The Catholic League for Religious and Civil Rights, The Lutheran Church-Missouri Synod, The National Association of Evangelicals, The Synagogue Council of America, and the Worldwide Church of God.

¹⁸⁹ In a news release dated December 17, 1991, the IRS stated that its examination of the

organization had violated the plain meaning of the prohibition contained in the statute. But the IRS settled the case, announcing that "[a]s a condition of its continued exempt status, JSM has agreed to refrain in future years from certain political activities."¹⁹¹ Perhaps the settling of the case in this manner reflects an awareness that the IRS had not applied the same standard to the Rev Martin Luther King, Jr., who famously endorsed John F. Kennedy in his presidential campaign in 1960, and had not sanctioned any of the Baptist churches that prominently supported Jesse Jackson's candidacy in the 1984 presidential campaign. Once again, the lack of uniformity in the government's enforcement of the ban on electioneering is not related to the formal organizational structure of religious organizations, but it does call into question the neutrality of the IRS in these matters.

B. Conformity to Public Policy

(a) Racial Discrimination

In a series of cases after the rejection of racial segregation in *Brown v. Board of Education*,¹⁹² the courts struggled with the question of whether the government could fund private academies that maintained a policy of racial exclusion. In the first case after *Brown* involving this issue, the Supreme Court viewed the simultaneous closing of the public elementary schools and the generous funding of private academies that were racially discriminatory as a manifest attempt to avoid the logic of the *Brown* decision.¹⁹³ On the view that exemption from taxation is the functional equivalent of funding, the NAACP Education Fund

ministry "disclosed that on the afternoon of September 8, 1988, Jimmy Swaggart met with Pat Robertson to discuss Robertson's candidacy for the Republican nomination for President of the United States. On the evening of September 10, 1988, Jimmy Swaggart spoke at a regularly scheduled Wednesday night service of JSM's Family Worship Center, members and adherents of JSM were present. Members of the press were also in attendance. Jimmy Swaggart stated at the service that Pat Robertson would most probably announce his candidacy for President and that he, Jimmy Swaggart, would support him."

¹⁹⁰ In the October 6, 1988, issue of *The Evangelist*, the official magazine of JSM, an endorsement of Pat Robertson's candidacy for President appeared in Jimmy Swaggart's column "From Me to You." The column stated "we are supporting Pat Robertson for the office of President of the United States" and "we are going to support him prayerfully and put forth every effort we can muster in his behalf." IRS News Release, Dec. 17, 1991.

¹⁹¹ *Id.* JSM explicitly agreed that Swaggart's endorsement of Robertson "constituted prohibited political campaign intervention within the meaning of § 501(c)(3) of the Code...." JSM also agreed to "changes in its organization's structure including the creation of an 'Audit and Compliance Committee' composed of members of an expanded board of trustees, to ensure that no further political campaign intervention activities will occur. Under no circumstances will any of JSM's resources, including financial resources, personnel or facilities, be utilized to participate or intervene in a political campaign." *Id.*

¹⁹² 347 U.S. 483 (1954).

¹⁹³ *Green v. County School Bd. of New Kent County*, 391 U.S. 430 (1968).

then sought to revoke the exempt status of elementary schools in Mississippi that practiced racial discrimination.¹⁹⁴ Because this litigation did not involve religious schools and thus did not present an opportunity for adjudication of a free exercise claim. That issue was presented in *Bob Jones University v. United States*.¹⁹⁵

In an earlier phase of its litigation with the government, the university abandoned its racially discriminatory admissions policy, which had made it literally unique among institutions of higher education.¹⁹⁶ The university, however, continued to prohibit interracial dating or marriage, and the Court construed this policy of student discipline to affect the university's admissions policy.¹⁹⁷ The Court held that the enforcement of this policy on the basis of religious doctrine disqualified the university as a tax-exempt organization under § 501(c)(3) of the tax code and that contributions to the school is not deductible as charitable contributions under § 170 of the code.¹⁹⁸

If Chief Justice Burger had justified this holding simply on the ground that government support of any sort for Jim Crow is unconstitutional, his opinion for the Court would have had stronger support. But Burger made a central feature of his opinion that "entitlement to tax exemption depends on meeting certain common law standards of charity-- namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy."¹⁹⁹ Burger expanded on this theme as follows:

Charitable exemptions are justified on the basis that the exempt entity confers a public benefit--a benefit which the society or the community may not itself choose or be able to provide, or which supplements and advances the work of public institutions already supported by tax revenues. History buttresses logic to make

¹⁹⁴ In *Green v. Kennedy*, 309 F.Supp. 1127 (D.D.C.), app. dismissed sub nom. *Cannon v. Green*, 398 U.S. 956 (1970), a three-judge court issued a preliminary injunction prohibiting the IRS from according tax-exempt status to private schools in Mississippi that discriminated as to admissions on the basis of race. Six months later the IRS concluded that it could "no longer legally justify allowing tax-exempt status [under § 501(c)(3)] to private schools which practice racial discrimination" nor allow contributions to such schools to be deductible under §170. IRS News Release (7/10/70). On June 30, 1971, the *Green* court issued its opinion on the merits, approving the IRS' amended construction of the tax code. *Green v. Connally*, 330 F.Supp. 1150 (D.D.C.), aff'd sub nom. *Coit v. Green*, 404 U.S. 997 (1971) (per curiam). The silence of Congress after this litigation was viewed by the Court in *Bob Jones* as "an unusually strong case of legislative acquiescence in and ratification by implication of the [IRS'] 1970 and 1971 rulings" 461 U.S. at 599; *see also* at 608 (Powell, J., concurring in part and concurring in the judgment).

¹⁹⁵ 461 U.S. 574 (1983).

¹⁹⁶ *See* Douglas Laycock, *Tax Exemptions for Racially Discriminatory Religious Schools*, 60 U. TEX. L. REV. 259 (1982); and Karla W. Simon, *The Tax-Exempt Status of Racially Discriminatory Schools*, 36 TAX L. REV. (1981).

¹⁹⁷ 461 U.S. at 577.

¹⁹⁸ *Id.* at

¹⁹⁹ *Id.* at 586.

clear that, to warrant exemption under § 501(c)(3), an institution must fall within a category specified in that section and must demonstrably serve and be in harmony with the public interest. The institution's purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred.²⁰⁰

This suggestion that a religious organization might lose its exempt status by failing to conform with some "public policy" announced by the IRS or by failing to "serve and be in harmony with the public interest" caused great concern both on and off the Court. Justice Powell tried to urge the Chief Justice to delete this material from the opinion he had drafted.²⁰¹ When Burger declined to do so, Powell prepared a concurring opinion that challenged Burger's insistence that the tax-exempt status of an organization could be revoked if an organization does not provide a clear "public benefit" as defined by the Court.²⁰² Noting that over 106,000 organizations filed § 501(c)(3) returns in 1981, Justice Powell found it "impossible to believe that all or even most of those organizations could prove that they `demonstrably serve and [are] in harmony with the public interest' or that they are `beneficial and stabilizing influences in community life.'"²⁰³ Justice Powell added:

Even more troubling to me is the element of conformity that appears to inform the Court's analysis. The Court asserts that an exempt organization must "demonstrably serve and be in harmony with the public interest," must have a purpose that comports with "the common community conscience," and must not act in a manner "affirmatively at odds with [the] declared position of the whole government." Taken together, these passages suggest that the primary function of a tax-exempt organization is to act on behalf of the Government in carrying out governmentally approved policies. In my opinion, such a view of § 501(c)(3) ignores the important role played by tax exemptions in encouraging diverse, indeed often sharply conflicting, activities and viewpoints.²⁰⁴

Similarly, leading commentators criticized the Burger opinion for subordinating the free exercise claim to a mere "public policy" determination by the IRS.²⁰⁵ *Bob Jones* thus set in motion a vague standard about exempt status that has considerable potential for mischief if given an expanded application beyond the issue of racial discrimination.

²⁰⁰ *Id.* at 591-92.

²⁰¹ Memorandum of Justice Powell to Chief Justice Burger, Papers of Justice Marshall, Library of Congress.

²⁰² *Id.* at 608 (Powell, J., concurring in part and concurring in the judgment).

²⁰³ *Id.* at 609.

²⁰⁴ *Id.* at 609.

²⁰⁵ See, e.g., Robert M. Cover, *Foreword: The Supreme Court: Nomos and Narrative*, 97 HARV. L. REV. 4, 67 (1983); Mayer G. Freed & Daniel D. Polsby, *Race, Religion, and Public Policy: Bob Jones University v. United States*, 1983 SUP. CT. REV. 1; and Thomas C. Berg, *What Hath Congress Wrought? an Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 10, 36, 43 (1994).

(b) Gender Discrimination

Within a decade of the decision in *Bob Jones* case, a leading feminist, Professor Mary Becker, urged reliance on the case for an "exceedingly moderate" change in the tax laws: the revocation of exempt status from religious "institutions subordinating women and denying women full religious freedom."²⁰⁶ Becker acknowledged that "religion has often empowered women and has responded to and reflected the beliefs and values of women, who are, in general, more religious than men."²⁰⁷ But, she claimed, it is also true that "religion perpetuates and reinforces women's subordination, and religious freedom impedes reform ... [and] women's effective political participation."²⁰⁸ Viewing exemptions from income and property taxes and awards of government contracts as "substantial government subsidies of religion ... [that] perpetuat[e] the subordination of women,"²⁰⁹ Becker urged that "courts could redefine, or legislatures amend, the Religion Clauses of the First Amendment to prohibit government subsidies to religions that close the ministry to women."²¹⁰

The major flaw in Becker's argument is that it overlooks the tradition of church autonomy over its own ministry. As noted above, this tradition traces its pedigree back to the ancient period. It entered into American law in a line of cases beginning with *Watson v. Jones*²¹¹ clarifying a principle of nonentanglement by the government in ecclesiastical matters.²¹² In *Watson*, Justice Miller stated: "The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of civil authority."²¹³ Now acknowledged as constitutional in stature,²¹⁴ this principle has been reinforced in subsequent decisions of the Court

²⁰⁶ Mary E. Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 U. CHI. L. REV. 453, 486 (1992); see also Jane Vandeventer Goldman, *Taxing Sex Discrimination: Revoking Tax Benefits of Organizations Which Discriminate on the Basis of Sex*, ARIZ. ST. L. J. 1976: 641; this student note does not address the free exercise issue that would arise if the rationale of *Bob Jones* were to be applied to a church that does not ordain women.

²⁰⁷ *Id.* at 459.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.* at 457. Becker explicitly noted that Mormons, Roman Catholics, and Orthodox Jews do not allow the ordination of women, *id.* at 460.

²¹¹ 80 U.S. (13 Wall.) 679 (1872).

²¹² See the discussion of excessive entanglement of the government in religion in the chapter by Thomas Berg on Religiously Affiliated Education.

²¹³ *Id.* at 730.

²¹⁴ *Watson* was a federal case because of the diversity of citizenship of parties to the case, some of whom lived in Kentucky and some in Ohio. It was decided before the religion clause

limiting the authority of secular courts to probe too deeply into the affairs of religious communities²¹⁵ and to take over decisions that are better left for these communities themselves to make in a variety of ways. Whether church autonomy should continue to serve as a rationale for exemption of churches from taxation, there is little doubt that the free exercise of religion includes the ability of a religious community to determine for itself the issue of who may exercise ministry within it. This counterargument does not diminish the duty on the part of the government to refrain from discrimination on the basis of sex without an exceedingly strong justification,²¹⁶ precisely because of the powerful distinction that the First Amendment draws between the government and religious communities. That distinction cannot be overcome by a characterization of grants of tax exemption as state action.²¹⁷

Becker also opposed tax subsidies given to religions that "mobilize opposition to feminist issues" and that are denied to "women's political organizations."²¹⁸ Implicitly at least, Becker urged that an aggrieved plaintiff has standing to argue that by failing to revoke the church's exempt status, the IRS would be denigrating the plaintiff's religious beliefs by giving tacit government endorsement of the subordination of women. As noted above, this is precisely the view of standing that the courts rejected in the *Abortion Rights Mobilization* case,²¹⁹ decided five years before Becker published her article.

C. The Necessity and Danger of Governmental Definition of Religion

was deemed to be incorporated against the States through the due process clause of the fourteenth amendment, *see, e.g.*, *Cantwell v. Connecticut*, 310 U.S. 296 (1940), and *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947). In *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969), the Court clarified that the principle announced in *Watson* is now binding on the States as a matter of constitutional law, not as a matter of "federal common law."

²¹⁵ The Court has expressly clarified that the free exercise of religion extends not only to individuals, but also to religious communities. *See, e.g.*, *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952); *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190 (1960), discussed in NOONAN, *LUSTRE OF OUR COUNTRY*, note 35 above, at 197-99. And *see Serbian Eastern Orthodox Diocese for the United States and Canada v. Milivojevich*, 426 U.S. 696 (1976).

²¹⁶ *See, e.g.*, *Craig v. Boren*, 429 U.S. 190 (1976) ("classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives").

²¹⁷ *Id.* at 485.

²¹⁸ *Id.* at 479.

²¹⁹ *Abortion Rights Mobilization, Inc. v. Regan*, 544 F. Supp. 471 (S.D.N.Y. 1982) (standing as voters to challenge exempt status of church); *Abortion Rights Mobilization, Inc. v. Regan*, 552 F. Supp. 364 (S.D.N.Y. 1982) (denying petition of federal defendants for interlocutory appeal on standing of plaintiffs); *Abortion Rights Mobilization, Inc. v. Regan*, 603 F. Supp. 970 (S.D.N.Y. 1985) (denying church's motion for dismissal of suit for lack of standing by plaintiffs, but dismissing church as party defendant); *In re Baker* 788 F. 2d 3 (2d Cir. 1986) (denying petition of Sec. of Treasury for interlocutory appeal), cert. denied, 479 U.S. 184 (1986).

Governmental definition of religion runs two risks. Stating criteria as though one size fits all religious communities may offend against the very pluralism that the First Amendment is meant to protect. Differentiating between religious and secular may violate a church's self-understanding of its mission to the world and thus offend against the principle of church autonomy sketched above. The necessity of some governmental definition, however, arises from two sources: the difficult task of administering the tax laws fairly and the lamentable abuse of tax exemption for personal gain or greed. Thus governmental definition of religion is both a necessity and a danger.

1. The Need for Limits to Abusive Practices

As a general proposition, the definitional task is simply unavoidable. "Religion" is a term found both in the text of the constitution and in the tax code. It will ineluctably be defined and doing so is not per se unconstitutional, any more than defining the term "press" to include films, radio, television, and the Internet, or the term "commerce" to include transportation of goods.

The government has a particular reason for vigilance in the application of the tax code to religious organizations. To put the matter bluntly, some religious organizations have abused their exempt status, and in some instances in a manner that seems plainly fraudulent. In other instances, some individuals have tried to take advantage of the tax-exempt status afforded to religious groups in a manner that violates the prohibition against private inurement. For example, in the late 1980s disclosures of the diversion of contributions to celebrated televangelists to their own private benefit charged the atmosphere within which the delicate task of defining religion must be undertaken. The most celebrated case involving excessive compensation of religious leaders was that of Jim and Tammy Faye Bakker, founders of a ministry in Fort Mill, S.C. known as PTL (an acronym for "Praise the Lord" or "People That Love"). Jim Bakker received nearly \$3 million in total compensation in the fiscal year before the audit of Heritage Village Church & Missionary Fellowship, that led to the revocation of PTL's exempt status. The government declined to prosecute Tammy Faye Bakker, but indicted and gained a criminal conviction of Jimmy Bakker for mail fraud, wire fraud, and criminal conspiracy.²²⁰

Although the Bakkers' luxuriant lifestyle²²¹ is by no means typical of religious ministers, the case undoubtedly led many to conclude that the government should "do something" to protect the public in all such circumstances. On the one hand, the free exercise of religion does not require the IRS to avoid regulation of flagrant abuse merely because the violator is a member of

²²⁰ United States v. Bakker, 925 F. 2d 728 (4th Cir. 1991).

²²¹ "The Internal Revenue Service has questioned scores of luxury items charged by PTL founders to the ministry they founded ranging from a \$592,000 oceanfront condominium in Palm Beach, Fla., to and \$800 Gucci briefcase.... Such purchases are among \$1.3 million worth of items charged by the Bakkers to PTL between 1981 and 1983 and which IRS auditors have questioned as possible personal expenses in the course of their continuing audit into the finances of the tax-exempt organization." "IRS Questions \$1.3 Million in Purchases Bakkers Charged to PTL," *Los Angeles Times*, (May 17, 1987), I-17, cols.1-2. The story omits several details from the IRS audit, such as the Bakkers' other four luxury homes in addition to the Palm Beach condominium, regular and unitemized cash advances in nice round amounts (\$5,000), and the excess of charity for man's best friend reflected in a air-conditioned dog house! See Wendell Bird, "Religious Organizations," in FRANCES R. HILL AND BARBARA KIRSCHTEN, FEDERAL AND STATE TAXATION OF EXEMPT ORGANIZATIONS ¶4.05[2], p. 4-37, note 229 (1994).

the clergy. On the other hand, in our constitutional order, it is not the normally the job of the government to save the people from false prophets, for to do so would involve the government at least implicitly in the task of announcing religious "truth."²²² We, the people must do that for ourselves. Even so, most would concede the need for some kind of line-drawing between legitimate religious autonomy and violations of the tax code, including illicit appropriation of charitable contributions to a religious body for personal use. Thus, although the salaries a church pays its ministers should normally be of no concern to the government, some governmental inquiry into this matter may occasionally be warranted by the prohibition of personal benefit from contributions to an exempt organization.²²³ This prohibition was at the heart of the government's successful, if highly controversial, prosecution of the Rev. Sun Myung Moon.²²⁴

Curiously the government has not always been as successful or even as zealous in prosecuting tax fraud cases involving religion. After losing a tax case in 1974 against the Universal Life Church,²²⁵ which issues a certificate of ordination to anyone who will send \$25 to

²²² In *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929), Justice Brandeis suggested that the civil courts might give "marginal" review to decisions of church authorities to ascertain if the church had been involved in fraud. Similarly, the Court suggested that it was legitimate for the government to probe the sincerity, but not the truth, of religious claims, in *United States v. Ballard*, 322 U.S. 78, 86-87 (1944). For a thoughtful discussion of the *Ballard* case, see NOONAN, *LUSTRE OF OUR COUNTRY*, note 35 above, at 141-76. In one of his "ten commandments" on religious freedom, Noonan writes: "You shall mark that government when it seeks to adjudicate the truth of a religion falls afoul of the First Amendment and when it attempts to adjudicate the sincerity of a believer enters on an enterprise beset by hazards." *Id.* at 357.

²²³ I.R.C. § 501(c)(3) provides in part that an organization is exempt from taxation if it is organized and operated in such a manner that "no part ... of [its] net earnings ... inures to the benefit of any private shareholder or individual." For further clarification of the private inurement rule, see BRUCE HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS*, note 110 above, at 264-99.

²²⁴ *United States v. Moon*, 718 F.2d 1210 (2d Cir. 1983), cert. denied, 466 U.S. 971 (1984). Scores of religious bodies of wide diversity, few of whom agree with the theological tenets of the Unification Church, filed briefs amicus curiae urging the Supreme Court to review this case.

²²⁵ *United States v. Universal Life Church*, 372 F.Supp. 770 (W.D. Cal. 1974). In this case the trial judge wrote: "Neither this Court, nor any branch of this Government, will consider the merits or fallacies of a religion. Nor will the Court compare the beliefs, dogmas, and practices of a newly organized religion with those of an older, more established religion. Nor will the Court praise or condemn a religion, however excellent or fanatical or preposterous it may seem. Were the Court to do so, it would impinge upon the guarantees of the First Amendment." *Id.*, 372 F. Supp. at 776. Although the court expressly relied upon *United States v. Ballard*, 322 U.S. 78, 86-87 (1944) for this view, it did not explore the very issue which the Supreme Court in *Ballard* had sent back to the trial court, viz., the sincerity of the beliefs, as opposed to their truth or falsity. It is puzzling why the Government did not choose to litigate this issue vigorously in *Universal Life Church*. In a more recent case before the Tax Court, a judge took a much less benign view of the use of religion in a situation where a taxpayer had "literally bathed himself" in personal benefits: "[O]ur tolerance for taxpayers who establish churches solely for tax avoidance purposes is reaching a breaking point. Not only do these taxpayers use the pretext of a church to

the founding "Pastor," Kirby Hensley,²²⁶ the government took a seemingly casual approach for several years to the problem of mail-order ministry before it cracked down on this phenomenon in the 1980s.²²⁷

2. The Danger of Monolithic Criteria that Offend against Pluralism

The government's more casual attitude toward the definition of religion during this period may have stemmed from the difficulty that IRS officials have themselves acknowledged to be inherent in any governmental attempt to define religion.²²⁸ Notwithstanding this difficulty, the IRS elaborated fourteen criteria for determining whether an organization is a church for tax purposes. The IRS will accord this status only if an organization has:

avoid paying their fair share of taxes, even where their brazen schemes are uncovered many of them resort to the courts in a shameless attempt to vindicate themselves." *Miedaner v. Commissioner*, 81 T.C. 272, 282 (1983).

²²⁶ Hensley has stated publicly that the principal purpose of the Universal Life Church is to avoid the payment of taxes by his mail-order "ministers." He hopes thereby to eventually force the elimination of the tax-exempt status of all religious organizations. See Charles Whelan, *Church in the Internal Revenue Code: The Definitional Problem*, 45 *FORDHAM L. REV.* 885 (1977) ("Church in the Internal Revenue Code").

²²⁷ In 1978 the State of New York revoked the sales tax exemption enjoyed by the Universal Life Church. In 1984 the IRS revoked the federal exempt status of the Universal Life Church. The tougher judicial attitude reflected in the *Miedaner* case, note 225 above, is paralleled in the IRS Training Manual, which now contains a section focused expressly on the problem of "Mail Order Ministries." IR Manual § 7(10)75. This approach to mail-order ministry is reflected in increased audits of such ministries by the IRS, which estimates, for example, that nearly 1,000 "ministers" of the mail-order Church of Universal Harmony owe the government over \$5 million in back taxes. Tougher enforcement policies have resulted in stiffer sentences of offenders. For example, a federal judge in Los Angeles sentenced Louis Pugliani, a mail-order minister in the Universal Life Church, to nine years in prison and imposed a fine of \$95,000 after he was found guilty on nineteen counts of preparing false tax returns. (RNS, Aug. 4, 1982). A federal judge in Sacramento, California, sentenced William Richardson, another mail-order pastor in the Universal Life Church, to nine years in prison for preparing false tax returns. (RNS, Nov. 30, 1983). A federal judge in Fort Worth, Texas, sentenced the "Pope" of the mail-order Basic Bible Church, Jerome Daly, to sixteen years in prison and imposed a fine of \$100,000 on him after Daly and seven other pilots with Braniff Airlines were convicted in a scheme of defrauding the government and filing false tax returns. In sentencing the defendants, the judge noted: "None of you were [sic] prosecuted for your religious beliefs. You were prosecuted for the use of religion to avoid individual taxes and to defraud the government." (RNS, May 4, 1983). For a sociological study of mail-order religion, see Anson D. Shupe, *Disembodied Access and Technological Constraints on Organizational Development: A Study of Mail-Order Religion*, 15 *J. FOR SCIENTIFIC STUDY OF RELIG.* 177 (1976); for a popular discussion of this problem, see Tim Ponder, *Ring Around the Clerical Collar*, *LIBERTY* (Sept.-Oct. 1982), 6-9.

²²⁸ See, e.g., *Difficult Problems in Tax Administration: 14 Religion and Race*, Address of Jerome Kurtz, Commissioner of IRS, at Practising Law Institute Seventh Biennial Conference on Tax Planning for Foundations, Tax-Exempt Status and Charitable Contributions, Jan. 9, 1977, reproduced in *BNA, DAILY EXECUTIVE REPORT* (Jan. 11, 1977) at J.8.

(1) a distinct legal existence; (2) a recognized creed and form of worship; (3) a definite and distinct ecclesiastical government; (4) a formal code of doctrine and discipline; (5) a distinct religious history; (6) a membership not associated with any other church or denomination; (7) an organization of ordained ministers; (8) ordained ministers selected after completing prescribed studies; (9) a literature of its own; (10) established places of worship; (11) regular congregations; (12) regular religious services; (13) Sunday schools for religious instruction of the young; and (14) schools for the preparation of its ministers.²²⁹

These criteria illustrate the dilemma of governmental efforts to define religion. Without any effort to distinguish among religious claimants, the government seems to lack any effective way of enforcing the tax code against those who would cloak themselves with a patina of religiosity solely for the purpose of evading their fair share of the tax burden. On the other hand, these so-called "criteria" are not really strict measuring sticks but loose guidelines. In any given application of these guidelines one or more of the fourteen elements may be missing from an organization without yielding the conclusion that it is not "religious." Otherwise, the government would answer the third question posed by this report in a hollow, mechanical, and unconstitutional way, preferring some kinds of churches over others by virtue of the fact that they are organized or structured differently. For example, loosely structured religious societies, such as the Society of Friends (Quakers) or the Christian Scientists, who undoubtedly enjoy the protection of the First Amendment Religion Clause.²³⁰ Although the IRS criteria have been criticized on this score by scholars,²³¹ they have been adopted by the courts with only slight recognition of the difficulties posed by the so-called "criteria."²³² I conclude that the deepest structures of religious communities are rarely affected by the federal tax laws.

3. The Danger of Definition of Religious Social Ministry that Violates Autonomy

The government must have the freedom to define religion for the purpose of making evenhanded, neutral application of tax policies to all religious organizations. As I indicated above, the government has, in my view, overstepped its proper role in the regulation of activities of religious organizations relating to politics, principally their efforts to communicate moral convictions on matters of public concern to elected officials (lobbying activities) and their efforts to persuade voters of the correctness of their moral convictions on these matters (electioneering activities). I offer now another example of an awkward attempt of the government to define

²²⁹ As cited in *Lutheran Social Services of Minnesota v. United States*, 758 F. 2d 1283, 1286-1287 (8th Cir. 1985), discussed below.

²³⁰ See, e.g., *Feldstein v. Christian Science Monitor*, 555 F. Supp. 974 (D. Mass. 198_).

²³¹ See Whelan, "Church" in the *Internal Revenue Code*, note 226 above, at 925-926; and Worthing, "Religion" under the *First Amendment*, 7 PEPPERDINE L. REV. 313, 344-345 (1980).

²³² See, e.g., *Lutheran Social Services*, note 229 above, 758 F.2d at 1287 (ruling that, in light of the IRS criteria, *Lutheran Social Services of Minnesota* is not a church), and *American Guidance Foundation, Inc. v. United States*, 490 F.Supp. 304, 306 (D.D.C. 1980) (acknowledging that some of the IRS criteria are "relatively minor," but ruling that the foundation failed to meet the "central" and "minimal" standards of a church: organized ministry serving an established congregation with regular religious services and religious education for its young and dissemination of a doctrinal code).

religion. This regulation purported to define a provision of the tax code exempting an "integrated auxiliary of a church" from an annual filing requirement. The regulation became intensely controversial because it undervalued the social ministry of religious organizations.

A 1988 policy statement adopted by the Presbyterian Church (U.S.A.) put succinctly the nub of the problem of this sort of governmental definition of religion from the churchside:

When the state grants exemption from taxes to religious organizations, the basic definition of what constitutes religious activity must be made by those organizations. With increasing frequency, taxing jurisdictions seek to collect taxes from religious organizations on particular property or activity in the face of statutory provisions exempting "churches, conventions, or councils of churches and their integrated auxiliaries" from tax liability. In such instances, the justification is most often that the property or activity is not sufficiently "religious" to qualify, although wholly owned, operated, controlled, and defined by the religious organization as a part of its life and work. We urge Presbyterians, when dealing with such situations, to recognize that the issue is not "whether the church should pay taxes." The issue is: "Who defines the church's nature and ministry?".... Presbyterians must resist any attempt by taxing authorities to define some of the properties and activities wholly controlled and defined by the church as nonreligious....

We concede that some properties and operations of religious organizations may be subjected to taxation by legislative act; but we will resist all efforts to do so by administrative determination, in the face of statutes that exempt churches from taxation, that some properties or activities wholly controlled and operated by the church as part of its mission are "nonreligious."²³³

If the main problem for religious organizations is the improper classification of their ministries as "nonreligious," the solution must lie in coming to terms with that problem. For over a decade there was considerable difficulty in doing so, because of an unfortunate and prolonged conflict between the IRS and various religious communities over the meaning of an obscure provision in the tax code exempting an "integrated auxiliary of a church" from reporting requirements.²³⁴ Part of the difficulty is that the term "integrated auxiliary" was not grounded in the historical experiences of American churches. The term does not resonate richly in the ecclesiological vocabulary of any of the major American religious bodies, with the single exception of the Mormons. In short, most Americans would increase their understanding of "integrated auxiliaries" if the IRS had caught one -- perhaps in Utah -- and put it in a cage so that they could observe one firsthand and at least get some inkling of what the government might have had in mind when it invented the phrase in 1969.

The failure of theology and church history to shed light on the term might not be too

²³³ "GOD ALONE IS LORD OF THE CONSCIENCE," note 123 above, 8 J. LAW & RELIG. 331, at 365-66, 367-68.

²³⁴ For an extensive discussion of the IRS regulations on this topic, see Edward McGlynn Gaffney, *Governmental Definition of Religion: The Rise and Fall of the IRS Regulations on an 'Integrated Auxiliary of a Church,'* 25 VALPARAISO U. L. REV. 203 (1991); and George J. Bain, *The Unfortunate Church-State Dispute over the I.R.C. Section 6033 'Exclusively Religious' Activity Test,* 23 NEW ENGLAND L. REV. 1 (1988).

discouraging if the term were one rich in legal meaning, in the practical experience of the politicians who wrote the phrase into the tax code or of the officials in the IRS charged with administering the code. But with the possible exception of Senator Wallace Bennett, a Mormon from Utah who suggested the use of the term "auxiliary" at the time of the 1969 tax legislation, it seems clear from the history surrounding the adoption of the legislation that Members of Congress did not have any clear meaning of the term in mind, and therefore in intention. Although there is much to be said for ignoring legislative history and focusing only on the meaning of statutes,²³⁵ legislative history should be useful at least to establish the basic contours of language used in a statute.

With no guidance from Congress, the IRS issued regulations that only made matters worse by insisting that the activity of an integrated auxiliary had to be "exclusively religious" and then by defining relying on a wooden, clumsy, unworkable definition of the church and its mission.²³⁶ According to the new guidelines, an organization would be deemed an "integrated auxiliary" of a church only if it did what the government thought that people normally do in a church: worship God by reading the Bible, singing hymns, listening to sermons, saying prayers and things like that. Once the "church service" was over and the church began to engage in service to the world, organizations that engaged in activity of that sort were not "integrated auxiliaries" in the mind of the IRS.

Lutherans and Baptists decided to challenge these regulations. They did so not because the burden imposed on the church's schools and social ministries was all that severe,²³⁷ but because they viewed the regulations as a classic instance of inappropriate governmental intervention in religious affairs. As in the *Abortion Rights Mobilization* case, religious communities were required to spend considerable time, energy, and financial resources resisting a foolish regulation that was premised on the exempt status of these communities. The churches prevailed in the litigation; two federal appellate courts and a district court found the Treasury regulations narrower than the statute allowed.²³⁸

Once again, the regulations were not aimed at any particular religious organization, but did mischief nonetheless. The IRS officials in five successive administrations (those of Presidents Nixon, Ford, Carter, Reagan, and Bush) demonstrated not only that they do not know

²³⁵ See, e.g., (Scalia, J., concurring), and (Scalia, J., dissenting). Although Justice Scalia has not yet persuaded any other justice to join him in this view, it is noncontroversial that the President only signs *Acts* of Congress. Thus Committee Reports (which are frequently drafted by staff counsel or by lobbyists for various interest groups, and rarely read by Members of Congress) and floor debates (which are sparsely attended by Members of Congress, who typically attend to other business such as hearings or meetings with lobbyists and constituents and appear on the floor only when summoned for a critical vote) are obviously not enacted into law in any formal sense.

²³⁶ Treas. Reg. §1-6033-2(g).

²³⁷ Compliance is achieved by annual filing of an informational return (Form 990).

²³⁸ See *Lutheran Social Services v. United States*, 758 F. 2d 1283 (8th Cir. 1985), *Tennessee Baptist Children's Homes, Inc., v. United States*, 790 F. 2d 534 (6th Cir. 1986), and *Lutheran Children & Family Services of Eastern Pennsylvania v. United States*, 58 AFTR 2d 86-5662, 86-2 USTC 9593 (E.D. Pa. 1986).

with much clarity what an integrated auxiliary is, but that they had little appreciation of the delicacy of the task in which they were engaged or of the fragility of the religious liberties at issue. The executive branch repeatedly claimed that it had been following the guidance of Congress on this matter, and it did not retreat from its position until the judiciary had ruled in three cases that it was not doing so.²³⁹

V. The Substantive Neutrality Requirement and Nondiscrimination Principle and

I turn now to the third question that this report addresses, whether exemption or regulation of churches depends upon their organizational form or structure. A negative answer to this question seems to flow from two central features of recent jurisprudence on religious freedom, the requirement of substantive neutrality and the nondiscrimination principle. According to the substantive neutrality requirement, the government must refrain from influencing religious belief.²⁴⁰ According to the nondiscrimination principle announced by Justice O'Connor in *Agostini v. Felton*,²⁴¹ there is no impermissible financial incentive to advance religion when "aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis."²⁴² In light of these principles, neither the particular organizational form nor the scope or object of a particular religious ministry should affect the outcome of whether or not it should be regarded as an exempt organization for tax purposes. If anything is clear from the decade-long dispute over the term "integrated auxiliary of a church," it is that the particular form or object of a ministry should be a matter of indifference to the government. Similarly, the structural connection between a ministry and an organized church should not affect its status as an exempt organization.

No matter what definition the government may adopt for criteria deemed necessary for an entity to be deemed a "church" for tax purposes, it may not distribute benefits or impose burdens in a discriminatory way. For example, religious organizations that do not easily fall within the technical definition of a "church" and that are known loosely as "parachurches" are nonetheless entitled to equal treatment under the tax code as that accorded to ministries formally part of a mainstream church.²⁴³ The cases discussed above sometimes illustrate the difficulty of obtaining

²³⁹ In 1986 the government finally agreed to issue a new Treasury Regulation that would not follow the "exclusively religious" activity test imbedded in its earlier regulation. Rev. Proc. 86-23, 1986-20 IRB 17.

²⁴⁰ See Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43 (1997); and Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001 (1990). As early as 1963 Professor Choper proposed a constitutional standard that promoted what Laycock was later to dub "substantive neutrality." Jesse H. Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329 (1963) (governmental program unconstitutional if likely to result in compromising or influencing a student's religious or conscientious beliefs).

²⁴¹ 521 U.S. 203, 117 S. Ct. 1997 (1997) (teaching of remedial reading and mathematics to children in religious elementary schools is permissible), reversing *Aguilar v. Felton*, 473 U.S. 402 (1985).

²⁴² 117 S.Ct. at 2001.

²⁴³ In the same Term in which *Frazee* was decided, the Court refused in *Hernandez v.*

evenhanded application of substantively neutral principles. But they do not undercut the validity of the principle deeply imbedded in the Religion Clause that all forms of religious ministries are entitled to equal treatment under the law,²⁴⁴ including the tax code.

This conclusion is buttressed by several decisions not directly related to taxation and exemption of churches. In the leading case dealing with nondiscrimination among religious organizations, the Court ruled that a Minnesota charitable solicitation statute violated both establishment and free exercise principles by granting a de facto preference to older, more established churches. In *Larson v. Valente*,²⁴⁵ Justice Brennan wrote: "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.... Free exercise ... can be guaranteed only when legislators -- and voters -- are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations." Seven years later the Court expressly held that the denial of unemployment compensation benefits to a person on the ground that his refusal to work was not based on the tenets or dogma of an established religious community violated the Free Exercise Clause.²⁴⁶ More recently the Court adopted the nondiscrimination principle as an effective manner of guarding against a violation of nonestablishment principles in the context of public funding of religious education.²⁴⁷ Under these rulings as well as those discussed throughout this report, equal treatment of all religious organizations is the norm.

In this report I have suggested that the exemption of religious organizations from taxation is a statutory privilege with roots sufficiently deep within our history (especially when our history is traced back further into the ancient and medieval world) as to be deemed constitutional. Tax exemption of religion is constitutional in the sense that the respect for the independence of religious communities from the State in our society is a fundamental statement of constitutive meaning of our people reflected in its long-standing customs and traditions. Although the legislative power to tax and to spend theoretically comprehends the prerogative to affect serious change in this ancient custom, there are no clear signs on the horizon that Congress will remove the exempt from federal income taxation currently enjoyed by religious organizations and other

Commissioner of Internal Revenue, 490 U.S. 680 (1989) to allow payments for the religious practice of auditing in the Church of Scientology to be deducted as a charitable contribution in the same way it has allowed fixed payments to other religions to be deducted. Justice White did not repudiate *Larson*, but distinguished it in *Hernandez* on the ground that "the line which IRC §170 draws between deductible and nondeductible payments to statutorily qualified organizations does not differentiate among sects." *Id.* at 695. Justice O'Connor, joined by Justice Scalia, dissented in *Hernandez*, on the view that the IRS' application of the quid pro quo standard in this case as surely discriminated against the Church of Scientology as the rigged rules on charitable solicitation discriminated against the Unification Church in *Larson*. *Id.* at 713.

²⁴⁴ See, e.g., Michael J. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311 (1986).

²⁴⁵ 456 U.S. 228 (1982).

²⁴⁶ *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829 (1989).

²⁴⁷ *Agostini v. Felton*, 521 U.S. 203 (1997).

not-for-profit organizations.