RELIGIOUS TAX EXEMPTION AND THE "CHARITABLE SCRUTINY" TEST

I. INTRODUCTION

Churches and other religious organizations have enjoyed the benefits of tax exemption in this country since the late nineteenth century. During this time, many American churches have grown, flourished, and garnered both wealth from and favor in society. Tax exemption has become "big business." A study conducted in 1996 concluded that nearly half the country's population donates to a church or other place of worship in any given month.[1] A similar study in 2000 showed an increase; now over half (fifty-four percent) of all adults donate to churches in a typical month.[2] When considering donations over an entire year, the figure climbs to seventy-five percent.[3] In fact, the majority of *all* donations made in the United States are directed toward churches and religious causes. According to the American Association of Fund-Raising Counsel Trust for Philanthropy, in 1998 Americans contributed $174.52 billion to charities, directing the lion's share ($76.06 billion), as always, toward religious entities.[4] Many of these donations are undoubtedly made as a result of the preferential tax treatment afforded the gifts.[5]

While tax-exempt status has long benefited American churches and religious institutions, given the development of modern case law and a changing attitude toward the role that religion plays in American life, churches may not continue to enjoy the benefits of tax exemption. As federal courts develop new (and arguably tenuous) justifications for the existence of religious tax exemptions and begin to condition continuing

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[1] Press Release, Barna Research Group/Barna Research Online, The Non-Profit Donation: Broad-Based but Meager (June 7, 1996) [hereinafter The Non-Profit Donation] (on file with author).

[2] Press Release, Barna Research Group/Barna Research Online, The State of the Church, 2000 (Mar. 21, 2000), *at* http://www.barna.org/cgi-bin/MainTrends.asp.

[3] Press Release, Barna Research Group/Barna Research Online, The Year's Most Intriguing Findings, From Barna Research Studies (Dec. 12, 2000), *at* http://www.barna.org/cgi-bin/MainTrends.asp.

[4] BRUCE R. HOPKINS, THE TAX LAW OF CHARITABLE GIVING 26 (2d ed. 2000).

[5] *See infra* Part I.B.1. Other donations, however, are tithes, a form of "required giving" mandated by Scriptural texts, which would arguably be given to the church regardless of the donation's deductibility. In the twenty-seventh chapter of Leviticus, the Israelite people were admonished "[a] tithe of everything from the land . . . belongs to the LORD." *Leviticus* 27:30 (New Int'l). Later in Scripture, presumably to encourage obedience to the tithing mandate, the prophet Malachi connects observance of the tithe with a promise of blessing: "Bring the whole tithe into the storehouse . . . and see if I will not throw open the floodgates of heaven and pour out so much blessing that you will not have room enough for it." *Malachi* 3:10 (New Int'l).

exemption on new requirements, the religious faithful may soon witness the erosion or elimination of their churches' preferential tax status.

In order to lay a foundation for this discussion, Part II of this comment provides background information regarding the origin, purpose, and importance of religious tax exemptions, and presents a primer of basic religious tax-exemption law. Part III discusses the constitutional and public policy bases for exemption. Part IV follows with a likely application of charitable exemption law relevant to churches and other religious organizations. Part V concludes with recommendations for retaining current exempt status, as well as possible alternatives to the current religious exemption.

II. BACKGROUND

A. An Historic Perspective

Tax exemption is a special status conferred by Congress on groups, organizations, and other entities entitled to beneficial treatment under Title 26 of the United States Code. Title 26, otherwise known as the Internal Revenue Code, has historically provided exemptions for a variety of organizations, from churches to fraternal orders, from private educational facilities to non-profit cemetery companies.[6]

Federal tax exemption directly exempts an entity only from federal income taxes; however, federal exemption often serves as a catalyst for exemption from state-based property and income taxes.[7] While tax-exempt status may be extended to a vast assortment of organizations and foundations, based on records of giving, Americans appear to prefer religious organizations to other tax-exempt entities. According to the Barna Research Group, a research company providing analysis of cultural trends and the Christian Church, almost half of all donors surveyed in a recent study believed the funds they donated to churches were used more productively than funds given to other non-profit organizations.[8]

Various rationales have been proposed over the years for the existence of these statutory exemptions from taxation. The current favorite is the public benefit rationale.[9] This justification focuses on the

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[6] 26 U.S.C. § 501(c) (2001). In recent years, the Internal Revenue Service has widened the categories of exemption to include new organizations that benefit the "happiness or well-being of members of the community." *See* Rev. Rul. 67-325, 1967-2 C.B. 113, *discussed in* W. HARRISON WELLFORD & JANNE G. GALLAGHER, UNFAIR COMPETITION? THE CHALLENGE TO CHARITABLE TAX EXEMPTION 94 (1988).

[7] *See* JAMES J. FISHMAN & STEPHEN SCHWARZ, NONPROFIT ORGANIZATIONS: CASES AND MATERIALS 330 (2d ed. 2000). *See also infra* text accompanying note 51.

[8] *See* Non-Profit Donation, *supra* note 1.

[9] *See infra* Part II.B.2.

benefit society receives as a direct result of the charitable works of the exempt organization. When private efforts benefit the community and are not conducted for private gain, governmental service providers experience a savings.[10] Through tax exemption, part of this savings is returned to the organization to encourage similar future endeavors. Judging from the language used by numerous courts, churches are often presumptively categorized as charitable organizations.[11]

A second rationale, somewhat disfavored at the moment, highlights the historical importance of diversity, or pluralism, in American culture. Under the diversity rationale, tax exemption indirectly supplies funding for private organizations to become publicly active, providing private entities with additional opportunities for involvement in public arenas. Promoting diversity of activity and viewpoints ensures that government is not the sole influence on an area of life and preserves the country's pluralistic spirit.[12] "For many countries . . . monolithic central support of all educational, scientific, and charitable activities would be regarded as normal. But for the United States it would mean the end of a great tradition."[13]

A third rationale, infrequently cited, is based on the premise that churches cannot afford to be taxed. At least one author proposes that since most property owned by churches does not produce income, churches would be unable to pay property taxes, would be seized in tax foreclosure, and would subsequently disappear. "[T]he question was not whether such an institution was deserving of support, and if so, how much, but instead . . . whether or not the institution should continue to exist."[14] A fourth rationale, discussed in greater depth in Part III,

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[10] *See* Trinidad v. Sagrada Orden, 263 U.S. 578, 581 (1924). *See also* Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

[11] *See* Kurkjian v. Comm'r, 65 T.C. 862, 869 (1976) (referring to "churches and *other* charitable organizations") (emphasis added); Murphy v. Comm'r, 54 T.C. 249, 253 (1970); Marquis v. Comm'r, 49 T.C. 695, 697 (1968); *In re* Metro. Baptist Church of Richmond, Inc., 121 Cal. Rptr. 899, 904 (Cal. Ct. App. 1975); Conner v. Brown, 3 A.2d 64, 73 (Del. Super. Ct. 1938); Little Red Schoolhouse for Special Children, Inc. v. Citizens & S. Nat'l Bank, 197 S.E.2d 342, 343 (Ga. 1973); Fried v. Jacobson, 456 N.E.2d 392, 393 (Ill. 1983); Cooley v. White Cross Health & Beauty Aid Disc. Ctrs., 183 A.2d 381, 383 (Md. 1962); Christian Reformed Church v. Grand Rapids, 303 N.W.2d 913, 919 (Mich. Ct. App. 1981); Butte Cmty. Union v. Lewis, 745 P.2d 1128, 1131-32 (Mont. 1987); Thomas v. Second Baptist Church, 766 A.2d 816, 818 (N.J. Super. Ct. App. Div. 2001); Cincinnati v. Lewis, 63 N.E. 588, 588 (Ohio 1902); Vance v. State, 557 S.W.2d 750, 754 (Tenn. Crim. App. 1977).

[12] HOPKINS, *supra* note 4, at 16 (discussing John W. Gardner, *Bureaucracy vs. The Private Sector*, 212 CURRENT 17, 18 (1979)).

[13] John W. Gardner, *Private Initiative for the Public Good*, *in* AMERICA'S VOLUNTARY SPIRIT 255, 256 (Brian O'Connell ed., 1983).

[14] Stephen Diamond, *Of Budgets and Benevolence: Philanthropic Tax Exemptions in Nineteenth Century America*, *in* CONFERENCE: RATIONALES FOR FEDERAL INCOME TAX EXEMPTION 2, 14 (1991). As an example, in 1874, Congress enacted legislation authorizing taxation of property belonging to churches in the District of Columbia. Many churches

regards tax exemption as an inalienable right, a constitutional guarantee provided to secure freedom of exercise of religion.[15]

Though commentators disagree about the modern justifications for tax exemption, the foundations of religious tax exemption were not originally laid by the Founding Fathers, nor were they a creation of the English common law system from which American legal principles descend. Instead, examples of religious exemption from taxation date back as far as the Egyptian Pharaohs.[16] Ancient Israel also exempted its priests and other temple employees from paying taxes.[17]

The language of modern tax exemptions, however, is easily traced to English sources, a direct derivative of the English Statute of Charitable Uses, written in 1601.[18] Activities cited in the Preamble to the Statute of Charitable Uses as worthy of state support included

> relief of the aged, impotent and poor people, . . . maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities, . . . repair of bridges, ports, havens, causeways, churches . . . education and preferment of orphans, . . . relief, stock or maintenance for houses of correction . . . and . . . relief or redemption of prisoners or captives.[19]

American colonial documents concerning taxation were generally silent regarding taxation of churches and church property, undoubtedly because of the tax status of the English state church.[20] Because the Anglican Church was part of the English government, it was naturally exempted from taxation without specific statutory reference to an

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either refused or were unable to pay the tax and their properties were seized. Congress's experiment apparently failed: by 1879, all such taxes had been revoked and taxes paid were restored to the appropriate congregations. 8 CONG. REC. 2334 (1879), *noted in* Diamond *supra* at 18; A.W. Pitzer, *The Taxation of Church Property*, 131 N. AM. REV. 362-63 (1880).

15 *See* discussion *infra* Part III.A.

16 *See Genesis* 47:26, *discussed in* Peter F. Nikolai, *Tax Exemption and the Advocacy Role of the U.S. Catholic Conference*, *in* JAMES EDWARD WOOD, CHURCH AND STATE: RELIGION AND THE BODY POLITIC 1, 1-2 (1988). *See also* FISHMAN & SCHWARZ, *supra* note 7, at 322 ("[R]eligious institutions were not taxed in ancient civilizations because they were thought to be owned by the gods themselves and thus beyond the reach of mortal taxing authorities.").

17 *See Ezra* 7:24, *discussed in* Nikolai, *supra* note 16.

18 HOPKINS, *supra* note 4, at 12.

19 2 RESTATEMENT (SECOND) OF TRUSTS § 368 cmt. a (1959) (quoting Statute of Charitable Uses, 1601, 43 Eliz., c. 4 (Eng.)). Notice the correlation between the organizations listed here and those qualifying under 26 U.S.C. § 501 (2001): churches, charities, scientific, literary and educational organizations (paragraph (c), subsection 3); organizations to protect children (subsection 3); employee benefit, medical, and life insurance organizations (subsections 9, 12, and 26); organizations of military members (subsections 19 and 23); trusts for payment of supplemental unemployment benefits (subsection 17); and pension plan trusts (subsections 18 and 24).

20 D.B. ROBERTSON, SHOULD CHURCHES BE TAXED? 50-51 (1968).

exemption.[21] Public tax assessments were routinely used to support the church's functions and infrastructure.[22] Additionally, since most of the American colonies had at least some form of established church, it was not surprising that colonial charters and constitutions provided no detailed tax exemption for church property.[23] Exemption from taxation was understood, as it was for any other government entity. After state churches were formally disestablished, churches were simply allowed to continue in a tax-exempt state.[24]

Tax exemptions for American religious institutions were formally recognized for the first time in the Tariff Act of 1894.[25] This legislation provided a tax exemption for "corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes."[26] Although this Act was later held to be unconstitutional on grounds not related to its exemptions,[27] its language and intent served as precedent for future exemption legislation.

Similar provisions exempting organizations of a charitable, religious, educational, or scientific nature appeared in subsequent federal income tax legislation enacted in 1913, 1916, and 1918.[28] Because of the repetitious, nearly duplicative wording of successive legislation, it appeared, as one commentator notes, that "Congress viewed tax exemption for charitable organizations as the only way to consistently correlate tax policy to political theory on the point, and saw the exemption of charities in the federal tax statutes as an extension of comparable practice throughout the whole of history."[29]

In fact, tax exemptions for religious institutions have been continuous from colonial times to the present.[30] The current tax code, therefore, is faithful to the tradition of granting exemption to entities organized and operated for religious purposes.

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[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] Nikolai, *supra* note 16, at 3.

[25] Tariff Act, ch. 349, § 32, 28 Stat. 509, 556 (1894), *quoted in* Bob Jones Univ. v. United States, 461 U.S. 574, 615 (1983) (Rehnquist, J., dissenting).

[26] *Id.*

[27] *See* Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 637 (1895).

[28] Revenue Act of 1913, ch. 16, 38 Stat. 114 (1913); Revenue Act of 1916, ch. 463, § 11a(6), 39 Stat. 756, 766 (1916); Revenue Act of 1918, ch. 18, § 231(6), 40 Stat. 1057, 1076 (1918), *discussed in* WELLFORD & GALLAGHER, *supra* note 6, at 79.

[29] HOPKINS, *supra* note 4, at 12.

[30] FISHMAN & SCHWARZ, *supra* note 7, at 431. For a lone exception to the practice of exempting religious organizations from taxation, see *supra* note 14.

B. Modern Statutory Provisions

1. The Basics

Modern regulation of religious tax exemptions finds its home in Title 26 of the United States Code, the Internal Revenue Code (IRC or the Code). Section 501 of the IRC sets the framework for qualifying organizations as exempt from governmental income entity taxation. Section 170 specifies which taxpayer contributions to section 501 organizations receive preferential tax treatment.

Section 501 begins by outlining basic organizational categories approved for exemption, stating, "An organization described in subsection (c) . . . shall be exempt from taxation under this subtitle, unless such exemption is denied under section 502 or 503."[31] This language creates, at the very least, a presumption of exemption for enumerated organizations. In fact, then Justice Rehnquist argued that the IRC's language creates an *irrebuttable presumption* in favor of exemption, notwithstanding the organization's other activities.[32]

Eight categories of institutions are enumerated in § 501(c)(3) as tax exempt. The categories encompass a variety of entities "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . or for the prevention of cruelty to children or animals."[33] Entities matching one or more of these criteria are commonly referred to as "501(c)(3) organizations." To qualify as "organized and operated" for one of these purposes, the entity must demonstrate that both the manner in which it was organized (an organizational test) and the manner in which it operates (an operational test) qualify the entity for exemption.[34] To meet an organizational test, the organization's articles of incorporation, charter, or other founding documents must limit the organization to exempt purposes.[35] To meet an operational test, the organization must demonstrate that it operates

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[31] 26 U.S.C. § 501(a) (2001). Sections 502 and 503, excluding "feeder organizations" and organizations engaging in prohibited, self-dealing transactions, *id.* §§ 502-03, are inapplicable for purposes of this discussion.

[32] *See* Bob Jones Univ. v. United States, 461 U.S. 574, 615 (1983) (Rehnquist, J., dissenting) ("To the contrary, I think that the legislative history of § 501(c)(3) unmistakably makes clear that *Congress has decided* what organizations are serving a public purpose and providing a public benefit within the meaning of 501(c)(3) and has clearly set forth in § 501(c)(3) the characteristics of such organizations."). *See also infra* note 129 and accompanying text.

[33] 26 U.S.C. § 501(c)(3).

[34] *See* Treas. Reg. § 1.501(c)(3)-1(a)(1) (2002).

[35] *See id.*

substantially for the purposes of and in the manner in which it was organized.[36]

The language of the Code requires the organization's primary goals to be limited exclusively to the performance of exempt functions. The term "exclusively" has been interpreted loosely, however, permitting incidental, non-exempt activities, so long as they do not become primary or substantial.[37] The presence of one non-exempt purpose, if substantial in nature, has been held to destroy an organization's preferential status, despite any number of exempt purposes in which the organization is engaged.[38] And since "[t]he primary purpose test is a measurement of the organization's purposes, not its activities,"[39] the existence of incidental or minor non-exempt activities of an exempt organization will not generally result in revocation of tax-exempt status.

While § 501 of the IRC determines which entities reap the benefit of tax exemption, § 170 governs the deductibility of contributions to organizations qualifying as tax exempt. Deduction of contributions from personal income taxes can provide a powerful incentive for individual taxpayers to donate funds to qualifying organizations.[40] Though the text of § 170 is lengthy, its primary principles can be summarized briefly. Section 170 defines the term "charitable contribution," outlines timing of contributions and the maximum percentages of income an individual can deduct in any given year, and lays out a number of other technical rules related to special types of contributions.

To be deductible, contributions must qualify as charitable contributions. Charitable contributions can be any "contribution or gift to or for the use of" a governmental unit, a 501(c)(3) qualifying organization, a veteran's auxiliary, fraternal society, or non-profit cemetery company.[41] The phrase "to or for the use of" limits control of donations once in receipt of the qualified organization, as if the funds

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[36] *See id.*; *see also* Taxation with Representation v. United States, 585 F.2d 1219, 1222 (4th Cir. 1978) ("[T]he true purposes of organization may well have to be drawn in final analysis from the manner in which the corporation has been operated.") (quoting Samuel Friedland Found. v. United States, 144 F. Supp. 74, 85 (D.N.J. 1956)).

[37] Church of the Chosen People v. United States, 548 F. Supp. 1247, 1253 (D. Minn. 1982) ("Courts have, however, interpreted the word 'exclusively' to mean 'substantially.'"). *See also* Colo. State Chiropractic Soc'y v. Comm'r, 93 T.C. 487, 496 (1989); Pulpit Res. v. Comm'r, 70 T.C. 594, 600 (1978).

[38] Better Bus. Bureau v. United States, 326 U.S. 279, 283 (1945), *discussed in* WELLFORD & GALLAGHER, *supra* note 6, at 94.

[39] *E.g.* Bethel Conservative Mennonite Church v. Comm'r, 746 F.2d 388 (7th Cir. 1984) (emphasis omitted), *discussed in* WELLFORD & GALLAGHER, *supra* note 6, at 94.

[40] Admittedly, donors contributing to churches out of a tithing obligation may not be affected in the same manner. However, tax exemption can still provide an incentive to give above and beyond the typical ten percent obligation. *See supra* note 5 and accompanying text.

[41] 26 U.S.C. § 170(c) (2001).

were to or "in trust for" the organization.[42] If a donor attempts to retain control over a donation, by limiting to whom it may be distributed,[43] a tax deduction is not allowed.[44]

Further, only a limited percentage of donations are deductible by the individual taxpayer. Congress has set ceilings on deductible donations, based on how the donation is categorized. Taxpayers may generally deduct donations to churches and other 501(c)(3) organizations of up to one-half of their adjusted gross income.[45] Cash donations to other organizations are generally limited to either twenty or thirty percent of income and involve additional restrictions.[46]

2. The Benefits

Maintaining tax-exempt status is vital to the financial health of religious congregations. Income generated by incidental, revenue-producing events, such as fundraising programs,[47] and from cash or materials donated to the church for transfer to other charitable

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[42] Davis v. United States, 495 U.S. 472, 480-81 (1990).

[43] "If contributions . . . are earmarked by the donor for a particular individual, they are treated . . . as being gifts to the designated individual and are not deductible." Rev. Rul. 62-113, 1962-2 C.B. 11. This provision arguably creates problems for taxpayers donating funds to particular persons within an organization, such as individual missionaries or organization employees. Although not widely acknowledged by taxpayers, donations restricted in this manner are not, technically, deductible. *See id.*

[44] *See Davis*, 495 U.S. at 473-489 (denying parents of Mormon missionaries the right to claim tax deductions for funds paid directly to their sons to support their missionary work because there was no binding agreement that the missionaries use the funds solely for church purposes and because there was no formally administered trust; thus, the funds were not contributed "for the use of" the church). For additional information, see R.A. Leavitt, *Recent Development: When Is a Gift to the Minister Not a Gift to the Church? – The Impact of* Davis v. United States *on Charitable Giving*, 66 TUL. L. REV. 245 (1991). *See also* Oppewal v. Comm'r, 468 F.2d 1000 (1st Cir. 1972) (denying deduction for parents donating to church when church maintained tuition-free school which children attended), *discussed in* John E. McKnight, From *Walz* to *Bob Jones University*: The Supreme Court's Changing Focus Regarding Religious Tax-Exempt Organizations and Implications for Christian Schools 166 (1988) (unpublished Ph.D. dissertation, Bob Jones University) (on file with Bob Jones University Library).

[45] *See* 26 U.S.C. § 170(b)(1)(A). An exception applies to gifts of capital gain property; donations of this sort are limited to a maximum of thirty percent of income. *Id.* § 170(b)(1)(C).

[46] *Id.* § 170(b)(1)(A). These limits generally do not present a problem for the typical taxpayer-donor, as few individuals make contributions in excess of such limits. Section 170 also limits the deductibility of donations made by corporations to charitable causes. *Id.* § 170(b)(2).

[47] For information on an organization that exceeded the level of incidental revenue production, see World Family Corp. v. Comm'r, 81 T.C. 958 (1983). If the organization's participation in bingo fundraising events had been incidental, rather than substantial, the organization could have been entitled to tax exemption. *Id.*

organizations[48] is exempted from federal taxation. An exempt organization may be required, however, to pay taxes on any substantial revenue-generating activity, if that activity is not related to its exempt purposes.[49] But even substantial commercial pursuits will not jeopardize an organization's exempt status if the activity furthers an exempt purpose.[50]

Exemption from income taxation marks just the beginning of the applicable benefits. Federally exempt organizations are generally subsequently exempted from property taxation under state law.[51] In addition, tax-exempt 501(c)(3) organizations are not required to pay federal unemployment taxes[52] and may be able to fund internal debt through tax-exempt bond issuances.[53] In addition to achieving tax exemption for themselves, 501(c)(3) organizations also provide tax deductions for contributing donors,[54] making donations more attractive to the individual taxpayer. And as "tax-exempt status connotes respectability and responsibility,"[55] 501(c)(3) organizations may benefit from a sense of government approval or endorsement.[56]

Qualification for exemption as a church is particularly beneficial, because the IRC exempts churches from filing the detailed, yearly reports required of other exempt organizations.[57] In fact, churches are not even required to receive a ruling confirming exempt status; churches

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[48] *See* White v. Brodrick, 104 F. Supp. 213 (D. Kan. 1952) (holding that wheat donated to a church for transfer to a humanitarian organization was not taxable to the church).

[49] 26 U.S.C. §§ 512-13 (2001) (delineating unrelated business income taxes, commonly referred to as "UBIT"); *see also* Comm'r v. Orton, 173 F.2d 483 (6th Cir. 1949). It is important to note, however, that tax exemption may not be revoked simply because of an increase in the volume of sales; a change in the organization's purpose is the correct criterion for evaluation, not sales volume. *See* Presbyterian & Reformed Publ'g Co. v. Comm'r, 743 F.2d 148 (3d Cir. 1984).

[50] *See Presbyterian & Reformed Publ'g Co.*, 743 F.2d at 156.

[51] *See, e.g.*, ARIZ. REV. STAT. §§ 42-11109, -11114-16, -11120-21 (2002) (exempting property belonging to various 501(c)(3) organizations from property taxation); CAL. REV. & TAX. CODE § 214 (Deering 2002) (same); CONN. GEN. STAT. § 12-81(7), (75) (2001); D.C. CODE. ANN. § 47-1010.01 (2002); GA. CODE ANN. § 48-5-41 (2002); KAN. STAT. ANN. § 79-201 (2001); ME. REV. STAT. ANN. tit. 36, § 652 (West 2001); MICH. COMP. LAWS § 205.94 (2002); MINN. STAT. § 272.02 (2001); MISS. CODE ANN. § 27-31-1 (2001); N.J. STAT. ANN. § 54:4-3.65 (West 2002); N.D. CENT. CODE § 57-02-08 (2002); OHIO REV. CODE ANN. § 5709.12(E) (Anderson 2002); OKLA. STAT. tit. 68, § 2887 (2002); S.D. CODIFIED LAWS §§ 10-4-9.1 to -9.3 (2002); TEX. TAX CODE ANN. § 11.18 (Vernon 2002); WIS. STAT. § 70.11 (2001).

[52] 26 U.S.C. § 3306(c)(8) (2000).

[53] *Id.* § 145.

[54] *See generally id.* § 170.

[55] JOHN EIDSMOE, THE CHRISTIAN LEGAL ADVISOR 423 (Leonard George Goss ed., 1984).

[56] *See infra* note 181 and accompanying text.

[57] 26 U.S.C. § 6033(a)(2)(A)(i) (2001).

are presumptively exempt from inception.[58] Moreover, taxpayers are allowed to deduct donations made to churches at the highest percentage allowed to any tax-exempt organization.[59] Maintaining tax-exempt status as a church, therefore, is most important.

3. The Pitfalls

While the requirements for exemption are few, the limitations imposed on tax-exempt organizations are numerous. Moreover, it can be relatively easy for an organization to lose exempt status. One of the most commonly litigated limitations involves permitting individual organization members to directly benefit from the organization's activities or assets, a concept referred to as "private inurement."[60] While this restriction may appear simply to prevent the granting of exemption to sham organizations existing solely for personal benefit, it encompasses much more. For example, excessive salaries paid to church ministers[61] and housing allowances provided for church officers[62] have both been held sufficient private inurement to justify revoking tax exemption.

Another common problem involves attempts by exempt organizations to influence legislation.[63] Churches that publicly promote or oppose pending legislation risk losing their exempt status if the lobbying activities are deemed substantial in nature.[64] Moreover, *any* overt participation in candidate election campaigns can end an organization's tax exemption.[65] A congregation in New York recently lost

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[58] *Id.* § 508(c)(1)(A).

[59] *See id.* § 170(b)(1)(A). *See also supra* note 45 and accompanying text.

[60] *See id.* § 501(c)(3) (authorizing exemption only if "no part of the net earnings of [the organization] inures to the benefit of any private shareholder or individual"). For an illustration of gross private inurement to the founder of the Church of Scientology, see Church of Scientology v. Comm'r, 823 F.2d 1310 (9th Cir. 1987).

[61] *See* Church by Mail, Inc. v. Comm'r, 765 F.2d 1387 (9th Cir. 1985).

[62] *See* Hall v. Comm'r, 729 F.2d 632 (9th Cir. 1984).

[63] *See* 26 U.S.C. § 501(c)(3) (2001) (authorizing exemption only if "no substantial part of the activities of [the organization] is carrying on propaganda, or otherwise attempting to influence legislation"). Note that this section does not serve as an *absolute* prohibition on lobbying activities, but prohibits only *substantial* efforts. What level of activity any given court would consider substantial is difficult to guess; as a result, many churches shy away from political involvement altogether.

[64] *See* Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849 (10th Cir. 1972) (finding that a nonprofit religious corporation providing religious radio and television programming and religious magazines had improperly influenced legislation by supporting the restoration of prayer in public schools through the Becker Amendment).

[65] *See* 26 U.S.C. § 501(c)(3) (2001) (authorizing exemption only if an organization "does not participate in, or intervene in . . . any political campaign on behalf of (or in opposition to) any candidate for public office").

tax-exempt status by publicly denouncing former-President Bill Clinton during his 1992 campaign for the Presidency.[66]

Confronted with a growing number of organizations claiming to exist for religious purposes, in 1977 the Internal Revenue Service (IRS) clarified an additional means of disqualification, an insincerity of religious belief. Sincerity of belief, however, will only be questioned in the absence of any reliable evidence of the organization's genuineness.[67] Though the final burden of persuasion rests with the government, a religious organization may be asked to demonstrate a sincere belief in the organization's doctrines in order to qualify for an exemption.

The newest restraint on exemption qualification involves integration of "basic principles of common law charity" with existing statutory requirements for exempt organizations.[68] By incorporating tenets of common law charity, the IRS is able to restrict the purposes of exempt organizations to activities not considered illegal or contrary to current public policy and which comport with traditional concepts of charitable activity.[69] This newly crafted requirement will be discussed in detail in Part III.

4. The Ambiguities

Although religious tax exemptions have been in existence throughout history, the law is not without its uncertainties and ambiguities. One overarching problem involves defining the term "religion." One author concluded, "The vast panoply of beliefs in the United States makes this definitional task inordinately delicate, which may explain why definitions of 'religious purpose' or 'church' are conspicuously absent from [IRS] regulations."[70]

There appear to be four primary approaches used to determine which organizations or purposes constitute religious activity. The first approach focuses on the context of a Supreme Being, a method that is likely closest to the examination the Founding Fathers might have conducted. America's Founders, after all, inhabited a "more homogenous society," one in which "religion was understood in a Judeo-Christian framework."[71] Dicta in several older cases attempted to define "religion"

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[66] Branch Ministries v. Rossotti, 211 F.3d 137 (D.C. Cir. 2000).

[67] *See* FISHMAN & SCHWARZ, *supra* note 7, at 441 (quoting Gen. Couns. Mem. 36,996 (Feb. 3, 1977)).

[68] *Id.; see also* Bob Jones Univ. v. United States, 461 U.S. 574, 585 (1983).

[69] *Id.*

[70] *Id.* at 432.

[71] Arlin M. Adams, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1666 (1989).

using traditional theistic terms as a belief in or relation to some Supreme Being.[72]

A second approach applies a multi-factor test to religious actions and convictions. The Third Circuit Court of Appeals espoused a three-factor test in *Africa v. Pennsylvania*,[73] questioning 1) whether the "religion addresses fundamental and ultimate questions having to do with deep and imponderable matters"; 2) whether the "religion is comprehensive in nature [and] consists of a belief-system as opposed to an isolated teaching"; and 3) whether the religion "can be recognized by the presence of certain formal and external signs."[74] The Seventh Circuit Court of Appeals favors an alternate, four-part test that evaluates the activities of an organization, including the presence of worship services, pastoral counseling, ceremonies, and religious education, to determine whether an organization is operated for religious purposes.[75]

A third approach does not attempt to define religion, but claims to "know it when one sees it."[76] For obvious reasons, this approach is of limited assistance.

A fourth approach, the methodology currently advocated by the IRS, asserts that religion cannot (or should not) be defined.[77] "An attempt to define religion, even for purposes of statutory construction, violates the 'establishment' clause since it necessarily delineates and, therefore,

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[72] *See* Davis v. Beason, 133 U.S. 333, 342 (1890); United States v. Macintosh, 283 U.S. 605, 633-34 (1931) (Hughes, C.J., dissenting), *cited in* Adams, *supra* note 71, at 1665. *But see* Torcaso v. Watkins, 367 U.S. 488, 495 (1961) ("[N]either a State nor the Federal Government . . . . can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."). *Torcaso* divorced the necessity of a concept of God from religion, creating what is now considered the "modern view" of religion. *See* Malnak v. Yogi, 592 F.2d 197, 207 (3d Cir. 1979).

[73] Africa v. Pennsylvania, 662 F.2d 1025 (3d Cir. 1981).

[74] *Id.* at 1032.

[75] *See* DOUGLAS COOK, CASES AND MATERIALS ON NONPROFIT, TAX-EXEMPT ORGANIZATIONS § 4-38 (2d ed. 1999) (discussing United States v. Dykema, 666 F.2d 1096, 1100-01 (7th Cir. 1981)). The four-part activity evaluation used by the *Dykema* court inquired as to whether the organization's activities included 1) corporate worship services; 2) pastoral counseling and comfort to members; 3) "performance by clergy of customary church ceremonies"; and 4) "a system of nurture of the young and education in the doctrine and discipline in the church." *Id.*

[76] *See id.* at § 4-39 (quoting BRUCE R. HOPKINS, THE LAW OF TAX-EXEMPT ORGANIZATIONS 215 (6th ed. 1992)).

[77] Gen. Couns. Mem. 36,996 (Feb. 3, 1977), *quoted in* FISHMAN & SCHWARZ, *supra* note 7, at 440. While not frequently cited as a test for religious purpose, perhaps the most balanced approach was endorsed by Judge Roney's dissent in *Brown v. Dade Christian Schools, Inc.*, 556 F.2d 310 (5th Cir. 1977). Judge Roney would have required religion only to be "based on a theory 'of man's nature or his place in the Universe,'" to reflect an "institutional quality" instead of a mere personal preference, and to be sincere. *Id.* at 324 (Roney, J., dissenting).

limits what can and cannot be a religion."[78] Further, when determining whether an organization is entitled to exemption, judgments regarding the truth or validity of particular religious beliefs must not be considered.[79] As a result, the IRS test requires little more than a sincere belief and an organization operating to further its stated purposes.[80]

Attempts to define the term "church" can prove equally vexing.

> While federal tax authorities must apply the word church in a variety of contexts, there is no ready definition . . . . It is generally accepted that Congress intended a more restricted definition for a "church" than for a "religious organization," but . . . it has provided virtually no guidance on this distinction.[81]

While the tax code lacks a precise definition of "church" for general purposes,[82] the IRS has provided a list of fourteen factors that are used to determine whether an organization qualifies as a church. These factors examine a church's 1) distinct legal existence; 2) recognized creed and form of worship; 3) definite and distinct ecclesiastical government; 4) formal code of doctrine and discipline; 5) distinct religious history; 6) membership not associated with another church or denomination; 7) organization of ordained ministers; 8) ordained minister selection; 9) unique literature; 10) established places of worship; 11) regular congregations; 12) regular religious services; 13) religious instruction of the young; and 14) schools for preparation of its ministers.[83] Each of the fourteen criteria need not be met; instead, the IRS uses the criteria as a guide in a totality of the circumstances analysis.[84] While the IRS has failed to specify which factors are of greater importance, courts have emphasized three factors as crucial—the existence of a regular

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[78] Gen. Couns. Mem. 36,996 (Feb. 3, 1977).

[79] *See* Teterud v. Burns, 522 F.2d 357, 360 (8th Cir. 1975) ("It is not the province of government officials or courts to determine religious orthodoxy.").

[80] Gen. Couns. Mem. 36,996 (Feb. 3, 1977) ("[T]he primary rule as to religiosity is whether the organization's adherents are sincere in their beliefs. If that question is resolved affirmatively, the [test considers] the use of the profits of the organization and the exclusive purposes of its existence.").

[81] Church of the Visible Intelligence that Governs the Universe v. United States, 4 Cl. Ct. 55, 64 (1983), *quoted in* Spiritual Outreach Soc'y v. Comm'r, 927 F.2d 335 (8th Cir. 1991).

[82] At least one author cautions against any attempt to create such a definition, as even Christians disagree on the appropriate definition. As a result, "it is dangerous for the IRS – or for any other government body – to define a church. Such attempts should be regarded with concern and vigilance." EIDSMOE, *supra* note 55, at 429.

[83] *Spiritual Outreach Soc'y*, 927 F.2d at 338 (discussing Remarks of IRS Commissioner Jerome Kurtz, PLI Seventh Biennial Conference on Tax Planning (Jan. 9, 1978), *reprinted in* FED. TAXES (P-H) § 54,820 (1978)).

[84] *Id.* For application of these factors to individual organizations, see Am. Guidance Found., Inc. v. United States, 490 F. Supp. 304 (D.D.C. 1980) and St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772 (1981).

congregation with regular religious services, religious education of the young, and dissemination of a distinct doctrinal code.[85]

These stated guidelines appear to give preference to formal, traditional churches,[86] but their application can lead to surprising results. When applied to churches on the fringe, application of the factor test allows the IRS to provide tax benefits to groups like Satanists and witch covens.[87] Ironically, one author suggested that the New Testament church described in the Bible's book of Acts may *not* have qualified as a church under this fourteen-point analysis.[88]

III. TAX EXEMPTION – RIGHT OR PRIVILEGE?

Churches and other religious organizations have long enjoyed the benefits of tax exemption. But they may not continue to enjoy it. The perpetuation of tax exemption may depend on whether tax exemption is a right owed to religious organizations or a mere a concession, revocable at the will of government.

A. Exemption as a Right

Some commentators argue that tax exemption for a religious organization, such as a church, is a right fundamental to the structure of American government. Proponents of this argument cite as principal justifications both the historical reluctance to tax churches and the constitutionally required separation of church and state.[89] After all, "[a]n unlimited power to tax involves, necessarily, a power to destroy"[90] churches and other religious organizations. In *United States v. Butler*,[91] the Supreme Court expanded this rationale, concluding that the "power to confer or withhold unlimited benefits is the power to coerce or destroy."[92] Burdensome taxation of churches and other religious organizations could restrict the free exercise of religion,[93] protected

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[85] *Spiritual Outreach Soc'y*, 927 F.2d at 339.

[86] *See* EIDSMOE, *supra* note 55, at 429.

[87] *See* Maggie Flynn, Comment, *Witchcraft and Tax Exempt Status Under Section 501(c)(3) of the Internal Revenue Code*, 21 U.S.F. L. REV. 763, 790 (1987). When United States Senator Jesse Helms proposed an amendment to tax legislation prohibiting extension of tax exemption benefits to witches and Satanists, the provision failed. *Id.* at 763. The author of *Witchcraft and Tax Exempt Status* sees Helms' amendment simply as "intolerance of unorthodox religious views." *Id.* at 764.

[88] *See* EIDSMOE, *supra* note 55, at 429.

[89] *See generally* EIDSMOE, *supra* note 55; Herbert W. Titus, *The Free Exercise Clause: Past, Present and Future*, 6 REGENT U. L. REV. 7 (1995).

[90] McCulloch v. Maryland, 17 U.S. 316, 327 (1819).

[91] United States v. Butler, 297 U.S. 1 (1936).

[92] *Id.* at 71, *discussed in* EIDSMOE, *supra* note 55, at 427.

[93] *See* Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 392 (1990) (stating that "it is of course possible to imagine that a more onerous tax rate, even if

under the First Amendment.[94] Under this theory, governmental taxation of a religious institution could be considered violative of constitutional provisions.

Unfortunately, the Supreme Court has repeatedly rejected this argument. The Supreme Court views the Free Exercise Clause as primarily prohibiting governmental regulation of *belief*,[95] not *any and all* impositions upon religion. While the Free Exercise Clause provides protection for belief-based conduct, "not *all* burdens on religion are unconstitutional. . . . [The federal government] may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest."[96] Where the collection of federal income taxes does not violate a specific religious belief, a church or other religious organization cannot claim violation of Free Exercise.[97]

Even if a group alleges that the payment of taxes violates its beliefs, the tax may be upheld if it survives a constitutional test of strict scrutiny. When a federal restriction or limitation on the free exercise of religion is analyzed, courts apply this balancing test to weigh the religious interest against the governmental interest.[98] As long as the

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generally applicable, might effectively choke off an adherent's religious practices"). *But see* Hernandez v. Comm'r, 490 U.S. 680, 699-700 (1989) ("[E]ven a substantial [tax] burden would be justified by the 'broad public interest in maintaining a sound tax system,' free of 'myriad exceptions flowing from a wide variety of religious beliefs.'").

[94] "Congress shall make no law . . . prohibiting the free exercise [of religion] . . . ." U.S. CONST. amend. I.

[95] *See* Bob Jones Univ. v. United States, 461 U.S. 574, 603 (1983); Wisconsin v. Yoder, 406 U.S. 205, 219 (1972); Sherbert v. Verner, 374 U.S. 398, 402 (1963).

[96] United States v. Lee, 455 U.S. 252, 257-58 (1982) (emphasis added). *See also Yoder*, 406 U.S. at 215; Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (Supp. V 1993). *But see* Employment Div. v. Smith, 494 U.S. 872 (1990) (overruling the compelling interest test in favor of a test of neutrality and general applicability). *See also infra* note 99 and accompanying text.

[97] *See Jimmy Swaggart Ministries*, 493 U.S. at 391 ("[T]o the extent that imposition of a generally applicable tax merely decreases the amount of money appellant has to spend on its religious activities, any such burden is not constitutionally significant.").

[98] *See generally Sherbert*, 374 U.S. 398. At least one author argues that exemption is a right that cannot be restricted at any point, *see* Titus, *supra* note 89, at 45, and that even strict scrutiny provides insufficient protection.

> *No* government interest, no matter *how* compelling it may be, is sufficient to justify a burden upon a person's free exercise of religion. One's duties to God are defined by the Creator, not by the State, and, if enforceable, only by reason and conviction as prescribed by the Creator, . . . such duties are unalienable rights toward men. If they are to remain unalienable, they must be *completely* and *absolutely* free from any government regulation, no matter *how* compelling the interest or necessary the regulation.

Id. at 46 (quoting *Religious Freedom Restoration Act of 1991: Hearing on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 7 (May 13-14, 1992) (testimony of Dean Herbert W. Titus) (emphasis added)).

governmental interest is compelling, outweighs the religious interest, and is carried out using the least restrictive means,[99] the limitation is upheld. The Middle District Court of Pennsylvania summarized application of a Free Exercise argument to a church's tax exemption particularly clearly in *United States v. Washington*:[100]

> We are sensitive to the defendant's claim that the income tax inhibits the free exercise of his religion because money collected in the form of tax cannot be used for religious activities. Undoubtedly the tax has that effect, but *religious groups are not free from all financial burdens of government.* The broad *public interest* in maintaining a sound tax system *is of such high order* that religious belief in conflict with the payment of taxes affords no basis for resisting the tax. But we need not rely solely on that principle to answer the defendant's constitutional contention, because here the government is not taxing the exercise of religion.
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> *To violate the free exercise clause, the government must burden the defendant's practice of his religion by pressuring him to commit an act forbidden by the religion or by preventing him from engaging in conduct that the faith mandates.* The burden must be more than an inconvenience and must interfere with a tenet or belief that is central to religious doctrine. It is clear that the Internal Revenue Code does not have that effect. . . . The fact that, because of income taxes, the

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That author's philosophy was not adhered to when Congress drafted the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (Supp. V 1993), creating predictable results. "After having found that the free exercise of religion is an unalienable right, [Congress] then found that there can be good reasons for alienating it . . . ." Titus, *supra* note 89, at 45. Titus also asserts that the principal downfall of the attorneys for Bob Jones University, in failing to maintain tax-exempt status for the fundamentalist Christian university, was the absence of a constitutional claim to tax exemption as a fundamental right of a religious institution. *Id.* at 57.

The Supreme Court has, however, repeatedly repudiated any argument associating tax exemption with a fundamental right. *See* Regan v. Taxation with Representation, 461 U.S. 540, 545 (1983) ("This Court has never held that Congress must grant a benefit such as TWR claims here [(a tax exemption)] to a person who wishes to exercise a constitutional right."); Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 596 (1998) (Scalia, J., concurring in the judgment); Ark. Writer's Project, Inc. v. Ragland, 481 U.S. 221, 236-37 (1987) (Scalia, J., dissenting) ("The reason that denial of participation in a tax exemption or other subsidy scheme does not necessarily 'infringe' a fundamental right is that – unlike direct restriction or prohibition – such a denial does not, as a general rule, have any significant coercive effect.").

[99] *Sherbert*, 374 U.S. at 403. In *Employment Division v. Smith*, 494 U.S. 872, 885 (1990), the Court overruled the *Sherbert* compelling interest test in favor of a test of neutrality and general applicability. In an effort to undue *Smith*, Congress subsequently codified application of the *Sherbert* test in the Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. § 2000bb (1993). Currently, RFRA's compelling interest test applies only to federal legislation, such as the federal tax code, and not to state legislation. *See* City of Boerne v. Flores, 521 U.S. 507 (1997) (holding RFRA unconstitutional, as applied to the states).

[100] United States v. Washington, 672 F. Supp. 167, 170 (M.D. Pa. 1987).

> church will receive less money does not rise to the level of a burden on the defendant's ability to exercise his religious beliefs.[101]

Therefore, as long as tax-exempt status does not prohibit an organization from practicing its faith, it is not prohibited under the federal Constitution.[102]

Some commentators even argue that tax exemption for churches violates another First Amendment principle, that of non-establishment.[103] However, the Supreme Court has repudiated this argument, as well. In *Hernandez v. Commissioner*,[104] the Court emphasized that tax exemptions for churches and corresponding tax deductions for taxpayer-donors do not endorse religion in general, nor any "particular religious practice."[105] Further, "a statute primarily having a secular effect does not violate the Establishment Clause merely because it 'happens to coincide or harmonize with the tenets of some or all religions.'"[106] As a result, the Supreme Court does not view tax exemption as a right owed to churches or other religious organizations, nor an impermissible establishment of religion.[107]

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[101] *Id.* (emphasis added) (alteration in original). *See also* Graham v. Comm'r, 822 F.2d 844, 850-51 (5th Cir. 1987); Bethel Baptist Church v. United States, 629 F. Supp. 1073, 1084 (M.D. Pa. 1986), *aff'd* 822 F.2d 1334 (3d Cir. 1987).

[102] Bob Jones Univ. v. United States, 461 U.S. 574, 603-04 (1983) (acknowledging that revocation of "tax benefits will . . . have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets").

[103] "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I. The current analysis for Establishment Clause violations is a form of the test espoused in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). This test requires governmental action to have a secular purpose, a primary effect that neither advances nor inhibits religion, and not to foster excessive government entanglement with religion. *Id.* The Supreme Court modified the *Lemon* test in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), where the Court determined the first and second prongs of the *Lemon* test should consider whether the governmental action at issue creates an appearance of governmental endorsement. Other opinions, including Justice Kennedy's concurrence in *County of Allegheny* and the majority opinion in *Lee v. Weisman*, 505 U.S. 577 (1992), may have further modified the Court's Establishment Clause analysis as it pertains to particular fact patterns.

[104] Hernandez v. Comm'r, 490 U.S. 680 (1989).

[105] *Id.* at 696.

[106] *Id.* (quoting McGowan v. Maryland, 366 U.S. 420, 442 (1961)). *See also* Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 20 (1989).

[107] *But see Tex. Monthly*, 489 U.S. at 14-15. In *Texas Monthly*, the Court held a tax exemption for organizations producing religious periodicals was an Establishment Clause violation and an impermissible government subsidy of religion. However, the Court distinguished the facts of *Texas Monthly* from other statutes exempting organizations from taxation.

> Insofar as [the tax] subsidy is conferred upon a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end, the fact that religious groups benefit incidentally does not deprive the subsidy of the secular purpose and primary effect mandated by

B. Exemption as a Privilege

As an alternative to viewing a religious tax exemption as a right guaranteed under the Constitution, recent opinions indicate the Supreme Court may now regard tax exemption as a mere privilege. In *Regan v. Taxation with Representation*, the Court asserted that it had never held that tax exemptions need be granted to those desiring to exercise a constitutional right.[108] In *Village of Schaumburg v. Citizens for a Better Environment*,[109] the dissent concluded, "The availability of [tax] exemptions and deductions is a matter of legislative grace, not constitutional privilege."[110] Again, in *Christian Echoes National Ministry v. United States*,[111] the Tenth Circuit Court of Appeals affirmed that "[t]ax exemptions are matters of legislative grace and taxpayers have the burden of establishing their entitlement to exemptions."[112] Recently, in *Branch Ministries v. Rossotti*,[113] the District of Columbia Circuit Court explained,

> The Church appears to assume that the withdrawal of a conditional *privilege* for failure to meet the condition is in itself an unconstitutional burden on its free exercise right. This is true, however, only if the receipt of the *privilege* (in this case the tax exemption) is conditioned upon conduct proscribed by a religious faith, or . . . denie[d] . . . because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs.[114]

Since courts may now view tax exemption as a privilege, the standard by which an organization will be judged worthy of the exemption must be evaluated. As alluded to briefly in Part II, various

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> the Establishment Clause. However, when government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion, as Texas has done, it "provide[s] unjustifiable awards of assistance to religious organizations" and cannot but "conve[y] a message of endorsement" to slighted members of the community.

Id. at 14-15 (quoting Corp. of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. Amos, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring in judgment) (alteration in original) (internal footnotes omitted)).

[108] Regan v. Taxation with Representation, 461 U.S. 540, 545 (1983).

[109] Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980).

[110] *Id.* at 643, n.2 (Rehnquist, J., dissenting). *See also* Bob Jones Univ. v. United States, 461 U.S. 574, 609 (1983) (Powell, J., concurring).

[111] Christian Echoes Nat'l Ministry v. United States, 470 F.2d 849 (10th Cir. 1972).

[112] *Id.* at 854.

[113] Branch Ministries v. Rossotti, 211 F.3d 137 (D.C. Cir. 2000).

[114] *Id.* at 142 (emphasis added) (alteration in original). *See also* Synanon Church v. United States, 579 F. Supp. 967 (D.D.C. 1984) (denying church "privilege" of tax-exempt status due to church misconduct in destroying records during IRS audit).

rationales have crept into the American mindset over the years, each providing a somewhat different justification for provision of tax exemptions to religious entities. The following discussion will highlight the two most recent rationales presented by the Supreme Court.

1. The *Walz* Rationale

In 1970, the Supreme Court considered the constitutionality of property tax exemptions for religious organizations in *Walz v. Tax Commission*.[115] In the course of that decision, which upheld a New York statute granting the exemptions, the Court took a long, hard look at the general justification for tax exemptions. Early in the opinion, the Court gave some credence to the social benefits provided by churches and other religious organizations.[116] Chief Justice Burger's opinion for the Court clarified a state's right to protect beneficial, private institutions. "[New York] 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."[117] However, the opinion falls short of suggesting that the federal government adopt the same justification scheme.

In fact, Chief Justice Burger made it clear that the Court did not require a direct "public service" benefit from exempt organizations to justify tax exemption.

> We find it unnecessary to justify the tax exemption on the *social welfare services* or *"good works"* that some churches perform for parishioners and others . . . . Churches vary substantially in the scope of such services; programs expand or contract according to resources and need. . . . The extent of social services may vary, depending on whether the church serves an urban or rural, a rich or poor constituency. To give emphasis to so variable an aspect of the work of religious bodies would introduce an element of governmental evaluation and standards as to the worth of particular social welfare programs, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize. Hence, the use of a social welfare yardstick as a significant element to qualify for tax exemption could conceivably give rise to confrontations that could escalate to constitutional dimensions.[118]

Instead of embracing a public benefit rationale, the Court approached tax exemptions from a pluralistic perspective, as a method of promoting diversity. Justice Brennan's concurrence supports the majority's justification: "[G]overnment grants exemptions to religious organizations because they uniquely contribute to the pluralism of

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[115] Walz v. Tax Comm'n, 397 U.S. 664 (1970).

[116] *Id.* at 673.

[117] *Id.*

[118] *Id.* at 674 (emphasis added).

American society by their religious activities."[119] Brennan cited precedent from *Washington Ethical Society v. District of Columbia*[120] as he expounded upon the innate value of divergent viewpoints within society. "Government may properly include religious institutions among the variety of . . . groups that receive tax exemptions, for each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society."[121] Brennan, however, was at odds with the majority because he promoted pluralism as a rationale *secondary* to the public benefit derived from the organizations.[122]

In addition to accepting tax exemptions as a valid support of the goal of pluralism and rejecting the need to prove a direct welfare benefit, the majority acknowledged the history and tradition surrounding religious tax exemptions. The Court recognized that, while no one gains a vested right to any benefit which directly contradicts clearly stated provisions of the Constitution, "an 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."[123] Brennan concurred.[124]

2. The *Bob Jones University* Rationale

Just thirteen years later, the Court dramatically limited the provision of religious tax exemptions espoused in *Walz*. In *Bob Jones University v. United States*,[125] where the Court upheld IRS revocation of tax-exempt status for a Christian university engaged in faith-based, racial discrimination, the Court rejected a diversity or pluralism

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[119] *Walz*, 397 U.S. at 689 (Brennan, J., concurring).

[120] Wash. Ethical Soc'y v. District of Columbia, 249 F.2d 127 (D.C. Cir. 1957).

[121] *Walz*, 397 U.S. at 689 (Brennan, J., concurring) (construing *Wash. Ethical Soc'y*, 249 F.2d at 129).

[122] *See id.* (footnotes omitted).

> Government has two basic secular purposes for granting real property tax exemptions to religious organizations. First, these organizations are exempted because they . . . contribute to the well-being of the community in a variety of nonreligious ways, and thereby bear burdens that would otherwise either have to be met by general taxation, or be left undone, to the detriment of the community.
>
> . . . .
>
> Second, government grants exemptions to religious organizations because they uniquely contribute to the pluralism of American society by their religious activities.

Id. at 687, 689 (Brennan J., concurring).

[123] *Id.* at 678.

[124] *Id.* at 681 (Brennan, J., concurring) ("History is particularly compelling in the present case because of the undeviating acceptance given religious tax exemptions from our earliest days as a Nation.").

[125] Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

justification and instead embraced public benefit as the appropriate rationale. The opinion of the Court, written by the author of the *Walz* opinion, Chief Justice Burger, advanced a significantly divergent view. Burger began by adopting a common-law approach to analysis of exemption justification. "[U]nderlying all relevant parts of the [tax] Code, is the intent 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."[126]

Burger continued, "[I]n enacting both § 170 and § 501(c)(3), Congress sought to provide tax benefits to charitable organizations, to encourage the development of private institutions that serve a useful public purpose or supplement or take the place of public institutions of the same kind."[127] Gone are the references to benefits derived solely on the grounds of diversity. "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."[128] Absent from Burger's language was any acknowledgment that society benefits from a variety of viewpoints. The *Walz* diversity rationale was completely abandoned by the Court.

Though not mentioned in the text of the statute itself, the Court injected into the IRC a requirement of adherence to established public policy. Citing a 1971 Revenue Ruling, the Court announced,

> Both the courts and the Internal Revenue Service have long recognized that the statutory requirement of being 'organized and operated exclusively for religious, charitable, . . . or educational purposes' was intended to express the basic common law concept of 'charity' . . . . All charitable trusts, educational or otherwise, are subject to the requirement that the purpose of the trust may not be illegal or contrary to public policy.[129]

The University countered that institutions falling within one (or more) specific categories enumerated in the tax code are automatically

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[126] *Id.* at 586.

[127] *Id.* at 587-88.

[128] *Id.* at 591 (footnote omitted).

[129] Rev. Rul. 71-447, 1971-2 C.B. 230, *quoted in Bob Jones Univ.*, 461 U.S. at 579. One might question why, if both the courts and the IRS were so familiar with the public policy provision, such a requirement had not then (and has not still) been reflected in the tax code. The only judicial precedent for tax exemption revocation based on public policy grounds at the time of *Bob Jones University* appears to be *Green v. Connally*, 330 F. Supp. 1150 (D.D.C. 1971), another case based on racial discrimination in private schools. The federal district court for the District of Columbia decided *Green* less than one month prior (June 30, 1971) to the release of Revenue Ruling 71-447 (in July 1971), using the same rationale.

entitled to tax exemption; such institutions are not further required to qualify as "charitable."[130] The Supreme Court rejected this plain-language approach to statutory interpretation, remarking, "It is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law . . . ."[131] The Court further hypothesized that Congress's intent, in using the list of 501(c)(3) organizations as part of the definition of "charitable contributions" in § 170 of the tax code, was to provide benefits solely to those organizations serving "charitable purposes."[132]

The Court then searched anew for the drafters' intent in American income tax legislation and dug deep into congressional debates surrounding the contents of similar English law.[133] To no great surprise, the Court found the justification it sought. Citing Congressional Record testimony,[134] the Court demonstrated that at least one consideration behind tax exemptions was the exemption's direct and measurable benefit to society. The Court adopted this rationale.

Only Justice Powell, in his concurring opinion, appeared to grasp the enormity of the difference between the *Walz* and *Bob Jones University* approaches.

> I am unconvinced that the critical question in determining tax-exempt status is whether an individual organization provides a clear "public benefit" as defined by the Court. . . .
>
> 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

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[130] *Bob Jones Univ.*, 461 U.S. at 585-86. *See also supra* note 32 and accompanying text.

[131] Brown v. Duchesne, 60 U.S. 183, 194 (1856), *quoted in Bob Jones Univ.*, 461 U.S. at 586.

[132] *Bob Jones Univ.*, 461 U.S. at 587 (footnote omitted). This conclusion, however, is less than satisfactory. It is just as logical to assume Congress used the term "charitable contribution" to refer to the charitable act of the *taxpayer-donor* in making the contribution.

[133] *See id.* at 589 n.13.

[134] *See* 26 CONG. REC. 586 (1894); 55 CONG. REC. 6728 (1917) ("Look at it this way: For every dollar that a man contributes for these public charities, educational, scientific, or otherwise, the public gets 100 per cent.") (statement of Sen. Hollis).

> tax exemptions in encouraging diverse, indeed often sharply conflicting, activities and viewpoints.[135]

3. Making the Change

Between the *Walz* and *Bob Jones University* decisions, the Court made a nearly complete reversal in its ideology and methodology for tax exemptions. The change may have been based solely on an administrative agency policy shift.

In 1970, the IRS announced a new policy regarding the tax status of educational facilities engaged in racial discrimination. After decades of providing tax exemption for similar educational organizations, the IRS announced that private schools limiting or denying admission to non-whites were to be denied tax-exempt status.[136] This policy was formally adopted by the IRS in Revenue Ruling 71-447.[137] In view of the IRS ruling and Supreme Court decisions eliminating racial segregation of public settings, the District Court for the District of Columbia followed suit in its 1971 decision, *Green v. Connally*.[138] In that decision, the court mandated,

> The Internal Revenue Code does not contemplate the granting of special Federal tax benefits to trusts or organizations, whether or not entitled to the special state rules relating to charitable trusts, whose organization or operation contravene Federal public policy.
>
> . . . .
>
> . . . We are persuaded that there is a declared Federal public policy against support for racial discrimination in education which overrides any assertion of value in practicing private racial discrimination,

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[135] *See Bob Jones Univ.*, 461 U.S. at 608-09 (Powell, J., concurring).

[136] *See* Green v. Connally, 330 F. Supp. 1150, 1160 (D.D.C. 1971) (footnote omitted), *aff'd sub nom.* Coit v. Green, 404 U.S. 997 (1971) ("While in the past the traditional law of charities embraced educational trusts for the benefit of a racially defined class, there is grave doubt whether this rule has continuing vitality in view of current values which govern the application of charitable trust law. The cases indicate a trend that racially discriminatory institutions may not validly be established or maintained even under the common law pertaining to educational charities."). Apparently, in reaction to forced desegregation of public schools, private schools were being formed in the South specifically to maintain segregated educational facilities.

Certainly, this author does not doubt the correctness of denying a government benefit, like tax exemption, to an organization determined to hinder the ability of children to obtain an education based solely upon their color or ethnicity. Racial discrimination is never appropriate or excusable. However, the manner in which the IRS and the courts came to revoke these tax exemptions and the wide-ranging implications for other organizations not engaged in such insidious activities are troubling.

[137] *See* Rev. Rul. 71-447, 1971-2 C.B. 230; *Bob Jones Univ.*, 461 U.S. at 579.

[138] *Green*, 330 F. Supp. 1150.

> whether ascribed to philosophical pluralism or divine inspiration . . . .[139]

In *Bob Jones University*, the Court simply adopted the position promoted by *Green v. Connally* and Revenue Ruling 71-447.[140] Though IRS Revenue Rulings do not carry the force of law,[141] the Court rejected the *Walz* precedent to adhere to a non-binding opinion of administrative agency officials.[142] This result occurred notwithstanding the government's challenge to the IRS's authority to issue Revenue Ruling 71-447[143] and Congress's noticeable refusal to incorporate the new policy into §§ 501(c)(3) and 170 of the tax code.[144] Through integration of common law charity doctrines of charitable purpose and public policy, the application of tax-exemption law changed dramatically. Whether the change will benefit the American public, beyond its application in racially discriminatory educational settings, is questionable.

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[139] *Id.* at 1162-63. The court further advised its holding was applicable to all racially discriminatory schools, regardless of whether they were specifically formed to avoid a desegregated school system. *Id.* at 1164.

[140] *See also* Rev. Rul. 71-506, 1971-2 C.B. 233; Rev. Rul. 71-580, 1971-2 C.B. 235; Rev. Rul. 73-127, 1973-1 C.B. 221. Each makes similar references to the application of common law charity to tax-exempt organizations.

[141] *But see* United States v. Howard, 855 F.2d 832, 836 (11th Cir. 1988) ("Although revenue rulings do not have the force of law, they are 'entitled to respectful consideration', and are 'to be given weight as expressing the studied view of the agency whose duty it is to carry out the statute.'"). *See also* Skinner v. Mid-Am. Pipeline Co., 490 U.S. 212, 222 (1989) ("Even when Congress legislates with remarkable specificity, as it has done in the Internal Revenue Code, it has delegated to the Executive the authority to 'prescribe all needful rules and regulations for the enforcement of [the Code], including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue' and the authority to determine 'the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect.' 26 U.S.C. §§ 7805(a), (b). Such rules and regulations, which undoubtedly affect individual taxpayer liability, are equally without doubt the result of entirely appropriate delegations of discretionary authority by Congress.").

[142] For general information regarding the interaction between courts and administrative agencies, see Maureen B. Callahan, *Must Federal Courts Defer to Agency Interpretations of Statutes?: A New Doctrinal Basis for* Chevron U.S.A. v. Natural Resources Defense Council, 1991 WIS. L. REV. 1275 (1991).

[143] *See* Bob Jones Univ. v. United States, 461 U.S. 574, 585 n.9 (1983).

[144] Congress has yet to add any mention of common law charity requirements to 26 U.S.C. §§ 501 or 170 subsequent to the decision in *Bob Jones University*. Admittedly, Congress could have acted and legislated to prevent IRS enforcement of its public policy argument. Congress' inaction has, in other contexts, been viewed as ratification of an executive agency's actions. *See* Brown & Williamson Tobacco Corp. v. FDA, 153 F.3d 155, 170 (4th Cir. 1998). In fact, legislation was introduced in Congress to overturn the IRS rulings. That legislation failed. *See Bob Jones Univ.*, 461 U.S. at 599-601. *See also* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 137 (1985) (indicating that Congress's refusal to overrule an agency's decision is particularly relevant in determining Congressional intent).

IV. APPLICATION OF THE "CHARITABLE SCRUTINY" TEST

Now that the Court has integrated common law charity principles into tax-exemption law, the implication is to require all exempt entities to conform to approved charitable purposes, something akin to a "charitable scrutiny" test. 501(c)(3) organizations may no longer rely on diversity or pluralism as their sole justification for the tax exemptions they have enjoyed throughout American history. Churches and other religious organizations may be required to prove both a judicially acknowledged charitable purpose and the absence of actions or purposes contrary to public policy.

A. Meeting a Charitable Purposes Requirement

If a church or other religious organization were required to meet a charitable purposes test, it may not survive scrutiny. Put another way, if modern churches were required to demonstrate that their activities or purposes provided a direct social benefit, they would likely fail the test, for reasons to be explained below.

Modern American social services originated with the country's religious institutions.[145] Early in our history, churches played a vital role in society, providing hospitals and orphanages,[146] both lower- and upper-level educational opportunities,[147] and relief to the poor.[148] The early American church took its call to serve the community seriously. One author suggests that the mindset of many of America's early religious groups was the result of Puritan influences in New England.

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[145] *Faith Based Solutions: What Are the Legal Issues?: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. (2001) (testimony of Richard T. Foltin, Legislative Director and Counsel, The American Jewish Committee).

[146] *See* MARSHALL SMELSER & HARRY W. KIRWIN, CONCEIVED IN LIBERTY: THE HISTORY OF THE UNITED STATES 446 (Ross J.S. Hoffman ed., 1955) ("Every [Catholic] parish rectory was a center of moral and physical aid for its own neighborhood, and there were orphanages, hospitals, and homes for the aged in many of the larger dioceses."). Even after the church began to centralize its charitable efforts in the years following World War I, the community parish still had "an obligation to care for its own." *Id.* at 561.

[147] *See* A.G. Roeber, *The Long Road to* Vidal*: Charity Law and State Formation in Early America*, *in* THE MANY LEGALITIES OF EARLY AMERICA 435 (Christopher L. Tomlins & Bruce H. Mann eds., 2001) (providing examples of schools run by Quakers, Episcopalians, German Lutherans, and German Reformed churches); GERALD J. GOODWIN ET AL., A HISTORY OF THE UNITED STATES TO 1877 260 (R. Jackson Wilson ed., 2d ed. 1985) (indicating that of approximately eighty private colleges established in the United States between 1830 and 1850, almost all were connected to a religious denomination); 1 NELSON KLOSE, UNITED STATES HISTORY TO 1877, at 57 (4th ed. 1983) ("Of the nine colleges founded in the colonies before the Revolution, all were connected with religious groups." This list included Harvard, William and Mary, and Yale.).

[148] *See* Roeber, *supra* note 147, at 431 (relating the example of a congregation providing private charity "to relieve poor widows and single women," as well as an expanded parochial school).

> New England divines devoted considerable effort to answering the query posed by the lawyer to Jesus of Nazareth in the parable of the Good Samaritan (Luke 10:29): Who is my neighbor? . . . The short answer remained: first, the immediate members of family and kinship, then the congregation and town, and the community in widening and weakening ripples thereafter.[149]

American churches served a multitude of charitable purposes in the early days of the country. These ancestors of modern church bodies would appear to easily qualify for a tax exemption under the current interpretation of federal tax law.

But many modern-day churches do not live up to such a standard. Justice Harlan appears to have envisioned this very problem in his *Walz* concurrence.

> [I]t is a question of fact, a fact that would only be relevant if we had before us a statute framed more narrowly to include only "charities" or a limited class of organizations, and churches. In such a case, depending on the administration of the exemption, it might be that the granting of an exemption to religion would turn out to be improper. This would depend, I believe, on what activities the church in fact sponsored. It would also depend, I think, on whether or to what extent the exemption were accorded to secular social organizations, conceived to benefit their own membership but also engaged in incidental general philanthropic or cultural undertakings.[150]

Here, Justice Harlan seems to agree that not all churches could withstand a test of "charitable scrutiny." Any such inquiry would, of necessity, be highly fact-based and individualized.

A troubling question is whether today's typical church provides a direct benefit to society. A nationwide study conducted in 1992 by the American Religion Data Archive (ARDA) of congregations representing a variety of faiths may provide some answers. According to the ARDA survey, less than half of America's churches included a minimum of 100 nonmembers in church activities during the year.[151] Few of the churches surveyed sponsored any form of elementary or secondary education.[152] Only seventeen percent were involved in any type of feeding program benefiting the aged or needy, and fewer than five percent responded to the needs of their communities by providing shelter to the homeless.[153]

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[149] *Id.* at 421.

[150] Walz v. Tax Comm'n, 397 U.S. 664, 697 n.1 (1970) (Harlan, J., concurring).

[151] INDEPENDENT SECTOR AND VIRGINIA A. HODGKINSON, AMERICAN RELIGION DATA ARCHIVE, FROM BELIEF TO COMMITMENT: THE COMMUNITY SERVICE ACTIVITIES AND FINANCES OF RELIGIOUS CONGREGATIONS IN THE UNITED STATES (1993 ed., 1992) *at* http://www.thearda.com (filename CRUTCHFLD).

[152] *Id.*

[153] *Id.* While the study noted somewhat higher percentages for programs operated by organizations affiliated with, but separate from, the church, such activities are not credited directly to the church.

Less than four percent of congregations reported providing programs to assist abused women; a comparably low percentage of congregations had a corresponding program for abused children.[154] Just over five percent of American churches surveyed maintained programs designed to assist migrants and refugees.[155]

While statistics cannot paint a complete picture of the work of modern American churches in society, they reveal potentially disturbing trends. The modern church does not appear to be as active as its historical predecessor in meeting the physical or emotional needs of the community. While a handful of churches are actively involved in their local communities, this small percentage of dynamic congregations is unlikely to carry the balance if a charitable requirement is widely imposed.

But perhaps modern churches indirectly benefit society, through the charitable "advancement of religion."[156] The advancement of religion has, at least historically, been considered inherently charitable.[157] Trusts for the advancement of religion have historically included everything from building churches, to paying the salaries of officiating clergy and maintaining both domestic and foreign missions programs.[158] However, a trust "for the religious benefit of persons of a class so small that the purpose is not of benefit to the community" is not generally considered charitable.[159] Hence, if a church fails to provide a benefit to the community, instead of benefits directed solely at its membership, it may not qualify for exemption under advancement of religion, either.

Further, one might reasonably suspect that the separate charitable classification of advancement of religion will not endure far into the twenty-first century. As the majority stated in *Bob Jones University*, "Charitable trust law also makes clear that the definition of 'charity' depends upon contemporary standards."[160] The Restatement (Second) of

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[154] *Id.*

[155] *Id.*

[156] See 2 RESTATEMENT (SECOND) OF TRUSTS § 368(c) (1959) and Treas. Reg. § 1.501(c)(3)-1(d)(2) (2001) for additional information regarding "advancement of religion" as a charitable purpose.

[157] However, see *infra* Part IV.C for a discussion of churches and religious organizations that lost tax-exempt status. Obviously, advancement of religion is not the sole factor considered in such circumstances.

[158] *See* 2 RESTATEMENT (SECOND) OF TRUSTS § 371 cmt. a (1959).

[159] *Id.* at cmt. f.

[160] Bob Jones Univ. v. United States, 461 U.S. 574, 593 n.20 (1983). *See also* Green v. Connally, 330 F. Supp. 1150, 1159 (D.D.C. 1971) ("The interests of the community . . . vary with time and place. [Charitable p]urposes which may be regarded as laudable at one time may at other times be regarded as subserving no useful purpose or even as being illegal.") (quoting IVA AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 368 at 2855-56 (4th ed. 1989)).

Trusts agrees with the Court: charitable purposes flex with the social interests of the community.[161]

The English Statute of Charitable Uses recognized no separate charitable purpose for the advancement of religion.[162] The exclusion of advancement of religion may have been the result, to a certain extent, of the struggles between Protestants and Catholics in existence at the time of the statute's drafting.[163] But the current state of religion may not be much different. Continuing clashes between religious groups in Northern Ireland, bloody conflicts between members of opposing faiths in Indonesia and the Middle East, and recent attacks on the World Trade Center and Pentagon, performed in the name of Allah, present a culture ripe for revoking recognition of any such charitable purpose. As a result, it might be unwise for churches and other religious organizations to presume the advancement of religion will always be considered presumptively charitable.

B. Meeting a Public Policy Requirement

Even if a church or other religious organization were able to demonstrate a direct public benefit, these groups may be hindered by a requirement of adherence to current public policy. The Supreme Court affirmed revocation of tax exemption for Bob Jones University based on a *sincerely held religious belief* that God intended separation of the races.[164] However misguided the University's policy may have been, it was an integral part of a belief system. Indeed, other sincerely held beliefs of American congregants could be found to violate public policies if examined in court. For example, the doctrine forbidding abortion could easily be interpreted as contravening the "established public policy" espoused in *Roe v. Wade*.[165] A church's views regarding homosexuality could conflict with public policy prohibiting discrimination on grounds of "sexual preference."[166] Some churches either discourage or forbid women

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[161] 2 RESTATEMENT (SECOND) OF TRUSTS § 368 cmt. b (1959) ("There is no fixed standard to determine what purposes are of social interest to the community; the interests of the community vary with time and place.").

[162] SCOTT & FRATCHER, *supra* note 160, § 371. Subsequent to the statute's drafting, however, courts began to validate trusts promoting religion.

[163] *See id.*

[164] *See Bob Jones Univ.*, 461 U.S. at 595.

[165] Roe v. Wade, 410 U.S. 113 (1973). One author says "not yet." *See* Mary E. Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 U. CHI. L. REV. 453, 481 n.129 (1992) (noting that the Catholic Church has not yet lost its tax-exempt status despite the fact that it openly teaches a position on abortion inconsistent with the decision in *Roe* and as reflected in subsequent legislation).

[166] *See* Romer v. Evans, 517 U.S. 620 (1996) (holding unconstitutional a Colorado constitutional amendment prohibiting governmental action designed to protect the status of homosexuals).

from direct participation in the role of clergy[167] – such doctrine likely conflicts with Court decisions prohibiting sex discrimination.[168] Clearly, it would not be difficult for a federal judge to interpret any of several doctrines common among modern believers to be in conflict with "public policy," as that term is understood by a particular judge.[169]

C. Bob Jones University – *Application to Churches*

Although the charitable requirement of *Bob Jones University* is not often publicized or cited, the doctrine is still alive and well in the Courts' modern jurisprudence. Admittedly, the charitable requirement has not been frequently applied in subsequent cases. Of the over 350 citing references to *Bob Jones University* in published opinions, only a small minority specifically apply charitable activity and public purpose arguments. The most common uses of the Court's holding are in support of a method of statutory analysis that looks beyond the actual legislative text, in effect modifying statutory language to comply with the legislature's "clear" intent, and as a means of prohibiting racial discrimination.

However, a handful of cases, including the *Bob Jones* opinion itself, clearly indicate that *Bob Jones University* charitable scrutiny is applicable to churches. Bob Jones University qualified for tax exemption under 501(c)(3) both as an educational institution and as a religious organization, yet the Court affirmed revocation of its exemption.[170] The Court's holding makes it clear that charitable scrutiny is applicable to religious organizations, of which churches are a subgroup.

But *Bob Jones University* is not the only case applying a charitable requirement to religious congregations. In revoking the tax-exempt status of the Synanon Church, the District Court for the District of Columbia quickly dismissed the government's argument that Synanon's activities did not constitute a religion,[171] because characterization of the organization as a church would not assist the organization in retaining its exempt status. "Even a bona fide church that failed the . . . *Bob Jones*

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[167] *See, e.g. 4 Bishops Ordered to Ordain Women*, CHATTANOOGA FREE PRESS, Sept. 29, 1995.

[168] United States v. Virginia, 518 U.S. 515, 598 (1996) (Scalia, J., dissenting) (arguing that discrimination on the basis of sex may not be considered charitable).

[169] Moreover, in the New Testament book of John, Jesus informed his followers that if they followed his teachings the rest of the world would not accept them. "If you belonged to the world, it would love you as its own. As it is, you do not belong to the world, but I have chosen you out of the world. That is why the world hates you." *John* 15:19 (New Int'l). Here, Jesus suggests Christians should, by the very nature of their faith, be in opposition to much of social culture and "public policy."

[170] *See* Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

[171] Synanon Church v. United States, 579 F. Supp. 967 (D.D.C. 1984).

test would not be eligible for tax exemption."[172] In a recent Seventh Circuit opinion, the court recounts the revocation of tax-exempt status for the World Church of the Creator, which, as a racist group, the court claimed was not entitled to state or federal tax exemptions.[173] Similarly, the Ninth Circuit applied charitable scrutiny to the Church of Scientology in a 1987 case.[174]

In contrast, in *Mellon Bank, N.A. v. United States*, the Third Circuit Court of Appeals declined to apply the charitable standard of *Bob Jones* to nonprofit cemetery companies, which benefit from tax exemption under § 501(c)(13) of the Internal Revenue Code.[175] The court reasoned that the charitable activity requirement applied solely to those organizations exempted under § 501(c)(3), in spite of Code language that lists contributions to nonprofit cemetery companies under a subsection heading of "Charitable contribution defined."[176] The Third Circuit's decision is curious, at best, and nothing in the opinion suggests churches are entitled to such beneficial treatment.

V. CONCLUSION

Because of changes in rationales supporting religious tax exemptions, it may become increasingly difficult for churches and other religious organizations to be granted or to maintain tax-exempt status under the federal tax code. Notwithstanding the foregoing, the modern church has a number of options it might pursue to maintain preferential tax exemptions. First and foremost, churches can (and many should) become more involved in their local communities, to demonstrate provision of a direct public benefit. By organizing continuing food or clothing drives for the needy, maintaining a soup kitchen, or providing

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[172] *Id.* at 971. The same argument was successfully advanced against a religious organization in *Inc. Trs. of the Gospel Worker Soc'y v. United States*, 510 F. Supp. 374 (D.D.C. 1981).

[173] Te-Ta-Ma Truth Found. v. World Church of the Creator, 297 F.3d 662, 664 (7th Cir. 2002). While it is true that the state court considering tax exemption revocation determined that the organization did not fit the description of "charitable," that decision was based on state, not federal law. *See* People *ex rel.* Ryan v. World Church of the Creator, 760 N.E.2d 953 (Ill. 2001). In the cited federal decision, the court affirmed revocation purely on the grounds that the church failed to timely appeal the IRS's decision, and did not address the issue of charitability. *See* Church of the Creator, Inc. v. Comm'r, 707 F.2d 491 (11th Cir. 1983).

[174] *See* Church of Scientology v. Comm'r, 823 F.2d 1310, 1315 (9th Cir. 1987).

[175] Mellon Bank, N.A. v. United States, 762 F.2d 283 (3d Cir. 1985).

[176] 26 U.S.C. § 170(c) (2001). The *Mellon* court based its holding, in large part, on the fact that contributions to cemetery companies were not deductible to donor-taxpayers until 1954. *Mellon Bank, N.A.*, 762 F.2d at 285. Somehow, the court assumed that Congress's overdue extension of contribution deduction to nonprofit cemetery and burial companies demonstrated those entities to be in a different class of organizations, one that was not necessarily charitable in nature. *Id. See also supra* note 132 and accompanying text.

regular daycare services for working parents, churches can demonstrate charitable purposes easily recognizable under charitable scrutiny requirements adopted in *Bob Jones University*. Moreover, these measures simultaneously further Christ's call for Christians to be salt and light to the world.[177] For the modern church, it is a win-win situation.

Second, churches can argue that the Supreme Court's holding in *Bob Jones University* was limited. Reliance on the principles espoused in *Bob Jones* outside the contexts of racial discrimination and statutory interpretation, by far the most common applications of the opinion, may be misplaced.

Third, churches and other religious organizations may be able to qualify under other provisions of § 501(c) of the tax code. Section 501(c)(7) makes exempt those clubs "organized for pleasure, recreation, or other nonprofitable purposes."[178] However, while qualification under this subsection could entitle churches to remain tax exempt for purposes of income and possibly real property, it would not provide the benefit of deductibility to taxpayer-donors currently provided under § 170(c) of the code.

Fourth, churches should be encouraged to argue that their activities and purposes benefit society at least no less than other 501(c)(3)-approved organizations like the Fund for UFO Research, Inc. (an organization providing financial support for scientific research and public education concerning unidentified flying objects);[179] the Amphibian Conservation Alliance (whose sole organizational goal is to protect and promote the interests of frogs and other amphibians);[180] and the Holy Land Foundation (suspected of advancing the interests of Arab terrorists in the Middle East through tax deductible donations);[181] all of which may be of questionable societal benefit.

However, if the Internal Revenue Service decides to revoke an individual church's tax-exempt status, or even revoke the exemptions of

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[177] *See Matthew* 5:13-16.

[178] 26 U.S.C. § 501(c)(7) (2001). *See* FISHMAN & SCHWARZ, *supra* note 7, at 702-04 for a discussion of organizations meeting the social clubs requirements.

[179] The Fund for UFO Research, Inc. is an organization based in Washington, D.C. Additional information can be obtained via the Fund's website at http://www.fufor.com (last visited March 12, 2003).

[180] See http://www.frogs.org (last visited March 12, 2003) for additional information.

[181] *See* Joshua Hammer, *Arafat at the Brink*, NEWSWEEK, Dec. 17, 2001, at 38. Some Muslim leaders claim to have relied upon the tax-exempt status of this charity, and others like it, as a kind of government endorsement of the organization. In December 2001, the federal government froze the assets of The Holy Land Foundation and other Muslim charities believed to be tied to terrorist groups. *See* Jeff Shields, et al., *Islamic Charities Feeling the Pinch; Allegations of Terrorist Links, Frozen Assets Dry Up Contributions*, SUN-SENTINEL (Fort Lauderdale), June 19, 2002, at 1A.

churches as a group, it is imperative for churches to remember that their *spiritual* survival is not dependent upon any governmentally conferred tax status. Rather, congregations should focus their attention on the work God has put before them and trust that He will provide accordingly. As the prophet Isaiah admonished the Jewish nation,

> [I]f you spend yourselves in behalf of the hungry and satisfy the needs of the oppressed, then your light will rise in the darkness, and your night will become like the noonday. The LORD will guide you always; he will satisfy your needs in a sun-scorched land and will strengthen your frame.[182]

Christine Roemhildt Moore

[182] *Isaiah* 58:10-11a (New Int'l).