View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by Valparaiso University

ValpoScholar

Valparaiso University Law Review

Volume 16
Number 1 *Symposium on Church and State*

*pp.*185-214

Symposium on Church and State

Socialized Religion: California's Public Trust Theory

Morton B. Jackson

Follow this and additional works at: https://scholar.valpo.edu/vulr

Part of the Law Commons

Recommended Citation

Morton B. Jackson, *Socialized Religion: California's Public Trust Theory*, 16 Val. U. L. Rev. 185 (1981).
Available at: https://scholar.valpo.edu/vulr/vol16/iss1/6

This Symposium is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.

SOCIALIZED RELIGION: CALIFORNIA'S PUBLIC TRUST THEORY

MORTON J. JACKSON*

INTRODUCTION

Socialism is classically defined as public ownership of the means of production. Socialized medicine, an extension of this concept, implies state ownership and control over the means by which the healing arts are practiced. California, fertile soil for original and exotic schemes, has presented the country with socialized religion, public ownership and control of the means of worship. This feat is accomplished through an ingenious device called the charitable or public trust theory. This article will examine the public trust theory and some of its corollaries, as articulated by California's Attorney General and applied by its trial courts. The legal basis advanced to justify the theory will also be analyzed, as well as the principal constitutional inhibitions with which it collides.

I. PUBLIC TRUST THEORY EXAMINED

The public trust theory is a device invented by the Charitable Trust Section of the California Attorney General's office to facilitate and legitimate state control of churches. This control is accomplished by classifying all churches as public trusts and their officers as the public's trustees, thus fastening public ownership—and state control—upon all property and assets purportedly owned by such churches.

The theory cannot withstand close analysis under charitable trust law, and the attributes of the theory demonstrate its incompatibility with the most basic notions of constitutional principle, to say nothing of common sense. However, the public trust theory cannot be dismissed lightly as a mere aberration, for it represents a further manifestation of the state's historic and inevitable effort to "dominate the church and use it as an engine for its purposes."[1]

---

* Partner in MacDonald, Halsted & Laybourne, Los Angeles, California.

1. PFEFFER, CHURCH, STATE AND FREEDOM 727 (rev. ed. 1967). Pfeffer's thesis in whole reads:

> Probably ever since the institutions of religion and of secular powers were recognized as separate and distinct in human history, the two forces have competed for and struggled over human destiny. In this struggle the church has sought to dominate the state and use it as an engine for its purposes, and the state has sought to dominate the church and use it as an engine for its purposes.

Produced by The Berkeley Electronic Press, 1981

The first premise underlying the public trust theory is that property accumulated by California churches from contributions is really owned by all residents of California. For example, even though a deed to a church sanctuary shows the church as the owner, the church is merely a custodian of the property—entitled to safeguard the sanctuary. The people of the State of California are entitled to control the sanctuary's use because they are its beneficial owners, regardless of whether any of them contributed to the sanctuary's building or even subscribe to the beliefs of the contributors.[2] Deputy Attorney General Lawrence Tapper explained the state's theory to members of the Worldwide Church of God in these words:

> The law is very protective of institutions such as yours, on the theory that the institution itself and all of those who run the institution are standing in a position of

---

2. State's Second Amended Complaint, State v. Worldwide Church of God, Inc., No. C267607 (L.A. Super. Ct., filed Jan. 2, 1979), *mandamus denied*, Worldwide Church of God v. Superior Court, No. 31091 (Cal. Mar. 22, 1979), *cert. denied*, 444 U.S. 883 (1979), *cert. denied*, 446 U.S. 914, 100 S. Ct. 1846 (1980), *cert. denied*, 446 U.S. 987, 100 S. Ct. 2974 (1980) (dismissed from L.A. Super. Ct., Oct. 16, 1980) [hereinafter cited as Second Amended Complaint].

The complaint formally alleges that the church and its associated college and foundation hold their assets "as trustees subject to supervision by the Attorney General." It goes on to state that beneficial ownership of these assets resides with the public, and then adds this remarkable language: "None of the defendants [the Church, the College, and the Foundation] has *or may legally have* any proprietary interest in . . . [their] . . . assets and property . . . nor in their books and records."

In arguing before the superior court in the same case, Special Deputy Attorney General Hillel Chodos averred:

> Every other party who comes before the court has some claim to its own property and has some right to resist intervention by the court, But for 700 years, Your Honor, it has been the law in England and America that charitable funds are public funds. They are perpetually in the custody of the court. The court is the ultimate custodian of all church funds.

Proceedings before Judge Title, at 7-8 (Jan. 10, 1979), State v. Worldwide Church of God, Inc. (emphasis added) [hereinafter cited as Title hearing, Jan. 10, 1979].

Earlier, when seeking to persuade Judge Pacht to issue the initial ex parte receivership order, Deputy Attorney General Lawrence Tapper blandly assured the court that "the [Church] records we are talking about are public records, just as the assets . . . are also public assets." Chodos then went on to add that the court need not be concerned that it might be interfering with someone's rights, since no private interests were involved, hence no private rights would be transgressed.

Proceedings before Judge Pacht, at 7-9 (Jan. 2, 1979), State v. Worldwide Church of God, Inc. [hereinafter cited as Pacht hearing]. *See also*, Worthing, *The State Takes Over A Church*, 446 ANNALS 136 (1979) [hereinafter cited as Worthing]; Kelley, *A Church in Receivership: California's Unique Theory of Church and State*, 97 CHRISTIAN CENTURY 669 (June 18-25, 1980).

> trust, the property being truly owned not by the institution or individuals, but rather the people of California.[3]

As Mr. Tapper's statement indicates, public ownership is only one of two defining characteristics of the theory. The other characteristic is that churches and their officers are "trustees" over property ostensibly belonging to the church, but actually held in a public trust.

"Trust" can be used as a term of art defined by centuries of use in England and the United States, and the State of California uses the term in this legal sense. The route by which it arrives at this use of the term is sweepingly simplistic. The state simply asserts that all churches are charitable organizations, that all charitable organizations are public trusts and therefore that every church becomes, *ipso facto*, a public trust, accountable to the state as the guardian of the public interest. This assertion gives rise to a number of startling corollaries, all of which the state seeks to apply to all churches. The following corollaries have been successfully claimed and applied.[4]

1. The State Controls and Supervises the Use of All Church Assets and May Punish Those Who Attempt to Evade State-Mandated Restrictions.

The State of California has recently claimed the right to control the use of all church property of the Synanon Foundation[5] and the Worldwide Church of God.[6] In litigation with the Synanon Foundation, a deputy attorney general threatened to seek an order from the judicial branch of the state that would prohibit Synanon Foundation from compensating certain employees. The state claimed that payment of the compensation should be enjoined because it was "ex-

3. Speech by Deputy Attorney General Lawrence Tapper to members and employees of the Worldwide Church of God, in Pasadena, California (Jan. 4, 1979).

4. While the articulation of the doctrine in its full reach is relatively recent, the basic concept was asserted by California's Attorney General as early as 1947. The State's complaint in People v. Christ's Church of the Golden Rule, 79 Cal. App. 2d 858, 859, 181 P.2d 49, 50 (1947), alleged that the Church "was a nonprofit California corporation formed for *public*, religious and charitable purposes, owning assets in excess of $3,000,000, and *having no valid franchise to hold property other than as a public, charitable trust*" (emphasis added). The court did not comment on the validity of this assertion.

5. *See* Synanon Foundation, Inc. v. California, Civil No. S-79-664-PCW (E.D. Cal.), *application for stay of order denied*, 444 U.S. 1307 (1979).

6. State v. Worldwide Church of God, Inc., No. C267607 (L.A. Super. Ct., filed Jan. 2, 1979).

Produced by The Berkeley Electronic Press, 1981

cessive, unreasonable and without legal justification."[7] No claim was made that the compensation had not been duly authorized by the church or that the recipient was not an employee.

In litigation against the Worldwide Church of God, the state obtained control over the entire property and activities of that church in the form of a state-imposed and supervised receivership. One of the deputy receivers explained the state's position to church members as follows:

> The law is that the [state-appointed] receiver owns all the property, assets and records of the Worldwide Church of God, Inc. and Ambassador College, Inc. He is in possession of them. The law gives him the right to do with them as he sees fit. . . . Anyone who defies the orders is in contempt of court . . . can be put in jail for his contempt.
>
> . . . .
>
> [T]he receiver is your boss now who has the power to hire and fire, to dispose of all church property, I want to emphasize this, as he sees fit in his judgment. Some people have not appreciated the extent of the receiver's power. He owns everything. It is his property now.[8]

Not only did the state empower the receiver to control and supervise the use of *all* church property, but also to exercise the power to rescind church decisions that he viewed as unwise or unreasonable: "[W]e wish to know whether millions of dollars in expenses . . . had a reasonable relationship to Church purposes."[9] Deputy Attorney General Tapper, referring to the Worldwide Church of God and affiliated corporations, stated that the state was to decide "whether they're spreading the Word as much as they're spreading the money."[10]

---

7. Proposed Complaint for restitution, damages, surcharge of trustees, appointment of a successor trustee, enforcement of a charitable trust, and for injunctive and other equitable relief, State of California v. Dederich. The filing of this complaint was enjoined by the United States District Court for the Eastern District of California in Synanon Foundation, Inc. v. California, Civil No. S-79-664-PCW.

8. Statement by Deputy State Receiver Raphael Chodos to church members and employees in Pasadena, California, at 1-3 (Jan. 4, 1979). The receiver, ex-Judge Steven Weisman, confirmed these views in the course of his remarks later in the same meeting.

9. State's Response to Application for Stay of Receivership at 8, State v. Worldwide Church of God, Inc., No. C267607 (L.A. Super. Ct., filed Jan. 2, 1979) [hereinafter cited as Response to Application for Stay].

10. Interview with Deputy Attorney General Lawrence Tapper, KNBC, Los Angeles, at 3 (Jan. 1979) [hereinafter cited as Tapper interview].

2. The State Can Appropriate Church Funds to Pay the Salaries and Expenses of the State's Supervisors and Investigators.

In the Worldwide Church of God litigation, the judicial branch of the State of California authorized the state-appointed receiver to appropriate church funds to cover the salaries and expenses necessary for state supervision and investigation of the church:

> Now the receiver is also empowered to hire and employ and retain his own counsel, accountants and any other personnel, employees which he deems necessary to assist him in the discharge of his duties under this order.
>
> He is authorized to pay to them reasonable compensation out of the funds and assets of the church. . . .[11]

In addition, the Court authorized the appropriation of church funds to pay the surety bond expenses of the state's receiver.[12] In this case alone, the state has claimed the right to appropriate more than $250,000 for these expenditures, and the church has been ordered to pay. Special Deputy Attorney General Hillel Chodos, the private attorney who persuaded the state to file the action and was prominently active in its early weeks, presented the church with an additional bill for over $100,000 in fees and costs for the "services" of his office. This claim was not immediately allowed and is presently on appeal.

3. The State May Remove Church Leaders If It Has the Slightest Suspicion That They Are Not Following State Dictates.

A representative of the state, Deputy Attorney General Chodos, argued before the Los Angeles Superior Court that:

> [T]here are presently trustees that have been *allowed* to manage the charitable fund on a day-to-day basis . . . . We believe that essentially *those trustees serve at the court's pleasure* and may be replaced. . . .[13]
>
> . . . .
>
> The church, as a charitable trust, has no interest to protect here . . . it is the court's funds and the court may

11. Hearing before Judge Title, at 394 (Jan. 12, 1979), State v. Worldwide Church of God, Inc., No. C267607 (L.A. Super. Ct., filed Jan. 2, 1979).

12. Pacht hearing, *supra* note 2, at 12.

13. *Id.* at 3-4 (emphasis added).

Produced by The Berkeley Electronic Press, 1981

> remove and replace and substitute trustees *at its pleasure.*
>
> . . . .
>
> If there is the slightest hint or suspicion . . . of wrongdoing, let alone proof positive or proof by preponderance, it is the court's duty, as I understand it, to see to it there is a worthy trustee installed.[14]

The installation of a "worthy trustee" entails removal of the present "trustee," which means removal of the church leaders who were selected by the church membership or hierarchy.[15] Moreover, the state uses the term "wrongdoing" to include actions that the state determines, after the fact, to have been unreasonable, unwise, or simply inappropriate, regardless of whether these actions involved any actual or attempted deception or fraud. "Wrongdoing" includes, for example, incurring travel expenses deemed by the state to be "excessive," what the state refers to as "civil" fraud. The cumulative impact is that the state claims the power to remove church officials for failure to abide by state guidelines on private church expenditures.

4. Churches Have No Right to the Due Process of Law Guaranteed by the United States Constitution.

The church's lack of due process protection came to light in the Worldwide Church of God litigation when the state sought to take control of the church, two related nonprofit corporations and several unrelated for-profit corporations. Since the relief sought by the state obviously involved the impairment of a property interest, the due process clause of the United States Constitution would ordinarily require that the these parties be given notice and a hearing prior to such action. The state successfully argued that the due process requirements did not apply to the church or its related non-profit corporations because the property was not owned by them but was owned by the people of the State of California. Thus, there was no deprivation of a *private* property interest. The state's lawyer argued:

> First of all, I recognize that any request for an ex parte receiver, without notice, has to be viewed against a strong presumption that it is an emergency measure to be used with great caution.
>
> . . . .

14. Title hearing, Jan. 10, 1979, *supra* note 2, at 8-9 (emphasis added).
15. *Id.* at 9.

> I would suggest to you, however, that at least insofar as pertains to the Worldwide Church of God, Inc., Ambassador College, Inc., and Ambassador International Cultural Foundation, Inc., that the usual principles are not applicable.
>
> . . . .
>
> [A] shorthand way of describing the law applicable to the[se] corporations . . . is that their property always and ultimately rests in the court's custody and they are always ultimately subject to the supervision of the court on the application of an Attorney General. In effect, there are no private interests. The court is not taking something away from somebody or interfering with anyone's *private* rights.[16]
>
> . . . .
>
> [F]urthermore, and most important, I want to emphasize that the usual impediment to granting ex parte relief does not exist here. Normally, in a *private* property situation where you grant ex parte relief, the court is put in a position of attempting to interfere with someone's rights and to stop people from doing things that they would otherwise do with their own property and maybe create great havoc to private interests that have not had an opportunity to be heard. . . . In this case, however, *there are no private transactions*.[17]

The court expressly accepted this reasoning. It issued an order dispossessing the church and its nonprofit corporation codefendants and imposed a receiver to take over the management of their activities without notice or hearing to these parties. However, the court refused to make a similar order with respect to the co-defendant for-profit corporations, since these were under *private* ownership and were thus entitled to due process!

The state has consistently argued that churches, as public trusts, are not entitled to *any* constitutional or other privileges vis-a-vis the investigative and supervisory powers of the state.[18] The

---

16. Pacht hearing, *supra* note 2, at 3 (emphasis added).

17. *Id.* at 8.

18. *E.g.*, The Attorney General of the State of California and his deputies have not only the power, but the duty, at any time, to investigate all the books and records, 100% of the books and records, of any charitable, religious or educational organization because . . . [the organization] derives its position, its existence, from the State of Califor-

state has also successfully argued that a public trust and hence a church or any of its officers or employees, is not entitled to fourth amendment protection against unreasonable search and seizure. Church premises are thus subject to unannounced entry at any time, and books, records, papers, and property are subject to unlimited scrutiny or even seizure and asportation at the discretion of the attorney general. This, of course, is precisely what occurred in the initial "raid" upon the Worldwide Church of God.

In justification of this startling proposition, the attorney general argued that churches and their officers, as trustees, are not entitled to any expectation of privacy with respect to property, records, or papers vis-a-vis the beneficiaries of the trust; that is, the public or its representative in the person of the state attorney general. Hence, the fourth amendment simply does not apply to churches or their officers. Further to buttress this argument, the attorney general likened churches to certain heavily regulated industries, such as the alcohol and firearms industries, with respect to which the Supreme Court has enunciated an exception to fourth amendment strictures.[19]

5. Churches Have No Right to Defend Themselves Against the State, Nor to Retain Counsel of Their Own Choosing.

The state strenuously argued, in the Worldwide Church of God case, that a church, as a public trust, has no private rights to be protected and therefore no basis for resisting the "protective" intervention of the court or the attorney general. Since church leaders, as "trustees," also have no interest, they have no standing either to resist on behalf of the church or to defend its interests. Church leaders might even be in violation of their trust if they spend church funds to obtain counsel, since the church is not entitled to counsel other than the court itself or, perhaps, such counsel as might be appointed by a court-appointed receiver.

> nia. Now those records do not belong . . . to Mr. Armstrong. There are no privileges, constitutional or otherwise, of a *charitable foundation against investigation by the Attorney General.*

Proceedings before Judge Foster, at 7 (Jan. 8, 1979), State v. Worldwide Church of God, Inc., No. C267607 (L.A. Super. Ct., Jan. 2, 1979) (emphasis added) [hereinafter cited as Foster hearing]. *See also*, Worthing, *supra* note 2.

19. State's Opposition to Motion for Return of Property Illegally Obtained at 18-19, State v. Worldwide Church of God, Inc., No. C267607 (L.A. Super. Ct., filed Jan. 2, 1979).

> The charitable fund is the . . . subject matter of this proceeding. It isn't a party in the usual sense. It is in Your Honor's safekeeping. *It has no interest to protect against the court. The Church as a charitable trust has no interest to protect here.*
>
> . . . .
>
> It is Your Honor's responsibility to do whatever needs to be done to preserve it . . . and protect the assets and records, and *no one has any basis to resist that intervention.*
>
> . . . .
>
> I am saying if there is any interest of the Church that needs representation before you, *the receiver should select that counsel.* That counsel should be briefed to come and raise whatever arguments have to be presented for the Church, and it should be paid out of the Church fund upon approval by the Court after a proper application.
>
> . . . .
>
> What I am suggesting is *this Church doesn't need a lawyer* to help this Court protect its assets.
>
> . . . .
>
> *I don't think the Church has a single interest that needs counsel* before Your Honor. In my view, the Church ought to welcome the supervision of the Court.[20]

When the Worldwide Church of God expended $50,000 in attorney's fees to defend itself from the state's attack, the state's lawyers immediately sought an order from a state court requiring the attorneys to return their fees and to terminate their representation of the church. "[The church's attorney] is not allowed, Your Honor, to represent the church, or to be paid out of church funds, certainly not in advance of court approval."[21]

The state also requested the court to place the entire Worldwide Church of God under state control in order to prevent expenditures perceived by the state as extravagant or excessive. A specific "extravagance" cited by the state as justification for state control was the expenditure by the church to defend itself from the state's attack.[22]

20. Title hearing, *supra* note 2, at 8-13 (emphasis added).
21. *Id.* at 6-9 (emphasis added).
22. Second Amended Complaint, *supra* note 2, at §§ 33-34. The same docu-

6. The State Determines How Churches Are to Be Governed.

The state claims that since churches are organized and hold their property for the benefit of all the people of the State of California, churches cannot allow a particular individual or group of individuals to control the church's activities. The church members must have democratic control, regardless of church doctrine on matters of polity. Hierarchical churches, such as the Roman Catholic Church, believe, as a matter of religious doctrine, that the church should be governed by the hierarchy and specifically reject congregational control. The state, however, has sought to compel the Worldwide Church of God, an hierarchical church, to govern itself democratically, despite contrary church doctrine. Deputy Attorney General Tapper explained the state's objectives to church employees in this manner:

> It is our understanding that for many years these institutions have been run rather autocratically. California law provides that there should be opportunities for meetings of the members of a non-profit organization; and that there should in connection with these meetings be opportunities for members to express their will through selecting the people who have [sic] the institution. . . . [the State] has asked that at some appropriate time, procedures . . . will be done [sic] by the court—an opportunity to put the institution back on a more traditional footing.[23]

Although the state has yet to disclose exactly what type of democracy it seeks to impose on the Worldwide Church of God, the state's present complaint seeks to have the court remove all financial control from the church's ecclesiastical hierarchy and place it in the hands of a democratically selected board of trustees. The state's original complaint was even more blunt. The complaint requested the court to abolish the church's hierarchical structure altogether and to oversee the selection of new church leaders through the medium of court-supervised elections.[24]

---

ment seeks to have the court remove church leaders simply because they resisted the state's incursion, i.e., defended against it in court. *Id.* at §§ 17-20.

23. Remarks by Receiver Steven Weisman and Deputy Attorney General Tapper, in Pasadena, California (Jan. 4, 1979).

24. Second Amended Complaint, *supra* note 2, at §§ 25-26; Original Complaint at §§ 11-13 and Prayer at § 2, State v. Worldwide Church of God, Inc., No. C267607 (L.A. Super. Ct., filed Jan. 2, 1979).

7. The State Can Examine and Physically Take All Church Records Regardless of the Chilling Effect This Might Have on Membership and Participation.

The state has commenced actions against Faith Center and the Worldwide Church of God to compel these corporations to allow the state to scrutinize their records. In each case the state has asserted that the church has no right to oppose state scrutiny because the records are public documents. In the Worldwide Church of God litigation, the state's second amended complaint stated: "None of the defendants has or may legally have any proprietary interest in the assets and properties of the Church, the College, or the Foundation, *nor in their books and records*. . . . [T]he [Church's] records . . . are public records, just as the assets are also public assets."[25] Ultimately the state court granted the attorney general full possession and control over all church records.[26]

The state successfully argued that the state and its attorney general "have not only the power, but the duty, at any time to investigate all the books and records, 100% of the books and records of any charitable, religious or educational organization" since such organizations derive their very existence from the state and their records, in any event, do not belong to them. Further, the state argued, "there are no privileges, constitutional or otherwise, of a charitable foundation against investigation by the attorney general."[27]

8. Church Members Have No Right to Protect Their Church or Direct How Their Contributions Should Be Spent.

While, on the one hand, the state contends that churches must be democratically run, and that members must, by law, elect church leaders, the state on the other hand insists that church members are without the right or power to say how their contributions shall be spent and have no standing to intervene or otherwise defend their

25. Pacht hearing, *supra* note 2, at 7 (emphasis added).

26. Title hearing, *supra* note 9, at 395 ("The [state] receiver shall have possession and control of all the books and records of the Church.").

27. Foster hearing, *supra* note 16, at 8. A similar order was made in the Faith Center case, in response to identical arguments and recently was upheld by the Second Appellate District of California's Court of Appeal in an opinion marked "Not to Be Published." Younger v. Faith Center, Inc., No. 56574 (Ct. App. 1980). It is, to our knowledge, the first appellate court to do so. It is perhaps revealing that the opinion was not certified for publication.

Produced by The Berkeley Electronic Press, 1981

church against action taken by the attorney general. The public trust theory bars them from any interest or right in the subject of the trust which they allegedly have created.

> Under the law, once people donate money to a charitable organization, *they no longer have standing to direct how it is to be used.* It must be used in accordance with the laws of the State of California. And under those laws, although the property is held by the charitable organization, it is held for the benefit of the public at large.[28]

The California trial court seems to agree. In the Worldwide Church of God case, when counsel for the church argued that the state, whether on its own behalf or ostensibly on behalf of six dissident former members, should not be permitted to overrule the wishes of the 100,000 members in good standing, the court replied, "Their wishes are immaterial, counsel."[29]

Furthermore, when an organization representing the interests of the church's members sought to intervene in the Worldwide Church of God case, an application that would have received routine approval in virtually any other situation, the state furiously resisted the attempt, and the court obligingly barred the group from entering the litigation on the ground that they had no standing.[30]

The state argued in its response to application by the church for a stay of the receivership:

> The . . . [State] . . . initially filed suit to protect the assets of the [Worldwide Church of God] and . . . related charitable corporations. . . . It was brought by the Attorney General as the *only party*, other than the [Church and its directors] having the legal standing to do so.[31]

9. The People of the State of California Own and Control All Property of Churches Incorporated in California, Even If No California Citizen Has Ever Contributed to the Church.

The state has contended "[t]o the extent [churches] have collected funds through a California charitable corporation, those funds

28. Tapper interview, *supra* note 8, at 3.

29. Hearing before Judge Title, at 14 (Feb. 13, 1979), State v. Worldwide Church of God, Inc., No. C267607 (L.A. Super. Ct., filed Jan. 2, 1979).

30. Proceedings before Judge Weil, at 80 (Feb. 20, 1979) State v. Worldwide Church of God, Inc., No. C267607 (L.A. Super. Ct., filed Jan. 2, 1979).

31. Response to Application for Stay, *supra* note 7, at 1 (emphasis added).

are impressed with a trust over which Your Honor is the supervisor."[32] It must come as a shock to church contributors and members who reside outside California to learn that their contributions are now owned by strangers, "the property being truly owned, not by the institution or individuals, but rather, *the people of California*."[33]

The state's receiver, in *Worldwide Church of God*, sent a mailgram to all of the church's ministers around the world instructing the ministers and their congregants (ninety percent of whom reside *outside* of California) that they were not permitted to send funds or contributions to anyone except him.[34]

II. THE PUBLIC TRUST REGULATORY SCHEME AND CONSTITUTIONAL FREEDOMS

Each facet of the public trust theory raises serious constitutional questions. The most obvious infringements are of the religion clauses of the first amendment.[35] However, numerous other guarantees have been vitiated by some of the theory's many corollaries.[36]

The first amendment of the United States Constitution provides: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." The United States Supreme Court has held that this provision restricts not only the federal legislature, but also restricts state governments.[37] The regulatory scheme created by the State of California is prohibited by both the free exercise and the establishment clauses of the first amendment.

At the most obvious level, the establishment clause initially was intended to prevent the federal government, and now also state

---

32. Title hearing, *supra* note 2, at 10.

33. *Id.* (emphasis added).

34. Brief for Petitioner, app. D, at 9, 444 U.S. 883 (1979).

35. *See* text accompanying notes 36-45 *infra*.

36. These guarantees include the prohibition on uncompensated takings by the appropriation of church monies to fund the regulatory scheme; the due process clause by the claim that churches have no *private* interests; the contract clause by the impairment and confiscation of private property interests and denial of standing to resist regulation despite the California Corporation Code grants of power; the search and seizure and freedom of association guarantees by the conversion of church records into public records; and the due process and commerce clauses by extraterritorial regulation. *See also* Sharon Worthing's thoughtful exploration of these problems in Worthing, *supra* note 2.

37. Everson v. Board of Education, 330 U.S. 1 (1947) (establishment clause); Cantwell v. Connecticut, 310 U.S. 296 (1940) (free exercise clause).

Produced by The Berkeley Electronic Press, 1981

governments, from creating an entity similar to the Anglican Church, which was controlled and sanctioned by the Crown and participated in secular government by functioning as an ecclesiastical court. These characteristics of the Crown's relationship with the Anglican Church have reappeared, in California, under the public trust regulatory scheme. The attorney general becomes the inspector general of religion through whom the State of California controls the day-to-day activities of regulated churches, determining which expenditures are consistent with corporate purpose (the church's mission) and compatible with "trust" principles (the state's perception of religion). This control extends to approving or removing church leaders, officers, and employees. State controlled and regulated churches must be perceived by the public as bearing the state's seal of approval for trustworthiness and honesty. Finally, state officials placed in control of churches blur the distinction between the two realms by functioning as both state and church employees, much as the priests who were ecclesiastical court judges in eighteenth century England.

Prior to the advent of California's regulatory scheme, no governmental entity in the history of this country had ever attempted to wrest physical control of a church from the church members and ecclesiastical officers. Thus, no American court has ever addressed a violation of the establishment clause rising to this magnitude. However, the standards developed by the United States Supreme Court to test the limits of mere governmental assistance to churches also establish the patent unconstitutionality of California's scheme.

In determining whether a state action passes muster under the establishment clause, the United States Supreme Court has required that the action have a secular purpose, principal or primary effect that neither advances nor inhibits religion, and no tendency to foster excessive entanglement of the state with religion.[38] As with any state action, the public trust regulatory scheme arguably has some secular purpose. However, the scheme undeniably has a principal or primary effect that advances the interests of those churches that might welcome state regulation and inhibits the spiritual life of any church unwilling to bear the yoke of state regulation. Furthermore, the public trust regulatory scheme totally entangles the state with the regulated church. Federal court decisions have prohibited Na-

38. Lemon v. Kurtzman, 403 U.S. 602 (1971); Walz v. Tax Comm'n, 397 U.S. 664 (1970).

Jackson: Socialized Religion: California's Public Trust Theory

tional Labor Relations Board examination of parochial school motives for labor relations practices,[39] state agency inspection of parochial school records to determine which expenditures were secular,[40] and state agency inspection of parochial school records to ascertain causes of increases in educational expenses.[41] Since the public trust regulatory scheme obviously entails examination of financial records, motives and much more, it goes well beyond the state actions previously declared unconstitutional because of excessive entanglement of the state with religion.

The California public trust regulatory scheme prohibits the free exercise of religion in mandating democratic church governments, allowing state officials to remove ministers and ecclesiastical officers from their offices, and requiring state approval of religious expenditures. The constitutional restriction on laws and state actions inhibiting the free exercise of religion absolutely prohibits any state law that attempts to regulate religious *beliefs* and requires a compelling state justification for any law that inhibits *actions* motivated by religious beliefs.[42] In addition, the Constitution requires any inhibiting law to cause the least possible inhibition consistent with recognition of the state's compelling interest.[43]

The regulatory scheme's mandate of democratic church governments, despite doctrinal requirements of hierarchical polity in churches such as the Roman Catholic Church, as a regulation of belief, is absolutely forbidden by the free exercise clause. The Supreme Court has interpreted this clause to protect the "power [of churches] to decide for themselves, free from state interference, matters of church government *as well as those of faith and doctrine*."[44]

The ejection of ecclesiastical officers and ministers is also prohibited by the Constitution since the free exercise clause has been interpreted to forbid state courts from removing church officials, except where it is shown that the church's *own* procedures were violated. Removal for failure to conform to *state* notions of proper official conduct, however, would empower the state to regulate church

39. NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 502-04 (1979).
40. Lemon v. Kurtzman, 403 U.S. at 621-22.
41. Surinach v. Pesquera de Busquets, 604 F.2d 73, 78 (1st Cir. 1979).
42. Sherbert v. Verner, 374 U.S. 398, 403 (1963).
43. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).
44. Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952) (emphasis added).

Produced by The Berkeley Electronic Press, 1981

activity completely since the churches may only act through their employees. Obviously, the Constitution forbids total state regulation.[45]

State control over church expenditures is often justified as incident to state control of solicitation for contributions. The state interest advanced is usually the protection of the general public from fraud. The state asserts that control over church expenditures is necessary to ensure that these contributions are used for religious purposes. This state interest, while plausible, seldom is deemed sufficiently compelling and, in any event, does not justify the public trust regulatory scheme. Most churches do not engage in public solicitation. Even if church funds were not expended for religious purposes, there would be no deception of the public, and consequently no state or public interest in the prevention of deception. For those few churches that do publicly solicit for funds, there may be a strong state interest. However, all-encompassing regulation still violates the Constitution because it is not the least drastic means for protecting this state interest. The federal courts repeatedly have held that prevention of fraud in solicitation may be achieved through criminal prosecution with much less inhibition of religious freedom than is entailed in comprehensive regulatory schemes.[46]

III. ARE CHURCHES CHARITABLE OR PUBLIC TRUSTS?

A public or charitable trust must be both exclusively benevolent and exclusively for the benefit of the public. Regrettably, these two separate requirements have never been set forth together in the cases. The result is a plethora of confusion. Since it is well documented that, in law, churches always have only benevolent purposes, the only and ultimate question is whether they allow for any private interests or benefits. If so, a church cannot be a public or charitable trust—what is commonly called a "charity" or a "public charitable organization."

Some courts have stated that churches hold their assets "in trust for their members," by which they mean no more than that churches are limited by their own corporate powers.[47] Other courts

45. *Id.* at 107-08.

46. International Soc'y for Krishna Consciousness v. Bowen, 600 F.2d 667, 669 (7th Cir. 1979); Cantwell v. Connecticut, 310 U.S. at 306.

47. *See* Wilson v. Hinkle, 67 Cal. App. 3d 506, 511, 136 Cal. Rptr. 731, 735 (1977); Metropolitan Baptist Church v. Younger, 48 Cal. App. 3d 850, 856-57, 121 Cal. Rptr. 899, 903 (1975).

have said that churches hold their assets in trust for their members or for the mother church or for the benefit and use of a certain religious belief[48]—statements made in the limited context of internal disputes over which religious faction in a schism has the right to church assets. All such statements are simply irrelevant to the issue at hand.

Any court applying Anglo-American law that ever implied that a church was a charitable trust or treated it as if it were a charitable trust shifted the definition of the word "charitable" to mean "benevolent" and thereby begged the ultimate question whether a church has a substantial private purpose. These cases cannot be relied on to prove that churches are strictly public.

A principal purpose of all churches is to minister to the spiritual needs of their members, congregants, or adherents. Thus, all churches have a substantial private purpose and cannot be deemed "charitable" in the full legal sense. Therefore, they cannot be public or charitable trusts. Nor can churches be deemed public trusts by forming a public class out of church membership. Failing to discriminate between church members and the public does violence to law, language and the Constitution.

A. *The Statutory Law*

The weaknesses in the arguments for imposing a public trust on a church are many and striking. Unfortunately the confusing and ambiguous terminology of the law of charitable trusts lends itself to sophistry. At the start, the sole basis for the attorney general's intrusion into church affairs was founded on former Corporations Code § 9505.[49] Enacted in 1905, the section deals with public charitable trusts and, in its original form, gives the attorney general broad supervisory power over such trusts. Churches are not specifically mentioned in the statute, but the attorney general argues that the legislature intended, or must have intended, to include churches.

---

48. *Id.*

49. CAL. CORP. CODE § 9505 (West Supp. 1979)(repealed 1980).

A nonprofit corporation which holds property subject to any public or charitable trust is subject at all times to examination by the Attorney General, on behalf of the State, to ascertain the condition of its affairs and to what extent, if at all, it may fail to comply with trusts which it has assumed or may depart from the general purposes for which it was formed. In case of any such failure or departure the Attorney General shall institute, in the name of the State, the proceedings necessary to correct the noncompliance or departure.

Produced by The Berkeley Electronic Press, 1981

Common sense dictates that if the legislature thought it was dealing with churches when it enacted § 9505, there would at least have been a difference of opinion on such an important issue, meriting, if not different treatment for churches, at least a specific reference. Indeed, when the legislature enacted the Nonprofit Corporations Law in 1979, it expressly grappled with the specific question of the attorney general's authority with respect to churches. The legislature accorded churches favored treatment and less stringent standards than those applicable to public benefit corporations, as well as greater protection from unwarranted attorney general intrusion than is received by charities.[50] The logical inference is that the legislature did not intend former § 9505 to have *any* application to churches, except perhaps when a church had accepted special assets under an express public trust.

Any argument to the contrary ignores the existence of a second statute, the Uniform Supervision of Trustees for Charitable Purposes Act.[51] This statute specifically states that it does not apply to churches, even though it does apply "to all charitable corporations and trustees holding property for charitable purposes over which the State or the Attorney General has enforcement or supervisory powers."[52] The legislature clearly expressed the view that a church taken as a whole is not a charitable trust and should not be held to charitable trust standards even as to those express charitable public trusts they do accept.

It was pointed out that if § 9505 was the source of the attorney general's authority over churches, then the legislature acted in violation of the principle of equal protection by favoring the Catholic Church. By its terms, § 9505 gives the attorney general authority only over *nonprofit corporations* that hold property subject to a public or charitable trust. Thus, those churches organized as non-

50. CAL. CORP. CODE § 9230 (West Supp. 1981). Section 9230 was recently amended out of a concern for infringment on the free exercise of religion. Ch. 1324, 1980 Cal. Stats. 5082 (1980). This expression of legislative will prompted the California attorney general to dismiss the action against the Worldwide Church of God. As amended, § 9230 prohibits the attorney general from bringing actions against religious corporations unless there has been a public solicitation and fraud is suspected. However, § 9230(d) makes it clear that the charitable trust theory remains a viable theory where fraud is alleged. *See* Abbott and Kornblum, *The Jurisdiction of the Attorney General Over Corporate Fiduciaries Under the New California Nonprofit Corporation Law*, 13 U.S.F.L. REV. 753, 789-90 (1979); Note, *Receivers, Churches and Nonprofit Corporations: A First Amendment Analysis*, 56 IND. L.J. 175, 186 n.82 (1980).

51. CAL. GOV'T CODE § 12580 *et seq.* (1980).

52. *Id.* at § 12581.

profit corporations would fall under the attorney general's authority. Catholic dioceses, however, are normally organized as corporations sole and there is no provision similar to § 9505 dealing with corporations sole.[53] Thus the attorney general would have no authority over the Catholic Church. However, the attorney general did not concede the lack of authority. Instead, he asserted for the first time that he was exercising his inherent powers under the common law of England.

B. *The Common Law*

From the time of Edward the Confessor to the revolt of the American Colonies, the principal charities were those of a religious nature. Church activity—of an established, non-hierarchical, non-superstitious variety—was considered the highest form of charity. Prior to the fifteenth century, religious corporations usually held their property in frankalmoign tenure, free of most feudal burdens. Property also could be devoted to charitable purposes by conveying to individuals to the use of religious organizations. The obligations of the feoffee (trustee) in these cases were honorary obligations, unenforceable in the courts. However, in 1391 Parliament extended the mortmain statutes (causing forfeiture of church lands to the crown) to include such conveyances.[54]

In the early fifteenth century, the chancellor first began to issue subpoenas for the enforcement of charitable uses, and, in 1601, the enactment of the Statute of Charitable Uses provided a new method for the enforcement of charitable trusts. The statute conferred authority upon the chancellor to appoint commissioners from time to time to inquire into any abuses of charitable bequests or donations. The statute expressly made the "bishop of every several diocese" a commissioner.[55] Though trusts for religious purposes intentionally were omitted from the statute, and therefore from the jurisdiction of the Charity Commissioners, from 1639 the courts in England upheld trusts to promote the established religion as valid charitable trusts. Such a trust would not fail for want of a definite beneficiary or for violation of the Rule Against Perpetuities. Only gradually did the English courts come to uphold trusts for other religions as charitable trusts. In 1754, a Jewish testator left money

53. Former CAL. CORP. CODE §§ 10000-09.

54. IV A. SCOTT, THE LAW OF TRUSTS § 348.2 (3d ed. 1967) [hereinafter cited as SCOTT].

55. *Id.* at n.7.

for instructing people in the Jewish religion.[56] The court held that the trust was illegal, but that under the *cy pres* doctrine the king might apply the fund to other charitable purposes. Similar disabilities of Protestant dissenters were lifted by the Toleration Act of 1688 and succeeding statutes. Gradually, this toleration was extended by upholding trusts for the promotion of Roman Catholicism in 1834, Judaism in 1837, and Unitarianism in 1842.[57]

From the time of the Statute of Charitable Uses, the attorney general had the responsibility for enforcing charitable trusts on behalf of and as the representative of the public, but there is no authority for the proposition that the attorney general had any authority over any church. It is doubtful that he did, since apparently even chancery had no supervisory power over the Anglican church.[58] Furthermore, the attorney general came forward with no authority from the common law that churches were ever deemed to be or ever impressed with a charitable or public trust.

C. *The Case Law*

Prior to the California cases decided in the past few years,[59] no case has ever held a church to be a public trust in the sense that the attorney general asserts, that is, with assets held in public trust and officers considered public trustees. Nor has any court either in the United States or in England specifically ruled that a church is subject to attorney general supervision or that a church is subject to the entire body of public trust law. In fact there is only one recorded case prior to 1979 of a California Attorney General suing a church to protect it from the irregularities of a church official.[60] In that case, the church did not resist, so the attorney general's authority was never tested. The only other case that involved the attorney general in a church's affairs concerned the disposition of the subject church's property upon dissolution.[61] The attorney general's intervention in that case was required by a statute[62] that made him a

---

56. Da Costa v. DePas, 1 Amb 228, 27 Eng. Rep. 150 (1754).

57. SCOTT, *supra* note 54, at § 371.

58. Note, *Judicial Intervention in Disputes Over the Use of Church Property*, 75 HARV. L. REV. 1142, 1147 (1962), citing CRIPPS, A PRACTICAL TREATISE ON THE LAW RELATING TO THE CHURCH AND CLERGY 51, 65-66 (8th ed. 1937).

59. *See* notes 5-6, *supra* and accompanying text.

60. People v. Christ's Church of the Golden Rule, 79 Cal. App. 2d 858, 181 P.2d 49 (1947).

61. Metropolitan Baptist Church of Richmond, Inc. v. Younger, 48 Cal. App. 3d 850, 121 Cal. Rptr. 899 (1975).

62. CAL. CORP. CODE § 9801 (West 1977).

party to the dissolution proceedings of a corporation that "holds its assets on any trust or is organized for a charitable purpose or purposes." The cited case, however, is no authority for the proposition that church property is held subject to or impressed with a public trust. It merely reveals that when the legislature intends to involve the attorney general with church procedures it does so clearly and unequivocally.

The principal thrust of the public trust regulatory theory is to categorize or classify all churches as public or charitable trusts so that the whole body of law relating to such organizations can be applied to churches. It must be made clear that the words "charitable" and "public" are both rather slippery. Each has at least two senses and, as the courts have pointed out, both have been sloppily applied.[63]

For most purposes, a bequest or an institution is charitable if:

(1) It is made for a charitable purpose, and its aims and accomplishments are of a religious, educational, political, or general social interest to mankind. This includes the alleviation of poverty and the provision of health care, in short, anything considered benevolent; *and*

(2) The ultimate recipients constitute either the community as a whole or an unascertainable and indefinite portion of the public.[64]

Thus, something can fail to be charitable in law for either of two reasons: (1) the purpose of the bequest or institution is malevolent or non-benevolent,[65] or (2) the beneficiary of the charity is not the public, or a class so unascertainable or indefinite as to be considered the public, but rather is private.

---

63. On the word "charitable," *see* La Societe Francaise de Bienfaisance Mutuelle v. California Employment Comm'n, 56 Cal. App. 2d 534, 542, 133 P.2d 47, 51 (1943). On the word "public," *see* 14 C.J.S. *Charities* § 1(e) (1939), where "public" means either the public at large or some substantial and indefinite portion of it. *See also*, SCOTT, *supra* note 54, at § 375 ("It is a question of degree whether the class [of beneficiaries] is large enough. . . .")

64. In re Allen's Estate, 17 Cal. App. 3d 401, 408, 94 Cal. Rptr. 648, 651-52 (1971); Lynch v. Spillman, 67 Cal. 2d 251, 261, 431 P.2d 636, 642, 62 Cal. Rptr. 12, 18 (1967).

65. SCOTT, *supra*, note 54, at § 398.1, discusses the word "benevolent" and takes it to mean purposes broader than those generally recognized by the courts as "charitable." In this article, the word is used only to signal that the nature of a charitable purpose—independent of the nature of the class of beneficiaries of that purpose—is being discussed.

Thus, the term "charitable" is the enemy of clear thinking, for it sometimes includes the public quality of the class of beneficiaries and sometimes refers only to the benevolent nature of the benefit conferred. There are, after all, such things as private charitable trusts (also a class into which churches do *not* fit), but judges have not always kept the distinctions clear. Thus, the law is littered with many unreasoned and ambiguous references categorizing churches as "charitable" or as being "organized exclusively for charitable purposes." It is uncontestable that religious benefits have always been deemed to be of a worthy nature—and in the same class as education and the alleviation of poverty and suffering. Yet the fact that churches are always charitable in this limited sense of being "benevolent" is no indication that churches cannot be or are not private organizations.[66] There are also myriad cases that speak of the benefits that churches provide to the public-at-large, but no amount of evidence that churches are trusts benefiting the public-at-large incidentally can show that churches are trusts exclusively *for* the public benefit.

It is well established that the terms "public trust" and "charitable trust" are terms of art. They are also synonymous.[67] Happily, the fact that they are synonyms can lead to clarity. The term "public trust" is preferable in this discussion because it is most often the public *vel non* nature of church assets that is at issue. Ultimately, a charitable trust or a public trust is merely a symbol used to designate the creation of a fiduciary relationship imposing obligations enforceable in equity.[68]

There are two lines of reasoning to support the public trust theory. The first, reduced to its essentials, would go something like this: A church holds its assets in implied trust for its membership. The membership of a church is a large, undefined and indefinite class. When something is held in trust for such a class, it is a public

66. Cases where express trusts for religious purposes were not upheld as charitable trusts because the class of beneficiaries was too narrow are collected in SCOTT, *supra* note 54, at §371.6. "Thus in Cocks v. Manners, L.R. 12 Eq. 574 (1871) it was held that a trust to aid in promoting the spiritual welfare of a group of nuns was not a charitable purpose. . . . In Gilmore v. Coats, [1949] A.C. 426 money was given to trustees in trust for the purpose of a Carmelite priory, a convent belonging to one of the strictly cloistered and clearly contemplative orders of the Roman Catholic church, with a gift over if the purposes were not charitable. It was held that the purposes were not charitable." These cases make it clear that religious purposes are not always public purposes and hence not always charitable purposes.

67. 14 C.J.S. *Charities* § 1(c) n.27 (1939).

68. RESTATEMENT OF TRUSTS § 348 (1935).

trust. The most serious problem with this argument is that it misconstrues the nature of the trust in question. The implied trust is not a charitable trust because its goal is not to carry out a benevolent purpose and it does not affect any public interest. To understand this, some history is needed.

There are cases holding that church assets are to be held in implied trust.[69] However, the cases are not concerned with the charitable trust doctrine. Instead, the implied trusts in these cases were created to deal with internal church property disputes, disputes into which the courts were inevitably drawn. In deciding church disputes, English courts traditionally distinguished between hierarchical churches and congregational churches. The necessity for making the hierarchical/congregational distinction was first enunciated in *Craigdallie v. Aikman*,[70] wherein Lord Chancellor Eldon framed the approach known as the implied trust doctrine. When a local congregation that is part of a larger, hierarchical organization obtains property, it does so in trust for the benefit and use of the religious beliefs propounded by the religious organization existing at the time of the gift. The implied trust imposed by the English court in *Craigdallie* was based upon the grantor's presumed intent to support the beliefs and doctrines advanced by the church as then organized, rather than to support any one local congregation. A natural extension of this doctrine was the "departure from doctrine" theory.[71] If the larger organization departed in any way from the doctrines and beliefs in existence at the time of the affiliation of the local church, the trust was violated and the larger church no longer had any claim to the property held by the local congregation. A court was therefore directly involved in determining the religious doctrine and beliefs espoused at affiliation and those held when the controversy arose.

The United States Supreme Court essentially adopted the English implied trust theory.[72] However, as church property disputes grew in number, courts increasingly became involved in strictly ecclesiastical disputes. Many states, California among them, departed from the rule that church assets were held in implied trust for the *mother church*, and adopted a rule that, in the absence of an

69. *See* notes 70-73 *infra* and accompanying text.

70. 3 Eng. Rep. 601 (1813).

71. *See, e.g.*, Municipality of Ponce v. Roman Catholic Apostolic Church, 210 U.S. 296 (1908); Reid v. Barry, 93 Fla. 849, 112 So. 846 (1927); Blanc v. Alsbury, 63 Tex. 489 (1885).

72. Watson v. Jones, 80 U.S. (8 Wall) 679 (1872).

Produced by The Berkeley Electronic Press, 1981

express corporate charter provision to the contrary, church assets were held in implied trust for the *membership* of the individual congregations.[73] In the event of a dispute with the mother church, the majority of the local congregation would retain title and control of the assets.

These property dispute cases are the *only* instances where church assets have been found to be impressed with a trust restriction. Only for the limited purpose of deciding an *internal* church dispute do the courts resort to the legal fiction of an implied trust and it is used solely for the purpose of divining the intent of some hypothetical donor. Thus, it is evident that this type of implied trust cannot be deemed charitable or public for at least three reasons. First, it is a dispute of a distinctly *private* character, the kind of ecclesiastical dispute the courts generally avoid. Second, the trust restriction to be imposed has nothing to do with benefiting the public. Third, the purpose of the trust is non benevolent. While it may be involved with religion, it asks that the church use its assets for the furtherance of one religious group or belief as against another. Neither the public nor the court would consider this a charitable aim or purpose. Any arguments in support of the public trust theory that rely on the implied trust doctrine are therefore without legal basis.

However, there is a second line of reasoning to support the public trust theory that does not refer to the implied trust doctrine at all. This argument is that churches are organized exclusively for religious and charitable purposes and churches exist for the benefit of the general public. Public trusts are exclusively for charitable purposes and for the benefit of the public. Therefore, churches should be deemed by the court to be charitable public trusts holding their assets in trust for the general public.

There are many difficulties here, the first being that the sense in which the term "charitable" is being used is not clear. Thus, churches are proved to be public only by definition. Just as it is clear that churches undeniably are charitable in one sense, they undeniably are not charitable in another. In law, the purposes of a corporation are determined by looking first to the corporate charter. It would be an odd church that did not list among its purposes the

73. Wheelock v. First Presbyterian Church of Los Angeles, 119 Cal. 477, 483, 51 P. 841, 844 (1897); Presbytery of Riverside v. Community Church of Palm Springs, 89 Cal. App. 3d 910, 152 Cal. Rptr. 854 (1979); Christian Church of Vacaville v. Crystal, 78 Cal. App. 1, 9, 247 P. 605, 608 (1926).

ministering to the spiritual needs of its members and congregants. This is most often the *primary* purpose of a church. In the legal world of corporate charters, it is always a purpose at least of equal importance with all others. The law is clear that an organization with just one substantial private purpose is not a charity or a charitable trust or "charitable" in the complete legal sense of conducting a benevolent purpose exclusively for the benefit of the public. Numerous cases involving lodges, fraternal organizations, mutual hospital societies, and other mutual benefit societies make this certain.[74] To be deemed charitable for the purpose of the law of public trusts, the organization must have exclusively charitable, i.e. *exclusively public*, purposes. An organization that has mixed public and private purposes or any substantial private purpose is not considered a charity. Unless an organization is *obligated* by law or its own charter to benefit only the public, instead of being able to choose among its various corporate purposes, then no court of equity can enforce a trust for the benefit of the public because there is *none* to enforce. The fact is that the assets of a church are held beneficially by the corporation to do with as it pleases consistent with its corporate purposes. The church may legally limit its activities and the use of its assets to the private religious purposes of its members. Furthermore, common sense suggests that those who contribute to the collection plate would recognize this fact. Donors are fully aware that a church is not a public charity and that the general public will benefit only incidentally and secondarily from their donations. A charitable trust, like an express private trust, is created only if the settlor properly manifests an intention to create a trust.[75] The donor's intent to benefit *only* the general public, which is the fundamental prerequisite for the impressing of a public trust, is absent when church members contribute to a church. Thus, churches are always "charitable" in that they are benevolent but never "charitable" in that they always have a substantial private aspect.

---

74. Lynch v. Spillman, 67 Cal. 2d 251, 431 P.2d 636, 62 Cal. Rptr. 12 (1967); In re Los Angeles County Pioneer Soc'y, 40 Cal. 2d 852, 257 P.2d 1 (1953); Pacific Home v. County of Los Angeles, 41 Cal. 2d 844, 264 P.2d 539 (1953); In re Allen's Estate, 17 Cal. App. 3d 401, 94 Cal. Rptr. 648 (1971); La Societe Francaise de Bienfaisance Mutuelle v. California Employment Comm'n, 56 Cal. App. 2d 534, 133 P.2d 47 (1943).
The precise framing of the rule is that a substantial private purpose, as opposed to an incidental private purpose, will destroy the charitable nature of an organization. The word "exclusive" therefore does have some flexibility in the law. However, if a church has any private purpose, it is certainly a substantial and not an incidental one. For purposes of argument, to say that an organization must be "primarily" public in order to be charitable would lead only to unnecessary confusion. Two-valued logic is here retained for the sake of simplified analysis.

75. SCOTT, *supra* note 54, at § 351.

If one is absolutely determined to make churches into public charities, it can be done simply by definition. By emphasizing that churches are "charitable" within the "legal" meaning given to the term, the private, selfish, non-public aspect of a church can be made to disappear. The question of whether or not the *only* intended recipients of a church's benevolence are the public successfully has been begged. The issue in question has been assumed to be true for the purpose of proving it to be true. This is exactly what the probate courts did for many years in a line of "pseudo-mortmain" cases.

There were formerly on the books in California and other states a group of statutes akin to the old English mortmain laws which put certain conditions, restrictions, and limitations on bequests to charitable organizations. Briefly, the laws declared bequests to charity void if a will was drawn within thirty days of death by a testator survived by certain designated relatives. Where the will of such a testator was made thirty days or more prior to death, the charitable bequests were valid only to the extent that they collectively did not exceed one-third of the decedent's estate. The probate courts were asked to determine whether or not a bequest was "charitable" by deciding if the recipient was "charitable." Nothing crucial turned on these rulings except that, in a very limited number of instances, organizations deemed "charitable" would not receive an attempted bequest. The bequest would go to the donor's kin. Churches were not *treated* as public trusts and no public trust restrictions followed from these rulings. Churches have never been subject to the body of public trust law.

The express intent of the mortmain statutes was to limit the flow of lands and funds to the church and to charity to prevent such assets from losing their taxable character. The intent of the California statutes was to favor heirs-at-law as against excessive or unreasoned gifts to charity. Not surprisingly, many organizations, especially churches, were swept into the rubric of "charitability" *for the purpose of these statutes*. These musty relics of old law form the vast majority of cases on which the attorney general relies to prove that there is no difference between a church and a public charity.[76]

It was not necessary for the probate courts to accord churches "charitable" status in such a definitional fashion, since the result in those cases was probably correct and could have been reached in a

76. In re Lubin's Estate, 186 Cal. 326, 329, 199 P. 15, 16 (1921); In re Hamilton's Estate, 181 Cal. 758, 186 P. 587 (1919); In re Moore's Estate, 219 Cal. App. 2d 737, 33 Cal. Rptr. 427 (1963).

more logical manner. The evil the legislature sought to guard against was overzealous fundraising, especially at a time when the donor was *in extremis*. The most likely overreachers at such a time would probably be the moribund's religious brethren, and the legislature no doubt intended that churches be included in the statute. Indeed, the language of former Probate Code §41 (and its predecessor Civil Code §131) defeated bequests "to any charitable or benevolent society or corporation." The result of including churches could have been accomplished simply by insisting that churches were benevolent or had at least charitable purposes as well as private ones. Instead, the result was achieved by adopting a very lax standard or rule as to the public benefit requirement, similar to the rule in the case of express trusts for religious purposes.

Express trusts will fail and the assets go to the donor's heirs if there is no definite beneficiary to enforce the trust or if it violates the Rule Against Perpetuities—unless the trust can be upheld as charitable.

> A trust will not be upheld as charitable unless the accomplishment of the purposes of the trust is of benefit or supposed benefit to the community. . . . It is a question of degree whether the class is large enough to make the performance of the trust of sufficient benefit to the community so that it will be upheld as a charitable trust. If the purpose of the trust is to relieve poverty, promote education, advance religion or protect health, the class need not be as broad as it must be when the benefits to be conferred have no relation to any of these purposes.[77]

Thus, a trust may be a valid charitable trust for the advancement of religion even though the persons who are to benefit are limited in number.[78] The California formulation of this broad rule adopted by the probate courts was that a religious organization was to be deemed charitable so long as it was "not strictly private,"[79] or so long as its benefits were not expressly and solely limited to its immediate membership.[80]

This is not the rule when the assets of a corporation are impressed with a public trust. Then the strict rule is applied. To be

77. SCOTT, *supra* note 54, at § 375.
78. *Id.* at § 375.1.
79. In re Graham's Estate, 63 Cal. App. 41, 44, 218 P. 84, 85 (1923).
80. In re Lubin's Estate, 186 Cal. at 329, 199 P. at 16.

"charitable," the organization must be organized solely for charitable purposes. Its purposes must be strictly public or at least only collaterally or incidentally private.[81]

All of these cases do no more than support the proposition that churches are by law, always of some incidental benefit to the public or, in the alternative, have *a* public purpose. They cannot support the proposition that churches have exclusively public purposes or beneficiaries.

In *In re Estate of Lubin*,[82] the court begged the questions whether a church has a substantial private purpose and whether the public is the sole beneficiary of church assets by reaching the ambiguous conclusion that churches exist "for the public benefit." The court commenced by defining a small Jewish congregation as charitable within the legal meaning of the term, giving no thought to the possibility that it was shifting the definition of the term. It applied the broad rule whereby to avoid "charitability," an organization would have to limit its benefits strictly to its membership. It then examined the synagogue's articles and concluded that the organization existed for the benefit of "all of like faith," a class large and indeterminate enough to constitute the public. In reaching that conclusion, the court simply ignored a cardinal rule of trusts that not every party who may benefit from the operation of a trust is to be regarded as a beneficiary. If the trust operates only incidentally to benefit a person, he is not a beneficiary and cannot enforce rights thereunder.[83] Thus, the organization was held to be a charity existing for the benefit of the incidental beneficiaries (the public) and the direct beneficiaries (the congregation) were simply ignored by lumping them with "all of like faith."

The California courts have dealt with these errors in a very practical and common sense way. The courts simply abandon any attempt to define categorically any given organization or class of organizations as "charitable." The courts now hold, quite pragmatically, that "[i]f used in a statute or legal instrument, the word ["charity"] must be defined in conformity with the purpose or intention of the lawmakers or the parties to the instrument."[84]

81. *See* note 70 *supra*.

82. 186 Cal. 326, ____, 199 P. 15, 16 (1921).

83. SCOTT, *supra* note 54, at § 126.

84. La Societe Francaise de Bienfaisance Mutuelle v. California Employment Comm'n, 56 Cal. App. 2d 534, 542, 543, 133 P.2d 47, 51 (1943) ("An institution may be declared 'charitable' for the purpose of a bequest or a tort action, but 'non-charitable' for the purpose of taxation"). The *Societe Francaise* court even went on to specifically limit the *Lubin* standard of what constitutes a public charity to the law of bequests.

Citing these cases to prove that a church exists for the benefit of the public closes a circle of argument. The probate courts used a definition of "charitable" that included the public nature of the beneficiary to prove that a church always has a public beneficiary. Under the public trust theory, these statements are used to prove that a church fulfills the full legal requirements of being "charitable" and having no private beneficiaries. In neither case were church charters examined to discover whether a substantial private purpose existed. The state can only assert that a church cannot have a private purpose *as a matter of law*. However, an organization can have no private purpose as a matter of law if, and only if, it is a public charity. An organization can only be a public charity if its stated purposes negate any substantial private interest, and the courts on which the state relies never posed this question to themselves in deciding whether churches were "charitable" or "for the public benefit". Ultimately, the state is trying to prove that an organization that is exclusively benevolent is *ipso facto* a public trust by definition.

A further proposition might be propounded by the state that church membership forms a class so large and indefinite that it is a public class. Therefore, an organization for the benefit of church members is a public organization. This argument has innumerable difficulties of a constitutional nature since it forms a prohibited religious class and then equates that class with the public. It also discriminates between churches and other groups, such as fraternal organizations and mutual benefit societies, on the basis of religion in violation of the equal protection clause.

Finally, the attorney general makes much of the necessity for his right to supervise churches and protect the public interest therein. This argument is based on the flawed assumption that the public's interest is a proprietary one, calling for the special enforcement remedies provided by classifying churches as charitable trusts. The public does have an interest in churches. However, that interest is indirect, incidental, and secondary, no more and no less than the public's interest in all other corporations and private associations. As such, it is adequately protected through the enforcement of the criminal law.

D. *The Tax Exemption Argument*

As the last independent justification for his position the attorney general argues that the people of the state should be deemed the beneficial owners of churches because churches are tax-exempt

Produced by The Berkeley Electronic Press, 1981

and therefore publicly supported. This contention assumes that a tax-exemption is a subsidy that gives the government some reciprocal right. This "tax expenditure" concept has enjoyed a certain vogue in recent years, but does not find legal support. The Supreme Court of the United States has responded directly to this argument by declaring "[t]he grant of tax-exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state."[85]

CONCLUSION

California's public trust theory is unsupported by statute, common law, or case law. Further, the premise of public ownership and control of the means of worship violates fundamental constitutional guarantees, primarily the first amendment guarantee of freedom of religion.

The California trial courts' acceptance of the public trust doctrine, as proposed by the attorney general, is based on a misperception of the characteristics of a church as a charitable organization. A public trust, enforceable by the attorney general, is both exclusively charitable and exclusively public. Although churches are exclusively charitable, in the sense of benevolence, they are not exclusively public, since one of their purposes is to benefit their members. Thus, by definition, churches are not public trusts.

However, regardless of attempts to justify the public trust doctrine by appeal to authority on related issues, it is clear that the state's incursion into the affairs of a church is a blatant violation of the Constitution that cannot withstand further judicial scrutiny.

---

85. Walz v. Tax Comm'n, 397 U.S. 664, 675 (1970).