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Church and State - Taxation of Religious Organizations - Benefits Granted by Federal and State Governments

Herbert H. Brown

Joseph J. Mahon Jr.

COMMENT

CHURCH AND STATE—TAXATION OF RELIGIOUS ORGANIZATIONS—BENEFITS GRANTED BY FEDERAL AND STATE GOVERNMENTS*

The principle of separation of church and state is well accepted as being basic to our American system of government. However, a more ancient concept in this system is the tax exempt status of certain property of religious organizations.[1] States have declared such property exempt since pre-Constitution times and the scheme of federal taxation has included similar exemptions despite the embodiment of the separation principle in the establishment clause of the first amendment.[2]

Although the constitutionality of such exemptions has never been judicially questioned,[3] Supreme Court pronouncements within the past fifteen years as to the nature of the concept of disestablishment[4] have stimulated discussion as to whether tax exemptions benefiting religious institutions are in conflict with this concept.[5] Other writers have questioned the policy rather than the constitutionality of granting tax exemptions to religious organizations citing economic and political consequences of such a policy.[6] With the increasing investigation by states in need of additional funds[7] into revenues lost because of tax exemptions in general, these problems of constitutionality and policy remain current. In order to promote a more adequate consideration of the issues involved, a survey

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1. PFEFFER, CHURCH, STATE AND FREEDOM, 183-84 (1953); STOKES, CHURCH AND STATE IN THE UNITED STATES 445-46 (1950).

2. U.S. CONST. amend. I. "Congress shall make no law respecting an establishment of religion. . . ."

3. No Supreme Court cases were found in which the constitutionality of tax exemptions for religious organizations were considered in light of the first amendment. In Lundberg v. County of Almeda, 46 Cal. 2d 644, 298 P.2d 1 (1956), *appeal dismissed sub nom.*, Heisey v. County of Almeda, 352 U.S. 224 (1956), Garrett Biblical Institute v. Elmhurst State Bank, 331 Ill. 308, 163 N.E. 1 (1928) and Griswold College v. State, 46 Iowa 275 (1877), the unconstitutionality of such exemptions was contended, but the contention was rejected by the courts.

4. For discussion of constitutionality see text accompanying notes 172-183 *infra*.

5. See PFEFFER, *op. cit. supra* note 1, at 188-90; III STOKES, *op. cit. supra* note 1, at 564-65; Paulsen, *Preferment of Religious Institutions in Tax and Labor Legislation*, 14 LAW & CONTEMP. PROB. 144 (1949).

6. See Christianity Today, Aug. 3, 1959, p. 7; Stimson, *Exemption of Churches from Taxation*, 18 TAXES 361 (1940).

7. In reply to a request by the writers for general information on exemptions, two of the states replying indicated that surveys into this area had been undertaken by them for the first time.

of relevant state and federal exemptions given religious institutions, and their economic effect, will be made and compared with exemptions given other charitable and educational organizations. Where possible, a basis or policy for the granting of such exemptions will be determined, and policy and constitutional arguments examined.

I.

EXEMPTIONS GRANTED BY THE STATES.

A state as a sovereign has the inherent power to tax and the power to grant exemptions from taxation. These powers exist apart from constitutions and, therefore, are exercisable without being expressly granted by the people.[8] However, the scope of the exercise of these powers by the legislature may be limited by the state constitution.[9]

The property tax, the oldest remaining and most direct form of taxation, is the most important state tax from a revenue standpoint.[10] Although the practice of the states has been to relinquish the property tax to local units of government,[11] the exemptions from this tax are set by the state legislatures or constitutions and most completely indicate the policy or basis a particular state has adopted in granting tax exemptions to non-profit organizations. In the instances where the exemptions from other state taxes do not follow the pattern of the property tax exemptions,[12] it is usually a matter of administrative expediency which prevails rather than a departure from the basic policy of the state toward these institutions.[13] In order that some degree of generalization and comparison among the states can be made, the property tax exemptions will be dealt with

8. See, State Tax Comm. v. Aldrich, 316 U.S. 174 (1942); Union Refrigerator Transit Co. v. Lynch, 18 Utah 378, 55 Pac. 639 (1898), *aff'd*, 177 U.S. 149 (1900).

9. See, *e.g.*, OHIO CONST. art. XII, § 2; PA. CONST. art. IX, § 1.

10. For example, in California, a state which has both a sales tax and a personal income tax, these being the most lucrative of the taxes adopted to compensate for the loss of property taxes, the revenue from property taxes amounts to 43.8% of the total revenue taken in from all taxes, and is twice as lucrative as the sales tax, the next most productive tax. THE CALIFORNIA CHAMBER OF COMMERCE, TAXES (California Industrial Research Series No. 2, 1956).

Deductions allowed in computing income and inheritance or estate taxes are not dealt with specifically, not only because of their relative unimportance from a revenue standpoint, but because there is no reason to believe that the basis, where such deductions are allowed, differs from the general state policy in granting tax exemptions.

11. THE INDIANA COMM. ON STATE TAX AND FINANCING POLICY, STAFF REPORT 1 (1959).

12. Thirty-three states currently have adopted sales taxes. *Id.* at 155. Of these, nine do not grant the usual charitable, educational and religious exemptions. *Id.* at 26.

13. For example, in Pennsylvania, a sales tax is imposed on purchasers of certain personal property which is collected by the retailer upon a sale to the consumer. In order that a church may take advantage of its exemption from this tax, it must secure a certificate of exemption from the state, a copy of which must be presented to the retailer on each purchase by the church. The retailer in turn must return the certificate to the state with his tax collections. It is evident that if a state did not grant an exemption because of the necessity for such a provision, the omission would seem to be an administrative convenience only, and the state could hardly be accused of varying from a policy indicated by its property tax exemptions.

primarily in attempting to determine the basis for granting exemptions to charitable, educational and religious organizations.[14]

In addition to the large number of state provisions granting exemptions from various taxes, as will be seen below, the generality of these provisions makes it necessary to arrive at policy bases so that groupings can be made. It is only in this way that the question can be answered of how and why such exemptions are granted to religious organizations.

A.

Need for Determination of a Basis.

The problem of determining whether or not particular property is exempt from taxation involves inquiries into both the character or purpose of the institution involved and also into the use to which the particular property is put. Although some states have specific provisions as to certain uses,[15] the problem of use requirements is usually left to the judiciary with seldom more as guides from the legislature than phrases such as "used exclusively for religious purposes," [16] "used wholly or in part for public charity," [17] or, "real property . . . necessary for occupancy and enjoyment. . . ." [18]

The provisions of the state statutes describing the necessary character or purpose of exempt non-profit organizations are generally worded in one of two different manners. One group exempts specifically defined property, for example, hospitals, cemeteries,[19] playgrounds, libraries,[20] property belonging to agricultural or horticultural societies, or houses used by officiating clergymen as dwellings.[21] The amount of litigation under these provisions is minimal, usually being concerned solely with the uses to which the land must be put to qualify rather than the nature of the exempt organizations.

The other group defines exempt property in more general terms, allowing a wide range of judicial interpretation. Such exemptions are granted to ". . . property owned by . . . institutions of purely public charity . . . ," [22] ". . . property used for scientific, educational, literary, historical, or charitable purposes . . . ," [23] and ". . . real property of corporations or associations organized for mental or moral improvement. . . ." [24] It is in this area that litigation has been heaviest. Here also the need is greatest for

14. For a survey treatment of religious exemptions from various state taxes see Note, 49 COLUMB. L. REV. 968 (1949).
15. See, *e.g.*, CONN. GEN. STAT. § 1763 (1949).
16. CAL. REV. AND TAX CODE § 214.
17. N.D. REV. CODE § 57-0208 (8) (1943).
18. PA. STAT. ANN. tit. 72, § 5020-204 (i) (Purdon 1950).
19. N.Y. TAX LAWS ch. 60, § 4 (6).
20. PA. STAT. ANN. tit. 72, § 5020-204 (j) (k) (Purdon 1950).
21. CONN. GEN. STAT. § 1761 (8) (13) (1949).
22. PA. STAT. ANN. tit. 72, § 5020-204 (i) (Purdon 1950).
23. CONN. GEN. STAT. § 1761 (7) (1949).
24. N.Y. TAX LAWS ch. 60, § 4 (8).

the determination of a basis upon which the legislature has granted the exemptions so that the courts may have a guide in interpreting which particular organizations were meant to be exempt.

Discounting such realistic determinants as lobbies and legislative preferences for certain objects of charity, two motives have been attributed to state legislatures in granting tax exemptions to non-profit organizations.[25] The exemption is justified either on the ground that the organization is assuming a *public burden* which the state would have to bear if the organization did not, or on the ground that *humanitarian* activities which the organization is performing should be encouraged. Theoretically, the "humanitarian" standard would be more liberal in granting exemptions than the "public burden" standard since organizations would be included which, though promoting public welfare, are not aimed at traditional objects of charity for which the state has been considered responsible.[26] Examples of such organizations might include bar associations, veterans' groups, and fraternal organizations.

The significance of the terms "public burden" or "humanitarian" should not be overemphasized. In most instances the terms refer to a general policy of a legislature and therefore the legislature of a state using the public burden test could grant, and has granted, tax exemptions to organizations whose goals are purely humanitarian.[27] Occasionally, however, the basis upon which tax exemptions may be granted is dictated by the state constitution and the legislature is limited thereby in the exemptions which it may grant. In *Missouri Pac. Hosp. Assn. v. Pulaski County*[28] the state constitution provided for tax exemptions on property used exclusively for public charity. It was held unconstitutional for the legislature to exempt non-profit hospitals operated solely for association members. In *Young Life Campaign v. Board of County Comm'rs*[29]

25. See Note, 64 HARV. L. REV. 288 (1950).

26. Some of the inconsistency among cases might be explained by a conflict as to what is the public burden of the state. For example, exemptions granted to hospitals have been stated to be upon a humanitarian basis. *Id.* at 289-90. However in a Kentucky case upholding a state grant to a hospital operated by a certain religious denomination it was stated that the burden of care for the sick, long borne by religious organizations, was now being borne by the federal and state governments. Kentucky Bldg. Comm. v. Effron, 310 Ky. 355, 220 S.W.2d 836, 838 (1949).

27. For example, Pennsylvania, pursuant to a specific constitutional allowance has granted tax exemptions to veterans organizations although the legislature is restricted by another constitutional provision to grant exemptions only to public charities. PA. CONST. art. IX, § 1; PA. STAT. ANN. tit. 72, § 5020-204 (h) (Purdon 1950).

28. 211 Ark. 9, 199 S.W.2d 329 (1947).

29. 134 Colo. 15, 300 P.2d 535 (1956); *accord*, Layman Foundation v. City of Louisville, 232 Ky. 259, 22 S.W.2d 622 (1929); *In re* Park College, 170 Okla. 107, 39 P.2d 105 (1934).

Although the Pennsylvania constitution appears to dictate a public burden policy, PA. CONST. art. IX, § 1, the Pennsylvania Superior Court recently held that Pennsylvania land owned by a New York charitable corporation used solely for the benefit of New York citizens was constitutionally exempt under Pennsylvania statutes. The court stated, obiter dictum, however, that under the constitution the legislature could have excluded such organizations. Appeal of Infant's Welfare League, 169 Pa. Super. 81, 82 A.2d 296 (1951). See 13 U. PITT. L. REV. 600 (disapproving of result since Pennsylvania tax exemptions are based on a public burden theory).

the Colorado Supreme Court also interpreted the state constitution as dictating the granting of exemptions only on a public burden basis. It held, therefore, that the Colorado land of a foreign charitable corporation used only to benefit foreign citizens was not tax exempt because the burden of the state was not relieved by the organization.

The following sections will attempt to determine, where possible, the basis that certain typical jurisdictions have used in granting tax exemptions to charitable, educational, and religious activities, charitable and educational being stated first because in those areas the bases are more clearly discernable and litigation more frequent. The exemption provisions of Pennsylvania and Connecticut will be given special consideration not only because of the importance of these jurisdictions but because their provisions tend to illustrate two discernable policies in granting tax exemptions. Where generalizations can be made other states will be classified according to these types.

B.

The Bases for Exempting Charitable and Educational Organizations from Taxation.

(a) Pennsylvania.

(i) *Charitable.* The Pennsylvania Supreme Court, in holding that a YMCA was not tax exempt as a charitable institution, stated that:

> "There are substantial reasons why institutions wholly devoted to public charity should be exempt from taxation, since one of the duties of government is to provide food and shelter for the poor. Any institution which by its charitable activities relieves the government of this burden is conferring a pecuniary benefit upon the body politic and in receiving exemption from taxation it is merely being given a 'quid pro quo' for its services in providing something which the government would have to provide." [30]

A review of the Pennsylvania constitution and statutes confirms the implication by this court that, in general, Pennsylvania grants tax exemptions on a public burden rather than a humanitarian basis.[31] Thus, in order for an organization to qualify for an exemption as "an institution of purely public charity" courts have held it must provide its services to traditional objects of public charity.[32] Under this theory bar associations,[33]

30. YMCA v. City of Philadelphia, 323 Pa. 401, 413, 187 Atl. 204, 210 (1936).

31. The Pennsylvania constitution restricts exemptions granted by the legislature to institutions of "purely public charity." PA. CONST. art. IX, § 1. Under this provision the legislature has exempted institutions of public charity, public playgrounds, public libraries, museums, and art galleries, and public parks. PA. STAT. ANN. tit. 72, § 5020-204 (Purdon 1950).

32. YMCA v. City of Philadelphia, 323 Pa. 401, 187 Atl. 204 (1936).

33. Pennsylvania Bar Assn. Endowment v. Robins, 69 Dauph. 181 (C.P. Pa. 1956).

bird sanctuaries,[34] masonic lodges,[35] and police and firemen's organizations[36] are not considered exempt from taxation as institutions of public charity.

Courts have found two further requirements implicit in the concept of public charity. The organization must provide its services free of charge or make merely nominal or negligible charges,[37] and must be open to the public in general and not confined to privileged persons.[38] With regard to the latter requirement, it has been held that giving a particular religious denomination a preference does not prevent the institution from being tax exempt, as long as a particular religious belief is not a prerequisite to enjoying the benefits.[39]

In Pennsylvania the former requirement is spoken of in terms of commercial activity. If the fee charged by the organization as compared to the total operating cost is large enough to consider the organization as engaging in commercial activity no exemption is granted even though the proceeds of the commercial activity are used for the charitable purposes of the organization. This was the holding of a 1936 Pennsylvania case which refused to exempt the dormitory facilities of a YMCA.[40] However, a more recent case has held the opposite, distinguishing the prior case on the ground that in the instant situation the fee charged was so small that the dormitories were being operated at a loss and, therefore, the YMCA was not engaged in commercial activity.[41] This case seems to strain the "negligible charge" requirement, if not by this holding, then by holding that a barbershop upon the premises which charged union rates was also exempt.

Ohio, a strict public burden jurisdiction,[42] seems to reject this treatment of the "negligible charge" requirement altogether since an Ohio case has held that where board was not given free to disabled veterans and their families the use of the property was not strictly charitable even though the rent charged was at cost or below cost.[43]

Once it has been decided that a particular organization qualifies under exemption provisions the question as to what use the property must be put to qualify for the exemption is usually left to the judiciary with few or no statutory guides. It is doubtful whether the classification of any state as one which has adopted a public burden or humanitarian test by

34. Hawk Mt. Sanctuary Assn. v. Board of Assessment, 50 Berks L.J. 12 (C.P. Pa. 1957).
35. Pennsylvania Bar Assn. Endowment v. Robins, 68 Dauph. 338, 347, *aff'd* 69 Dauph. 181 (C.P. Pa. 1956) (dictum).
36. Beedle v. Borough of Canonsburg, 84 Pa. D. & C. 181 (C.P. Wash. 1952).
37. YMCA v. City of Philadelphia, 323 Pa. 401, 187 Atl. 204 (1936).
38. Hastings v. Long, 11 Pa. Dist. 370 (C.P. Lanc. 1901).
39. White v. Smith, 189 Pa. 222, 42 Atl. 125 (1899); Burd Orphan Asylum v. School District of Upper Darby, 90 Pa. 21 (1879).
40. YMCA v. City of Philadelphia, 323 Pa. 401, 187 Pa. 204 (1936).
41. Appeal of YMCA of Pittsburgh, 383 Pa. 175, 117 A.2d 743 (1955).
42. See Note, 20 U. CINC. L. REV. 266 (1957).
43. Beerman Foundation v. Board of Tax Appeals, 152 Ohio St. 179, 87 N.E.2d 474 (1949).

looking at its statutory exemption provisions in general will be of any aid in answering problems in this area except in denoting a strict or liberal policy of the legislators of the jurisdiction.

Pennsylvania courts, although enjoined by statute to construe tax exemptions strictly,[44] have held recently that the clause "necessary to the enjoyment" meant reasonable and not absolute necessity and, therefore, the parking lot of a charitable organization is exempt from taxation.[45]

A much litigated question concerning use requirements of charitable organizations is whether residences owned by the organization and used by its officials are exempt under general charitable exemption provisions. In holding that property owned by a charitable organization for the residence of its director was not tax exempt under a provision worded "used wholly or in part for public charity," the Supreme Court of North Dakota stated that the general rule was that to be exempt the residence must have some direct and primary connection with the charitable activities, for example, by being necessary to the performance of the director's duties.[46] This rule is extended to similarly worded educational and religious exemption provisions and, therefore, where a college president lived far from campus,[47] and where a minister's residence was not used in performing his duties[48] the residences were not tax exempt.

(ii) *Educational.* The Pennsylvania legislature has exempted the property of universities, colleges, seminaries, academies, and associations or institutions of learning.[49] The Pennsylvania constitutional provisions specifying tax exemptions which the legislature may grant does not specifically include educational organizations.[50] Therefore, the specific exemptions granted by the legislature to such organizations must be constitutionally justified on the ground that such institutions are organizations of public charity. It is clear then that the basis for such exemption is a public burden policy and educational organizations must meet the same

44. PA. STAT. ANN. tit. 46, § 558 (5) (Purdon 1952). Some states have adopted liberal rules of construction where tax exemption of a charitable, educational or religious organization is involved. See, *e.g.*, New York Catholic Protectory v. City of New York, 175 Misc. 427, 428, 23 N.Y. Supp. 2d 789, 791 (Sup. Ct. 1940); Note, 29 ST. JOHN'S L. REV. 121, 123, n. 21 (1954).

45. Academy of Natural Sciences v. City of Philadelphia, 6 Pa. D. & C. 2d 145 (C.P. Phila. 1955).

46. Society for Crippled Children v. Murphy, 94 N.W.2d 343 (N.D. 1959). See Trustees of the Presbytery v. Board of Revision of Taxes, 5 Pa. D. & C. 2d 226 (C.P. Phila. 1955) (exemption granted where residence on premises was necessary).

47. Knox College v. Board of Review, 308 Ill. 160, 139 N.E. 56 (1923); President of Williams College v. Assessors of Williamstown, 167 Mass. 565, 46 N.E. 394 (1897). See also Freeport School District v. County of Armstrong, 162 Pa. Super. 237, 57 A.2d 692 (1948).

48. People *ex rel.* Thompson v. First Congregational Church, 232 Ill. 158, 83 N.E. 536 (1907). This rule of course can only apply where the statutory exemption refers to "religious purposes" and cannot apply where the exemption is granted to "places of worship." See Griswold College v. State, 46 Iowa 275 (1877). There is no need to resort to the rule where rectories and parsonages are specifically exempted by the statute. See, *e.g.*, CONN. GEN. STAT. § 1761 (13) (1949).

49. PA. STAT. ANN. tit. 72, § 5020-204 (c) (Purdon 1949).

50. PA. CONST. art. IX, § 1.

requirements as exempt charities.[51] Thus a private school for one special group is not exempt even though operated on a non-profit basis.[52] However, if the institution is operated on a non-profit basis it does not lose its exemption by giving preference to a particular religious denomination.[53]

Other states, for example Illinois, have exempted educational organizations upon a public burden basis even though the provisions to exempt property used for educational purposes are broadly worded.[54] Guided by this basis, courts have held not to be tax exempt highly specialized schools offering courses in electricity,[55] undertaking,[56] and fashions,[57] even though they were non-profit and were teaching courses which may be offered in public schools. It was reasoned that these highly specialized courses of study do not fit the general scheme of education and, therefore, the burden of the state is not relieved.

Once the organization has qualified as an exempt educational institution, the use requirements are fairly liberal even in public burden jurisdictions. Dormitories,[58] dining halls [59] and playgrounds[60] appurtenant to exempt schools are generally tax exempt. In Nebraska, farmland owned by an educational institution was within the statutory exemption of land used exclusively for educational purposes even though the farm produced income, since the farm also was used in the instruction of the students.[61]

(b) Connecticut.

(i) *Charitable.* The Connecticut legislature would appear to have adopted a policy of encouraging charitable organizations with general humanitarian goals in granting tax exemptions to such organizations. Exemptions from property tax include ". . . (7) property used for scientific, literary, [or] historical purposes, (8) property belonging to agricultural

51. *In re* Hill School, 370 Pa. 21, 87 A.2d 259 (1952); Northampton County v. Lafayette College, 128 Pa. 132, 18 Atl. 516 (1889).

52. *In re* Hill School, 370 Pa. 21, 87 A.2d 259, 261 (1952) (dictum).

53. Trustees of Academy v. Taylor, 150 Pa. 565, 25 Atl. 55 (1892); Dougherty v. Neidig, 27 Berks L.J. 99 (C.P. Pa. 1934).

The view taken by the Minnesota Supreme Court is that even private schools relieve the public burden and not only are such schools granted exemptions, but the statute is construed liberally so as to encourage the establishment of private educational institutions. Graphic Arts Educ. Foundation v. State, 240 Minn. 143, 59 N.W.2d 841, 845 (1953) (dictum).

54. Coyne Electrical School v. Paschen, 12 Ill. 2d 387, 146 N.E.2d 73 (1957).

55. *Ibid.*

56. Milward v. Paschen, 16 Ill. 2d 302, 157 N.E.2d 1 (1959).

57. Ray Schools-Chicago, Inc. v. Cummins, 12 Ill. 2d 376, 146 N.E.2d 42 (1957).

58. Yale Univ. v. Town of New Haven, 71 Conn. 316, 42 Atl. 87 (1899).

59. *Ibid.*

60. St. Bridget Convent Corp. v. Town of Milford, 87 Conn. 474, 88 Atl. 881 (1913). It should be noted that at this time Connecticut granted exemptions upon a public burden basis. See text accompanying note 72 *infra.*

61. Nebraska Conference Assn. v. County of Hall, 166 Neb. 588, 90 N.W.2d 50 (1958); *accord,* Downingtown Industrial School v. Chester County, 37 Pa. County Ct. 703 (C.P. Chest. 1910). But note that a farm supplying a charity with its food is not tax exempt as being "necessary." Convent of the Sisters, IHM v. County of Berks, 37 Berks L.J. 231 (C.P. Pa. 1944). See also Malad Second Ward Church v. State Tax Comm., 75 Ida. 162, 269 P.2d 1077 (1954) (concerning a farm of a religious organization).

or horticultural societies . . . , [and] (15) property of veterans organizations" [62] in addition to the normal general exemption of property used for charitable purposes.[63] Exemption from the excise tax on places of amusement includes organizations with even broader humanitarian goals, among which are societies for prevention of cruelty to children or animals, organizations maintaining orchestras, organizations maintaining community theatres, and grange, lodge, or fraternal organizations.[64] Despite this humanitarian policy, Connecticut by statute exempts only state-supported hospitals,[65] and therefore a private hospital was held to be taxable.[66]

The New York legislature also has been somewhat liberal in granting tax exemptions to charitable organizations and New York would probably be considered a humanitarian jurisdiction. Excerpts from N. Y. TAX LAWS, Consol. Laws, ch. 60, § 4 will illustrate. Exempted property includes: ". . . (6) real property of corporations or associations organized for moral or mental improvements, . . . charitable, benevolent, scientific, literary, bar association, library, patriotic [or] historical purposes . . . , (7) real property of incorporated associations of former or present volunteer firemen . . . , (9) real property of agricultural societies . . . , (15) real property of war veterans groups. . . ." That exemptions in New York are more broadly based than upon a public burden theory is confirmed by a judicial statement that "the basis for tax exemptions in New York is the performances of services which by settled public policy of the state are of such importance to justify or require tax exemptions." [67]

The California Supreme Court has indicated that tax exemptions to charitable organizations in California are also granted on a humanitarian basis. In holding that dormitory facilities for which a slight charge was paid were exempt as property "used exclusively for charitable purposes," the court distinguished a contrary Pennsylvania decision[68] on the ground that in Pennsylvania "the concept of charity is confined solely to the relief of the needy and destitute . . . rather than comprehending as well activities which are *humanitarian* in nature and rendered for the general improvement and betterment of mankind, though the recipients of such benefits may be able to pay at least in part thereof . . ." as is the case in California.[69]

62. CONN. GEN. STAT. § 1761 (7) (8) (15) (1949).
63. CONN. GEN. STAT. § 1761 (7) (1949).
64. CONN. GEN. STAT. § 2081 (1949).
65. CONN. GEN. STAT. § 1761 (14) (1949).
66. Institute of Living v. Town and City of Hartford, 133 Conn. 258, 50 A.2d 822 (1946). It is to be noted that although a jurisdiction may adopt a humanitarian policy in granting tax exemptions, this should be considered by the courts only in interpreting broad terms such as "charitable" or "benevolent." Note, 64 HARV. L. REV. 288 (1950). When the statutory exemption is specific the court must follow the statute even though it may appear restrictive. Masonic Bldg. Assn. v. Town of Stamford, 119 Conn. 53, 174 Atl. 301 (1934).
67. Williams Inst. Colored M.E. Church v. City of New York, 275 App. Div. 311, 89 N.Y. Supp. 2d 300, 302 (1949).
68. YMCA v. City of Philadelphia, 323 Pa. 401, 187 Atl. 204 (1936).
69. YMCA v. Los Angeles County, 35 Cal. 2d 760, 221 P.2d 47, 52 (1950) (emphasis added).

Where the legislature has indicated a humanitarian basis for granting tax exemptions the term "charity" has been defined very broadly. In a Missouri case which exempted a housing authority as a charity it was stated that the term "embraces the improvement and happiness of man and . . . may be applied to almost anything that tends to promote the well doing and well being of social man" from both a physical and moral point of view.[70]

(ii) *Educational.* Previous to 1927 the Connecticut statute granted exemptions from taxation to property exclusively occupied as colleges, academies, churches, or public schoolhouses. It was stated in *Forman Schools, Inc. v. Town of Litchfield*[71] that at the root of this exemption was the concept of public education and public benefit — the performance by private persons of functions which otherwise would devolve upon the state or municipal government. Thus private schools, "calculated manifestly to interest only those who have the means and disposition to separate their children from public schools" were not exempt.[72]

In 1927 the exemption provisions of the statute were reworded to "real property of Connecticut corporations organized exclusively for educational purposes." This rephrasing was interpreted by the courts as dispensing with the requirement that the school should bear some portion of the public burden of education and private schools were thereby held to be exempt.[73] This interpretation has resulted in the property of the Daughters of the American Revolution and the League of Women Voters being considered as that of private educational institutions.[74]

As mentioned previously, use requirements set by the courts do not follow a public burden or humanitarian policy of the legislature but rather a strict or liberal policy of the courts. It is not inconsistent therefore with the humanitarian theory that Connecticut taxes teachers' quarters[75] whereas New York declares such property exempt as used for educational purposes.[76]

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70. Bader Realty & Inv. Co. v. St. Louis Housing Authority, 358 Mo. 747, 217 S.W.2d 489, 492 (1949).

71. 134 Conn. 1, 54 A.2d 710 (1947).

72. Brunswick School v. Greenwich, 88 Conn. 241, 90 Atl. 801 (1914). See also, Pomfret School v. Pomfret, 105 Conn. 456, 136 Atl. 88 (1927).

73. Forman Schools, Inc. v. Town of Litchfield, 134 Conn. 1, 54 A.2d 710 (1947). *But see,* Institute of Living v. Town and City of Hartford, 133 Conn. 258, 50 A.2d 822 (1946) where a private hospital was held not tax exempt. However hospitals do not come under the general charitable exemption but are granted a specific exemption which requires that in order to qualify for the exemption they be state supported. CONN. GEN. STAT. § 1761 (14) (1949). The apparent inconsistency, therefore, is not the work of the court but of the legislature.

74. TAX COMM. OF CONN., QUADRENIAL STATEMENT OF REAL ESTATE EXEMPTED FROM TAXATION 7 (1954).

75. New Canaan Country School, Inc. v. Town of New Canaan, 188 Conn. 347, 84 A.2d 691 (1951); *accord,* Freeport School Dist. v. County of Armstrong, 162 Pa. Super. 237, 57 A.2d 692 (1948).

76. Pratt Institute v. Boyland, 16 Misc. 2d 58, 174 N.Y. Supp. 2d 112 (Sup. Ct. 1958) (against the general rule on residences; see text accompanying note 46 *supra*).

C.

The Bases for Exempting Religious Organizations from Taxation.

(a) Pennsylvania.

Fifteen state constitutions allow tax exemptions to be granted to religious organizations. Fifteen others are self executing and grant certain exemptions without the aid of legislation and are thereby immune from legislative withdrawal.[77] The constitution of Pennsylvania, which is among the former group, restricts the permissible religious exemptions to "places of worship." [78] However, an organization with a religious purpose is not precluded from qualifying for a tax exemption as a charitable or educational institution merely because of its religious purpose.[79] It is clear that when tax exemptions are granted, the exemptions are based upon the same policy as those granted to non-sectarian institutions, which would seem to be a public burden policy in Pennsylvania.

It is uniformly held in Pennsylvania and in Ohio, which is also a public burden jurisdiction[80] with religious exemptions limited to places of worship, that rectories and parsonages are not exempt,[81] the latter state specifically rejecting the contention that a charitable exemption should be granted to such property. Ohio also taxes seminaries[82] while in Pennsylvania they are specifically exempted by statute,[83] although the public burden requirements dictated by the constitution might seem somewhat strained thereby.[84] Massachusetts has recently exempted a seminary and a surrounding seventy-acre wooded area under the statutory exemption of "property of literary, benevolent, charitable and scientific institutions." [85] It could be argued that because of this broad provision, Massachusetts

77. Van Alstyne, *Tax Exemption of Church Property*, 20 OHIO ST. L. REV. 461 (1959). The states having no constitutional provisions have appropriate legislation and are said to have omitted constitutional provisions only because the institution of tax exemptions for religious organizations was so well established that none were needed. See also ZOLLMAN, AMERICAN CHURCH LAW 244-45 (1913); Note, 29 ST. JOHN'S L. REV. 121 (1954).

78. PA. CONST. art. IX, § 1. See Dougherty v. City of Philadelphia, 139 Pa. Super. 37, 11 A.2d 695 (1940); See also Malad Second Ward Church v. State Tax Comm., 75 Ida. 162, 269 P.2d 1077, 1079 (1954): "Churches . . . enjoy no inherent right of exemption from taxation; and their property is taxable except insofar as it is specifically exempt by constitutional provision or statutory enactment."

79. Appeal of West Indies Mission, 387 Pa. 534, 128 A.2d 773 (1957).

80. OHIO CONST. art. XII, § 2. See Note, 20 U. CINC. L. REV. 266 (1957).

81. Watterson v. Halliday, 77 Ohio St. 150, 82 N.E. 962 (1907); Beers v. Kemp, 10 Pa. D. & C. 97 (C.P. Monroe 1927).

82. Society of Precious Blood v. Board of Tax Appeals, 149 Ohio St. 62, 77 N.E.2d 459 (1948).

83. PA. STAT. ANN. tit. 72, § 5020-204 (c) (Purdon 1950).

84. See text accompanying note 51 *supra*.

85. Assessors of Dover v. Dominican Fathers Province, 334 Mass. 530, 137 N.E.2d 225 (1956). Note that educational uses are not included in these provisions. However courts have included them even though the courses offered by the institution are not strictly literary or scientific. *Ibid.*

grants exemptions on humanitarian grounds[86] and, therefore, the case is distinguishable from the Ohio case.

In developing use requirements, Pennsylvania courts have shown an extending rather than restricting policy of granting exemptions in this area, despite a statutory rule of strict construction by which the courts are bound.[87] Recent cases have held that a parking lot[88] and landscaped tract of land, not necessary for access, light or air, adjoining a church[89] were exempt from taxation as being reasonably necessary to the enjoyment of the property.

(b) Connecticut.

Connecticut has much broader religious exemption provisions than Pennsylvania, granting exemptions to ". . . (10) personal property of religious organizations devoted to religious or charitable uses . . . , (12) real property of religious organizations used as schools, parish houses, orphan asylums, homes for children, reformatories, and infirmaries. . . ." [90] Although specifically exempting these religious activities might possibly indicate that this was the state-approved extent into which religious organizations should enter the charitable area,[91] no reason appears why these exemptions are not granted upon the same basis as are exemptions to non-sectarian organizations performing the same functions, which would seem to be a humanitarian basis in Connecticut.

Other states express equally broad provisions in more general terms. California exempts property used exclusively for religious purposes.[92] Seminaries would seem clearly to come within this exemption and residences of religious personnel can be exempt if their residence upon the particular property is necessary to their religious activities, following the general rule mentioned above with regard to both charitable and educational uses.[93] Thus, in *Serra Retreat v. Los Angeles County*,[94] that portion of a retreat house used for priests' residences was held as being used for exclusively religious purposes where living on the premises was found necessary to conducting retreats.

86. The word "benevolent" has been interpreted as including an act dictated by kindness, good will, or a disposition to do good, the objects of which have no relation to the relief of the public burden. New England Theosophical Soc. v. Board of Assessors, 172 Mass. 60, 51 N.E. 456 (1898). See also Bangor v. Rising Virtue Lodge, 73 Me. 428 (1884) (holding that where "benevolent" is used with "charity" that it should be interpreted as a synonym thereof).

87. PA. STAT. ANN. tit. 46, § 558 (8) (5) (Purdon 1952).

88. Second Church of Christ Scientist v. City of Philadelphia, 189 Pa. Super. 579, 151 A.2d 860 (1959), *application for allocatur granted* (1959).

89. The Church Foundation v. City of Philadelphia, 3 Pa. D. & C. 2d 571 (C.P. Phila. 1951).

90. CONN. GEN. STAT. § 1761 (10) (12) (1949).

91. Note that scientific or literary purposes are not included in these sections although exempted generally in other sections. CONN. GEN. STAT. § 1761 (7) (14) (1949).

92. CAL. REV. AND TAX CODE § 214.

93. See text accompanying note 48 *supra*.

94. 35 Cal. 2d 755, 221 P.2d 59 (1950).

(c) Conclusion.

The bases upon which tax exemptions are granted for places of worship and other property of religious organizations not used for charitable or educational purposes has not been considered in the above sections. This is because authorities are as obscure as to the nature of the basis where the statute is restrictive as where the exemption is expressed in broader terms. The opinion has been expressed that the basis cannot be a public burden policy since it would be unconstitutional for the state to render the particular service which the religious organization performs and, therefore, the church cannot be assuming a public burden of the state.[95] However, if without the service which the church is performing for the community, the state would have to take other means to effect the same results, then tax exemptions for churches and places of worship could be rationalized on a public burden basis.[96] At least one early case takes this view. In *Barnes v. First Parish in Falmouth*[97] it was stated that:

> "The object of public religious instruction is to teach, and to enforce by suitable arguments the practice of a system of correct morals among the people; and to form and cultivate reasonable and just habits and manners, by which every man's person and property are protected from outrage, and his personal and social enjoyments promoted and multiplied. From these effects every man derives the most important benefits and whether he be or be not an auditor of any public teacher, he receives more solid and permanent advantages from this public instruction, than the administration of justice in courts of law can give him. The like objection may be made by any man to support of public schools if he have no family who attend. . . ." [98]

It might be pointed out that this case concerned taxation for the *support* of churches and therefore promulgated principles not now consistent with our federal and state constitutions. However, tax exemptions for churches originated before, and have continued since, the time this opinion was written and, since the later cases do not discuss a basis for the exemption, the earlier cases must be looked to.

A New York case contains language to the effect that the basis of tax exemptions for religious organizations is humanitarian (consistent with the general New York policy): "The policy of this state has been, from an early day, to encourage, foster, and protect corporate institutions of religious and literary character, because the religious, moral, and intellectual

95. Note, 64 HARV. L. REV. 288, 292 (1950).
96. Isn't it necessary to consider the Pennsylvania exemption for seminaries as being granted upon a public burden basis? See text accompanying notes 51 and 83 *supra*.
97. 6 Mass. 400 (1810).
98. *Id.* at 408. See also YMCA v. Douglas County, 60 Neb. 642 (1900) which also justified tax exemptions to religious institutions upon the relief of a public burden.

culture afforded by them were deemed, as they are in fact, beneficial to the public, necessary to the advancement of civilization, and the promotion of the welfare of society." [99]

The opinion of some writers in the field is that there is now no definite, identifiable basis — that tax exemption for religious organizations is merely an unquestioned practice of the states since "pre-separation" days.[100]

However, merely because tax exemptions for religious organizations began at a time when churches held a favored position, it is not to be assumed that these exemptions can be explained only as a special privilege from the state. The cases above show that where the basis was discussed it was equivalent to the policies used today to justify tax exemptions to non-sectarian charitable and educational organizations. As long as the humanitarian policy justifies exemptions to such organizations as drama schools,[101] women's clubs,[102] labor temples,[103] and temperance societies,[104] exemptions to churches seem at least similarly justifiable.[105]

II.

BENEFITS GRANTED BY THE FEDERAL GOVERNMENT.

While the federal government is prohibited from furnishing direct financial support to religious organizations,[106] it has not been precluded from aiding these organizations indirectly through the granting of benefits under the revenue laws. These indirect benefits take two forms: (1) the

99. People *ex rel.* Seminary of Our Lady of Angels v. Barber, 42 Hun. 27, 30 (Sup. Ct. N.Y. 1886), *aff'd mem.*, 106 N.Y. 669, 13 N.E. 436 (1887). See also Garrett Biblical Institute v. Elmhurst State Bank, 331 Ill. 308, 163 N.E. 1 (1928) (statute exempting church property was constitutional for the reason, *inter alia*, that the states in a Christian nation such as this should encourage religious establishments to build up the moral character and better impulses of the heart).

100. ZOLLMAN, AMERICAN CHURCH LAW § 343 (1933). See also I STOKES, CHURCH AND STATE IN THE UNITED STATES 445, 446 (1950).

101. Pasadena Playhouse Ass'n v. Los Angeles, 69 Cal. App. 2d 611, 159 P.2d 679 (1945).

102. WIS. STAT. § 70.11 (4) (1949).

103. WIS. STAT. § 70.11 (16) (1949).

104. American Issue Publishing Co. v. Evatt, 137 Ohio St. 264, 28 N.E.2d 613 (1940).

105. If exemptions to churches and other property used exclusively for religious purposes can be attributable only to a humanitarian policy, such exemptions might be considered a special privilege where the policy of the state was to grant tax exemptions only on a public burden theory.

But see Van Alstyne, *Tax Exemption of Church Property*, 20 OHIO ST. L.J. 461, 462 (1959) where the writer concludes that exemptions to charitable and educational organizations are only granted upon a public burden basis and, since religious exemptions cannot be granted upon such a basis, any "attempt to develop a theoretical rationale for the church exemption by analogy to other exemptions" would be necessarily defective.

106. "Congress shall make no law respecting an establishment of religion. . . ." U.S. CONST. amend. I, Everson v. Board of Educ., 330 U.S. 1 (1947). However, a hospital owned by members of a religious order and operated under the auspices of a particular church is not a religious organization so as to preclude the government from making payments to them in return for their furnishing treatment to the poor. Bradfield v. Roberts, 175 U.S. 291 (1899).

exemption of religious organizations or transactions involving them from the payment of taxes which otherwise would have been levied on their activities or transactions and (2) the stimulus given others to support religious organizations by making it financially advantageous to do so.

There follows a more detailed discussion of these benefits and a comparison with those given to charitable and educational organizations. Unlike the state exemptions, an analysis from the standpoint of basis is impracticable due to the lack of judicial and legislative material from which a basis can be discerned.

A.

The Exemptions.

(1) *Income Taxes — Corporate.*

A tax is imposed on the income of every corporation at the rate of 30 per cent on the first $25,000 of income and 52 per cent on all income in excess thereof.[107] Under section 501 of the Internal Revenue Code of 1954 "corporations, and any community chest fund, or foundation organized and operated exclusively for religious . . . purposes" [108] are exempt from taxation on their income.[109] However, this exemption will not be granted if any part of the organization's net earnings inures to the financial benefit of any individual, if the organization devotes a substantial part of its activities to an attempt to influence legislation, or if the organization becomes involved in any political campaign on behalf of any candidate for public office.[110]

The exemption granted to religious organizations also extends to corporations organized exclusively to hold title to property and who turn over to a religious organization the net income received from the property.[111] On the other hand, an organization operated primarily for the purpose of carrying on a trade or business for profit shall not be exempt on the ground that all of its profits are payable to a religious organization.[112] Similarly, religious organizations, other than a church, a convention or an association of churches, are subject to a tax on that part of their income which is derived from a regularly conducted business, the operation of which has no substantial relationship to the purposes of the organization other than to provide it with funds.[113] The term "church," as used above, includes a religious organization or order which is an integral part of a church and which is engaged in carrying out the func-

107. INT. REV. CODE OF 1954, § 11.
108. INT. REV. CODE OF 1954, § 501(c)(3).
109. INT. REV. CODE OF 1954, § 501(a).
110. INT. REV. CODE OF 1954, § 501(c)(3).
111. INT. REV. CODE OF 1954, § 501(c)(2).
112. INT. REV. CODE OF 1954, § 502.
113. INT. REV. CODE OF 1954, §§ 511(a)(1) (imposes tax on unrelated business income), (a)(2)(A) (exempts churches), 513(a) (defines unrelated business income).

tions of a church such as the ministration of sacerdotal functions and the conduct of religious worship.[114]

With certain exceptions, the above mentioned exemption given to religious organizations[115] and the limitations thereon[116] are also applicable to "corporations, and any community chest, fund, or foundation, organized and operated exclusively for . . . charitable, . . . or educational purposes. . . ." [117] The first exception is that charitable and educational organizations are subject to the tax on unrelated income, having no exemption therefrom similar to that granted churches.[118] Thus a charitable organization which regularly conducts bingo games for fund raising purposes will be subject to a tax on income so derived[119] while under the same circumstances a church would not.[120]

Another exception is that certain charitable and educational organizations are subject to taxation if they engage in transactions which permit the persons forming or owning the corporation to use the organization's assets for their own advantage.[121] The organizations subject to this limitation on their exemption are, generally, those which are privately rather than publicly owned and supported.[122] These same "private organizations" can also lose their exemption if they accumulate an unreasonable amount of income or if their use of the income is not consistent with the purpose forming the basis upon which they were initially exempted.[123] This limitation on the exemption was enacted to prevent abuses in the use of the exemptions.[124] The reason that religious, public charitable, and public educational organizations are not subject to these limitations is that such organizations are less likely to engage in the type of activities which have incurred the censure of Congress.[125] The question naturally arises whether this is also the reason for the exemption from the tax on unrelated business income given to churches or whether that exemption can be taken as a general indication that the Church occupies a preferred position in the minds of the legislators.[126]

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114. Treas. Reg. § 1.511-2(a)(3) (1958). For the purposes of the code the Salvation Army is a church. See Salvation Army v. United States, 138 F. Supp. 914 (S.D. N.Y. 1956).
115. See notes 109, 111 *supra*, and accompanying text.
116. See notes 110, 112, 113 *supra*, and accompanying text.
117. INT. REV. CODE OF 1954, § 501(c)(3).
118. INT. REV. CODE OF 1954, § 511.
119. *Cf.* Rev. Rul. 59-330, 1959 INT. REV. BULL. No. 41, at 13.
120. INT. REV. CODE OF 1954, § 511(a)(2)(A).
121. INT. REV. CODE OF 1954, § 503.
122. INT. REV. CODE OF 1954, § 503(b).
123. INT. REV. CODE OF 1954, § 504.
124. S. Rep. No. 2375, 81st Cong., 2d Sess. (1950). See, for discussion of abuses, 98 U. PA. L. REV. 696 (1949).
125. S. Rep. No. 2375, 81st Cong., 2d Sess. 19, 38 (1950).
126. "The inference is strong that it intended churches to have the right to operate businesses without losing their exemption." Moore and Dohan, *Sales, Churches, and Monkeyshines,* 11 TAX. L. REV. 87 (1955). See also text accompanying note 170 *infra.*

(2) *Employment Taxes.*

Both the Federal Insurance Contributions Act (FICA)[127] and the Federal Unemployment Tax Act (FUTA)[128] subject employers to a tax based upon the amount of wages paid by them. The rate of the former tax is 2½ per cent while that of the latter is 3 per cent.[129]

Under the FICA, remuneration paid to a minister for services performed in the exercise of his ministry or to a member of a religious order for services performed in the exercise of duties required by such order need not be included in wages when computing the amount of the tax.[130] The same is true of remuneration paid for services performed in the employ of "tax exempt" religious, charitable and educational organizations.[131] These organizations may, upon concurrence of two-thirds of its employees, obtain a waiver of the exemption and place its employees under the protection of the FICA, thereby subjecting themselves to the tax.[132] Other organizations who, under section 501,[133] are considered to be tax exempt,[134] are granted only nominal relief from this tax — only remuneration of less than $50 per calendar quarter is exempt.[135] The exemptions granted under the FUTA are substantially the same[136] except that no provision is made for any waiver of the exemption.

(3) *Miscellaneous Taxes.*

(a) *Retailers excise tax.* A tax of 10 percent is imposed on the retail sales of jewelry and related items,[137] furs,[138] toilet preparations[139] and items such as luggage, hand bags and billfolds.[140]

Sales of jewelry used for religious purposes are exempt from this tax[141] as is the sale of any of the above mentioned items when made to certain educational organizations, *i.e.,* a regularly conducted school.[142] Other exemptions bestow a limited benefit on the blind,[143] the sick,[144] farmers,[145] and parents.[146]

127. INT. REV. CODE OF 1954, §§ 3101-3125.
128. INT. REV. CODE OF 1954, §§ 3301-3308.
129. INT. REV. CODE OF 1954, §§ 3111, 3301.
130. INT. REV. CODE OF 1954, § 3121(b)(8)(A).
131. INT. REV. CODE OF 1954, § 3121(b)(8)(B).
132. INT. REV. CODE OF 1954, § 3121(k)(1).
133. INT. REV. CODE OF 1954, § 501(c).
134. INT. REV. CODE OF 1954, § 501(a).
135. INT. REV. CODE OF 1954, § 312(6)(10)(A).
136. INT. REV. CODE OF 1954, § 3306(c)(8), (10)(A)(i).
137. INT. REV. CODE OF 1954, § 4001.
138. INT. REV. CODE OF 1954, § 4011.
139. INT. REV. CODE OF 1954, § 4021.
140. INT. REV. CODE OF 1954, § 4031.
141. INT. REV. CODE OF 1954, § 4003.
142. INT. REV. CODE OF 1954, § 4057.
143. INT. REV. CODE OF 1954, § 4003 (watches designed especially for use by the blind).
144. INT. REV. CODE OF 1954, § 4003 (surgical instruments).
145. INT. REV. CODE OF 1954, § 4041(d) (fuels).
146. INT. REV. CODE OF 1954, § 4022(a) (toilet preparations intended to be used or applied in the care of babies).

Insignia required to be worn by a church, brooches and pins which the religious organization buys to be given as awards for service in connection with the organization, and emblems or brooches which may be worn on ordinary civilian clothing but which identify the wearer as a soldier of the Salvation Army are all considered to be jewelry used for religious purposes. Crosses of different designs, and a brooch which reads "Jesus Saves" are not so considered since they have no "special relationship" to the particular church.[147]

Since there is no discernable difference between pins given as awards for service in a religious organization and pins given as awards for service in a charitable organization the exemption of the former and not the latter is certainly indicative of special treatment.[148] This treatment would seem to be based either on a desire to encourage religious organizations, they being considered more worthy than charitable organizations, or else on a reluctance to impose any tax which could even remotely be said to be a tax on the practice of religion. The latter theory seems more acceptable.

(b) *Manufacturers excise tax.* A tax generally ranging from 5 to 10 per cent of the sales price is levied on sales by manufacturers of motor vehicles, parts and accessories; gasoline and lubricating oil; refrigeration equipment; certain household appliances; and certain other items such as radio and television sets, phonographs, musical instruments, sporting goods, photographic equipment, firearms, business machines, lighters and matches, etc.[149] From among this list the sale of musical instruments to a religious organization for exclusively religious purposes is exempt from the tax.[150] While sales to non-profit, regularly conducted schools are exempt from the tax, regardless of the type of item purchased,[151] no exemption is given to charitable organizations.

(c) *Facilities and services.* The amount paid for admission to any place and all amounts paid for refreshment, service or merchandise at any cabaret or similar place furnishing a public performance for profit are subject to tax. The rate on the former is 1 cent for each 10 cents paid and the rate on the latter is 20 per cent.[152] Admissions for events other than athletic contests and motion picture exhibitions are exempt from this tax when a church, educational, or a charitable organization which is primarily supported by contributions from the public or the government

147. Salvation Army v. United States, 138 F. Supp. 914 (S.D. N.Y. 1956). Crucifixs, rosaries, chalices, etc., are presumed to be usable only for religious purposes.

148. Sales to charitable organizations of articles to be used as awards or prizes, when made by a wholesaler in wholesale quantities and at wholesale price levels, are not retail sales and thus are not taxable. *Cf.,* Torti v. United States, 249 F.2d 623 (7th Cir. 1957).

149. INT. REV. CODE OF 1954, §§ 4061-4226.

150. INT. REV. CODE OF 1954, § 4221(e)(3). See, for possible explanation of this exemption, note 171 *infra* and accompanying text. The statement therein quoted was instrumental in the enactment of this exemption.

151. INT. REV. CODE OF 1954, § 4221(a)(5).

152. INT. REV. CODE OF 1954, § 4231.

receives the benefit of the proceeds.[153] Educational institutions are also exempt from the tax placed on the use of communications and transportation facilities.[154]

(d) *Other taxes.* The tax which is placed on wagers does not apply to bingo-type games or to drawings, the proceeds of which go to charitable, educational, religious, or other non-profit organizations.[155] Likewise, bowling alleys and pool tables when operated by and located on the premises of a non-profit organization are not taxed.[156]

B.

The Deductions.

Perhaps the most lucrative benefit the Internal Revenue Code extends to religious, charitable, and educational institutions is to be found in those provisions which allow a tax-paying entity to reduce the amount of income subject to tax by a portion, if not all, of its charitable contributions. Charitable contributions as defined by the code for this particular purpose are contributions to or for the use of those corporations, trusts, community funds, and foundations which were mentioned above as being exempt from the tax on corporate income.[157]

However, the amount which may be deducted is not unlimited. A corporation may only deduct it's charitable contribution up to 5 per cent of it's gross income;[158] an individual up to 20 per cent of his gross income.[159] An individual may also deduct, over and above the 20 per cent limitation, his contributions to churches, schools and hospitals to the extent that they do not exceed 10 per cent of his gross income.[160] An estate or trust may deduct its charitable contributions to the same extent that an individual could.[161] However, an estate or a trust of the type which is not required to distribute all of its income currently may deduct, without limitation, its charitable contributions and amounts permanently set aside to be used exclusively for charitable purposes when such are made pursuant to the terms of the instrument governing the estate or trust.[162] Unlimited deductions for charitable contributions are also allowed in the computation of the estate tax[163] and the gift tax.[164]

153. INT. REV. CODE OF 1954, § 4233(a)(1)(A) (i)-(iii).
154. INT. REV. CODE OF 1954, § 4294.
155. INT. REV. CODE OF 1954, § 4421(2).
156. INT. REV. CODE OF 1954, § 4473(3).
157. INT. REV. CODE OF 1954, § 170(c). See, for a discussion of the methods by which donors may profit by making charitable contributions, Merritt, *The Tax Incentives for Charitable Giving,* 36 TAXES 646 (1958).
158. INT. REV. CODE OF 1954, § 170(b)(2).
159. INT. REV. CODE OF 1954, § 170(b)(1)(B).
160. INT. REV. CODE OF 1954, § 170(b)(1)(A).
161. INT. REV. CODE OF 1954, § 641.
162. INT. REV. CODE OF 1954, § 642(c).
163. INT. REV. CODE OF 1954, § 2106(a)(2)(A)(ii).
164. INT. REV. CODE OF 1954, § 2522(a)(2).

In a survey taken by the National Council of Churches it was found that the contributions received by fifty-two Protestant and Eastern Orthodox churches in 1956 totalled $2,043,741,555.[165] There is no doubt that this amount would be significantly smaller were it not for the treatment given to charitable and religious contributions by the code.

C.

Lack of Federal Basis.

An examination of the code reveals no clear basis for the exemptions and other benefits given to religious organizations. The Tax Court in *Appeal of Unity School of Christianity*[166] said that Congress granted the exemption "in recognition of the benefit which the public derives." [167] The same statement has been made in construing the exemption given to charitable and educational organizations.[168] Thus it would seem, in the minds of the judiciary at least, Congress granted exemptions to religious organizations on the same basis that it granted exemptions to charitable and educational organizations.

Yet Congress has granted some special consideration to churches. Their exemption from the tax on unrelated business income is the best example.[169] The committee reports offer no reason or discussion of this show of favoritism. The record of the committee hearings reveals that while the question of favoritism was raised it was never answered.[170] Perhaps the answer lies in the fact that few congressmen would care to be in the position of "having found an opportunity favorably to report to the Senate a bill to relieve brewers of the Nation of an excise tax, but . . . no time to . . . relieve churches of excise taxes." [171]

Thus it would seem that the battle is won once a champion is found since black knights who would dare align themselves against such a worthwhile cause are few and far between.

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165. YEARBOOK OF AMERICAN CHURCHES 289 (Landis ed. 1959).
166. 4 B.T.A. 61 (1926).
167. *Id.* at 69.
168. Trinidad v. Sagrada Orden de Predicadores, 263 U.S. 578, 581 (1924).
169. INT. REV. CODE OF 1954, § 511(a)(2)(A).
170. S. Doc. No. 451, 81st Cong., 2d Sess. 38, 172, 173 (1950).
171. 94 CONG. REC. 8745 (1948) (remarks of Senator Robertson). As a result of the Senator's efforts a bill to relieve brewers of certain excise taxes was amended to include a provision relieving churches from the excise tax on musical instruments. In turn this amendment served as armor against any further attempts to amend the bill since subsequent objections to the bill were met with: "I cannot believe any member will take the position that he wants to tax the church or to prevent the church from receiving the relief it seeks, by trying to place some other amendments on the bill." The erstwhile opponent could only answer with: "I do not agree to the bill at the present time, but I do want to relieve church organs from the imposition of further taxes. For that reason I am withdrawing my objection at this time. . . ." 94 CONG. REC. 8748 (1949) (remarks of Senators Robertson and Johnston).

III.

CRITICISMS.

A.

Constitutional Problems.

As noted above,[172] the inherent right of the sovereign to tax encompasses the power to grant exemptions. The exercise of this power is subject to a general limitation imposed by the Constitution that it must not be arbitrary or discriminatory.[173] However, when the exemption is directed toward religious organizations the question arises whether the first amendment imposes another limitation on the sovereign's power to tax. The argument is made that since the disestablishment clause of the first amendment prohibits the government from using public funds to aid religion, it should also preclude the government from aiding religion through the medium of tax exemptions, there being "no practical difference between making appropriations and failing to send a tax bill. In either event the church is given aid by the state." [174] While this distinction between direct and indirect aid may not be "practical" it, nevertheless, may be legally valid.

According to the Supreme Court, the disestablishment clause of the first amendment reflects the philosophy that the church and state must be separated.[175] However, the question as to what is meant by "separation" remains.

In the case of *Everson v. Board of Educ.*[176] the Supreme Court defined the doctrine of separation as meaning: "Neither a state nor the federal government can . . . pass laws which aid one religion, aid all religions or prefer one religion over another. . . . No tax, in any amount, large or small, can be levied to support any religious activities or institutions. . . . New Jersey cannot . . . contribute tax raised funds to the support of any institution which teaches the tenets and faith of any church." However, the Court also said that the first amendment does not require the state to become an adversary of the church but rather only to be neutral in its relations with groups of religious believers and non-believers. The Court reaffirmed this position in *People ex rel. McCollum v. Illinois*[177] and reiterated "that the first amendment has erected a wall which must be kept high and impregnable."

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172. See text accompanying note 8 *supra*.
173. ROTTSCHAEFER, CONSTITUTIONAL LAW 674 (1939).
174. Paulsen, *Preferment of Religious Institutions in Tax and Labor Legislation*, 14 LAW & CONTEMP. PROB. 144, 147 (1949).
175. Zorach v. Clausen, 343 U.S. 306 (1952); People *ex rel.* McCollum v. Illinois, 333 U.S. 203 (1948).
176. 330 U.S. 1 (1947).
177. 333 U.S. 203 (1948).

As a result of the language used in these two cases some commentators have concluded that tax exemptions violate the first amendment.[178] However, it should be noted that the *Everson* case, in spite of the language therein, did condone a state practice which indirectly aided religion when it upheld a New Jersey statute which authorized the reimbursement of parents for money they spent on bus fares to send their children to Catholic parochial schools.[179] Apparently the interest of the state in helping parents get their children safely and expeditiously to school outweighs any argument that such indirect aid was contrary to the principle of disestablishment.

In the *McCollum* case a released time statute was struck down, the Court holding that the principle of disestablishment was violated by the use of tax supported public school buildings for the dissemination of religious doctrine and, in addition, by the invaluable aid allowed sectarian groups through the use of the state's compulsory public school machinery to provide pupils for their religious classes. It should be noted that no counterbalancing economic benefit to the state was present in this case.

Five years later, the Supreme Court in *Zorach v. Clausen*[180] upheld a released time program on the grounds that the mere adjustment by public schools of their curricula to accommodate the religious needs of the students was not violative of the separation doctrine. This case can be rationalized with the two former cases as representing a situation where although the public received no direct benefits from the practice sustained as were present in *Everson,* the state, on the other hand, rendered only minimal aid to religion as contrasted with *McCollum.* However, the language of the *Zorach* case seems to represent a change in the definition of the separation doctrine. It is there pointed out that the principle, as enunciated in *Everson* and *McCollum,* if carried to its full implication would, among other things, *prohibit* the taxation of churches. The Court, however, rejects this as being an extreme view of the doctrine and states that while the doctrine would at least prohibit the financing by the state of churches, it does not require that in every and all respects there shall be a separation of church and state. Speaking for the majority, Mr. Justice Douglas stated that: "We are a religious people whose institutions presuppose a Supreme Being [and] when the state encourages religious instruction . . . it follows the best of our traditions." [181]

Thus, it can be said that the current definition of the disestablishment principle, while not precluding the removal of tax exemptions, does not require it unless it is interpreted as being the same as financing the

178. See PFEFFER, CHURCH, STATE & FREEDOM 190 (1953); Note, 49 COLUM. L. REV. 992 (1949); Note, 3 RUTGERS L. REV. 115 (1949).

179. Justice Jackson, in his dissent, seeing the inconsistency here, draws an analogy between the majority and ". . . Julia who, according to Byron's reports, 'whispering 'I will ne'er consent,' ——consented.'" 330 U.S. 1, 19 (1947).

180. 343 U.S. 306 (1952).

181. Zorach v. Clausen, 343 U.S. 306, 313-14 (1952).

churches. Since this problem "like many problems in constitutional law is one of degree," [182] the distinction between direct aid and tax exemptions may be valid. However, it seems unlikely that the Supreme Court will decide the question until economic necessities force it to do so.[183]

B.

Policy Considerations.

Constitutionality aside, a common criticism directed against the state's policy of granting tax exemptions to religious organizations is that it imposes an inequitable burden on non-church members,[184] and also upon church members when the per capita value of property owned by their sect is less than that of other sects. For example, the last reliable study revealed that the per capita value of church edifices owned by one major religious group was $39 while that of another was $162.[185] Certainly the removal of the exemption would to a degree benefit members of the former church.

The usual reply to this criticism is that while the direct benefits of the tax exemption may be enjoyed by a minority, the public as a whole receives an indirect benefit sufficient to justify the exemption.

Another criticism stems from the accumulation of church wealth and its relation to the economy. Dr. Eugene Carson Blake, Stated Clerk of the United Presbyterian Church and former president of the World Council of Churches, points out that ". . . it is not unreasonable to prophesy that, with reasonably prudent management, the churches ought to be able to control the whole economy of the nation within the predictable future." [186] Dr. Blake sees this situation as a danger to the church, in that a combination of an increasing dollar amount of tax exemptions coupled with the rising cost of government and a dissatisfaction with the present tax burden, both in amount and distribution will generate hostility toward the continuance of the exemption. Dr. Blake points out that, historically,

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182. *Id.* at 314.

183. See PFEFFER, *op. cit. supra* note 178, at 190.
Through procedural devices available to it the Court can avoid this question until it is ready to handle it. In *Doremus v. Board of Educ.*, 342 U.S. 429 (1952), a taxpayer objected to the use of his tax money for an alleged unconstitutional purpose. The Court never considered the constitutional objection since they held that a taxpayer's interest as such was not substantial enough to create a case or controversy and thereby give the Court appellate jurisdiction.
Recently an appeal from a California case, Lundberg v. County of Almeda, 46 Cal. 2d 644, 298 P.2d 1 (1956), upholding the constitutionality of tax exemptions to religious institutions, was dismissed for want of a substantial federal question, Heisey v. County of Almeda, 352 U.S. 224 (1956).

184. See Stimson, *The Exemption of Churches from Taxation,* 18 TAXES 361 (1940).

185. Calculations based on statistics contained in I BUREAU OF CENSUS, RELIGIOUS BODIES 92 (1936).

186. Christianity Today, Aug. 3, 1959, p. 7.

the removal of tax exemption has been preceded by strong anti-clerical feelings. He suggests that in the long run this situation might result in greater harm to the cause of religion than would the actual economic effect of the removal of the exemption.

It has also been argued that while the removal of the exemption would result in funds devoted to religious or educational purposes being diverted from the highest public use — the promotion of learning and virtue — to some lower public use, *"such removal would be expedient when too large an amount of property has been devoted to the superior use."* [187]

The importance of determining the extent to which tax exemptions have been granted to religious organizations can be seen from the above arguments. The available figure considered important in determining whether religious exemptions were increasing at a significant rate is the percentage that such exempt property comprises of the total tax exempt property.[188] Thus, in New York the significance of tax exempt religious property was considered minimal where the percentage of religious property to total tax exempt property remained between 8 and 10 per cent between 1940 and 1949, dropping from the figure of 11.7 per cent of 1917.[189] The same conclusion could be drawn from statistics on the Connecticut exemptions to "ecclesiastical societies." The figure has dropped from 13.2 per cent in 1941 to 11.5 per cent in 1949 to 10.1 per cent in 1953, the last year for which statistics are available.[190] In California, on the other hand, where statistics of publicly owned exempt land are not kept the percentage of religiously owned exempt property to total privately owned exempt property is increasing steadily, rising from 11.7[191] to 11.8[192] to 12.2[193] to 13.5[194] percent from 1953 to 1959.

However, if the percentage of total exemptions to the total taxable property in the state is also rising, the fact that the religious exemptions are maintaining a steady proportion within the total exemption group means that exempt religious property is also increasing. It is interesting to note that in nation-wide figures the value of new construction of religious buildings has risen from 474 million dollars in 1953 to 868 million dollars in 1957.[195] The percentage of exempt property to total taxable property should, therefore, be kept in mind also. Thus, in California the

187. Quote by C. W. Eliot appearing in PFEFFER, *op. cit. supra* note 178, at 186.

188. See Paulsen, *supra* note 174, at 155; Note, 29 ST. JOHN'S L. REV. 121, 128 (1954).

189. *Ibid.* The term "religious property" here more than likely refers only to churches.

190. TAX COMM. OF CONN., QUADRENIAL STATEMENT OF REAL ESTATE EXEMPTED FROM TAXATION 9 (1954).

191. CAL. STATE BD. OF EQUALIZATION, NUMBER AND ASSESSED VALUE OF EXEMPTIONS (1953).

192. *Id.* for the year 1957.

193. *Id.* for the year 1958.

194. *Id.* for the year 1959.

195. U.S. DEPT. OF COMMERCE, CONSTRUCTION VALUE AND COSTS (1958).

total dollar value of exempt churches in 1953[196] was lower than it was in Connecticut in the same year[197] despite the great difference in population between the two states since total exempt property in Connecticut comprises approximately 20 per cent of the total taxable property[198] while this figure in California is apparently somewhat less.[199]

Figures for other significant jurisdictions whose exemption provisions are discussed above were only received for the latest available year thus precluding the determination of any trend within the state. However a comparison with other states can be made. In Pennsylvania, *e.g.*, where exempt property comprises 19 per cent of the total taxable property, churches total 14 per cent of the exempt property.[200] In Ohio, where tax exemptions comprised 12 per cent of the total assessed property, exempt churches comprised 14.9 per cent of the exempt property.[201]

In New Jersey, a state which compiles no statistics as to religious tax exemptions, a study has been made by the Legislative Analyst of the Department of Education of the county assessment rolls for the years 1950 and 1956. Some conclusions of the study are worthy of mention here. Church owned property, though comprising a substantial percentage of the exemptions granted to eleemosynary institutions, was increasing at a rate lower than taxable property in general. This was in contrast to publicly owned exempt property. Religious property was found to be evenly distributed throughout the tax districts of the state also in contrast to publicly owned property which tended to be concentrated in a certain few tax districts. The study pointed out that such figures in general might be misleading because of the tendency of assessors to place a purely nominal valuation on all types of exempt property despite statutory requirements that it be valued on the same basis as taxable property. The conclusion of the study was that the field of tax exempt real property in New Jersey is one in which the information is meager and in which there is little interest. This is despite the importance of the tax exemption in New Jersey, a state in which property tax revenues are exceedingly important.

It should be noted that records of assessed value of exempt real property are not generally accumulated by the states. In reply to a request for information by the writers, at least eighteen of thirty-one of the states

196. CAL. STATE BD. OF EQUALIZATION, *supra* note 191.

197. TAX COMM. OF CONN., *supra* note 190, at 9.

198. *Id.* at 5.

199. See CAL. STATE BD. OF EQUALIZATION, Press Release Oct. 13, 1959. It should be pointed out that different assessment policies might prevent an accurate comparison of state figures, especially in absolute dollar values.

200. PA. TAX EQUALIZATION BOARD, TAX EXEMPT REAL PROPERTY 9 (1957).

201. Letter from Division of Research and Statistics, Dep't of Taxation of the state of Ohio.

replying reported such records were not kept by them. However some states are showing increased interest in the problem of tax exemptions. For example Pennsylvania has recently published its first study of tax exempt real property and such a study is now in process in Kentucky.

Even though the above statistics do not indicate that there has been a significant increase in church wealth, there seems to be an increased awareness by the states of the problems of tax revenues and tax exemptions in general.

Herbert H. Brown

Joseph J. Mahon, Jr.