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# CHARACTERIZATION IN RELIGIOUS PROPERTY TAX-EXEMPTION: WHAT IS RELIGION? — A SURVEY AND A PROPOSED DEFINITION AND APPROACH

*John R. Brancato**

## I. Introduction

One of the most common governmental practices among the states today is the exemption of church property from real property taxation. Indeed, throughout the history of America religious societies have been accorded this tax-free status.[1] Only recently, however, have the taxing authorities been looking askance at the practice. While the exemption is required or authorized by all the state constitutions and/or tax codes,[2] the local assessors and collectors are applying far stricter rules for qualification.

> Across the country, state and local taxing powers are putting the bite on many properties owned, operated or otherwise affiliated with churches . . . and other groups long considered exempt. As the costs of local government continue to soar, these attempts to wring cash from the previously untaxed seem certain to continue.[3]

Understandably, this crackdown is related largely to the rapid increase in recent years of both the number and magnitude of the church exemptions.[4] An increasing number of uncontroverted religious societies are taking advantage of the exemption through the acquisition of new property. Similarly, more and more borderline groups, claiming the magic status of "religion," are seeking to rid themselves of the property tax burden.[5] Clearly, strained relations and litigation seem to be indicated in the near future.[6]

In order to help characterize borderline groups, this article will survey the present scope and policy of the law of tax-exemption and focus on the determina-

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1 C. ZOLLMANN, AMERICAN CHURCH LAW 328-29 (1933).

2 For a collection of state constitutional and statutory provisions, see Van Alstyne, *Tax Exemption of Church Property*, 20 OHIO ST. L.J. 461, 464 nn. 15-23 (1959). Not included therein are the provisions of Alaska and Hawaii: ALASKA CONST. art. IX, § 4; HAWAII REV. LAWS § 128-18 (Supp. 1965).

3 Wall Street Journal, Nov. 16, 1966, at 1, col. 6. *See also*, M. LARSON, TAX-EXEMPT RELIGIOUS PROPERTY IN KEY AMERICAN CITIES 37-38 (1965).

4 In the latter part of 1964, Dr. Martin A. Larson was commissioned by Americans United to analyze the tax records of certain cities in order to discover facts concerning tax-exempt realty. He examined the records of Buffalo, Baltimore, Denver, and the District of Columbia. By extrapolation he estimated that all taxable property in the United States was worth about $850 billion and that $330 billion was tax-exempt. Of this, $79.5 billion worth of property was estimated to belong to churches. Transcript, CBS Reports, *The Business of Religion* 7a-8, Tuesday, June 18, 1968, 10:00 PM EDT. Other estimates of the value of tax-exempt church property run from $40 to $100 billion. *Id.* at 7a.

5 *See, e.g.*, note 83 *infra*.

6 While there is something less than a plethora of reported cases on the "twilight zone" religions in the property tax field, it is suspected that the great majority of controversies have heretofore been disposed of at the local administrative level.

tion of what activities and beliefs will and should be characterized as "religion" for purposes of the exemption laws. Once a workable definition has been established, a tool to aid in its use will be submitted.

Any attempt to define religion involves the processes of inclusion and exclusion with respect to borderline beliefs. Moreover, once it has been decided that a certain belief or activity constitutes religion generally, it is necessary to determine whether it constitutes religion for the purpose of tax-exemption, and, whether this distinction can or should be made. Generally, these processes will be limited at least by the United States Constitution.[7] This task, then, will involve, *inter alia*, the reconciliation of legislative intent with constitutional prescriptions and limitations.

## II. The Exemption Laws

The religious property tax-exemption laws in the United States are of various types.[8] Generally, they are based either on ownership or on use, or a combination of ownership and use. As might be guessed, "ownership" statutes merely require the property in question to be owned by a religious society in order to be tax-exempt.[9] "Use" statutes require the property to be used by the society, either exclusively[10] or primarily,[11] for religious worship or purposes.[12] The "hybrid" statutes require concurrent ownership and use by a religious society.[13]

The scope of these statutes and constitutional provisions vary. Some states limit the exemption to parsonages and church edifices only, while others exempt all property which would qualify under the general enabling acts. The latter commonly encompass all property used directly or indirectly for religious worship or purposes.[14]

In addition to religious property exemptions, there are "catch-all" exemptions for charitable, educational, benevolent, literary, and other similar types of

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7 Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . . U.S. CONST. amend. I.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, § 1.

8 *See* Van Alstyne, *supra* note 2, at 464.

9 *E.g.*, DEL. CODE ANN. tit. 9, § 8103 (Supp. 1966); MINN. STAT. ANN. § 272.02 (Supp. 1967); N.M. CONST. art. VIII, § 3. These laws are worded rather simply; *e.g.*, Minnesota's law provides:

All property described in this section to the extent herein limited shall be exempt from taxation:

. . .

(5) All churches, church property, and houses of worship . . . .

10 *E.g.*, CAL. CONST. art. XIII, § 1½ (West Supp. 1967); COLO. REV. STAT. ANN. § 137-1-3(6) (1963); N.J. STAT. ANN. § 54:4-3.6 (Supp. 1967); OHIO REV. CODE ANN. § 5709.07 (Page 1954).

11 *E.g.*, D.C. CODE ANN. § 47-801a(m) & (n) (1967).

12 Van Alstyne, *supra* note 2, at 464 suggests that the use of the term "purposes" intimates a broader exemption policy than does the use of the term "worship."

13 *E.g.*, CONN. GEN. STAT. ANN. §§ 12-81(13), 12-88 (1958); MASS. ANN. LAWS ch. 59, § 5 (Supp. 1967); MISS. CODE ANN. § 9697(d) (Supp. 1966); N.Y. REAL PROP. TAX § 4(20) (McKinney Supp. 1967); TENN. CODE ANN. § 67-502 (Supp. 1967).

14 For a survey of different properties, such as the church itself, the church land, tangible personalty, living quarters of clergy and personnel, see Van Alstyne, *supra* note 2 at 463-503.

property.[15] Under these, a group which is not characterized as a religion may receive an exemption. Qualifying for such an exemption, with the special problems it poses,[16] is beyond the scope of this article, which deals with qualifying only for a "religious" exemption.

## III. The Policy of the Exemption

Serious problems arise when a court attempts to define religion for any purpose.[17] However, that there is a practical necessity for the utilization of the definitional process is virtually axiomatic, especially in the tax-exemption area.

Given this need for a workable definition of religion in tax-exemption, there remains the necessity of examining the setting of the problem in order to gain a proper appreciation of certain influential factors. This section and the next consider the policy and justification of exempting religious societies from the property tax. Also considered are omnipresent constitutional matters under which the exemption operates.

Tax exemption of Christian churches originated in the Roman Empire under the first Christian Emperor, Constantine. Noted for his efforts in desecularization, Constantine decreed the exemption after his conversion to Christianity in the early fourth century.[18] Little is known about the practice from that time forward, except that it must have flourished and reached its zenith in the very early days of the Holy Roman Empire, when church and state were apparently merged in their entirety.[19]

In the New World, the English colonies granted exemptions to their own established churches. "Church property . . . was exempted [in the colonies] under the doctrine that it ceased to be under human control when it was devoted to God."[20]

After the formation of the United States and the adoption of the first amendment to the Constitution,[21] however, the nation was ostensibly committed to the separation of church and state, and the historical rationale of tax exemption was seemingly of no legitimate application.[22] Nevertheless, the practice con-

15 *Id.* at 496-97.

16 *E.g.*, plaintiff, a non-profit corporation that operated a rest home for the elderly sought an *ad valorem* exemption pursuant to FLA. CONST. art. 16, § 16. Its property was not held and used exclusively for either religious, scientific, municipal, educational, literary, or charitable purposes. Although it did not qualify as to any exemption singly, plaintiff argued that an exemption should be granted because it qualified under a combination of some of the exemptions. The Supreme Court of Florida affirmed the denial of the exemption:

> " 'Since taxation is the rule and exemption is the exception the Court is not inclined to enlarge by construction, nor implication something that neither the Legislature nor the framers of the [Florida] Constitution have not written in clear and definite terms.' "

Presbyterian Homes of the Synod v. City of Bradenton, 190 So. 2d 771, 772 (Fla. 1966). *See also*, Van Alstyne, *supra* note 2, at 499-503.

17 *See, e.g.*, Pfeffer, *Church and State: Something Less than Separation*, 19 U. CHI. L. REV. 1 (1951).

18 3 A. STOKES, CHURCH AND STATE IN THE UNITED STATES 419 (1950).

19 J. STRAYER, WESTERN EUROPE IN THE MIDDLE AGES 47-48 (1955).

20 Stimson, *The Exemption of Property from Taxation in the United States*, 18 MINN. L. REV. 411, 416 (1934).

21 See note 7 *supra*.

22 While the limitations of the first amendment did not apply to the states until the adoption and subsequent application of the fourteenth amendment, most states patterned their bills of rights after the provisions of the federal document.

tinued, and even flourished in the case of the Christian sects.[23]

Today, there are four generally recognized justifications for exempting property of religious institutions from taxation. The courts have looked to one or more of them to uphold the exemption practice as non-violative of the restrictions of the first amendment.[24] Generally, they can be phrased as follows:

> 1. If certain functions of the organization to be exempted were not provided by some private institution or organization, the ultimate burden of rendering them would fall upon the state.
> 2. The performance of these functions by these private groups actually increases the capacity of other property to pay taxes, and this exemption is no burden upon taxed property.
> 3. Being non-profit organizations, these groups possess no net income and therefore no capacity to pay taxes.[25]
> 4. The organizations or institutions are engaged in a service which is beneficial to the public in general or to some class thereof, and for purely humanitarian reasons the tax exemption should be allowed.

Of these four, the last is invoked most widely to support tax exemption of churches today. As Professor Stimson states:

> It should be recognized . . . that exemptions should not be granted merely because of custom or tradition. Their justification today clearly must rest upon the basis of the best interests of society as it now exists. This fact is recognized by the courts when they attempt to justify the exemption of church property, for instance, on the basis of moral influence rather than on tradition and custom. The influence of churches upon the character of various members of society is said to be sufficiently desirable to warrant the removal of church property from the tax roll. Religious societies devote their efforts and their property to the moral uplifting of society, in most cases seeking no pecuniary profit for themselves. Should not the government assist, to the extent of relieving them from the burden of taxation?[26]

It seems highly unlikely that this deeply entrenched practice will ever be discontinued. A recent poll shows very strong support among the public, Congress, and clergymen for exempting the land on which a house of worship stands, the house itself, and its contents.[27] There was also strong support for exempting

23 C. ZOLLMANN, AMERICAN CHURCH LAW 328-30 (1933).

24 While the United States Supreme Court has never passed on the constitutionality of the church exemption, it recently denied certiorari in a Maryland taxpayers' suit which contested the constitutionality of the practice. The Maryland Supreme Court, in upholding the exemption law, said the purpose and effect of the church exemption is secular since churches promote the general welfare of society. The benefit to religion was said to be merely incidental and unavoidable. *Murray v. Comptroller,* 241 Md. 383, 216 A.2d 897, 907, *cert. denied,* 385 U.S. 816 (1966).

25 P. TAYLOR, THE ECONOMICS OF PUBLIC FINANCE 336 (3d ed. 1961).

26 Stimson, *supra* note 20, at 422.

27 When asked by a CBS poll if these things should be taxed, 80% of the public, 89% of Congress, and 84% of the clergy answered in the negative. CBS Reports, *supra* note 4, at 11.

other non-commercial property of religious institutions such as schools and community houses.[28]

## IV. The Constitutional Perspective

No examination of the definitional process in tax exemption would be complete without a survey of the constitutional setting under which the exemption practice functions.[29]

At the outset, it is interesting to note that the framers of the Constitution probably did not intend to deprive the Christian religion of its high status in America, either directly or indirectly, by giving equal recognition to the non-Christian sects. This is stated in the lucid words of Mr. Justice Story:

> Probably at the time of the adoption of the Constitution, and of the amendment to it [the First Amendment] . . . the general, if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation if not universal indignation.
>
> . . . .
>
> The real object of the amendment was . . . to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give rise to a hierarchy the exclusive patronage of the national government.[30] [Footnote omitted.]

This proposition is merely academic for the purposes at hand, however, since it is widely recognized that the Constitution, to be workable, must be given interpretations geared to the times. "[T]he content of constitutional immunities is not constant, but varies from age to age."[31]

What is the present scope of the first amendment's "free exercise" and "establishment" clauses? While both clauses are made applicable to the states through incorporation by the fourteenth amendment,[32] the free exercise clause has generated a greater amount of litigation.[33]

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28 When asked if these things should be taxed, 65% of the public, 81% of the Congress, and 73% of the clergy answered in the negative. CBS Reports, *supra* note 4, at 12.

29 See the Constitutional provisions set out in note 7 *supra*.

30 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 663-64 (3d ed. 1858). This seems to be the general understanding of the early courts as well. No less a historical figure than New York's Chancellor Kent said in a blasphemy case:

> Nor are we bound . . . to punish at all, or to punish indiscriminately the like attacks upon the religion of *Mahomet* or of the grand *Lama* . . . we are a christian people, and the morality of the country is deeply ingrafted upon christianity, and not upon the doctrines or worships *of those imposters. People v. Ruggles,* 8 Johns R. 290, 295 (N.Y. 1811). (Emphasis added.)

31 B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 82-83 (1921). *Accord,*

> Whatever Jefferson or Madison would have thought . . . our use of the history of their time must limit itself to broad purposes, not specific practices. . . . It is *"a constitution* we are expounding," and our interpretation of the First Amendment must necessarily be responsive to the much more highly charged nature of religious questions in contemporary society. *School Dist. of Abington Township v. Schempp,* 374 U.S. 203, 241 (1962) (concurring opinion, Brennan, J.)

32 Cantwell v. Connecticut, 310 U.S. 296, 303 (1939). Although there were earlier incorporation cases, *Cantwell* is the most explicit and most widely-cited case on this proposition.

33 *See* Note, *Constitutionality of Tax Benefits Accorded Religion,* 49 COLUM. L. REV. 968 (1949).

Perhaps the most famous definitive statement on the free exercise clause was made by Mr. Justice Miller in one of the earliest cases arising under the first amendment. In *Watson v. Jones*[34] he stated:

> In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine . . . is unquestioned.[35]

It was soon recognized, of course, that this "freedom to believe" cannot always be coextensive with the "freedom to act." Although both freedoms are contemplated by the free exercise clause, the latter type can never be as absolute as the former. As Mr. Justice Field stated in upholding the convictions of certain Mormons for bigamy and polygamy: "However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation."[36]

The other face of the first amendment coin is the establishment clause, sometimes referred to as the "no-establishment" clause. Of the two clauses, it is doubtless the more significant with respect to tax-exemption of church property. The question here is: Do you establish a church when you accord it the exemption? To answer this question it is necessary to pin-point what exactly is forbidden when "an establishment of religion" is put beyond the pale of the government's power. The leading case on this issue is the controversial decision of *Everson v. Board of Education*.[37]

In this case the defendant, the township board of education, had authorized reimbursement to parents for money spent for transportation of their children to school on public busses. Some of the money allocated was to reimburse transportation costs of children attending Catholic parochial schools. Plaintiff brought a taxpayer's suit, challenging the validity of this action of the Board under the first and fourteenth amendments.[38] The Supreme Court found that this state action was analogous to police and fire protection for Catholic schools, and that it did not support these schools.[39] It found that the statute involved, as applied, did "no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."[40] In so holding, Mr. Justice Black, speaking for the five-four majority,

34 80 U.S. (13 Wall.) 679 (1872).
35 *Id.* at 728-29.
36 Davis v. Beason, 133 U.S. 333, 342-43 (1890). Some years earlier the constitutionality of an act of Congress which made illegal the Mormon religious practice of polygamy was sustained in the landmark case of *Reynolds v. United States,* 98 U.S. 145 (1878).
37 330 U.S. 1 (1947).
38 *Id.* at 3-5.
39 *Id.* at 17-18.
40 *Id.* at 18.

enunciated the "neutrality"[41] doctrine which some commentators have criticized as a basis for making agnosticism the state religion.[42] In the words of Mr. Justice Black:

> The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.[43]

This limitation involves two kinds of neutrality: that among religious sects themselves, and that between, generically speaking, religion and nonreligion. In light of this, can tax-exemption of religious sects really be unconstitutional? As pointed out,[44] the United States Supreme Court has never passed on this question, but the courts that have done so have rested its constitutionality on policy grounds, *i.e,* upholding it because of the public benefits conferred by religion on society.[45] There are two aspects to these public benefits: (1) Religion makes men obey the law more readily by instilling morality in them;[46] (2) religion carries on many activities that would otherwise have to be carried on by the state. In the most recent case on this subject, the Supreme Court of Maryland looked to the second aspect to uphold the constitutionality of the exemption. The court

41 *Id.*

42 The argument is: To hold that government must be neutral by not preferring religion over non-religion, is tantamount to suspending judgment on the question of God's existence, which in turn is equivalent to adopting agnosticism as the official state "religion," as the agnostic believes the existence of God to be unknowable. *See* Rice, *The Meaning of "Religion" in the School Prayer Cases,* 50 A.B.A.J. 1057 (1964), in which the author bases his conclusions more on cases interpretative of *Everson* than on *Everson* itself, *e.g., Torcaso v. Watkins,* 367 U.S. 488 (1961) and *School Dist. of Abington Township v. Schempp,* 374 U.S. 203 (1962).

The question, however, seems to be whether something can be inferred from the court's silence and neutrality, *i.e.,* whether "unknown or unknowable" *in law* is equivalent to "unknown or unknowable" *in fact or faith.* That the latter is not within the purview of the *Everson* line of decisions is affirmatively borne out in the opinion of the court in *Schempp,* where it was said, "We agree of course that the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.' " *School Dist. of Abington Township v. Schempp,* 374 U.S. 203, 225 (1962), quoting from *Zorach v. Clauson,* 343 U.S. 306, 314 (1952).

Perhaps the best answer to those critical of the neutrality doctrine was given by Mr. Justice Jackson in his own characteristic fashion: "It is possible to hold a faith with enough confidence to believe that what should be rendered to God does not need to be decided and collected by Caesar." *Zorach v. Clauson,* 343 U.S. 306, 324-25 (1952) (dissenting opinion).

43 Everson v. Bd. of Education, 330 U.S. 1, 15 (1947).

44 See note 24 *supra.*

45 *E.g.,* Lundberg v. County of Alameda, 46 Cal. 2d 644, 298 P.2d 1, *appeal dismissed sub nom.* Heisey v. County of Alameda, 352 U.S. 921 (1956); Murray v. Comptroller, 241 Md. 383, 216 A.2d 897, *cert. denied,* 385 U.S. 816 (1966); Gen. Fin. Corp. v. Archetto, 93 R.I. 392, 176 A.2d 73 (1961), *appeal dismissed,* 369 U.S. 423 (1962).

46 *Cf.*

> While charity and education may be said to be established in the policy of the state, an establishment of religion is expressly prohibited both in the federal constitution and in most if not all the state constitutions. The strictly religious features of church societies can therefore furnish no valid reason for this exemption. The only rational ground remaining on which it can be justified is the benefit accruing to the state through the influence exerted by the various churches on their members. The religious and moral culture afforded by these societies is deemed to be beneficial to the public, necessary to the advancement of civilization and the promotion of the welfare of society.

Zollmann, *Tax Exemptions of American Church Property,* 14 MICH. L. REV. 646, 646-47 (1916).

reasoned that "if the present purpose and effect of the exemption is primarily secular, and if those secular purposes could not reasonably be deemed achievable without an incidental benefit to religious organizations, the 'establishment' clause is not violated."[47]

In addition, the mere fact that tax-exemption of religious property is so widespread and traditional is some indication of its constitutionality. "Certainly, while the very universality of the practice of exempting church property from taxation may not be a conclusive test of its constitutionality, it certainly is a sound reason for courts to be extremely reluctant to take any steps to disturb such a practice."[48] (Emphasis omitted.)

Thus, what is important for present purposes is not whether the exemption of church property is unconstitutional. Rather, the need is to determine what constitutes religion under the neutrality doctrine.

## V. Traditional Definitions of Religion

Undoubtedly, the most famous of all definitions of religion was expounded by Mr. Chief Justice Hughes, dissenting in *United States v. MacIntosh:* "The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation."[49] This statement brings to the fore the essence of the traditional, customary, and classical concept of religion — a reverence for and obeisance to something higher than man, a quasi-personal supreme being or supernatural force.

This theistic theme has had prominence throughout the history of American jurisprudence.[50] An early New Hampshire case stated that "Religion, *in the strict sense of the word,* is a personal concern. It is a matter *between God and every one of his rational creatures.*"[51] (Emphasis added.) Other courts have said the same thing, but in a broader sense. For example, in *McMasters v. State*[52] an Oklahoma court said that

> 'religion' has reference to man's relation to Divinity; to reverence, worship, obedience, and submission to the mandates and precepts of *supernatural or superior beings.* In its broadest sense it includes all forms of belief in the existence of *superior beings,* exercising power over human beings by volition, imposing rules of conduct with future rewards and punishments.[53] [Emphasis added.]

47 Murray v. Comptroller, 241 Md. 383, 216 A.2d 897, 907, *cert. denied,* 385 U.S. 816 (1966).

48 Fellowship of Humanity v. County of Alameda, 153 Cal. App.2d 673, 315 P.2d 394, 408 (1957). *Cf.* Mr. Justice Holmes: "[I]f a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it." Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922).

49 283 U.S. 605, 633-34 (1931).

50 Jefferson, of course, invoked the aid of the "Creator" in the *Declaration of Independence.* Moreover, the preambles of all except six state constitutions contain references to "God," "Almighty God," the "Supreme Being," or the "Supreme Ruler of the Universe." 3 A. STOKES, *supra* note 16, at 567.

51 Muzzy v. Wilkins, Smith's N.H.R. 1, 11 (1803).

52 21 Okla. Crim. 318, 207 P. 566 (1922).

53 207 P. at 568. For an almost identical definition, see W. TORPEY, JUDICIAL DOCTRINES OF RELIGIOUS RIGHTS IN AMERICA 3 (1948).

A more explicit definition can be found in *Nikulnikoff v. Archbishop of the Russian Orthodox Greek Catholic Church,*[54] where a lower New York court succinctly stated the substance of the traditional definition as follows:

> Religion as generally accepted may be defined as a bond uniting man to God and a virtue whose purpose is to render God the worship due to Him as the source of all being and the principle of all government of things.[55]

An earlier United States case had said substantially the same thing: "The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."[56]

The foregoing definitions are termed "traditional" in that they all involve the time-honored conception of theism as the *sine qua non* of religion in America. As such, it can be said that tax exemption was granted to theistic sects only.

However, with the broadening of man's horizons in recent decades, a consequence largely of the increased emphasis on individual liberties, a dissatisfaction with traditionalism in the definitional process can be discerned. Moreover, although there is no question that theistic religious societies fall within the terms of the *Everson* neutrality doctrine,[57] serious equal protection, establishment, and free exercise questions would arise if the scope of that doctrine excluded all but the theistic sects.

## VI. Modern Definitions of Religion

In one of the earliest cases illustrating the dissatisfaction with the theistic definition, it was said:

> In its [religion's] primary sense (from *religare,* to rebind, to bind back), it imports, as applied to moral questions, only a recognition of a conscientious duty to recall and obey restraining principles of conduct. In such sense we suppose there is no atheist who will admit that he is without religion.[58]

An even earlier Pennsylvania case rendered a similar, but more simplified understanding of the concept: "[W]hat is *religion* but morality, with a sanction drawn from a future state of rewards and punishments?"[59]

These representative statements introduce a new perception and insight into religion — the willingness to characterize some non-theistic beliefs as religion. This is important. The great non-theistic oriental religions such as Buddhism,

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54 142 Misc. 894, 255 N.Y.S. 653 (Sup. Ct. 1932).

55 *Id.* at 901, 255 N.Y.S. at 663.

56 Davis v. Beason, 133 U.S. 333, 342 (1890). That these traditional "legal" definitions have reference to "non-legal reality" is borne out by the following dictionary passage: "[Religion is] . . . a personal awareness or conviction of the existence of a supreme being or of supernatural powers or influences controlling one's own, humanity's or all nature's destiny." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1918 (1961) (unabridged).

57 See text accompanying notes 37-43 *supra.*

58 Estate of Hinckley, 58 Cal. 457, 512 (1881). *See also, In re* Knight's Estate, 159 Pa. 500, 28 A. 303 (1894); *Ex parte* Jentzsch, 112 Cal. 468, 44 P. 803 (1896).

59 M'Allister v. Marshall, 6 Binn. 338, 350 (Pa. 1814).

Confucianism and Taoism have flourished for centuries, but their legal status in America has never been a potentially prominent issue until recent times.[60]

In the last analysis, the acceptance of non-theism as religion did not come without compulsion at the highest level. In the famous case of *Torcaso v. Watkins*,[61] a Maryland notary was denied his commission because he refused to declare a belief in God, as required by the Maryland Constitution. In holding this religious test unconstitutional, the court, speaking through Mr. Justice Black, said:

> [N]either a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion." Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, *and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.*[62] [Emphasis added.]

This passage is extremely important because it suggests that there is such a thing as religion "without God," and it does so on the constitutional level. As such, the case expands the neutrality doctrine discussed above.[63] *Everson* commanded neutrality between religions, and between religion and non-religion. Assuming that religion was strictly the legal province of theism at the time of *Everson*, that case would require neutrality between the different theistic sects on the one hand and between theistic sects and non-theistic sects on the other. But this latter type of neutrality was between religion and non-religion. *Torcaso* changes this by classifying (or requiring to be classified) some non-theistic sects as religion, thereby reordering the concepts *within* the neutrality doctrine.[64]

Because *Torcaso* does not explicitly hand down any test for determining what kind of non-theistic beliefs can qualify as religion, it is not definitive in the substantive sense. Indeed, nine years before *Torcaso*, Mr. Justice Black indirectly expressed his unwillingness to propose such a test on the constitutional level: "A state policy of aiding 'all religions' necessarily requires a governmental decision as to what constitutes 'a religion.' Thus is created a governmental power to hinder certain religious beliefs by denying their character as such."[65]

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60 *E.g.*, in 1965 there were 80 Buddhist churches in America, with a combined membership of 100,000 people. WORLD ALMANAC 148 (1967).

61 367 U.S. 488 (1961).

62 *Id.* at 495.

63 See text accompanying notes 37-43 *supra*.

64 Theoretically, there are now the following five types of neutrality (presupposing that all theistic sects will be classified as religion):

1. Between theistic sects and other theistic sects;
2. Between theistic sects non-theistic, religious sects;
3. Between non-theistic, religious sects and other non-theistic, religious sects;
4. Between theistic sects and non-theistic non-religious sects; and
5. Between non-theistic, religious sects and non-theistic, non-religious sects.

All of these types fall within the terms of the *Everson* case. The first three pertain to the neutrality between religions, and the latter two relate to neutrality between religion and non-religion. *Torcaso*, then, merely changes the internal scope of *Everson*, by requiring an inclusion of some forms of non-theism in the sphere of religion.

65 Zorach v. Clauson, 343 U.S. 306, 318 n.4 (1952) (dissenting opinion). The *Zorach* case is somewhat of an anomaly in modern church-state law. It involved a "released-time" statute which was upheld by the court. Mr. Justice Black, in dissent, criticized the decision as violating the religion—non-religion neutrality requirement. *Id.* The importance of the case for definitional purposes lies in the following statement of Mr. Justice Douglas, who

Some commentators maintain that anything is now possible, that *Torcaso* requires any bona fide belief to be given the legal status of religion, if the holder of the belief says it is religion.[66] The argument is that this proposition always was valid with respect to the free-exercise clause of the first amendment (subject, of course, to the belief/conduct distinction illustrated by *Davis v. Beason*[67]); and that *Torcaso* now makes it valid with respect to the establishment clause.

For purposes of tax-exemption, of course, the scope of the establishment clause is of primary concern. When some religious sects are the victims of discrimination by the law, a question of establishing the favorably treated sects, in violation of the neutrality doctrine, arises. This is not to de-emphasize too much the importance of the free exercise clause, however. An exclusion of a religious sect from the benefits of tax-exemption would almost certainly bring allegations of interference with the free exercise of that sect's religion.[68] More likely, however, such a case would be rested on the establishment clause and/or discrimination in violation of the fourteenth amendment's equal protection clause.

The question, then, seems to be: Are the scopes of the free exercise and establishment clauses coextensive? *Torcaso,* however, is like the oriental god that looks in all directions; it is no aid whatsoever in answering this question. Indeed, there even is doubt as to whether *Torcaso* is primarily a free exercise or an establishment case.

It was previously concluded that *Torcaso* merely extended the internal scope of the neutrality doctrine. As such the scopes of the two clauses are probably now coextensive. If non-theism can be regarded as religion, the establishment clause certainly steps up to the level of the free exercise clause. This is at least true on the plane of possibility, for *Torcaso* merely changed the *range* of definition, without delineating the *method* of making that definition. Thus, Mr. Justice Frankfurter could say one year later:

> Within the discriminating phraseology of the First Amendment, distinction has been drawn between cases raising "establishment" and "free exercise" questions. Any attempt to formulate a bright-line distinction is bound to founder. In view of the competition among religious creeds, whatever "establishes" one sect disadvantages another, and vice versa.[69]

The obvious and necessary answer to those who would dance the "*Torcaso* Panic" is that a definition of religion for tax-exemption purposes, while controlled by the restrictions of the Constitution, need not be exploited by those restrictions to the point of absurdity. In practice, if not theory, the distinction

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wrote the opinion for the divided court: "We are a religious people whose institutions presuppose a Supreme Being." *Id* at 313. Whatever the problems presented by that statement and the *Zorach* case in general, it seems that the *Torcaso* case limits *Zorach* to the peculiar facts under which it was decided.

66 *See e.g.,* Manning, *The Douglas Concept of God in Government,* 39 WASH. L. REV. 47, 66 (1964).

67 133 U.S. 333 (1890). *See* note 36, *supra,* and accompanying text.

68 Again, as to the *constitutionality* of the exemption practice, it was argued by two defendants who had been permitted to intervene in *Murray v. Comptroller,* 241 Md. 383, 216 A.2d 897, 908, *cert. denied,* 385 U.S. 816 (1966), that to tax churches for their property would be violative of the free exercise clause, but the Maryland Court rested its decision on other grounds. *See* note 24 *supra.*

69 McGowan v. Maryland, 366 U.S. 420, 463 (1961) (separate opinion, Frankfurter, J.).

in scope, if any, between the two clauses is not overly significant for the purposes at hand. No one would seriously argue that the characterizations given to beliefs by the holder of those beliefs can *alone* be soundly determinative of religion for valuable tax-exemptions. Indeed, most states grant the exemption only to those groups which are formally organized and open to the general public.[70] Moreover, a substantive definition is by its very nature limiting. For example, the following definition, which contemplates both theism and non-theism, would probably exclude more beliefs and activities than it would include: "Religions are *systems* of *belief, practice,* and *organization* which shape an *ethic* manifest in the *behavior* of their adherents."[71] (Emphasis added to "behavior.")

## VII. Constitutional Shortcomings of the Definitional Process

### A. The Ballard Limitation

In the last section it was seen that the fear instilled by the *Torcaso* requirement can be overcome by a judicious application of the limiting tool of definition. Thus, in the case of a non-theistic belief, questions of violations of the first and fourteenth amendments can be disposed of before they arise by depriving that belief of the "religion" label. That label is the *sine qua non* of falling within the purview of those amendments. But the use of such a process in the tax-exemption area has a serious shortcoming. It gives the government a tremendous weapon to exclude politically unfavored sects. One important limitation on such power is the case of *United States v. Ballard.*[72] The Ballards were proponents of the "I Am" movement. One of them maintained that he was a "divine messenger" who saw and spoke with Jesus Christ, and who could heal those afflicted with diseases and ailments. They were charged with using and conspiring to use the mails to defraud, in connection with their solicitation of funds under the above representations.[73]

At the trial the district court charged the jury that the truth or falsity of the representations was not at issue, but rather, the sole question for determination was whether the defendants held their beliefs honestly and in good faith.[74] Losing their case, the defendants appealed to the court of appeals, which reversed in a 2-1 decision, on the ground that the charge to the jury was improper, and that the truth or falsity of a belief was a competent question for jury determination.[75] The case was brought to the United States Supreme Court, which reversed the court of appeals and reinstated the charge of the trial judge. Speaking for a divided court, Mr. Justice Douglas said:

> It [freedom of religion] embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. Men may

70 See Fellowship of Humanity v. County of Alameda, 153 Cal. App.2d 673, 315 P.2d 394, 414 (1957) (dissenting opinion), where organization and openness are treated as general common law requirements.

71 A DICTIONARY OF THE SOCIAL SCIENCES 588 (J. Gould and W. Kolb eds. 1964).

72 322 U.S. 78 (1944), *rev'd on other grounds,* 329 U. S. 187 (1946).

73 *Id.* at 79-80.

74 *Id.* at 81-82.

75 138 F.2d 540, 545 (9th Cir. 1943).

> believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law.[76]

Thus, the government got its convictions because the Court wished to protect the defendants' freedom of religion! *Ballard,* of course, was a "free exercise" case, but its applicability to the definitional process is clear. Simply stated, the truth or falsity of the *content* of a belief is not a proper subject for governmental inquiry when that belief is prima facie *religious in nature.*[77] Using the term "prima facie religious in nature" seems to be the only way to explain the case without becoming entrapped in a vicious circle. If the proposition is limited to *religious* beliefs, there is no problem because the definitional process would be complete, and the full protection of the first and fourteenth amendments would follow. The question is not, however, whether a certain religion is deprived of its constitutional immunities, but whether a certain belief is religious so that it can be accorded these immunities.[78]

Applying the *Ballard* limitation to the tax-exemption area, whenever a borderline sect claims an exemption, if the government cannot examine the truth or falsity of the content of the belief, what can it do but accede to the claim? This clearly indicates a need for a new method of characterizing beliefs, for an auxiliary tool to be used in conjunction with a modern, substantive definition of religion.

B. The Non-Integrated Definition

Earlier it was seen that the exemption of church property from taxation is not unconstitutional,[79] even though this practice involves an indirect subsidy to religion. This proposition was grounded on the idea that churches perform certain services beneficial to society, services that should be encouraged by granting the exemption rather than discouraged by levying the tax. Difficulty arises, however, when a sect is classified as a religious society but is still not granted the exemption because it does not fall within the policy of the exemption, *i.e.,* when, in the government's judgment, the religion confers no public benefits.

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76 United States v. Ballard, 322 U.S. 78, 86-87 (1944), *rev'd on other grounds,* 329 U.S. 187 (1946).

77 A *belief* which is religious in nature should not be confused with *religion* itself. As used in this context, a belief is prima facie *religious in nature* when it is concerned with the ultimate significance of human existence, *i.e.,* when it fills the gap created by reason's inability to grasp man's relation to the universe.

> Religious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellow-men and to his universe — a sense common to men in the most primitive and in the most highly civilized societies. *United States v. Kauten,* 133 F.2d 703, 708 (2d Cir. 1943) (Hand, J.).

The belief may or may not constitute religion depending on whether the other elements of religion, if any, are satisfied. For an excellent in-depth discussion of the distinction between religion and a religious belief, see Rabin, *When is a Religious Belief Religious:* United States v. Seeger *and the Scope of Free Exercise,* 51 CORNELL L.Q. 231 (1966).

78 It is interesting to note that, although the value of the case is particularly great with respect to the characterizations to be given non-theistic beliefs, the Ballards were followers of a theistic creed.

79 *See* note 24 *supra.*

Perhaps the Black Muslims is or could be illustrative of such a sect. To deny that group the benefit of tax-exemption, however, would certainly raise serious constitutional questions. The tax authorities would probably be attacked with the triple-edged sword of the equal protection, establishment, and free exercise clauses.[80] However, the problem would be further complicated if an exemption is granted. Assuming the Black Muslims are not beneficial to society, their property would be tax-exempt only because it is religious property. Yet, the exemption cannot be given to religious-owned property solely because religion is religion without violating the neutrality doctrine which is so firmly embedded in modern Church-State law.[81] An exemption of religious property must promote the general welfare.

> A state cannot pass a law to aid one religion or all religions, but state action to promote the general welfare of society, apart from any religious considerations, is valid, even though religious interests may be indirectly benefitted. If the primary purpose of the state action is to promote religion, that action is in violation of the [First] Amendment, but if a statute furthers both secular and religious ends, an examination of the means used is necessary to determine whether the state could reasonably have attained the secular end by means which do not further the promotion of religion.[82]

This analytical look at the universal practice of exempting religious societies from property tax seemingly requires such practice to be held unconstitutional, regardless of how it is presently explained and justified. This is, however, a surface dilemma which can be avoided by a judicious application of the definitional process.

What is needed is an integrated definition of religion for the tax-exemption area — one that encompasses not only the substance of religion but also the policy for the exemption. Unless both of these elements are satisfied, a group should not be characterized as a "religious" group under the exemption statutes. Retaining the substantive part is indeed necessary to save the "religious" feature of the exemption, and it also serves to exclude nonreligious, philosophical groups from the benefits of tax-exemption. Incorporation of the "policy" element into the definition would favorably circumvent the constitutional compulsion which would otherwise have to include an "unconstitutional" group which does not promote the general welfare.

One wonders how the dilemma discussed above has avoided the courts for so long — or rather, how the courts have avoided the dilemma. Clearly, most legislatures have not even attempted to define religion in their exemption statutes. This monumental task has been left to the courts and the administrative agencies of tax collection. Whether these authorities have been using an integrated or a non-integrated definition is beyond the scope of this article. It is submitted, however, that in the interest of expressly reconciling legislative intent with constitutional requirements, further action is necessary. An integrated definition

80 Query whether the following applies: "Thrice is he arm'd that hath his quarrel just." W. SHAKESPEARE, II HENRY VI, act iii, sc. 2, l. 233. (T. Brooke ed. 1923).

81 *See* text accompanying notes 37-43 *supra.*

82 Murray v. Comptroller, 241 Md. 383, 216 A.2d 897, 906, *cert. denied,* 385 U.S. 816 (1966).

should either be added to each exemption statute or be expressly adopted by courts and tax agencies.[83]

## VIII. An Integrated Definition

In considering an integrated definition of religion, some of the things considered by the courts in characterizing various beliefs and activities for purposes of religious tax-exemptions will be examined. In this manner, the different elements of a proposed definition can be isolated and then synthesized.

In addition to the basic requirement of a moral belief which is prima facie religious in nature, the following elements of an integrated definition are proposed:

1.) Openness to the general public
2.) Organization or society[84]
3.) Tenets and rituals
4.) Psychological commitment
5.) Moral practice of promoting the welfare of society.

It was previously[85] suggested that there must be some form of organization in a religious sect, *i.e.*, a society or association of members. In *Mordecai F. Ham Evangelistic Association v. Matthews,*[86] an ordained Protestant minister sought a constitutional exemption[87] for his alleged parsonage. His primary activity was the radio broadcasting of extra-denominational Christian evangelistic messages and the publication of religious tracts. Reverend Ham's enterprise was incorporated as a religious institution[88] and his parsonage owned by the corporation, but the Kentucky court upheld the denial of the exemption on the ground that there was no religious "society" as required by the statute. The court conceded the existence of religious worship, but could not bring itself to characterize the radio audience as "members" of Reverend Ham's essentially one-man operation.

> In this case there is no question but what this appellant corporation and the Reverend Mr. Ham are engaged in religious activities. The spread

83 This argument, of course, is rested on the premise that religion does not ipso facto confer benefits. Throughout its history America has known several sects of dubious renown for promoting the general social welfare. The Cult of the Black Mass has long proved to be the antithesis of benevolence and compassion. More recently, the League of Spiritual Discovery, a group of people who use and advocate the use of psychedelic drugs indicated its intention to claim the religious tax exemption. Nashville Tennessean, Jan. 29, 1967, at 16, col. 2. It is extremely doubtful that the League will be successful in light of the affirmance of two convictions for illegal possession of marijuana against a pleaded defense of the free exercise clause of the first amendment. *Leary v. United States,* 383 F.2d 851 (5th Cir. 1967); *State v. Bullard,* 267 N.C. 599, 148 S.E.2d 565 (1966). For a discussion of these two cases, see Note, *Church-State: A Legal Survey—1966-68,* 43 NOTRE DAME LAWYER 684, 778-80 (1968).

84 Openness and organization are probably required on policy grounds, *i.e.*, that they, along with the more important element of moral practice, are generative of the public benefits on which the exemption practice is grounded.

85 *See* text accompanying note 70 *supra.*

86 300 Ky. 402, 189 S.W.2d 524 (1945).

87 KY. CONST. § 170.

88 KY. REV. STAT. ANN. § 273.020 (1963).

> of the Christian religion has been most pronounced during periods of fervent evangelism. But we are constrained to hold that the ownership is lacking the element of a "society." As observed by the chancellor: "We could hardly conceive of a society, as we understand it from the broader term existing without some time or another there is a getting together. The term society itself implies a getting together of its members, although it is true persons may worship God or even receive religious instructions without getting together." The many contributors and the audiences may be regarded as a kind of fellowship but not as a "society" within the meaning of the Constitution. There is no communion, no unity, no society. This is a one man organization; at least, as said by the chancellor, "Its whole operation is centered around one personality." He is not a pastor and the organization is not a church. He does not claim it to be. We are quite sure that the appellant nor the individual it represents, is the type of religious organization whose parsonage or residence of the minister is tax free. If the property should be held exempt under these circumstances, the decision would afford a facility or means for any individual engaged in religious service to escape payment of taxes on his residence.[89]

This case illustrates the possibility of engaging in religious worship without being considered a religion for purposes of tax-exemption.

It should be noted that the fact of incorporation under a religious corporation law is of little aid in determining whether an organization qualifies for a tax-exemption. The religious "society" or "church" has always been distinguished from the "corporation."[90] The former is said to encompass the belief which constitutes religion, while the latter is concerned with the temporal powers of the organization, such as the holding of record title, etc.[91]

Another previous suggestion was that, after a society has been established, it must be open to the general public.[92] This is implicit in the Connecticut court's treatment of a Masonic organization in *Masonic Building Association v. Stamford*.[93] Although it found that the Masonic organization was characterized

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89 Mordecai F. Ham Evangelistic Ass'n v. Matthews, 300 Ky. 402, 189 S.W.2d 524, 528 (1945). *See also* People v. Deutsche Evangelisch Lutherische Jehovah Gemeinde Ungeänderter Augsburgische Confession, 249 Ill. 132, 94 N.E. 162 (1911):

> While religion, in its broadest sense, includes all forms and phases of belief in the existence of superior beings capable of exercising power over the human race, yet in the common understanding and in its application to the people of this state it means the formal recognition of God *as members of societies and associations.* As applied to the uses of property, a religious purpose means a use of such property by a religious society or body of persons as a stated place for public worship . . . . *Id.* at 136-37, 94 N.E. at 164.

90 C. ZOLLMANN, AMERICAN CHURCH LAW 145 (1933); *but cf. In re* Long Island Church of Aphrodite, 172 Misc. 668, 14 N.Y.S.2d 762 (Sup. Ct. 1939), where the court first denied, then approved on further hearing, the issuance of a certificate of incorporation under the religious corporation law for a beauty worship sect. On the denial, the court said

> Aphrodite was the Greek goddesss of love, fruitfulness and beauty. However, she was deemed to possess other qualities, questionable in character, by reason of which there has come into our language the word "aphrodisia" and other like words indicating that the fame of the goddess is based on her alleged vices rather than her alleged virtues. Keeping in mind the right of the incorporators to freedom of religious belief, the justice is not required to give his approbation to a proposed religious corporation which might possibly tend to glorify qualities which are the very antithesis of religion. *Id.* at 669, 14 N.Y.S.2d at 762.

91 W. TORPEY, JUDICIAL DOCTRINES OF RELIGIOUS RIGHTS IN AMERICA 84 (1948).

92 *See* text accompanying note 70 *supra.*

93 119 Conn. 53, 174 A. 301 (1934).

by benevolence and charity and that it inculcated "in its members a spirit of worship of and reverence for the Deity,"[94] the court affirmed a denial of the exemption.[95] In so doing, the court stated:

> An organization which meets in secret, membership in which is dependent in part at least on social considerations and the ends of which are in part at least of a social nature, would not conform to . . . [the] standards [of qualification for the religious exemption]. . . .[96]

*In re Peace Haven*[97] suggests the necessity for tenets and rituals. The society involved was formed for the study of metaphysics. The property in question was a retreat house where members could gather for study, meditation, and relaxation. The court denied the exemption under an "ownership" statute,[98] finding Peace Haven to present all "the aspects of any ordinary country club, except that the members of the former are said to profess a common interest in metaphysics."[99] The court did, however, find the one characteristic clearly common to all religious groups: "It [the society] has no tenets, ritual, dogma or other characteristics of a religious organization except, possibly, the solicitation and receipt of funds."[100]

The psychological commitment element can be seen in *Washington Ethical Society v. District of Columbia*,[101] one of the first cases to recognize non-theism as religion for tax exemption purposes. The exemption was claimed under a use statute by the Ethical Culture Movement, a group concerned with ethics as the essence of religion. The members were free to believe in a supreme being if they wished, but were not required to do so; their beliefs went to the relation of man to the universe, in addition to the relation of man to man.[102] There was sufficient evidence to warrant the finding that the adherents of Ethical Culture

94 *Id.* at 56, 174 A. at 302.
95 In other jurisdictions exemptions have been granted to Masonic organizations under statutes worded more broadly than Connecticut's. *Id.* at 62-63, 174 A. at 304.
96 *Id.* at 61, 174 A. at 304.
97 175 Misc. 753, 25 N.Y.S.2d 974 (Sup. Ct. 1941).
98 At the time in question, the applicable statute was N.Y. TAX LAW § 4(6).
99 *In re* Peace Haven, 175 Misc. 753, 755, 25 N.Y.S.2d 974, 976 (Sup. Ct. 1941).
100 *Id.* at 755, 25 N.Y.S.2d at 977. Perhaps this characteristic should have been included in the basic elements of the above definition.
101 249 F.2d 127 (D.C. Cir. 1957).
102 Doctor David S. Muzzey, a leader in the Ethical Culture Movement, describes Ethical Culture in the following terms.

> Instead of positing a personal God, whose existence man can neither prove nor disprove, the ethical concept is founded on human experience. It is anthropocentric, not theocentric. Religion, for all the various definitions that have been given of it, must surely mean the devotion of man to the highest ideal that he can conceive. And that ideal is a community of spirits in which the latent moral potentialities of men shall have been elicited by their reciprocal endeavors to cultivate the best in their fellowmen. What ultimate reality is we do not know; but we have the faith that it expresses itself in the human world as the power which inspires in men moral purpose. D. MUZZEY, ETHICS AS A RELIGION 95 (1951)

> Thus the "God" that we love is not the figure on the great white throne, but the perfect pattern, envisioned by faith, of humanity as it should be, purged of the evil elements which retard its progress toward "the knowledge, love and practice of the right." *Id.*, at 98.

This description of ethics as religion was quoted by the United States Supreme Court in *United States v. Seeger*, 380 U.S. 163, 183 (1965).

were firmly and in good faith, committed to their movement as a religion.[103] The Court of Appeals for the District of Columbia considered the policy of the exemption and applied the religion label, declaring: that "also included in . . . [the definition of religion] is the idea of 'devotion to some principle; strict fidelity or faithfulness; conscientiousness, pious affecting or attachment.' "[104]

*Fellowship of Humanity v. County of Alameda,*[105] illustrating the element of a moral practice promoting the general welfare of society, is perhaps the greatest characterization case in the property tax-exemption area. Plaintiffs were also non-theists. They believed that man contained within himself infinite goodness and should direct that quality to his fellow man. The purpose of the Fellowship was

> "to establish and maintain a free fellowship for the study of human relationships from the viewpoint of religion, education and sociology; establishment and the propagation and nurture of the ideals of brotherhood of man, and without any distinctive creed or religious formula; . . . a further purpose of plaintiff . . . [was] to promote humanism by means of public meetings, lectures, programs, study classes, publishing and distributing literature and such other means as may be deemed practical for the dissemination of constructive and progressive thought."[106]

The California District Court of Appeal upheld the exemption under a statute requiring the property in question to be used "solely and exclusively for religious worship."[107] In a lengthy opinion, the court explored the nature of religion and, oddly enough, intimated that the humanist society was not engaged in religious worship in the strict, traditional sense.[108] The exemption was rested on policy grounds, *i.e.,* the benefits conferred on society by the Fellowship of Humanity were similar to those conferred by more orthodox religious groups.[109] In granting the exemption to a group whose activities were admittedly "nonreligious"[110] in a strict sense the court employed a functional approach in characterizing that group's activities.

## IX. The Functional Approach to Moral Beliefs

To satisfy the statute in *Fellowship* it was necessary for the court to apply the label of religion to what it considered a nonreligious group. To accomplish this the functional approach was employed. Under this tool of definition, a borderline sect is characterized as religion if its beliefs occupy the same position, or serve the same function, in the lives of its adherents as the beliefs of an accepted, orthodox religion occupy in the lives of its adherents, and if it

103 Washington Ethical Society v. District of Columbia, 249 F.2d 127, 128-29 (D.C. Cir. 1957).
104 *Id.* at 129.
105 153 Cal. App.2d 673, 315 P.2d 394 (1957).
106 315 P.2d at 398.
107 CAL. CONST. art. XIII, § 1½ (Supp. 1967).
108 Fellowship of Humanity v. County of Alameda, 153 Cal. App.2d 673, 315 P.2d 394, 400-01 (1957). It was carefully pointed out, however, that secular humanism is recognized as a religion by the Unitarians. 315 P.2d at 405.
109 315 P.2d at 409-10.
110 *Id.*

conducts itself in a way a traditional religious group conducts itself[111] *i.e.*, if it satisfies the above-mentioned elements of the substantive definition of religion. This is a factual inquiry, capable of being determined by triers of fact.[112] The content of the belief itself, however, is not a proper subject for inquiry.

> Under this test the belief or nonbelief in a Supreme Being is a false factor. The only way the state can determine the existence or nonexistence of "religious worship" is to approach the problem objectively. It is not permitted to test [the] validity of, or to compare beliefs. This simply means that "religion" fills a void that exists in the lives of most men. Regardless of why a particular belief suffices, as long as it serves this purpose, it must be accorded the same status of an orthodox religious belief. Of course, the belief cannot violate the laws or morals of the community, but subject to this limitation, the content of the belief is not a matter of governmental concern.[113]

Thus, the *Ballard* limitation[114] is an essential element of this approach.

The court found that the activities of the Fellowship were analogous to the activities, that they served the same place in the lives of its members, and that they occupied the same place in society as the activities of traditionally recognized churches.[115] Since the Fellowship was like a religion, the court felt constitutionally compelled by the neutrality doctrine to grant the exemption.

> If the words "religious worship" are given a narrow limited meaning, so as to require a belief in and adoration of a Supreme Being, then grave doubts would exist as to the constitutionality of the section. On the other hand, a definition which emphasizes the "non-religious" facets of the conduct of respondent will serve to sustain the constitutionality of the section. Our interpretation of the tax-exemption provision must be as broad as is reasonably necessary to uphold it. If we limit the exemption to those who advocate theism then it is quite possible that the Supreme Court of the United States may hold that such an interpretation encourages particular religious doctrines and practices and thus violates the division between church and state. Theism is a concept which is peculiar to religious theory and practice in the technical sense. *It is not a feature common to those advantages gained by the state and supportable by it, through the activities of private educational and charitable institutions.* The problem can be reduced to a simple formula. If the state cannot constitutionally subsidize religion under the First Amendment, then it cannot subsidize theism. If the state can constitutionally subsidize those functions of religious groups

111 *Id.* at 406.

112 *Cf.* United States v. Seeger, 380 U.S. 163, 185 (1965). In this case, in employing the functional approach in determining conscientious objector status, the Supreme Court stated:

> But we hasten to emphasize that while the "truth" of a belief is not open to question, there remains the significant question whether it is "truly held." This is the threshold question of sincerity which must be resolved in every case. It is, of course, a question of fact—a prime consideration to the validity of every claim for exemption as a conscientious objector.

113 Fellowship of Humanity v. County of Alameda, 153 Cal. App.2d 673, 315 P.2d 394, 406 (1957).

114 United States v. Ballard, 322 U.S. 78 (1943), *rev'd on other grounds*, 329 U.S. 187 (1946). See text accompanying notes 72-78, *supra*.

115 Fellowship of Humanity v. County of Alameda, 153 Cal. App.2d 673, 315 P.2d 394, 409 (1957).

> which are not related to "religion" in its narrow sense, then it must subsidize those nontheistic groups which perform the same functions. The First Amendment precludes a classification based on them.[116] [Emphasis added.]

It is submitted that the court, while correct in granting the exemption, should not have done so without labelling the Fellowship as a religion. This could raise a problem. There is no constitutional compulsion to grant an exemption to a non-religion despite the neutrality doctrine. True, it is necessary to justify the exemption practice on the public benefit theory, but that is merely one factor in our two element integrated definition: (1) a religion which (2) confers public benefits. Standing alone, the latter element should not be controlling. If it were — because of the equal protection clause of the fourteenth amendment — there could be no religious exemption at all, since any group conferring public benefits would be entitled to the same exemption as that afforded a church. Any such equal protection problem is avoided by characterizing a group that is afforded an exemption as a "religion" through employment of a modern definition of religion and the functional approach.

## X. Summary and Conclusion

Since certain religious property is exempted from the property taxes of all the states, it is necessary to determine what types of activity will be characterized as religion, so that these tax laws may be expeditiously administered.

To qualify as a "religion" in tax-exemption, the following substantive elements should be established:

> 1. Moral beliefs which are prima facie religious in nature.
> 2. A psychological commitment to those beliefs on the part of its members.
> 3. Tenets and rituals concerning those beliefs.
> 4. A moral practice manifest in the lives of the believers, resulting from that commitment.
> 5. A formal organization or "society" of the believers, which is nonsecret and open to the public.

This is an integrated definition which encompasses both the essence of religion and the policy underlying the practice of tax exemption, providing the element of "moral practice" is defined in terms of the public-benefit theory. The definition contemplates both theistic and nontheistic beliefs.

Whenever it is difficult to determine fairly whether all elements of the "model" definition have been established by a group claiming the exemption, it is necessary to complement this process with what can be termed the "functional approach." By this test, triers of fact ascertain whether the moral belief in question occupies a position in the lives of its adherents similar to the position occupied by the orthodox beliefs in the lives of orthodox believers. If these findings are

116 *Id.*

in the affirmative, the exemption should be allowed providing all the elements of the substantive definition can then be established.

This definition and approach should be helpful in characterizing new groups seeking property tax exemptions on the grounds that they are religions. On the one hand, a nontheistic group which benefits society could be granted an exemption without any difficulty; yet, on the other hand, a theistic group that does not promote the general welfare of society would not be granted a tax-exemption.