PROPERTY TAX EXEMPTIONS FOR THE NONTRADITIONAL CHURCH: HOW DO WE GRANT TAX EXEMPTIONS TO PLACES OF WORSHIP AND NOT AMUSEMENT PARKS?

SARAH A. LINDQUIST*

I. INTRODUCTION

Is "Disney" a religion? While this seems like a ridiculous, nonlegal question, it is arguably at the heart of an emerging issue in constitutional and tax law. In February 2001, The Holy Land Experience (the "Holy Land") opened its doors to the public in Orlando, Florida.[1] Shortly thereafter, what has been dubbed a "tax battle of biblical

* J.D., Florida State University College of Law, 2006; B.S., Finance, University of Florida, 2003. Very special thanks to my family for their continued guidance and support. Thanks to Professor Steve Gey for his helpful comments and feedback and to Scott Edwards and the rest of the *Law Review* staff for their efforts in preparing this Comment for publication. All errors are my own.

1. Jerry W. Jackson, *Tax Battle of Biblical Proportions Arises: Judgment Day Looms as Orange County and the Holy Land Park Collide over Its Status*, ORLANDO SENT., July 21, 2003, at CFB 14.

proportions"[2] began. According to many, the Holy Land is one of Orlando's numerous tourist attractions—a theme park with a religious theme.[3] According to others, it is akin to a church or museum, displaying biblical artifacts and reenacting biblical passages.[4] Those in favor of labeling the Holy Land a theme park point to the fact that it was designed by the same firm that created Universal Studios' Islands of Adventure,[5] charges approximately $30 for admission,[6] puts on theatrical shows,[7] and has restaurants and gift shops.[8] Those who characterize it as a church or museum point to the fact that it is owned and operated by the religious organization Zion's Hope, is designed to bring the "life-changing message of Jesus Christ" to all people, houses the United States' largest private collection of biblical texts and artifacts, and presents biblical reenactments.[9]

The distinction is significant. If the Holy Land is a church or museum, it is exempt from property taxation under the Florida Constitution and the *Florida Statutes*.[10] If it is a tourist attraction, it must pay taxes on its property, which is valued at more than $12.5 million.[11] Given this dichotomy, it is no surprise that the owners and operators of the Holy Land are among those who characterize it as a church or museum. The Orange County property appraiser, however, found that the Holy Land was a profit-making attraction and denied the owner's application for tax-exempt status.[12] The owners filed suit against the County, seeking to block collection.[13] Circuit Court Judge Cynthia Z. MacKinnon found that the Holy Land was a tax-exempt

---

2. *Id.*

3. *See, e.g.*, Zion's Hope, Inc. v. Donegan, Nos. 2002-CA-12146-0, 2003-CA-7898-0, 2004-CA-7574-0 (Fla. 9th Cir. Ct. July 5, 2005), *reprinted in State Taxes—Property Containing 'Biblical Museum' Held Entitled to Property Tax Exemption*, [2005] Daily Rep. for Executives (BNA) No. 134, at K-20 (July 14, 2005) [hereinafter *State Taxes*] (noting that the Orange County Property Appraiser considers the Holy Land Experience a tourist attraction); David Johnson, *God and Man in Orlando*, ENT. DESIGN, July 2001, at 25 (referring to the Holy Land Experience as "Orlando's newest theme destination"); Mark I. Pinsky, *Orlando's Holy Land: The Holy Land Experience, A $16 Million Religious-Themed Tourist Attraction, Will Open for Business Next Month*, ORLANDO SENT., Jan. 11, 2001, at A1; Mike Thomas, Op-Ed., *Heaven Help Us: It's Another Attraction*, ORLANDO SENT., Jan. 14, 2001, at B2.

4. *See, e.g.*, *Zion's Hope, Inc.*, No. 2002-CA-12146-0, *reprinted in State Taxes*, *supra* note 3 (noting that the owners of the Holy Land Experience litigation describe it as a "living biblical museum").

5. *See* Johnson, *supra* note 3, at 25; Thomas, *supra* note 3.

6. Mark Schlueb, *Holy Land Exempt from Property Tax*, ORLANDO SENT., July 12, 2005, at A1.

7. Thomas, *supra* note 3.

8. Johnson, *supra* note 3, at 25; Thomas, *supra* note 3.

9. *Zion's Hope, Inc.*, No. 2002-CA-12146-0, *reprinted in State Taxes*, *supra* note 3 (citing Plaintiff's Motion for Summary Judgment).

10. *See infra* Part III.A.

11. Schlueb, *supra* note 6 (providing property value).

12. *Zion's Hope, Inc.*, No. 2002-CA-12146-0, *reprinted in State Taxes, supra* note 3.

13. *Id.*

entity under the Florida law and issued an order granting summary judgment for the owners.[14] The favorable judgment saved the Holy Land from having to pay over $786,000 in back taxes, which would have risen to over $1 million in the next year.[15]

The Florida judge's decision raises interesting questions under both state and federal law. The one thing upon which proponents on either side of the argument are likely to agree is that the Holy Land is not a "church" in the traditional sense of the word. While most people have become accustomed to the state and federal tax exemptions for traditional churches, granting a tax exemption to a religious organization that is housed on $12.5 million property and charges $30 for admission is certainly something to give many a pause. This Comment explores the history of religious tax exemptions and the various theories for providing them, and it evaluates their validity under the First Amendment religion clauses. This Comment argues that the Holy Land should not enjoy tax-exempt status and attempts to discern a standard to be used for all tax exemptions.

Part II of this Comment provides background on religious tax exemptions, including both historical and modern developments. Part III sets forth Florida's tax-exemption scheme and then takes a closer look at the controversial Holy Land Experience case. Part III concludes with a discussion of the decision's faults in light of current Florida law. Part IV provides a brief introduction to the First Amendment religion clauses and a more detailed analysis of the Establishment Clause. Part V sets forth the Supreme Court's various rationales for granting tax exemptions to religious organizations and then applies them to the Establishment Clause and its standards. Part VI concludes that strict adherence to a rule that grants tax exemptions to only those organizations, religious or not, that provide a public benefit to the community leads to the correct result under the Establishment Clause.

II. THE CONCEPT OF RELIGIOUS-BASED TAX EXEMPTIONS

A. Sources of Tax Exemptions

Tax exemptions for religious organizations are nothing novel in America. The language in modern American tax exemptions can be traced back as far as 1601 to the English Statute of Charitable Uses.[16] In the early part of the nineteenth century, Congress adopted several taxing statutes that specifically exempted religious organiza-

14. *Id.*
15. Schlueb, *supra* note 6.
16. Christine Roemhildt Moore, Comment, *Religious Tax Exemption and the "Charitable Scrutiny" Test*, 15 REGENT U. L. REV. 295, 298 (2003).

tions.[17] In 1870, Congress specifically exempted all church property in the District of Columbia from property tax,[18] and the Tariff Act of 1894 formally recognized income tax exemptions for American religious organizations.[19]

Modern religious tax exemptions come in one of two forms: income tax exemptions and property tax exemptions.[20] While there is certainly a debate over the validity of both income and property tax exemptions, this Comment focuses on property tax exemptions and the issues that stem therefrom. Unlike income tax exemptions, which are governed at the federal level by the Internal Revenue Code, property tax exemptions are governed at the state level.[21] All fifty states currently provide some form of property tax exemption to religious organizations, either in their state constitution or state statutes.[22] The extent of property tax exemptions varies from state to state. Some states provide special treatment to religious organizations, while others provide exemptions to other similar organizations—for example, nonprofit organizations.[23]

B. Modern Developments

While the concept of tax exemption for religious organizations is certainly rooted in American history, what constitutes a religious organization or religious property has significantly changed. In the early nineteenth century, when Congress first adopted statutes exempting religious properties from taxation, the exempt properties were probably relatively homogeneous. The vast majority of the colonists were Christians and a "church" was a simple building to serve as a place of worship. Two important changes have occurred in modern society. First, Christian denominations have been joined by the Jewish, Buddhist, and Muslim faiths, just to name a few. New religious groups—such as Moonies, Scientologists, and Oriental cults—have formed alongside the more traditional religions and have also sought property tax exemptions.[24] Second, as evinced by the litigation over the Holy Land, the meaning of church property has moved far beyond the simple house of worship. Religious organizations often own realty that is used for ventures that are, at least arguably, non-

17. Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 677-78 (1970).

18. *Id.* at 678.

19. Moore, *supra* note 16, at 299.

20. Robert Maddox, *Churches & Taxes: Should We Praise the Lord for Tax Exemption?*, 22 CUMB. L. REV. 471, 471 (1992).

21. Moore, *supra* note 16, at 300, 303.

22. Michael K. Ryan, Note, *A Requiem for Religiously Based Property Tax Exemptions*, 89 GEO. L.J. 2139, 2139-40 (2001).

23. *Id.* at 2140.

24. *See* John Witte, Jr., *Tax Exemption of Church Property: Historical Anomaly or Valid Constitutional Practice?*, 64 S. CAL. L. REV. 363, 402 (1991).

religious and profit-making. The question then becomes: Which uses are exempt and which are not?

State regulations and court decisions do not provide much help for answering this question. To be more direct, the regulations "are cryptic and often devoid of definitions," and the judicial decisions "are copious and often discordant."[25] Religious organizations are well aware of these ambiguities and have exploited them by taking their matter to court when they are not awarded exempt status.[26] Quite simply,

> [t]he lack of any necessary correlation between the nature of the owner and the nature of the use of an exempt property has allowed nonprofit organizations to gain exemptions on a variety of different bases . . . . The permitted admixture of predominant exempt uses and incidental nonexempt uses has allowed religious groups to engage in short-term or occasional profiteering on their properties with no adverse tax consequences.[27]

III. A CLOSER LOOK AT THE HOLY LAND EXPERIENCE CASE AND FLORIDA LAW

A. Florida's Tax Exemption Scheme

Florida's Constitution, statutes, and case decisions are one example of an ambiguous and confusing tax-exemption scheme. Like many states, Florida's exemption is grounded in its state constitution. Under article VII, section 3, portions of property that "are used predominantly for educational, literary, scientific, religious or charitable purposes may be" exempt from taxation.[28] Scattered sections within chapter 196, *Florida Statutes*, attempt to clarify the constitutional provision and supply standards for assessing tax-exempt religious property.[29]

First, under section 196.193(1)(b), *Florida Statutes*, the property appraiser may deny a religious organization tax-exempt status in one of three instances: (1) the use is not clear, (2) the land is being held for speculative purposes, or (3) the organization is renting the land to others for a nonreligious purpose.[30] Because the second and third reasons apply only in narrow circumstances, the majority of litigation concerns whether the use is clearly religious.[31] Section

---

25. *Id.* at 395-96.
26. *Id.* at 396.
27. *Id.* at 401.
28. FLA. CONST. art. VII, § 3.
29. At the time this Comment was going to print, an additional section had been proposed and was being debated in the Florida House of Representatives. *See infra* Part III.D.
30. FLA. STAT. § 196.193(1)(b) (2005).
31. *See* Zion's Hope, Inc. v. Donegan, Nos. 2002-CA-12146-0, 2003-CA-7898-0, 2004-CA-7574-0 (Fla. 9th Cir. Ct. July 5, 2005), *reprinted in State Taxes*, *supra* note 3; Grady v. Hausman, 509 So. 2d 1316, 1317 (Fla. 5th DCA 1987).

196.196(1)(a) provides three criteria to determine whether the property is actually being used for a religious purpose: "[1] [t]he nature and extent of the . . . religious . . . activity . . . , [2] a comparison of such activities with all other activities of the organization, and [3] the utilization of the property for . . . religious . . . activities as compared with other uses."[32]

Second, only those portions of the property predominantly used for a religious purpose may be exempt; incidental use is insufficient.[33] Third, regardless of the religious nature of the activity, the property may not be tax exempt if it is used for a profit-making purpose.[34] Section 196.195(2) sets forth five criteria to determine whether the property is used for a profit-making purpose: the reasonableness of (1) payment for salaries and other overhead costs; (2) any loan guaranties; (3) contracts for goods and services; (4) payments for services and operating costs; and (5) charges made by the applicant for services rendered.[35]

B. The Holy Land Experience Litigation

In *Zion's Hope, Inc. v. Donegan*—the litigation over the Holy Land—the circuit court judge applied the three statutory provisions. Since there were no allegations that the property was being held for speculative purposes or rented to another group, the only relevant section 196.193(1)(b) factor was the clarity of the use.[36] Judge MacKinnon concluded that all three section 196.196(1)(a) factors—nature and extent of the plaintiff's religious activity, comparison of the plaintiff's religious activity to its other activities, and utilization of the property for religious activities compared to nonreligious activities—supported the conclusion that the property was predominantly used for a religious purpose.[37] The judge emphasized the pleadings of the case. While Zion's Hope presented evidence that it participated in several religious activities, such as publishing a magazine about biblical teaching, arranging Bible trips to the Middle East, and conducting evangelistic meetings, the property appraiser failed to provide any evidence of nonreligious activities.[38] With respect to the second factor, the judge accepted the plaintiff's position that all of the Holy Land's activities were religious and rejected the property appraiser's argument that religion was simply the Holy

32. FLA. STAT. § 196.196(1)(a) (2005); *Grady*, 509 So. 2d at 1317.
33. FLA. STAT. § 196.196(2) (2005).
34. *Id.* § 196.196(3); *see Zion's Hope, Inc.*, No. 2002-CA-12146-0, *reprinted in State Taxes*, *supra* note 3.
35. FLA. STAT. § 196.195(2) (2005).
36. *Zion's Hope, Inc.*, No. 2002-CA-12146-0, *reprinted in State Taxes*, *supra* note 3.
37. *Id.*
38. *Id.*

Land's theme in the same way marine life is Sea World's theme.[39] The judge summarized the distinction as follows:

> The undisputed evidence before the Court is that Plaintiff is using the property to spread what it considers to be God's word to many people at one time. This is in contrast to Disney World's and Anheuser-Busch's use of their properties, Epcot and Sea World, respectively, which is indisputably to make money for the companies. The Property Appraiser has failed to direct the Court's attention to any evidence that Plaintiff is using The Holy Land Experience to make money or for some other purpose than evangelizing and worshipping.[40]

The judge also determined that, based on the section 196.195(2) factors, the Holy Land property was not being used for a profit-making purpose.[41] Again, the judge emphasized the pleadings.[42] While the plaintiff admitted paying its employees and officers salaries, these salaries were reasonable and significantly less than salaries paid to the directors of other Orange County nonprofit organizations, such as the Orlando Science Center.[43] Based on nothing more than statements made by the plaintiff's accountant in an affidavit, the judge concluded that the next three factors—loan guaranties, contracts for goods and services, and payments for services and operating costs—were all reasonable.[44] According to the judge, the property appraiser did not submit any evidence to refute this statement.[45] Finally, the charge for admission was reasonable in light of the "entertainment options" available to the Holy Land's visitors.[46] Although the judge was willing to accept that the property appraiser's arguments presented a reasonable inference that the Holy Land was operating at a profit, she emphasized that any profits were turned back over to the "[p]laintiff's missionary and evangelical activities."[47] The judge concluded:

> [T]he Property Appraiser focused its argument on the conclusion it seems to have reached before it denied the exemption—that The Holy Land Experience looks like and acts like a theme park, and therefore it must be a theme park. This approach, however, ignores the statutory factors . . . for determining whether property is

---

39. *Id.*
40. *Id.*
41. *Id.*
42. *See id.*
43. *Id.* The Plaintiff's Motion for Summary Judgment indicated that its president received a five-figure salary while the President and CEO of the Orlando Science Center received a six-figure salary. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*

entitled to a tax exemption for being predominantly used for religious purposes.[48]

C. Propriety of the Circuit Court Decision

On its face and based strictly on the statutory factors, the decision in favor of tax-exempt status seems logical. However, Judge MacKinnon failed to consider subtle principles that have evolved within Florida case law. First, in making their determinations, the courts have often divided the land owned by the religious organization and separately analyzed different parcels that are put to different uses. Prior to the adoption of chapter 196, the Florida Supreme Court adopted the concept of severability for tax exemptions. In a 1942 decision, the court accepted a rule that allows the taxing authority to sever portions of the property used for profit-making purposes from those with an exempt use.[49] The portion used for a profit-making purpose is taxed while the remainder still enjoys tax-exempt status.[50] Although no cases have explicitly applied the severability concept to the *Florida Statutes*, a 1974 attorney general opinion did extend the reasoning.[51] The opinion noted that, under section 196.195, land owned by an exempt organization would not be exempt if it was used for a nonexempt purpose, but "if there is a severable portion that is used for exempt purposes . . . such portion may be granted an exemption from taxation."[52] In *Grady v. Hausman*, the Fifth District Court of Appeal applied this reasoning to determine whether all or part of a seventeen-acre tract of land owned by a Catholic church was tax exempt.[53] The court analyzed each of the four parcels separately and determined that all four met the tax-exemption requirements.[54]

The severability concept has been frequently applied to unimproved tracts of land owned by religious organizations. If the organization can demonstrate that it is used for a religious purpose, such as the occasional prayer service or area for meditation, the unimproved parcel is exempt like the parcel that houses the building itself.[55] If, however, there is no evidence that the unimproved portion is used for

48. *Id.*
49. State *ex rel.* Cragor Co. v. Doss, 8 So. 2d 17, 18 (Fla. 1942).
50. *Id.*
51. 74-231 Fla. Op. Att'y Gen. (1974).
52. *Id.*
53. Grady v. Hausman, 509 So. 2d 1316, 1317 (Fla. 5th DCA 1987).
54. *Id.* at 1320.
55. *See* Robbins v. Fla. Conference Ass'n of Seventh Day Adventists, 641 So. 2d 893, 894-95 (Fla. 3d DCA 1994); *see also* Hausman v. First Baptist Church of Pine Hills, Inc., 513 So. 2d 767, 768 (Fla. 5th DCA 1987).

a religious purpose, the organization must pay property taxes.[56] In a second part of the opinion, Judge MacKinnon applied this line of reasoning and concluded that an unimproved piece of property owned by the *Zion's Hope* plaintiff was not tax exempt. Judge MacKinnon did not explore whether portions of the Holy Land property could be severed. For example, could the tax collector sever the portion of the property that houses the collection of biblical texts from the portion that houses the restaurants and gift shops? Applying a more specific and detailed severability may be a way to satisfy owners with nontraditional religious uses while still comporting with the purpose of the tax-exemption scheme.

A more important concept that Judge MacKinnon failed to discuss is that ownership alone is insufficient to qualify property for a tax exemption. That is, nature of the use—not nature of the owner—is what determines tax-exempt status. The constitutional provision is clear on this point: "portions of property as are *used* predominantly for . . . religious . . . purposes may be exempted."[57] The courts' emphasis on the *predominant* use emphasizes this point. According to the Fifth District Court of Appeal, "eligibility for an exemption is predicated upon a predominant religious use of the property" and "the religious use must be the most significant activity on the land where the land may support multiple activities."[58] Thus, Judge MacKinnon's focus on the other activities of Zion's Hope is misplaced. The fact that Zion's Hope publishes a biblical magazine and arranges religious trips, and that it uses its profits from the Holy Land to fund these activities is irrelevant to determining the specific *use* of the *property*. As a result, these facts should not be considered in the property tax exemption analysis.

Finally, Judge MacKinnon failed to address the well-established principle that tax exemptions are strictly construed against the tax exemption and in favor of taxation.[59] Florida courts have clearly established a rule that tax exemptions are strictly construed against

---

56. *See* Palm Beach Cmty. Church v. Nikolits, 835 So. 2d 1274, 1275 (Fla. 4th DCA 2003).

57. FLA. CONST. art. VII, § 3 (emphasis added).

58. *Grady*, 509 So. 2d at 1318.

59. *See, e.g.*, Volusia County v. Daytona Beach Racing & Recreational Facilities Dist., 341 So. 2d 498, 502 (Fla. 1976) ("The rule is that all property is subject to taxation unless expressly exempt and such exemptions are strictly construed against the party claiming them."); State *ex rel.* Szabo Food Servs., Inc. v. Dickinson, 286 So. 2d 529, 530-31 (Fla. 1973) ("Exemptions to taxing statutes are special favors granted by the Legislature and are to be strictly construed against the taxpayer."); State *ex rel.* Wedgworth Farms, Inc. v. Thompson, 101 So. 2d 381, 386 (Fla. 1958) ("While a taxing statute is always construed liberally in favor of the taxpayer and against the tax collector, we must remember that exemptions and special benefits to particular taxpayers that remove them from the more burdensome requirements applicable to others are construed strictly against the exemption.").

the taxpayer seeking the exemption.[60] Judge MacKinnon's decision, on the other hand, seems to favor the owner of the Holy Land. Her determination that the property was not used to generate a profit was based on nothing more than conclusory statements in the Zion's Hope affidavits.[61]

Despite the infirmities in the decision, Judge MacKinnon's decision to grant summary judgment in favor of the Holy Land is, at least arguably, correct under current Florida law in light of the lack of evidence advanced by the property appraiser in its pleadings. What Judge MacKinnon's decision did not address was the more important issue of whether this result advanced the purpose of the tax exemption or whether it took advantage of vague statutory language. Moreover, the decision did not address the propriety of granting the exemption in light of the First Amendment.

D. Recent Legislative Developments

The Florida Legislature has similarly overlooked the issue of whether granting religious property tax exemptions is proper under the First Amendment. At the 2006 regular session of the Florida Legislature, both the Senate and the House proposed bills that were in direct response to the Holy Land litigation.[62] It is clear from the legislative history that the bills were proposed in direct response to the Holy Land litigation and were intended to make clear that the Holy Land and similar profit-making ventures receive the religious property tax exemption.[63] The House of Representatives Staff Analysis explained that the effect of the proposed change was to clarify "what constitutes religious use of property" for the purpose of the article VII, section 3 exemption.[64] The analysis explained that although section 196.196 provided "some guidance" for how to apply the exemption, "occasionally there is a dispute as to what constitutes religious use of property."[65] *Zion's Hope* was cited as an example of such disputes.[66]

If passed,[67] the new statute, section 196.1987, would mandate that any property owned by a tax-exempt organization and used to display biblical artifacts be exempt from ad valorem property taxes.[68]

---

60. *Wedgworth Farms, Inc.*, 101 So. 2d at 386.

61. *See supra* notes 41-48 and accompanying text.

62. Fla. HB 7183 (2006) (proposed FLA. STAT. § 196.1987); Fla. SB 2676 (2006) (proposed FLA. STAT. § 196.1987).

63. Fla. H.R. Comm. on Fin. & Tax, HB 7183 (2006) (Apr. 11, 2006) (on file with comm.).

64. *Id.*

65. *Id.*

66. *Id.*

67. At the time this Comment went to print, the House version had favorably passed the House and had been referred to the Senate.

68. Fla. HB 7183 (2006); Fla. SB 2676 (2006).

The owner of the property would only have to meet two conditions to qualify for the exemption: (1) provide the public with free admission at least one day in each calendar year, and (2) obtain a written statement from the Internal Revenue Service confirming that the organization's activities do not affect its tax exempt status under the Internal Revenue Code.[69]

IV. ASSESSING THE TAX EXEMPTION ISSUE UNDER THE FIRST AMENDMENT

A. Competing Considerations: The Free Exercise Clause and the Establishment Clause

At the heart of every legal issue arising from a government action that involves religion is the First Amendment to the U.S. Constitution. In but a single sentence, the First Amendment sets forth two religion clauses: "Congress shall make no law [1] respecting an establishment of religion, or [2] prohibiting the free exercise thereof . . . ."[70] Thus, the justifications for religious tax exemptions are but a narrow part of the constitutional analysis. On a broader level, regardless of how they are justified, the tax exemptions must comport with both the Establishment Clause and the Free Exercise Clause.

As noted by the Supreme Court, the sweeping, absolute terms of the two clauses present a problem for any court wishing to respect them both.[71] If either clause were taken to the extreme, it "would tend to clash with the other."[72] Justice Blackmun explained the inconsistency in his concurring opinion in *Texas Monthly, Inc. v. Bullock*: "[t]he Free Exercise Clause value suggests that a State may not impose a tax on spreading the gospel," but "[t]he Establishment Clause value suggests that a State may not give a tax break to those who spread the gospel that it does not also give to others who actively might advocate disbelief in religion."[73] Thus, while "[t]he Free Exercise Clause suggests that a special exemption for [religion] is required[, t]he Establishment Clause suggests that a special exemption . . . is forbidden."[74]

---

69. Fla. HB 7183 (2006); Fla. SB 2676 (2006).

70. U.S. CONST. amend. I.

71. Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 668-69 (1970).

72. *Id.* Justices Rehnquist and Scalia have characterized this conflict as a metaphorical navigation between the channel that divides Scylla and Charybdis. *See* Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 42 (1989) (Scalia, J., dissenting); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 721 (1981) (Rehnquist, J., dissenting) (noting that any government action must pass through the channel between Scylla and Charybdis to pass constitutional scrutiny).

73. *Tex. Monthly*, 489 U.S. at 26 (Blackmun, J., concurring) (citations omitted).

74. *Id.* at 27; *see also* Witte, *supra* note 24, at 407 ("Opponents insist that [tax exemptions of church property] . . . are proscribed by the establishment clause . . . . Proponents argue that such exemptions . . . are prescribed by the free exercise clause . . .").

Given this conflict, what is the correct decision with respect to a religious tax exemption? Does granting the tax exemption violate the Establishment Clause? Does denying the tax exemption violate the Free Exercise Clause? If the answer to both these questions is yes, how do we reconcile the conflict and create a tax scheme that comports with the First Amendment as a whole? These are questions that the Supreme Court has left largely unanswered in its decisions. In his *Texas Monthly* concurrence, Justice Blackmun noted that a tax exemption could, in fact, be written to comport with both clauses and admonished both the majority and dissent for "sacrificing either the Free Exercise Clause value or the Establishment Clause value" by subordinating one clause to the other.[75] The remainder of this Comment addresses the tax-exemption issues under the Establishment Clause. Although the Free Exercise Clause issues are certainly worthy of further examination, the Supreme Court has repeatedly rejected the argument that exemption is required because a tax upon the church would violate the Free Exercise Clause.[76]

B. The Establishment Clause and Its Standards

Under the Establishment Clause, the government is forbidden from making any law "respecting an establishment of religion."[77] Cast in general and ambiguous terms, the clause is anything but straightforward. Over the years, the Court has purportedly made the clause less ambiguous by developing standards to evaluate government action. However, the standards themselves are imprecise, often overlap, and sometimes even clash. While the number of potential rationales for the Establishment Clause are seemingly endless, the

---

75. *Tex. Monthly*, 489 U.S. at 27 (Blackmun, J., concurring). According to Justice Blackmun, the majority's approach, written by Justice Brennan, would subordinate the Free Exercise Clause to the Establishment Clause while Justice Scalia's dissenting approach would subordinate the Establishment Clause to the Free Exercise Clause. Justice Blackmun believed:

> It is possible for a State to write a tax-exemption statute consistent with both values: for example, a state statute might exempt the sale not only of religious literature distributed by a religious organization but also of philosophical literature distributed by nonreligious organizations devoted to such matters of conscience as life and death, good and evil, being and nonbeing, right and wrong.

Id. at 27-28.

76. *Id.* at 19-20 (majority opinion) (noting that not all burdens on the exercise of religion are unconstitutional and limitations on tax exemptions may be overridden by the federal government's interest in collecting a sales tax); Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 303 (1985) ("It is virtually self-evident that the Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights.").

77. U.S. CONST. amend. I.

analysis below focuses on the three principal theories: (1) the *Lemon* test, (2) the endorsement analysis, and (3) the coercion analysis.[78]

1. The Lemon *Test*

The Court first articulated an explicit test for determining whether an act was an unconstitutional establishment of religion in *Lemon v. Kurtzman,* a 1971 case questioning the constitutionality of state-sponsored financial aid for religious schools.[79] The test has remained the focus of all Establishment Clause discussions to date and has become known as "the *Lemon* test."[80] Under the test, any government action must satisfy three factors to avoid running afoul of the Establishment Clause. First, the action must have a secular purpose.[81] Second, the action's "principal or primary effect must be one that neither advances nor inhibits religion."[82] Third, the action must not be "an excessive government entanglement with religion."[83]

2. Endorsement Analysis

The second approach to the Establishment Clause, first articulated by Justice O'Connor in her concurring opinion in *Lynch v. Donnelly*,[84] is an outgrowth of the *Lemon* test. According to Justice O'Connor, the Establishment Clause prohibits two types of government action: excessive entanglement with religion and endorsement or disapproval of religion.[85] While excessive entanglement indirectly interferes with religious organizations, endorsement or disapproval directly violates the Establishment Clause by sending adherents messages that they are insiders and nonadherents messages that they are outsiders.[86] Thus, "[f]ocusing on institutional entanglement and on endorsement or disapproval of religion clarifies the *Lemon* test as an analytical device."[87] More specifically, the purpose prong should focus on whether the gov-

78. While there is much scholarly debate over the proper Establishment Clause standard, this subject is outside the scope of this Comment. Instead of arguing for one standard over the other, this Comment simply recognizes that different rationales exist and analyzes the tax exemption issue under each.

79. Lemon v. Kurtzman, 403 U.S. 602, 606, 612-13 (1971).

80. *See id.*

81. *Id.* at 612.

82. *Id.*

83. *Id.* at 613 (quoting Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 674 (1970)). In *Lemon*, the Court applied these factors and determined that the statutes providing for state-sponsored financial aid were, in fact, unconstitutional as a violation of the Establishment Clause. *Id* at 613-14. The Court's main focus was the final, excessive entanglement prong. *See id.* at 615. In fact, the Court found it unnecessary to determine whether the action had a permissible effect because the cumulative impact was an "excessive entanglement between government and religion." *Id.* at 613-14.

84. 465 U.S. 668 (1984).

85. *Id.* at 687-88 (O'Connor, J., concurring).

86. *Id.* at 688.

87. *Id.* at 689.

ernment "intends to convey a message of endorsement or disapproval of religion,"[88] and the effect prong should focus on whether the government act had "the effect of communicating a message of government endorsement or disapproval of religion."[89]

A subpart of the endorsement analysis is the concept of the "reasonable observer." The reasonable observer is the person who evaluates whether the government action does, in fact, endorse religion.[90] There are two alternative theories regarding the identity of the reasonable observer and the amount of information he or she is presumed to possess. Justice O'Connor's reasonable observer is presumed to possess certain historical and contextual knowledge and to use this knowledge in his or her evaluation of the government action.[91] Justice Stevens, on the other hand, believes that O'Connor presumes too much and has created a "legal fiction" that protects only the " 'ideal' observer" rather than all reasonable people.[92] His reasonable observer considers the perspective of one "who may not share the particular religious belief" at issue, so that adherents to other beliefs do not feel they are "stranger[s] in the political community."[93]

3. Coercion Analysis

The coercion analysis is a third approach to determining whether government action violates the Establishment Clause. Unlike the endorsement test, the foundation for the coercion analysis is not the Court's *Lemon* test. In fact, proponents of the coercion analysis would abandon the *Lemon* test altogether and decide Establishment Clause cases solely upon whether the government action "coerce[d] an individual to believe in or act in accordance with a religion against the individual's will."[94] The majority of the Court has repeatedly rejected this test as invalid, but it has remained prevalent in many dissenting opinions and scholarly works.[95]

Justice Kennedy first advanced his support for the coercion analysis in his opinion in *Allegheny*.[96] He stressed that the Court's cases

88. *Id.* at 691.

89. *Id.* at 692.

90. County of Allegheny v. ACLU, 492 U.S. 573, 630-31 (1989) (O'Connor, J., concurring in part and concurring in the judgment).

91. *See id.*; *see also* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring in part and concurring in the judgment) ("[T]he reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which [the government action] appears.").

92. *Capitol Square Review*, 515 U.S. at 799-800 n.5 (Stevens, J., dissenting).

93. *Id.* at 799.

94. Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 464.

95. *Id.*

96. *County of Allegheny*, 492 U.S. at 655 (Kennedy, J., concurring in the judgment in part and dissenting in part).

revealed "two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise" and may not give direct benefits to religion in a way that would establish a state religion.[97] Under these principles, the Court would invalidate any action that "further[ed] the interests of religion through the coercive power of government."[98] But, if the government's action was noncoercive and "within the realm of flexible accommodation or passive acknowledgment of existing symbols," it would not run afoul of the Establishment Clause.[99]

V. DOES THE GRANT OF A TAX EXEMPTION VIOLATE THE ESTABLISHMENT CLAUSE?

A. Rationales for Religious Tax Exemptions

For over thirty years, since the Supreme Court first addressed the constitutionality of tax exemptions for religious property,[100] it has struggled to find a workable rationale for granting these exemptions. The Court has apparently recognized that many Americans believe religion is a worthy cause for donations and tax exemptions.[101] At the same time, however, the Court is acutely aware of the special problems that any tax exemption—which is clearly government action—presents when it is applied to any religion.[102] The struggle to balance these two conflicting policies has led to no less than four different primary rationales for recognizing religious tax exemptions as constitutionally valid.

1. The Neutrality Theory

Although it is not generally employed as the sole rationale for allowing religious tax exemptions, neutrality is the overarching theme in most tax exemption cases. That is, a tax exemption that includes all houses of worship as merely one part of a broader class of nonprofit groups is permissible because it is not singling out a particular religious group or even religion in general.[103] The Supreme Court first applied this theory in 1970, which was also the first time it addressed the constitutionality of religious tax exemptions.[104] In *Walz v. Tax Com-*

97. *Id.* at 659.
98. *Id.* at 660.
99. *Id.* at 662-63.
100. *See* Walz v. Tax Comm'n of N.Y., 397 U.S. 664 (1970).
101. *See* Moore, *supra* note 16, at 296 ("[A]lmost half of all donors surveyed in a recent study believed the funds they donated to churches were used more productively than funds given to other non-profit organizations." (citation omitted)).
102. *See supra* Part IV (discussing the religious tax exemption issue under the First Amendment religion clauses).
103. *See Walz*, 397 U.S. at 672-73.
104. *See id.*

mission of New York, an owner of real estate that was not used for any religious purpose sought an injunction to prevent the New York City Tax Commission from granting property tax exemptions to religious organizations.[105] The lower New York courts granted summary judgment for the Tax Commission, and the Supreme Court affirmed.[106] The Court noted that New York did not single out a particular church, a particular religious group, or even all churches and religions.[107] Instead, it had "granted exemption to all houses of religious worship within a broad class of property owned by non-profit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups."[108]

Despite the *Walz* Court's regard for the statute's neutrality, it did not link the neutrality to any constitutional principle; rather, its ultimate decision rested upon a separate analysis.[109] But nineteen years later, in *Texas Monthly, Inc. v. Bullock*,[110] the Court was faced with a nonneutral state statute and made it clear that neutrality—or scope of entities included in the exemption—was a factor determinative of constitutionality. Texas Monthly, the publisher of a general interest magazine, challenged the constitutionality of a Texas statute that granted an exemption from state sales tax to all "[p]eriodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith."[111] The Court emphasized that, under the Establishment Clause, the government cannot favor one religion or even religion generally.[112] While a government policy with a secular purpose could incidentally benefit religion, the benefits must also flow to a large number of nonreligious groups.[113] The *Texas Monthly* Court noted that "[t]he breadth of New York's property tax exemption [in *Walz*] was essential to our holding that it was 'not aimed at establishing, sponsoring, or supporting religion.' "[114] Thus, the Court concluded that the Texas exemption was unconstitutional because it lacked sufficient breadth to comport with the Establishment Clause.[115]

---

105. *Id.* at 666.
106. *Id.* at 667.
107. *Id.* at 672-73.
108. *Id.* at 673.
109. *See infra* Part V.A.4.
110. 489 U.S. 1 (1989).
111. *Id.* at 5 (citation omitted) (alteration in original). Although the statute and the ultimate issue dealt with a state sales tax, the same principles used in the property tax context apply.
112. *Id.* at 8-9.
113. *Id.* at 11.
114. *Id.* at 12 (quoting Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 674 (1970)).
115. *Id.* at 14. The neutrality theory applies with equal force to the reverse situation, where a religious organization has challenged the government's authority to tax its operations. In *Jimmy Swaggert Ministries v. Board of Equalization*, 493 U.S. 378, 382-84 (1990),

In more recent decisions, the Court has continued to apply the neutrality theory and characterize it as a function of the Establishment Clause analysis. In *Mitchell v. Helms*, a plurality of the Court upheld state and federal programs that provided aid to schools, public and private alike.[116] Writing for the plurality, Justice Thomas noted that when the government provides aid to the "religious, irreligious, and areligious" alike, it cannot be viewed as endorsing any particular religion.[117] Thus, if the government offers aid to those who further a legitimate public purpose, without regard to religion, the effect of any benefit to a religious organization can only further the secular purpose.[118]

Notwithstanding Justice Thomas's endorsement of the neutrality theory, it is probably not a sufficient rationale, in and of itself, for religious tax exemptions. The fifth vote in *Mitchell* was Justice O'Connor's. In her concurring opinion, she admonished the plurality for putting too much weight on neutrality.[119] She agreed that neutrality is one reason for upholding government aid programs, but she also emphasized that the Court has "never held that a government-aid program passes constitutional muster *solely* because of the neutral criteria it employs as a basis for distributing aid."[120]

2. The Public Benefit Rationale

As evinced by the *Mitchell* Court's "legitimate public purpose" analysis, a product of the neutrality theory is the public benefit rationale. In his concurring opinion in *Walz*, Justice Brennan explained the public benefit rationale as one of the basic secular purposes for granting property tax exemptions to religious organizations.[121] The government exempts religious organizations because "they, among a range of other private, nonprofit organizations contribute to the well-being of the community in a variety of nonreligious ways, and thereby bear burdens that would otherwise either have to be met by general taxation, or be left undone, to the detriment of the commu-

---

a religious organization challenged California's ability to apply the state sales and use tax to its sale of religious books, tapes, records, and other merchandise. The Court held that taxing the religious organization did not violate the Establishment Clause because materials were taxed without regard for the content or motive. *Id.* at 396-97.

116. Mitchell v. Helms, 530 U.S. 793 (2000). Because the benefit given to the private schools was a direct money grant, the issue is distinguishable from indirect aid through tax exemptions, but the neutrality theory is the same in both contexts.

117. *Id.* at 809.

118. *Id.* at 810.

119. *Id.* at 837 (O'Connor, J., concurring).

120. *Id.* at 838.

121. Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 687 (1970) (Brennan, J., concurring). Justice Brennan's second secular purpose—contribution to the pluralism of American society—is discussed *infra* Part V.A.3.

nity."[122] Since the organization is providing a public benefit to the community at large, which would otherwise come at a cost to the government, the government returns some of its savings to the organization through the tax exemptions.[123] Presumably, these exemptions will also encourage organizations to continue providing public services in the future.[124]

In his concurrence, Justice Brennan presumed that the public derives a benefit from all property owned by a religious organization, even if the property is used exclusively for a house of worship.[125] Justice Brennan rejected the argument that church-owned property could not be used for a public benefit unless it housed a hospital, orphanage, or other similar structure as a "simplistic view of ordinary church operations."[126] According to Justice Brennan, when church buildings were not holding religious ceremonies, they were often used for community activities such as Boy Scout activities and town meetings.[127] Moreover, even during religious ceremonies, church groups often collect funds and plan for secular operations.[128]

In *Bob Jones University v. United States*, a majority of the Court embraced the public benefit rationale, as modified by a public policy requirement.[129] Private religious schools challenged a change in IRS policy that effectively took away their tax-exempt status.[130] Until 1970, the IRS granted all private schools tax-exempt status, regardless of the school's admissions policies.[131] In 1970, however, the IRS noted that charitable organizations could not be illegal or contrary to public

---

122. *Walz*, 397 U.S. at 687 (Brennan, J., concurring). Nearly fifty years before the *Walz* decision, the Court recognized the public benefit rationale in *Trinidad v. Sagrada Orden de Predicadores*, 263 U.S. 578, 581 (1924), finding that a tax exemption for religious organizations recognizes "the benefit which the public derives from [the organization's] activities . . . and is intended to aid them when not conducted for private gain."

123. Moore, *supra* note 16, at 297.

124. *Id.*

125. *Walz*, 397 U.S. at 688-89 (Brennan, J., concurring).

126. *Id.* at 688.

127. *Id.*

128. *Id.* at 688-89.

129. 461 U.S. 574 (1983). It is interesting to note that Chief Justice Burger wrote the majority opinion in both *Walz* and *Bob Jones University*. *See Walz*, 397 U.S. at 666; *Bob Jones Univ.*, 461 U.S. at 577. In *Walz*, Chief Justice Burger refused to base his decision on the public works of the church, noting that the extent of social services provided by churches would vary depending on the location and the sufficiency of public-sponsored programs. *Walz*, 397 U.S. at 674. Considering the value of a religious organization's contribution to the community would inevitably lead to a governmental evaluation of religion—the very thing that is prohibited by the Constitution. *Id.* Yet, in *Bob Jones University*, Chief Justice Burger fully embraced the very rationale he refused to follow thirteen years prior. *Bob Jones Univ.*, 461 U.S. at 591-92.

130. *Bob Jones Univ.*, 461 U.S. at 577-79. The schools also argued, unsuccessfully, that even if refusing the exemption was valid for nonreligious private schools, it was unconstitutional as applied to private schools discriminating based upon their religious beliefs. *Id.* at 602-04.

131. *Id.* at 577-78.

policy and announced its intent to deny tax exemption for any private school practicing racial discrimination in its admissions policies.[132] The Court found that denial of the exemption was not only permissible, but required in furtherance of public policy.[133] Tax benefits were granted to certain organizations because they serve desirable public, charitable purposes and thereby relieve the government of financial burdens that it would otherwise have to bear.[134] But a direct "corollary to the public benefit principle is the requirement . . . that the purpose of a charitable trust may not . . . violate established public policy."[135] That is, the entity receiving the exemption may not have a purpose "so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred."[136]

Although the majority of the Court apparently embraced the public benefit/public policy rationale, it was not without its critics. In a concurring opinion, Justice Powell agreed that tax exemption was properly denied to private schools that practiced racial discrimination, but he disagreed with the Court's test for determining tax-exempt status.[137] Justice Powell refused to believe that all, or even most, exempt organizations could prove that they served the public interest.[138] Moreover, the fact that an organization engaged in some practices that clearly violated public policy, such as racial discrimination, does not necessarily mean that that same organization contributes nothing of benefit to society.[139]

3. The Pluralism Rationale

Upon rejecting the public benefit rationale, Justice Powell also expressed his support for the pluralism rationale.[140] The pluralism rationale focuses on the historical importance of diversity in American culture.[141] Justice Brennan clearly articulated the diversity rationale in his concurring opinion in *Walz*. Simply put, "government grants exemptions to religious organizations because they uniquely

---

132. *Id.* at 578-79.
133. *Id.* at 595-96.
134. *Id.* at 589-90.
135. *Id.* at 591.
136. *Id.* at 592.
137. *Id.* at 608 (Powell, J., concurring in part and concurring in the judgment). Justice Rehnquist also disagreed with the Court's decision; however, his dissent focused on the statutory interpretation aspect of the exemption. He admonished the majority for legislating in an area that Congress had, for whatever reason, chosen not to act. *Id.* at 622 (Rehnquist, J., dissenting).
138. *Id.* at 609 (Powell, J., concurring in part and concurring in the judgment).
139. *Id.*
140. *See id.*
141. Moore, *supra* note 16, at 297. In this regard, it highlights a subtle point that seems to lie beneath every religious clause issue—religion in our society, for some unanswered reason, is just special.

contribute to the pluralism of American society by their religious activities."[142] According to Justice Powell, the public benefit rationale runs contrary to this interest by forcing exempt organizations to act in harmony with the public interest, uphold only those values that are consistent with the community at large, and not act in a manner inconsistent with the expressed policy of the government.[143] The pluralism rationale does, however, share the neutrality theory with the public benefit rationale. In his *Walz* concurrence, Justice Brennan noted that the exemption at issue also included other nonreligious groups "organized exclusively for the moral or mental improvement of men and women."[144] Thus, the exemption "merely facilitate[d] the existence of a broad range of private, non-profit organizations, among them religious groups, by leaving each free to come into existence . . . without being burdened by real property taxes."[145]

4. History and Inalienable Rights

A final rationale, somewhat related to the pluralism rationale, is the idea that religion is "just special," and every religion has an inalienable right to tax exemption. Like the plurality rationale, the inalienable right rationale focuses on the history of American society. In *Walz*, the Court's ultimate decision to declare the tax exemption constitutionally valid rested on this premise. Writing for the majority, Chief Justice Burger noted that the government has granted religious organizations certain tax exemptions since as early as 1802.[146] While Chief Justice Burger agreed that long and continued use did not *guarantee* a protected right, he refused to ignore the "unbroken practice of according the exemption to churches."[147] He ultimately concluded that since the Court had repeatedly "accepted without discussion the proposition that federal or state grants of tax exemption to churches were not a violation of the Religion Clauses of the First Amendment," the Court would not begin to question them now.[148]

Despite the prior support for this view, it no longer appears to be a viable theory.[149] The Supreme Court has declared that the government may choose to deny a tax exemption based upon public policy,

142. Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 689 (1970) (Brennan, J., concurring).
143. *Bob Jones Univ.*, 461 U.S. at 609 (Powell, J., concurring).
144. *Walz*, 397 U.S. at 689 (Brennan, J., concurring).
145. *Id.*
146. *See id.* at 677 ("In 1802 the 7th Congress enacted a taxing statute for the County of Alexandria, adopting the 1800 Virginia statutory pattern which provided tax exemptions for churches.").
147. *Id.* at 678.
148. *Id.* at 680.
149. *See* Moore, *supra* note 16, at 311 ("[T]he Supreme Court does not view tax exemption as a right owed to churches or other religious organizations, nor an impermissible establishment of religion.").

even if the organization has violated public policy because of its religious beliefs.[150] Instead of an inalienable right, the current view is that tax exemption is a mere privilege that may be denied if the taxpayer does not establish its entitlement.[151]

B. Applying the Establishment Clause Standards to the Tax Exemption Rationales

The Court's numerous attempts to justify religious tax exemptions do have one thing in common: they all fail to address how the exemption rationale fits into the Establishment Clause analysis. Nonetheless, the Establishment Clause and the Court's approaches to it are at the heart of every tax-exemption issue. As Justice Blackmun accurately conveyed, the decree that "Congress shall make no law respecting an establishment of religion"[152] necessarily implies that any tax exemption granted to an organization solely on the basis of its religious nature violates the U.S. Constitution.[153] Thus, the propriety of the neutrality theory, public benefit rationale, pluralism rationale, or inalienable right rationale rests on which Establishment Clause standard the court is applying.

1. The Public Benefit Rationale: The Only Viable Theory

Under the *Lemon* test, the public benefit rationale is the only acceptable tax-exemption standard. Although it seems to be the overarching principle in every religious tax-exemption case, neutrality alone cannot be the basis for the exemption. The neutrality—or breadth—of an exemption has little bearing on the ultimate determination of its constitutionality.[154] While the Constitution explicitly forbids the establishment of religion, it does not forbid the establishment of other charitable or nonprofit groups.[155] The Court must look at the exemption as applied to the religious organization, without consideration of the exemption as applied to other sectarian organizations.

---

150. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 592 (1983).

151. Moore, *supra* note 16, at 312; *see also* Regan v. Taxation with Representation of Wash., 461 U.S. 540, 545 (1983) ("This Court has never held that the Court must grant a [tax exemption] to a person who wishes to exercise a constitutional right."); Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 643 n.2 (1980) (Rehnquist, J., dissenting) ("The availability of [tax] exemptions and deductions is a matter of legislative grace, not constitutional privilege."); *cf.* County of Allegheny v. ACLU, 492 U.S. 573, 630 (1989) (O'Connor, J., concurring in part and concurring in the judgment) (finding that history is not relevant because it creates an absolute exception but because it provides a context for the reasonable observer).

152. U.S. CONST. amend. I.

153. Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 26 (1989) (Blackmun, J., concurring).

154. Ryan, *supra* note 22, at 2154.

155. *Id.*

Moreover, both the pluralism and history/inalienable rights rationales fail the *Lemon* test under the purpose prong. If the justification for granting a religious institution a tax exemption is to foster diversity in religious beliefs, the purpose is anything but secular. The same is true for a justification based upon the mere fact that religion is special. This implies that the sole purpose of the tax exemption is to advance religion. If, on the other hand, the government grants a tax exemption to an organization because it provides public services to the community at large, the government is advancing a secular, nonreligious purpose. The public benefit rationale also has a secular effect: to provide more services to the public at less of a direct expense on the government.

Although the excessive entanglement prong is more problematic for the public benefit rationale, as long as the government is simply evaluating the nature of the public benefit and not the nature of the religion itself, there is no objectionable entanglement. In *Walz*, the majority argued that both taxation and tax exemptions led to government involvement in religion, but the involvement was much less excessive in the case of tax exemptions.[156] Taxation would be more of an entanglement than exemption because it would "giv[e] rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes."[157] The question is whether the entanglement is "excessive" and "whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement."[158]

A tax exemption based purely on the fact that an organization is "religious" would clearly involve excessive entanglement and continued surveillance.[159] To grant an exemption, the government would have to define "religious" and determine whether a particular organization met this definition.[160] Instead of simply inquiring into the value of a parcel of land, the government would be inquiring into "the content of the religious institution's activities."[161] A tax exemption based on the public benefit provided by an organization that may or may not be religious, on the other hand, does not involve excessive entanglement. The tax collector would sign off on the exemption

156. Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 674-75 (1970).

157. *Id.* at 674. The Court distinguished a tax exemption from a direct subsidy, noting that the latter would clearly constitute excessive entanglement but the former does not. *Id.* at 675.

158. *Id.* at 674-75.

159. *See* Ryan, *supra* note 22, at 2159-62.

160. *Id.* at 2160.

161. *Id.* at 2161 (quoting Hope Eastman, *Why Churches Should Be Taxed*, *in* TAXATION AND THE FREE EXERCISE OF RELIGION 38 (Papers and Proceedings of the Sixteenth Religious Liberty Conference, sponsored by Baptist Joint Committee on Public Affairs, James E. Wood ed., 1978)).

based on an organization's contribution to society, rather than on an organization's religious beliefs. While the government may be exercising control over the public benefit program itself, it would not be defining religion or exercising control over the religious practices. Thus, the public benefit approach leads to the correct result under the *Lemon* test for the Establishment Clause.

The public benefit rationale is also the correct rationale under the endorsement and coercion analyses. As the *Bob Jones University* Court discussed, a corollary to the public benefit rationale is the notion that a tax exemption is the equivalent of a subsidy that indirectly forces nonqualifying taxpayers to donate to qualifying entities.[162] Charitable exemptions are justified because the entity is providing a benefit to society that public tax dollars would otherwise have to support.[163] A religious tax exemption, on the other hand, can not be justified under this pretense. If every tax exemption is a subsidy, a tax exemption based on nothing more than religion would force nonbelievers to indirectly donate to a religious organization. This would give the appearance of government endorsement and, at the same time, coerce nonbelievers into supporting religion.

Additionally, the public benefit approach is appealing from the standpoint of those who wish to encourage churches to spend time and effort on charitable works rather than on extravagant structures and profit-making ventures. A true public benefit analysis would force a distinction between the church buildings and the benefits the church is providing to the community. If, for example, a church operated a soup kitchen in one building on the back of its property and held Sunday worship services in the church building on the front of the property, only the building on the back of the property would be tax-exempt. With this example in mind, a strict public benefit rationale could encourage more modern day churches to provide benefits to the community at large, rather than "building crystal cathedrals, prayer towers, and *theme parks*."[164] The public benefit rationale has thus been characterized as a "win-win situation" for the modern church because it affords the church a tax exemption while "simultaneously further[ing] Christ's call for Christians to be salt and light to the world."[165]

---

162. Bob Jones Univ. v. United States, 461 U.S. 574, 591 (1983); *see also* Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 14 (1989) (citing *Bob Jones Univ.*, 491 U.S. at 574, 591); Regan v. Taxation with Representation of Wash., 461 U.S. 540, 544 (1983). *But see Walz*, 397 U.S. at 675 ("The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state.").

163. *Bob Jones Univ.*, 461 U.S. at 591.

164. Witte, *supra* note 24, at 410 (emphasis added).

165. Moore, *supra* note 16, at 325.

2. Refuting the Potential Criticisms

Despite the appeal of the public benefit rationale, it is not a perfect solution for those who want to provide exemptions for traditional houses of worship. In his *Walz* concurrence, Justice Brennan implied that church buildings provide a public benefit because they are used for community activities when they are not being used for religious services.[166] He admonished the appellant for "assum[ing] . . . that church-owned property is used for exclusively religious purposes if it does not house a hospital, orphanage, weekday school, or the like" because such an assumption "rests on a simplistic view of ordinary church operations."[167]

But Justice Brennan's view is based on an outdated concept of American religion. A more progressive view is that of Justice Powell, espoused in his *Bob Jones University* concurrence, that most exempt organizations could not prove that they served a public interest.[168] A 1992 nationwide survey revealed that only seventeen percent of America's churches provided food to the needy, less than five percent provided shelter to the homeless, less than four percent provided programs to assist abused women, and just over five percent provided programs to assist migrants and refugees.[169] These statistics clearly suggest that very few modern churches would be granted tax-exempt status under a strict public benefit rationale.

Those who believe that a religious house of worship is worthy of tax exemption are likely to argue for a "modified public benefit rationale." This argument could come in one of two forms. First, one could argue that a religious house of worship is a public benefit in itself. That is, religious institutions provide the public benefit of filling the emotional needs of community members. Religion is often a form of counseling for those in need of moral support. People who have recently experienced a death in the family or emotional heartache often turn to the church for counsel. Without the church, the government itself may have to subsidize more counseling services.

More importantly, religion may be a public benefit in and of itself because it may actually heal those who are sick. That is, those who attend church regularly and have some belief in religion may actu-

166. *Walz*, 397 U.S. at 688 (Brennan, J., concurring).

167. *Id.*

168. *Bob Jones Univ.*, 461 U.S. at 609 (Powell, J., concurring in part and concurring in the judgment); *see also supra* text accompanying notes 137-39.

169. Moore, *supra* note 16, at 320-21 (citing INDEPENDENT SECTOR, FROM BELIEF TO COMMITMENT: THE COMMUNITY SERVICE ACTIVITIES AND FINANCES OF RELIGIOUS CONGREGATIONS IN THE UNITED STATES (1993), *available at* http://www.thearda.com/Archive/Files/Codebooks/CRUTCHFD_CB.asp).

ally have better physical and mental health than those who do not.[170] The effect of what some have termed the "faith factor"[171] is not just a conceptual theory. Many of its proponents have documented it with statistical research.[172] The International Center for the Integration of Health and Spirituality, a group devoted to advancing the concept of spiritual healing, provides several research links on its website that show how religion has been linked to various health benefits.[173] Greater religious beliefs may lead to lower blood pressure, less risk of domestic abuse, longer life expectancy, and less risk of depression.[174]

The second form of the modified public benefit rationale stems from the Supreme Court's recent decision in *Kelo v. City of New London*.[175] In *Kelo,* the Court held that furthering the economic development of a community was a public use sufficient to allow the government to exercise its eminent domain power.[176] The Court reasoned that "[p]romoting economic development is a traditional and long accepted function of government."[177] Thus, the government could exercise eminent domain to obtain private property in a blighted area and resell it to a commercial developer.[178] The hope was that this would revitalize the "distressed municipality" by increasing property values.[179] It would not be difficult to extend this reasoning to the tax-exemption context. Churches often stabilize communities by providing a safe focus for the community members. In an unstable community, this may give citizens a common goal and encourage them to re-

---

170. THEODORE J. CHAMBERLAIN & CHRISTOPHER A. HALL, REALIZED RELIGION: RESEARCH ON THE RELATIONSHIP BETWEEN RELIGION AND HEALTH 8 (2000).

171. *See, e.g.*, *id.* at 7.

172. *See id.* at 3-22 (providing an introduction to the concept of religious healing and citing several sources of research).

173. INT'L CTR. FOR THE INTEGRATION OF HEALTH AND SPIRITUALITY, RESEARCH REPORTS, http://www.nihr.org/programs/researchreports.cfm (last visited Apr. 13, 2006).

174. *See* INT'L CTR. FOR THE INTEGRATION OF HEALTH AND SPIRITUALITY, HIGHER LEVELS OF RELIGIOUS ACTIVITY LINKED TO LOWER BLOOD PRESSURE, http://www.nihr.org/programs/researchreports/bloodpressure.cfm (last visited Apr. 13, 2006) ("[P]eople who both attended religious services at least once a week and prayed or studied the Bible at least daily had consistently lower blood pressure . . . ."); INT'L CTR. FOR THE INTEGRATION OF HEALTH AND SPIRITUALITY, NON-RELIGIOUS COUPLES REMAIN AT HIGHER RISK OF DOMESTIC ABUSE, http://www.nihr.org/programs/researchreports/nonreligiouscouples.cfm (last visited Apr. 13, 2006) (reviewing a study finding that men who frequently attend religious services are less likely to hit their wives); INT'L CTR. FOR THE INTEGRATION OF HEALTH AND SPIRITUALITY, RISK OF EARLIER DEATH CUT BY GOING TO RELIGIOUS SERVICES, http://www.nihr.org/programs/researchreports/religiousservices.cfm (last visited Apr. 13, 2006) (reviewing a study finding that frequently attending religious services may extend life); INT'L CTR. FOR THE INTEGRATION OF HEALTH AND SPIRITUALITY, WHO'S HAPPY AND WHY?, http://www.nihr.org/programs/researchreports/whoishappy.cfm (last visited Apr. 13, 2006) ("Highly spiritual people . . . are twice as likely to say they are 'very happy' . . . .").

175. 125 S. Ct. 2655 (2005).

176. *Id.* at 2665.

177. *Id.*

178. *Id.* at 2665-68.

179. *Id.* at 2658, 2665-68.

vitalize the community, which will, in turn, lead to increased property values. Since granting a tax exemption is a government action in the same way exercising eminent domain is, any economic benefit to the community is a proper purpose for granting the exemption.

These arguments are, admittedly, justifiable. Despite one's personal beliefs on religion, existing data and research demonstrates the health benefits of religious beliefs. Furthermore, with data that shows a health benefit derived from religious beliefs, we are led back to the point where all religious houses of worship are exempt from taxation, regardless of whether they provide the community with any other public service. Likewise, it is hard to dispute the idea that churches often bring ancillary economic benefits to the community and may help stabilize the community. However, the problem with both arguments lies within the modern developments in religion.[180] How do we define a modern church? While it may seem easy to say that an amusement park is not a church, what about more ambiguous situations? Is a private residence that serves as a meeting place for a new, developing religion a house of worship? The inquiry will undoubtedly lead to the question of how we define religion—a question that would clearly result in an excessive entanglement with religion.[181]

VI. CONCLUSION

Modern religion presents a slippery slope for tax-exemption issues. If the government exempts a house of worship based purely on the fact that it is a house of worship, it will open the doors for theme parks and other profit-making ventures that are "spreading the word of the gospel." This is clearly not what was originally intended when the courts and Congress began allowing tax exemptions for religious institutions. The only way to prevent abuse is to enforce—fully and completely—a public benefit approach. Only those portions of church property that are providing a public service to the community, beyond the religion itself and beyond any economic effect to the community, should be tax-exempt. To prevent future litigation over amusement parks and other profit-making ventures, states like Florida must amend their constitutions and statutes to reflect the public benefit standard.

While the statistics suggest that very few modern churches would satisfy this test, and this may be disturbing in light of the long history of religious tax exemptions, it is the correct result under the *Lemon* test for the Establishment Clause. Affording traditional houses of worship tax exemptions solely because they are houses of

180. *See supra* Part II.B.
181. *See supra* Part IV.B.1 and text accompanying notes 159-61.

religious worship would advance a nonsecular purpose, have a nonsecular effect, and foster an excessive entanglement between government and religion.