WOULD CAESAR TAX GOD? THE CONSTITUTIONALITY OF GOVERNMENTAL TAXATION OF CHURCHES

I. INTRODUCTION

All fifty states and the federal government have statutory provisions exempting churches from various forms of taxation.[1] Although there are several provisions which grant churches exemptions from many taxes, the most common exemptions apply to income taxes and property taxes.[2]

The issue of whether governmental exemption of churches from taxation violates the first amendment by providing aid to religion was addressed by the United States Supreme Court in *Walz v. Tax Commission*.[3] The *Walz* Court held that such tax exemptions are constitutional.[4] This decision has settled the issue of whether a tax exemption to churches, as a legislative grant, is permissible;[5] however, a question that was not addressed by the Court in *Walz*, or in any other opinion, is whether the Constitution affirmatively mandates that government exempt churches from taxation.

There are some commentators, including Dean Kelley, who argue emphatically that the government cannot constitutionally tax churches:

> There are those who will dispute any contention that the legislatures have the authority under the First Amendment to tax the churches. The Supreme Court has not upheld this view as yet, nor has it rejected it. If any legislature undertakes to levy a tax upon the house of worship, the churches and synagogues will fight it to the highest court. Meanwhile, if the doctrine of "legislative grace" [that is, that churches are exempt from taxation as a result of a grant from the legislature and not as a constitutional right] is not a "fallacy" in the full sense, it is at least a "sectarian" doctrine - one that is not accepted by significant segments of society. Consequently, whenever anyone casually asserts that "tax exemption is *granted* to churches" let their unconceded assumption be pointed out and vigorously contested. There are those of us who do not concede that the legislature can constitutionally tax churches; that is an issue yet to be determined.[6]

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1. *See* P. FERRARA, RELIGION AND THE CONSTITUTION: A REINTERPRETATION 53 (1983) [hereinafter cited as FERRARA].

2. *See, e.g.*, 26 U.S.C. § 501 (1982); IOWA CODE § 427.1(9) (1985).

3. 397 U.S. 664 (1970).

4. *Id.* at 680.

5. The Court's decision was 8-1. Chief Justice Burger wrote the majority opinion. Justices Brennan and Harlan each wrote a concurring opinion. Justice Douglas dissented.

6. D. KELLEY, WHY CHURCHES SHOULD NOT PAY TAXES, 21-22 (1977) [hereinafter cited as KELLEY].

This Note investigates the question of whether governmental taxation of churches is constitutionally forbidden. Specifically, the issue of exemption from property taxation is addressed because it is a tax assessed directly on the church, on a house of worship. There is less confusion of issues with this type of a tax than there might be with other taxes imposed on other, less-direct religious activities.[7] As appropriate, analogies will be drawn to other taxes that are imposed directly on churches.

The conclusion reached by this Note is that exemption of churches from taxation is not merely constitutionally-permissible, it is constitutionally-required. Thus any attempt to subject churches to taxation is unconstitutional.

II. History of Tax Exemptions

Instances of favorable tax treatment of the clergy are reported in Biblical times.[8] In the fourth century, the Emperor Constantine exempted the Christian ministry from all taxes.[9] From colonial times, states have exempted churches from property taxes.[10] When the Supreme Court considered the constitutionality of these tax exemptions, Justice Brennan wrote: "History is particularly compelling in the present case because of the undeviating acceptance given religious tax exemptions from our earliest days as a Nation. Rarely if ever has this Court considered the constitutionality of a practice for which the historical support is so overwhelming."[11]

The historical basis for tax exemption of churches is long and, in this country, unbroken.[12] "All of the 50 States provide for tax exemption of places of worship, most of them doing so by constitutional guarantees."[13]

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7. *See* United States v. Lee, 455 U.S. 252 (1982) (non-ecclesiastical personnel have no constitutional right to exemption from social security taxation based on a claim of religious exemption). Other taxes on churches are challenged when imposed. *See* Gospel Assembly Church v. Iowa Dept. of Revenue, 368 N.W.2d 158 (Iowa 1985) (challenge of sales and use tax; no decision on merits of challenge).

8. *See Genesis* 47:26; *Ezra* 7:24.

9. Gibbon, The Decline and Fall of the Roman Empire, 301 (Great Books of the Western World Ed. 1952).

10. An example of an early tax exemption law is the Law of April 1, 1799, ch. LXXII, [1799] Laws of N.Y.:

> That no house or land belonging to the United States, or the the people of this state, nor any church or place of public worship, or any personal property belonging to any ordained minister of the gospel, nor any college or incorporated academy, nor any school house, court house, gaol, alms house or property belonging to any incorporated library, shall be taxed by virtue of this act.

Quoted in, Note, *Real Property Tax Exemption In New York: When Is A Bible Society Not Religious?*, 45 Fordham L. Rev. 949, 949 n.3 (1977).

11. Walz v. Tax Commission, 397 U.S. at 681 (Brennan, J., concurring).

12. For a history of tax exemptions accorded religion, see Zollman, *Tax Exemptions of American Church Property*, 14 Mich. L. Rev. 646 (1916).

13. Walz v. Tax Commission, 397 U.S. at 676-77 ("Few concepts are more deeply embed-

The courts have had little opportunity to address the issue of taxation of churches because the legislatures have historically, for whatever reason, provided statutory exemptions for churches in taxing legislation.

III. WALZ V. TAX COMMISSION

In 1970, *Walz v. Tax Commission*,[14] which involved a challenge of statutory property tax exemptions for churches, reached the Supreme Court. In *Walz*, a property owner challenged a state constitutional provision[15] which mandated that property owned by and used for religious purposes be exempt from taxation.[16] The property owner argued that the exemption indirectly forced him to contribute to religious bodies, thereby violating the first amendment prohibition of establishment of religion.[17] The *Walz* Court affirmed the decisions of the lower courts that upheld the constitutionality of the exemption.[18]

In reaching its decision, the Court distinguished between tax exemptions and tax subsidies.[19] Tax exemptions are not the equivalent of the appropriation of public funds to a religious institution. In pointing out the operational distinctions between government subsidies of religion and tax exemption, one writer summarized them as follows:

> 1. In a tax exemption, *no money changes hands* between government and the organization. There is no financial transaction with applications, checks, warrants, vouchers, receipts, accounting, or audits; " . . . government does not transfer part of its revenue . . . ."
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> 2. A tax exemption, in and of itself, *does not provide one cent* to an organization. Without contributions from its supporters, it has nothing to spend. Government cannot create or sustain - by tax exemption - any organization which does not attract contributions on its own merits.
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> 3. The *amount* of a subsidy is determined by the legislature or an administrator; there is no "amount" involved in a tax exemption because it is "open-ended"; the organization's income is dependent solely on the generosity of its several contributors, each of whom decides freely and individually how much he or she will give.

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ded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise . . . .").

14. 397 U.S. 664 (1970).

15. "Exemptions from taxation may be granted only by general laws. Exemptions may be altered or repealed except those exempting real or personal property used exclusively for religious, educational or charitable purposes . . . ." N. Y. CONST. art. XVI, § 1.

16. Walz v. Tax Commission, 397 U.S. at 666.

17. *Id.* at 667. The first amendment provides in part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

18. Walz v. Tax Commission, 397 U.S. at 667.

19. "The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches . . . ." *Id.* at 675.

> 4. Consequently, there is *no periodic legislative or administrative struggle* to obtain, renew, maintain, or increase the amount, as would be the case with a subsidy; political allegiances are not mobilized to support or to oppose it; the energies of the organization are not expended in applying for, defending, reporting, qualifying, undergoing audits and evaluations, etc., and the resources of government are not expended in administering them.
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> 5. A subsidy is not *voluntary* in the same sense that tax exempt contributions are. When the legislature taxes the citizenry and appropriates a portion of the revenues as a subsidy to an organization, the individual citizen has nothing determinative to say as to the amount of the subsidy or the selection of the recipient . . . .
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> 6. A tax exemption does not convert the organization into an agency of "state action," whereas a subsidy - certain circumstances may - ("No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or employees 'on the public payroll.' ")[20]

By accepting the distinction between subsidies and tax exemptions, the Supreme Court refuted *sub silentio* the assertion of some lower court decisions that had held that tax exemption is an appropriation of public funds to religious institutions.[21]

There is some indication in recent decisions that the Court may be reappraising the distinction between exemption and subsidy. It has said that an exemption has "much the same effect as a cash grant to the organization of the amount it would have to pay . . . ."[22] The Court, however, has not explicitly stated that exemption and subsidy are the same thing, or that the two have the same constitutional consequences. The holding of *Walz* that tax exemptions are constitutional while tax subsidies are not,[23] remains valid.

The Court emphasized that the grant of tax exemption did not create governmental sponsorship of religion.[24] Tax exemptions for religious organizations in general do not constitute an impermissible government sponsorship of religion.[25] Governments have sometimes been harshly oppressive of religion; "[g]rants of exemption historically reflect the concern of authors of constitutions and statutes as to the latent dangers inherent in the imposi-

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20. KELLEY, *supra* note 6, at 33-34 (quoting Walz v. Tax Commission, 397 U.S. at 675).

21. *See, e.g.*, Snyder v. Town of Newton, 147 Conn. 374, _, 161 A.2d 770, 776 (1960) ("Exemption from taxation is the equivalent of an appropriation of public funds, because the burden of the tax is lifted off the back of the potential taxpayer who is exempted and shifted to the back [sic] of others.").

22. Regan v. Taxation With Representation, 461 U.S. 540, 544 (1983).

23. "Obviously a direct money subsidy would be a relationship pregnant with involvement . . . but that is not this case." Walz v. Tax Commission, 397 U.S. at 675.

24. *Id.*

25. Haring v. Blumenthal, 471 F. Supp. 1172, 1177 (D.D.C. 1979), *cert. denied*, 452 U.S. 939 (1981).

tion of property taxes; exemption constitutes a reasonable and balanced attempt to guard against those dangers."[26]

It is significant that the Court in *Walz* decided that property tax exemptions for churches do not constitute an excessive entanglement of church and state.[27] The Court noted that in evaluating whether an excessive entanglement would result from tax exemptions, "[t]he test is inescapably one of degree."[28] The Court stated, "[e]ither course, taxation of churches or exemption, occasions some degree of involvement with religion."[29] Elimination of property tax exemption, however, would tend to expand the involvement of government with religion.[30] The *Walz* court appeared to be stating that application of property taxes to churches would produce more entanglement of church and state than does exemption.[31]

By exempting churches from taxation, the government "abstains from demanding that the church support the state."[32] Taxation of churches is a demand that the church support the state; as such, it would pose dangers of creating an excessive entanglement of church and state. "The hazards of churches supporting government are hardly less in their potential than the hazards of government supporting churches; each relationship carries some involvement rather than the desired insulation and separation."[33] Tax exemption "restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other."[34]

Although it explicitly upheld the constitutionality of legislative grants of property tax exemptions by holding that they do not violate the religion clauses of the first amendment,[35] the *Walz* decision did not address the issue of whether such tax exemption was constitutionally required. Justice Brennan, in his concurrence, specifically stated that he was not holding that exemption is constitutionally required.[36] The *Walz* decision did indicate that taxation would result in more involvement of government with religion than would exemption.[37] Such involvement may create an unconstitutionally excessive entanglement of church and state or infringe on the free exercise

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26. Walz v. Tax Commission, 397 U.S. at 673.

27. *Id.* at 676 ("The exemption creates only a minimal and remote involvement between church and state . . . .").

28. *Id.* at 674.

29. *Id.*

30. *Id.*

31. *Id.* at 676 (exemption creates minimal involvement between church and state which is "far less than taxation of churches" would produce).

32. *Id.* at 675.

33. *Id.* (footnote omitted).

34. *Id.* at 676.

35. *Id.* at 680.

36. "I do not say that government must provide [exemptions], or that the courts should intercede if it fails to do so." *Id.* at 692 n.12. (Brennan, J., concurring).

37. *See supra* notes 27-34 and accompanying text.

of religion. That is an issue that the Supreme Court has not yet addressed. The unresolved question is whether the first amendment mandates that churches be exempted from direct taxation.[38] It is an issue that the Court may have to face.

IV. Decisions That Tax Exemption Is Not Constitutionally Required

Although the Supreme Court has not addressed this point, several state court decisions have held that the Constitution does not mandate tax exemptions. The Georgia Supreme Court has held that "[r]eligious groups do not enjoy a general immunity from property taxes under the First Amendment to the United States Constitution."[39] A New York court has stated that "[t]axation of religious organizations is constitutionally permissible under the free exercise clause of the First Amendment . . . ."[40] The highest state court in Kentucky has held that "[n]otwithstanding . . . the immeasurable benefit of religion to the structure of society, even in the temporal way, there is no inherent immunity in the church from liability for the support of the government . . . . Immunity or exemption must come from an express waiver of the sovereign."[41] Kentucky has also ruled that a sales tax on retail sales by religious organizations does not burden the free exercise of religion.[42] Similarly, the California courts have stated that "[i]t has never been supposed that the property used in the exercise of the rights of freedom of press or religion is not subject to a uniform tax for revenue imposed on all alike."[43]

The opinions of these state courts appear to be holding that the government is sovereign, that the sovereign can grant tax exemption to its subjects if it desires, and that there is no right to tax exemption for churches or any other institution. Implicit in this reasoning is an assumption that the government holds sovereign authority over the property of the church.

The church's claim of constitutional protection has not been accorded much weight in these state court decisions. Typical is the statement in a New York opinion that "church property is taxable except as it may be specifically exempted by statutory enactment. The issue then is not one of constitutional dimension but whether an individual or organization claiming re-

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38. The first amendment states in part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I. Violation of either clause would result in a ruling that the action is unconstitutional and void.

39. Leggett v. Macon Baptist Assn., 232 Ga. 27, _, 205 S.E.2d 197, 201 (1974).

40. People v. Life Science Church, 113 Misc. 2d 952, _, 450 N.Y.S.2d 664, 669 (1982).

41. Mordecia F. Ham Evangelistic Assn. v. Matthews, 300 Ky. 402, _, 189 S.W.2d 524, 526 (1945).

42. International Society for Krishna Consciousness, Inc. v. Commonwealth *ex rel.* Carpenter, 610 S.W.2d 910, 912 (Ky. 1980).

43. Watchtower Bible & Tract Society, Inc. v. County of Los Angeles, 30 Cal. 2d 426, _, 182 P.2d 178, 180, *cert. denied*, 332 U.S. 811 (1947).

ligious exemption qualifies under applicable statutes."[44] Clearly, these courts are of the opinion that nothing in the Constitution requires that churches be given exemption from taxation.

V. Constitutional Dimensions of the Issue

Contrary to the assertion by some state courts that the issue of tax exemptions for churches is merely one of a grant from the government,[45] the issue is of constitutional dimensions. As a general proposition, the government has very broad power to levy taxes. The Constitution grants Congress virtual plenary power to tax.[46] State constitutions grant broad taxing powers to state governments.[47] Few limitations on the power to tax exist.[48] Even a constitutional due process of law requirement does not act as a limitation on the taxing power.[49]

Despite the broad taxing power granted by the Constitution, the Supreme Court has held in *Flast v. Cohen*[50] that the first amendment operates as a specific constitutional limitation upon the exercise of the taxing power.[51] Specifically, the clause of that amendment prohibiting legislation respecting an establishment of religion was designed as a specific bulwark against governmental abuses of the spending and taxing power.[52] Because the first amendment operates as a limitation on the taxing power of government, it follows that constitutional protections for religion can limit the power to tax a religious exercise. Indeed, the Supreme Court has struck down taxes that are a restraint on freedom of religion.[53]

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44. People v. Life Science Church, 113 Misc. at _, 450 N.Y.S.2d at 669.

45. *See supra* notes 39-44 and accompanying text.

46. The constitutional provisions relating to substantive taxing power given to Congress are U.S. Const. art. I, § 2, cl. 3 ("[D]irect Taxes shall be apportioned among the several States . . . ."); U.S. Const. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and Collect Taxes . . . ."); U.S. Const. art. I, § 9, cl. 4-5 ("No Capitation or other direct Tax shall be laid, unless in Proportion to the Census or Enumeration . . . . No Tax or Duty shall be laid on Articles exported from any State."); and U.S. Const. amend. XVI ("The Congress shall have power to lay and collect taxes on incomes . . . .").

47. *See, e.g.*, Ark. Const. art. II, § 23 ("The State's ancient right of . . . taxation is herein fully and expressly conceded . . . .").

48. License Tax Cases, 72 U.S. (5 Wall.) 462, 471 (1867) (the power to tax reaches every subject and may be exercised at discretion). *See also* United States v. Kahriger, 345 U.S. 22, 28 (1953) (the Congressional power to tax is extensive; the constitutional restraints on taxing are few).

49. *See* Brushaber v. Union Pacific R.R., 240 U.S. 1, 24 (1916) (The due process clause of the fifth amendment "is not a limitation upon the taxing power conferred upon Congress by the Constitution.").

50. 392 U.S. 83 (1968).

51. *Id.* at 104.

52. *Id.*

53. Follett v. Town of McCormick, 321 U.S. 573 (1944) (license tax on a preacher or evangelist is an unconstitutional restraint on freedom of religion).

Thus a claim that the religion clauses of the first amendment require that churches be exempt from taxation must receive serious consideration from the judiciary if such a tax is imposed and challenged. An unsupported assertion that the first amendment does not confer immunity from property taxation[54] or a curt statement that the issue is not one of constitutional dimension,[55] without serious consideration of the constitutional questions involved, is clearly erroneous. The remainder of this Note is designed to address the constitutional issues that are involved in governmental attempts to tax churches. The three issues are: sovereignty, the establishment clause of the first amendment, and the free exercise clause of that amendment.

A. *Sovereignty*

The issue is not only one of constitutional dimensions, it is, at heart, an issue of sovereignty. Because the government is sovereign, it can levy taxes.[56] The thirteen original states, because they were free and independent between the time of the signing of the Declaration of Independence in 1776 and the ratification of the Constitution in 1787, were sovereign before the existence of the United States. Texas was also an independent sovereign before joining the United States. They possessed all the powers of sovereignty. Under the American constitutional system, the states possess all the powers of sovereignty not granted exclusively to the national government, nor prohibited to the states by the Constitution, nor reserved to the people.[57] The Supreme Court has said that the "governments of the States are sovereign within their territory save only as they are subject to the prohibitions of the Constitution or as their action in some measure conflicts with powers delegated to the National Government, or with Congressional legislation enacted in the exercise of those powers."[58]

Christian religion is not opposed to the payment of taxes to support the sovereign. In reference to the payment of taxes to support the government, Jesus Christ taught: "Render unto Caesar the things that are Caesar's; and unto God the things which are God's."[59] The unmistakable command is that individuals are to pay taxes to the government. The question is, having taxed the individual taxpayer, will the Constitution allow the modern Caesar (the government) to impose a tax on the church and thereby allow Cae-

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54. Leggett v. Macon Baptist Ass'n., 232 Ga. at _, 205 S.E.2d at 201.

55. People v. Life Science Church, 113 Misc. 2d at _, 450 N.Y.S. 2d at 669.

56. *See supra* notes 46-48 and accompanying text.

57. U.S. CONST. amend. X.

58. Parker v. Brown, 317 U.S. 341, 359-60 (1943). *See also* United States Fidelity & Guarantee Co. v. Bramwell, 108 Or. 261, 217 P. 332 (1923) ("Every State of the Union possessed all of the powers of sovereignty not so delegated or prohibited, and these include every power of civil government, the exercise of which is not in conflict with the powers delegated to the United States or prohibited to the States.").

59. *Matthew* 22:21.

sar to tax that which has been rendered unto God?

Although churches generally are not opposed to taxes levied upon individuals, they are very opposed to the imposition of property, income, sales, and other taxes upon the church itself as an institution of God.[60] In regard to income taxation, a question could be raised about the application of such a law to a church. A church generates no income; rather, it exists solely on gifts.

> [W]ith relatively small exception, the funds received by churches are gifts, not income. The money placed in the Sunday morning offering plate is not like the steel worker's payroll check or the fee charged by the lawyer or the profit made by the utility company. The offering is not a compensation for services rendered, it is a gift to God.[61]

But the federal or state government, faced with a need for increased revenue, may attempt to impose various taxes upon churches. A question that must be resolved is whether the state is sovereign over the church.

A state cannot tax an individual or institution that it does not possess sovereignty over. A state may not impose a tax upon the property of the federal government.[62] The Supreme Court has consistently forbidden state taxation of federal property because the states are not sovereign over the federal government: "The supremacy of the Federal Government in our Union forbids the acknowledgment of the power of any State to tax property of the United States against its will. Under an implied constitutional immunity, its property and operations must be exempt from state control in tax, as in other matters."[63]

The Supreme Court, in a very important decision on taxation and sovereignty, stated in *McCulloch v. Maryland*[64] that the power of taxation is an absolute power, a sovereign power, subject to and controlled by the United

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60. *See supra* note 6 and accompanying text. The National Council of Churches, in its policy statement TAX EXEMPTION OF CHURCHES has stated:

> In the United States, it has been a basic public policy since the founding of the nation to accord to freedom of religion, speech, press and assembly a "preferred position" at the head of the Bill of Rights. Christians support and affirm this healthful arrangement of the civil order, not solely or primarily for themselves and their churches, but for everyone. Citizens, whatever their beliefs, should likewise appreciate the policy of our society that the free exercise of religion cannot be licensed or taxed by government. Property or income of religious bodies that is genuinely necessary (rather than merely advantageous) to the free exercise of religion should likewise not be taxed.

Quoted in, KELLEY, *supra* note 6, at 94.

61. L. BUZZARD & S. ERICSSON, THE BATTLE FOR RELIGIOUS LIBERTY, 268 (1982).

62. "[W]hether the property of the United States shall be taxed under the laws of a State depends upon the will of its owner, the United States, and no State can tax the property of the United States without their consent." Van Brocklin v. Tennessee, 117 U.S. 151, 175 (1886).

63. S.R.A., Inc. v. Minnesota, 327 U.S. 558, 561 (1946).

64. 17 U.S. (4 Wheat.) 316 (1819).

States Constitution.[65] The *McCulloch* Court also stated that the power of taxation does not extend to subjects over which the state is not sovereign.[66] The Court declared unequivocally that "[t]he power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create . . . ."[67] Even though taxation "does not necessarily and unavoidably destroy," and to carry it to the excess of destruction "would be an abuse," the Constitution will not allow a state any authority to tax any instrument over which it does not possess sovereignty.[68]

Because a government cannot impose taxes upon an instrument over which it is not sovereign, the District of Columbia exempts property belonging to foreign governments from property taxes.[69] The state of New York likewise does not attempt to impose property taxation on the United Nations' property.[70] This is not to imply that the church is a foreign government or that it should be treated as such; however, if a state seeks to impose property taxation on the property of a church, it follows that the state is claiming sovereignty over the church as an institution. This claim of sovereignty over the church has been rejected by Christianity for the last two thousand years.[71]

Since "the power to tax involves the power to destroy,"[72] a claim by the government that it has inherent authority to levy a tax on the church is tantamount to a claim by the government that it has the latent power to destroy the church. Just as this assertion of power was rejected by the Supreme Court when a state tried to tax an instrument of the federal government in *McCulloch v. Maryland*, it should be rejected anytime a state tries to impose its authority over the church.

The theme of sovereignty will be addressed more fully in the discussion of the impact of taxation upon the free exercise clause; it is sufficient to state at this point that there are those who vehemently oppose any suggestion that the state is sovereign over the church.

> The church has a distinctive mandate received from God and in no way derived from or subject to the divine mandate which gives authority to

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65. *Id.* at 427.
66. *Id.* at 429 ("This proposition may almost be pronounced self-evident.").
67. *Id.* at 431.
68. *Id.* at 431-32.
69. D.C. CODE ANN. § 47-1002(3) (1981).
70. N.Y. REAL PROPERTY TAX LAW § 416 (McKinney 1984).
71. *See Ephesians* 1:22-23; *Matthew* 16:18; *Matthew* 28:18-20. The church has consistently rejected state oversight as unscriptural. Countless martyrs perished in the Roman Coliseums rather than acknowledge the Roman Caesar. "Let us not forget why the Christians were killed. They were *not* killed because they worshipped Jesus . . . . Nobody cared who worshipped whom as long as the worshipper did not disrupt the unity of the state, centered in the formal worship of Ceasar. The reason [they] were killed was because they were rebels." F. SCHAEFFER, HOW SHOULD WE THEN LIVE, 24 (1976).
72. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819).

> the state . . . . The church . . . is supportive of, but not subject to, Caesar's role in the exercise of just government . . . . But the payment of direct taxes on churches is [a] symbolic act of subjection the church dare not render to the state . . . . In addition to the symbolic statement involved, to submit itself to the state's power of taxation would on a more practical level make the church vulnerable to domination by the state. The power to tax is, at least implicitly, the power to control, and even to destroy.[73]

The power to tax, and its accompanying power to destroy,[74] are not among the powers of the government over the church. The power of taxation only extends to subjects of the government's sovereignty.[75] The establishment clause and the free exercise clause of the first amendment[76] arguably deny the government sovereignty over the church.

B. *Establishment Clause: The Problem of Excessive Entanglement*

The first amendment's establishment clause[77] provides for a degree of separation of church and state.[78] This clause has been applied to the states through the fourteenth amendment.[79] Therefore any action forbidden to Congress in regard to religion is also forbidden to the states. The first amendment must be analyzed and applied to determine if Congress and the state legislatures possess the power to levy taxes on the church. Again, the issue of taxation of churches is one of constitutional dimensions because the first amendment operates as a specific limitation on the exercise of the tax-

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73. R. NEUHAUS, CHRISTIAN FAITH & PUBLIC POLICY, 173 (1977) [hereinafter cited as NEUHAUS].

74. McCulloch v. Maryland, 17 U.S. (4 Wheat.) at 431. *See also* Follett v. Town of McCormick, 321 U.S. 573, 577 (1944) (power to tax the exercise of first amendment liberty is the power to control or suppress it).

75. *Id.* at 429.

76. *See supra* note 38.

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

78. *See, e.g.*, Everson v. Board of Education, 330 U.S. 1, 18 (1947) (religion clauses erect a "wall" of separation between church and state). *But cf., e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) ("total separation is not possible in an absolute sense"); Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756, 760 (1973) (total separation is neither possible nor desirable); Lynch v. Donnelly, 104 S. Ct. 1355, 1359 (1984) ("wall of separation" is merely a "metaphor" - a useful figure of speech).

79. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). In *Cantwell*, the Court stated that the fourteenth amendment has rendered the state legislatures as incompetent as Congress to enact laws respecting an establishment of religion or prohibiting its free exercise. *Id.* Freedom of worship, along with freedom of speech and press, " '[w]hich are protected by the First Amendment from infringement by Congress, are among the fundamental rights and liberties which are protected by the Fourteenth Amendment from invasion by state action.' " Chaplinsky v. New Hampshire, 315 U.S. 568, 570-71 (1942) (quoting Lovell v. Griffin, 303 U.S. 444, 450 (1938)).

ing power.[80]

As has been stated before, the taxing power of the government is very weighty.[81] Freedom of religion protections in the Constitution, however, were designed as specific bulwarks against governmental abuses of taxing power.[82] Freedom of religion is in a preferred position when balanced against the power to tax.[83]

Although some might claim that a tax exemption for churches constitutes a violation of the establishment clause by creating government support of religion; others, such as Boris Bittker, Sterling Professor of Law at Yale Law School, have argued forcefully that tax exemption for churches is not an establishment of religion.[84] Court decisions, following the Supreme Court's reasoning in *Walz*, have generally upheld the constitutionality of tax exempt status of churches in the face of assertions that they violate the establishment clause.[85]

One particularly illustrative case is *Diffenderfer v. Central Baptist Church of Miami, Florida, Inc.*[86] The federal court stated that "*Walz* stands merely for the proposition that a state is free to provide any tax exemption scheme it wishes (as long as the classifications are not capricious or arbitrary) and that exemptions to houses of worship are included because they do not violate the religious clauses of the First Amendment."[87] The *Diffenderfer* decision upheld the constitutionality of tax exemption for a portion of a church property used as a parking lot, although it was rented out as a commercial lot during the week while not being used by church members for religious services.[88] The Florida Supreme Court had previously upheld the tax exempt status of that parking lot when Dade County had attempted to levy taxes on it.[89] The *Diffenderfer* case was a challenge of that decision as in violation of the free exercise clause; that challenge was rejected.[90]

The requirements of the establishment clause were explained by the

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80. Flast v. Cohen, 392 U.S. 83, 104 (1968).

81. *See supra* notes 46-49 and accompanying text.

82. Flast v. Cohen, 392 U.S. at 104.

83. Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943). *See also* Follett v. Town of McCormick, 321 U.S. 573, 575 (1944).

84. Bittker, *Churches, Taxes, and the Constitution*, 78 YALE L.J. 1285, 1288 *et seq.* (1969).

85. *E.g.*, Diffenderfer v. Central Baptist Church, 316 F. Supp. 1116, 1118 (S.D. Fla. 1970), *vacated*, 404 U.S. 412 (1972). *See also* Haring v. Blumenthal, 471 F. Supp. 1172 (D.D.C. 1979), *cert. denied*, 452 U.S. 939 (1981).

86. 316 F. Supp. 1116 (S.D. Fla. 1970), *vacated*, 404 U.S. 412 (1972).

87. *Id.* at 1119.

88. *Id.* The Supreme court later vacated the decision because the repeal of the challenged statute and the enactment of new legislation made the injunctive relief sought inappropriate. Diffenderfer v. Central Baptist Church, 404 U.S. 412, 414-16 (1972).

89. Central Baptist Church v. Dade County, 216 So. 2d 4 (Fla. 1968).

90. Diffenderfer v. Central Baptist Church, 316 F. Supp. at 1118.

Supreme Court in *Lemon v. Kurtzman*.[91] The tripartite test announced in *Lemon* to determine if a governmental action violates the establishment clause was succinctly summarized later by the Court in *Wolman v. Walter*.[92] According to the Court, the three planks of the *Lemon* test that a statute must pass are: "[A] statute must have a secular legislative purpose, must have a principle or primary effect that neither advances nor inhibits religion, and must not foster an excessive government entanglement with religion."[93]

Would a statute that imposes taxation on a church violate any plank of the *Lemon* test? The first prong, that the statute must have a secular legislative purpose, is easily met. Statutes taxing churches would be designed to halt the erosion of the tax base.[94] The second prong, that the statute neither advance nor inhibit religion, would probably not be a problem. It would be difficult to argue that taxation hinders religion without admitting that exemption advances religion. A taxation statute would be neutral in that it applies equally to churches and other non-religious institutions. The Court has said that the first amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers . . . ."[95] Taxing statutes are facially neutral.

If a statute imposing a tax on the church fails to pass the *Lemon* test, it will fail the third prong of that test: that the statute must not foster excessive entanglement of government and religion. Government programs that create an excessive entanglement of government and religion are unconstitutional.[96] In *Walz*, the court concluded that tax exemptions for churches would not create excessive entanglement:

> Either course, taxation of churches or exemption, occasions some degree of involvement with religion. Elimination of exemption would tend to expand the involvement of government by giving 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 . . . . [T]ax exemptions . . . gives rise to some, but yet a lesser, involvement than taxing them.[97]

While the *Walz* decision made it clear that tax exemptions produce less entanglement than taxation,[98] does that mean that tax exemptions *must* be

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91. 403 U.S. 602 (1971).

92. 433 U.S. 229 (1977).

93. *Id.* at 236.

94. *See* Note, *Real Property Tax Exemption in New York: When is a Bible Society Not Religious?*, 45 FORDHAM L. REV. 949, 963 (1977).

95. Everson v. Board of Education, 330 U.S. 1, 18 (1947).

96. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. at 612; Walz v. Tax Commission, 397 U.S. at 674.

97. Walz v. Tax Commission, 397 U.S. at 674-75.

98. *Id.*

provided? That is, will taxation of churches result in constitutionally-forbidden excessive entanglement of government and religion? The Court did not address this question in *Walz* or any subsequent decision. Justice Brennan's concurrence in the *Walz* decision specifically stated that he was not deciding that government must provide exemptions or that the courts should intercede if it fails to do so.[99] It is possible that the Court will have to address this issue if a legislature, in its search to expand the tax base, imposes a property tax or other tax on churches.

The establishment clause forbids any governmental action that will require a comprehensive, discriminating and continuing surveillance of religious institutions.[100] The Supreme Court in *Lemon* struck down a Rhode Island program of grants to religious educational institutions that would require that degree of governmental surveillance.[101] Such comprehensive, discriminating and continuing surveillance would result in "excessive and enduring entanglement between state and church" in violation of the establishment clause.[102] The *Lemon* decision also invalidated a Pennsylvania program to reimburse private elementary and secondary schools for teacher's salaries, textbooks and instructional materials only used for secular education because the grants would create an unconstitutional excessive entanglement by requiring an "intimate and continuing relationship between church and state."[103] The Court was particularly opposed to a program that allowed state officials to inspect the financial books of church schools and determine which expenditures were religious and which were secular.[104] This indicates that a governmental program requiring that state agents inspect the books and records of a church is an excessive entanglement of church and state. Although the imposition of property taxes on churches may not require that state agents audit church books and records, other taxes, such as income and sales taxes, may involve such audits.

In a decision announced the same day as *Lemon*, the Court in *Tilton v. Richardson*[105] upheld a program of federal grants to church-related colleges to construct buildings to be used only for secular education.[106] In that case, the Court cited several factors that would lead to an excessive entanglement: a continuing financial relationship between government and a religious institution, annual audits of the institution's expenditures, and government analysis of these expenditures to determine which were religious and which were secular.[107] Although none of these factors would be controlling, the ab-

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99. *Id.* at 692 n.12 (Brennan, J. concurring).
100. Lemon v. Kurtzman, 403 U.S. at 619.
101. *Id.*
102. *Id.*
103. *Id.* at 621-22.
104. *Id.*
105. 403 U.S. 672 (1971).
106. *Id.* at 689.
107. *Id.* at 688.

sence of all three indicated a "narrow and limited relationship" of a religious institution and the government and allowed the program to be upheld.[108]

It has been stated that the mere requirement that churches file informational tax returns is an unconstitutional excessive entanglement of church and state.[109] The requirement of merely filing informational returns is "a first step whose ultimate end is full government surveillance of religious institutions."[110] There are dangers inherent in the imposition of taxes on churches; exemption guards against those dangers.[111] Clearly, the processes that accompany taxation — tax valuations, liens, foreclosures, audits, inspections, etc. — will mandate a close and continuing governmental surveillance of churches. This excessive entanglement of government and religion is forbidden by the establishment clause of the first amendment. Any statute imposing direct taxes on churches is therefore unconstitutional.

C. *The Free Exercise Clause: Taxation as a Prohibition on the Exercise of Religion*

The first amendment forbids governmental action that prohibits the free exercise of religion.[112] Under the Constitution, freedom of religion, as well as freedom of speech and press are in a preferred position.[113] Those freedoms are among the fundamental rights and liberties which the fourteenth amendment protects against invasion by state action.[114] Free exercise of religion is susceptible to governmental restriction only to prevent grave and immediate danger to interests which the state may lawfully protect.[115] One's relations with "his Maker and the obligations he may think they impose" cannot be interfered with, "provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with."[116] But any governmental intrusion upon free exercise of religion is a breach of the separation of church and state and should be

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108. *Id.* at 688-89.

109. Note, *The Internal Revenue Service as a Monitor of Church Institutions: The Excessive Entanglement Problem*, 45 FORDHAM L. REV. 929, 948 & n.178 (1977).

110. *Id.*

111. Walz v. Tax Commission, 397 U.S. at 673.

112. U.S. CONST. amend. I.

113. Follett v. Town of McCormick, 321 U.S. 573, 575 (1944); Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943).

114. Chaplinsky v. New Hampshire, 315 U.S. 568, 570-71 (1942).

115. West Virginia State Board of Education v. Barnette, 319 U.S. 624, 639 (1943). For example, governmental agencies can make health and fire safety inspections of religious facilities because violation of health and fire codes can constitute a clear and present danger to the people. *See* Jacobson v. Massachusetts, 197 U.S. 11, 26-27 (1905).

116. United States v. Ballard, 322 U.S. 78, 87 (1944) (quoting Davis v. Beason, 133 U.S. 333, 342 (1890)).

rigidly limited to legitimate concerns for public health and safety.[117] State regulations of activities protected by the religion clauses of the first amendment are only those that "have invariably posed some substantial threat to public safety, peace or order."[118]

The test of governmental regulation of freedom to act according to religious belief is that such regulation must attain a permissible end without unduly infringing on the free exercise of religion.[119] The Court held in *Sherbert v. Verner*[120] that for a governmental action that has an effect of burdening the free exercise of religion to be upheld:

> [I]t must be either because . . . [it] represents no infringement by the State of [the] constitutional rights of free exercise, or because any incidental burden on the free exercise of . . . religion may be justified by a compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . . .[121]

The question is, what *compelling state interest* requires the imposition of taxes upon churches in violation of the right to free exercise of religion? If taxation of churches does impose a restraint on freedom of religion, and there is no *compelling* governmental interest, taxation of churches is unconstitutional. There are those who believe that payment of taxes by churches is against their sincere religious beliefs.[122] Any inquiry into the sincerity of religious beliefs is to be severely limited; courts are not to require individuals to prove their religious beliefs.[123] In fact, any judicial inquiry into the sincerity of religious beliefs is "extraordinarily dangerous."[124]

A statute requiring churches to pay taxes in violation of sincere religious beliefs is a burden on the free exercise of religion. Justice Douglas, in the religious liberty case of *Poulos v. New Hampshire*,[125] stated, "[w]hen a legislature undertakes to proscribe the free exercise of a citizen's constitutional right . . . it acts lawlessly . . . . The command of the First Amendment . . . is that there shall be *no* law which abridges those civil rights. The matter is beyond the power of the legislature to regulate, control or condition."[126]

A direct tax on the church, in violation of the church's doctrinal be-

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117. *See* Wisconsin v. Yoder, 406 U.S. 205, 230 (1972).

118. *Id.* (quoting Sherbert v. Verner, 374 U.S. 398, 402-03 (1963)).

119. Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).

120. 374 U.S. 398 (1963).

121. *Id.* at 403 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

122. *See generally* KELLEY, *supra* note 6; NEUHAUS, *supra* note 73, at 173; FERRARA, *supra* note 1, at 56.

123. United States v. Ballard, 322 U.S. 78, 86 (1944).

124. L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 14-11 (1978).

125. 345 U.S. 395 (1953).

126. *Id.* at 423 (Douglas, J., dissenting).

liefs,[127] prevents the church from exercising its religious freedom. The Supreme Court in *Follett v. Town of McCormick*[128] ruled that a flat license tax applied to one who earns his livelihood as an evangelist or preacher is an unconstitutional restraint on freedom of religion.[129] The direct tax on a minister is unconstitutional because any tax on a first amendment liberty is obnoxious, for "the power to tax the exercise of a privilege is the power to control or suppress its enjoyment."[130] The majority rejected the argument of the dissenters that immunity from taxation constitutes a subsidy for religion.[131]

Taxation infringes on free exercise of religion: "It is wise to remember that the taxing and licensing power is a dangerous and potent weapon which, in the hands of unscrupulous or bigoted men, could be used to suppress freedoms and destroy religion unless it is kept within appropriate bounds."[132] Imposing a tax on religion could result in its suppression. Even if taxation is not carried to that excess, any tax is a degree of governmental limitation on religion.

The state may justify a limitation on the free exercise only by showing that such a limitation is essential to the accomplishment of some overriding governmental interest.[133] If there is no overriding governmental interest which would allow the imposition of a tax on one who preaches religion,[134] what governmental interest allows imposition of a tax on the property of a church? Sincere religious principles of many individuals oppose any exercise of state authority over the churches through taxation. "[T]o make accommodation between the religious action and an exercise of state authority is a particularly delicate task . . . because resolution in favor of the State results in the choice to the individual of either abandoning his religious principle or facing . . . prosecution."[135]

Courts should not challenge a sincere claim that the payment of taxes by churches violates the right to free exercise of religion. In refusing to decide whether implementation of social security taxes upon the Amish will threaten the integrity of the Amish religious belief, the Court stated that "[i]t is not within 'the judicial function and judicial competence,' however, to determine whether . . . the Government has the proper interpretation of

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127. *See* the Statement of the National Council of Churches, *supra* note 60.

128. 321 U.S. 573 (1944).

129. *Id.* at 576.

130. *Id.* at 577.

131. *See id.* at 581 (Roberts, J., dissenting).

132. *Id.* at 579 (Murphy, J., concurring).

133. Bob Jones University v. United States, 461 U.S. 574, 603 (1983); United States v. Lee, 455 U.S. 252, 257-58 (1982). *See also* Thomas v. Review Board, 450 U.S. 707 (1981); Wisconsin v. Yoder, 406 U.S. 205 (1972); Gillette v. United States, 401 U.S. 437 (1971); Sherbert v. Verner, 374 U.S. 398 (1963).

134. Follett v. Town of McCormick, 321 U.S. at 576.

135. Braunfeld v. Brown, 366 U.S. 599, 605 (1961).

the Amish faith; '[c]ourts are not arbiters of scriptural interpretation.' "[136] The Court also noted that "[b]ecause the payment of taxes or receipt of benefits violates Amish religious beliefs, compulsory participation in the social security system interferes with their free exercise rights."[137] Taxation of churches unquestionably will interfere with the free exercise of religion.

The nearby property owners may complain that exempting churches from property taxes means that they have to pay higher taxes on their properties to pay for the police, fire and other services of the community because the church property is untaxed.[138] Be that as it may, "[W]hen we balance the Constitutional rights of property owners against those of the people to enjoy freedom of press and religion . . . the latter occupy a preferred position."[139] The argument could be made that churches should pay property taxes, or at least some portion of a tax assessment, to pay the government for the police services and fire protection that they receive. But there is no reason to require them to do so. Such governmental services are provided to many untaxed properties. For example, the District of Columbia provides police and fire protection to foreign embassies, although it derives no revenue from them through taxation.[140] This Note is not advocating that the state treat churches as the equivalent to foreign governments; however, it should be noted that government does provide police and fire protection to property that it cannot tax.[141]

A direct tax on a church, such as a property tax, has the same effect on the free exercise of religion that a license tax would have on one who earns his livelihood as an evangelist.[142] To grant the state the power to impose such a tax on a church would be equivalent to granting the state the power to control or suppress the religious activities of the church. "The power to tax involves the power to destroy."[143] "The power to tax the exercise of a privilege is the power to control or suppress its enjoyment."[144] To vest such a power over the church in the hands of the government, even if that power remains latent and is never used to such an extent as to suppress or destroy

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136. United States v. Lee, 455 U.S. 252, 257 (1982) (quoting Thomas v. Review Board, 450 U.S. 707, 716 (1981)).

137. *Id.* The Court did, however, uphold the imposition of the taxes because it found an overriding governmental interest mandating it. *Id.* at 260. *But see infra* notes 158-62 and accompanying text.

138. *See* Walz v. Tax Commission, 397 U.S. at 667.

139. Marsh v. Alabama, 326 U.S. 501, 509 (1946).

140. D.C. CODE ANN. § 47-102(3) (1981).

141. For an example of a state statute exempting real property from taxation, see IOWA CODE § 427.1 (1985). Exempt property includes federal and state property, cemeteries, property of associations of war veterans, libraries and art galleries. *Id.* The state derives no tax revenue from these properties although it presumably provides police and fire protection services to them.

142. *See supra* notes 129-30 and accompanying text.

143. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 429 (1819).

144. Follett v. Town of McCormick, 321 U.S. at 577.

a church, is incompatible with the free exercise clause of the Constitution.

VI. Recent Supreme Court Decision Involving Tax Exemptions for Religious Institutions

In three recent decisions the Supreme Court has appeared to implicitly deny that there is a first amendment right of churches to be exempt from taxation. Such an inference is drawn from the opinions in *United States v. Lee*,[145] *Regan v. Taxation with Representation*,[146] and *Bob Jones University v. United States*.[147] An examination of this trilogy of cases is required to determine if they refute the central contention of this Note; that is, that tax exemption for churches is constitutionally-mandated.

In *Lee*, the Court stated that not all burdens on religion are unconstitutional.[148] The imposition of social security taxation on an individual was upheld despite a claim that the taxation burdened the individual's right to free exercise of religion.[149] The restriction on free exercise of religion was justified because the Court found an overriding governmental interest that required it.[150]

The *Regan* opinion held that the Constitution does not require that tax exemption be granted to a person who wishes to exercise a constitutional right.[151] The Court also stated that a "tax exemption has much the same effect as a cash grant to the organization of the amount it would have to pay on its income."[152] This seems to run counter to the distinction between exemptions and subsidies that the Court drew in *Walz*.[153]

In *Bob Jones University*, the Court held that religious-affiliated schools may not receive income tax exemptions if those schools violate a public policy of eradicating racial discrimination.[154] Again, the Court concluded that the governmental interest involved was overriding.[155] The Court specifically stated that the "governmental interest at stake here is compelling"[156] and that "no less restrictive means . . . are available to achieve the governmental interest."[157]

A close scrutiny of each of these three cases, however, reveals that none

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145. 455 U.S. 252 (1982).
146. 461 U.S. 540 (1983).
147. 461 U.S. 574 (1983).
148. United States v. Lee, 455 U.S. at 257.
149. *Id.* at 260.
150. *Id.*
151. Regan v. Taxation with Representation, 461 U.S. at 544.
152. *Id.* at 544.
153. Walz v. Tax Commission, 397 U.S. at 675. *See supra* notes 19-21 and accompanying text.
154. Bob Jones University v. United States, 461 U.S. at 604.
155. *Id.*
156. *Id.*
157. *Id.* (citation omitted).

of them directly refutes the contention that the first amendment requires that churches be exempt from governmental taxation. In *Lee*, the issue was the application of social security taxes upon an individual engaged in purely secular employment.[158] The Court did not address the issue of imposition of taxation on a religious activity, but restricted the opinion to dealing with the imposition of taxes on a commercial activity.[159] There was no danger of excessive entanglement of church and state in that factual situation. Taxation of churches, rather than non-religious commercial activities, would lead to just such an excessive entanglement.[160] There is no demonstrable overriding governmental interest in applying taxes to churches.[161] Again, it must be remembered that the first amendment operates as a specific limitation on the taxing power.[162]

In *Regan*, the statement that a tax exemption *has the same effect* as a cash grant,[163] does not mean that tax exemption is the same thing as a cash grant. Two entirely different means can have identical effects. In making this assertion, the Court did not overrule the holding in *Walz* that the grant of tax exemption to churches is not the same as a cash grant because the government is not transferring part of its revenue to churches.[164] Also, the statement that the Constitution does not mandate tax exemption to a person who wishes to exercise a constitutional right,[165] must not be read too broadly. *Regan* involved a challenge of a denial of tax exemption to an organization involved in lobbying and not a church.[166] The constitutional right at issue was freedom of speech, not freedom of religion.[167] The religion clauses of the first amendment were not implicated at all in that case. Therefore there was no excessive entanglement/establishment of religion problem to deal with. Had there been such an issue, the decision may have been different and the broad generalizations may have been more narrow.

In *Bob Jones University*, the Court concluded that a compelling governmental interest in eradicating racial discrimination required that religious schools be denied income tax exemption if they promoted racial discrimination.[168] This ruling, however, cannot be used to support an argument that the Constitution does not mandate that churches be tax exempt. The

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158. United States v. Lee, 455 U.S. at 254. The appellee was a farmer and carpenter. *Id.* The limits of a religious faith on conduct are not superimposed on statutory requirements when followers of that sect enter a commercial activity as a matter of choice. *Id.* at 261.

159. *Id.*

160. *See supra* notes 96-111 and accompanying text.

161. *See supra* notes 115-37 and accompanying text.

162. Flast v. Cohen, 392 U.S. at 104.

163. Regan v. Taxation with Representation, 461 U.S. at 544.

164. Walz v. Tax Commission, 397 U.S. at 675.

165. Regan v. Taxation with Representation, 461 U.S. at 544.

166. *Id.* at 544.

167. *Id.*

168. Bob Jones University v. United States, 461 U.S. at 604.

Court made it emphatically clear that it was dealing "only with religious *schools* — not with churches or other purely religious institutions . . . ."[169] the Court did not treat the schools as religious institutions, rather it treated them as a charity.[170] The religion clause of the first amendment, however, bestows rights on religious institutions that may not be available to other charitable or eleemosynary organizations. The issue in *Bob Jones University* clearly was not the constitutionality of a tax on churches or other purely religious institutions.[171] Neither *Bob Jones University*, *Regan* nor *Lee* can be extended far enough to refute the premise that the Constitution requires that churches be exempt from governmental taxation.

VII. Conclusion

The issue of the constitutionality of a governmentally-imposed tax on churches has not reached the United States Supreme Court for adjudication. As financially-strapped state and local governments look for ways to expand their tax bases, the issue could easily become a live one. Without doubt, a legislative grant of a tax exemption to churches does not violate the establishment clause of the first amendment.[172] If a legislative body attempts to revoke that grant and impose a tax on a church directly, that legislative action should be aggressively challenged as a constitutionally-forbidden act.[173]

Based on the three arguments addressed in this Note, a legislative enactment to tax churches, if attempted, would be unconstitutional. First, the issue of sovereignty forbids it. A government can only tax the objects over which it is sovereign. The power to tax an institution is the power to regulate, control, suppress and destroy. A church is not a creature of the state and it enjoys constitutional protection from governmental regulation, control, suppression and destruction.

Second, taxation of churches would result in excessive entanglement of government with religion. Such excessive entanglement is forbidden by the establishment clause of the first amendment.

Finally, tax applied to churches, like the application of a license tax to an evangelist or preacher, is a restraint on freedom of religion. As such, it is

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169. *Id.* at 604 n.29.

170. *See id.* at 585-92.

171. *Id.* at 604 n.29.

172. Walz v. Tax Commission, 397 U.S. at 680.

173. Kelley, *supra* note 6, at 21-22. "[W]henever anyone casually asserts that 'tax exemption' is *granted* to churches' let their unconceded assumption be pointed out and vigorously contested. There are those of use who do not concede that the legislature can constitutionally tax churches . . . ." *Id. See also* Ferrara, *supra* note 1, at 56 ("Taxation would burden the freedom of churches, and increase government involvement with religion, contrary to the values expressed in both religion clauses."); Neuhaus, *supra* note 73, at 174 (If taxation is imposed, "the church must contend that the state has violated both the constitutional guarantee of the free exercise of religion and, more ominously, the sovereign will of God.").

unconstitutional as a violation of the free exercise clause of the first amendment.

This is not to say that a religious institution should automatically be entirely exempt from taxation. A profit-making commercial venture that competes with other secular ventures should not be tax-exempt merely because it is owned by a church. "There are conceivably various expenditures by churches that are *not* essential to the free exercise of religion, such as speculative investments, which might be subject to taxation just as income from trade or business unrelated to the exempt function of a church now is."[174] For example, a grocery store could not claim exemption from taxation if it is owned by a church, because ownership and operation of a grocery store does not go to the core of the church's essentially-religious mission. The essential religious goals of the church "involve the right of assembly, public worship, public promulgation of the gospel, witness on questions of social justice, and the like. The institutions and activities essential to facilitating these goals must be unquestionably tax exempt."[175] A house of worship, a parsonage and facilities used for religious education and exclusively religious purposes are constitutionally-protected from governmental intrusion and taxation, as well as the accompanying governmental processes such as tax liens, tax foreclosures, tax sales, and continuing financial oversight and auditing.

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174. KELLEY, *supra* note 6, at 94. Kelley continues by saying, "Of course, a church should always be permitted to attempt to show that a given type of expenditure proposed to be taxed is indeed essential to the free exercise of religion of its members." *Id.* at 94-95.

175. NEUHAUS, *supra* note 73, at 174.