2020

The Unconstitutional Entanglement Concerns That Arise from Taxing Portions of Religious Institutions

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INTRODUCTION

"[T]he power to tax involves the power to destroy,"[1] and from this fact it follows that giving "states the power to tax the church would be tantamount to giving it the power to destroy the church."[2] Throughout history, religious institutions have been tax exempt by means of common law[3] or statutory provisions.[4] Tax exemptions have been customary in society since the ancient world.[5] "Egypt, Sumeria, Babylon and Persia forgave priests and temples their taxes."[6] Despite the long tradition of tax exemptions, most scholars have been unable to pinpoint when government tax exemptions for religious institutions became normalized.[7] Nevertheless, modern reliance on tax exemptions for religious institutions are widespread today and derive from some combination of historical precedent, legislative determination, constitutional law, and judicial interpretation.

The First Amendment contains two clauses that create a spectrum where the government balances the interest of the State and the interest of religious institutions. Through the Establishment Clause and the Free Exercise Clause ("the Religion Clauses"), the federal government adheres to a basic principle of *neutrality* towards religion. The Religion Clauses achieve this result by ensuring, via the Establishment Clause, that no particular religion is established or preferred over others, while also ensuring, via the Free Exercise Clause, that every religion is practiced without discrimination or interference. In *Gitlow v. New York,*[8] the Supreme Court held that the protections of the First Amendment extend to the actions of state and local

[1] McCulloch v. Maryland, 4 Wheat. 316, 431 (1819).
[2] John Witte, Jr., *Tax Exemption of Church Property: Historical Anomaly or Valid Constitutional Practice?*, 64 S. CAL. L. REV. 363, 415 (1991).
[3] *Id.* at 368.
[4] *Id.* at 389.
[5] Erika King, *Tax Exemptions and the Establishment Clause*, 49 SYRACUSE L. REV. 971, 974 (1999).
[6] Elizabeth A. Livingston, Note, *A Bright Line Points Toward Legal Compromise: IRS Condoned Lobbying Activities for Religious Entities and Non-Profits*, 9.1 RUTGERS J.L. & RELIGION 1, 2 (2008).
[7] *Id.*
[8] Gitlow v. New York, 268 U.S. 652 (1925).

governments through the Fourteenth Amendment, thus, in effect, applying this same principle of religious neutrality to all actors at all different levels of government.

Utilizing the language from the Religion Clauses, the Supreme Court has decided two monumental cases concerning the taxation of religious institutions and the "entanglement" concerns to which that practice often gives rise. In 1970, the Supreme Court, in *Walz v. Tax Commission of New York*,[9] held that state grants of tax exemptions to religious institutions do not violate the Establishment Clause,[10] emphasizing that "[e]ach value judgment under the Religion Clauses must turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so."[11] Shortly after *Walz*, the Court reviewed *Lemon v. Kurtzman*[12], a case regarding government funding of religious primary and secondary schools, and expressed that "[t]he objective is to prevent, as far as possible, the intrusion of either [state or religion] into the precincts of the other."[13] The Court emphasized that "prophylactic"[14] interactions between state and churches "will involve excessive and enduring entanglement between" both institutions.[15]

Since *Walz* and *Lemon*, state and local governments have attempted to navigate the delicate parameters outlined by the Court's interpretation of the Religion Clauses. This essay will identify various instances in which state and local governments, facilitated by their own courts, have erred too far to the side of intruding upon the operation of religious institutions, thus resulting in an infringement of First and Fourteenth Amendment rights. This essay will exam the history of tax exemptions for religious institutions, the Court's application of the First Amendment's Religion

[9] Walz v. Tax Comm'n of N.Y., 397 U.S. 664 (1970).
[10] *Id.* at 680.
[11] *Id.* at 669.
[12] Lemon v. Kurtman, 403 U.S. 602 (1971).
[13] *Id.* at 614.
[14] *Id.* at 619.
[15] *Id.* at 619.

Clauses, the Court's analysis in *Walz* and *Lemon*, and modern tax exemptions on religious institutions.

I. THE HISTORY OF TAX EXEMPTIONS FOR RELIGIOUS INSTITUTIONS

A. Tax Exemptions in the Ancient World

Religious tax exemptions "extend as far into the past as do written records…."[16] The widespread competition in the ancient world for actual authority between government and religious institutions created a necessity for religious tax exemptions. [17] In the ancient world, the decision not to tax was largely a decision not to antagonize."[18] The contention between established empires and the prominent religious bodies based in those societies led to societal economic collapses, the confiscation of wealth from churches, and a desire to destroy through taxation.[19] America's commitment to a separation of church and state derives in part from historical records that indicate that separation protects and preserves religious liberties and the political arena.[20]

B. Tax Exemptions in America

In the United States property tax was a "tax on all forms of property, real and personal, tangible and intangible, 'upon every man according to his estate, and with consideration to all his other abilities . . . .'"[21] Modern property tax in the "United States is limited largely to real estate, reaching only selected items of personal property."[22] State and local government reliance on property tax revenues varies. In recent years, "property taxes accounted for nearly seventy-five percent of all local government taxes and thirty-six percent of all state and local taxes combined."[23]

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[16] Erika King, *Tax Exemptions and the Establishment Clause*, 49 SYRACUSE L. REV. 971, 973 (1999).
[17] *Id.* at 974.
[18] *Id.*
[19] *Id.* at 974-975.
[20] *Id.* at 975.
[21] WALTER HELLERSTEIN ET AL., STATE AND LOCAL TAXATION, 867-68 (10th ed. 2014).
[22] *Id.* at 868.
[23] *Id.* at 868.

Almost all of state and local taxes are derived from property taxes. [24] Property taxes also supply "most school districts' independent revenue."[25] Nonetheless, many states allow broad tax exemptions because "[e]xemption of personal property simplifies tax administrations . . . ."[26]

Congress, from the beginning of the Nation's founding, has understood the Religion Clauses to authorize tax exemptions for religious institutions.[27] In 1802, after the ratification of the Constitution, Congress enacted a taxing statute which provided tax exemptions for churches.[28] As a result, an inference may be made that early government participants were aware of the existence and implementation of tax exemptions for religious institutions and still, no language was developed to undermine its existence.[29] Justice Brennan, in his *Walz* concurrence, expressed that existing evidence of Thomas Jefferson and James Madison's knowledge of religious tax exemptions make it unlikely that they would have "remained silent had they thought the exemptions established religion."[30]

America's current laws regarding tax exemptions of religious property stem from two traditions: "(1) a common law tradition, which accorded such exemptions to established churches that discharged certain governmental burdens; and (2) an equity law tradition, which accorded such exemptions to all churches that dispensed certain social benefits."[31] Those traditions contributed to the development of state laws (often initially in the form of colonial laws) that exempted religious institutions from taxation.[32]

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[24] *Id.* at 868.
[25] *Id.*
[26] HELLERSTEIN ET AL., *supra* note 21, at 868.
[27] *Walz*, 397 U.S. at 677.
[28] *Id.*
[29] *Id.* at 684.
[30] *Id.* at 684-85.
[31] Witte, Jr., *supra* note 2, at 368.
[32] *Id.*

a. Common Law Tradition

In the colonies, the common law traditions did not automatically provide unrestricted tax exemptions to religious institutions.[33] All property within a particular jurisdiction was taxable at common law unless exempted by a particular legislative act.[34] Only certain types of religious institutions were considered exemptible.[35] These included the "properties of incorporated established churches that were devoted to the appropriate 'religious uses' prescribed by ecclesiastical law, such as chapels, parsonages, glebes, and consecrated cemeteries."[36] "The exclusivity of established churches in the 17th and 18th centuries was often carried to prohibition of other forms of worship."[37] Generally, churches were often responsible for "quit-rent taxes, poll taxes, land taxes" and other similar property taxes.[38] The exclusivity of established churches diminished exemptions applicable to all types of religious properties throughout the colonies.[39]

Oftentimes these exemptions could be lifted in "times of emergency or abandoned altogether if the tax liability imposed on remaining properties in the community proved too onerous."[40] However, these tax exemptions, were a product of a religious institutions' establishment within a particular colony.[41] These established religious institutions were effectively arms of the state or "state agencies, and their clergy were effectively state officials."[42] Consequently, those religious institutions who were privileged enough to receive tax exemptions were de facto government agencies.[43]

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[33] *Id.* at 371.
[34] *Id.*
[35] *Id.* at 372.
[36] *Id.*
[37] *Walz*, 397 U.S. at 668.
[38] Witte, Jr., *supra* note 2, at 373.
[39] *Id.* at 374.
[40] *Id.*
[41] *Id.* at 374.
[42] *Id.* at 374-75.
[43] *Id.* at 375.

b. Equity Tradition

Tax exemptions at equity were applied by colonial chancery courts with a different reasoning than those applied by common law.[44] Equity courts exempted religious institutions because of their contributions to charitable efforts.[45] These exemptions were only granted to religious institutions that engaged in charity.[46] The courts viewed the activity itself to determine the charitable character.[47] Religious institutions were also utilized to "host town assemblies, political rallies, and public auctions, to hold educational and vocational classes, to maintain census rolls and marriage certificates, to house the community library, and to discharge a number of other public functions."[48] Additionally, the "[p]arsonages were used not only to house the minister's family but also to harbor orphans and widows, the sick and the handicapped, and victims of abuse and disaster."[49]

In recognition of this work, equity courts would provide tax exemptions and subsidies.[50] Both the amount of the subsidy and the scope of the exemption was calculated on a case-by-case basis.[51] Certain individuals designated and regulated by the equity courts would visit the religious institution to conduct a performance assessment and determine its needs.[52] After their visit, they would recommend "to the equity court each charity's entitlement to subsidy and exemption."[53] The equity courts would then provide the religious institutions "with a second basis for receiving tax exemptions for their properties and tax subsidies for their activities."[54]

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[44] *Id.* at 375.
[45] *Id.*
[46] *Id.*
[47] *Id.* at 376.
[48] *Id.* at 378.
[49] *Id.*
[50] *Id.* at 378.
[51] *Id.* at 377.
[52] *Id.*
[53] *Id.*
[54] *Id.* at 378.

c. Disruption in the Colonial Patterns of Religious Tax Exemptions

Colonial laws surrounding the "tax exemption of church property continued largely uninterrupted in the early decades of the American republic."[55] However, at a particular point three different developments disrupted the "colonial pattern of tax exemption of church property."[56] First, the disestablishment of religion within states began to prohibit religious establishment within state constitutions.[57] Churches that may have previously belonged to a state or local government were no longer a subsidized state agency and thus, were no longer in possession of what was considered tax-exempt government property.[58] The second, was the revocation of English statutes through state constitutional mandates.[59] The English Statute of Charitable Uses of 1601 was one of the casualties of the revocation of traditional equity law.[60] As a result, charitable institutions and in turn religious institutions, were no longer under the jurisdiction of equity courts.[61] This separation eventually led to the demise of equity rationale for tax exemptions.[62] Third, the presumption that all property was to incur property taxes provided an additional burden on the implementation of tax exemptions for religious institutions.[63] The impression that exemptions could only be granted if it consisted of bringing forth "public welfare" or advancing other "good and compelling reasons" dismantled the presumption of providing tax exemptions for religious institutions.[64]

[55] *Id.* at 380.
[56] *Id.*
[57] *Id.* at 381.
[58] *Id.* at 380.
[59] *Id.* at 383.
[60] *Id.* at 384.
[61] *Id. at 384-85.*
[62] *Id.* at 385.
[63] *Id.*
[64] *Id.* at 386.

II. THE FIRST AMENDMENT, *WALZ* AND *LEMON*

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[65] The Religion Clauses reflect the framers' initial desire to avoid government entanglement with religion. The Establishment Clause prevents the government from establishing a preferred religion and avoids potentially discriminatory laws towards different or opposing religious groups. The Free Exercise Clause proceeds on the notion that people should rarely be forced to do things that oppose their religious beliefs and the government should not be allowed to override religious beliefs without a legitimate reason.

A. *Walz*

The Supreme Court directly confronted the relationship between religious-based tax exemptions and the Religion Clauses in *Walz*, where a property-owner sought an injunction to prevent the New York City Tax Commission from granting tax exemptions to religious organizations using otherwise-taxable property for religious worship.[66] The exemption was authorized by New York's state constitution,[67] but the claimant in *Walz* contended that the exemption, in effect, amounted to express government support to religious bodies in violation of the U.S. Constitution's Establishment Clause.

Writing for the majority, Chief Justice Burger noted that a complete separation of government from religion was not viable. [68] Indeed, as the Court went on to explain, the "very existence of the Religion Clauses is an involvement of sorts – one that seeks to mark boundaries

[65] U.S. CONST. AMEND. I.
[66] *Walz*, 397 U.S. at 666.
[67] *Id.*
[68] *Id.* at 676.

to avoid excessive entanglement."[69] Chief Justice Burger presented fire and police protection received by religious institutions that are afforded by state and local governments to demonstrate the inevitable contact that exist between government and religion.[70] According to Chief Justice Burger, reliance on these services does not diminish a genuine expectation of separation between government and religion.[71] Chief Justice Burger turned to the issue at hand and similarly determined that tax exemptions were not aimed at the establishment, sponsorship, or support of religion. [72] In particular, Chief Justice Burger emphasized that "[n]othing in this national attitude towards religious tolerance and two centuries of uninterrupted freedom from taxation has given the remotest sign of leading to an established church or religion and on the contrary it has operated affirmatively to help guarantee the free exercise of all forms of religious beliefs."[73]

Regarding the assessment of excessive government entanglement with religion, the Court determined that religious tax exemptions create "only a minimal and remote involvement between church and state."[74] The involvement is far less than the taxation of religious institutions.[75] Therefore, the Court reasoned that tax exemptions were not in violation of the Religion Clauses of the First Amendment because "[n]o perfect or absolute separation is really possible."[76]

The Court in *Walz* then identified parameters that allow tax exemptions to presume a constitutional identity. Whereas it may be unconstitutional to grant tax exemptions to only some religious groups, that was not the case in *Walz* and is generally not permissible. Tax exemptions are not utilized for the "advancement or inhibition of religion." [77] Providing religious tax

[69] *Id.* at 670.
[70] *Walz*, 397 U.S. at 676.
[71] *Id.*
[72] *Id.* at 675-76.
[73] *Id.* at 678.
[74] *Id.* at 676.
[75] *Id.* at 674.
[76] *Id.* at 670.
[77] *Walz*, 397 U.S. at 672.

exemption does not single out any particular church or religious group. [78] Tax exemptions are granted to "all houses of religious worship . . . ."[79] Neither are the qualifications for tax exemptions intended to be "perpetual or immutable," tax-exempt groups may lose their status if their activities no longer satisfy the parameters defined by the legislature, while new religious institution may develop and receive tax exempt status.[80] Tax exemptions simply guarantee a "reasonable and balanced attempt to guard against th[e] dangers," of exercising economic hostility towards religion on behalf of the government.[81]

B. *Lemon*

In *Lemon* the Court reviewed a case with a particular focus on entanglement concerns regarding statutes that granted aid to church-related elementary and secondary educational facilities.[82] Both of the statutes at issue were challenged as being in violation of the Religion Clauses of the First Amendment and the Due Process Clause of the Fourteenth Amendment.[83] The Court held that both statutes were unconstitutional.[84]

The Court predicated its decision on the finding that the enacting legislatures had recognized that "church-related elementary and secondary schools have a significant religious mission and that a substantial portion of their activities is religiously oriented."[85] Therefore, the legislature would be obligated to create statutory restrictions to "guarantee the separation between secular and religious educational functions and to ensure that state financial aid supports only the former."[86] The Court ultimately reasoned that:

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[78] *Id.* at 673.
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Lemon*, 403 U.S. at 606.
[83] *Id.*
[84] *Id.* at 625.
[85] *Id.* at 613.
[86] *Id.*

> All [the] provisions [utilized to create statutory restriction that guarantee separation between secular and religious educational functions] are precautions taken in candid recognition that these programs approached, even if they did not intrude upon, the forbidden areas under the Religion Clauses. We need not decide whether these legislative precautions restrict the principal or primary effect of the programs to the point where they do not offend the Religion Clauses, for we conclude that the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion.[87]

Chief Justice Burger, writing once again for the majority, clarified that "under the statutory exemption before [the Court] in *Walz*, the State had a continuing burden to ascertain that the exempt property was in fact being used for religious worship."[88] The Court then identified, that to "determine whether the government entanglement with religion is excessive, [courts] must examine the character and purposes of the institutions that are benefited" and should be cautious of "'programs whose very nature is apt to entangle the state in details of administration . . . .'"[89]

After analyzing the statutes and assessing whether a secular legislative purpose existed, and finding that it did; and analyzing whether the statutes's principal or primary effect advanced or inhibited religion, and deciding that secular and religious education is identifiable and separable;[90] the Court ultimately asserted that the very need to engage in surveillance in order to enforce the statutes demonstrated sufficient entanglement to invalidate the statutes as unconstitutional.[91] Justice Douglas, in his concurring opinion, echoed this concern and asserted that the state's power to dictate what is or is not secular or religious, is sufficiently apt to "promote rancor and ill-will between church and state" that would result from the surveillance the statute in *Lemon* required.[92]

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[87] *Id.* at 613-14.
[88] *Id.* at 614.
[89] *Lemon*, 403 U.S. at 615 (quoting *Walz*, 397 U.S. at 695 (Brennan, J., concurring)).
[90] *Id.* at 612-13.
[91] *Id.* at 620.
[92] *Id.* at 637 (Douglas, J., concurring).

A connection exists between the entanglement depicted in *Lemon* and the entanglement concerns that arise from state and local government practices of taxing portions of religious institutions. Just as the statute in *Lemon* that required state actors to separate secular and religious lessons was deemed unconstitutional entanglement, allowing the government to divide and determine what portions of a religious institution counts as taxable also creates entanglement concerns between state and church.

III. MODERN TAX EXEMPTIONS

All fifty states now grant tax exemptions for property belonging to religious institutions.[93] The language used within the particular constitutional section or statutory provision varies.[94] Some states use narrow language such as "religious worship" to maintain stringent control on tax exemptions, while other states use less stringent language such as "religious purpose," which broadens interpretation.[95] "Religious Worship" allows state and local governments to maintain stringent control on tax exemptions because the government must determine if the activity taking place on the property qualifies as exempt religious worship.[96] The government does so by considering the regular services, ceremonies, rituals, religious instructions, the exclusivity of the group and other activities directed towards a higher being.[97] "Religious purpose" on the other hand is less restrictive and is defined in a broad manner that encompasses a general range of activities.[98] The varying language used within different state constitutions and statutes are

[93] *Lemon*, 403 U.S. at 676.
[94] Evelyn Brody, *All Charities Are Property-Tax Exempt, but Some Charities Are More Exempt Than Others*, 44 NEW ENG. L. REV. 621, 671-72 (2010).
[95] 4 WILLIAM W. BASSETT, W. COLE DURHAM, JR. & ROBERT T. SMITH, RELIGIOUS ORGANIZATIONS AND THE LAW § 33:16 (2d ed. 2017).
[96] *Id.*
[97] *Id.*
[98] *Id.*

indicative of the various approaches states are taking when granting tax exemptions to religious institutions.

As indicated in *Walz*, the determination as to whether a religious institution is in fact a religious institution worthy of obtaining a tax exemption is an appropriate question outside of the parameters of entanglement concerns.[99] This is so because the Court determined that both taxing religious institutions and exempting religious institutions gave rise to some degree of involvement with religion.[100] However, the Court found that the elimination of exemptions would "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."[101] The Court deemed that no genuine nexus existed between a tax exemption and the establishment of religion.[102] The Court went on to express that "[t]he exemption creates only a minimal and remote involvement between church and state and far less than taxation of churches. It restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other."[103]

Although most states differ in determining whether the property must be used for religious worship or purpose, the language within state constitutions and state statutes are relatively concise and generally read as follow: "all property used exclusively for religious … purposes … shall be exempt from taxation . . . ."[104] The concise language utilize by state legislators provides room for interpretation. However, if a state is to utilized Chief Justice Burger's assertion in *Lemon* as to "the character and purposes" of a religious institution to determine deference for tax exemptions,

[99] *Walz*, 397 U.S. at 676.
[100] *Id.* at 674.
[101] *Id.*
[102] *Id.* at 675.
[103] *Id.* at 676.
[104] OKL. CONST. art. X, § 6.

it must do so broadly.[105] As indicated in *Walz*, religious institutions get broad protections under the Religion Clauses to avoid state-religion interactions that would harm either the state or religion.[106] Nevertheless, states still tax portions of religious institutions that they deem separate from the religious worship or purpose. However, once a religious institution has been deemed worthy of a tax exemption, no standard exists to avoid or define what portions of that religious institution's property may count as being utilized for *sufficient* religious worship or purpose.

In an effort to tax religious institutions, state and local governments have developed different tests or standards to identify when portions of a religious institution are taxable. State statutes and courts have applied standards such as the *reasonably necessary* standard,[107] which assesses how necessary a particular portion of a religious property is to the objective of the religious institution; the *exclusive use* standard,[108] which assesses if the property's sole use is religious in nature; and the *dominant purpose* test,[109] which determines if the primary use of the property is religious in nature. These standards or test create an entanglement between state and church through the required surveillance necessary to utilize them. An examination of a religious property dispute through any of the standards requires courts to infringe on the Religion Clauses.

A. Reasonably Necessary Standard

The *reasonably necessary* standard considers whether a parsonage is reasonably necessary for the accomplishment of the religious institution's objectives.[110] In *German Apostolic Christian Church v. Department of Revenue*,[111] the Oregon Supreme Court reviewed a decision from the tax

[105] Lemon, 403 U.S. at 615.
[106] *Walz*, 397 U.S. at 673
[107] German Apostolic Christian Church v. Dep't of Revenue, 569 P.2d 596, 599 (Or. 1977).
[108] Christ Church Pentecostal v. Tenn. State Bd. of Equalization, 428 S.W.3d 800, 807 (Tenn. Ct. App. 2013).
[109] Shrine of Our Lady of La Salette Inc. v. Bd. of Assessors of Attleboro, 71 N.E.3d 509, 517 (Mass. 2017).
[110] *German Apostolic Christian Church*, 569 P.2d at 599.
[111] 569 P.2d 596 (Or. 1977).

court regarding the language in an Oregon statute[112] that allowed the exemption of only portions of an *ad volerem* property tax on religious institutions.[113] The text of the relevant statute allows an exemption for religious institutions that primarily use the property for the goals of the religious institution.[114] If a religious institution were to claim tax exemption for a portion of its property used for charitable purposes, the exemption requires that the charitable use is in the "advancement of religion and must be primarily[115] for the benefit of the institution as well as *reasonably necessary* for the furthering of the religious aims of the" religious institution.[116]

The issue in *German Apostolic Christian Church* arose after the construction of a new building on its property using donations, and monetary/manual labor gifts.[117] When the project was completed it was used for several purposes, including housing for the Administrating Elder of the congregation, a guest area with three bedrooms, and six apartments for elderly members of the church.[118] After its completion the County Assessor determined that the property was subject to assessment for the following tax year.[119]

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[112] 307.140 Property of religious organizations.
Upon compliance with ORS 307.162, the following property owned or being purchased by religious organizations shall be exempt from taxation:

> (1) All houses of public worship and other additional buildings and property used solely for administration, education, literary, benevolent, charitable, entertainment and recreational purposes by religious organizations, the lots on which they are situated, and the pews, slips and furniture therein. However, any part of any house of public worship or other additional buildings or property which is kept or used as a store or shop or for any purpose other than those stated in this section shall be assessed and taxed the same as other taxable property.
> (2) Parking lots used for parking or any other use as long as that parking or other use is permitted without charge for no fewer than 355 days during the tax year.
> (3) Land and the buildings thereon held or used solely for cemetery or crematory purposes, including any buildings solely used to store machinery or equipment used exclusively for maintenance of such lands.

[113] *German Apostolic Christian Church*, 569 P.2d at 597.
[114] *Id.* at 599.
[115] This essay addresses the dominant use standard in a separate section.
[116] *German Apostolic Christian Church*, 569 P.2d at 599.
[117] *Id.* at 597.
[118] *Id.* at 597-98.
[119] *Id.* at 598.

At the conclusion of an evidentiary trial, the Tax Court found the first floor office, a basement meeting area, and a vault to be exempt from taxation.[120] The remainder of the building however, was taxable."[121] The Supreme Court of Oregon reviewed the assessment and determined that through the statutory language "the Tax Court was correct in allowing an exemption for the office room in the Administrating Elder's residence but disallowing further exemption."[122] The court asserted that it received insufficient evidence "as to the necessity of a parsonage including the specific duties of [the Administrating Elder living on the property] which require his continuous presence near the house of worship of the church."[123]

When determining whether the guest area for visiting church officials was entitled to tax exemptions, the court reviewed the language within the statute.[124] Although the amount of times the property was used was not a factor in and of itself, it was indicative of the reliance on the guest area or lack thereof.[125] The court expressed that "[i]nfrequent use of the property may indicate in part that such utilization is not reasonably necessary for the advancement of church aims,"[126] and the church presented "insufficient evidence of the necessity for [the] area."[127] The court also found "that the portion of the property used as a guest area for visiting church officials was not entitled to an exemption . . . ."[128] The court held that the charitable and nonreligious use of the portion of the property that provided low-rent apartments to the needy and older members of the church's congregation was tax exempted because of the charitable purpose.[129]

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[120] *Id.*
[121] *Id.*
[122] *German Apostolic Christian Church*, 569 P.2d at 600.
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.* at 600-01.
[129] *Id.* at 602.

The reasonably necessary standard in *German Apostolic Christian Church*, allowed the court to consider whether a portion of the church's property was reasonably necessary for its religious mission. Like the unconstitutional surveillance necessary in *Lemon* to determine which classes were secular or religious, the surveillance necessary here to determine whether a portion of a property belonging to a religious institution is reasonably necessary, allows the court to first determine what it believes to be reasonably necessary and then requires monitoring by secular authorities to ensure that religious groups follow those standards. That in and of itself is detrimental to the wall between state and church.

The court in *German Apostolic Christian Church* made clear that convincing evidence was necessary to demonstrate the requisite nexus to the organization's religious mission. However, the court does not provide what may satisfy such a standard. Essentially, the court is creating in itself unfettered power that may continuously change with individual bias. What is reasonable to one judge may not be reasonable to the next and what is reasonable in one religion may not be reasonable in the next. The individuality and uniqueness associated with different religious beliefs cannot be restricted by a subjective reasonable standard. Simply put, if a court invites individual judges to define what is reasonable it creates an unconstitutional standard that supports the entanglement of state and church.

B. Exclusive Use Standard

The exclusive use standard assesses whether the property's sole use is religious in nature.[130] This assessment in and of itself presents an entanglement concern between state and religion. For example, in a recent and controversial decision, a Tennessee court deemed portions of a "mega-church" taxable. In *Christ Church Pentecostal v. Tennessee State Board of Equalization*,[131] Christ

[130] *Christ Church Pentecostal*, 428 S.W.3d at 807.
[131] 428 S.W.3d 800 (Tenn. Ct. App. 2013).

Church Pentecostal ("CCP"), completed construction of a multi-million dollar building known as the Hardwick Family Life Center ("the Center").[132] The Center contained "space for worship and fellowship; classrooms; offices; an indoor playground, the 'For His Glory' bookstore/café area; and the Hardwick Activity Center ("HAC"), which includes a fitness center and gymnasium."[133] After a site visit in 2007, a staff attorney for the State Board of Equalization determined that most of the new building was tax-exempt.[134] However, the staff attorney denied the exemption for portions of the building containing the bookstore/café area and the fitness center/gymnasium on the grounds that they were retail/commercial in nature and not used for religious purposes.[135] CCP appealed and the matter was heard by an administrative law judge ("ALJ").[136] In 2009 the judge affirmed the denial of the exemption for the bookstore/café and "granted a fifty percent exemption for the fitness center area on the basis that it was used for CCP's youth recreational activities in addition to general public use on a membership fee basis."[137]

CCP filed a petition with the chancery court, asserting that the evidence submitted to the ALJ and the Commission demonstrated that the bookstore/café and fitness centers were integral to one or more of the church's religious purposes.[138] CCP claimed that the Commission's decision violated Tennessee's Religious Freedom Restoration Act and the Establishment Clause, insofar as it turned on an official determination as to the religious purposes of CCP.[139] The chancery court affirmed the decision and CCP filed a timely notice of appeal to the Court of Appeals of Tennessee.[140]

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[132] *Christ Church Pentecostal*, 428 S.W.3d at 804.
[133] *Id.* at 804-05.
[134] *Id.* at 805.
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *Id.* at 806.

CCP claims that a violation of the Religion Clauses was at issue, the court however, asserted that the state's constitution deems all property taxable unless it is "duly exempted."[141] The court explained that it is undisputed that CCP is a religious institution and a majority of its property is exempt from taxation, however, a portion of CCP's property is not used for exempt purposes.[142] The court held that although the areas in question may have been in place to attract new members, exemptions were not intend to apply to such uses.[143] Under this premise, the court determined that the "exclusive use" standard applied to the "direct and immediate use of the property itself and to any indirect and consequential benefit to be derived from its use."[144] "The requirement is met when 'the use is "directly incidental to or an integral part of" one of the recognized purposes of an exempt institution.'"[145] The court reasoned that the bookstore/café and the fitness center areas were not purely and exclusively for religious purposes.[146]

CCP asserted that the determination by the Commission and the trial court "excessively entangles the government with church doctrine and theology and substitutes the wisdom of the state for the doctrine of the church in contravention of the *Establishment Clause*."[147] The court disagreed and determined that "although laws may not interfere with religious belief, they may interfere with conduct that is religiously motivated."[148] CCP asserted, however, that "the determination that it did not use the disputed areas of the Family Life Center exclusively for the purpose for which CCP exists as a religious institution impermissibly entangle the State in matters

[141] *Id.*
[142] *Id.* at 807-08.
[143] *Christ Church Pentecostal*, 428 S.W.3d at 812.
[144] *Id.* at 812 (citing Book Agents of the Methodist Episcopal Church v. State Bd. of Equalization, 514 S.W.2d 513, 524 (Tenn. 1974)).
[145] *Id.* (quoting Methodist Hosp. of Memphis v. Assessment Appeals Comm'n, 669 S.W.2d 305, 307 (Tenn. 1984)).
[146] *Id.* at 814.
[147] *Id.* at 814-15.
[148] *Id.* at 815.

of church doctrine by defining a 'religious use.'"[149] CCP relied on a Colorado case which claims that "avoiding a narrow construction of property tax exemptions based upon religious use also serves the important purpose of avoiding any detailed governmental inquiry into or resultant endorsement of religion that would be prohibited by the establishment clause of the first amendment to the United States Constitution."[150] The court rejected the contention because it was "predicated on the character of the taxpayer and on the manner in which the taxpayer used the property."[151]

CCP introduced more case law in support of its First Amendment claim relying on a New York case where the court observed that "[i]n the tax context, the first amendment requires the court to accept the entity's characterization of its activities and beliefs as religious as long as the characterization is in good faith."[152] The court dismissed that observation as well, claiming that the "imposition of property tax on church property that is, by character and manner of use, essentially commercial in nature does not interfere with CCP's doctrine, beliefs, faith, or government."[153] The court ultimately held that "'[r]eligious institutions are not above the law . . .'" Therefore, a "State may, 'enact and enforce facially neutral and uniformly applicable laws that have the incidental effect of burdening a religious practice."[154] The court's assertion that a state may incidentally burden religious practices is questionable because the Court in *Walz* expressed that to assess the entanglement concerns of a particular act one must look beyond the language of the statute and to the effect it has on religious practices.[155]

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[149] *Christ Church Pentecostal*, 428 S.W.3d at 816.
[150] *Id.* at 816 (citing Maurer v. Young Life, 779 P.2d 1317, 1333 n.21 (Col. 1989)).
[151] *Id.* at 817.
[152] *Id.* at 818 (citing Holy Spirit Ass'n for the Unification of World Christianity v. Tax Comm'n, 435 N.E.2d 662, 663 (1982)).
[153] *Id.*
[154] *Id.* at 820.
[155] *Walz*, 397 U.S. at 677.

Nevertheless, the court in *Christ Church Pentecostal*, relied on the "exclusive use" standard, to determine that the property in question was not directly incidental to the religious purposes of the church. However, in utilizing such a standard, the court implicated the very entanglement problems that the Supreme Court cautioned against in *Lemon*. The Court in *Christ Church Pentecostal* could not have known whether or not CCP was utilizing the property solely for religious use unless it reviewed and refused all arguments brought forth by CCP. This is especially relevant because CCP's argument for constructing the entire center was "to reach out to the community and minister to their needs; something that is a direct purpose of the Church."[156] The court rejected CPP's claim and instead determined that CPP's use of the area was far from traditional,[157] specifically the court pointed towards the Center's paid staff and the gym's fee-based membership.[158] However, the court failed to assess the value of the underlying purpose for the Center: CPP's religious mission.

In *Lemon*, the Court recognized that "a dedicated religious person, teaching in a school affiliated with his or her faith operated to inculcate its tenents, will inevitably experience great difficulty in remaining religiously neutral."[159] That is exactly the case in *Christ Church Pentecostal*, regardless of the initial commercial nature of portions of the property, according to CCP, the entire premise is consumed with the religious intent to accumulate new church attendees and to strengthen their religious mission.[160] CCP provided its religious understanding as to why the property was relevant to their institution. If that reasoning is insufficient to satisfy the court's analysis of the property for taxation purpose, what would be? A bench is simply a bench before

[156] Christ Church Pentecostal, 428 S.W.3d at 808.
[157] *Id.* at 814.
[158] *Id.* at 813-14.
[159] *Id.* at 618.
[160] *Id.* at 808.

it is placed in a church and deemed a pew. Similarly, CCP may have built commercial properties, but the commercial properties are utilized for CCP's mission thus, altering the properties' purpose. If CCP's sole intent was motivated by the continual growth of their congregation and religious mission, the religious purpose should be clear. Demanding that a religious institution's property be used exclusively for outright religious purposes as allowed by a court of law drains the community of a source that may provide more than a weekly religious service. Many religious institutions utilize common areas for several things outside of the confines of exclusive religious use. These uses include weddings, birthday parties, and other similar communal gatherings. Courts should not be able to tax communal portions of religious institutions simply because it is not used *exclusively* for a religious purpose. Doing so would force courts to make doctrinal determinations as to the religious purposes of different parcels belonging to religious institutions.

C. Dominant Purpose Test

The dominant purpose test considers, each portion of church property, and determines "whether its dominant purpose is religious worship or instruction, or connected with religious worship or instruction (and is therefore exempt from taxation), or whether its dominant purpose is something other than religious worship or instruction (and therefore has been 'appropriated for purposes other than religious worship or instruction')."[161] In *Shrine of Our Lady of La Salette Inc. v. Board of Assessors of Attleboro,*[162] for example, the Shrine, a "Catholic religious organization affiliated with the Missionaries of Our Lady of La Salette," opened a national shrine in Attleboro, Massachusetts in 1953,[163] which thousands of people visit each year.[164] In 2012 the city assessor's

[161] *Shrine of Our Lady of La Salette Inc*, 71 N.E.3d at 517.
[162] 71 N.E.3d 509 (Mass. 2017).
[163] *Id.* at 512.
[164] *Id.*

determined that the Shrine owed property taxes based on the valuation of the property.[165] The Shrine paid its property taxes with interest and filed an abatement the following year.[166] The city's board of assessors denied it.[167] The assessors' valuation divided the Shrine's property into eight distinct portions.[168] Of the eight, the board determined that the welcome center, the maintenance building, the safe house, and the wildlife sanctuary were fully taxable.[169]

The court in *Shrine of Our Lady of La Salette Inc.*, rejected "Shrine's argument that the dominant purpose test is an 'all or nothing' test regarding the exemption of church property, *i.e.*, that an assessor must look at the entirety of a church's property and determine whether the dominant purpose of that property is religious worship or instruction, such that the entirety of the property is either exempt or not."[170] Instead, the court found that the clause that grants the tax exemptions for religious institutions also limits it.[171] The corresponding clause provides "that the exemption shall not 'extend to any portion of any such house of religious worship appropriated for purposes other than religious worship or instruction.'"[172] Exploiting that language, Massachusetts taxing authorities deemed it appropriate to divide the properties of religious institutions to determine which portions could be taxed.[173] And thus, Shrine's extensive property consisted of portions that were taxable and portions that were tax exempt.[174] The court ultimately determined that the dominant purposes of the welcome center and maintenance building were to facilitate

[165] *Id.* at 513.
[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] *Id.*
[170] *Id.* at 518.
[171] *Shrine of Our Lady of La Salette Inc*, 71 N.E.3d at 518.
[172] *Id.*
[173] *Id.* at 513.
[174] *Id.* at 513.

religious worship, whereas the dominant purposes of the safe house and the wildlife sanctuary were not.[175]

The court's analysis in *Shrine of Our Lady of La Salette Inc.,* is indicative of the inherent flaws within the *dominant purpose* test. The test is flawed because it requires courts to determine how much of a religious institution's property must be used and what. For instance, the wildlife sanctuary, according to Shrine was used for meditative walks and was deemed connected to the religious worship of the Shrine.[176] The court however, dismissed that argument because the wildlife sanctuary was transferred to the Massachusetts Audubon Society to manage and perform a range of conservation-related activities.[177] The court pivots its argument on the legislative intent and asserts that the legislator did not intend to include a wildlife sanctuary or even a safe house to qualify as a house of religious worship.[178] Although the court's understanding of the legislators intent may be accurate, legislators are bound by the Constitution and creating policy that leads the government to control churches, is unconstitutional. If the *dominant purpose* test requires a court to look at a property and determine which portions of that property are engaging in what kind of activity, the court is interfering with religious beliefs because it places the identification of the use of the property in the hands of a court. Despite having a truly religious purpose for a parcel, a court may reject its reasoning and deem it insufficient for a tax exemption. This action by a court belittles the religious groups intended purpose for the property and their identification of what purpose that property serves for the advancement of their religious beliefs. A court acting in this manner poses entanglement concerns endangering the religious freedom that religious organizations enjoy to practice their beliefs.

[175] *Id.* at 519-20.
[176] *Shrine of Our Lady of La Salette Inc*, 71 N.E.3d at 519.
[177] *Id.* at 515.
[178] *Id.* at 520.

IV. POTENTIAL SOLUTION

It is apparent that some kind of interaction will occur between state and religion. In light of this reality, it would be logical to create a viable standard in which states may potentially collect taxes from religious institutions that are maximizing profits from their commercial entities. The standard should go as follows, if a religious institution uses a portion of its property to derive profits from a commercial entity that surpass all operational cost, that profit should be taxed. This form of taxation may potentially go beyond the confines of a typical property tax, however, it would provide a feasible manner in which state and local governments can attempt to avoid entanglement concerns while collecting taxes from churches who may commercialize outside of the ordinary confines of religion.

For example, if CCP's annual operational fee, including all good faith expenses necessary to exist were $200,000, and the commercial properties were returning profits of $400,000, the state or local government should be able to tax the difference between the returning profit and the good faith expenses necessary to exist. Here, that would result in $400,000 - $200,000 = $200,000 of taxable income.

However, even this suggestion may create entanglement concerns from the assessment of financial statements that churches provide. Nevertheless, the standard is minimally intrusive because religious institutions would provide their prepared expenses. Furthermore, a simple formula is being utilized without the biases of human involvement. Potentially, a standard like this would secure tax exemptions for religious institutions and may prevent commercial organizations from abusing religious tax exemptions.

V. Conclusion

Ultimately, analyzing and normalizing surveillance over religion institutions in any capacity is unconstitutional. As established in *Lemon*;

> Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn.[179]

[179] *Lemon*, 403 U.S. at 625.