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Rejecting the Theism Test in England and the United States in Property Tax Exemption Cases

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Rejecting the Theism Test in England and the United States in Property Tax Exemption Cases

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Abstract

This Note will examine the tax exemption for property used in religious worship in its English and American settings. Analysis of the scope of the exemption in England will review the history of the exemption and its present application. The discussion of the exemption in the United States will focus on constitutional considerations. The theism test will also be considered in light of the principles underlying the exemption in both countries. The Note will conclude by recommending the analogy test for both England and the United States as an alternative to the theism test.

REJECTING THE THEISM TEST IN ENGLAND
AND THE UNITED STATES IN PROPERTY
TAX EXEMPTION CASES

INTRODUCTION

The definition of religion for property tax exemption purposes has become an issue for the courts as a result of municipal budgetary constraints¹ and increasing religious pluralism.² Courts in England and some courts in the United States, when faced with the issue, have recently applied a theism test, which rejects creeds that do not include a deity.³ The use of that test raises three basic issues:

1. Municipal and domestic fiscal pressure have contributed to the careful scrutiny given those granted tax exempt status. Ginsberg, *The Real Property Tax Exemption of Nonprofit Organizations: A Perspective*, 53 TEMP. L.Q. 291, 292-96 (1980). The Legislature of New York State moved to limit such exemptions for both religious and nonreligious groups when a committee report predicted that within 15 years, half of the real property in the state would be exempt. Note, *Real Property Tax Exemption in New York: When is a Bible Society not Religious?*, 45 FORDHAM L. REV. 949, 950 (1977) (citing 15 N.Y. Legis. Doc. 20 (1970)). In a slightly different context, Lord Upjohn noted that "the 'spirit and intentment' of the preamble of the Statute of Elizabeth have been stretched almost to breaking point. . . . Now that it is used so frequently to avoid the common man's liability to rates or taxes, this generous trend of the law may one day require reconsideration." *Scottish Burial Reform & Cremation Soc'y, Ltd. v. Glasgow City Corp.*, 1968 A.C. 138, 153 (premises of Society held used by charity for charitable purposes).

2. One British commentator referred to the new religious pluralism in his country as rooted in the "swinging sixties" and arriving when "the enthusiasms of California and Greenwich Village . . . reached our shores . . ." Picarda, *New Religions as Charities*, 131 NEW L.J. 436, 436 (1981). Many of the new religions are controversial, perceived as amassing great fortunes for their leaders and brainwashing their followers. See Rudin, *The Cult Phenomenon: Fad or Fact?*, 9 N.Y.U. REV. L. & SOC. CHANGE 17(1980). See generally Heins, "Other People's Faiths": *The Scientology Litigation and the Justiciability of Religious Fraud*, 9 HASTINGS CONST. L.Q. 153 (1981). A list of such controversial movements would include Scientology, the Unification Church (followers of Reverend Sun Myung Moon), the Hare Krishna movement, The Way International and The Body of Christ. Rudin, *supra*, at 21-22 n.28. New York's highest court recently reinstated the tax-exempt status of property belonging to the Unification Church. *Holy Spirit Ass'n for the Unification of World Christianity v. Tax Comm'n*, 55 N.Y.2d 512, 435 N.E.2d 662, 450 N.Y.S.2d 292(1982).

3. See, e.g., *Missouri Church of Scientology v. State Tax Comm'n*, 560 S.W.2d 837 (Mo. 1977), *appeal dismissed*, 439 U.S. 803 (1978). The Supreme Court of Missouri affirmed the finding of the Tax Commission, holding that religion required "a belief in and devotion to a Supreme Being." *Id.* at 840. The court concluded that Scientology fell short of that standard. *Id.* See *infra* notes 117-19 and accompanying text. The Church of Scientology suffered the same fate in England. *Regina v. Registrar Gen. ex parte Segerdal*, [1970] 2 Q.B. 697 (C.A.). The Church has not lost all such battles. In *Founding Church of Scientology v. United States*, 409 F.2d 1146 (D.C. Cir.), *cert. denied*, 396 U.S. 963 (1969), it successfully defended itself against charges that its literature qualified as mislabelling of "E-meters." *Id.* at 1161. "E-meters" are a type of skin galvanometer that Scientologists use in "auditing." *Id.* at 1153, their primary therapeutic procedure. *Id.* at 1149-50. The government brought the

how to define God,⁴ whether the test is appropriate within the nation's legal framework,⁵ and whether the theism test serves the purposes of the exemption.⁶

English and American jurists attempting to apply a theism test face a formidable task: defining God.⁷ The judiciary claims no expertise on the subject.⁸ Those who have made religion their life's study describe God as unfathomable.⁹ Without an authoritative definition of God, the theism test may exclude theistic sects or

charges under the Federal Food, Drug and Cosmetic Act, 21 U.S.C. §§ 301-392 (1976). *Founding Church of Scientology*, 409 F.2d at 1148. The court concluded if the movement was a religion the literature was its scripture. *Id.* at 1159. The court noted that the Church "has ministers, who are licensed as such, with legal authority to marry and to bury. Its fundamental writings contain a general account of man and his nature comparable in scope, if not in content, to those of some recognized religions." *Id.* at 1160 (footnote omitted). The court held that the Church had made out a prima facie case for religious status which the government had not challenged. *Id.* The fact that "it postulates no deity in the conventional sense," the court concluded, "does not preclude its status as a religion." *Id.* (footnote omitted). Scientology is not the only movement to suffer under the theism test. The South Place Ethical Society failed in its attempt to attain judicially recognized religious status when the court applied the theism test. *In re South Place Ethical Soc'y*, [1980] 1 W.L.R. 1565 (Ch.). "The society is non-theistic, like all other ethical movements. The existence of God is neither affirmed nor denied." *Id.* at 1569. Similar movements have achieved religious status in American jurisdictions applying a test similar to the one used in *Founding Church of Scientology*. See *Washington Ethical Soc'y v. District of Columbia*, 249 F.2d 127 (D.C. Cir. 1957); *Fellowship of Humanity v. County of Alameda*, 153 Cal. App. 2d 673, 315 P.2d 394 (1957). See *infra* notes 93-96, 107-13 and accompanying text.

4. The test does not require a complete definition of God. It does require definition of God to the extent that the belief in question could not possibly refer to God. See *infra* notes 128-37 and accompanying text.

5. In the United States, that framework consists primarily of the constitutional guarantees of religious freedom. See *infra* notes 69-120, 138-54 and accompanying text. In England, the history of religious freedom and present policy comprise the background for consideration of the theism test. See *infra* notes 22-53, 138-54 and accompanying text.

6. In the United States, the state's purposes in exempting property used for religious worship include the moral and mental advancement of the community, the promotion of pluralism within the community and the avoidance of church-state entanglement. *Waltz v. Tax Comm'n*, 397 U.S. 664 (1970). In England, the state's purposes do not include avoidance of entanglement, but include the advancement of religion. See *Neville Estates, Ltd. v. Madden*, 1962 Ch. 832, 853 (1961). See *infra* notes 155-64 and accompanying text.

7. In his Memorial and Remonstrance Against Religious Assessments, "James Madison labeled the suggestion that 'the Civil Magistrate is a competent Judge of Religious truth' an 'arrogant pretension falsified by the contradictory opinion of Rulers in all ages, and throughout the world.'" L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 871-72 (1978)(quoting 2 *THE WRITING OF JAMES MADISON* 183-91 (G. Hunt ed. 1901). See *infra* notes 128-37 and accompanying text.

8. Lord Justice Winn conceded as much in *Regina v. Registrar Gen. ex parte Segerdal*, [1970] 2 Q.B. 697, 708 (C.A.).

9. "God is . . . beyond all categories . . ." P. TILLICH, *A HISTORY OF CHRISTIAN THOUGHT* 115 (1968). See *infra* notes 131-32 and accompanying text.

include nontheistic sects.¹⁰ The courts have already described creeds as "nontheistic" whose descriptions of God are indistinguishable from those of some Christian theologians.¹¹

Failure to define God adequately implies that the theism test may reject some theistic religions. It thus results in state discrimination among religions on theological grounds. Such discrimination, and therefore the theism test, contravenes the mandates of the United States Constitution and of English policy toward religion. The religion clauses of the United States Constitution guarantee free exercise of religion and the freedom from state establishment of religion.¹² English law does not contain similar overriding guarantees.¹³ Yet despite the lack of constitutional guarantees and the existence of an established church, English policy is one of general religious freedom.¹⁴

In a legal system that does not discriminate among religions, the theism test frustrates some of the purposes for which the state grants the exemption. The moral and mental improvement of the community¹⁵ is not promoted by a test that places nontheistic

10. See *infra* notes 138-47 and accompanying text.

11. Buddhism conceives of "supreme Reality," *United States v. Seeger*, 380 U.S. 163, 191 (1965) (Douglas, J., concurring), and Ethical Culture of "'the highest ideal that [man] can conceive.'" *Id.* at 183 (quoting S. MUZZEY, *ETHICS AS A RELIGION* 95 (1951)). Such concepts are similar to protestant theologian Paul Tillich's "power of being, which works through those who have no name for it, not even the name God." 2 P. TILlich, *SYSTEMATIC THEOLOGY* 12 (1957) quoted in *Seeger*, 380 U.S. at 180. See *infra* notes 134-37 and accompanying text.

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

13. The British Constitution, which is unwritten, prevents the enactment of guarantees that would take precedence over subsequent legislation. Parliament is omniscient; nothing, not even a previous act of Parliament, can inhibit Parliamentary action. Consequently, judicial review does not exist in Great Britain as it does in the United States where an act of Congress contravening the Constitution of the United States may be declared void by the courts. O.H. PHILLIPS & P. JACKSON, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 447 (6th ed. 1978); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Proposals for a declaration of rights that would not purport to limit future Parliamentary action are being debated. O.H. PHILLIPS & P. JACKSON *supra*, at 446-49. Article 9 of the European Convention on Human Rights, Nov. 4, 1950, art. 9, 213 U.N.T.S. 221, 230, which provides for religious freedom, is considered persuasive by English courts. *Ahmad v. Inner London Educ. Auth.*, 1978 Q.B. 36, 41 (C.A.). It is not part of the law, and Lord Denning described it as too vague to be of much practical use. *Id.*

14. *Neville Estates Ltd. v. Madden*, 1962 Ch. 832 (1961). "As between different religions the law stands neutral . . ." *Id.* at 853. See *infra* notes 45-49 and accompanying text.

15. See *Walz v. Tax Comm'n*, 397 U.S. 664, 672-73 (1970). The Court described the exemption of churches as proper because they belong to the larger class of exempt institutions fostering the moral and mental improvement of the community.

groups advancing those aims on the tax rolls. The inclusion of only one type of religion does not foster pluralism within the community.¹⁶ Distinguishing among faiths based upon their beliefs does not minimize church-state entanglement.¹⁷ In place of minimizing church-state involvement, England seeks to foster religion through the exemption. The theism test frustrates that aim as well. It leaves on the tax rolls both religions misidentified as nontheistic and religions similar to Buddhism, but less well known.¹⁸

Jurisdictions employing the theism test are not without an alternative. Many American jurisdictions have rejected the theism test as unconstitutional, adopting some form of analogy test.¹⁹ Such a test allows tax exemption for institutions filling a place in the lives of their members and a role in society analogous to the place filled by institutions admittedly qualifying for the exemption.²⁰ The test is particularly well adapted to property tax disputes. In that context, the test avoids the probing of personal beliefs that plagues similar tests when applied to the claims of individuals as in conscientious objector cases.²¹ The test is consistent with the purposes of the exemption because it focuses on the institution's ability to fulfill those purposes rather than the institution's internal affairs.

16. *See id.* at 693 (Brennan, J., concurring). Justice Brennan concluded that religion's unique contribution to the pluralism of the community justified its tax exempt status based upon its religious activities.

17. *See id.* at 673-74. The Court held that minimizing harmful entanglement of church and state was among the constitutional justifications for the exemption.

18. English courts have described Buddhism as an exception to the theism requirement. *Regina v. Registrar Gen. ex parte Segerdal*, [1970] 2 Q.B. 697, 707 (C.A.). *See infra* note 150 and accompanying text. The establishment clause prohibits any state action the intent or primary effect of which is the promotion of religion. *Abington School Dist. v. Schempp*, 374 U.S. 203, 222 (1963).

19. *See, e.g.*, *Washington Ethical Soc'y v. District of Columbia*, 249 F.2d 127 (D.C. Cir. 1957); *Fellowship of Humanity v. County of Alameda*, 153 Cal. App. 2d 673, 315 P.2d 394 (1957).

20. *Fellowship of Humanity*, 153 Cal. App. 2d at 698, 315 P.2d at 409-10.

The real question is whether the activities of the Fellowship of Humanity which in the above sense are "nonreligious," [not including a Supreme Being] and which include all of the Fellowship's activities, are analogous to the activities, serve the same place in the lives of its members, and occupy the same place in society, as the activities of the theistic churches.

Id.

21. *Cf. Wisconsin v. Yoder*, 406 U.S. 205, 215-17 (1972). The Court conceded the difficulty and necessity of determining whether the beliefs in question were of a religious nature. The Court then noted the religious nature of the beliefs of the Old Order Amish, evidenced by expert testimony, the fact that they are shared by an organized group and the long and consistent history of adherence to those beliefs. The Court contrasted them to the

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I. THE EXEMPTION IN ENGLAND: HISTORICAL DEVELOPMENT AND CURRENT SCOPE

Anglican churches have been exempt from real property taxes since the adoption of the Poor Relief Act of 1601.²² The expansion of the exemption to include analogous property of other faiths followed the expansion of religious tolerance in general. Parliament allowed different religions to practice openly according to two criteria: first, it liberated sects according to their similarity to the established church, and second, it rejected sects it saw as a threat to the Realm.²³ Initially, only the established church was exempt from property taxation.²⁴ The exemption was not statutory but *de facto*.²⁵ A number of rationales have been offered for the practice, from reluctance to tax holy ground²⁶ to the fact that the parish was the taxing unit,²⁷ and therefore taxing the church would merely transfer money from one pocket to another. The question of exempting a broader range of religions was moot because the Church of England was the only legally recognized religion.²⁸ Parliament

philosophical and personal beliefs of Thoreau. *Id.* Justice Douglas saw the court's analysis as a repudiation of *United States v. Seeger*, 380 U.S. 163 (1965). *Yoder*, 406 U.S. at 248-49 (Douglas, J., dissenting in part). *Seeger* concerned a claim of conscientious objector status. See *infra* notes 98-101 and accompanying text.

22. Poor Relief Act, 1601, 43 Eliz., ch. 2. "After passing of the Poor Relief Act, 1601, churches were, in fact, not rated [taxed]." *Henning v. Church of Jesus Christ of Latter-Day Saints*, 1964 A.C. 420, 437.

23. General exemption for all places of religious worship did not come about until 1855. See *supra* note 22 and *infra* notes 24-32 and accompanying text.

24. *Henning*, 1964 A.C. at 432.

25. *Id.*

26. See *Henning*, 1964 A.C. at 437.

27. Poor Relief Act, 1601, § 1; 1964 A.C. at 437.

28. See Act of Uniformity, 1558, 1 Eliz., ch. 2. The Act reinstated the *Book of Common Prayer* as the sole permissible liturgy and required all to attend services of the

codified the exemption in 1833, extending its coverage to sects previously granted official recognition and the right to maintain a house of worship.²⁹ That group included only Christian denominations.³⁰ Parliament extended recognition to Judaism in 1846³¹ and to religion in general in 1855.³²

established church. *Id.* §§ 4, 8, 27. The Act of Uniformity, 1662, 13 & 14 Car. 2, ch. 4, reinstated statutory disabilities for all but the established church. Relief from those disabilities began with Protestant Trinitarians. Toleration Act, 1688, 1 W. & M., ch. 18, §§ 2, 17. As late as 1926, disabilities remained for adherents of traditional religions other than the established church. Roman Catholic Relief Act, 1926, 16 & 17 Geo. 5, ch. 55. Certain disabilities remain, but they relate directly to the administration of the Church of England. The Jews Relief Act, 1858, 21 & 22 Vict., ch. 49, forbids "any person professing the Jewish religion . . . to advise Her Majesty . . . concerning the appointment to or disposal of any office . . . in the . . . Church of England." *Id.* § 4. The Sovereign must be a member of the Church of England. Act of Settlement, 1700, 12 & 13 Will. 3, ch. 2, § 3. By the nineteenth century, lack of recognition did not imply that a religious body could not maintain a suit for breach of contract. *Israel v. Simmons*, 171 Eng. Rep. 671 (K.B. 1818) (suit for arrears on seats in a synagogue). As Lord Parker of Waddington noted in *Bowman v. Secular Soc'y, Ltd.*, 1917 A.C. 406 (attack upon Christianity not blasphemous absent scurrilous language), lack of recognition did not imply that a religion of the Judeo-Christian tradition was not recognized at common law. His analysis of *DaCosta v. DePas*, 27 Eng. Rep. 150 (Ch. 1754), revealed that the common law recognized Judaism as a religion. *Bowman*, 1917 A.C. at 443. *DaCosta* concerned, inter alia, the disposal of a bequest for readings of Jewish Law. The crown applied the funds "towards supporting a preacher, and to instruct the children . . . in the Christian religion." 27 Eng. Rep. at 151-52. The court applied the prerogative *cy pres* doctrine, which allowed the crown to apply a charitable gift, unenforceable at law, to a similar, lawful charity. See G. BOGERT, *LAW OF TRUSTS* 523-27 (5th ed. 1973); *Moggridge v. Thackwell*, 32 Eng. Rep. 15, 22-23 (Ch. 1803) (explaining *DaCosta v. DePas*). See also *Cary v. Abbot*, 32 Eng. Rep. 198 (M.R. 1802) (similar disposition of trust originally intended for education of children in the Roman Catholic faith).

29. The Poor Rate Exemption Act, 1833, 3 & 4 Will. 4, ch. 30, § 1, excluded from taxation

any Churches, District Churches, Chapels, Meeting Houses, or Premises, or such Part thereof as shall be exclusively appropriated to public Religious Worship, and which (other than Churches, District Churches, and Episcopal Chapels of the Established Church) shall be duly certified for the Performance of such Religious Worship according to the Provision of any Act or Acts now in force.

Id.

30. The following denominations were allowed, in fact, required to certify their houses of worship. Protestant Trinitarians were recognized initially by virtue of the Toleration Act, 1688, 1 W. & M., ch. 18, § 19, and subsequently under the Places of Worship Registration Act, 1812, 52 Geo. 3, ch. 155, § 2. Protestant non-Trinitarians, for example, Unitarians, achieved official recognition through An Act to relieve Persons who impugn the Doctrine of the *Holy Trinity* from certain Penalties, 1813, 53 Geo. 3, ch. 160, that repealed the portions of previous acts requiring belief in the Trinity, e.g., Toleration Act, 1688, § 17. Roman Catholics achieved essential recognition through the Roman Catholic Relief Act, 1791, 31 Geo. 3, ch. 32, §§ 4-5, and through the Roman Catholic Charities Act, 1832, 2 & 3 Will. 4, ch. 115, § 1. *But see supra* note 28.

31. Religious Disabilities Act, 1846, 9 & 10 Vict., ch. 59, § 2.

32. Places of Worship Registration Act, 1855, 18 & 19 Vict., ch. 81. In addition to the "Protestant Dissenters," "Protestants" and "persons professing the Roman Catholic religion"

The second criterion, the safety and well-being of the Realm, revealed itself through the continued suppression of Roman Catholicism for 100 years after the toleration of Protestant Nonconformist Trinitarians.³³ Loyalty oaths were required of the members of tolerated sects.³⁴ With the explicit exception of the Society of Friends (Quakers), religious groups were forbidden to hold services behind locked doors.³⁵

The two criteria, similarity to the established church and the security of the Realm, determine the nature of the exemption as well as which creeds qualify. In *Henning v. Church of Jesus Christ of Latter-Day Saints*,³⁶ the House of Lords refused to require the Registrar to include the Temple of the Church of Jesus Christ of Latter-Day Saints among tax exempt houses of worship.³⁷ English law recognizes the Mormon Church as a Christian sect,³⁸ and its chapels are exempt from taxation.³⁹ The Church conducts its sacred ordinances in the Temple.⁴⁰ The Temple, however, is not open to the public at large but only to "members of the church in good standing."⁴¹ The House of Lords held that the Temple did not qualify for the exemption because it was not "public"⁴² within the meaning of the statute.⁴³ Lord Pearce denied one of the Church's arguments, holding that "public" must be interpreted to require practices paralleling those of the Church of England.⁴⁴ The House

already eligible to certify their places of worship, the Act provided that "persons, professing the Jewish religion" might certify their places of worship, and "every place of meeting for religious worship of any other body or denomination of persons, may be certified in writing to the Registrar." *Id.* § 2.

33. *See supra* note 30.

34. *See, e.g.*, Toleration Act, 1688, 1 W. & M., ch. 18, § 2.

35. *Id.* §§ 9, 13; Places of Religious Worship Act, 1812, 52 Geo. 3, ch. 155, §§ 11, 14. The requirement was based on considerations of political security. *Henning v. Church of Jesus Christ of Latter-Day Saints*, 1964 A.C. 420, 439.

36. 1964 A.C. 420.

37. *Id.* at 441.

38. *Id.* at 430.

39. *Id.* at 434.

40. *Id.* at 436.

41. *Id.*

42. *Id.* at 440.

43. Rating and Valuation (Miscellaneous Provisions) Act, 1955, 4 Eliz. 2., ch. 9, § 7(2)(a) (repealed 1967). "This section applies to . . . places of *public* religious worship . . ." *Id.* (emphasis added). Similarly, the current statute, General Rate Act, 1967, ch. 9, § 39, applies only to "places of *public* religious worship." *Id.* (emphasis added).

44. *Henning*, 1964 A.C. at 440. Lord Pearce noted that the Rating and Valuation (Miscellaneous Provisions) Act, 1955, descended directly from the Poor Rate Exemption Act

of Lords thus rejected the Temple because it was not sufficiently similar to the established church.

Throughout the twentieth century, the British courts have declared that the law does not discriminate among religions.⁴⁵ Yet, the two criteria, similarity and security, still operate to determine what qualifies as religion. The security criterion has contributed to the exclusion of the Black Muslims from the list of religions recognized by prison authorities.⁴⁶ The similarity criterion places broad theological requirements on religious status. Theism is required,⁴⁷ but idolatry would probably be disqualifying.⁴⁸ Briefly, "monotheistic theism" will do.⁴⁹

English law historically has encouraged the practice of religion. The Acts of Uniformity required church attendance.⁵⁰ Older acts enfranchising nonestablished sects required attendance at worship,⁵¹ but allowed the followers of the emancipated sect to attend

of 1833. *Id.* (discussing the Poor Rate Exemption Act, 1833. *Id.* (discussing the Poor Rate Exemption Act, 1833, 3 & 4 Will. 4, ch. 30).

By the Act of 1833 the legislature was intending to extend the privileges of exemption enjoyed by the Anglican churches to similar places of worship belonging to other denominations. Since the Church of England worshipped with open doors and its worship was in that sense public, it is unlikely that the legislators intended by the word "public" some more subjective meaning which would embrace in the phrase "public religious "worship" [sic] any congregational worship observed behind doors closed to the public.

Id.

Lord Evershed analyzed the differences between the relevant portions of the two acts and found them negligible. *Id.* at 433. The exemption extended to other denominations must be the same as the exemption originally possessed by the Church of England. *Id.* at 440.

45. *Bowman v. Secular Soc'y, Ltd.*, 1917 A.C. 406, 449; *In re South Place Ethical Soc'y*, [1980] 1 W.L.R. 1565, 1570 (Ch.); *In re Watson*, [1973] 1 W.L.R. 1472, 1478-79 (Ch.); *Neville Estates, Ltd. v. Madden*, 1962 Ch. 832, 853 (1961).

46. *Robilliard, Religion in Prison*, 130 NEW L.J. 800, 800 (1980).

47. *Regina v. Registrar Gen. ex parte Segerdal*, [1970] 2 Q.B. 697, 707 (C.A.); *In re South Place Ethical Soc'y*, [1980] 1 W.L.R. 1565 (Ch.).

48. *Mitford v. Reynolds*, 41 Eng. Rep. 602, 605 (Ch. 1842) (fund for the benefit of the people of Dacca would not be applied to idolatrous uses). *Cf. Roberts v. Ravenwood Church of Wicca*, 292 S.E.2d 657, 660 (Ga. 1982) (Satan worship would be rejected). *See infra* notes 142-47 and accompanying text.

49. *Bowman v. Secular Soc'y, Ltd.*, 1917 A.C. 406, 449. The Chief Justice of the Georgia Supreme Court recently expressed a similar sentiment in a dissenting opinion. *Roberts v. Ravenwood Church of Wicca*, 292 S.E.2d 657, 660-61 (Ga. 1982) (Jordan, C.J., dissenting).

50. *See, e.g.*, Act of Uniformity, 1558, 1 Eliz., ch.2, § 14.

51. *See, e.g.*, Roman Catholic Relief Act, 1791, 31 Geo. 3, ch. 32, § 9. Required attendance at religious services ended with the Religious Disabilities Act, 1846, 9 & 10 Vict., ch. 59, § 1.

services at their own houses of worship.⁵² More recently the law "assumes that any religion is at least likely to be better than none."⁵³

In *Regina v. Registrar General ex parte Segerdal*,⁵⁴ the Court of Appeals considered the application of Scientologists to have their chapel registered as a "place of meeting for religious worship."⁵⁵ Registration would, inter alia, make the chapel eligible for consideration for property tax exemption as a "place of public religious worship."⁵⁶ The analysis did not view the adjective "religious" in isolation but considered the phrase "religious worship" as a unit.⁵⁷ The judges unanimously held that Scientology did not qualify, as it might contain a belief in the spirit of man but no belief in God.⁵⁸ Lord Denning described Scientology as "more a *philosophy* of the existence of man or of life, rather than a *religion*. Religious worship," he continued, "means reverence or veneration of God or of a Supreme Being."⁵⁹

52. See, e.g., Roman Catholic Relief Act, 1791, 31 Geo. 3, ch. 32, § 9.

53. *Neville Estates, Ltd. v. Madden*, 1962 Ch. 832, 853 (1961) (trust for the benefit of members of a private body, Catford Synagogue, held to be of sufficiently public benefit to qualify as charitable).

54. [1970] 2 Q.B. 697 (C.A.).

55. *Id.* at 704; Places of Religious Worship Registration Act, 1855, 18 & 19 Vict., ch. 81, § 2.

56. *Segerdal*, [1970] 2 Q.B. at 704 (quoting General Rate Act, 1967, ch. 9, § 39). Certification to the registrar as required under the Places of Religious Worship Registration Act, 1855, 18 & 19 Vict., ch. 81, does not insure qualification for tax exemption. In *Henning v. Church of Jesus Christ of Latter-Day Saints*, 1964 A.C. 420, the House of Lords denied tax exempt status to the Temple of the Church of Jesus Christ of Latter-Day Saints despite its certification. In addition to certification as a house of religious worship, the Registrar must satisfy himself that the worship therein is sufficiently public. *Id.* at 436.

57. *Segerdal*, [1970] 2 Q.B. at 707.

58. *Id.* Lord Justice Winn thought that Scientology might be considered a religion in the ancient sense of "superstition, fear [and] panic about the unknown," but their meetings did not partake of worship. *Id.* at 708. Worship would have required that they "humble themselves in reverence and recognition of the dominant power and control of any entity or being outside their own body and life." *Id.* at 709. Lord Justice Buckley noted that worship required at least "submission to the object worshipped, veneration of that object, praise, thanksgiving, prayer or intercession." *Id.* at 709.

59. *Id.* at 707 (emphasis in original). Lord Denning elaborated on the meaning of "place of meeting for religious worship" as used in the Places of Religious Worship Registration Act, 1855, 18 & 19 Vict., ch. 81, § 2, as follows:

It connotes to my mind a place of which the principal use is as a place where people come together . . . to do reverence to God. It need not be the God which the Christians worship. It may be another God, or an unknown God, but it must be reverence to a deity.

[1970] 2 Q.B. at 707.

The court followed *Segerdal* in *In re South Place Ethical Society*,⁶⁰ declaring that advancement of religion was not among the objects of the Society.⁶¹ Judge Dillon found that the Society was agnostic,⁶² although it originally had been a religious society.⁶³ He further found no question of the sincerity or integrity of the members of the Society.⁶⁴ Judge Dillon considered and rejected American cases applying a broader definition of religion.⁶⁵ He followed *Segerdal*⁶⁶ and rejected the Society's claim of religious status.⁶⁷ He declared: "Religion . . . is concerned with man's relation with God, and ethics are concerned with man's relations with man. The two are not the same, and are not made the same by sincere inquiry into the question: what is God?"⁶⁸

The position currently taken by the English courts follows a long tradition. That tradition recognized a religion if its theology was sufficiently similar to that of the established church, and if it did not threaten the state. Tax exemption followed recognition and was based on the notion of granting to other denominations a privilege enjoyed by the established church. Recent English cases have considered and rejected American cases espousing a broader definition of religion, following instead their own precedents applying the theism test.

60. [1980] 1 W.L.R. 1565, 1572 (Ch.).

61. *Id.* at 1573. The court found the objects of the Society to be as follows: "the study and dissemination of ethical principles and the cultivation of a rational religious sentiment." *Id.* at 1568. Trustees brought suit asking a declaration that, inter alia, the "trusts on which the property was held were . . . for the advancement of religion or otherwise charitable" and that the objects of the Society were "for the advancement of religion or otherwise charitable." *Id.* at 1567. A declaration in the Society's favor would result, among other things, in a tax reduction under the General Rating Act, 1967, ch. 10, § 40. The court held that the purposes of the Society were for the advancement of education and therefore charitable. [1980] 1 W.L.R. 1565, 1577 (Ch.).

62. [1980] 1 W.L.R. at 1569. "They are not atheists, opposed to all belief in any god. They are agnostic about the existence of any god. . . . The existence of God is neither affirmed nor denied." *Id.*

63. *See id.* at 1579.

64. *Id.* at 1569.

65. *Id.* at 1570-73 (rejecting *United States v. Seeger*, 380 U.S. 163 (1965) and *Washington Ethical Soc'y v. District of Columbia*, 249 F.2d 127 (D.C. Cir. 1957)). *See infra* notes 98-113 and accompanying text.

66. [1970] 2 Q.B. 691.

67. *South Place Ethical Soc'y*, [1980] 1 W.L.R. at 1573.

68. *Id.* at 1571.

II. *THE EXEMPTION IN THE UNITED STATES:
CONSTITUTIONAL CONSIDERATIONS AND
CURRENT SCOPE*

The British and American analyses of the scope of religion are parallel⁶⁹ in several areas, but often diverge because of the religion clauses of the United States Constitution.⁷⁰ Constitutional requirements often receive most of an American court's attention when it considers the religious nature of a group claiming tax exemption.⁷¹ The constitutional analysis of property tax exemption for houses of religious worship historically includes two main issues: first, whether such an exemption is prohibited by the establishment clause⁷² or perhaps required by the free exercise clause,⁷³ and second, how the religion clauses affect the application of such an exemption.

The United States Supreme Court, in *Walz v. Tax Commission*,⁷⁴ held that such exemptions are permissible. The decision rested on four grounds: an exemption is qualitatively different from a subsidy;⁷⁵ there is a long history of such exemptions;⁷⁶ they promote the constitutional objective of state neutrality toward reli-

69. See *infra* notes 121-64 and accompanying text.

70. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I. These clauses are fully applicable to the states through the fourteenth amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940).

71. See, e.g., *Ideal Life Church v. Washington County*, 304 N.W.2d 308 (Minn. 1981).

72. See *supra* note 70.

73. See *supra* note 70.

74. 397 U.S. 664 (1970).

75. *Id.* at 690 (Brennan, J., concurring); *id.* at 699 (Harlan, J., concurring). See *id.* at 675. The distinction between a subsidy and an exemption was found significant because the former "forcibly diverts the income of both believers and nonbelievers to churches' while 'in the case of an exemption, the state merely refrains from diverting to its own uses income independently generated by the churches through voluntary contributions.'" *Id.* at 691 (Brennan, J., concurring) (quoting Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development* (pt. 2), 81 HARV. L. REV. 513, 553 (1968)). Justice Harlan saw impermissible administrative entanglement in subsidies that he found absent in the exemption. *Id.* at 699. (Harlan, J., concurring). Justice Douglas, however, considered the exemption a subsidy. *Id.* at 701 (Douglas, J., dissenting).

76. *Id.* at 676-80; *id.* at 681-85 (Brennan, J., concurring); *id.* at 698 (Harlan, J., concurring). In response to Justice Douglas's conclusion that the exemption was "a long step down the Establishment path," *id.* at 716 (Douglas, J., dissenting), Chief Justice Burger, writing for the Court, noted that "the second step has been long in coming." *Id.* at 678. Justice Brennan contrasted the long and universal acceptance of the exemption with recently outlawed prayer in the public schools. *Id.* at 687 n.7.

gion,⁷⁷ and such exemptions minimize the deleterious entanglement of government with religion.⁷⁸

The Court held that nondiscriminatory inclusion of houses of worship among entities that "foster [the community's] 'moral or mental improvement,' . . . includ[ing] hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups," did not violate the principle of neutrality.⁷⁹ Justice Brennan, in his concurring opinion, described the church's religious activity as contributing to the pluralism of the community.⁸⁰ That, he concluded, was sufficient secular justification for including churches among tax exempt community service organizations.⁸¹

The Court divided impermissible entanglement into two categories.⁸² The first included programs that by their nature produce direct government involvement in religious affairs.⁸³ The second involved administrative entanglement "calling for official and continuing surveillance."⁸⁴ The Court concluded that terminating the exemption would increase the level of church-state involvement.⁸⁵

77. *Id.* at 669-70. See *infra* notes 79-81 and accompanying text.

78. *Id.* at 674. See *infra* notes 82-87 and accompanying text.

79. *Id.* at 672-73. Justice Harlan laid greater emphasis on that point: "To the extent that religious institutions sponsor the secular activities that this legislation is designed to promote, it is consistent with neutrality to grant them an exemption just as other organizations devoting resources to these projects receive exemptions." *Id.* at 697 (Harlan, J., concurring).

80. *Id.* at 689, 692-93.

81. *Id.* See *id.* at 697 (Harlan, J., concurring):

I think, moreover, in the context of a statute so broad as the one before us, churches may properly receive an exemption even though they do not themselves sponsor the secular-type activities mentioned in the statute but exist merely for the convenience of their interested members. As long as the breadth of exemption includes groups that pursue cultural, moral, or spiritual improvement in multifarious secular ways, including, I would suppose, groups whose avowed tenets may be antitheological, atheistic, or agnostic, I can see no lack of neutrality in extending the benefit of the exemption to organized religious groups.

Id. (footnote omitted).

82. *Id.* at 674-75. See also *id.* at 695 (Harlan, J., concurring).

83. *Id.* at 674-75. "[G]overnmental involvement, while neutral, may be so direct or in such degree as to engender a risk of politicizing religion." *Id.* at 695 (Harlan, J., concurring) (citing Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680 (1969)).

84. 397 U.S. at 674-75. Although Justice Harlan disagreed with the Court's opinion that basing church exemption on its social welfare programs would produce such entanglement, he asserted that one of the virtues of the exemption was that "its administration need not entangle government in difficult classifications of what is or is not religious . . ." *Id.* at 698 (Harlan, J., concurring). The impermissible administrative entanglement theme was sounded in the parochial school aid cases and was often the factor distinguishing permissible aid from impermissible aid. *E.g.*, *Lemon v. Kurtzman*, 403 U.S. 602, 614-15 (1971).

85. 397 U.S. at 674-75. See also *id.* at 698-99 (Harlan, J., concurring).

The Court condemned the possibility of the church supporting the state,⁸⁶ as well as the spectre of tax liens and foreclosures on houses of worship.⁸⁷ The courts have not addressed the possibility that the Constitution requires an exemption for churches.⁸⁸

The Supreme Court has never defined which creeds and groups are protected and limited by the religion clauses.⁸⁹ The Court's pronouncements during the nineteenth century spoke in terms of "God" or a "Supreme Being." Theistic terminology continued throughout the first half of the twentieth century. In 1933, Chief Justice Charles Evans Hughes declared: "The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation."⁹⁰ The question of excluding non-theistic religions was not before the court in *MacIntosh*,⁹¹ and courts have questioned the validity of using Justice Hughes's language to exclude them.⁹²

86. *Id.* at 675. See also Freund, *supra* note 83.

87. *Id.* at 674.

88. See, e.g., *Murray v. Comptroller of Treasury*, 241 Md. 383, 216 A.2d 897, *cert. denied*, 385 U.S. 816 (1966).

89. *Malnak v. Yogi*, 592 F.2d 197, 207 (3d Cir. 1979) (Adams, J., concurring).

90. *United States v. MacIntosh*, 283 U.S. 605, 633-34 (1931) (Hughes, C.J., dissenting).

91. In *MacIntosh*, the Court held that a Canadian Baptist minister, who subsequently became chaplain and a member of the faculty of Yale University, could be refused American citizenship on the ground that he said that he would refuse to take up arms in a war that he believed was morally unjustified. *Id.* at 625-26.

92. *Fellowship of Humanity v. County of Alameda*, 153 Cal. App. 2d 673, 683, 315 P.2d 394, 400 (1957).

To attribute to such highly educated men as Hughes, Holmes, Brandeis and Stone [the four dissenters] an ignorance of Taoism or Comte's humanism, or their denial that either is a religion if the question had been presented to them, would be an unwarranted assertion of their ignorance of the history of religious beliefs.

Id. (quoting *Berman v. United States*, 156 F.2d 377, 384 n.2 (9th Cir. 1946) (Denman, C.J., dissenting)). Indeed, Chief Justice Hughes's purpose was the expansion of religious freedom, not its limitation. Similarly, James Madison called religion "the duty we owe our creator," in an effort to expand the scope of religious liberties in Virginia. James Madison, *Memorial and Remonstrance Against Religious Assessments*, reprinted in A. STOKES & L. PFEFFER, *CHURCH AND STATE IN THE UNITED STATES* 56 (1964). In a different spirit, the Supreme Court declared that "'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will." *Davis v. Beason*, 133 U.S. 333, 342 (1890). The Court upheld Davis's conviction for illegally procuring the vote in the territory of Idaho. The statute denied the vote to anyone belonging to "an organization . . . which teaches, advises, counsels or encourages . . . the crime of bigamy or polygamy." *Id.* at 347. Davis was a Mormon; that sect, at the time, advocated polygamy. Considering Davis's challenge to the statute on free exercise grounds, the Court declared: "To call their advocacy a tenet of religion is to offend the common sense

The Court's more recent discussions have spoken in terms of a broader scope for "religion." In *Torcaso v. Watkins*,⁹³ the Court specifically referred to Buddhism, Taoism, Ethical Culture and Secular Humanism as "religions . . . which do not teach what would generally be considered a belief in the existence of God."⁹⁴ The Court declared that government cannot aid religions based upon a traditional belief in God over others nor aid religion over non-believers.⁹⁵ Although the applicability of that declaration to the property tax situation has been questioned,⁹⁶ its similarity to the principle of neutrality described in *Walz v. Tax Commission*,⁹⁷ assures its place in the analysis of the religious property tax exemption question.

The Court continued in the mold of *Torcaso v. Watkins*,⁹⁸ with *United States v. Seeger*.⁹⁹ *Seeger* contained a prototype of the test often employed by courts faced with something questionably religious. The *Seeger* Court held that the test for the "religious training and belief," required of conscientious objectors,¹⁰⁰ was whether the claimed belief "occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption" ¹⁰¹

Some have seen a retreat from *Seeger* in the Court's more recent decision.¹⁰² In *Wisconsin v. Yoder*,¹⁰³ the Court contrasted

of mankind." *Id.* at 341-42. *Davis* was one of three cases in which the Court upheld acts of Congress limiting the rights of Mormons. See *Latter-Day Saints v. United States*, 136 U.S. 1 (1890); *Reynolds v. United States*, 98 U.S. 145 (1879). The Court analogized polygamy to other practices that it viewed as having no base in religion, notwithstanding the beliefs of their practitioners. *Id.* at 149. The Court concluded that "[b]igamy and polygamy are crimes by the laws of all civilized and Christian countries." *Davis*, 133 U.S. at 341.

93. 367 U.S. 488 (1961). *Torcaso* struck down a Maryland law requiring that public office holders declare a belief in God. *Id.* at 495.

94. *Id.* at 495 n.11.

95. *Id.* at 495.

96. *Missouri Church of Scientology v. State Tax Comm'n*, 560 S.W.2d 837, 842-43 n.5 (Mo. 1977), *appeal dismissed*, 439 U.S. 803 (1978).

97. 397 U.S. 664 (1970). "[C]onstitutional neutrality in this area . . . is to insure that no religion be sponsored or favored, none commanded, and none inhibited." *Id.* at 669. See also *id.* at 696 (Harlan, J., concurring). "Neutrality in its application requires an equal protection mode of analysis." *Id.*

98. 367 U.S. 488 (1961).

99. 380 U.S. 163 (1965).

100. *Id.* at 164-65.

101. *Id.* at 176. The Court limited its holding to statutory construction, abjuring the possible constitutional question. *Id.* at 165-66.

102. *Wisconsin v. Yoder*, 406 U.S. 205, 247-49 (1972) (Douglas, J., dissenting in part).

the "philosophical and personal" opinions of Thoreau with the "deep religious conviction, shared by an organized group" of the Amish.¹⁰⁴ Limitation of *Seeger* by the Court in *Yoder* stems from the idea that "the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests."¹⁰⁵ *Yoder* rests primarily on balancing the interests of the state against those of the individual.¹⁰⁶ The theism test does not protect "ordered liberty" or any other legitimate interest any better than the analogy test.

The *Seeger* test bears a striking resemblance to the tests used in *Washington Ethical Society v. District of Columbia*¹⁰⁷ and in *Fellowship of Humanity v. County of Alameda*.¹⁰⁸ In 1957,¹⁰⁹ the courts in the last two cases refused to apply a theistic definition of religion to determine the applicability of real property tax exemptions.¹¹⁰ Both cases involved agnostic sects.¹¹¹ Both courts noted that the uses of the buildings closely paralleled those of traditional churches.¹¹² The courts considered standard linguistic and theologi-

103. 406 U.S. 205 (1972). The Court refused to require the Amish community to comply with the state's compulsory education laws for its children past the eighth grade. *Id.* at 207. The Court described the threatened imposition of criminal penalties on the exercise of religious practices central to the maintenance of their faith as "precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent." *Id.* at 218.

104. *Id.* at 216.

105. *Id.* at 215-16.

106. *Id.*

107. 249 F.2d 127 (D.C. Cir. 1957).

108. 153 Cal. App. 2d 673, 698, 315 P.2d 394, 409-10 (1957). See *infra* notes 167-71 and accompanying text.

109. A broad definition of religion was explicitly employed long before 1957. In 1896, six years after *Davis v. Beason*, 133 U.S. 333 (1890), the California Supreme Court stated: Under a constitution which guarantees to all equal liberty of religion and conscience, . . . [l]iberty of conscience and belief is preserved alike to the followers of Christ, to Buddhist and Mohammedan, to all who think that their tenets alone are illumined by the light of divine truth; but it is equally preserved to the skeptic, agnostic, atheist and infidel who says in his heart "There is no God."

Ex parte Jentzsch, 112 Cal. 468, 471, 44 P. 803, 803-04 (1896).

110. 249 F.2d 127 (D.C. Cir. 1957); 153 Cal. App. 2d 673, 315 P.2d 394 (1957).

111. *Washington Ethical Soc'y*, 249 F.2d at 128; *Fellowship of Humanity*, 153 Cal. App. 2d at 679-80, 315 P.2d at 398.

112. In addition to weekly services paralleling those of traditional churches, as in *Washington Ethical Soc'y*, 249 F.2d at 128; *Fellowship of Humanity*, 153 Cal. App. 2d at 678-79, 315 P.2d at 397, the Washington Ethical Society participated in traditionally church-related events, such as the naming of children, marriage and burial. 249 F.2d at 128. The Fellowship of Humanity used its premises for social and community functions similar to those engaged in by churches in the area. 153 Cal. App. 2d at 679, 315 P.2d at 397-98.

cal definitions. Both concluded that the failure to fit within those definitions did not dispose of the legal question.¹¹³ A number of decisions have applied such analogy tests in recent years.¹¹⁴

Two recent decisions employing a theism test are *Missouri Church of Scientology v. State Tax Commission*¹¹⁵ and *Roberts v. Ravenwood Church of Wicca*.¹¹⁶ In *Missouri Church of Scientology*, the court distinguished the modern decisions of the United States Supreme Court that many have viewed as mandating a broader definition of religion.¹¹⁷ The Missouri court considered an interpretation of *United States v. Seeger*¹¹⁸ that required a belief in God but did not require its denomination as such.¹¹⁹ The Georgia Supreme Court seemed to adopt a similar interpretation of *Seeger*.¹²⁰

Constitutional considerations dominate American decisions on the scope of religion. The Supreme Court has not clearly established what criteria the courts may use to determine religious status, and state courts and lower federal courts have split over the constitutionality of the theism test. The reliance by the test's advocates on older cases, while ignoring more modern cases, raises grave doubts about the validity of their position.

113. *Washington Ethical Soc'y*, 249 F.2d at 129; *Fellowship of Humanity*, 153 Cal. App. 2d at 679, 315 P.2d at 399. Both courts also noted that a contrary holding might violate the United States Constitution. 249 F.2d at 129; 153 Cal. App. 2d at 697, 315 P.2d at 409.

114. See, e.g., *Ideal Life Church v. County of Washington*, 304 N.W.2d 308 (Minn. 1981). For contexts other than property tax exemption, see *Malnak v. Yogi*, 592 F.2d 197, 207 (3d Cir. 1979) (Adams, J., concurring) (Science of Creative Intelligence/Transcendental Meditation taught in public schools); *Africa v. Pennsylvania*, 662 F.2d 1025 (3d Cir. 1981) (rights of prisoner to special diet).

115. 560 S.W.2d 837 (Mo. 1977), *appeal dismissed*, 439 U.S. 803 (1978).

116. 292 S.E.2d 657 (Ga. 1982). The theism requirement was not at issue in the case. The Wiccan Church believes in a deity, but the Chief Justice dissented on the ground that the Wiccan deity was not the type envisioned by the Georgia legislature. 292 S.E. 2d at 660-61 (Jordan, C.J., dissenting).

117. The Missouri Court distinguished, on their facts, *Torcaso v. Watkins*, 367 U.S. 488 (1961) (struck down Maryland law requiring holders of public office to profess belief in God), and *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (upheld public transportation for children attending parochial school). *Missouri Church of Scientology v. State Tax Comm'n*, 560 S.W.2d at 842-43 n.5.

118. 380 U.S. 163 (1965). See *supra* notes 98-101 and accompanying text.

119. *Missouri Church of Scientology*, 560 S.W.2d at 842.

120. *Roberts v. Ravenwood Church of Wicca*, 292 S.E.2d 657, 659 (Ga. 1982) (quoting *Holy Spirit Ass'n for the Unification of World Christianity v. Tax Comm'n*, 81 A.D.2d 64, 72, 438 N.Y.S.2d 521, 526 (1981)).

III. COMPARISON AND ANALYSIS

Use of the theism test in both England and the United States¹²¹ must surmount three interrelated hurdles: the intrinsic difficulty of defining God,¹²² the propriety of such a test within the nation's legal system¹²³ and the test's ability to achieve the state goals justifying the exemption.¹²⁴ If the judiciary is unable to define God satisfactorily, the test will violate basic policy in England and constitutional requirements in the United States by discriminating among religions.¹²⁵ An adequate definition of God, however, does not free the test from discrimination among religions.¹²⁶ Finally, the policies justifying the exemption would be better served by a test that focuses upon the effect of the church on the community rather than upon its internal workings.¹²⁷

A. Defining God

Use of a theism test requires the court to define God. That is equally true when it considers sects disavowing theistic beliefs and when it considers sects claiming to believe in God.¹²⁸ The inherent difficulty of defining God was a major theme of *United States v. Seeger*.¹²⁹ The Court's review of the opinions of various theologians

121. *E.g.*, *Roberts v. Ravenwood Church of Wicca*, 292 S.E.2d 657 (Ga. 1982); *Missouri Church of Scientology v. State Tax Comm'n*, 560 S.W.2d 837 (Mo. 1977), *appeal dismissed*, 439 U.S. 803 (1978); *In re South Place Ethical Soc'y*, [1980] 1 W.L.R. 1565 (Ch.).

122. *See infra* notes 128-37 and accompanying text.

123. *See infra* notes 138-54 and accompanying text.

124. *See infra* notes 155-64 and accompanying text.

125. *See infra* notes 138-47 and accompanying text.

126. *See infra* notes 148-54 and accompanying text.

127. *See infra* notes 155-64 and accompanying text.

128. Theologian Paul Tillich has noted that the term "God" is a stumbling block for some. P. TILlich, *THE SHAKING OF THE FOUNDATIONS* 57 (1948), *quoted in* *United States v. Seeger*, 380 U.S. 163, 187 (1965). *Cf.* *Malnak v. Yogi*, 440 F. Supp. 1284, 1320 (D.N.J. 1977), *aff'd*, 592 F.2d 197 (3d Cir. 1979) (the court considered the qualities attributed to "creative intelligence" and concluded that something possessing them "is given the name 'god' in common usage.")

129. 380 U.S. 163 (1965).

Few would quarrel, we think, with the proposition that in no field of human endeavor has the tool of language proved so inadequate in the communication of ideas as it has in dealing with the fundamental questions of man's predicament in life, in death or in final judgment and retribution.

Id. at 174.

revealed that concepts of God, even among members of orthodox faiths, are neither static nor uniform.¹³⁰

Religious literature itself is replete with references to man's ignorance of the nature of God. Among the Bible's pronouncements to that effect are the following: "Behold, God is great, and we know *him* not"¹³¹ "*Touching* the Almighty, we cannot find him out"¹³² In Hinduism, "the Supreme Being is Brahman. . . . Ultimately, mystically, Brahman must be understood as without attributes"¹³³

Courts applying a theism test have concluded that neither Buddhism nor Ethical Culture is theistic. Some Christian theologians, however, have discussed God in the same terms as have spokesmen for those two sects. In *A History of Christian Thought*, Paul Tillich described Augustine's conception of God: "God is *summa essentia*, ultimate being, beyond all categories, beyond all temporal and spatial things. Even the categories of substance cannot be used."¹³⁴ Buddhism conceives of a "supreme Reality; . . . the eternal, hidden and incomprehensible Peace."¹³⁵ That Buddhist conception parallels Augustine's *summa essentia*. An Anglican Bishop's declaration that "we are reaching the point at which the whole conception of a God "out there," . . . is itself becoming more of a hindrance than a help,"¹³⁶ might well introduce an Ethical Humanist's conclusion that "the "God" that we love is not the figure on the great white throne, but the perfect pattern, envisioned by faith, of humanity as it should be, purged of the evil elements which retard its progress toward "the knowledge, love and practice and the right."¹³⁷

130. *Id.* at 180-82.

131. *Job* 36:26 (King James).

132. *Job* 37:23 (King James).

133. *Seeger*, 380 U.S. at 189-90 (Douglas, J., concurring).

134. P. TILlich, *A HISTORY OF CHRISTIAN THOUGHT* 115 (1968).

135. *United States v. Seeger*, 380 U.S. 163, 191 (1965) (Douglas, J., concurring) (quoting CONZE, *BUDDHISM* 38-39 (1959)).

136. *Seeger*, 380 U.S. at 181 (quoting J. ROBINSON, *HONEST TO GOD* 15-16 (1963)).

137. *Seeger*, 380 U.S. at 183 (quoting D.S. MUZZEY, *ETHICS AS A RELIGION* 98 (1951)).

The Court further considered the opinions of Dr. Muzzey:

Dr. David Saville Muzzey, a leader in the Ethical Culture Movement, states . . . that "[e]verybody except the avowed atheists (and they are comparatively few) believes in some kind of God," and that "The proper question to ask, therefore, is not the futile one, Do you believe in God? but rather, What *kind* of God do you believe in?"

Seeger, 380 U.S. at 182-83 (quoting D.S. MUZZEY, *ETHICS AS A RELIGION* 86-87 (1951)).

The theism test distinguishes among sects on the basis of an incomprehensible being. In the absence of a clear definition of the underlying concept, God, the courts might distinguish among faiths on the basis of their expressions of that concept. Courts have described creeds as nontheistic whose expressions of that concept are often indistinguishable from the expressions of spokesmen for conceded theistic religions. The test, therefore, in its conception and by its results reveals itself beyond judicial administration.

B. *The Propriety of the Theism Test*

In the absence of a universally accepted definition of God, application of the theism test will reject religions that are in fact theistic, but outside of the definition used. Such discrimination among sects on the basis of their theology is unconstitutional in the United States.¹³⁸ The establishment clause at least prevents governmental favoritism among different conceptions of God.¹³⁹ While state action in England is not limited in that manner,¹⁴⁰ such discrimination conflicts with England's policy of neutrality among faiths.¹⁴¹

Perhaps the case most clearly revealing that the theism test distinguishes between definitions of God rather than between God and no God is *Roberts v. Ravenwood Church of Wicca*.¹⁴² The

138. See *Board of Educ. v. Barnette*, 319 U.S. 624 (1943). "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . ." *Id.* at 642. "[O]nly in a theocratic state . . . [can] ecclesiastical doctrines measure legal right . . ." *Id.* at 654 (Frankfurter, J., dissenting).

139. M. HOWE, *THE GARDEN AND THE WILDERNESS* 150-56 (1965). A broader interpretation holds that the establishment clause "withdrew from the sphere of legitimate legislative concern and competence a specific, but comprehensive, area of human conduct: man's belief or disbelief in the verity of some transcendental idea . . ." *McGowan v. Maryland*, 366 U.S. 420, 465-66 (1961) (Frankfurter, J., concurring). A denial that the establishment clause at least proscribes state discrimination between religious sects denies the very foundation of the clause. "Who does not see that the same authority which can establish Christianity, in exclusion of all other religions, may establish, with the same ease, any particular sect of Christians, in exclusion of all other sects?" James Madison, *Memorial and Remonstrance Against Religious Assessments*, reprinted in A.P. STOKES & L. PFEFFER, *CHURCH AND STATE IN THE UNITED STATES* 56-57 (1964).

140. See *supra* text accompanying note 3.

141. See, e.g., *In re South Place Ethical Soc'y*, [1980] 1 W.L.R. 1565 (Ch.). "In a free country—and I have no reason to suppose that this country is less free than the United States of America—it is natural that the court should desire not to discriminate between beliefs deeply and sincerely held . . ." *Id.* at 1571.

142. 292 S.E.2d 657 (Ga. 1982).

members of the Ravenwood Church refer to themselves as "witches" and "warlocks."¹⁴³

In this faith, there is a belief in a deity, but not in the sense of an anthropomorphic God. Rather, the Wiccan belief is that there is a primordial, supernatural force which is the creator of the world and universe and which permeates everything therein. In the Wiccan faith, there is a deification of this force, and all individuals are seen as divine sparks from this divinity with a concomitant moral and ethical responsibility to themselves and to everything in nature.¹⁴⁴

The majority held that the Wiccan beliefs met the theism requirement.¹⁴⁵ The Chief Justice dissented: "There is no belief in a deity in the sense of an anthropomorphic God, only a belief in some strange supernatural force which permeates the world."¹⁴⁶ That belief, he concluded, did not meet the test.¹⁴⁷

Presuming an acceptable definition of God, the theism test still discriminates among religions and thus violates established policy in England¹⁴⁸ and constitutional strictures in the United States.¹⁴⁹ English and American courts have described Buddhism as a religion that does not meet the standard theism test.¹⁵⁰ That position acknowledges that people may adopt religions that do not posit a god in the Anglo-American tradition. The theism test therefore discriminates against such religions that are not as well known as Buddhism but no less religious.

English experience suggests a further ground for the unconstitutionality of the theism test in the United States. The intrusion of government into the theological realm would not end with the initial determination of religious status. The state would have to

143. *Id.* at 657. Those appellations do not imply the black magic generally associated with them. "The Wiccan church is not Christian, but it does believe in the teachings of Christ. It does not believe in the devil." *Id.* at 658.

144. *Id.* at 658.

145. *Id.* at 659-60.

146. *Id.* at 660 (Jordan, C.J., dissenting).

147. *Id.* at 660-61 (Jordan, C.J., dissenting).

148. *See supra* notes 45-49 and accompanying text.

149. *Walz v. Tax Comm'n*, 397 U.S. 664 (1970). "Neutrality in its application requires an equal protection mode of analysis." *Id.* at 696 (Harlan, J., concurring).

150. *See Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961); *Regina v. Registrar Gen. ex parte Segerdal*, [1970] 2 Q.B. 697, 707 (C.A.).

monitor the church's beliefs continually for maintenance of the standard that engendered the court's initial approval. The South Place Ethical Society originated as a society of "Protestant Dissenters" of admittedly religious bent.¹⁵¹ "The Society's beliefs underwent gradual change. . . . Prayer was discontinued The upshot is that . . . the society . . . has not been a 'Society of Protestant Dissenters' at all" ¹⁵² Continuous supervision of an institution's theological orthodoxy is the very type of entanglement that *Walz v. Tax Commission*¹⁵³ sought to prevent by allowing the exemption.¹⁵⁴

C. Policy Considerations

The basic rationale behind the exemption is not the practice of religion for its own sake but the benefit derived by the community. In the United States, state advancement of religion is unconstitutional.¹⁵⁵ The exemption, therefore, must have secular objects. In England, the promotion of religion is among the goals of the state.¹⁵⁶ The promotion of religious worship itself, however, is not the major rationale behind the exemption for houses of worship. The House of Lords rejected the claim of the most sacred of the Mormon houses of worship to tax exempt status because it did not admit the public at large.¹⁵⁷ It is not, therefore, the religious act within but the benefit to the community that engenders exempt status.

In neither country does community benefit require the use of a "social welfare yardstick."¹⁵⁸ The institution need not feed the poor or shelter the homeless to qualify. Its religious functions satisfy the community benefit standard by contributing to the mental and emotional well-being of its members,¹⁵⁹ by adding to the pluralism

151. [1980] 1 W.L.R. 1565, 1578-79.

152. *Id.* at 1579.

153. 397 U.S. 664 (1970). *See supra* note 84 and accompanying text.

154. *See supra* notes 78, 82-88 and accompanying text.

155. The purpose of any enactment may not be the advancement of religion. *Abington School Dist. v. Schempp*, 374 U.S. 203, 222 (1963).

156. *See supra* notes 50-53 and accompanying text.

157. *See supra* notes 36-44 and accompanying text.

158. *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970). *See In re Watson*, [1973] 1 W.L.R. 1472, 1482 (Ch.).

159. *See supra* note 79 and accompanying text.

of the community¹⁶⁰ and, in England, by promoting religion within the community.¹⁶¹

Congregations failing the theism test may advance those aims as well as congregations with creeds meeting the test. The court in *In re South Place Ethical Society* acknowledged: "There is no doubt at all that the members of the society are sincere people of the highest integrity."¹⁶² The pluralism of the community is ill served by a test that promotes only one type of group to minister to the spiritual needs of the community. Even the advancement of religion itself is impeded by the theism test. The impossibility of defining God¹⁶³ and the acknowledgement that religion can exist without a judicially cognizable God, as Buddhism does,¹⁶⁴ imply that the theism test inhibits rather than advances some religions.

IV. AN ALTERNATIVE

Analogy tests, used by a number of American jurisdictions,¹⁶⁵ better serve the purposes of the exemption by focusing on an institution's place in its community instead of focusing on its internal workings. Generally, such tests consider all the facts of a case, and no single factor or group of factors is dispositive.¹⁶⁶ Briefly, the test

160. See *supra* notes 80-81 and accompanying text.

161. See *supra* notes 50-53 and accompanying text.

162. [1980] 1 W.L.R. 1565, 1569 (Ch.). The court also noted that the Society provides lectures, discussions and concerts of a very high standard, all open to the public. *Id.*

163. See *supra* notes 121-37 and accompanying text.

164. See *supra* note 150 and accompanying text.

165. E.g., *Washington Ethical Soc'y v. District of Columbia*, 249 F.2d 127 (D.C. Cir. 1957); *Fellowship of Humanity v. County of Alameda*, 153 Cal. App. 2d 673, 315 P.2d 394 (1957); *Ideal Life Church v. Washington County*, 304 N.W.2d 308 (Minn. 1981).

166. *Ideal Life Church v. Washington County*, 304 N.W.2d 308, 315 (Minn. 1981). After noting that all factors must be considered, the court noted eight specific factors it considered in that case:

1. In substance, the . . . primary, if not the sole, motive behind Petitioner's organization and operation was tax avoidance
2. Petitioner's doctrine and beliefs, such as they are, are intentionally vague and non-binding upon its members.
3. Petitioner's members freely continue to practice other religions.
4. Petitioner has no formally trained or ordained ministry.
5. Petitioner has no sacraments, rituals, education courses or literature of its own.
6. Petitioner has no liturgy, other than simple meetings which resemble mere social gatherings or discussion groups rather than religious worship.
7. Petitioner is not an institution which advances religion (as that term is commonly understood) as a way of life for all men.
8. Petitioner does not require a belief in any Supreme Being or beings.

is whether the institution fills the same place in the community and in the lives of its members as institutions qualifying for the exemption.¹⁶⁷ The United States Supreme Court adopted a similar test for determining conscientious objector status in *United States v. Seeger*.¹⁶⁸

The courts can administer such a test more easily to determine the role of an institution in the community than to determine the nature and role of an individual's beliefs, as required by *Seeger*. While objective evidence may be almost entirely lacking in a *Seeger* type situation, it generally abounds where the question is an institution's place in the community. Such evidence would include the following: the frequency and type of meetings,¹⁶⁹ the institution's place in traditionally church-centered events such as marriage and the naming of babies,¹⁷⁰ the existence of a creed or spiritual guidance,¹⁷¹ the publicness of the institution,¹⁷² the education of its clergy¹⁷³ and any others the court finds relevant.¹⁷⁴

Courts in England and America using the theism test to determine the nature of the sect, use a type of analogy test to determine if the land is being used in the manner prescribed by the statute.¹⁷⁵

Id. In a concurring opinion, Justice Wahl criticized the majority's enumeration of specific factors as insufficiently flexible, *id.* at 319-20, and suggested a more amorphous analogy. *Id.* The majority's repeated insistence that "all relevant factors in each case" be considered, *id.* at 315, removes its analysis from the dangers anticipated by Justice Wahl.

167. *Fellowship of Humanity v. County of Alameda*, 153 Cal. App. 2d 673, 698, 315 P.2d 394, 409-10 (1957).

168. 380 U.S. 163 (1965). *See supra* notes 98-101 and accompanying text.

169. *Compare* *Washington Ethical Soc'y v. District of Columbia*, 249 F.2d 127, 128 (D.C. Cir. 1957) (weekly meetings with readings, sermons, singing and meditation) *with* *Ideal Life Church v. County of Washington*, 304 N.W.2d 308, 312 (Minn. 1981) (monthly meetings where members discuss world affairs and "get things off their chests").

170. *See, e.g., Roberts v. Ravenwood Church of Wicca*, 292 S.E.2d 657, 658 (Ga. 1982) (marriages, funerals and naming of babies).

171. *Compare In re South Place Ethical Soc'y*, [1980] 1 W.L.R. 1565, 1569 (Ch.) (belief in the excellence of truth, love and beauty, but not in anything supernatural) *with* *Ideal Life Church*, 304 N.W.2d at 311 (bylaws and "Doctrine" adopted after failure to obtain tax exemption) *and* *United States v. Kuch*, 288 F. Supp. 439, 445 (D.D.C. 1968) (Church motto: "Victory over Horseshit").

172. *See, e.g., Parshall Christian Order, R.E. v. Board of Review*, 315 N.W.2d 798, 802 (Iowa 1982) (order included only members of nuclear family).

173. *Compare Roberts*, 292 S.E.2d at 658 (10 years of training for head of church) *with* *Ideal Life Church*, 304 N.W.2d at 310 (mail order certificate of ordination received for \$20).

174. No single factor is dispositive. *See supra* notes 165-66 and accompanying text.

175. *See, e.g., Stradling v. Higgins*, 1932 Ch. 143, 152 (Ch. 1931) (use of rooms for secular objects does not disqualify place of worship; court analogized similar uses of parts of St. Paul's Cathedral); *Roberts*, 292 S.E.2d at 660.

Adoption of the analogy test, therefore, would require simply extending the use of the analogy test to the issue of religion. In England, the adoption of the analogy test would merely shift the emphasis of the historic criterion, similarity to the established church¹⁷⁶ from theological similarity to functional similarity.

CONCLUSION

The use of the theism test to distinguish religion from other beliefs results in unequal treatment of different religions and ineffective promotion of the purposes of the exemption. Discrimination among religions contravenes stated policy in England and constitutional mandates in the United States. The treatment of Buddhism manifests the discriminatory nature of the theism test. Courts requiring theism have considered Buddhism an exception to the rule, thus admitting the possibility of nontheistic religion. Conversely, some have noted that Buddhism, and other sects described as nontheistic by the judiciary, include concepts indistinguishable from some Christians' conception of God. Either analysis reveals that the theism test fails to distinguish religion from other beliefs.

The exemption serves several state ends. It aids those groups that enhance the moral and mental well-being of the community; it adds to the pluralism of the community and it advances religion, which is a permissible state purpose in England. All of those ends are frustrated to some degree by the theism test. An analogy test better serves the purposes of the exemption because it considers an institution's place in the life of the community rather than its internal workings. Courts still using the theism test should abandon it in favor of the analogy test, which has proved itself a workable alternative in a number of American jurisdictions.

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176. See *supra* notes 24-32 and accompanying text.