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A LAW IN SEARCH OF A POLICY: A HISTORY OF NEW YORK'S REAL PROPERTY TAX EXEMPTION FOR NONPROFIT ORGANIZATIONS

Robert L. Beebe*

Stephen J. Harrison**

I. Introduction

That the real property tax is at once both the most important and the most controversial component of municipal finance has been stated and restated in a series of studies produced during the last decade.¹ Controversy engulfs seemingly the entire range of the administration of this tax, from the establishment of assessments² through to the rights of over-assessed property owners to obtain

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1. *E.g.*, NEW YORK SENATE STANDING COMM. 203d SESS. CERTIORARI — A REPORT ON ADMINISTRATIVE AND JUDICIAL REVIEW OF REAL PROPERTY ASSESSMENTS (Apr. 1980); STATE OF NEW YORK REPORT OF THE TEMP. STATE COMMISSION ON THE REAL PROPERTY TAX (1979); NEW YORK ASSEMBLY WAYS & MEANS COMM., 201st SESS. ASSESSMENT ADMINISTRATION (1978); NEW YORK STATE BOARD OF EQUALIZATION AND ASSESSMENT, INDEX OF PROPERTY TAX NON-UNIFORMITY AMONG SCHOOL DISTRICTS IN NEW YORK STATE (1977); NEW YORK LEGISLATIVE COMMISSION ON EXPENDITURE REVIEW, 200th SESS. THE OPTIONAL SERVICE CHARGE LAW (Mar. 11, 1977); STATE OF NEW YORK, EDUCATIONAL FINANCE AND THE NEW YORK STATE REAL PROPERTY TAX — THE INESCAPABLE RELATIONSHIP (1976); NEW YORK SENATE, TASK FORCE ON CRITICAL PROBLEMS, 199th SESS. THREE BILLION DOLLAR HURDLE (1976); STATE OF NEW YORK, REPORT OF THE TEMP. STATE COMMISSION ON STATE AND LOCAL FINANCES, vol. 2, THE REAL PROPERTY TAX (1975); STATE OF NEW YORK, TEMPORARY STATE COMMISSION ON CONSTITUTIONAL TAX LIMITATIONS, FINAL REPORT (1975); STATE OF NEW YORK, REPORT OF THE STATE COMMISSION ON EMINENT DOMAIN AND REAL PROPERTY ASSESSMENT REVIEW (1974); STATE OF NEW YORK, REPORT OF THE NEW YORK STATE COMMISSION ON THE QUALITY, COST AND FINANCING OF ELEMENTARY AND SECONDARY EDUCATION (1972); STATE OF NEW YORK, FINAL REPORT OF THE JOINT LEGISLATIVE COMM. TO STUDY AND INVESTIGATE REAL PROPERTY TAX EXEMPTIONS, LEGIS. DOC. NO. 15 193d SESS. (1970); Beebe & Sinnott, *In the Wake of Hellerstein: Whither New York?*, 43 ALB. L. REV. 203, 411, 777 (1979).

2. See *Hellerstein v. Assessor, Town of Islip*, 37 N.Y.2d 1, 332 N.E.2d 279, 371 N.Y.S.2d 388 (1975), *modified*, 39 N.Y.2d 920, 352 N.E.2d 593, 386 N.Y.S.2d 406 (1976).

refunds.³ The range of cases and controversies has spawned a new lexicon, including terms such as "tax limit,"⁴ "special equalization ratios,"⁵ "hold harmless,"⁶ "Municipal Assistance Corporation"⁷ and "Emergency Financial Control Board."⁸ In the ebb and flow of events, each problem seems to dominate the public attention for a time only to recede without final resolution in the face of rising concern over one of the others.

The problem of the erosion of the tax base due to a proliferation of exemptions and exempt properties has remained a serious concern, perhaps without having reached the crisis level of the others. And yet many municipalities, particularly several of our largest cities and some of our most rural communities, face excruciating problems as a result of dilution of their tax bases. Indeed, in direct response to a perceived abuse and inappropriate expansion of the nonprofit exemption, virtually an entire town ceased paying taxes for two years by claiming exemptions as mail order ministers.⁹

As we enter the last two decades of the twentieth century, one of the most difficult and sensitive subjects of real property tax administration is the exemption available to property owned by non-

3. See *Ed Guth Realty, Inc. v. Gingold*, 34 N.Y.2d 440, 315 N.E.2d 441, 358 N.Y.S.2d 367 (1974); *W.T. Grant Co. v. Srogi*, 71 A.D.2d 457, 423 N.Y.S.2d 324 (4th Dep't 1979); *860 Executive Towers, Inc. v. Board of Assessors*, 53 A.D.2d 463, 385 N.Y.S.2d 604 (2d Dep't 1976), *aff'd sub nom. Pierre Pellaton Apts., Inc. v. Board of Assessors*, 43 N.Y.2d 769, 372 N.E.2d 801, 401 N.Y.S.2d 1013 (1977); *Slewett & Farber v. Board of Assessors*, 97 Misc. 2d 637, 412 N.Y.S.2d 292 (Sup. Ct. 1978), *aff'd*, N.Y.L.J., Jan. 26, 1981, at 1, col. 2 (2d Dep't Jan. 22, 1981).

4. *Waldert v. City of Rochester*, 44 N.Y.2d 831, 378 N.E.2d 115, 406 N.Y.S.2d 752, *appeal dismissed*, 439 U.S. 922 (1978); *Hurd v. City of Buffalo*, 34 N.Y.2d 628, 311 N.E.2d 504, 355 N.Y.S.2d 369 (1974).

5. See *Bloom v. Mayor of New York*, 28 N.Y.2d 952, 271 N.E.2d 919, 323 N.Y.S.2d 436 (1971) (Bergan, J., dissenting) (N.Y. CONST. art. VIII, § 10 prescribes a tax limit for New York City of 2½% of the average full valuation to be determined by applying to the assessed valuation over a stated period the ratio the assessed value bears to the full valuation). See also *Pellnat v. City of Buffalo*, 100 Misc. 2d 848, 420 N.Y.S.2d 459 (Sup. Ct. 1979); N.Y. REAL PROP. TAX LAW §§ 1250-1264 (McKinney 1972 & Supp. 1980).

6. See *Board of Educ. v. Nyquist*, 94 Misc. 2d 466, 408 N.Y.S.2d 606, 613-14 (Sup. Ct. 1978) ("save-harmless" provisions in 1974 N.Y. Laws chs. 241, 718 guarantee that a school district will receive as much state aid in current year as it did in preceding year).

7. See *Flushing Nat'l Bank v. Municipal Assistance Corp.*, 40 N.Y.2d 731, 358 N.E.2d 848, 390 N.Y.S.2d 22 (1976).

8. *Wein v. State*, 39 N.Y.2d 136, 347 N.E.2d 586, 383 N.Y.S.2d 225 (1976) (The Board was created during New York City's fiscal crisis. See 1975 N.Y. Laws ch. 868 § 5).

9. See *State Bd. of Equal. and Assessment v. Kerwick*, 91 Misc. 2d 152, 397 N.Y.S.2d 533 (Sup. Ct. 1977), *aff'd*, 72 A.D.2d 292, 425 N.Y.S.2d 640 (3d Dep't 1980).

profit organizations. Grounded in statutory law of the nineteenth century, current section 420(1) of the Real Property Tax Law provides, in part, as follows:

(a) Real property owned by a corporation or association organized or conducted exclusively for religious, charitable, hospital, educational, moral or mental improvement of men, women or children or cemetery purposes, or for two or more such purposes, and used exclusively for carrying out thereupon one or more of such purposes either by the owning corporation or association or by another such corporation or association as hereinafter provided shall be exempt from taxation as provided in this section.

(b) Real property owned by a corporation or association which is not organized or conducted exclusively for religious, charitable, hospital, educational, moral or mental improvement of men, women or children or cemetery purposes, or for two or more such purposes, but which is organized or conducted exclusively for bible, tract, benevolent, missionary, infirmary, public playground, scientific, literary, bar association, medical society, library, patriotic or historical purposes, for the enforcement of laws relating to children or animals, or for two or more such purposes, and used exclusively for carrying out thereupon one or more such purposes either by the owning corporation or association, or by another such corporation or association as hereinafter provided, shall be exempt from taxation; provided, however, that such property shall be taxable by any municipal corporation within which it is located if the governing board of such municipal corporation, after public hearing, adopts a local law, ordinance or resolution so providing.¹⁰

Several scholarly works have been written on this subject including one concerned primarily with educational properties,¹¹ one concerned with a general summary of the current statutory requirements¹² and a third concerned with the overall philosophy of the statute based upon a national survey.¹³ The study which follows includes four continuing themes. First, in the nearly one hundred years since the predecessor of our law was enacted, there has de-

10. N.Y. REAL PROP. TAX LAW § 420(1) (McKinney 1972 & Supp. 1980). Although New York's real property tax exemption for nonprofit organizations was seemingly renumbered as § 421 by 1971 N.Y. Laws ch. 417, § 5, the effective date of chapter 417, commonly referred to as the "service charge law," has been annually postponed by the legislature. See, e.g., 1980 N.Y. Laws ch. 42. This section will be referred to herein as § 420.

11. Curtiss, *Tax Exemption of Educational Property in New York*, 52 CORNELL L.Q. 551 (1967).

12. Note, *New York's Real Property Tax Exemptions for Religious, Educational, and Charitable Institutions: A Critical Examination*, 44 ALB. L. REV. 488 (1980).

13. Ginsberg, *The Real Property Tax Exemption of Nonprofit Organizations: A Perspective*, 53 TEMP. L.Q. 291 (1980).

veloped an increasingly intense competition between the needs of expanding municipal government and the expanding nonprofit organizations. Second, this competition is evident in the continuing probing by exempt organizations at the outer limits of the scope of the nonprofit exemption. Third, and similarly, municipalities have maintained an aggressive attitude in seeking to restrict exempt holdings by means of strict construction of the statute. And, fourth, within these circumstances, the state legislature has remained virtually silent since 1896, and the courts have been required to bear the responsibility for resolving these increasingly intense conflicts.

The resulting situation is one in which administration, until recently, has been almost entirely based upon a knowledge (or ignorance) of decisional law. The authors here hope to add to both the scholarship and the public discussion of this most sensitive issue by tracing the development of the law in New York State to the point at which the current difficulties can be specifically isolated, described, understood and, perhaps, begun to be resolved.

II. The Early Laws, Revised Statutes and Special Laws: The Privilege of Exemption (1828-1896)

The history of the exemption from taxation of real property owned by nonprofit organizations is divisible into three eras, the first of which extends from the beginning of the state's history through to 1896. This first era is notable because the law governing the nonprofit exemption was established primarily by statute, with decisional law serving primarily to enforce the statutory limits. The courts invariably rejected requests for extensions of those limits as being more appropriately a province of the legislature. Moreover, it is important to recognize that the courts were guided by numerous and often very clear expressions of state policy as established in legislation. As will be seen, there are several instances in which the legislature amended the law following decisions in which the judiciary had reluctantly concluded that existing statutes did not provide a satisfactory remedy to a petitioning property owner.

Although the decisional law of this era is based upon statutory provisions which are no longer in effect, the authors believe that a review of the major decisions is both appropriate and necessary. Certainly the review is appropriate because the law of this era is

the first stage in the development of the current law, and it is important to know not only where we are but how we got here. However, this review of the early decisions is also necessary because during this era, which marks the modern development of our law, it has not been uncommon for the courts, in their role as the primary policy maker, to return to the old cases, regardless of their limited relevance.

The earliest general exemption from taxation in New York State, included in a 1799 law entitled "An act for the assessment and collection of taxes," provided that

no house or land belonging to the United States, or the People of this State, nor any church or place of public worship, or any personal property belonging to any ordained minister of the gospel, nor any college or incorporated academy, nor any school house, court house, gaol, alms house or property belonging to any incorporated library, shall be taxed by virtue of this act.¹⁴

The earlier law was superseded by section III of chapter 262 of the Laws of 1823 which exempted, as is relevant to present section 420, "real estate belonging to . . . any college or incorporated academy, . . . any building for public worship, school house, . . . alms-house, house of industry, and all the real and personal property belonging thereto, . . . [and] the property belonging to any public library. . . ."

Shortly thereafter, however, the first edition of the Revised Statutes was prepared. It has been stated that "[t]he tax system in the Revised Statutes was a revision of previous legislation perfected by additional provisions recommended by the revisers or adopted by the legislature. Prior to the enactment of the Revised Statutes, the general system of taxation was prescribed by chapter 262 of the Laws of 1823."¹⁵ Effective January 1, 1828, the law as set forth in the Revised Statutes¹⁶ exempted "[e]very building erected for the use of a college, incorporated academy, or other seminary of learning; every building for public worship; every school house, . . . and the several lots whereon such buildings are situated. . . . Subdivi-

14. 1799 N.Y. Laws ch. 72, § 32. Except for a \$1500 limitation placed on the exemption for ministers or priests (which is still found in N.Y. REAL PROP. TAX LAW § 460 (McKinney Supp. 1980)), 1801 N.Y. Laws ch. 179, § 24 provided for the same exemption. See also 1813 N.Y. Laws ch. 52 § 28.

15. *Catlin v. Trustees of Trinity College*, 113 N.Y. 133, 139, 20 N.E. 864, 866 (1889).

16. [1828] N.Y. REV. STAT. pt. I, ch. XIII, tit. 1, § 4(3).

sion 4 of section 4 exempted "every poor-house, alms-house, house of industry, and every house belonging to a company incorporated for the reformation of offenders, and the real and personal property belonging to, or connected with the same," and subdivision 5 exempted "[t]he real and personal property of every public library."

The statute remained substantially the same until 1893, primarily because the more common method of tax exemption was through enactment of special laws. As the court of appeals stated in 1889:

It has never been the general policy of the state to wholly exempt the property, either real or personal, of incorporated churches, colleges, or charitable institutions from taxation. There was a limited exemption of real estate and personal property in the Revised Statutes. The policy of complete exemption, where adopted, has been accomplished through special acts applicable to particular and specified corporations.¹⁷

Between 1828 and 1896, it was estimated that over 100 supplemental acts were passed, many of which provided for special exemptions.¹⁸ And presumably because these acts were so numerous and specific, there is virtually no appellate record of litigation relating to special exemptions.

Undoubtedly, this factor also accounts for the relative paucity of cases which arose with respect to the general exemption law during this era. Even where the general law was applicable, there was little that would admit of ambiguity, and where a question was raised, the courts invariably adhered to a rule of strict construction. One interesting (and perhaps the earliest) example of this is the case of *Chegaray v. Mayor of New York*,¹⁹ wherein the court of appeals construed the portion of the Revised Statutes quoted above in denying an exemption to a privately owned boarding and day school for girls. Looking to the statute, the court held that "school-house" referred to public common schools, and that the phrase "or other seminary of learning," preceded as it was by "college" and "incorporated academy," precluded all but property held

17. *Catlin v. Trustees of Trinity College*, 113 N.Y. at 141-42, 20 N.E. at 867.

18. ANNUAL REPORT OF THE COMMISSIONERS OF STATUTORY REVISION OF THE STATE OF NEW YORK 11 (1896).

19. 13 N.Y. 220 (1855).

by corporations.²⁰ The court said, "It is evident that it was intended to exempt only property used by the public for the purposes of education, or which belonged to a corporation created for the advancement of learning, and thereby devoted to educational purposes."²¹ This narrow construction, according to Judge Hand, was necessary to avoid the possibility of persons building a school room and establishing private schools in their homes, thereby exempting their property from taxation. In acknowledging the restrictive effect of the decision, however, Judge Hand said, "I should regret very much that our decision should discourage such commendable efforts; but the meaning of the act appears to be plain, and that must control."²²

The rule of strict construction prevailed throughout this first era, and the reason for its prevalence was explained by the court of appeals as follows:

Taxation is a burden. It is a common burden, for the common good. The person or the class which is exempted therefrom is a favored one. A statute giving favors at the expense of the public is not to be liberally interpreted. Statutes conferring exemptions from taxation are to be strictly construed.²³

As in the *Chegaray* case, the effect of this construction could be very restrictive indeed when an owner had not obtained a special exemption and found it necessary to rely on the general law. Thus, the court of appeals held taxable certain real estate occupied and used as a medical college, hospital and free dispensary for women because it was not a building for public worship or a seminary and no special act had exempted it.²⁴

Given this state of the law, assessors seized upon even the slightest deviation from the existing criteria in determining taxable status, and the burden of proof was clearly on the property owner. Judicial review under these circumstances was often a very techni-

20. *Id.* at 228.

21. *Id.* at 229.

22. *Id.* at 230.

23. *Buffalo City Cemetery v. City of Buffalo*, 46 N.Y. 506, 508-09 (1871). *See also* *People ex rel. Westchester Fire Ins. Co. v. Davenport*, 91 N.Y. 574, 586 (1883) ("The courts have . . . required an exemption from taxation to be described in clear and unambiguous language, and to appear to be, undisputably, within the intention of the legislature, or they have declined to enforce it."); *Roosevelt Hosp. v. Mayor of New York*, 84 N.Y. 108 (1881).

24. *People ex rel. New York Medical College and Hospital for Women v. Campbell*, 93 N.Y. 196 (1883).

cal matter as can be seen in the opinion in *Temple Grove Seminary v. Cramer*.²⁵ The assessor of the City of Saratoga Springs had revoked the exemption of an incorporated academy and seminary of learning because the school had leased its buildings during the school's summer vacation for use as a boarding house or hotel. Here, however, the court was persuaded that the policy of exemption was for the encouragement of learning, and that permitting the seminary to devote its premises to a profitable use during the summer when the buildings were not needed or able to be used for school purposes promoted the intent of the law.

Temple Grove was decided more than fifty years after the general revision of 1828, and it is interesting to ponder whether the statute had become inadequate in the changed circumstances of a new era. We know, for example that during the last twenty years of the nineteenth century there was a heightened concern for the delivery of services afforded by government and the nonprofit institutions.²⁶ Perhaps these new circumstances are related to the apparent relaxation of the rule of strict construction in two late nineteenth century cases involving the care and education of children. In *People ex rel. Seminary of Our Lady of Angels v. Barber*,²⁷ the assessors assessed as taxable certain land owned by a school but used as a farm. However, the products of the farm were used to supply the teachers, students, and staff of the school. The lower court referred to the policy of the state to encourage institutions of the type discussed therein because of the benefit they provided to society. The statute was to be given "a reasonably necessary interpretation," which required "that the lot be devoted to no use other than that which is necessary or fairly incidental to the use and purposes of the institution."²⁸ The lower court found the entire property to be entitled to exemption, and the court of appeals affirmed without opinion.²⁹

In the second case, the high court did issue an opinion, in which an apparent relaxation in the traditional rules of construction was

25. 98 N.Y. 121 (1885).

26. REPORT OF THE TEMPORARY STATE COMM'N ON STATE AND LOCAL FINANCES, vol. II THE REAL PROPERTY TAX 104-05 (1975) [hereinafter cited as REAL PROPERTY TAX].

27. 49 N.Y. Sup. Ct. 27 (5th Dep't 1886), *aff'd*, 106 N.Y. 669, 13 N.E. 936 (1887).

28. *Id.* at 31.

29. 106 N.Y. 669, 12 N.E. 936 (1887).

again present. In *Association for the Benefit of Colored Orphans v. Mayor*,³⁰ the court found that an orphan asylum, while not shown to be exempt as a school house or building for public worship within subdivision three of section four of the *aforecited Revised Statutes*, was an "alms-house" within the meaning of subdivision four of that section and therefore exempt.³¹ The court noted that, whereas prior to the adoption of the *Revised Statutes*, only *public* alms-houses were exempt,³² the legislature was presumed to have intended to broaden this exemption in the *Revised Statutes*. The court said, "The general principle that statutes of exemption should be strictly construed, we believe in and adhere to, but such a case as this we do not regard as coming within that principle."³³ The rationale for this conclusion was that the plaintiff was performing a work of charity that would otherwise fall upon the public. As such, it was outside the "mischief" which the strict construction rule was meant to prevent.

The addition of the phrase "moral and mental improvement of men and women" to the general law in 1893³⁴ was undoubtedly the legislature's response to the court of appeals' reluctant denial of an exemption of property owned by the Young Men's Christian Association ("YMCA") in New York City in 1889. Under the law as it then stood, the court found the YMCA to be neither a seminary of learning nor a building used for public worship, and, therefore, taxable. The opinion concludes with the following comment: "Associations of this character are so useful and so deserving of encouragement and support that a different result would please us better, but we are unable to reach it under the law as it stands."³⁵

In the 1893 amendment, the legislature added not only the phrase "moral and mental improvement of men and women"

30. 104 N.Y. 581, 12 N.E. 279 (1887).

31. *Id.* at 588, 12 N.E. at 282.

32. 1826 N.Y. Laws ch. 10.

33. 104 N.Y. at 587, 12 N.E. at 281.

34. 1893 N.Y. Laws ch. 498 provided an exemption to real property of "a corporation or association organized exclusively for the moral and mental improvement of men and women or for religious, charitable, missionary, hospital, educational, patriotic, historical or cemetery purposes, or for two or more of such purposes and used exclusively for carrying out thereupon one or more of such purposes. . . ."

35. *YMCA v. Mayor of New York*, 113 N.Y. 187, 190, 21 N.E. 86, 87 (1889).

(taken from the YMCA charter);³⁶ it also added the word "exclusively" to modify both the organization and the use requirements of the law. This exclusivity test of organization purpose and property use was seemingly derived from laws which had been previously applicable only in New York City.³⁷

These major decisions of the 1880's in combination with the rapidly changing social and economic conditions most certainly were part of what was apparently a widespread concern that the laws relating to taxation were in need of attention. There had been no general revision of the tax statutes since 1829, and in 1889 the legislature appointed a Commission for the Revision of the Statutes of the State.³⁸ Among other things, the Commission was charged to prepare both a report to the legislature and a bill for the consolidation and revision of the general statutes of the state "relating to the collection and assessment of taxes and the exemption of property from taxation throughout the State." In discussing the situation which resulted in the appointment of the Commission, the court of appeals stated:

The subject of taxation has been a great embarrassment to legislative bodies throughout the history of the world. Special interests clash with general interests and seek relief, wholly or in part, from the public burden which is essential to the protection of property and the preservation of order. Claims for exemption multiply and when the legislature yields to the pressure of special interests, the precedent breeds a multitude of special statutes and brings confusion into the law. Such was the situation that confronted the legislature of 1889. . . .³⁹

36. 5 Op. COUNSEL S.B.E.A. No. 17 at 34 (1976).

37. 1825 N.Y. Laws ch. 83 provided that with regard to buildings for public worship and schools, the exemptions provided by 1823 N.Y. Laws ch. 262 were limited in New York City to property "exclusively used for such purposes." Similarly, 1852 N.Y. Laws ch. 282 provided that the exemptions from taxation of buildings for public worship, school houses and seminaries of learning under the provisions of [1828] N.Y. Rev. Stat., pt. I, ch. XIII, tit. 1, § 4(3) "shall not apply to any such building or premises in the City of New York, unless the same shall be *exclusively used* for such purposes, and *exclusively* the property of a religious society. . . ." (emphasis added). See also 1882 N.Y. Laws ch. 410 § 827. The fact that property was not exclusively owned by the applicant led to denial of exemptions in *Hebrew Free School Ass'n v. Mayor of New York*, 99 N.Y. 488, 2 N.E. 399 (1885) and failure to show exclusive religious use contributed to the denial of exemptions in *YMCA v. Mayor of New York*, 113 N.Y. 187, 21 N.E. 86 (1889).

38. See 1889 N.Y. Laws ch. 289 § 1.

39. *Pratt Inst. v. City of New York*, 183 N.Y. 151, 155, 75 N.E. 1119, 1120 (1905).

III. The Tax Law: A Complete and Harmonious System (1896-1944)

The Commissioners of Statutory Revision saw their effort as one "to eliminate inconsistencies and to reduce the subject to a harmonious and systematic whole,"⁴⁰ and after several unsuccessful attempts, they reported what became the Tax Law of 1896.⁴¹ In terms of the property tax exemption available to property owned by nonprofit organizations, the new law in part exempted the

real property of a corporation or association organized exclusively for the moral or mental improvement of men or women, or for religious, bible, tract, charitable, benevolent, missionary, hospital, infirmary, educational, scientific, literary, library, patriotic, historical or cemetery purposes, or for the enforcement of laws relating to children or animals, or for two or more of such purposes, and used exclusively for carrying out thereupon one or more of such purposes. . . .⁴²

In addition to the elimination of the special exemption laws, this new general exemption statute retained the traditional purposes, including those added in 1893, and added several new categories, seemingly in an attempt to replace the types of activities exempted by the special exemption laws. In so doing, the new law expressed the acceptable purposes and activities in significantly less specific language than the prior law.

Looking back nearly a century from today, with little primary source material extant, the entire intent of the 1896 law is not clear. We do know that the court of appeals held its effect to be the repeal of all special exemption acts by implication, except where a transfer of property was induced by promise of exemption.⁴³ This, of course, coincided with the expressed purpose of the Revisers to establish statewide standards through general law. And having presumably corrected the inequalities in exemption which

40. ANNUAL REPORT OF THE COMMISSIONERS OF STATUTORY REVISION OF THE STATE OF NEW YORK 10-11 (1896).

41. 1896 N.Y. Laws ch. 908.

42. N.Y. TAX LAW § 4(7) (1896) (repealed).

43. *People ex rel. Roosevelt Hosp. v. Raymond*, 194 N.Y. 189, 87 N.E. 90 (1909). See also *People ex rel. Cooper Union v. Gass*, 190 N.Y. 323, 83 N.E. 64 (1907); *Pratt Inst. v. City of New York*, 183 N.Y. 151, 75 N.E. 1119 (1905); *In re Estate of Huntington*, 168 N.Y. 399, 61 N.E. 643 (1901). See generally J. SAXE, CHARITABLE EXEMPTION FROM TAXATION IN NEW YORK STATE ON REAL AND PERSONAL PROPERTY 17 (1933).

had "crept into the law during the preceding century or more"⁴⁴ and to ensure that no further exemptions were enacted by means of special law, an amendment to the state constitution was proposed and subsequently ratified in 1901 to prohibit exemptions other than by general law. The amendment became part of article III, section eighteen of the constitution when approved by the people at the election of 1901.⁴⁵

However, the repeal of the special exemption laws in combination with the revised and less specific language of the new general law also seems to have created a statutory framework which was naturally at odds with the traditional rule of strict construction. Thus, rather than providing an exemption for "every building for public worship; every school house . . . every poor-house," [etc.] the new statute offered exemption to all real property (assuming satisfaction of the ownership and nonprofit requirements) "used exclusively for religious . . . educational . . . charitable" purposes. Moreover, the previously limited number of purposes and uses had been substantially expanded to include activities such as the "moral and mental improvement of men or women, . . . bible, tract . . . benevolent . . . infirmary . . . scientific, literary, library, patriotic, historical . . . [and] the enforcement of laws relating to children or animals."

Although the Revisers and the legislature must surely have understood and been guided by the prior law as strictly interpreted by the courts, one must consider in retrospect whether the repeal of the special laws was intended to be offset by the enactment of a broader, less restrictive statute. Litigation was not long in coming, and the early cases, perhaps not surprisingly, seemed to adhere to the traditional rule of strict construction.

One of the first cases to construe the new Tax Law provision was *People ex rel. Young Men's Association for Mutual Improvement v. Sayles*.⁴⁶ Under subdivision five of section four of the Revised

44. 10 NEW YORK STATE CONSTITUTIONAL CONVENTION COMMITTEE, PROBLEMS RELATING TO TAXATION AND FINANCE 206 (1938).

45. The constitutional amendment provided: "The legislature shall not pass a private or local bill in any of the following cases: . . . Granting to any person, association, firm or corporation, an exemption from taxation on real or personal property." (currently codified at N.Y. CONST. art. 3, § 17).

46. 32 A.D. 197, 53 N.Y.S. 67 (3d Dep't), *aff'd*, 157 N.Y. 677, 51 N.E. 1093 (1898). See also *People ex rel. Catholic Union v. Sayles*, 32 A.D. 203, 53 N.Y.S. 65 (3d Dep't), *aff'd*, 157

Statutes of 1828 (as amended), the relator's property had previously enjoyed total exemption as "the real and personal property of a public library."⁴⁷ However, since the building was used only partially as a library, when the Tax Law became effective, the assessors assessed it. The court found that a small part of the building was used exclusively to carry out thereupon library purposes, but that most of the building was used for theatrical performances, public meetings and exhibitions. The income derived from these uses was applied toward the organization's benevolent enterprises.

The court held the Tax Law would not permit a liberal interpretation to exempt the property based on the usage of the revenue derived from non-exempt uses for exempt purposes. Only free public hospitals could still retain exemption on leased portions of property when they used the revenue derived therefrom for the maintenance and support of the hospital.⁴⁸ The court also noted that the rule of interpreting exemptions strictly against those claiming that status was applicable to religious and charitable corporations. Indeed, the language of the opinion would indicate that this court found the new law to be more strict than the old, based on the "used exclusively" test, previously limited to New York City but now, under the Tax Law, applicable statewide. This decision of the Third Department was affirmed without opinion.⁴⁹

Strict construction of the exemption and its various elements continued to be the test applied by the courts and can be seen in several cases involving education. In *People ex rel. Delta Kappa Epsilon Society v. Lawler*,⁵⁰ the appellate division upheld denial of exemption to a fraternity house claiming exemption for its property as a literary organization. The court noted that the purposes for which a corporation is organized and the uses to which it puts its property must coincide, or incorporators would state exempt purposes in order to secure exemption and then use their property for nonexempt purposes. Although the court found that on occasion the property was used for exempt purposes, the predominant

N.Y. 679, 51 N.E. 1092 (1898).

47. [1828] N.Y. REV. STAT. pt. I, ch. XIII, tit. 1, § 4(5).

48. 1897 N.Y. Laws ch. 371. This provision can be found today in N.Y. REAL PROP. TAX LAW § 420(5) (McKinney 1972).

49. 157 N.Y. 677, 51 N.E. 1093 (1898).

50. 74 A.D. 553, 77 N.Y.S. 840 (4th Dep't 1902), *aff'd*, 179 N.Y. 535, 71 N.E. 1136 (1904).

use failed to satisfy the exclusivity test required,

[f]or although we ought not, perhaps, to give to the word "exclusively" an interpretation so literal as to prevent an occasional use of the relator's property for some purpose other than one or more of those specified, yet the policy of the law is to construe statutes exempting property from taxation somewhat rigidly, and not to permit such exemption to be established by doubtful implication.⁵¹

Owners claiming exemption on the basis of educational use frequently sought judicial review as the scope of the new exemption law was tested. In a case involving a religious school, the Second Department adopted the report of its referee, who, while recognizing the doctrine of strict construction, also stated that "strict construction does not mean such a literal interpretation as would defeat or nullify the intention of the Legislature."⁵² However, the court refused to exempt the entire parcel, finding a woodlot used only as a source of lumber for improvements to other portions of the school to be subject to taxation.

No exemption was granted in *People ex rel. Adelphi College v. Wells* to a college-owned athletic field which was leased out to various athletic associations unconnected with the school during school vacation periods.⁵³ The court distinguished *Temple Grove Seminary*,⁵⁴ saying that that case was decided under the old Revised Statutes, and that "[t]he language of the present Tax Law, however, is quite different, and evinces, it seems to me, an intent to restrict the exemption to a greater extent than was permitted under the Revised Statutes."⁵⁵

In the same year, citing *Adelphi* regarding the importance of athletics, the same Second Department exempted an academy's sleeping rooms, drill rooms, armories, stable, library, the residence of the principals, recreation halls and dining halls, applying the statute to exempt "the entire articulated system" of the institution.⁵⁶ Since the same five judges decided these two cases but one

51. *Id.* at 557, 77 N.Y.S. at 842.

52. *People ex rel. Missionary Sisters v. Reilly*, 85 A.D. 71, 83 N.Y.S. 39 (2d Dep't 1903), *aff'd*, 178 N.Y. 609, 70 N.E. 1107 (1904).

53. 97 A.D. 312, 89 N.Y.S. 957 (2d Dep't 1904), *aff'd*, 180 N.Y. 534, 72 N.E. 1147 (1905).

54. 98 N.Y. 121 (1885).

55. *People ex rel. Adelphi College v. Wells*, 97 A.D. at 315, 89 N.Y.S. at 958.

56. *People ex rel. Board of Trustees of Mt. Pleasant Academy v. Mezger*, 98 A.D. 237, 90 N.Y.S. 488 (2d Dep't 1904), *aff'd*, 181 N.Y. 511, 73 N.E. 1130 (1905).

month apart and with no dissent in either case, the differences between the results can best be traced to the *users* of the property in each and not the *use*, since an athletic field, exclusively used by a college would presumably have been held to be part of the "articulated system" of the school.

Part of this spate of litigation involving school owned real property was a case which actually preceded those referred to above and which was probably rather obscure at the time it was decided. The property, owned by a small school for Indians, was located in a town in Cattaraugus County. The assessors had assessed it as fully taxable on the basis of the school's use of a substantial number of the 467 acres as farm, pasture, woodlot, timber and brush. The school claimed entitlement to a full exemption.

In its decision in *Blackburn v. Barton*, the appellate division cited the *Sayles* case in reiterating both the rule of strict construction and that in order to "secure the benefit of the exemption, it is necessary that [the relator] should bring itself clearly within the provisions of the statute."⁵⁷ However, the court also reached back to a case decided under the prior law to permit certain activities which were not strictly educational:

In determining whether property is used for the purposes of an institution of this kind so as to exempt it from taxation, it must be made to appear that the use is necessary or fairly incidental to the maintenance of the institution for the carrying out of the purposes for which it was organized. It is not necessary that every particle of the real estate should be devoted to the location of the buildings and the laying out of the grounds of the institution. . . .⁵⁸

Relying on the doctrines enunciated in each case, the court found a portion of the property, that is, farm land used for the growing of crops used for the students' needs, to be exempt. Unused portions were left taxable and a proportional exemption granted.⁵⁹

As noted above, this litigation was initiated because the assessors considered the use of the land to be other than "educational"

57. *People ex rel. Blackburn v. Barton*, 63 A.D. 581, 583, 71 N.Y.S. 933, 935 (4th Dep't 1901).

58. *Id.* at 583. (relying on *People ex rel. Seminary of Our Lady of Angels v. Barber*, 49 N.Y. Sup. Ct. 27 (5th Dep't 1886), *aff'd*, 106 N.Y. 669, 13 N.E. 936 (1887)).

59. The court in *Sayles* also noted that a partial exemption was possible in that case, and that the assessors had done so, in effect, but not in form, by reducing the property's assessment.

while the owners believed the property should be *wholly* exempt. The final decision came down more in favor of the assessors, with the appellate court overruling a referee and special term, both of whom had held the property to be wholly exempt. The appellate division's reliance on the incidental use precedent of *Our Lady of Angels Seminary* was seemingly a means by which to avoid so strict a construction of the statute as to make the property fully taxable. Read in this context, the court's comment did not seem to break much new ground.

The "incidental" use test for exemption was applied by the court of appeals in that same year. In *People ex rel. Society of the Free Church of St. Mary the Virgin v. Feitner*,⁶⁰ the court agreed with the court below⁶¹ that the portions of a clergy house adjoining a concededly exempt church and occupied by three church curates and the building engineer were wholly exempt. It did not agree that the rectory was "necessary and incident" to the work of the church, but found it to be a residence, and accordingly limited to the \$2,000 exemption provided by subdivision nine of section four of the Tax Law.⁶²

Strict construction continued to be referred to as the primary doctrine in the interpretation of tax exemption statutes,⁶³ but exemptions were being granted by the courts on the basis of the incidental use doctrine and its corollary, that interpretations should not be so strict as to defeat the intent of the statute.⁶⁴ For example, the Fourth Department said that although exemption statutes are to be strictly construed against those claiming exemption,⁶⁵

60. 168 N.Y. 494, 61 N.E. 762 (1901).

61. 63 A.D. 181, 71 N.Y.S. 257 (1st Dep't 1901).

62. The exemption for the residence of officiating clergymen was added by 1892 N.Y. Laws ch. 565 and is now contained in N.Y. REAL PROP. TAX LAW § 462 (McKinney 1972). The limitation on the exemption was removed by 1958 N.Y. Laws ch. 281 and subsequently recodified at 1959 N.Y. Laws ch. 733.

63. See *People ex rel. Mizpah Lodge v. Burke*, 228 N.Y. 245, 126 N.E. 703 (1920).

64. See *Silver Bay Ass'n for Christian C. & T. v. Braisted*, 80 N.Y.S.2d 548, 553 (Sup. Ct. 1920), *aff'd*, 196 A.D. 913, 186 N.Y.S. 956 (3d Dep't 1921). It appears that the opinion was unreported for some 28 years until cited in *In re N.Y. Conf. Ass'n of Seventh-Day Adventists*, 80 N.Y.S.2d 8, 19 (Sup. Ct. 1948), *rev'd*, 275 A.D. 742, 87 N.Y.S.2d 709 (4th Dep't), *on remand*, 111 N.Y.S.2d 329 (Sup. Ct. 1949), *rev'd*, 279 A.D. 845, 109 N.Y.S.2d 774 (4th Dep't), *aff'd*, 304 N.Y. 706, 107 N.E.2d 654 (1952).

65. *In re Syracuse University*, 214 A.D. 375, 212 N.Y.S. 253 (4th Dep't 1925) (citing *People ex rel. Mizpah Lodge v. Burke*, 228 N.Y. 245, 126 N.E. 703 (1920)).

their interpretation should not be so narrow as to defeat the Legislature's intent to "encourage, foster and protect corporate institutions of a religious, literary or educational character."⁶⁶ Based on this construction, the court exempted Syracuse University's dormitories, dining halls, hospital, athletic fields, and farm, as well as the chancellor's residence.⁶⁷ The decision confirmed assessments only on a portion of a building rented and occupied as a store and three vacant lots where no improvements were in progress or shown to be contemplated in good faith.⁶⁸

With the exception of the several decisions in which the "incidental use" and preservation of legislative intent qualifications were applied to educational and religious holdings, there were no major changes immediately apparent in the availability of this exemption as a result of the new Tax Law. However, during the latter half of the 1920's, a series of cases occurred which suggested that the use of property by nonprofit organizations was becoming more complex than that which had been understood and accepted in 1896. The common issues in these cases were used by persons unrelated to the owner-petitioner and the production of income from such use. For example, in *Board of Foreign Missions v. Board of Assessors*,⁶⁹ property consisting of six separate but contiguous parcels was used as a home and resting place for returned Methodist missionaries and their families, as well as for conferences and meetings. A closely divided court of appeals noted that had the property use been so confined, it would have been entirely exempt. However, since the main building, containing 100 guest rooms, was used by 317 outside visitors in 1920 (out of a total of 3,575 users of the property) and other buildings were used by outside parties, three of the parcels were held to be taxable. The court noted that income was derived from these properties; no income was derived from three other parcels, one of which was used by missionary

66. *In re Syracuse University*, 214 A.D. 375, 377, 212 N.Y.S. 253, 256 (4th Dep't 1925) (citing *People ex rel. Seminary of Our Lady of Angels v. Barber*, 49 N.Y. Sup. Ct. 27 (5th Dep't 1886), *aff'd*, 106 N.Y. 669, 13 N.E. 936 (1887) and *People ex rel. Missionary Sisters v. Reilly*, 85 A.D. 71, 83 N.Y.S. 39 (2d Dep't 1903), *aff'd*, 178 N.Y. 609, 70 N.E. 1107 (1904).

67. *Id.* at 377, 212 N.Y.S. at 256 (citing *People ex rel. Board of Trustees of Mt. Pleasant Academy v. Mezger*, 98 A.D. 237, 90 N.Y.S. 488 (2d Dep't 1904), *aff'd*, 181 N.Y. 511, 73 N.E. 1130 (1905).

68. See N.Y. REAL PROP. TAX LAW § 420(3) (McKinney 1972).

69. 244 N.Y. 42, 154 N.E. 816 (1926).

families with children or employees of the organization. The court disagreed with the appellate division,⁷⁰ which had held that all of the parcels were tainted by the commercialism of the main building, pointing out the statutory authorization to exempt a portion of property where appropriate. The other two parcels, presently vacant, were held to satisfy the good faith contemplation rule discussed above. Three judges dissented, arguing that either all six parcels were taxable or otherwise all exempt, division of the property being only for the convenience of the assessors. As a whole, the dissenters would have held the property to be entirely taxable. One judge voted to reverse the appellate division's denial of exemption entirely.

These issues were the focal point of a series of three cases involving the Young Women's Christian Association ("YWCA"), decided between 1926 and 1928. In the first,⁷¹ the organization sought to cancel, as a cloud on title, the taxes for 1921-1923. The building which provided lodging for women under thirty years of age and who earned less than thirty dollars per week also contained (on the first floor) a cafeteria open to the public. The facts showed that more than half of the meals served were to the public for cash, at a profit. Here, the First Department said that,

It is familiar law that statutes exempting property from taxation are to be strictly construed and that the intention of the Legislature to grant immunity must be clear beyond a reasonable doubt; the rule being that the right of taxation exists unless the exemption is expressed in clear and unambiguous terms, and that no claim of exemption can be sustained unless within the express letter or the necessary scope of the exemption clause.⁷²

The court concluded that the public patronage of the restaurant was not merely occasional, sporadic or an emergency use, but rather a daily practice for the purpose of receiving revenue. Despite the fact that this revenue was used for the "laudable" and "praiseworthy" aims of the YWCA, no exemption was allowed to the cafeteria and related portions of the property. While the applicant may have been entitled to a partial exemption that is, on the lodging portion of its property, its remedy in that respect was lim-

70. 207 A.D. 151, 202 N.Y.S. 50 (2d Dep't 1923).

71. *YWCA v. City of New York*, 217 A.D. 406, 216 N.Y.S. 248 (1st Dep't 1926), *aff'd*, 245 N.Y. 562, 157 N.E. 858 (1927).

72. *Id.* at 408, 216 N.Y.S. at 251.

ited to certiorari. In the following year, a different branch of the YWCA in New York City found its property being assessed as taxable due to the operation of two small shops on the premises. In again refusing to find that to be an exempt use, the same court held the property partially exempt, while subjecting the shops to taxation.⁷³

And finally, in the following year, a third branch of the organization (located in Brooklyn) went to court in opposition to assessments placed on apartments which were located in its building and rented to its members. Here, however, the court found the use to be unrelated to a purposeful production of income and not available to the general public. Citing the prior YWCA cases and the earlier *Sayles* decision⁷⁴ as authority for what would not be permitted, and referring to *Mount Pleasant Academy* and its principle of the "articulated system,"⁷⁵ the trial court held the entire building to be exempt.⁷⁶ This decision was affirmed without opinion by both the appellate division and court of appeals.⁷⁷

Although several amendments had been made to section 4(7) of the Tax Law during this period, it is sufficient to note here that only bar associations⁷⁸ and public playgrounds⁷⁹ were added to the list of exempt purposes. However, it is evident that tax exemptions continued to be of concern to the legislature during this period and were the subject of frequent studies⁸⁰ which were considered by the 1938 Constitutional Convention.

Two cases concerning religious residential use should be noted as well. In the first,⁸¹ the Second Department granted an exemption

73. *YWCA v. City of New York*, 220 A.D. 49, 220 N.Y.S. 365 (1st Dep't 1927), *aff'd*, 247 N.Y. 591, 161 N.E. 194 (1928).

74. *See People ex rel. Young Men's Ass'n for Mutual Improvement v. Sayles*, 32 A.D. 197, 53 N.Y.S. 67 (3d Dep't), *aff'd*, 157 N.Y. 677, 51 N.E. 1093 (1898). *See also* notes 46-48 *supra* and accompanying text.

75. *See People ex rel. Board of Trustees of Mt. Pleasant Academy v. Mezger*, 98 A.D. 237, 90 N.Y.S. 488 (2d Dep't 1904), *aff'd*, 181 N.Y. 511, 73 N.E. 1130 (1905).

76. *YWCA v. City of New York*, 137 Misc. 321, 243 N.Y.S. 294 (Sup. Ct. 1928), *aff'd*, 227 A.D. 742, 236 N.Y.S. 926 (2d Dep't 1929), *aff'd*, 254 N.Y. 558, 173 N.E. 865 (1930).

77. *Id.*

78. 1927 N.Y. Laws, ch. 565.

79. 1929 N.Y. Laws, ch. 382.

80. N.Y. LEGIS. DOC. No. 62 (1935); N.Y. LEGIS. DOC. No. 77 (1932); N.Y. LEGIS. DOC. No. 86 (1927); N.Y. LEGIS. DOC. No. 72 (1922); N.Y. SEN. DOC. No. 19 (1917).

81. *St. Barbara's Roman Catholic Church v. City of New York*, 243 A.D. 371, 277 N.Y.S. 538 (2d Dep't 1935).

pursuant to Tax Law, section 4(7)⁸² to the residence of the teaching staff (that is, nuns) of a parochial school. Relying on the *St. Mary*⁸³ case for authority, the court held that given the semicloistered status of the order this was a religious use. In addition, in reliance on *Syracuse*,⁸⁴ the court found there was as much, if not more, reason for exempting that portion of the property used by the teaching staff as a place of residence than there had been for the chancellor's residence in the *Syracuse* case. The court also noted that "strict construction" could not be used to thwart the purposes of the exemption.

In the other case, the court exempted a religious retreat which it found to be used exclusively for the relator's purposes.⁸⁵ The property, located in the Bronx, consisted of twelve acres of land, much of which was undeveloped. The court set forth a long and detailed discussion of the facts before reaching its conclusion, and it is evident that it was concerned with the effect of the decision. The court referred to the "[t]ax exemption or such method of compensation for services rendered" as "a free-for-all contest on the part of state legislators" with municipalities receiving less benefit from the organization's operations than they would have received from the taxation foregone on the property. "The fault, if any, lies with the legislature, and not with the courts which are compelled to follow the verbiage of subdivision 6."⁸⁶

By the time of the 1938 Constitutional Convention, decisional law had established that the exemption for nonprofit organizations was contingent on three tests. First, the nonprofit status of the applicant, where in issue, had to be clearly proven.⁸⁷ Second, the applicant's purposes could be ascertained from its incorporation pa-

82. Actually, by the time *St. Barbara's* was decided, the exemption had been renumbered subdivision six by 1933 N.Y. Laws, ch. 470, § 3, but as *St. Barbara's* involved taxes between 1921 and 1932, the court referred to it by its former subdivision enumeration.

83. *People ex rel. Society of the Free Church of St. Mary the Virgin v. Feitner*, 168 N.Y. 494, 61 N.E. 762 (1901).

84. *In re Syracuse University*, 214 A.D. 375, 212 N.Y.S. 253 (4th Dep't 1925).

85. *People ex rel. Outer Court, Inc., of the Order of the Living Christ v. Miller*, 161 Misc. 603, 292 N.Y.S. 674 (Sup. Ct. 1936), *aff'd*, 256 A.D. 814, 10 N.Y.S.2d 208 (1st Dep't), *aff'd*, 280 N.Y. 825, 21 N.E.2d 881 (1939).

86. *Id.* at 610, 292 N.Y.S. at 682.

87. *Lawrence-Smith School, Inc. v. City of New York*, 166 Misc. 856, 2 N.Y.S.2d 752 (Sup. Ct.), *aff'd*, 255 A.D. 762, 7 N.Y.S.2d 486 (1st Dep't 1938), *aff'd*, 280 N.Y. 805, 21 N.E.2d 693 (1939).

pers, or if needed, by-laws.⁸⁸ And third, and by far the most difficult test, actual use of the property in conformance with statutory purposes had to be proven.

The statutory history and effect of real property tax exemptions as it existed at the time of the 1938 Constitutional Convention is contained in chapter X of volume X of the New York State Constitutional Conventional Committee Reports. By design, however, "advocacy of any particular proposal was avoided" in that report.⁸⁹ The Report of the Committee on Taxation of the Constitutional Convention, which was reported to the Convention, in relevant part, provided:

Exemptions from taxation may be granted only by general laws. Exemptions may be altered or repealed except those exempting real or personal property used exclusively for religious, educational or charitable purposes and owned by any corporation or association organized or conducted exclusively for one or more of such purposes and not operating for profit. The Legislature may, however, prescribe limitations upon the extension of such exemptions in the various counties in relation to the taxable property therein.⁹⁰

The Committee's rationale for the proposed language was:

[T]hat the legislative power with respect to exemptions from taxation should be circumscribed in order to avoid the resultant increased burden upon taxable property. Therefore, it (*i.e.*, the Committee) deemed it wise to provide for the granting of exemptions by general laws which may be altered or repealed except as to property used exclusively for religious, educational or charitable purposes and owned by organizations conducted exclusively for one or more of such purposes and not operating for profit. Those corporations are discharging social obligations which the State would otherwise have to assume and are reasonably entitled to constitutional protection in the exemptions granted to them with respect to that property essential to the operation and maintenance of their work. With respect to the extension of such exemptions in the various counties, the legislature may prescribe limitations in relation to the taxable property therein.⁹¹

88. *In re Estate of De Peyster*, 210 N.Y. 216, 104 N.E. 714 (1914); *Board of Educ. v. Baker*, 241 A.D. 574, 272 N.Y.S. 801 (4th Dep't 1934), *aff'd*, 266 N.Y. 636, 195 N.E. 359 (1935). The effect of a corporation's by-laws upon its tax-exempt status was examined in *Corp. of Yaddo v. Saratoga Springs*, 216 A.D. 1, 214 N.Y.S. 523 (3d Dep't 1926).

89. 10 NEW YORK STATE CONSTITUTIONAL CONVENTION, PROBLEMS RELATING TO TAXATION AND FINANCE v (1938).

90. 1938 NEW YORK STATE CONSTITUTIONAL CONVENTION DOC. II, REPORT OF THE COMMITTEE ON TAXATION 1-2.

91. *Id.* at 2.

The last sentence in the quoted section was explained by Committee Chairman Saxe during the Convention debates. He said:

Now, let me say with respect to that, that if these exemptions grow to such an extent that they are going to result in an undue burden upon the taxable property, the legislature is empowered to work out a limitation so that the taxable property will not suffer by reason of the extension of these exemptions in the future.⁹²

Debate on this sentence continued, with Chairman Saxe indicating that his committee was concerned with the possibility of exemptions in any particular county in the future becoming an undue burden of other taxable property.⁹³ Other delegates were concerned that the provisions could result in particular organizations being singled out for taxation.⁹⁴ Finally, it was determined that an agreement would be sought before the proposal was offered on third reading.⁹⁵ Subsequently, the sentence empowering the legislature to prescribe limitations on exemptions was stricken, unfortunately with no discussion on that decision in the record.⁹⁶ The provision concerning tax exemptions was included in section one of article XVI of the Constitution of 1938, which was adopted by the people on November 8, 1938, and has not since been amended.

IV. The Tax Law and the Real Property Tax Law: To Give Full Effect to the Policy (1945-1980)

On January 1, 1939, the new state constitution took effect, and a portion of the new article XVI, entitled "Taxation," provided as follows:

Exemptions from taxation may be granted only by general laws. Exemptions may be altered or repealed except those exempting real or personal property used exclusively for religious, educational or charitable purposes as defined by law and owned by any corporation or association organized or conducted exclusively for one or more of such purposes and not operating for profit.⁹⁷

92. 1938 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK vol. II, 110-11 [hereinafter cited as REVISED RECORD].

93. *Id.* at 1121.

94. *Id.* at 1123-24.

95. *Id.* at 1125.

96. *Id.* at vol. III, 2444.

97. N.Y. CONST. art. XVI, § 1.

Whether by coincidence or due to an accumulation of circumstances, there now occurs a brief hiatus in the judicial law interpreting the nonprofit exemption. At this point the statutory law had remained relatively unchanged since its enactment in 1896,⁹⁸ and the judicial decisions interpreting that statute were grounded primarily in the traditional rule of strict construction.

There had been some early need to review the scope of the exemption in light of the new language of 1896, particularly with regard to schools, and as has been described, decisions such as *Mount Pleasant*⁹⁹ and *Syracuse University*¹⁰⁰ had shown that the new statute contemplated a broader scope than that of 1828. However, with the exception of a line of decisions which began to develop in the 1930's,¹⁰¹ the courts had established a definite and consistent three-step test in reviewing applications for exemption by nonprofit organizations. And for each of these tests, the courts had consistently applied a standard of strict construction: the exclusive organization requirement was governed by the act, charter or by-laws of the organization;¹⁰² non-exempt uses of the property would either result in denial of the exemption¹⁰³ or in taxation of a separately assessed portion of the property;¹⁰⁴ and the organization

98. 1896 N.Y. Laws ch. 908.

99. *People ex rel. Board of Trustees of Mt. Pleasant Academy v. Mezger*, 98 A.D. 237, 90 N.Y.S. 488 (2d Dep't 1904), *aff'd*, 181 N.Y. 511, 73 N.E. 1130 (1905).

100. *In re Syracuse University*, 214 A.D. 375, 212 N.Y.S. 253 (4th Dep't 1925).

101. *YWCA v. City of New York*, 137 Misc. 321, 243 N.Y.S. 294 (Sup.Ct., 1928), *aff'd*, 227 A.D. 742, 236 N.Y.S. 926 (2nd Dept. 1929), *aff'd*, 254 N.Y. 558, 173 N.E. 865 (1930); *People ex rel. Corp. of Yaddo v. Freeman*, 259 N.Y. 620, 182 N.E. 207 (1932); *St. Barbara's Roman Catholic Church v. City of New York*, 243 A.D. 371, 277 N.Y.S. 538 (2d Dep't 1935); *People ex rel. Christodora House v. Miller*, 254 A.D. 670, 4 N.Y.S.2d 993 (1st Dep't 1938), *aff'd*, 278 N.Y. 652, 16 N.E.2d 303 (1938); *People ex rel. Trustees of Masonic Hall and Asylum Fund v. Miller*, 279 N.Y. 137, 18 N.E.2d 8 (1938); *People ex rel. Buffalo Turn Verein v. Assessors, City of Buffalo*, 256 A.D. 772, 12 N.Y.S.2d 170 (4th Dep't 1939).

102. *In re De Peyster's Estate*, 210 N.Y. 216, 104 N.E. 714 (1914); *Board of Educ. v. Baker*, 241 A.D. 574, 272 N.Y.S. 801 (4th Dep't 1934), *aff'd*, 266 N.Y. 636, 195 N.E. 359 (1935); *People ex rel. Corp. of Yaddo v. Freeman*, 259 N.Y. 620, 182 N.E. 207 (1932).

103. *People ex rel. Mizpah Lodge v. Burke*, 228 N.Y. 245, 126 N.E. 703 (1920); *People ex rel. N.Y. Lodge No. 1 v. Purdy*, 179 A.D. 805, 167 N.Y.S. 285 (1st Dep't 1917), *aff'd*, 224 N.Y. 710, 121 N.E. 885 (1918); *People ex rel. Delta Kappa Epsilon Soc'y v. Lawler*, 74 A.D. 553, 77 N.Y.S. 840 (4th Dep't 1902), *aff'd*, 179 N.Y. 535, 71 N.E. 1136 (1904); *People ex rel. Young Men's Ass'n v. Sayles*, 32 A.D. 197, 53 N.Y.S. 67 (3d Dep't), *aff'd*, 157 N.Y. 677, 51 N.E. 1093 (1898).

104. *In re Board of Foreign Missions v. Board of Assessors*, 244 N.Y. 42, 154 N.E. 816 (1926); *People ex rel. Society of the Free Church of St. Mary the Virgin v. Feitner*, 168 N.Y.

was not permitted to operate at a profit.¹⁰⁵

The brief hiatus in decisional law is basically the years 1940 through 1944. The forces and factors which had begun with the Great Depression¹⁰⁶ included the adoption of the new state constitution,¹⁰⁷ the Second World War, the nation's exposure to modern totalitarianism,¹⁰⁸ and the immediate aftereffects of the end of the war, including overwhelming needs and demands for housing, medical care and education. As one examines the judicial interpretations of the nonprofit exemption statute beginning in 1945, it seems apparent that one of the essential factors which must be considered is that the courts were faced with the duty of applying a fifty-year old statute to rapidly changing social conditions and circumstances. It is striking, particularly in the first several years subsequent to 1944, to observe the broadening of the scope of the exemption in reliance upon decisional law which in many cases either had held property to be subject to taxation in whole or in part, or had found circumstances so special as to necessitate exemptions which might be described as *sui generis*.¹⁰⁹ Indeed, in one of the decisions often cited subsequent to 1944, the court had

494, 61 N.E. 762 (1901); *YWCA v. City of New York*, 220 A.D. 49, 220 N.Y.S. 365 (1st Dep't 1927), *aff'd*, 247 N.Y. 591, 161 N.E. 194 (1928); *YWCA v. City of New York*, 217 A.D. 406, 216 N.Y.S. 248 (1st Dep't 1926), *aff'd*, 245 N.Y. 562, 157 N.E. 858 (1927); *People ex rel. Adelphi College v. Wells*, 97 A.D. 312, 89 N.Y.S. 957 (2d Dep't 1904), *aff'd*, 180 N.Y. 534, 72 N.E. 1147 (1905).

105. *Lawrence-Smith School, Inc. v. City of New York*, 166 Misc. 856, 2 N.Y.S.2d 752 (Sup. Ct.), *aff'd*, 255 A.D. 762, 7 N.Y.S.2d 486 (1st Dep't 1938), *aff'd*, 280 N.Y. 805, 21 N.E.2d 693 (1939). *See also* note 87 *supra* and accompanying text.

106. *Buffalo Turn Verein v. Reuling*, 155 Misc. 797, 798, 281 N.Y.S. 545, 546 (Sup. Ct. 1935).

107. Pursuant to 1936 N.Y. Laws, ch. 598, the question of whether to hold a constitutional convention was submitted to the voters on November 3, 1936. The question was answered in the affirmative. Pursuant to 1938 N.Y. Laws, ch. 376, the convention met in Albany, beginning on April 5, 1938. The proposed constitution was divided into nine amendments and submitted to the voters on November 8, 1938. Six amendments were approved, and three amendments were disapproved.

108. This issue was discussed frequently during the 1938 Constitutional Convention heretofore discussed. *See REVISED RECORD*, *supra* note 92, at vol. I, 272, 477 and vol. II, 1140.

109. *See, e.g., People ex rel. Trustees of the Masonic Hall and Asylum Fund v. Miller*, 279 N.Y. 137, 18 N.E.2d 8 (1938); *People ex rel. Christodora House v. Miller*, 254 A.D. 670, 4 N.Y.S.2d 993 (1st Dep't) *aff'd*, 278 N.Y. 652, 16 N.E.2d 303 (1938); *Webster Apts. v. City of New York*, 118 Misc. 91, 193 N.Y.S. 650 (Sup. Ct. 1922), *aff'd*, 206 A.D. 749, 200 N.Y.S. 956 (1st Dep't 1923).

lamented the state of the law and stated that "relief from this situation can only be obtained from the Legislature."¹¹⁰

A second essential factor which must be considered throughout this review is that at the same time as the nonprofit organizations were expanding their holdings and activities in order to respond to the needs which they perceived in the post-war era, the municipal governments of the state were doing the same. The necessary result of this parallel expansion of services in the context of municipal finance was that the exempt organizations were seeking to secure and increase their exempt holdings while the municipal governments were seeking to preserve and expand their tax bases. This is a competition and conflict which has continued through to the present day.¹¹¹

Lower court decisions in the late 1940's adhering to the basic rules of strict construction were not uncommon. Precedents existed which affirmed the action of assessors in returning previously exempt property to the rolls¹¹² and which denied the petitions of expanding nonprofit organizations seeking exemption for new types of property holdings.¹¹³ Typical of this type of decision is that in which a lower court stated that although it had not been referred to any authorities which were controlling, "there are certain principles of law applicable on all issues of exemption from taxation

110. *People ex rel. Outer Court, Inc., of the Order of the Living Christ v. Miller*, 161 Misc. 603, 610, 291 N.Y.S. 678, 682 (1938).

Tax exemption or such method of compensation for services rendered has, however, tended to become a free-for-all contest on the part of State legislators, with the result that municipalities are now forced to forego taxes on lands and buildings to the extent of millions of dollars, without an adequate corresponding return to the community in a great many instances. Today section 4 of the Tax Law (especially subdivision 6) in many respects imposes a hardship not only on the State but also on the average taxpayer. The fault, if any, lies with the Legislature, and not with the courts, which are compelled to follow the verbiage of subdivision 6. Relief from this situation can only be obtained from the Legislature.

Id. at 610, 292 N.Y.S. at 681-82.

111. *St. Joseph's Health Center Properties, v. Srogi*, 51 N.Y.2d 127, 412 N.E.2d 921, 432 N.Y.S.2d 865 (1980) (Cooke, C.J., dissenting).

112. *New York Catholic Protectory v. City of New York*, 175 Misc. 472, 22 N.Y.S.2d 739, (Sup.Ct. 1940).

113. See *People ex rel. Watchtower Soc'y v. Haring*, 8 N.Y.2d 350, 170 N.E.2d 677, 207 N.Y.S.2d 673 (1960); *In re New York Conference Ass'n of Seventh-Day Adventists*, 80 N.Y.S.2d 8 (Sup. Ct. 1948), *rev'd*, 275 A.D. 742, 87 N.Y.S.2d 708 (4th Dep't 1949); *People ex rel. Cornell Univ. v. Thorne*, 184 Misc. 630, 57 N.Y.S.2d 6 (Sup. Ct. 1945).

. . ." and that the principle with application in this case is that "tax exemptions, however, are limitations of sovereignty and are strictly construed. . . . If ambiguity or uncertainty occurs, all doubt must be resolved against the exemption."¹¹⁴

There also continued to be isolated examples of the successful petitioning for exemption by nonprofit organizations in what amounted to *sui generis* situations,¹¹⁵ such as the granting of an exemption to a church which had originally been denied exemption by the City of New York on the grounds that it had been incorporated outside of the State of New York.¹¹⁶ Perhaps the major decision of this nature is that of *People ex rel. Doctors Hospital v. Sexton*,¹¹⁷ in which the City of New York unsuccessfully sought to tax a hospital which had petitioned for exemption, despite the fact that it had originally been organized as a profitmaking enterprise. Faced with this potential loss of tax base and without the benefit of any precise definition of the term "hospital," the city contended that eligibility for this exemption required an element of charity in the operation of the hospital.

In commenting on the city's contention, the appellate division stated that

[t]he public policy of the State requiring tax exemption to be determined by law (Tax Law, §3) would then be meaningless. No such power was given to respondents by the Legislature and indeed article XVI, section 1 (adopted in 1938) of the Constitution of the State of New York, is an express mandate against any rule of discretion or rule of reason that has been here suggested.¹¹⁸

This decision was affirmed by the court of appeals without opinion, and in the years since it has often been cited as authority in decisions which deny, modify or reverse strict administrative interpretation of the nonprofit exemption by local assessors.

The nature and extent of the requirement that charity be part of

114. *People ex rel. Cornell Univ. v. Thorne*, 184 Misc. at 632, 57 N.Y.S.2d at 8 (quoting *People v. Brooklyn Garden Apts., Inc.*, 283 N.Y. 373, 380, 28 N.E.2d 877, 879 (1940)).

115. *In re Ladycliff College*, 266 A.D. 753, 41 N.Y.S.2d 149 (2d Dep't 1943), *aff'd*, 293 N.Y. 712, 56 N.E.2d 729 (1944).

116. *Williams Inst. Colored Methodist Episcopal Church v. City of New York*, 275 A.D. 311, 89 N.Y.S.2d 300 (1st Dep't 1949), *aff'd*, 300 N.Y. 716, 92 N.E.2d 58 (1950).

117. 267 A.D. 736, 48 N.Y.S.2d 201 (1st Dep't 1944), *aff'd*, 295 N.Y. 553, 64 N.E.2d 273 (1945).

118. *Id.* at 743, 48 N.Y.S.2d at 207.

the exempt organization's purposes and activities was again addressed by the courts in the following year in the case *People ex rel. Untermyer v. McGregor*.¹¹⁹ Involving the apparently very unusual situation of the application of the *cy pres* doctrine by the surrogate court to maintain and preserve a piece of property as a public playground or park, this decision has become the principal basis for petitions seeking exemption of land which is said to benefit the general public because of its unimproved and natural state. A review of the opinion of the court of appeals, however, shows that in the absence of both statutory definition and decisional law relating to this type of property, the court created law by finding the land to be

an embellishment or adjunct to the successful maintenance and development of the whole project as a place of healthy and cultural enjoyment. . . . [w]hen we take into consideration the exclusive public use to which the executors and trustees, during their interim ownership, and the trustees of the corporation have devoted the property, it seems clear and indisputable that it is exempt from taxation. . . .¹²⁰

The influx of new students and the establishment of new households resulting from the return of the members of the armed forces were undoubtedly social changes of immense proportions during this era. The difficulties which these circumstances created and their effect upon the competition between the exempt organizations and the municipal governments, is perhaps first described in the decision entitled *People ex rel. Thomas G. Clarkson Memorial College of Technology v. Haggett*.¹²¹ The lower court opinion provides the following summary of the facts:

Essentially we here have for determination the question whether dwellings or apartments owned and maintained by a college but assigned to its teachers or administrators as private dwellings at a stated periodic rental, but without requirement that the same be open for public or semi-public educational or administrative activities, constitutes such a part of the articulated educational system of the college as to permit their exemption from taxation. . . .

119. 295 N.Y. 237, 66 N.E.2d 292 (1946).

120. *Id.* at 244, 66 N.E.2d at 295. *But see People ex rel. Blackburn v. Barton*, 63 A.D. 581, 584, 71 N.Y.S. 933, 936 (4th Dep't 1901), wherein it was stated "The remainder is not used at all . . . and it clearly does not come within the exemption. . . ."

121. 191 Misc. 621, 77 N.Y.S.2d 182 (Sup. Ct. 1948), *aff'd*, 274 A.D. 732, 87 N.Y.S.2d 491 (3d Dep't), *aff'd*, 300 N.Y. 595, 89 N.E.2d 882 (1949).

It does not appear that we in this State have passed upon this precise issue, divorced from other considerations.¹²²

The court noted that "[a]s has been the common experience of educational institutions, its faculty, staff and student body have multiplied several times since the end of the war. To meet the demand for additional accommodations it has purchased and used several former residential properties in Potsdam and has also opened a branch at Malone in Franklin County."¹²³

Having reviewed the decisional law of New York and several other states and having suggested that the experience of Clarkson College would surely be repeated by other colleges throughout the state, the court commented that "the rule should be fixed with certainty both for the guidance of the taxing authorities and of the institutions involved."¹²⁴ However, with the necessity to decide the case within the circumstances which had been presented to it, the court found that

A college with students but no faculty is much more of an anomaly than one with a faculty but no students. In our conception of the term, a faculty and a student body, for all practical considerations, are necessarily coexistent if there is to be a college.

So viewing the matter, I hold that, as real properties used for the corporate purposes of the relator, within the proper exercise of discretion of its trustees and within the purview of the statute, the . . . properties are exempt from taxation. . . .¹²⁵

Upon appeal, the appellate division was evidently concerned with the expansive nature of the holding of the lower court.

We do not agree that our statutory prescription whereby the real estate of an educational corporation is made exempt from taxation is the recognition of any fundamental right. . . . While that history gives some basis for relaxing the general rule of strict construction, still, in essence, all such exemptions are in arrest of the sovereign power of the State.¹²⁶

Nevertheless, the appellate division affirmed the lower court finding, and, in turn, the decision was affirmed by the court of appeals

122. *Id.* at 624-25, 77 N.Y.S.2d at 186.

123. *Id.* at 622, 77 N.Y.S.2d at 184.

124. *Id.* at 626, 77 N.Y.S.2d at 187.

125. *Id.* at 627-28, 77 N.Y.S.2d at 188-89.

126. 274 A.D. at 735, 87 N.Y.S.2d at 493.

without opinion. The resulting extension of the benefit of the statute to properties which were devoted to private residential purposes, even to the extent of family units, can be seen as the equivalent of the *Untermeyer* decision in terms of its subsequent effect on the scope of the exemption.

Several years after its affirmance without opinion of the *Clarkson* case, the court of appeals confirmed its holding in a non-property tax exemption case by stating that in the *Clarkson* case "this court has held . . . that college-owned buildings rented by the college to faculty members are exempt from realty taxation as being 'used exclusively for carrying out' one of the purposes of the owning corporation."¹²⁷ And again in 1957, the court had occasion to state that

It is however generally known, which in these times may be judicially noticed, that hospitals customarily provide living accommodations for at least some of their personnel. Here, there was, in fact, testimony that some of the nurses and technicians would not have taken employment in this hospital or would not have continued their employment if living quarters had not been so provided. . . . Whether the persons using the dwellings in the manner shown constitute a *family unit* need not detain us, since it clearly appears that the dwellings are being used as an accessory to the hospital.¹²⁸

Although municipal governments attempted to restrict the effect of the *Clarkson* holding by suggesting that the result depended upon the existence of an extraordinary housing shortage brought on by the influx of war veterans to a school, they were not successful, and the precedent became established.¹²⁹ The issue of the taxable status of housing accommodations owned by an otherwise exempt nonprofit organization was essentially laid to rest in 1962 with the decision of the court of appeals in *St. Luke's Hospital v. Boyland*.¹³⁰ At the outset the court distinguished between the terms "hospital" and "free public hospital" in the statute¹³¹ and concluded that because *St. Luke's* was not a free public hospital it

127. *New York Univ. v. Temporary State Rent Comm'n*, 304 N.Y. 124, 127-28, 106 N.E.2d 44, 46 (1952) (citation omitted).

128. *De Mott v. Notey*, 3 N.Y.2d 116, 119, 143 N.E.2d 804, 806, 164 N.Y.S.2d 398, 400 (1957) (emphasis in original).

129. *See Pratt Inst. v. Boyland*, 16 Misc. 2d 58, 174 N.Y.S.2d 112 (Sup. Ct. 1958), *aff'd*, 8 A.D.2d 625, 185 N.Y.S.2d 753 (2d Dep't 1959).

130. 12 N.Y.2d 135, 187 N.E.2d 769, 237 N.Y.S.2d 308 (1962).

131. *Id.* at 143, 187 N.E.2d at 772, 237 N.Y.S.2d at 312.

was not entitled to a total exemption of the property. However, citing the housing shortage cases,¹³² and building upon the developing principle that "a use which 'is reasonably incident' to the major purpose" of the exempt organization was acceptable,¹³³ the court held that "it is clear" that apartments occupied by hospital personnel and their families are exempt.¹³⁴

Since *St. Luke's*, otherwise exempt organizations are clearly permitted to operate and furnish housing to their personnel and members, virtually without restriction in the terms of location and use.¹³⁵ This expansion of the scope of the nonprofit exemption, plainly engrafted on the statute by judicial interpretation, has never been directly addressed by the state legislature. And although acquiescence may be construed as acceptance on the part of the legislature, the effect of the legislative silence on this subject has more recently been manifested in a further probing of the limits of the exemption as it relates to housing and the exclusively organized requirement of the statute. This problem will be taken up in a later portion of this study.¹³⁶

Although perhaps somewhat less clear than the results of *Clarkson* in relation to housing properties, the precedent of *Untermeyer* can be seen to have had a significant effect upon the difficult question of the taxable status of unimproved properties. In a lower court case decided within the decade following *Untermeyer*, the court held that land acquired "to protect the far flung view from

132. *De Mott v. Notey*, 3 N.Y.2d 116, 143 N.E.2d 804, 164 N.Y.S.2d 398 (1957); *New York Univ. v. Temporary State Rent Comm'n*, 304 N.Y. 124, 106 N.E.2d 44 (1952); *People ex rel. Thomas G. Clarkson Memorial College of Technology* 191 Misc. 621, 77 N.Y.S.2d 182 (Sup. Ct. 1948), *aff'd*, 274 A.D. 732, 87 N.Y.S.2d 491 (3d Dep't), *aff'd*, 300 N.Y. 595, 89 N.E.2d 882 (1949).

133. *St. Luke's Hosp. v. Boyland*, 12 N.Y.2d at 143, 187 N.E.2d at 772, 237 N.Y.S.2d at 312, (quoting *People ex rel. Watchtower Soc'y v. Haring*, 8 N.Y.2d 350, 358, 170 N.E.2d 677, 681, 207 N.Y.S.2d 673, 678 (1960)).

134. *Id.*

135. *See University of Rochester v. Wagner*, 63 A.D.2d 341, 408 N.Y.S.2d 157 (4th Dep't 1978), *aff'd*, 47 N.Y.2d 833, 392 N.E.2d 569, 418 N.Y.S.2d 583 (1979); *In re Faculty-Student Ass'n v. Sharkey*, 35 A.D.2d 161, 316 N.Y.S.2d 698 (4th Dep't 1970), *aff'd*, 29 N.Y.2d 621, 273 N.E.2d 139, 324 N.Y.S.2d 411 (1971); *In re Syracuse Univ.*, 59 Misc. 2d 684, 300 N.Y.S.2d 129 (Sup. Ct. 1969).

136. *See St. Joseph's Health Center Properties, Inc. v. Srogi*, 51 N.Y.2d 127, 412 N.E.2d 921, 432 N.Y.S.2d 865 (1980); *In re Marino P. Jeantet Residence For Seniors, Inc. v. Commissioner of Fin.*, 105 Misc. 2d 1080, 430 N.Y.S.2d 545 (Sup. Ct. 1980); *Belle Harbor Home of the Sages v. Tishelman*, 100 Misc. 2d 911, 420 N.Y.S.2d 343 (Sup. Ct. 1979).

the Hall of Fame" of New York University was entitled to the exemption from taxation.¹³⁷ Relying in part on *Untermeyer*, the court stated simply that "the trustees of the university had the obligation of protecting the view."¹³⁸ In ensuing years *Untermeyer* has been cited as authority for exempting unimproved land which is used in association with activities found by the courts to be religious,¹³⁹ educational¹⁴⁰ and for the moral and mental improvement of men, women and children.¹⁴¹ There has been increasing recognition that the undefined extent to which unimproved land is exempt creates insoluble problems for both tax administrators and the courts.¹⁴² However, legislative silence has continued, and the courts have been required to continue to pass upon exemption petitions which are seeking increasingly expansive interpretations of the statute in relation to vacant land. The most recent manifestations of this process are the holdings in separate cases in which both an appellate division and a trial court granted petitions for exemption for unimproved land used as a buffer to protect otherwise exempt property.¹⁴³

Having identified *Doctors Hospital*, *Untermeyer* and *Clarkson College* as seminal cases in the modern interpretation of the non-profit exemption statute, it is appropriate to add to that group a fourth case, *Pace College v. Boyland*.¹⁴⁴ Here again, the court was

137. *In re Major Deegan Blvd.*, 131 N.Y.S.2d 330, 331 (Sup. Ct. 1954).

138. *Id.* at 332.

139. See *Greater N.Y. Corp. of Seventh-Day Adventists v. Town of Dover*, 29 A.D.2d 861, 288 N.Y.S.2d 334 (2d Dep't), *appeal dismissed*, 23 N.Y.2d 682, 243 N.E.2d 150, 295 N.Y.S.2d 932 (1968). See also *Gospels Volunteers, Inc. v. Village of Speculator*, 33 A.D.2d 407, 308 N.Y.S.2d 785 (3d Dep't 1970), *aff'd*, 29 N.Y.2d 622, 273 N.E.2d 139, 324 N.Y.S.2d 412 (1971).

140. *Chautauqua Inst. v. Town of Chautauqua*, 35 A.D.2d 1, 312 N.Y.S.2d 364 (4th Dep't), *appeal denied*, 27 N.Y.2d 485, 315 N.Y.S.2d 1025 (1970). See *Mohonk Trust v. Board of Assessors*, 47 N.Y.2d 476, 392 N.E.2d 876, 418 N.Y.S.2d 763 (1979).

141. *Nassau County Council Boy Scouts of America v. Assessors, Town of Rockland*, No. 1271-79 (Sup. Ct. Mar. 10, 1980).

142. THE REAL PROPERTY TAX, *supra* note 26, at 120-28. See also *Nassau County Council Boy Scouts of America v. Assessors, Town of Rockland*, slip op. at 6-9 (Sup. Ct. 1980) "The problem continues to intensify and there does not appear to be an answer on the horizon. The sole corrective step taken by the Legislature was their recognition of the existence of the problem." *Id.* at 14.

143. See *Nassau County Council, Boy Scouts of America v. Assessors, Town of Rockland*, slip op. at 11-12; *Order Minor Conventuals v. Lee*, 64 A.D.2d 227, 409 N.Y.S.2d 667 (3d Dep't 1978).

144. 4 N.Y.2d 528, 151 N.E.2d 900, 176 N.Y.S.2d 356 (1958).

confronted with the situation of a rapidly expanding nonprofit organization (in this case the college had converted an entire 16-story office building to use for its purposes) and its confrontation with the municipal taxing authorities. The college had converted a portion of the office building into a cafeteria, which in turn was leased to private business concerns for operation for school purposes. Under the terms of an interim agreement with the college, the lessee-operator was permitted to make a profit, although there apparently was authority to renegotiate the agreement if the college came to consider the lessee to be making an undue profit. The New York City Tax Commission revoked *part* of the previous total exemption of the building, and the college petitioned the court for a reinstatement of that total exemption.

In holding that "[t]his cafeteria is part of the operation of Pace College,"¹⁴⁵ the court of appeals seemingly disregarded well established law relating to partial taxation¹⁴⁶ and created a new precedent which subsequently has been melded into the incidental use doctrine. In a vigorous dissent to this holding, two of the judges stated that the result was directly contrary to the *Sayles* case¹⁴⁷ and at variance with the plain language of the statute.¹⁴⁸ In suggesting that "[o]nly the legislature may do this,"¹⁴⁹ the dissent cites the 1948 amendment of the Tax Law as an example of legislative response to judicial decisions which had maintained the prevailing interpretation of the statute despite changed circumstances which seemingly militated in favor of a different result.¹⁵⁰

Two years later, in *People ex rel. Watchtower Bible and Tract Society, Inc. v. Haring*,¹⁵¹ the court of appeals was faced with the

145. *Id.* at 532, 151 N.E.2d at 902, 176 N.Y.S.2d at 358.

146. *See, e.g.*, *Board of Foreign Missions v. Board of Assessors*, 244 N.Y. 42, 154 N.E. 816 (1926); *People ex rel. Society of the Church of St. Mary the Virgin v. Feitner*, 168 N.Y. 494, 61 N.E. 762 (1901); *YWCA v. City of New York*, 220 A.D. 49, 220 N.Y.S. 365 (1st Dep't 1927), *aff'd*, 247 N.Y. 591, 161 N.E. 194 (1928); *YWCA v. City of New York*, 217 A.D. 406, 216 N.Y.S. 248 (1st Dep't 1926); *People ex rel. Adelphi College v. Wells*, 97 A.D. 312, 89 N.Y.S. 957 (2d Dep't 1904), *aff'd*, 180 N.Y. 534, 72 N.E. 1147 (1905); *People ex rel. Blackburn v. Barton*, 63 A.D. 581, 71 N.Y.S. 933 (4th Dep't 1901).

147. *People ex rel. Young Men's Ass'n v. Sayles*, 32 A.D. 197, 53 N.Y.S. 67 (3d Dep't), *aff'd*, 157 N.Y. 677, 51 N.E. 1093 (1898).

148. *Pace College v. Boyland*, 4 N.Y.2d at 535, 151 N.E.2d at 903, 176 N.Y.S.2d at 361.

149. *Id.* at 536, 151 N.E.2d at 904, 176 N.Y.S.2d at 361.

150. *Id.* at 535, 151 N.E.2d at 903, 176 N.Y.S.2d at 361.

151. 8 N.Y.2d 350, 170 N.E.2d 677, 207 N.Y.S.2d 673 (1960). Here, the court construed

complex situation of a religious sect (that is, Jehovah's Witnesses) owning and operating a large farm, which they contended to be wholly and exclusively for the religious purposes of the organization. Over the course of a five-year period, the lower courts had consistently rejected the organization's petitions for exemption on the grounds that the large-scale operation of a farm was simply not an exclusive use of property for an exempt purpose,¹⁵² and that the farm was neither operated for educational or religious purposes nor as "a necessary adjunct for the religious functions of the petitioner or for carrying out the purposes of its incorporation."¹⁵³ In referring to the nonprofit exemption as "a public policy statute,"¹⁵⁴ the court concluded that "historically and in reason, the only test is whether the farm operation is reasonably incident to the major purpose of its owner. There can be no doubt about that here."¹⁵⁵

Although the result reached in *Watchtower* was undoubtedly due in part to the association with religion, a factor which will be discussed in more detail below,¹⁵⁶ the holding also can be seen as yet another judicial expansion of the law based upon the incidental use doctrine. And just as with the seminal cases of *Doctors Hospital*, *Untermeyer*, *Clarkson* and *Pace*, this case and its principle of incidental use have been repeatedly cited in subsequent years as authority for exemption in numerous uses of property including housing,¹⁵⁷ recreation,¹⁵⁸ religious camps,¹⁵⁹ conference cen-

the exemption now contained in N.Y. REAL PROP. TAX LAW § 420 (McKinney 1972 & Supp. 1980), following the recodification of that law, 1958 N.Y. Laws ch. 959. No substantive change was intended, N.Y. REAL PROP. TAX LAW § 2002(6) (McKinney Supp. 1980).

152. *People ex rel. Watchtower Bible & Tract Soc'y, Inc. v. Mastin*, 191 Misc. 899, 80 N.Y.S.2d 323 (Sup. Ct. 1948).

153. *People ex rel. Watchtower Bible & Tract Soc'y, Inc. v. Haring*, 8 N.Y.2d at 355, 170 N.E.2d at 678, 207 N.Y.S.2d at 675.

154. *Id.* at 357, 170 N.E.2d at 680, 207 N.Y.S.2d at 677.

155. *Id.* at 358, 170 N.E.2d at 680-81, 207 N.Y.S.2d at 678.

156. See notes 166-79 *infra* and accompanying text.

157. *University of Rochester v. Wagner*, 63 A.D.2d 341, 408 N.Y.S.2d 157 (4th Dep't 1978), *aff'd*, 47 N.Y.2d 833, 392 N.E.2d 569, 418 N.Y.S.2d 583 (1979). See *St. Luke's Hosp. v. Boyland*, 12 N.Y.2d 135, 187 N.E.2d 769, 237 N.Y.S.2d 308 (1962).

158. *Chautauqua Inst. v. Town of Chautauqua*, 35 A.D.2d 1, 312 N.Y.S.2d 364 (4th Dep't 1970); *Faculty-Student Ass'n of Harpur College, Inc. v. Dawson*, 57 Misc. 2d 112, 292 N.Y.S.2d 216 (Sup. Ct. 1967).

159. *Gospel Volunteers, Inc. v. Village of Speculator*, 33 A.D.2d 407, 308 N.Y.S.2d 785 (3d Dep't 1970), *aff'd*, 29 N.Y.2d 622, 273 N.E. 2d 139, 324 N.Y.S.2d 412 (1971).

ters,¹⁶⁰ education,¹⁶¹ buffer zones¹⁶² and boy scout camps.¹⁶³

By 1960, the results of fifteen years of litigation interpreting the nonprofit exemption statute in light of the radically different social and economic circumstances of the post-war era had produced a core group of six decisions (*Doctors Hospital, Untermyer, Clarkson College, Pace College, Watchtower* and *St. Luke's*) which had virtually superseded the decisional law of the pre-war era. And although there continued to be decisional law reiterating the doctrine of strict construction, these interpretations invariably concerned situations which were virtually *sui generis*.¹⁶⁴ The juxtaposition to the pre-war era is striking.¹⁶⁵

The sensitivity of governmental action involving religion in this country can of course be traced back to the first amendment to the United States Constitution. Undoubtedly, the experience of the holocaust and the modern totalitarianism adopted as a form of government by major nations of the world during the twentieth century served only to heighten the sensitivity of this issue. One needs only to review the decisions of the New York State Court of Appeals and the United States Supreme Court in *Walz v. Tax Commission*¹⁶⁶ to appreciate the difficulty associated with this issue as it arises in the context of municipal taxation.

One of the earliest post-war exemption cases in which the courts

160. *Trustees of Columbia Univ. v. Taylor*, 76 Misc. 2d 717, 351 N.Y.S.2d 928 (Sup. Ct. 1974).

161. *Rudolph Steiner Educ. and Farming Ass'n, Inc. v. Brennan*, 65 A.D.2d 868, 410 N.Y.S.2d 404 (3d Dep't 1978); *Rabbi Solomon Kluger School, Inc. v. Town of Liberty*, 76 Misc. 2d 691, 351 N.Y.S.2d 563 (Sup. Ct. 1974).

162. *Order Minor Conventuals v. Lee*, 64 A.D.2d 227, 409 N.Y.S.2d 667 (3d Dep't 1978).

163. *Nassau County Council Boy Scouts of America v. Assessors, Town of Rockland*, No. 1271-79 (Sup. Ct. Mar. 10, 1980).

164. *YMCA v. Rochester Pure Waters Dist.*, 37 N.Y.2d 371, 334 N.E.2d 586, 372 N.Y.S.2d 633 (1975); *City of Lackawanna v. State Bd. of Equal. and Assessment*, 16 N.Y.2d 222, 212 N.E.2d 42, 264 N.Y.S.2d 528 (1965); *BOCES v. Buckley*, 15 N.Y.2d 971, 207 N.E.2d 528, 259 N.Y.S.2d 858 (1965); *Semple v. School for Girls v. Boyland*, 308 N.Y. 382, 126 N.E.2d 294 (1955); *Plattsburgh College Benevolent and Educ. Ass'n, Inc. v. Board of Assessors*, 43 Misc. 2d 741, 252 N.Y.S.2d 229 (Sup. Ct. 1964); *People ex rel. Provident Loan Soc'y v. Chambers*, 196 Misc. 367, 88 N.Y.S.2d 459 (Sup. Ct. 1949).

165. *People ex rel. Trustees of Masonic Hall and Asylum Fund v. Miller*, 279 N.Y. 147, 18 N.E.2d 8 (1938); *People ex rel. Corp. of Yaddo v. Freeman*, 259 N.Y. 620, 182 N.E. 207 (1932); *People ex rel. Christodora House v. Miller*, 254 A.D. 670, 4 N.Y.S.2d 993 (1st Dep't), *aff'd*, 278 N.Y. 652, 16 N.E.2d 303 (1938); *Webster Apts. v. City of New York*, 118 Misc. 91, 193 N.Y.S. 650 (Sup. Ct. 1922).

166. 24 N.Y.2d 30, 246 N.E.2d 517, 298 N.Y.S.2d 711 (1969), *aff'd*, 397 U.S. 664 (1970).

were asked to define "religious" in terms of a request for an expansion of that definition concerned a four acre island and forty-six acres of adjacent mainland used for eight weeks each summer as a boys' camp. Finding that the owning corporation was incorporated to give instruction in Christian doctrine and maintain camps for physical, moral and spiritual advancement, both the trial court and the appellate division held the property to be exempt as a "religious summer camp".¹⁶⁷ The sole authority cited for this holding was an unreported 1920 special term decision (affirmed by the appellate division without opinion) holding a similar facility for adults to be exempt. That decision, published twenty-eight years later, contained no reference to either specific statutory or judicial authority for its holding.¹⁶⁸ Rather than indicating a lack of scholarship on the part of the courts, this unsupported but expansive interpretation of the term religious may very well have been the result of the courts' judgment or hope that the situations at issue were so isolated and so sensitive that simply granting the petition would best serve society's purposes.

The provisions contained within both the federal and state constitutions, in combination with heightened post-war sensitivity to religious freedom, received surprisingly little direct comment by the courts.¹⁶⁹ In fact, the strongest statement is probably contained in a court of appeals opinion in a zoning case in which the court stated that, "[t]he paramount authority of this State [that is, the State Constitution] has declared a policy that churches and schools are more important than local taxes, and that it is in furtherance of the general welfare to exclude such institutions from taxation."¹⁷⁰

167. *Christian Camps, Inc. v. Village of Speculator*, 275 A.D. 868, 88 N.Y.S.2d 377 (3d Dep't 1949).

168. *Silver Bay Ass'n For Christian Conferences & Training v. Braisted*, 80 N.Y.S.2d 548 (Sup. Ct. 1920), *aff'd*, 196 A.D. 913, 186 N.Y.S. 956 (3d Dep't 1921).

169. *People ex rel. Thomas G. Clarkson Memorial College of Tech. v. Hagggett*, 274 A.D. 732, 87 N.Y.S.2d 491 (3d Dep't 1949); *Trustees of Columbia Univ. v. Taylor*, 76 Misc. 2d 717, 351 N.Y.S.2d 928 (Sup. Ct. 1974); *Rabbi Solomon Kluger School, Inc. v. Town of Liberty*, 76 Misc. 2d 691, 351 N.Y.S.2d 563 (Sup. Ct. 1974); *American Press, Inc. v. Lewisohn*, 74 Misc. 2d 562, 345 N.Y.S.2d 396 (Sup. Ct. 1973), *aff'd*, 48 A.D.2d 798, 372 N.Y.S.2d 194 (1st Dep't 1975); *In re Religious Soc'y of Families*, 73 Misc. 2d 923, 343 N.Y.S.2d 159 (Sup. Ct. 1973), *aff'd*, 75 A.D.2d 1004, 429 N.Y.S.2d 321 (4th Dep't 1980).

170. *Diocese of Rochester v. Planning Bd.*, 1 N.Y.2d 508, 524-25, 136 N.E.2d 827, 836, 154 N.Y.S.2d 849, 861 (1956).

The sensitivity of the court of appeals in the 1960 *Watchtower* case was evident in its statement that well-established decisional law supported a finding that both the owning organization and its use of the property were religious and would "serve as an answer to the argument made or suggested here that the somewhat rudimentary training of these Witnesses and the unorthodox character of their religious beliefs and practices removed them from the beneficent aim and coverage of this statute."¹⁷¹ Similarly, in finding that a former country club converted to a "spiritual retreat" by Seventh Day Adventists was a religious use of real property, the appellate division relied on two pre-war cases¹⁷² and the *Christian Camps* decision.¹⁷³ The court of appeals denied appeal by the town without opinion.¹⁷⁴

Building on the decisions in *Christian Camps*, *Watchtower*, *Walz* and *Seventh Day Adventists*, a series of decisions during the 1970's granted petitions for exemptions for properties owned by churches or affiliated religious organizations and used for summer camps,¹⁷⁵ public restaurants¹⁷⁶ and vacant land used for religious retreats.¹⁷⁷

As with other purposes and terms from the statute, the continuing necessity for judicial interpretations has continued to extend the limits of the existing definition of the term religious. In the few instances in which courts have refused to expand the scope of the definition, the results are seemingly dictated by facts which indi-

171. *People ex rel. Watchtower Bible & Tract Soc'y, Inc. v. Haring*, 8 N.Y.2d 350, 359, 170 N.E.2d 677, 681, 207 N.Y.S.2d 673, 678-79 (1960).

172. *People ex rel. Blackburn v. Barton*, 63 A.D. 581, 71 N.Y.S. 933 (4th Dep't 1901); *People ex rel. Outer Court, Inc., of the Order of the Living Christ v. Miller*, 161 Misc. 603, 292 N.Y.S.2d 674 (Sup. Ct. 1936), *aff'd*, 256 A.D. 814, 10 N.Y.S.2d 208 (1st Dep't), *aff'd*, 280 N.Y. 825, 21 N.E.2d 881 (1939).

173. *Greater N.Y. Corp. of Seventh-Day Adventists v. Town of Dover*, 29 A.D.2d 861, 288 N.Y.S.2d 334 (2d Dep't), *appeal dismissed*, 23 N.Y.2d 682, 243 N.E.2d 150, 295 N.Y.S.2d 932 (1968).

174. 23 N.Y.2d 682, 243 N.E.2d 150, 295 N.Y.S.2d 932 (1968).

175. *Chautauqua Inst. v. Town of Chautauqua*, 35 A.D.2d 1, 312 N.Y.S.2d 364 (4th Dep't 1970); *Gospel Volunteers, Inc. v. Village of Speculator*, 33 A.D.2d 407, 308 N.Y.S.2d 785 (3d Dep't 1970), *aff'd*, 29 N.Y.2d 622, 273 N.E.2d 139, 324 N.Y.S.2d 412 (1971); *Rabbi Solomon Kluger School, Inc. v. Town of Liberty*, 76 Misc. 2d 691, 351 N.Y.S.2d 563 (Sup. Ct. 1974).

176. *Shrine of Our Lady of Martyrs v. Board of Assessors*, 40 A.D.2d 75, 337 N.Y.S.2d 786 (3d Dep't 1972), *aff'd*, 33 N.Y.2d 713, 304 N.E.2d 563, 349 N.Y.S.2d 993 (1973).

177. *Mary Immaculate School v. Wilson*, 73 A.D.2d 969, 424 N.Y.S.2d 251 (2d Dep't 1980).

cate a total inconsistency with any semblance of understood terms of religion¹⁷⁸ or because of circumstances so unusual that the reviewing court is unable to marshal all the facts necessary for a decision and sends the case back for further fact-finding.¹⁷⁹

Given the entire range of modern decisional law relative to what is now section 420 of the Real Property Tax Law, the term "educational" has undoubtedly generated at once the most expansive and the most confusing series of interpretations from the courts. With one exception, the decisions of the modern era adhering to a strict construction of the term "education" have been limited to either isolated situations involving the nonprofit and organization requirements¹⁸⁰ or lower court decisions involving relatively minor property holdings.¹⁸¹ The exception in the case of *Swedenborg Foundation, Inc. v. Lewisohn*,¹⁸² wherein the court of appeals seemed to establish a precise and strict series of criteria by which administrators and future courts would be able to establish whether an organization's purposes and uses were indeed "educational." However, within four years, virtually the same court of appeals concluded that "some 5,000 acres of undeveloped wilderness land located in the upper reaches of the Shawangunk Mountains. . . ." which "is heavily wooded with hard wood and evergreens and contains a variety of geological formations"¹⁸³ was "used primarily for an assortment of 'charitable . . . educational, [and] moral improvement of men, women or children's purposes. . . .'"¹⁸⁴ The court further stated that it could "see no reason why these categories should not encompass lands used for en-

178. See *Crusade for Christ, Inc. v. Town of New Lebanon*, 36 A.D.2d 247, 320 N.Y.S.2d 164 (3d Dep't 1971), *aff'd*, 31 N.Y.2d 765, 290 N.E.2d 440, 338 N.Y.S.2d 440 (1972); *In re Religious Soc'y of Families*, 73 Misc. 2d 923, 343 N.Y.S.2d 159 (Sup. Ct. 1973), *aff'd*, — A.D.2d —, 429 N.Y.S.2d 321 (4th Dep't 1980).

179. *Holy Spirit Ass'n v. Tax Comm'n*, 62 A.D.2d 188, 404 N.Y.S.2d 93 (1st Dep't 1978); *F.O.R. Holding Co. v. Board of Assessors*, 45 A.D.2d 875, 357 N.Y.S.2d 875 (2d Dep't 1974).

180. *BOCES v. Buckley*, 15 N.Y.2d 971, 207 N.E.2d 528, 259 N.Y.S.2d 858 (1965); *Semple School for Girls v. Boyland*, 308 N.Y. 382, 126 N.E.2d 294 (1955).

181. *Hudson Inst., Inc. v. Cernese*, 39 A.D.2d 576, 332 N.Y.S.2d 59 (2d Dep't 1972); *Plattsburgh College Benevolent and Educ. Ass'n, Inc. v. Board of Assessors*, 43 Misc. 2d 741, 252 N.Y.S.2d 229 (Sup. Ct. 1964); *Faculty-Student Ass'n of N.Y. State College for Teachers v. City of Albany*, 17 Misc. 2d 404, 191 N.Y.S.2d 120 (Sup. Ct. 1959).

182. 40 N.Y.2d 87, 351 N.E.2d 702, 386 N.Y.S.2d 54 (1976).

183. *Mohonk Trust v. Board of Assessors*, 47 N.Y.2d 476, 480, 392 N.E.2d 871, 418 N.Y.S.2d 763, 764 (1979).

184. *Id.* at 484, 392 N.E.2d at 880, 418 N.Y.S.2d at 767.

vironmental and conservation purposes which are necessary to the public good and which are open to and enjoyed by the public. (citing *Untermyer*)¹⁸⁵

This case, *Mohonk Trust v. Board of Assessors*,¹⁸⁶ is perhaps the best indication of the extent to which this provision of the law has been expanded by modern judicial interpretation based on the decisions of the early post-war years. Prior to 1945, it would have been virtually impossible to construct an argument based on statute or decisional law which would have offered persuasive authority to exempt this type of land as being used for an educational purpose. However, in the post-war years, among the exempt organizations, those concerned with education have clearly been among the most expansive and aggressive, and our society has most assuredly evinced a deep and continuing concern for the creation and maintenance of the highest quality education available.¹⁸⁷

In the face of these circumstances, and given only the 1896 law with which to order society's priorities on this issue, the courts have built upon the principles established by those early post-war decisions. Thus one can see a progression from the housing shortage situation in *Clarkson College*, in combination with *St. Luke's* and *Watchtower*, to a series of decisions which consistently hold that housing owned by educational organizations and supplied to faculty and students is exempt from taxation.¹⁸⁸ Likewise building upon the principles of *Clarkson*, *Pace* and *Watchtower*, the courts have progressed through a series of decisions in which they have found qualified for the educational exemption uses such as a theater group,¹⁸⁹ facilities for continuing education,¹⁹⁰ an ice

185. *Id.* See also *North Manursing Wildlife Sanctuary v. City of Rye*, 48 N.Y.2d 135, 397 N.E.2d 693, 422 N.Y.S.2d 1 (1979) (citation omitted).

186. 47 N.Y.2d 476, 392 N.E.2d 876, 418 N.Y.S.2d 763 (1979).

187. See *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971), *cert. denied sub nom. Clowes v. Serano*, 432 U.S. 907 (1977); *Board of Educ. v. Nyquist*, 94 Misc. 2d 466, 408 N.Y.S.2d 606 (Sup. Ct. 1978).

188. *University of Rochester v. Wagner*, 63 A.D.2d 341, 408 N.Y.S.2d 157 (4th Dep't 1978), *aff'd*, 47 N.Y.2d 833, 392 N.E.2d 569, 418 N.Y.S.2d 583 (1979); *Pratt Inst. v. Boyland*, 16 Misc. 2d 58, 174 N.Y.S.2d 112 (Sup. Ct. 1958), *aff'd*, 8 A.D.2d 625, 185 N.Y.S.2d 753 (2d Dep't 1959); *People ex rel. Thomas G. Clarkson Memorial College of Tech. v. Hagggett*, 191 Misc. 621, 77 N.Y.S.2d 182 (Sup. Ct. 1948), *aff'd*, 274 A.D. 732, 87 N.Y.S.2d 491 (3d Dep't), *aff'd*, 300 N.Y. 595, 89 N.E.2d 882 (1949).

189. *Little Theater of Waterbury, Inc. v. Hoyt*, 7 Misc. 2d 907, 165 N.Y.S.2d 292 (Sup.

skating rink,¹⁹¹ conference centers (even those operated by private organizations)¹⁹² and various non-traditional settings such as camps,¹⁹³ farms¹⁹⁴ and large tracts of unimproved land.¹⁹⁵

The expansion of the interpretation of educational use has been paralleled in the courts' interpretations of the educational purpose requirement in the line of faculty student association cases beginning with *Faculty-Student Association of Harpur College, Inc. v. Dawson*.¹⁹⁶ Here, and in the later cases of *Faculty-Student Association of State University College at Oswego, Inc. v. Sharkey*,¹⁹⁷ the courts have extended the limits of acceptable educational organizations to include those which do not provide direct classroom services. The faculty-student association, organized for the purposes of providing housing, recreation, food and supplies to students and faculty, has now been established as a qualified educational organization in the context of section 420. This is so to the extent that in the latest in this line of cases, *University Auxiliary Services, Inc. v. Smith*,¹⁹⁸ the organizational structure and purpose is simply not an issue. One need only recall that the issue in the *Pace College* case centered on the operation of the school cafeteria by a private corporation to understand the full extent to which the limits of this activity have been expanded by the post-war courts.

Ct. 1956), *aff'd*, 4 A.D.2d 853, 167 N.Y.S.2d 240 (4th Dep't 1957).

190. *In re Syracuse Univ.*, 59 Misc. 2d 684, 300 N.Y.S.2d 129 (Sup. Ct. 1969).

191. *University Auxiliary Servs. at Albany, Inc. v. Smith*, ___ A.D.2d ___, 433 N.Y.S.2d 270 (3d Dep't 1980); *Harvey School v. Town of Bedford*, 34 A.D.2d 965, 312 N.Y.S.2d 586 (2d Dep't 1970).

192. *American Mgmt. Ass'ns v. Assessor, Town of Madison*, 63 A.D.2d 1102, 406 N.Y.S.2d 583 (3d Dep't 1978), *aff'd*, 47 N.Y.2d 841, 392 N.E.2d 571, 418 N.Y.S.2d 584 (1979); *Trustees of Columbia Univ. v. Taylor*, 76 Misc. 2d 717, 351 N.Y.S.2d 928 (Sup. Ct. 1974).

193. *Chautauqua Inst. v. Town of Chautauqua*, 35 A.D.2d 1, 312 N.Y.S.2d 364 (4th Dep't 1970); *Rabbi Solomon Kluger School, Inc. v. Town of Liberty*, 76 Misc. 2d 691, 351 N.Y.S.2d 563 (Sup. Ct. 1974).

194. *Rudolph Steiner Educ. and Farming Ass'n, Inc. v. Brennan*, 65 A.D.2d 868, 410 N.Y.S.2d 404 (3d Dep't 1978).

195. *Mary Immaculate School v. Wilson*, 73 A.D.2d 969, 424 N.Y.S.2d 251 (2d Dep't 1980); *Glickenhous v. Board of Assessors*, 40 A.D.2d 1059, 338 N.Y.S.2d 995 (3d Dep't 1972).

196. 57 Misc. 2d 112, 292 N.Y.S.2d 216 (Sup. Ct. 1967).

197. 35 A.D.2d 161, 316 N.Y.S.2d 698 (4th Dep't 1970), *aff'd*, 29 N.Y.2d 621, 273 N.E.2d 139, 324 N.Y.S.2d 411 (1971).

198. ___ A.D.2d ___, 433 N.Y.S.2d 270 (3d Dep't 1980).

IV. The Local Option to Tax: To Stem the Erosion (1974-1980)

The relentless march of decisional law which has so markedly changed the scope of this exemption statute has occurred, as stated at the outset, within a context of virtual legislative silence since 1896. Aside from several amendments which were perceived to be primarily corrective,¹⁹⁹ the only exception to this silence was the legislative actions of 1971 and 1972.

In 1969, pursuant to resolution,²⁰⁰ a Joint Legislative Committee for the Study and Investigation of Real Property Tax Exemptions was established. The Committee's report²⁰¹ issued in 1970, recounted other studies which had preceded it,²⁰² and noted the continuing increase in the value of real property owned by nonprofit organizations.²⁰³ In response, the Committee included in its recom-

199. 1980 N.Y. Laws ch. 818; 1948 N.Y. Laws ch. 622. See N.Y. LEGIS. ANNUAL 291 (1948).

200. See N.Y. ASSY. RES. No. 165, 198th Sess. (1969) (first clause of the preamble of which provides "WHEREAS, A growing number of properties which were an important source of taxable revenues in many municipalities of New York State are exempt from taxation as, increasingly, they have been acquired by religious, educational, charitable, fraternal and other non-profit [sic] organizations, associations, and corporations. . .").

201. N.Y. LEGIS. DOC. No. 15 FINAL REPORT OF THE JOINT LEGISLATIVE COMMITTEE TO STUDY AND INVESTIGATE REAL PROPERTY TAX EXEMPTIONS (1970) [hereinafter cited as *Joint Legislative Committee Report*].

202. N.Y. LEGIS. DOC. No. 62 (1935); N.Y. LEGIS. DOC. No. 77 (1932); N.Y. LEGIS. DOC. No. 72 (1922); N.Y. SEN. DOC. No. 19 (1917).

203. Any discussion of the assessed value of wholly exempt property in New York is suspect because of the unreliability of assessments placed on such property. John Godfrey Saxe contended that the assessed values, at least in 1933, were inflated. J. SAXE, CHARITABLE EXEMPTION FROM TAXATION IN NEW YORK STATE ON REAL AND PERSONAL PROPERTY 76 (1933). An annual report of the State Tax Commission issued at about that time was "unable to state whether the valuations put upon the exempt property are better or worse than valuations put upon taxable property." ANNUAL REPORT OF THE COMMISSIONERS OF STATUTORY REVISION OF THE STATE OF NEW YORK 169 (1934). While Mr. Saxe may have been correct that some wholly exempt parcels are unequally assessed at inflated values because the exempt property owners feel little, if any, necessity to protest the assessment against which no taxes will be levied, it is no less correct to assume that some wholly exempt parcels are considerably underassessed because the assessor feels there is little purpose in expending time and energy in calculating an equitable assessment on such property. It was because of the unreliability of assessed valuations on wholly exempt property that § 520 of the Real Property Tax Law, 1978 N.Y. Laws ch. 635 (codified at N.Y. REAL PROP. TAX LAW § 520 (McKinney Supp. 1980)), providing for the taxation of transferred exempt property during the year of the transfer, includes a provision for reassessment as of the date of transfer. See N.Y. LEGIS. ANNUAL 362, 363 (1978).

mendations that the exemption for nonprofit organizations, other than religious, charitable, educational, cemetery and hospital organizations, be made optional with municipal corporations and that a study be made of the constitutional prohibition, article XVI, section 1, against legislative alteration of exemptions for religious, charitable or educational organizations.²⁰⁴ Although the latter recommendation was apparently never implemented, the substance of the local option to the tax proposal was enacted as chapter 414 of the Laws of 1971.

After setting forth legislative findings consistent with those in the aforementioned resolution, the chapter divided what had been subdivision one of section 420 into paragraphs (a), (b) and (d) and added a new paragraph (c). In newly designated paragraph (a), the words "or conducted" were added after "a corporation or association organized," while, as recommended by the Joint Legislative Committee, all but five categories of exempt purposes were deleted. These deleted purposes²⁰⁵ were included in new paragraph (b) which provided that corporations or associations organized or conducted exclusively for these purposes would be exempt unless the municipal corporation within which such an organization owned property, after a public hearing, adopted a local law, resolution or ordinance to provide that one or more of these categories would thereafter be taxable. Paragraph (c) provided that the local law, ordinance or resolution must apply alike to all property within the same category or categories. Paragraph (d) repeated the existing prohibition against pecuniary profit and was amended to refer to new paragraphs (a) and (b).²⁰⁶

As municipalities began to adopt local legislation to tax the new optional exempt categories, litigation was commenced and pressure brought to bear on the legislature, especially with respect to the "moral or mental improvement" category, which included such well-known organizations as the Boy and Girl Scouts and YMCA

204. JOINT LEGISLATIVE COMMITTEE REPORT, *supra* note 201, at 40-41.

205. These deleted purposes were: moral or mental improvement of men and women, bible, tract, benevolent, missionary, infirmary, public playground, scientific, literary, bar association, medical society, library, patriotic or historical, and for the enforcement of laws relating to children and animals. Medical societies, not previously discussed, had been added to the list of exempt categories by 1965 N.Y. Laws ch. 1063.

206. For further discussion of this amendment, see N.Y. LEGIS. ANNUAL 392 (1971); THE REAL PROPERTY TAX, *supra* note 26, at 122-24.

and YWCA. As previously noted, this category was first added to the law in 1893, following a case holding the YMCA to be taxable.²⁰⁷ Subsequently, this category of exemption has been construed to refer only to organizations such as the Y's and the Scouts.²⁰⁸

As a result of the 1971 amendment, a new issue was raised with respect to section 420, namely, into which category would the applicant fit? Whereas, previously it had not been an issue as to whether an applicant was, for example, "religious" or "bible," the exercise of the local option made that determination crucial. The cases began at once.

In *Lower East Side Action Project, Inc. v. Town of Liberty*²⁰⁹ the court held that the plaintiff's purposes and activities were for moral and mental improvement, and, given the municipality's election to tax such organizations, the property was taxable from the date of the local law. It is apparent that as of the date that decision was rendered (that is, July 7, 1972), the court was unaware that the Legislature had again amended section 420 to move the category of moral and mental improvement of men, women and children back into the mandatory list of exempt categories.²¹⁰ The amendment was made retroactive to apply to assessment rolls with taxable status dates on or after January 1, 1972.²¹¹ The Lower East Side Action Project returned to court, and the judge held the property to be exempt.²¹²

Without question, the most significant action taken pursuant to the new amendment was the 1971 adoption by the City of New

207. *YMCA v. Mayor of New York*, 113 N.Y. 187, 21 N.E. 86 (1889).

208. *See, e.g.*, 5 OP. COUNSEL SBEA No. 17.

209. 70 Misc. 2d 562, 334 N.Y.S.2d 333 (Sup. Ct.), *modified*, 87 Misc. 2d 860, 387 N.Y.S.2d 342 (Sup. Ct. 1972).

210. *See* 1972 N.Y. Laws ch. 529. For the memorandum in support of this legislation, see N.Y. LEGIS. ANNUAL 266 (1972). The bill was supported by the YMCA, the Boy Scouts, and the Office of Urban Affairs, and opposed by the Citizen's Union, the Association of the Bar of the City of New York, the Town of Schroon (which had just opted to tax such properties), the County Officers Association and the Essex County Republican County Committee. Neutral positions were taken by Audit and Control, the Attorney General, Department of Taxation and Finance, the Department of State, the Division of the Budget and the Office for Local Government. The objections to the bill centered on its impact upon local tax bases and the vagueness of the term "mental and moral improvement."

211. The same date on which 1971 N.Y. Laws ch. 414 became effective.

212. *Lower East Side Action Project v. Town of Liberty*, 87 Misc. 2d 860, 387 N.Y.S.2d 342 (Sup. Ct. 1972).

York of a local law to tax *all* of the optional categories of exemption.²¹³ Properties which hitherto had been exempt were now returned to the tax rolls, not on the basis of a failure to satisfy one or more of the three steps of the traditional test, but rather, because the city assessors had determined that the properties were "paragraph (b)" types. However, the 1971 legislation did not change or add to any of the basic language of the statute, so that the issues created by chapter 414 must be resolved in a complete void of terms of statutory definition. The result, beginning in 1973, was a rush to the courts by a myriad of organizations seeking judicial approval of their right to be classified within paragraph (a).

Because prior to 1972, qualification within *any* category had meant a *mandatory* exemption, there had been no real need for interpretations which distinguished between apparently related purposes and activities such as religious, bible and tract or educational, scientific and literary.²¹⁴ Moreover, most major decisions involved the extent to which a concededly qualified organization could use its property for otherwise non-exempt uses and retain the exemption. Thus, the available decisional law was primarily concerned with use rather than purpose and was not generally of direct relevance to the issue. However, in construing the 1971 amendment and in making distinctions between and among the related purposes, the courts have not been reluctant to draw on the modern decisional law relating to "incidental use."

The court of appeals first considered the local option provision in 1974, in *Association of the Bar v. Lewisohn*,²¹⁵ wherein it upheld the constitutionality of the new law. The court recognized the applicant's public benefit but said that public benefit was not the test of exempt status, and that the legislature's purpose was to stem

213. N.Y.C. LOCAL LAWS, No. 46 (1971).

214. One case which did discuss the possible differences was *In re Watson*, 171 N.Y. 256, 63 N.E. 1109 (1902), wherein the court noted that the legislature had obviously intended to differentiate between missionary societies and moral and mental improvement associations in that each was named "separately and specifically in the same context." *Id.* at 261, 63 N.E. at 1111. See also *Matter of De Peyster*, 210 N.Y. 216, 104 N.E. 714 (1914) (differentiating "historical" from "educational"); *Matter of Francis*, 121 A.D. 129, 105 N.Y.S. 643 (4th Dep't), *aff'd*, 189 N.Y. 554, 82 N.E. 1126 (1907) (differentiating "library" from "educational"). For a discussion of the post-1971 differentiation, see *Trustees of Columbia Univ. v. Town of Orangetown*, 93 Misc. 2d 261, 402 N.Y.S.2d 899 (Sup. Ct. 1976). *aff'd*, 60 A.D.2d 582, 399 N.Y.S.2d 708 (2d Dep't 1977)

215. 34 N.Y.2d 143, 313 N.E.2d 30, 356 N.Y.S.2d 555 (1974).

the erosion of municipal tax bases. The court also recognized that although the petitioning organization had educational attributes, nevertheless its *primary* purposes were included within the categories for optional exemption and, therefore, the property was now subject to taxation.

The same year, the court reviewed yet another *Watchtower* case and continued the exemption of the governing body of the Jehovah's Witnesses,²¹⁶ finding its printing facility to be a religious use of property in the context of paragraph (a) of section 420(1). In so doing, the court stated that the taxing authority had failed to "prove not only that the corporate owner *is* organized exclusively for bible and tract purposes, but as well that it *is not* organized or conducted exclusively for religious purposes."²¹⁷ The court distinguished the *Bar Association* case, stating that the taxing authority had met both requirements of proof in that case; that is, 1) that the property owner was not organized or conducted exclusively for one or more of the mandatory categories of exemption, and 2) that the owner was organized or conducted for one or more of the optional categories of exemption. It is impossible to ascertain whether, as suggested by the language of the opinion, the court actually put the burden of proof on the municipality, but, if so, the holding raises a particularly difficult issue of balancing conflicting burden of proof principles. There is nothing in the history of chapter 414 of the Laws of 1971 to indicate that the legislature intended that the burden categorizing an applicant should be on the municipality. And since the issue in these cases is basically the entitlement to exemption, there would seem to be strong support for the proposition that the strict construction rule should control.²¹⁸

Notwithstanding the *Watchtower* decision, in two subsequent cases the court of appeals found applicants to be entitled only to the optional exemption and, therefore, given New York City's local law, subject to taxation. The American Bible Society, whose certifi-

216. *Watchtower Bible & Tract Soc'y v. Lewisohn*, 35 N.Y.2d 92, 315 N.E.2d 801, 358 N.Y.S.2d 757 (1974).

217. *Id.* at 97, 315 N.E.2d at 803, 358 N.Y.S.2d at 759 (emphasis in original).

218. For some discussion of this problem, see *City of Lackawanna v. State Bd. of Equal. and Assessment*, 16 N.Y.2d 222, 236-37, 212 N.E.2d 42, 50-51, 264 N.Y.S.2d 528, 539-40 (1965) (Bergan, J., dissenting); *Grumman Aircraft Eng'r Corp. v. Board of Assessors*, 2 N.Y.2d 500, 510, 141 N.E.2d 794, 799, 161 N.Y.S.2d 393, 400 (1957).

cate of incorporation provided that its purpose was to publish and circulate the holy scriptures without note or comment, was found to be a bible organization, not a religious organization. The basis of the court's holding was its finding that

The promotion of religion in a broad or generic sense is the by-product of the accomplishment of the Society's corporate Bible purpose. In this sense we distinguish [*Watchtower* in which] . . . the corporation was the governing body of the religious group known as Jehovah's Witnesses, thus 'the ecclesiastical governing body of a recognized religious denomination with its own beliefs and form of organization' [citations omitted]. In the present case there is no corporate affiliation between the American Bible Society and any denomination, sect, or organization having as its avowed purpose the furthering of a recognized religion. . . .²¹⁹

The same day, the court of appeals, while not precisely categorizing the Swedenborg Foundation, found that it did not fit within any of the mandatory categories and, therefore, was taxable.²²⁰ The organization was not religious although it shared a common interest with the Church of New Jerusalem. Likewise, it was not educational because the court restricted that term to "the development of faculties and powers and the expansion of knowledge by teaching, instruction or schooling."²²¹

The new judicial decisions related to the 1971 amendment are perhaps the clearest indication of the judiciary's continuing role in establishing social policy through this exemption. *Watchtower*, in combination with *American Bible* and *America Press*, established the test of association with established religious organizations as both a condition for classification as religious and a protection against taxation of organizations such as *America Press*.²²² The courts' disinclination to separate the printing and publishing activities from the religious associations of the organizations in two of these cases would seem to be consistent with the judiciary's previ-

219. *American Bible & Tract Soc'y v. Lewisohn*, 40 N.Y.2d 78, 85, 351 N.E.2d 697, 701, 386 N.Y.S.2d 49, 53 (1976). See also *America Press, Inc. v. Lewisohn*, 74 Misc. 2d 562, 345 N.Y.S.2d 396 (Sup. Ct. 1973), *aff'd*, 48 A.D.2d 798, 372 N.Y.S.2d 194 (1st Dep't 1975).

220. *Swedenborg Foundation, Inc. v. Lewisohn*, 40 N.Y.2d 87, 351 N.E.2d 702, 386 N.Y.S.2d 54 (1976).

221. *Id.* at 94, 351 N.E.2d at 705, 386 N.Y.S.2d at 58.

222. *American Bible & Tract Soc'y v. Lewisohn*, 40 N.Y.2d at 85-86, 351 N.E.2d at 701, 386 N.Y.S.2d at 53; *America Press, Inc. v. Lewisohn*, 74 Misc. 2d at 565, 345 N.Y.S.2d at 400. See also *Mary Immaculate School v. Wilson*, 73 A.D.2d 969, 424 N.Y.S.2d 251 (2d Dep't 1980).

ously described reluctance to become unnecessarily involved in issues which are intimately related to religion.²²³ On the other hand, the *Swedenborg* line of cases²²⁴ seems to show that in reviewing municipal determinations which involve organizations not directly associated with organized religion, the courts appear more inclined to apply and reiterate traditional rules of strict construction. Indeed, the presence or association with religion appeared to be the critical favor in distinguishing these cases until *Mohonk Trust v. Board of Assessors*,²²⁵ a 1979 court of appeals decision in which at least two significant determinations were made.

The first determination in *Mohonk* is that environmental and conservation are mandatorily exempt purposes within section 420 (1)(a) because "the Legislature has not seen fit to remove environmental and conservation purposes from the broad category of charitable, educational, or mental or moral improvement of man purposes within which they so neatly fit."²²⁶ The history of section 420 and its predecessors has heretofore been discussed at length, and it is noted that neither "environmental" nor "conservation" has ever been included within the list of exempt purposes. As stated in a preceding section, it is difficult to fit this interpretation within any rule of strict construction.

Yet, perhaps the more significant determination of the opinion is its discussion of chapter 414 of the Laws of 1971. While referring to the division of the formerly exempt categories into mandatory and optional groupings, the court stressed another previously mentioned portion of the amendment to subdivision one of section 420, wherein the words "or conducted" were added, thereby resulting in the requirement "organized or conducted exclusively" for one or more of the specified exempt purposes. The court in *Mohonk* states that prior to the 1971 amendment, an essential element of the test for exemption was to be "organized" for an exempt purpose, which determination was in large part limited to an examina-

223. *But see* Religious Soc'y of Families v. Town of Carroll, 73 Misc. 2d 923, 343 N.Y.S.2d 159 (Sup. Ct. 1973).

224. *Collector's Club v. Tishelman*, N.Y.L.J., July 30, 1979, at 6, col. 5 (Sup. Ct.), *aff'd*, ___ A.D.2d ___, ___ N.Y.S.2d ___ (1st Dep't 1979); *Moral Re-Armament, Inc. v. Tax Comm'n*, N.Y.L.J., July 12, 1978, at 6, col. 1 (Sup. Ct.), *aff'd*, 72 A.D.2d 722, 422 N.Y.S.2d 872 (1st Dep't 1979).

225. 47 N.Y.2d 476, 392 N.E.2d 876, 418 N.Y.S.2d 763 (1979).

226. *Id.* at 485, 392 N.E.2d at 880, 418 N.Y.S.2d at 768.

tion of the applicant's corporate documents. In *Mohonk* it appears that the court determined that the 1971 amendment meant that a determination of an organization's primary purpose may now turn upon the extent to which it carries out exempt purposes and is no longer dependent upon the language of its organizational documents.²²⁷

The *Mohonk* decision is apparently a judicially made policy determination which significantly expands the scope of the exemption. The addition of the category of "environmental or conservation" can, of course, be anticipated as a means by which owners of previously taxable holdings of unimproved land may now claim the benefits of the exemption.²²⁸ However, and perhaps, as suggested, of even greater import is the court's apparently substantial modification of the organization test. The first manifestation of this new issue was not long in coming.

In *St. Joseph's Health Center Properties, Inc. v. Srogi*, a sharply divided court of appeals appears to have extended the incidental use doctrine to the organizational test on the basis of the "or conducted" change. Perhaps appropriately in light of the history of the law, this case concerned housing for hospital personnel.²²⁹ The majority correctly pointed out there is nothing in the scant legislative history of chapter 414 of the Laws of 1971 to explain the insertion of the words "or conducted," although the amendment "was made at a time when municipalities were being granted relief the need for which was well documented." However, the majority concluded that the absence of intent in regard to the addition of "or conducted" suggested "the Legislature's intention to exempt property owned by a corporation conducted for a purpose reasonably incident to the major purpose of another subdivi-

227. Without emphasizing the 1971 amendment, a lower court had previously held that where, from an analysis of its incorporation papers, an organization was not found not to be organized exclusively for exempt purposes, a determination of its conduct was necessary. *Return Realty Corp. v. Ranieri*, 78 Misc. 2d 825, 359 N.Y.S.2d 611 (Sup. Ct. 1974). The court of appeals reiterated its conclusion in *Mohonk* in *North Manursing Wildlife Sanctuary v. City of Rye*, 48 N.Y.2d 135, 397 N.E.2d 693, 422 N.Y.S.2d 1 (1979).

228. See *North Manursing Wildlife Sanctuary v. City of Rye*, 48 N.Y.2d 135, 397 N.E.2d 693, 422 N.Y.S.2d 1 (1979); *Catskill Center for Conservation and Dev., Inc. v. Voss*, 63 A.D.2d 1091, 406 N.Y.S.2d 375 (3d Dep't 1978).

229. 51 N.Y.2d 127, 412 N.E.2d 921, 432 N.Y.S.2d 865 (1980). *Mohonk* and *North Manursing* had been unanimous decisions whereas the court in *St. Joseph's* was divided by a vote of 4 to 3.

sion (a) exempt corporation, even though not itself organized to engage in all of the activities of the latter corporation."²³⁰ The dissent²³¹ restated the court's holding in *Mohonk*, but concluded that the 1971 amendment was not intended to eliminate the dual test for exemption pursuant to section 420 (that is, organizational purpose and property use). The dissenters charged that the majority was overlooking the organization requirement and focusing solely upon the use requirements, thereby applying only half of the statutory test for exempt status.

It appears that the court of appeals overread this provision of the 1971 amendment in *Mohonk* and has continued to do so. While, as the majority in *St. Joseph's Health Center* correctly point out, there is a scant legislative history concerning chapter 414 of the Laws of 1971, what little there is suggests absolutely no intention on the part of the legislature to expand the exemption umbrella in section 420. As noted above, the Joint Legislative Committee which recommended the amendment²³² did so in order to *expand* the tax base and *limit* exemptions. The sponsor's memorandum for 1971 Assembly bill 7228 (subsequently enacted as chapter 414) is limited to a discussion of the local option provision of the then proposed legislation.²³³ No comment is made in the sponsor's memorandum concerning the inclusion of the phrase "or conducted." Given the stated purpose of the legislation, it seems inconsistent to conclude that the Legislature intended to liberalize the exemption with respect to what thereafter became the mandatory category of nonprofit exempt organizations, especially in the absence of any comment stating this intent. Rather, it seems far more reasonable to assume that the inclusion of the phrase "or conducted" was meant merely as a technical amendment made to conform the statute to the language of the state constitution. Indeed, prior to *Mohonk*, the court of appeals used the terms "organized" and "conducted" interchangeably, with no indication of different meanings being ascribed to the terms.²³⁴

230. *Id.* at 133, 412 N.E.2d at 923, 432 N.Y.S.2d at 867-68.

231. *Id.* at 136-37, 412 N.E.2d at 926, 432 N.Y.S.2d at 870 (Cooke, C. J., dissenting).

232. JOINT LEGISLATIVE COMMITTEE REPORT, *supra* note 201.

233. N.Y. LEGIS. ANNUAL 392 (1971).

234. *See, e.g., Swedenborg Foundation, Inc. v. Lewisohn*, 40 N.Y.2d at 93, 351 N.E.2d at 705, 386 N.Y.S.2d at 57.

V. Conclusion: The Ill to be Cured

The policy of the law has been, in this State from an early day, to encourage, foster and protect corporate institutions of religious and literary character, because the religious, moral and intellectual culture afforded by them were deemed, as they are in fact, beneficial to the public, necessary to the advancement of civilization, and the promotion of the welfare of society. And, therefore, those institutions have been relieved from the burden of taxation by statutory exemption.²³⁵

This statement by the court of appeals would seem to be an accurate and concise summary of the current attitude of the courts in applying our 1896 law to modern conditions. The perceived obligation of the courts, unrestricted by modern, responsive state legislation, makes the duty and responsibility of the local assessor all the more difficult. Determining the extent to which to grant or to deny exemptions to properties which are being used for *new* purposes by traditional organizations is as complex a question as has been reviewed in the preceding pages. The task of making a determination based on precedents rather than statute is even more difficult when the petitioning organization is one such as St. Joseph's Health Center, which does not easily fit within the traditional categories. The establishment of organizations and facilities devoted to the care, treatment and rehabilitation of persons addicted to drugs is another recent example of this problem. As previously noted, in *Lower East Side Action Project, Inc. v. Town of Liberty*²³⁶ the court found that such activity fell within the category of moral and mental improvement of men, women and children and ultimately held the property to be exempt (following the 1972 amendment).²³⁷ However, in *Glickenhau Foundation v. Board of Assessors*,²³⁸ the court held that insufficient information had been elicited at trial and remanded the case for further proceedings prior to making its determination. Similarly in *Catskill Center for Conservation and Development, Inc. v. Voss*, the appellate division was reluctant without further factual development to find property exempt because of ownership and use for purposes of conservation and envi-

235. *People ex rel. Seminary of Our Lady of Angels v. Barber*, 49 N.Y. Sup. Ct. 27, 30 (5th Dep't 1886), *aff'd*, 106 N.Y. 669, 13 N.E. 936 (1887).

236. 70 Misc. 2d 562, 334 N.Y.S.2d 333 (Sup. Ct. 1972).

237. 1972 N.Y. Laws ch. 125.

238. 40 A.D.2d 1059, 1061, 338 N.Y.S.2d 995, 997 (3d Dep't 1972).

ronmental protection.²³⁹

The development, ownership and operation of properties which are devoted to the care of needy and elderly people would appear to be among the most urgent issues that the courts are now being required to determine in the context of the nonprofit exemption statute. Older lower court decisions such as *Great Neck Section, National Council of Jewish Women, Inc. v. Board of Assessors*,²⁴⁰ and *American-Russian Aid Association, Inc. v. City of Glen Cove*²⁴¹ seemed to lend support to the proposition that organizations which are structured and operate *exclusively* for the benefit of persons in need of *charity* may indeed qualify for exemption.²⁴² However, where that proof is lacking the issue becomes whether the ownership and operation of a housing facility is an activity which qualifies for the statutory exemption.

Litigation on this new issue initially developed without regard to the 1971 amendment. In reviewing this issue upon the basis of established decisional law, the courts have initially applied the traditional rules of strict construction. Thus, despite stated charter objectives,

the record overwhelmingly shows that petitioner used its facilities with the purposeful design of operating a vacation resort into which convalescents entered, if they entered at all, unsolicited and then only after petitioner had determined that it would not be burdened with their care. Such a variance between corporate character and corporate conduct sustains a denial of exemption by the express language of Section 420 of the Real Property Tax Law.²⁴³

Likewise, an organization whose purpose was to hold title to real and personal property utilized by a separate organization for the care of retarded children was also denied exemption on the basis of traditional interpretations.²⁴⁴ Also, an organization owning an

239. 63 A.D.2d 1091, 1092, 406 N.Y.S.2d 375, 376 (3d Dep't 1978). The resolution of that issue was accomplished in *Mohonk Trust v. Board of Assessors*, 47 N.Y.2d 476, 392 N.E.2d 876, 418 N.Y.S.2d 763 (1979).

240. 21 Misc. 2d 142, 189 N.Y.S.2d 623 (Sup. Ct. 1959).

241. 41 Misc. 2d 622, 246 N.Y.S.2d 123 (Sup. Ct. 1964), *aff'd*, 23 A.D.2d 966, 260 N.Y.S.2d 589 (2d Dep't 1965).

242. *Church Home v. Wagner*, 58 A.D.2d 972, 397 N.Y.S.2d 478 (4th Dep't 1977).

243. *Valeria Home, Inc. v. Cook*, 28 A.D.2d 893, 894, 282 N.Y.S.2d 41, 43 (2d Dep't 1967), *aff'd*, 22 N.Y.2d 388, 239 N.E.2d 631, 292 N.Y.S.2d 882 (1968).

244. *Columbia County Mental Retardation Realty Co. v. Palen*, 97 Misc. 2d 9, 410 N.Y.S.2d 789 (Sup. Ct. 1978). *But see St. Joseph's Health Center Properties, Inc. v. Srogi*,

apartment complex for persons over the age of sixty-two was held to be outside the scope of the statute. Finding that "the tenants pay substantial admission fees and regular rents and service charges designed to provide income to make the apartments self-sustaining, the tenants are self-supporting and the apartment complex does not dispense charity," the appellate division held that "the record demonstrates that its property is not used for exempt purposes."²⁴⁵

The decision-making process which has been described in the preceding pages obviously places a significant burden on the public officials charged with primary responsibility for assessment administration. In making determinations involving organizations and activities which are so fraught with emotion and subjectivity, it seems quite obvious that local assessors should have both a basic understanding of the law and a complete command on the facts upon which the applicant bases its right to the exemption.

Although the ability of anyone to attain a basic understanding of this law may be highly problematic, there should be a capacity to gather the necessary factual information. Yet despite the evident complexity, sensitivity and ambiguity of the subject matter, until 1979, there was no standard statewide method for either obtaining that information or training assessors in the appropriate decision-making process.

In an effort to assist assessors in ascertaining whether particular parcels of individual nonprofit organizations qualify for the exemption pursuant to section 420, in 1979, the State Board of Equalization and Assessment promulgated application forms designed to elicit from the applicant organizations the information necessary for the assessor to make an informed decision. Pursuant to statute²⁴⁶ and a rule of the State Board,²⁴⁷ assessors now must have

51 N.Y.2d 127, 412 N.E.2d 921, 432 N.Y.S.2d 865 (1980).

245. *Presbyterian Residence Center Corp. v. Wagner*, 66 A.D.2d 998, 999, 411 N.Y.S.2d 765, 767 (4th Dep't 1978), *aff'd*, 48 N.Y.2d 885, 424 N.Y.S.2d 896, 400 N.E.2d 1348 (1979). *See also* *Bedford-Stuyvesant Restoration Corp. v. Lewisohn*, 50 A.D.2d 815, 376 N.Y.S.2d 912 (2d Dep't 1975); *Jeantet Residence for Seniors, Inc. v. Commissioner of Fin.*, 105 Misc. 2d 1080, 430 N.Y.S.2d 545 (Sup. Ct. 1980); *Belle Harbor Home of the Sages, Inc. v. Tishleman*, 100 Misc. 2d 911, 420 N.Y.S.2d 343 (Sup. Ct. 1979).

246. *See generally* N.Y. REAL PROP. TAX LAW §§ 202, 202(1)(h) (McKinney 1972 & Supp. 1980); 1978 N.Y. Laws ch. 125.

247. 9 N.Y.C.R.R. §§ 190-1.3(c).

completed application forms from nonprofit organizations on file for each section 420 exemption entered on the assessment roll.²⁴⁸ Several forms are required for each exemption.

The development of these forms began shortly after the enactment of chapter 125 of the Laws of 1978, which amended section 202 of the Real Property Tax Law specifically to authorize the State Board to prescribe exemption application forms. Although it is likely the State Board of Equalization and Assessment would have had such authority without the amendment to section 202(h) of the Real Property Tax Law, the enactment of this amendment removed any doubts on the question.²⁴⁹

After an intensive period of development, including consultation with and comment from representatives of various nonprofit orga-

248. This requirement became effective for all assessing units defined in N.Y. REAL PROP. TAX LAW § 102(1) (McKinney 1972), having taxable dates, *see* N.Y. REAL PROP. TAX LAW § 302 (McKinney 1972), occurring on or after April 1, 1979. Organization purpose information is required on form EA-420-ORG. Where necessary, income information is elicited on form EA-420-ORG (Schedule A). Schedule A is not normally required where the applicant has received a Federal income tax exemption as the assessor is authorized to rely on the Internal Revenue Service's finding of nonprofit status for purposes of the nonprofit requirement of § 420. One copy of form EA-420-ORG is required to be filed in each assessing unit in which the applicant seeks exemption.

An assessor garners property use information from form EA-420-USE, one of which is required for each separately assessed parcel in recognition of the fact that an organization may be using its several parcels for differing purposes, some of which may be exempt, and some of which may not.

In each succeeding year after the first year in which exemption is granted following the submission of the above forms, renewal forms, *e.g.*, EA-420-RNW-I and EA-420-RNW-II, may be utilized by the applicant. Villages which rely on the town (or county) assessment roll as the basis of the village assessment, *see* N.Y. REAL PROP. TAX LAW § 1402(1) (McKinney 1972), may utilize a special form (EA-420-VLG) in lieu of the others. Note also that special forms for property held in trust by clergymen pursuant to § 436 of the Real Property Tax Law, N.Y. REAL PROP. TAX LAW § 436 (McKinney Supp. 1980) (EA-436) and property used for the residence of officiating clergymen, exempt pursuant to § 462 of the Real Property Tax Law (EA-462), N.Y. REAL PROP. TAX LAW § 462 (McKinney 1972), have also been prescribed.

249. 1978 N.Y. Laws ch. 125. An examination of the Bill Jacket for this chapter discloses that the bill was supported by the State Board of Equalization and Assessment, which drafted it, by the New York State Association of Counties, and by the Real Property Section of the New York State Bar Association Committee on Legislation. Neutral positions were taken by the Division of the Budget, the Attorney General's Office, the Department of Taxation and Finance, the Temporary State Commission on Real Property Tax, the New York Conference of Mayors, and the Association of Towns. There was no opposition to the bill.

nizations,²⁵⁰ the State Board issued the forms in January of 1979. Sixty-five thousand sets of the original forms and instructions were distributed to all assessors through the offices of the county real property tax service agencies. This distribution was followed in March, 1980, with a statewide distribution of annual renewal forms.

State Board statistics based on the initial use of the forms show that by August, 1980, assessors in 749 cities and towns (not including New York City) had reported on their use of the forms. Over \$2.6 billion in assessed value remained exempt, the owners of such property proving their entitlement to exemption to the satisfaction of the assessor. However, nearly \$8.5 million in assessed value²⁵¹ of formerly exempt property had been returned to the taxable portion of the assessment roll, generally for failure to satisfy the property use test for exemption.

In New York City, which first utilized the forms for purposes of its 1980 assessment roll, based on its January 25 taxable status date,²⁵² some 9,500 applications were mailed to owners of parcels receiving exemption on the 1979 assessment roll pursuant to sections 426 or 462. By January 25, 1980, approximately 5,000 completed forms were returned, and by January 1, 1981, applications had been received for approximately 8,300 parcels. Sixty-three parcels with a total assessed value of approximately \$17.5 million were returned to the tax roll after review of the forms. Preliminary restoration of the 1,200 remaining parcels added additional assessed value estimated at \$150 million. An initial investigation suggests that perhaps ninety percent of these parcels will be shown to be exempt once analysis is complete. With respect to those parcels which initial investigation suggested to be ineligible for exemption, the New York City Tax Commission granted an opportunity for additional data to be submitted. The final results with respect to these parcels are still pending.

As stated above, vigorous administration of this law requires not only the compilation of information, but also an understanding of

250. See 1978 PROCEEDINGS OF THE STATE BOARD OF EQUALIZATION AND ASSESSMENT, vol. I, Meetings of June 14, July 18, and September 8, 1978. See also 1979 PROCEEDINGS OF THE STATE BOARD OF EQUAL. AND ASSESSMENT, Meeting of Dec. 14, 1979.

251. See note 203 *supra* for a discussion of the assessed values of exempt property.

252. N.Y.C. CHARTER § 1507.

the legal rights and responsibilities of both the municipal government, that is, the assessor and the property owner. The assessor must be responsible for both even-handed and correct treatment of the rights of the owners of legitimately exempted properties and a firm and aggressive decision-making process which ensures that the municipal tax base and, therefore, the owners of non-exempt properties, are protected as well. This decision-making process and administration must be as complete and open as is necessary to ensure public confidence in the entitlement to the exemptions set forth on the annual assessment roll.

Directly related to the vigorous decision-making process of administration is the clear authority given to assessors either to separately assess exempt and non-exempt portions or, where separate assessment is not possible, to apportion the assessed value of property and enter the value of the portion eligible for exemption in a separate column in the taxable portion of the assessment roll.²⁵³ Separate assessment of clearly taxable holdings of nonprofit organizations is a straightforward option which has always been available to the assessors and should present no difficulty.²⁵⁴ However, the alternative authority available to assessors to apportion the assessed value of a single parcel between exempt and taxable uses apparently is not quite so clear. Although the use of this method was quite evident in major litigation such as *St. Luke's*²⁵⁵ and *Chautauqua*,²⁵⁶ its use was called into question in a case against New York City which ultimately resulted in the very strong statement of approval by the court of appeals in 1970. In the case of *Sailors' Snug Harbor v. Tax Commission*, a five-man majority reviewed the provision in subdivision five of section 502 of the Real Property Tax Law, which had its origins at least as far back as the *Catholic Union v. Sayles* case.²⁵⁷ The court in *Sailors' Snug Harbor* stated that

[i]t would be an obstacle of almost insurmountable difficulty for assessors

253. N.Y. REAL PROP. TAX LAW § 502(5) (McKinney 1972).

254. *Board of Foreign Missions v. Board of Assessors*, 244 N.Y. 42, 154 N.E. 816 (1926).

255. *St. Luke's Hospital v. Boyland*, 12 N.Y.2d 135, 187 N.E.2d 769, 237 N.Y.S.2d 308 (1962).

256. *Chautauqua Inst. v. Town of Chautauqua*, 35 A.D.2d 1, 312 N.Y.S.2d 364 (4th Dep't), *appeal denied*, 27 N.Y.2d 485, 315 N.Y.S.2d 1025 (1970).

257. 32 A.D. 203, 53 N.Y.S. 65 (3d Dep't), *aff'd*, 157 N.Y. 679, 51 N.E. 1092 (1898).

looking at the building to make an accurate physical allocation of space. . . .

The reasonable thing for assessors to do in this situation, following the words of the statute, is to fix . . . the 'amount' of the exemption. If this is unfair or inaccurate it can be corrected after a trial of the proceeding. Normally the owners would know more about the actual apportionment than anyone else, and the subject is fully within the court's power to review.²⁵⁸

Where this authority is used to its fullest extent, such as in New York City, not only is property added to and maintained on the tax base, but the litigation is more often in regard to the apportionment as opposed to the all-or-nothing issues that are presented when apportionment is not used.

The continuing difficulty which confronts both the State Board and the local assessors is that the limits and policies of the non-profit exemption in New York State continue to be established primarily by means of judicial decision. Besides being expensive and inefficient for this purpose, this method of policy-making has certain obvious limitations. By definition litigation presents only the most difficult cases for decision, thereby often producing results which may not be appropriate for the vast majority of those subject to the law. In addition, an unfortunate characteristic of the adversarial system is that at times one of the parties may find itself very much over matched in legal representation in court. In recent years this concern was often expressed by small municipalities which had entered into litigation with large and well endowed non-profit organizations.²⁵⁹ Finally, of course, the decisions of the appellate courts, primarily in the case of the appellate division and exclusively in the case of the court of appeals, are limited to the record created in the trial court. Thus, it is not uncommon for the appellate court to be required to render a decision of potentially statewide significance on the basis of an obviously inadequate

258. *Sailors' Snug Harbor v. Tax Comm'n*, 26 N.Y.2d 444, 448-49, 259 N.E.2d 910, 912, 311 N.Y.S.2d 486, 489 (1970). See also *Trustees of Columbia Univ. v. Taylor*, 76 Misc. 2d 717, 351 N.Y.S.2d 928 (Sup. Ct. 1974).

259. As a result of this type of complaint from local officials, N.Y. REAL PROP. TAX LAW § 202(1-a) (McKinney 1972) was enacted authorizing the State Board of Equalization and Assessment to provide appropriate legal assistance to municipalities which were subjected to judicial actions as a result of compliance with the State Board of Equalization and Assessment rules, regulations, orders, determinations or instructions. 1978 N.Y. Laws ch. 739.

record.²⁶⁰

Beyond all these factors, of course, the overriding factor is that by and large the policy is being established by the judiciary rather than by the legislature. Whether this is a satisfactory state of affairs is in fact a judgment for the legislature to make, and perhaps up until the post-war era there may have been some validity in concluding that the silence of the legislature could be equated with its acquiescence to the policies established by the judiciary. However, in recent times, beginning with the 1971 Joint Legislative Commission and continuing through the Temporary State Commission on State and Local Finances²⁶¹ and the Temporary State Commission on the Real Property Tax,²⁶² the legislature has indicated a continuing and growing concern for real property tax administration in general, and exemptions, including the nonprofit exemption, in particular.

The courts themselves are not unmindful of this concern, and their suggestions and comments in regard to legislative responsibility and prerogative appear throughout the course of judicial decision-making which has occurred since 1938.²⁶³ Most recently a trial court judge was moved to protest that:

The ill which respondent seeks to cure is the eroding tax base confronting municipalities as a result of the ever increasing amount of exempt properties. These properties, formerly taxable, are being acquired by a variety of organizations currently entitled to exemption from taxation.

As municipalities face rising costs, the loss of tax revenue due to exemption requires a shifting of increases in taxes to the tax paying public. These citizens and businesses, also faced with rising costs, are becoming increasingly burdened by taxes and are required to pay more than what most feel

260. *In re* N.Y. Conf. Ass'n of Seventh-Day Adventists, 80 N.Y.S.2d 8 (Sup. Ct. 1948), *rev'd*, 275 A.D. 742, 87 N.Y.S.2d 708 (4th Dep't 1949); *Mary Immaculate School v. Wilson*, 73 A.D.2d 969, 424 N.Y.S.2d 251 (2d Dep't 1980).

261. See 1973 N.Y. Laws ch. 1000 § 1; *THE REAL PROPERTY TAX*, *supra* note 26, at 120-35.

262. 1977 N.Y. Laws ch. 889 § 1.

263. *Pace College v. Boyland*, 4 N.Y.2d 528, 151 N.E.2d 900, 176 N.Y.S.2d 356 (1958); *Williams Institutional Colored Methodist Episcopal Church v. City of New York*, 275 A.D. 311, 89 N.Y.S.2d 300 (1st Dep't 1949), *aff'd*, 300 N.Y. 716, 92 N.E.2d 58 (1950); *People ex rel. Doctors Hospital, Inc. v. Sexton*, 267 A.D. 736, 48 N.Y.S.2d 201 (1st Dep't 1944), *aff'd*, 295 N.Y. 553, 64 N.E.2d 273 (1945). See also *Sailors' Snug Harbor v. Tax Comm'n*, 26 N.Y.2d 444, 259 N.E.2d 910, 311 N.Y.S.2d 486 (1970); *People ex rel. Outer Court, Inc., of the Order of the Living Christ v. Miller*, 161 Misc. 603, 292 N.Y.S. 674 (Sup. Ct. 1936), *aff'd*, 256 A.D. 814, 10 N.Y.S.2d 208 (1st Dep't), *aff'd*, 280 N.Y. 825, 21 N.E.2d 881 (1939).

is their fair share.

The problem continues to intensify and there does not appear to be an answer on the horizon. The sole corrective step taken by the Legislature was their recognition of the existence of the problem. [See 1971 N.Y. Laws ch. 414 § 1]. No further constructive action has been taken.

Respondent's remedy is to be found in the Legislature and not in the Courts.²⁶⁴

While this observation is so surely consistent with those of other judges who have been confronted by the nonprofit exemption law in other years, there is a most crucial difference between the prevailing judicial attitude of today as compared to that of fifty years ago. In the context of the legislative silence since 1896, the probing of the limits of the scope of the exemption by nonprofit organizations has continued to become more intense and more sophisticated. And, since 1945, the results of that probing have been decidedly in the favor of those claiming exemption. How very much different in terms of establishing policy is the observation of the court quoted above when compared to the court in the 1893 YMCA case:

Associations of this character are so useful and so deserving of encouragement and support that a different result would please us better, but we are unable to reach it under the law as it stands.²⁶⁵

Legislative decisions on the future policy direction must necessarily be the result of a deliberative process as complex and varied as the scope of the current law. The agenda need be as broad as the Legislature deems appropriate, of course, but certain items would already seem to be ripe for consideration. Included among these would be the suggested constitutional change of the 1971 Joint Legislative Committee,²⁶⁶ the problem of the extent to and circumstances within which unimproved land should be exempt,²⁶⁷ and the apparent need to clarify the intent and administration of the 1971 amendment, both as to the organizational requirement²⁶⁸ and

264. *Nassau County Council Boy Scouts of America v. Assessors, Town of Rockland*, slip op. at 14 (Sup. Ct. 1980).

265. See note 35 *supra* and accompanying text.

266. JOINT LEGISLATIVE COMMITTEE REPORT, *supra* note 201, at 41.

267. THE REAL PROPERTY TAX, *supra* note 26, at 128.

268. *St. Joseph's Health Center Properties, Inc. v. Srogi*, 51 N.Y.2d 127, 412 N.E.2d 921, 432 N.Y.S.2d 865 (1980).

the definitions of the purposes and activities listed within paragraphs (a) and (b) of subdivision one of section 420.

The last item listed, that of definitions, may be the most crucial. In the analyses, deliberations and debates of the 1938 Constitutional Convention, there was evident concern in regard to an increasing burden being placed on taxable property as a result of the extension of exemptions.²⁶⁹ Thus, not only did the 1938 Convention (and, ultimately, the new Constitution) limit the authority of the legislature to enact exemptions, that is, by continuing the general law limitation, it also specifically authorized the legislature to limit the three "protected" exemptions by statute.²⁷⁰ Thus, the constitutional provision, adopted in 1938 and in effect today, contains three provisions with respect to exemptions, two of which are clearly intended as limitations on the spread of exemptions:

1. Exemptions may be granted only by general law;
2. Exemptions may be altered or repealed;
3. Exemptions may not be altered or repealed which apply to property owned by qualified nonprofit organizations and used exclusively for religious, educational or charitable purposes *as defined by law*.

Although "as defined by law" undoubtedly includes the law established by the judiciary, there can be no doubt that the framers of the 1938 Constitution anticipated the need for legislative clarification and definition of the constitutionally protected purposes.²⁷¹ Nor can there be any doubt that the phrase "as defined by law" was placed in section one of article XVI for the express purpose of enabling the legislature to enact definite legislation.

Improved administration alone will not relieve the pressure exerted on the municipal governments by aggressive nonprofit organizations. Unless we are content to rely on the judicial system, the legislature must review the current law and determine what it believes to be the appropriate basis for future state policy in this aspect of real property tax administration.

269. See notes 89-96 *supra* and accompanying text.

270. N.Y. CONST. art. XVI, § 1.

271. See notes 91-92 *supra* and accompanying text.