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REAL PROPERTY TAX EXEMPTION IN NEW YORK: WHEN IS A BIBLE SOCIETY NOT RELIGIOUS?

In 1970 the United States Supreme Court decided that it was constitutional for states to include churches and religious institutions within the categories of organizations exempt from real property taxes. A recent series of decisions by the state courts in New York presents a much more troublesome question: what kind of distinctions may a state legislature constitutionally draw between various types of religious organizations in its attempt to prevent undue erosion of the property tax base?

Since 1938 New York has grounded exemptions for religious, charitable and educational organizations in the state's constitution. However, from colonial times, New York has provided for real property tax exemptions for these and other groups. The present state tax statute is based on an 1896 law which established that real property shall be tax-exempt if it is owned by a corporation or an association organized and used exclusively for one or more of seventeen specific purposes, including religious and bible or tract. Up to 1971, the only change in the statute was to add "public playground" and "bar association" to the tax-exempt categories.

During the twentieth century, the number of organizations enjoying tax exemption burgeoned. Not only could organizations obtain tax-exempt status

2. "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 Exemptions may be altered or repealed except those exempting real or personal property used exclusively for religious, educational or charitable purposes as defined by law and owned by any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." N.Y. Const. art. XVI, § 1 (McKinney 1969).
3. An example of an early tax exemption statute is Law of April 1, 1799, ch. LXXII, (1799) Laws of N.Y.: "That no house or land belonging to the United States, or to 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."
4. "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 . . . shall be exempt from taxation." Law of May 27, 1896, vol. I, ch 908, § 4(7), [1896] Laws of N.Y.
6. The problem of prolific tax exemptions is widely recognized throughout the country: "One can easily show . . . that carelessness in preparing property rolls has frequently conferred tax exempt status on property that qualifies nominally more than substantively. There are also a growing number of communities that serve tax exempt facilities that bear a relatively high proportion of total assessed realty. Communities whose primary economic activities revolve around government or higher education find themselves in this tight situation. The traditional exemptions of realty have been so expanded that a new plane of vastly different dimensions exists. Within this situation is found the highly profitable business property which is accorded tax
pursuant to the tax statute or the constitution, but also by special act of the legislature. Between 1900 and 1970, approximately 107 special acts were passed which either added, consolidated or amended tax exemptions.\(^7\) In 1970 the Legislative Committee to Study and Investigate Real Property Tax Exemptions found that if the average annual increases of tax-exempt property were to continue at the present rate, within fifteen years "50 percent of the total assessed value of all real property in New York State will be exempt . . . .\(^8\) This forecast is particularly alarming in light of the fact that the current quantity of tax-exempt real property already places a significant financial burden on all municipalities within the state.\(^9\)

Based on these findings, the committee recommended a change in the tax statute, and, in 1971, the legislature adopted the committee's recommendations and amended the New York Real Property Tax Law.\(^10\) Part 1(a) of the statute provides for an unqualified tax exemption for the real property owned by corporations or associations organized or conducted exclusively for one of six purposes: "religious, charitable, hospital, educational, moral or mental improvement of men, women or children or cemetery purposes . . . .\(^11\) Additionally, the real property in question must be used exclusively for carrying out similar purposes.\(^12\) Because the statute continues tax exemption

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\(^8\) Id. at 35-36.
\(^9\) Id. at 34-35. The problem has shown no signs of abating since 1970. Recently published figures show that the Unification Church, commonly known as the Moon Sect, presently owns real estate valued conservatively at $25 million. (This value reflects the market value; the assessed valuation for tax purposes is significantly higher.) Most of the church's property is located in New York State and California, but there are "outposts" in almost every state. N.Y. Times, September 19, 1976, § 8, at 1, col. 1. Half of the citizens of Hardenburgh, N.Y., a town in the Catskill Mountains, have been ordained as ministers so as to achieve limited tax-exempt status in protest of the amount of tax-exempt property within their community. (The degrees were purchased from the Universal Life Church, a California organization profiting from the frustration of U.S. taxpayers.) "The total assessed value of property in Hardenburgh is $21 million, and $5 million of that is tax-exempt." The town's 236 residents must bear the resultant fiscal burden—in the past six years taxes have increased three to four times. The ordinations were planned to alert the State Legislature to the severity of the problem. Id., § 1, at 1, col. 1.
\(^11\) N.Y. Real Prop. Tax Law § 421(1)(a) (McKinney 1972): "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 . . . as hereinafter provided shall be exempt from taxation as provided in this section." Id.
\(^12\) Id.
for the real property of religious, educational and charitable organizations, Article XVI of the state constitution has not been violated.\(^\text{13}\)

Section 421(1)(b) of the statute contains provisions designed to limit the growing number of tax exemptions. It provides for a qualified tax exemption for the real property owned by those corporations or associations not organized or conducted exclusively for the six purposes enumerated in section 421(1)(a), but for one of fourteen other purposes, including bible, tract, and missionary purposes.\(^\text{14}\) The tax exemption for these organizations is qualified in the sense that these groups are exempt from taxation by the state, but the municipal corporation within which any real property of the organization is located is empowered to take away the exemption through adoption of a local law.\(^\text{15}\)

Pursuant to the grant of power provided in section 421(1)(b), New York City enacted New York City Local Law No. 46 in 1971\(^\text{16}\) denying tax-exempt status to real property belonging to all organizations listed in section 421(1)(b).\(^\text{17}\) The Tax Commission of the City of New York notified many previously exempted organizations of their new tax status effective January 1, 1972.\(^\text{18}\) Litigation challenging, \textit{inter alia}, the constitutionality of section 421 was initiated by several of these organizations.\(^\text{19}\) This Note will survey those

\(^{13}\) See note 2 supra and accompanying text.

\(^{14}\) N.Y. Real Prop. Tax Law § 421 (1)(b) (McKinney 1972); “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 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; 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 . . . adopts a local law . . . so providing.” Id.

\(^{15}\) Id.

\(^{16}\) “Taxation of property of non-profit organizations, pharmaceutical societies and dental societies.—1. Real Property owned by a corporation or association which is not organized or conducted exclusively for religious, charitable, hospital, educational 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 of such purposes either by the owning corporation or association, or by another such corporation or association . . . shall be taxable.” New York City Administrative Code § J51-3.0 (1975).

\(^{17}\) See note 14 supra and accompanying text.


cases which have challenged the statute and examine the manner in which the New York courts have answered, or failed to answer, the various constitutional issues raised.

THE INITIAL CASES

The cases of Association of the Bar v. Lewisohn\textsuperscript{20} and Explorers Club v. Lewisohn\textsuperscript{21} were the first Court of Appeals decisions which interpreted the statute. Both organizations claimed that their property was entitled to unqualified exemptions pursuant to section 421(1)(a)\textsuperscript{22} because it was owned by a charitable or educational organization and used exclusively for such purposes.\textsuperscript{23} They also argued that if the statute denied them an exemption it was violative of their constitutional guarantees of equal protection and due process of the law.\textsuperscript{24}


\textsuperscript{21} Id.

\textsuperscript{22} Id. at 149, 313 N.E.2d at 30, 356 N.Y.S.2d at 556.

\textsuperscript{23} Id. at 150-151, 313 N.E.2d at 30, 33-34, 356 N.Y.S.2d at 559-60. The Explorers Club lost at the trial level because Special Term decided that the Club's educational activities were incidental to its mainly scientific activities. 42 App. Div. 2d 537, 538, 344 N.Y.S.2d 723, 724 (1st Dep't 1973). Thus, Special Term classified the Club as being organized and conducted exclusively for educational purposes and not for educational purposes, thereby denying the Club unqualified tax-exempt status pursuant to section 421(1)(a). Id. The Appellate Division reversed, reasoning that research is necessary for education so that even though the Club engages in scientific research, such research is for educational purposes. Id. The Club's educational and scientific activities could not be considered separately. Id.

The Bar Association won at both the trial level and in the Appellate Division. 71 Misc. 2d 401, 336 N.Y.S.2d 338 (Sup. Ct. 1972), aff'd mem., 41 App. Div. 2d 1026, 344 N.Y.S.2d 972 (1st Dep't 1973), rev'd, 34 N.Y.2d 143, 313 N.E.2d 30, 356 N.Y.S.2d 555 (1974). The lower court concluded that the use of the petitioner's property was exclusively for bar association purposes and simultaneously exclusively for educational and charitable purposes. 71 Misc. 2d 401, 112-13,
In an opinion deciding both cases, the Court of Appeals denied the exemption to both petitioners and found the statute to be constitutional. The court set out determinative factors for classifying organizations under the statute. First the court examined the content of each organization's statement of purpose to determine if either of them was organized for educational or charitable purposes. It concluded that the Bar Association was organized for bar association purposes and the Explorers Club for scientific purposes.

The court noted that the prior tax-exempt classifications which both organizations had enjoyed were precisely the classifications now falling within the qualified exemption part of the statute. The court rejected petitioners' claims to unqualified exemptions as charitable or educational institutions, pointing out that neither of them had ever before made such a claim. The Court of Appeals then reversed the lower courts, holding that exclusively classifying an organization in only one category when it also pursued purposes of another category would render the statute void for vagueness. It stated that "'exclusive', as used in the context of these exemption statutes . . . [connotes] 'principal' or 'primary.'" Incidental purposes will not defeat exemption nor will they entitle the taxpayer to exemption. Thus, the court established a third determinative factor: the principal activities of each organization. The petitioners' bar association and scientific activities were found to be their principal activities and their educational and charitable functions were deemed to be incidental and peripheral.

336 N.Y.S.2d 338, 350 (Sup. Ct. 1972). (The organization maintained an extensive law library, made recommendations on candidates for judicial office, investigated misconduct by members of the Bar, made recommendations regarding legislation and provided legal assistance for the poor. 34 N.Y.2d 143, 149-50, 313 N.E.2d 30, 33, 356 N.Y.S.2d 555, 558-59 (1974).) It also stated that if the classifications within the statute were interpreted in accordance with the city's view as being mutually exclusive—i.e., no organization classified in part (1)(a) as religious could also be classified in part (1)(b) as bible and missionary—the statute would be void for vagueness. 71 Misc. 2d at 411, 336 N.Y.S.2d at 349. The mutual exclusivity approach would require that in order for an organization to be exclusively religious it must not engage in any activities which involve the use of the Bible or that for an organization to be exclusively educational it may not carry on any scientific or literary activities or maintain a library. Id. at 410, 336 N.Y.S.2d at 348. Such an interpretation of the statute would prohibit a reasonable man from knowing what is expected of him. Id. at 411, 336 N.Y.S.2d at 349.

The court also determined that the city's argument would render the statute void for "internal inconsistency and repugnancy . . . for containing provisions which are inharmonious, conflicting, contradictory, and irreconcilable, thusly rendering the statutes incapable of interpretation and enforcement." Id. at 411, 336 N.Y.S.2d at 349.

27. The Bar Association was classified as a bar association and the Explorers Club as a scientific organization. Id. at 154-55, 313 N.E.2d at 35-36, 356 N.Y.S.2d at 562-63.
28. See note 14 supra and accompanying text.
29. 34 N.Y.2d 151, 313 N.E.2d 34, 356 N.Y.S.2d 560.
30. See note 21 supra and accompanying text.
31. 34 N.Y.2d at 153, 313 N.E.2d at 35, 356 N.Y.S.2d at 561 (citations omitted).
32. Id. at 153, 313 N.E.2d at 35, 356 N.Y.S.2d at 561-62.
33. Id. at 153-54, 313 N.E.2d at 35-36, 356 N.Y.S.2d at 562-63.
The court briefly examined the constitutional issues and concluded that the statute did not violate the due process and equal protection clauses of the federal or state constitutions. The court asserted that the state is permitted to select the property it shall tax or exempt from taxes as long as the selection has a reasonable basis. The Constitution only prohibits "arbitrary or invidious classifications." The court placed heavy emphasis on the legislative determination that the overwhelming profusion of tax exemptions placed an undue financial burden on local governments and their taxpayers. Action was therefore necessitated to halt the erosion of municipal tax bases.

It is important to note that the constitutionality of the statute was established when the facts involved did not concern a religious organization. Therefore, first amendment issues were not considered.

The first case to challenge the statute on first amendment grounds was Watchtower Bible and Tract Society, Inc. v. Lewisohn. The Society was placed on the New York City tax rolls as of January 1, 1972 as a bible, tract or missionary society under part (1)(b). Special Term reinstated its exemption as a religious organization and the Appellate Division and Court of Appeals agreed. In rendering its decision the Court of Appeals added two more factors for determining classification under the statute: the organization's corporate name and the specific law under which the organization was incorporated. The court held that even though the Society's corporate name included the words "Bible and Tract Society," such nomenclature was not determinative of the Society's purposes. Neither was "[t]he fact that the [organization] is incorporated under the Membership Corporations Law instead of the Religious Corporations Law . . . decisive" in determining whether or not the corporation is organized or conducted exclusively for religious purposes.

34. Id. at 156, 313 N.E.2d at 37, 356 N.Y.S.2d at 564.
35. Id. at 156-57, 313 N.E.2d at 37, 356 N.Y.S.2d at 564-65.
36. The court noted the Joint Legislative Committee's figures showing that in 1967 more than 30 per cent of the assessed value of all real property throughout the state was tax-exempt and, in New York City, the percentage was 33.2. Id. at 155, 313 N.E.2d at 36, 356 N.Y.S.2d at 563. The court concluded that the legislature, by enacting the statute, clearly intended to halt this financial burden on the cities by permitting municipalities to end tax exemptions for any non-profit organizations other than the specific few listed in part (1)(a). Id. at 155-56, 313 N.E.2d at 36, 356 N.Y.S.2d at 563-64.
39. Id. at col. 2.
41. See notes 25-33 supra and accompanying text.
42. 35 N.Y.2d at 97, 315 N.E.2d at 803, 358 N.Y.S.2d at 760.
Prior cases, though not involved with the tax-exempt issue, had already determined that the Society is the governing board of a religious denomination and thus entitled to full first amendment protection. Case law had also determined that the Jehovah's Witnesses' house-to-house preaching method was religious activity entitled to first amendment protection. From these precedents, the court concluded that the Society was organized and conducted exclusively for religious purposes and entitled to tax exemption within the contemplation of the statute. However, since tax-exempt status was restored, the first amendment challenges to the statute's constitutionality were never reached.

In America Press, Inc. v. Lewisohn, a case which did not reach the Court of Appeals, an organization affiliated with a recognized religious denomination, the Roman Catholic Church, had its tax-exempt status reinstated. America Press publishes America, a weekly magazine, and Catholic Mind, a monthly magazine. The group was organized in 1909 at the behest of the general superior of the Jesuit order. The property in question serves as the residence for priests who publish the two magazines. The priests also hold religious services and conduct the activities of the John La Farge Institute, which is devoted to ecumenical and interracial concerns. The city's contention was that the publications consisted primarily of secular articles dealing with political and economic issues and, therefore, the organization was conducted exclusively for bible, tract or missionary purposes. The Appellate Division answered this argument rather forcefully:

It is clear... that the court is invited to join the argument of semantics as it pertains to what is, or is not, religious activity or exclusively religious activity. More particu

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46. 35 N.Y.2d at 98, 315 N.E.2d at 804, 358 N.Y.S.2d at 761.

47. Id. at 99, 315 N.E.2d at 804, 358 N.Y.S.2d at 761.


49. 74 Misc. 2d at 566, 345 N.Y.S.2d at 401.

50. Id.

51. 74 Misc. 2d at 563, 345 N.Y.S.2d at 398.

52. See id.
larly, it seems, the court is asked to sit in judgment as to the breadth of proper religious and canonical activity vouchsafed to the man of the cloth and when, if at all, he oversteps the bounds of religious call.\textsuperscript{53}

The court determined that America Press was not organized exclusively for bible, tract or missionary purposes\textsuperscript{54} nor could the organization be deemed a "separate, divisible nonreligious activity of the Jesuits."\textsuperscript{55} "Tax exemption may not be based . . . upon the carving out of activities from a larger group."\textsuperscript{56} The court also cited precedent supporting the same contention that had been determinative in \textit{Watchtower}: the furtherance of religion through publications is a religious activity entitled to the same first amendment protection as other forms of religious preaching.\textsuperscript{57} It should be noted that, as in \textit{Watchtower}, the return of America Press' tax-exempt status meant that the issue of the constitutionality of section 421 was not reached.\textsuperscript{58}


The recent decisions of \textit{American Bible Society v. Lewisohn}\textsuperscript{59} and \textit{Swedenborg Foundation, Inc. v. Lewisohn}\textsuperscript{60} have highlighted the controversial nature of the exemption statute. Both organizations were denied restoration of their tax-exempt status even though they asserted that their activities were religious in nature. Special Term had found that the activities of the Society consisting primarily of distribution of the Bible, are exclusively religious even though they are simultaneously exclusively "Bible."

\textit{... that religious and bible are mutually exclusive is to deny reality. One is an integral part of the other, and they cannot be considered separately.}\textsuperscript{61}

The Appellate Division reversed. It found that the Society was organized exclusively for bible purposes and that any incidental religious or educational

\begin{itemize}
\item \textsuperscript{53} Id. at 563, 345 N.Y.S.2d at 398-99.
\item \textsuperscript{54} Id. at 567, 345 N.Y.S.2d at 402.
\item \textsuperscript{55} Id. at 568, 345 N.Y.S.2d at 403.
\item \textsuperscript{56} Id. at 570, 345 N.Y.S.2d at 404.
\item \textsuperscript{57} Id. at 566, 345 N.Y.S.2d at 401.
\item \textsuperscript{58} Since the Court of Appeals denied the city's petition for appeal, the Appellate Division's decision stands. 38 N.Y.2d 708 (1976). The city's petition to appeal the Appellate Division's decision regarding the Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America was also denied. See In re Domestic & Foreign Missionary Soc'y v. Lewisohn, 169 N.Y.L.J., Jan. 30, 1973, at 16, col. 4 (Sup. Ct. 1973), aff'd mem., 48 App. Div. 2d 1013, 372 N.Y.S.2d 192 (1st Dep't 1975), appeal denied, 38 N.Y.2d 708 (1976). This society, like America Press, is affiliated with an established religious denomination.
\item \textsuperscript{61} 170 N.Y.L.J., Nov. 20, 1973, at 17, col. 1 (Sup. Ct. 1973).
\end{itemize}
benefits were insufficient to classify it as a tax-exempt organization. The Court of Appeals agreed, holding that a corporation organized and conducted exclusively for the purpose of publishing and distributing the Holy Bible, when neither the corporation nor its corporate activity is directly associated with a recognized religion or with an organization having as its avowed purpose the furthering of a recognized religion is not entitled to an unqualified tax exemption.

The court began its analysis by considering the Society's original purpose for incorporation—one of the factors established in Bar Association for classifying organizations under the statute. It determined that the Society's original purpose of "publishing and promoting a general circulation of the holy scriptures, without note or comment" remained as its current objective. The court then considered the Society's former tax-exempt status, another factor set forth in Bar Association, and concluded that the American Bible Society is organized and conducted exclusively for bible purposes and not for religious or educational purposes even though the effects of its activity will be the advancement of the Christian faith.

62. "The primary or main purpose of the petitioner is the dissemination or distribution of bibles, and as such, it comes within the category of a bible society. Accordingly, those benefits which are derived incidentally as a result of petitioner's primary activity, whether they be characterized as the promotion of religion, as the promotion of moral or mental improvement, or as educational, cannot serve to cast petitioner into the exempt category." 48 App. Div. 2d at 312, 369 N.Y.S.2d at 730.

63. 40 N.Y.2d at 81, 351 N.E.2d at 698, 386 N.Y.S.2d at 50.

64. 40 N.Y.2d at 82, 351 N.E.2d at 698, 386 N.Y.S.2d at 50.

65. See note 26 supra and accompanying text.


67. Id.

68. See note 27 supra and accompanying text. The court rejected the appellant's argument that the decision in People ex rel. American Bible Society v. Commissioners, 76 Hun. 491, 27 N.Y.S. 1058 (Sup. Ct. 1st Dep't) (per curiam), aff'd, 142 N.Y. 348, 37 N.E. 116 (1894), whereby the Society first gained tax-exempt status, is binding precedent for the classification of the American Bible Society as a religious organization. The court reasoned that the statute under consideration was substantially different from the former statute, so res judicata was inapplicable. 40 N.Y.2d at 84, 351 N.E.2d at 700, 386 N.Y.S.2d at 52. The stare decisis argument was also precluded because the issue in the earlier case was the effective date of the tax statute in question and not whether the American Bible Society was entitled to a tax exemption. See id. at 84, 351 N.E.2d at 700, 386 N.Y.S.2d at 52. The court discussed the history of the tax statute pointing out that in 1896 the classifications of bible and tract were added to the exempt classes and concluded that the legislative intent in enacting the amendment was to grant tax exemption to organizations "which would not have come under the pre-existing broad categorical umbrellas." Id. Thus, exemption was guaranteed to corporations organized exclusively for bible purposes regardless of whether or not they could be categorized as exclusively religious.

69. "There is, however, no reference in the Society's charter documents to Christianity or to religion. The promotion of religion in a broad or generic sense is the by-product of the accomplishment of the Society's corporate Bible purpose." Id. at 85, 351 N.E.2d at 700-01, 386 N.Y.S.2d at 53.
Watchtower was distinguished on the ground that the American Bible Society had no corporate affiliation with any denomination whose purposes were the furthering of a recognized religion nor were its bible activities directly connected with any religious sect. The court again placed strong emphasis on the legislature's intent in enacting section 421. It concluded that this section was intentionally designed to distinguish between religious and bible purposes and to allow bible societies to be taxed unless the particular organization's bible purpose was obviously incidental to a primary religious purpose. The court determined that the existence of "significant religious overtones" to a bible society's bible activities will not exempt it from taxation.

The court dealt with the constitutional issues by citing Bar Association to refute the due process and equal protection arguments. The legislature's intent to alleviate the fiscal problems of municipalities was held to be a rational reason for the change in the tax structure. Bar Association was also cited as support for the conclusion that the classifications within the statute were neither irrational nor vague.

In Swedenborg, the Swedenborg Foundation sought the return of its tax-exempt status. The Foundation's activities primarily involved the publication and distribution of the religious and philosophical writings of Swedenborg, an eighteenth century Swedish theologian, scientist and philosopher. The Foundation also provided the Church of the New Jerusalem, a religious organization following Swedenborg's teachings, with most of its copies of Swedenborg's writings, although the New Church published its own books of worship and hymnals.

The court began its analysis by considering the various factors it had established in Bar Association and Watchtower. The corporate name of the organization, the corporate purposes, the law under which it was incorporated, and the current principal activities of the organization. The court

70. Id.
71. Id. at 86, 351 N.E.2d at 701, 386 N.Y.S.2d at 53.
72. Id.; See notes 34-36 supra and accompanying text.
73. 40 N.Y.2d at 86, 351 N.E.2d at 701, 386 N.Y.S.2d at 53-54.
74. Id. at 86, 351 N.E.2d at 701-02, 386 N.Y.S.2d at 54.
75. 40 N.Y.2d 91, 351 N.E.2d 704, 386 N.Y.S.2d 56.
76. Id.
77. Id.
78. Id. at 93-94, 351 N.E.2d at 705-06, 386 N.Y.S.2d at 57-58. See text accompanying notes 25-33 supra.
79. Id. at 94, 351 N.E.2d at 706, 386 N.Y.S.2d at 58. See text accompanying notes 41-43 supra.
80. The Foundation was originally incorporated "as 'The American Swedenborg Printing & Publishing Society' under an 1848 act providing for the incorporation of 'benevolent, charitable, scientific and missionary societies.' " 40 N.Y.2d at 90, 351 N.E.2d at 703, 386 N.Y.S.2d at 55 (citation omitted). The original corporate purposes were "'the printing, publishing and circulating [of] the Theological Works and Writings of Emanuel Swedenborg for charitable and missionary purposes [sic].' " Id. The corporate name was changed to Swedenborg Foundation,
then went on to find that the primary purpose of the Foundation was not religious. This conclusion was based on the holding in *American Bible Society* that “[n]either the corporation nor any corporate activity is directly associated with an organized religious denomination or with an organization having as its avowed purpose the furthering of a recognized religion.”

Even though most of the Foundation's 317 “life members” were simultaneously members of the New Church, and all 16 of the Foundation’s board of directors were members of the New Church, the court found the two organizations to be “legally unrelated.”

The Foundation’s relationship with the New Church was deemed to be of “incidental significance only” as compared to the relationship between the Watchtower Bible and Tract Society and the Jehovah's Witnesses. No religious purpose was stated in the Foundation’s charter and “a significant portion” of the Foundation’s publications were scientific or philosophical rather than theological. “The most that can be said is that the foundation and the New Church share a common interest.” The court’s treatment of the constitutional issues in *Swedenborg* was simply to reject the Foundation’s claims that it had been denied equal protection and due process citing *American Bible Society*.

Thus, to secure an exemption as a religious organization a publishing organization must be able to prove an affiliation with a recognized religious denomination. New York has promulgated a narrow definition of that affiliation. In *American Bible Society* the court noted that there was no corporate

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81. Id. at 90-91, 351 N.E.2d at 703-04, 386 N.Y.S.2d at 55-56.
82. Id. at 94, 351 N.E.2d at 706, 386 N.Y.S.2d at 58 (citation omitted)
83. Id. at 91, 351 N.E.2d at 704, 386 N.Y.S.2d at 56.
84. Id. at 94, 351 N.E.2d at 706, 386 N.Y.S.2d at 58.
85. Id.
86. Id.
87. “Finally we reject appellant’s arguments predicted on asserted denials of equal protection of the law and of due process (Matter of American Bible Soc. v. Lewisohn, 40 N.Y.2d 78, supra, decided herewith).” Id. at 95, 351 N.E.2d at 707, 386 N.Y.S.2d at 59 (emphasis omitted). See text accompanying notes 72-74 supra.
affiliation between the Society and "an organized religious denomination or with an organization having as its avowed purpose the furthering of a recognized religion . . . ." 88 The court also determined that the Society's corporate activity—publication and distribution of the Bible—was not directly associated with a religious denomination or an organization furthering a recognized religion. 89 In Swedenborg, the court again noted that the Foundation and the Church of the New Jerusalem were "legally unrelated." 90 While an association did exist between these two organizations, 91 the Court of Appeals determined that the Foundation's activity was not directly associated with the New Church. 92 Thus either a legal relationship between the organization seeking tax-exempt status and a religious denomination or a direct association between the activities of the organization and a religious denomination appear to be the essential alternative bases for affiliation.

**EVALUATION**

Under the American Bible Society/Swedenborg test the following result seems plausible. Organization X's sole purpose, as set forth in its charter, and its principal exclusive activity is to publish and distribute prayer and religious books to the general public. However X could not be classified as a religious organization under New York law unless a legal relationship existed between X and an organized religious denomination or an organization whose purpose is to further a recognized religion. In contrast, organization Y's sole purpose, as set forth in its charter, and its principal exclusive activity is also to publish and distribute prayer and religious books to the general public. However, church Z owns stock of organization Y. Therefore, Y would be granted tax-exempt status as a religious organization because it has a legal affiliation with an organized religious denomination. Thus, under the New York test for applying section 421, the classification of organizations as religious and the subsequent granting of tax-exempt status may turn on whether the organization conforms to a structural scheme required by the state.

**Free Exercise**

The argument can be made that insistence on a particular organizational scheme violates the free exercise clause in that the state is interfering with the right of religious organizations to structure themselves as they see fit and this interference unconstitutionally infringes on the free exercise of religion.

The free exercise clause of the first amendment involves both the freedom to believe and the freedom to act according to that belief. 93 The freedom to believe is absolutely protected but the freedom to act may be regulated. The test of such regulation is that it must attain a permissible end without unduly infringing the free exercise of religion. 94

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88. 40 N.Y.2d at 81, 351 N.E.2d at 698, 386 N.Y.S.2d at 50.
89. Id.
90. See note 83 supra and accompanying text.
91. See notes 82-86 supra and accompanying text.
92. 40 N.Y.2d at 94, 351 N.E.2d at 706, 386 N.Y.S.2d at 58.
94. Id. at 303-04.
While what is meant by undue infringement is far from clear, some relevant precedent appears to indicate that the American Bible Society/Swedenborg corporate affiliation test violates the free exercise clause. In Kedroff v. Saint Nicholas Cathedral, a schism developed between the Russian Orthodox churches in the United States and the mother church in Russia. The Patriarch of Moscow and the Convention of American Churches both claimed the right to administer the Saint Nicholas Cathedral in New York City. New York attempted to settle this dispute by enacting legislation transferring the administration of the United States Russian Orthodox churches to the American organization. The New York law was struck down as "[i]t prohibits . . . the free exercise of religion." The court stated that religious organizations should have the "power to decide for themselves, free from state interference, matters of church government . . . ." In Kreshik v. Saint Nicholas Cathedral, the Court made clear that it makes no difference whether the dispute is settled by legislative or judicial action: both forms of state interference are prohibited by the first amendment.

The rationale of Kedroff and Kreshik might well require that all religious organizations have unfettered discretion to determine their organizational structure. However, Kedroff is distinguishable from American Bible Society and Swedenborg as the former involved a hierarchical church embroiled in a controversy as to which group within the church governed the hierarchy. Had the legislation not been struck down, state power would have been utilized "for the benefit of one segment of a church." Further, all institutions involved were clearly churches or organized religious denominations. Neither American Bible Society nor Swedenborg involved a conflict within the hierarchy of a church; nor was there any danger that the state would be, in deciding these cases, benefitting one segment of a church at the expense of another. The issue was whether an organization should be recognized as being religious as defined by law.

However, Kedroff's relevance to American Bible Society and Swedenborg lies in its indication that the Court has taken a restrictive view of what actions a state can take respecting the internal organization of religious institutions. This approach was evidenced on various occasions, and was most recently illustrated in Serbian Eastern Orthodox Diocese v. Milivojevich. There the Court rejected what it termed earlier dictum which had indicated that

95. 344 U.S. 94 (1952).
96. Id. at 100-06.
97. Id. at 97-99.
98. Id. at 107.
99. Id. at 116.
100. 363 U.S. 190 (1960).
101. Id. at 191.
102. 344 U.S. at 119. As Mr. Justice Frankfurter pointed out, "[w]hat is at stake here is the power to exercise religious authority." Id. at 121 (concurring opinion).
decisions of hierarchical churches could be reviewed by the state judiciary if they were arbitrary.\textsuperscript{105} While \textit{Milivojevich} is distinguishable from the \textit{American Bible Society} and \textit{Swedenborg} cases for the same reasons as \textit{Kedroff}, it is submitted that the Court's continuously asserted restrictive view as to what actions a state may take respecting the internal structure of an organization recognized to be religious\textsuperscript{106} may well cause it to condemn, as an undue infringement on free exercise, New York's insistence that an organization conform to a state imposed structural scheme in order to be deemed a religious organization. It seems that upholding the \textit{American Bible Society/Swedenborg} test would be allowing the state to do indirectly what cannot be done directly.

However, the possibility exists that the statute does not \textit{unduly} infringe on free exercise. The Supreme Court has determined that "[t]o strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, \textit{i.e.}, legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature."\textsuperscript{107} The state faces a dilemma in trying to delineate between commercial publishing houses which publish Bibles and religious books for economic profit and religious publishing houses which publish the same materials for religious purposes. It may be, therefore, that the \textit{American Bible Society/Swedenborg} corporate affiliation test would withstand constitutional analysis because the test leads to a permissible end without unduly infringing the free exercise of religion.\textsuperscript{108}

The free exercise argument may also fail in the absence of a finding that the \textit{American Bible Society/Swedenborg} test coerces organizations to follow its structural mandates. In \textit{Kedroff}, the legislative enactment demanded compliance by the Eastern Orthodox Church, and in \textit{Kreshik} a judgment mandated compliance. Under the New York tax statute an organization does not have to comply with the \textit{American Bible Society/Swedenborg} test: failure to comply would merely mean payment of the same tax non-religious organizations pay.\textsuperscript{109} However, while the statute on its face does not mandate

\textsuperscript{105} "[N]o 'arbitrariness' exceptio—in the sense of an inquiry whether the decisions of the highest ecclesiastical tribunal of a hierarchical church complied with church laws and regulations" exists. Id. at 715. For a thorough discussion of the \textit{Milivojevich} case see 45 Fordham L. Rev. 992 (1977).

\textsuperscript{106} "Indeed, final authority with respect to the promulgation and interpretation of all matters of . . . internal organization rests with the Holy Assembly . . . ." 426 U.S. at 715-16 (emphasis deleted).


\textsuperscript{108} It should also be noted that the corporate affiliation test may be viewed as infringing on the exercise of the entire Christian faith in New York State rather than on only one particular denomination. If several denominations, in the spirit of ecumenism, organized an effort to establish an inter-denominational publishing house without corporate ties to any individual denomination, that publishing house would apparently be denied tax-exempt status. Thus, the \textit{American Bible Society/Swedenborg} test may effectively stymie ecumenical attempts within the Christian faith.

\textsuperscript{109} The issue involved is not that the tax itself is an infringement on free exercise, rather the
compliance, if the effect of the statute is to coerce compliance, a court must analyze the statute's constitutionality as if it demanded compliance.\textsuperscript{110} The Court has recognized that taxing a religious organization represents a burden.\textsuperscript{111} It follows that an organization will attempt to ease this burden through conformity to the \textit{American Bible Society}/\textit{Swedenborg} requirements. Whether this natural tendency will rise to the level of state coercion is likely to turn, in a particular case, on the ability of the organization in question to prove it required the exemption to survive or, at least, would be severely affected by not obtaining it.

\textit{Establishment Clause}

In \textit{Lemon v. Kurtzman},\textsuperscript{112} the Court set forth three tests\textsuperscript{113} for determining whether a statute conforms with the establishment clause: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the statute must not foster ‘an excessive government entanglement with religion.’”\textsuperscript{114} While there is no doubt that section 421 has a valid legislative purpose—the halting of the erosion of the tax base throughout the state—this is the only “prong” of the \textit{Lemon} test which does not present a problem.

The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion . . . over another . . . . Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and \textit{vice versa}. In the words of Jefferson, the clause against establishment of religion by law was intended to erect “a wall of separation between church and State.”\textsuperscript{115}

Later cases have revealed that this “wall of separation” is not an absolute one.\textsuperscript{116} There is “room for play in the joints productive of a benevolent neutrality”\textsuperscript{117} which is neither sponsorship nor hostility, but what will not be

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\item[110.] Yick Wo v. Hopkins, 118 U.S. 356, 367 (1886).
\item[112.] 403 U.S. 602 (1971).
\item[113.] The use of the word test needs to be qualified: “There are always risks in treating criteria discussed by the Court from time to time as ‘tests’ in any limiting sense of that term. Constitutional adjudication does not lend itself to the absolutes of the physical sciences or mathematics. The standards should rather be viewed as guidelines with which to identify instances in which the objectives of the Religion Clauses have been impaired. And, as we have noted . . . candor compels the acknowledgement that we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication.” Tilton v. Richardson, 403 U.S. 672, 678 (1971) (citations omitted).
\item[114.] Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (citation omitted).
\item[115.] Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947).
\item[116.] “The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State.” Zorach v. Clauson, 343 U.S. 306, 312 (1952).
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tolerated is "either governmentally established religion or governmental interference with religion." 1118 Although this language seems clear, what will be found to establish or interfere with religion is usually a close question, with results altered by what might appear to be small factual differences. 1119 Thus, recognizing that it is hazardous to place "too much weight on a few words or phrases of the Court," 1120 it seems that an adjudication preferring religious organizations which conform to a structural scheme imposed by the state is probably unconstitutional. New York, through its refusal to declare an organization religious based solely on its failure to conform to the structure the state requires, appears, through the denial of tax exemptions, to be "hostile" to these organizations. A state statute which tends to control the form a religious organization must take suggests the "kind of involvement that would tip the balance toward government control of churches . . . ." 1121

Thus far this Note has concentrated upon the definition of affiliation promulgated in American Bible Society and Swedenborg as that of corporate or legal affiliation. It should be noted, however, that the Court of Appeals has stated that the affiliation must be with "an organized religious denomination or with an organization having as its avowed purpose the furthering of a recognized religion . . . ." 1122 The terms "organized" and "recognized" are troublesome and seem to indicate that tax exemptions will only be granted to those organizations affiliated with a state-recognized religion. The implication that a state has the power to acknowledge that a religion exists but refuse to recognize it is unconstitutional for the same reasons outlined in the above establishment clause argument. 1123 In fact, the Supreme Court, in upholding the constitutionality of the granting of tax exemptions by New York to religious organizations, stressed that no one religion or religious group was singled out for special treatment. 1124 Recognizing some religions and not others would clearly contravene the directive against singling out certain religions. However, the Court of Appeals in American Bible Society and Swedenborg has not refused to recognize as religious any organization to which an affiliation was claimed. Rather, the cases turned on affiliation, not recognition. Hopefully the word "recognized" will be deleted in future cases as it has not been a determinative factor and, in light of the first amendment, cannot be.

The second alternative of the American Bible Society/Swedenborg test—that corporate activity of the organization seeking tax exemption be directly
associated with a religious denomination—violates the third prong of the Lemon test by fostering excessive government entanglements. In Lemon, Rhode Island enacted a statute authorizing state officials to supplement salaries of elementary school teachers of secular subjects. The statute was struck down as, inter alia, it would require a “comprehensive, discriminating, and continuing state surveillance” to insure that a teacher was, in fact, teaching secular subjects. By contrast, in Tilton v. Richardson, which involved construction grants to higher educational facilities, no excessive entanglements were found. The Court, inter alia, noted that the grants were one-time expenditures and there were “no continuing financial relationships or dependencies, no annual audits, and no government analysis of an institution’s expenditures . . . .” While none of these factors were controlling, the absence of all three indicated that the entanglements were not significant.

The second alternative of the American Bible Society/Swedenborg test necessitates a vague standard of affiliation to satisfy the obscure notion of a “direct association.” To enforce this standard, a state surveillance which is comprehensive and discriminating would be mandated to insure that the association is close enough to justify tax-exempt status. There would, most likely, be annual audits and a “government analysis of an institution's expenditures” would be called for. Fact-finding hearings involving testimony from the relevant officials are conceivable. Additionally, the state surveillance is likely to be continuous. If, for example, an organization in question succeeds in being declared religious for one year, the tax authorities are free to challenge the exemption in a subsequent tax period, arguing that the organization and its affiliated church have drifted apart. Conversely, if the organization lost, the next year it may argue that the bonds between it and its affiliated church have solidified. Thus, in contrast to Tilton, there would be “continuing financial relationships or dependencies . . . .” In sum, all the elements which caused the Lemon court to find excessive entanglements would be present and all those elements whose absence led the Tilton court to find no excessive entanglements would also be present.

There are, of course, times when a court must, as in Walz, make a choice between two roads, each of which would cause some state contact with religion. However, in Walz, one course—the failure to grant exemptions—would lead to excessive entanglements, while the other—the granting of exemptions—would not offend the establishment clause. Here, either attempt to enforce the statute seems to violate the prohibition against the establish-

125. See note 114 supra and accompanying text.
127. Id. at 619.
128. 403 U.S. 672 (1971).
129. Id. at 688.
130. Id.
131. Id.
132. Id.
134. 403 U.S. at 688.
ment of religion: to employ the legal control test appears to advance or inhibit religion, while the direct association test fosters excessive government entanglements.

The conclusion, then, appears inescapable: the attempt of section 421 to separate organizations which publish religious material from religious organizations has not succeeded. The borderline between these two types of organizations is so vague that the statute cannot be enforced without violating the establishment clause. Thus, section 421, in as much as it purports to do this, is unconstitutional.

CONCLUSION

There is no doubt that the question of what constitutes a religious organization as defined by law is a complex area wherein the interests of the economically-bereft municipalities clash with the constitutional guarantee of freedom of religion. It is no easy task to reconcile these forces. However, an acceptable reconciliation is not obtained by avoiding the constitutional issues. In neither American Bible Society nor Swedenborg did the Court of Appeals fully address the constitutional issues involved in applying section 421 to religious organizations. Undoubtedly, the question will arise again; when it does, the first amendment issues should be dealt with squarely.

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