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# TAX EXEMPTIONS AND THE ESTABLISHMENT CLAUSE

Erika King<sup>†</sup>

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## INTRODUCTION

Churches are exempted from a variety of taxes collected by the vari-

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ous levels and jurisdictions of government in the United States. For instance, they are almost always exempt from payment of property tax at the local level<sup>1</sup> and from payment of income tax to both state and federal government.<sup>2</sup> They are often exempt from payment of state sales tax on the products they sell.<sup>3</sup> A person making a contribution to a religious organization is usually entitled to deduct the contribution from his income when calculating both his state and his federal income taxes at the end of the taxable year.<sup>4</sup> A minister is usually allowed to exclude from his taxable income the rental value of the home provided to him by his church, or the cash allowance paid to him by his church for the securing of a home, when calculating both his state and federal income taxes.<sup>5</sup>

This article provides an overview of the history and practice of religious tax exemption in America and addresses whether religious tax exemptions violate the Establishment Clause of the United States Constitution,

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1. See, e.g., N.C. GEN. STAT. §§ 105-278.3 (1995) (exempting from property tax real property used for religious purposes), 105-278.4 (educational purposes), 105-278.6 (charitable purposes), 105-278.8 (charitable educational purposes); WIS. STAT. § 70.11 (1997) (exempting from property tax property owned and used exclusively by churches or religious, educational, or benevolent institutions); ALA. CONST. art. 4, § 91 (providing that legislature shall not tax property "used exclusively for religious worship").

2. See, e.g., 26 U.S.C. § 501(c)(3) (1994) (exempting from income tax "corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes"); N.M. STAT. ANN. § 7-2-4 (1988) (exempting from income tax "religious, educational, benevolent, or other organizations not organized for profit which are exempt from income taxation under the Internal Revenue Code").

3. See, e.g., N.C. GEN. STAT. § 105-164.13(31)(a) (1998) (exempting from sales tax food sold by church when proceeds of sale are used for religious activities). The Supreme Court ruled in 1990 that a sales tax exemption on products sold by a religious organization was not required by either the Free Exercise Clause or the Establishment Clause. *Jimmy Swaggart Ministries v. Board of Equalization of Cal.*, 493 U.S. 378, 398 (1990).

4. See, e.g., 26 U.S.C. § 170 (1994) (allowing charitable contribution deduction including for contributions to religious organizations); N.J. STAT. ANN. § 54:8A-37(b)(4) (1998) (allowing "deducting of any charitable contribution not in excess of 10% of the taxpayer's gross income which is made by the taxpayer within the taxable year to a religious organization, an educational organization, [etc.]").

5. See, e.g., 26 U.S.C. § 107 (1994) ("In the case of a minister of the gospel, gross income does not include—(1) the rental value of a home furnished to him as part of his compensation; or (2) the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home."); W.VA. CODE § 11-3-9 (1966) (exempting from property tax "parsonages, and the household goods and furniture pertaining thereto"). Other types of religious tax exemption could be added to this short list. See, e.g., MONT. CODE ANN. § 15-6-201(b) (1997) (exempting from property tax residences of the clergy); N.C. GEN. STAT. § 105-3(2) (exempting from inheritance tax property passing to churches, hospitals, and orphanages); see also Arvo Van Alstyne, *Tax Exemption of Church Property*, 20 OHIO ST. L.J. 1 (1958) (useful, if somewhat dated, overview of religious exemptions in state tax codes).

which provides that "Congress shall make no law respecting an establishment of religion."<sup>6</sup> It is the thesis of this article that, in light of the history of both tax exemptions and the clause itself, and despite the conventional wisdom that tax exemption is tantamount to a subsidy, religious tax exemptions do not violate the Establishment Clause ban on direct aid to religion; that neither religious tax exemptions nor taxation of religious entities violates the prohibition on entanglement of church and state; but that, depending on the larger legislative scheme in question, and whether conventional charitable institutions are similarly exempted, religious tax exemptions may violate the norm of "equal treatment" also embodied in the clause. It is the goal of this piece to cast doubt on the current tendency of courts and commentators casually to refer to tax exemptions as "subsidies" without exploring the implications of the word choice and to urge a renewed look at the "equal treatment" and "religious gerrymandering" theories of Justice Harlan.

## I. RELIGIOUS TAX EXEMPTIONS

### A. *The Lesson From History*

Religious tax exemptions extend as far into the past as do written records, and the literature addressing this history is vast. It indicates that the raising of revenue and the exempting of religious entities have varied tremendously over time. Nevertheless, the information available suggests that the decision whether and how to tax or to exempt churches tends to reflect the relative power of sovereign and church. Exemptions for priests and temples in ancient Egypt, Sumeria, Babylon, and Persia, for example, were

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6. U.S. CONST. amend. I. Twenty-seven years ago the Supreme Court ruled that the Establishment Clause does not forbid a city to exempt religious organizations from payment of property tax, at least when other nonprofit entities are also exempt from that tax. *Walz v. Tax Comm. of N.Y.*, 397 U.S. 664, 673 (1970). Although there have been no further Supreme Court rulings on religious tax exemptions (state or federal) and the Establishment Clause, there have been lower court and state court rulings, and there has been no shortage of secondary literature. Often building on Boris Bittker's seminal 1969 article written in anticipation of the *Walz* decision, Boris Bittker, *Churches, Taxes, and The Constitution*, 78 YALE L.J. 1285 (1969), the vast majority of these pieces address discrete sub-topics, such as the parsonage exclusion of the federal income tax code or religious tithing in bankruptcy. See, e.g., Dean T. Barham, *The Parsonage Exclusion Under the Endorsement Test: Last Gasp or Second Wind*, 13 VA. TAX REV. 397 (1993); Maggie Flynn, *Witchcraft and Tax Exempt Status Under Section 501(c)(3) of the Internal Revenue Code*, 21 U.S.F. L. REV. 763 (1987); Matthew W. Foster, Note, *The Parsonage Allowance Exclusion: Past, Present, and Future*, 44 VAND. L. REV. 149 (1991); Terry L. Slye, *Rendering Unto Caesar: Defining "Religion" for Purposes of Administering Religious-Based Tax Exemptions*, 6 HARV. J.L. & PUB. POL'Y 219 (1983).

the necessary byproduct of a very uneasy relationship between palace and temple—one of shared power and yet constant competition for actual authority. In the ancient world, the decision not to tax was largely a decision not to antagonize.<sup>7</sup> The combination of wealth, power, and exemption in the hands of the temples created a genuine problem for the ancient economies that would later be noted by James Madison—the economic instability that can result when large amounts of productive property are owned by entities that are tax-exempt.<sup>8</sup> Under Ramses II, for instance,

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7. Professor Durant notes, for instance, that in ancient Babylon the priests were simply more powerful than the kings. DURANT, *OUR ORIENTAL HERITAGE* 234 (1954). Much evidence of ancient practices of tax exemption can be found scattered throughout the Old Testament. See, e.g., *Genesis* 47:26 (“Joseph made it a law over the land of Egypt unto this day, that the Pharaoh should have the fifth part; except the land of the priests only.”) (reign of Ramses II, 1300-1233 b.c.); *Ezra* 7:24 (“It shall not be lawful to impose toll, tribute, or custom upon . . . priests . . . or ministers of the house of God.”) (reign of Solomon, 974-937 b.c.). See generally Durant, *supra*; John W. Whitehead, *Tax Exemption and Churches: A Historical and Constitutional Analysis*, 22 CUMB. L. REV. 521, 524-28 (1991-92); John D. Colombo, *Why Is Harvard Tax Exempt (And Other Mysteries of Tax Exemption For Private Educational Institutions)*, 35 ARIZ. L. REV. 841, 845 n.12 (1993). See also MARTIN A. LARSON & C. STANLEY LOWELL, *PRAISE THE LORD FOR TAX EXEMPTION* 10-11 (1969) for a cataloging and contextualizing of Old Testament references to tax exemption.

8. Particularly late in his life, Madison spoke out against church acquisition of property. “There is an evil,” he wrote, “which ought to be guarded [against] in the indefinite accumulation of property from the capacity of holding it in perpetuity by ecclesiastical corporations.” JAMES MADISON ON RELIGIOUS LIBERTY 89-94 (Alley, ed., 1985) (excerpts from *The Detached Memoranda*, in WILLIAM AND MARY QUARTERLY (1946)). Indeed, he argued, “[t]he excessive wealth of ecclesiastical Corporations and the misuse of it in many Countries of Europe . . . has long been a topic of complaint.” *Id.* In fact, in some of these countries, “the Church has amassed half perhaps the property of the nation.” *Id.* These concerns were also echoed in letters he wrote at the time. See, e.g., Letter to J. K. Pauldin (March 10, 1897), reprinted in 9 WRITINGS OF JAMES MADISON 281; Letter to Reverend Adams (1832), reprinted in 9 WRITINGS OF JAMES MADISON 487. A number of people have inferred from these writings that the Establishment Clause itself, drafted by Madison some twenty or thirty years earlier, was meant to prohibit religious tax exemptions. See, e.g., Robert Maddox, *Churches and Taxes: Should We Praise the Lord for Tax Exemptions*, 22 CUMB. L. REV. 471, 472 (1991-92). Similar inferences are drawn from other comments in his later writings—particularly the misgivings he expressed about the use of chaplains in Congress and in the national army and navy and about religious proclamations issued by the executive. See, e.g., Kyle D. Freeman, Note, *Robinson v. City of Richmond: Establishment Clause Jurisprudence and a Case for Governmental Acknowledgment of the Historical Role of Religion*, 32 TULSA L.J. 605, 617 n.157 (1997) (arguing Madison “recanted” the constitutionality of congressional chaplains); Verna Sanchez, *All Roads Are Good: Beyond the Lexicon of Christianity in Free Exercise Jurisprudence*, 8 HASTINGS WOMEN’S L. J. 31, 32 n.7 (1997) (presidential religious proclamations and chaplain system); Jonathan C. Drimmer, *Hear No Evil, Speak No Evil: The Duty of Public Schools to Limit Student-Proposed Graduation Prayers*, 74 NEB. L. REV. 411, 415 n.15 (1995) (chaplains); Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 837, 952-53 (1995) (chaplains). Although it is clear that Madison worried that the concentration of property (power) in

priests owned as much as one-seventh of Egypt's productive land, which may have been partly responsible for the regime's ultimate economic collapse.<sup>9</sup>

Similarly, much has been written about Henry VIII's decision to confiscate the vast wealth of the Church once he severed ties with Rome in the sixteenth century.<sup>10</sup> A century later Oliver Cromwell, too, would levy stiff taxes on church property.<sup>11</sup> These and other examples demonstrate the very real threat to a church's existence when the ability to tax is wielded by a sovereign bent on destruction (or at least subordination) of the institution. It is no surprise, then, that when medieval European monarchs taxed the church to support their wars, the papacy rebelled—Pope Boniface argued, when monasteries in England and France faced such taxation by Philip IV and Edward I in 1294, that the freedom of the Church was grounded in its economic independence.<sup>12</sup>

Modern separation theory—the American commitment to a “wall of separation” between church and state—relies in part on this historical record for the proposition that separation protects and preserves both religious liberty and the political arena.<sup>13</sup> There is in fact considerable evidence that the American “experiment of the mutual independence of religious and political sovereignties” resulted from a desire to avoid precisely this “continual struggle for supremacy between Prince and Pope.”<sup>14</sup> Thus the writings of Roger Williams, the Baptist founder of Rhode Island to whom the metaphor of the wall is traced, reflect the notion that there should be a “hedge or wall of separation between the garden of the church and the wilderness of the world.”<sup>15</sup> Separation was justified, Williams believed, by

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churches was a threat to religious liberty, it is not clear from the *Detached Memoranda* that he viewed taxation as a way to discourage accumulation of property/power. In any event, the focus of these essays was not the federal constitution or the constitutional notion of establishment; it was the principle of “religious liberty” and “equal rights.” The writings read more like essays on practices that endanger religious freedom (and the Virginia General Assembly did vote down a religious tax exemption while he was a delegate, although his own vote on the matter is unrecorded) than like an explanation of what the Establishment Clause would have prohibited had it applied to the states.

9. Colombo, *supra* note 7, at 845 n.12; see also DURANT *supra* note 7, at 214; LARSON & LOWELL, *supra* note 7, at 10.

10. See, e.g., J.J. SCARISBRICK, HENRY VIII 241-338 (1968) (on the Henrician Reformation); see also *id.* at 536-42 (bibliography referencing secondary sources on the economic aspect of this reformation).

11. Whitehead, *supra* note 7, at 530.

12. *Id.* at 530-31; DURANT, *supra* note 7, at 812-13.

13. Whitehead, *supra* note 7, at 545.

14. LEO PFEFFER, CHURCH, STATE & FREEDOM 16-17 (1953).

15. Robert S. Peck, *The Threat To The American Idea Of Religious Liberty*, 46 MERCER L. REV. 1123, 1129 (1995) (quoting Williams that there should be a “hedge or wall

the necessity of keeping the state out of the affairs of church, lest church be subordinated to the state. Once the wall was broken down, he argued, "the authority and power of the government would corrupt the churches."<sup>16</sup> Jefferson added—most famously in an 1802 letter to the Danbury Baptist Association—that the wall would also "keep the church out of the business of government, lest the government be subordinated to the church."<sup>17</sup> Over the last two centuries, many American political theorists and theologians have argued that by reducing government regulation and oversight of religious bodies, and by reducing formal contact between church and state, tax exemption furthers separation in the Jefferson/Williams sense. And this much is certain: exemption decreases the possibility of a Cromwellian effort to subjugate religious organizations through oppressive taxation, and thus presumably protects religious liberty.<sup>18</sup>

### B. *The American Experience*

The practice of "establishing" a church by force of law made its way across the Atlantic with the early colonists. So, too, did the tendency to exempt churches from taxation.<sup>19</sup> Each colony was a political culture unto itself: the practice of establishment varied, the practice of tax collection varied, and the practice of tax exemption varied.<sup>20</sup>

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of separation between the garden of the church and the wilderness of the world"); see also PAUL J. WEBER & DENNIS A. GILBERT, *PRIVATE CHURCHES AND PUBLIC MONEY: CHURCH-GOVERNMENT FISCAL RELATIONS* 4 (1981).

16. WEBER & GILBERT, *supra* note 15, at 4.

17. LEONARD LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 246 (1944); Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 4 (1961) ("[Separation] is justified in Williams' terms by the necessity for keeping the state out of the affairs of the church, lest the church be subordinated to the state; in Jeffersonian terms its function is to keep the church out of the business of government, lest the government be subordinated to the church."); John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Framework*, 71 NOTRE DAME L. REV. 371, 400 (1996) (Jefferson "tied the principle of separationism directly to the principle of liberty of conscience").

18. See *Agostini v. Felton*, 521 U.S. 203, 243 (1997) (Souter, J., dissenting) ("[T]he flat ban on subsidization . . . expresses the hard lesson learned over and over again in the American past and in the experiences of the countries from which we have come, that religions supported by governments are compromised just as surely as the religious freedom of dissenters is burdened when the government supports religion.") (citing Madison and Williams).

19. John Witte, Jr., *Tax Exemption of Church Property: Historical Anomaly or Valid Constitutional Principle?*, 64 S. CAL. L. REV. 363, 368-80 (1991); see also Colombo, *supra* note 7, at 844 (Religious and educational institutions "were exempted from local taxes from the beginning.").

20. See Witte, *supra* note 19, at 372-78 (overview of tax exemptions in colonial Virginia, North Carolina, South Carolina, Massachusetts, Connecticut, and New Hampshire);

There is considerable dispute as to how many colonies had an "established church" and what exactly it is that one is counting.<sup>21</sup> One estimate holds that at the time of the Revolution, established churches existed in at least ten of the thirteen colonies—the Anglican Church of England in Virginia, Maryland, South Carolina, North Carolina, and Georgia; the Congregational Church in Massachusetts, Connecticut, and New Hampshire; the Episcopal Church in New York; and the Dutch Reformed Church in New Jersey.<sup>22</sup> If one looks to states that disbursed tax revenue to a church or churches, in the years immediately following the revolution (i.e., the years leading up to the ratification of the Establishment Clause), nearly every state had a law "establishing religion."<sup>23</sup>

In some instances, a state merely authorized its towns to establish a religion, limited to the Protestant sects, which would be supported by taxes raised from all the residents in the town. This was the pattern in New England, the result being that the established religion in one town might well be the dissenting religion in another.<sup>24</sup> Often a dissenting individual had the option of directing his money toward a Protestant sect of his own choosing, although not, apparently, to "no sect whatsoever."<sup>25</sup> Disestablishment also took a different path in each state, the pace varying considerably.<sup>26</sup> By 1787, for example, Virginia, New York, Maryland, and North

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see also CAROLYN WEBER, A HISTORY OF TAXATION AND EXPENDITURE IN THE WESTERN WORLD 363 (1986). Weber notes, for instance, that colonial New England favored direct taxation of personal property, house, and land, while the Southern colonies favored indirect taxes on exports and imports. Both imposed the poll tax with a considerable number of exemptions; in New England, for instance, governors, schoolteachers, ministers, invalids, and Harvard College students were exempt.

21. See Jed Rubenfeld, *Anti-disestablishmentarianism: Why RFRA Really Was Unconstitutional*, 95 MICH. L. REV. 2347, 2351-57 (1997).

22. Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2099 (1996); see also ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 4 (1982) (listing established churches in nine of the thirteen colonies). See generally SANFORD H. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA: A HISTORY (1902).

23. Rubenfeld, *supra* note 21, at 2351; see also PFEFFER, *supra* note 14, at 92 (At the time of the Revolution, "compulsory support of religion was the rule rather than the exception" and "some type of establishment existed in most of the thirteen colonies . . ."); THOMAS CURRY, THE FIRST FREEDOMS 24-76, 82-133 (1986) (colony-by-colony breakdown for seventeenth and eighteenth centuries).

24. See LEONARD LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 8-12 (2d ed. 1994); see also Rubenfeld, *supra* note 21, at 2352 (giving examples of Massachusetts, Connecticut, New Hampshire, and Vermont authorizing each town to tax its residents for the support of Protestant teachers).

25. LEVY, *supra* note 24, at 26-51.

26. See generally CURRY, *supra* note 23, at 148-88 (discussing disestablishment, state-by-state).



Carolina had disestablished.<sup>27</sup> In other states it was a more gradual process—Vermont did not disestablish until 1807, New Hampshire not until 1819, and Massachusetts not until 1833.<sup>28</sup> Two facts about this period, however, stand out: at the time of the revolution, most colonies had an “established” church, and over the next two decades nearly every one “disestablished” that same church.

Established churches were exempt from “ecclesiastical taxes” such as the church rate and the tithe, which were paid into their own coffers.<sup>29</sup> By way of contrast, churches were apparently not uniformly exempted from the variety of other property taxes (such as the land tax, the hearth tax, and the quitrent) that were sporadically collected in each colony.<sup>30</sup> Property held by a minister was taxed in some colonies and exempt in others, although the trend over time was to exempt it.<sup>31</sup> Property dedicated to charitable uses (including religious uses<sup>32</sup>) was often exempted from the collection of poor rates, education rates, charity tax, and the like—and, indeed, churches (whether established or dissenting) usually received cash disbursements from the revenue generated in this way.<sup>33</sup>

The formative years of the republic gave each new state the opportunity to consider the appropriateness of tax exemptions for church property. Significantly, most left in place, enacted, or reenacted statutes either per-

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27. CORD, *supra* note 22, at 4.

28. *Id.*; see also COBB, *supra* note 22, at 234; Epstein, *supra* note 22, at 2100. See generally Herbert W. Titus, *No Taxation or Subsidization: Two Indispensable Principles of Freedom of Religion*, 22 CUMB. L. REV. 505, 507 (1991-92).

29. Witte, *supra* note 19, at 371, 372-73.

30. *Id.* at 374.

31. *Id.* at 373 & n.39.

32. British common law has considered “charitable uses” to include “religious uses” since at least the middle of the seventeenth century. While the Statute of Charitable Uses, passed in 1601 to enforce charitable trusts, did not explicitly include “religious uses,” the advancement of religion was quickly recognized by the English courts as a charitable purpose. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 589 (1983) (citing Lord McNaghten for the proposition that charity comprises four divisions including “trusts for the advancement of religion”); Whitehead, *supra* note 7, at 535 (“[A]dvancement of religion has been recognized as a charitable purpose by the British common law of charitable trusts since at least 1639.”); see also 26 C.F.R. § 1.501(c)(3)-1 (1997). Federal regulations define “charity” as including

[r]elief of the poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening the burdens of Government; and promotion of social welfare by organization designed to accomplish any of the above purposes or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency. *Id.* (emphasis added).

33. Witte, *supra* note 19, at 377-78.

mitting or mandating charitable and religious exemptions from local property tax, and many new state constitutions explicitly addressed the topic.<sup>34</sup> This occurred concurrently with the disestablishment movement, which suggests that the two courses of action were not at the time thought to be inconsistent.<sup>35</sup> In 1799, for instance, the New York legislature exempted from real and personal property tax a variety of entities including churches, land and houses owned by the United States government, schoolhouses, courts, gaols, alms houses, and libraries.<sup>36</sup> Similar laws were passed in 1801, 1813, and 1823.<sup>37</sup> And New York had just, during the Revolutionary War, repealed the statutes that had established the Episcopalian Church.<sup>38</sup> A similar exemption was passed in Virginia in 1800, when Madison was a member of its General Assembly and only one year after the state's final disestablishment bill.<sup>39</sup> Exemptions from property tax of property dedicated to religious uses or belonging to religious associations, while differently formulated and worded across the several states<sup>40</sup> and through the two centuries, have been a consistent and stable feature of our tax collection system, dating to the very point in time when states disestablished their churches, and they remain a consistent feature of state tax schemes.<sup>41</sup>

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34. See *Institute of Living v. Town and City of Hartford*, 50 A.2d 822, 823 (Conn. 1946) (Connecticut exempted property "given or granted for the maintenance of the ministry of the gospel" from taxation in 1702, re-enacted the same in 1808, suspended it from 1821 to 1851, and then re-instated it in 1851); *St. Stanislaus Kosta Church v. Mayor of Wilmington*, 105 A.2d 596, 598 (Del. Supr. Ct. 1954) (Delaware exempted from property tax property belonging to "church, country, religious society, or parish" in its 1796 code); see also Reka Potgieter Hoff, *The Financial Accountability of Churches for Federal Income Tax Purposes: Establishment or Free Exercise?*, 11 VA. TAX REV. 71, 108 (1991).

35. There were, of course, challenges to religious tax exemptions in state courts during the nineteenth century. Challengers alleged that the exemptions were vestiges of religious establishment and contrary to the particular state's constitution, and the point was echoed in pamphlets and editorials at the time. Witte, *supra* note 19, at 380-86. Professor Witte argues that the complaints were "not just isolated musings," but in any event, the challenges were uniformly rejected. *Id.* at 383; see, e.g., *Trustees of Griswold College v. State*, 46 Iowa 275, 282 (1877); *State v. Collector of New Jersey*, 24 N.J.L. 108, 120 (1853); *Congregational Soc'y v. Ashley*, 10 Vt. 241, 244-46 (1838).

36. *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 683 (1970).

37. Brief of the State of New York at 6-7, *Walz*, 397 U.S. 664.

38. *CORD*, *supra* note 22, at 4.

39. II Va. Stat. at Large 200 (Shepherd's) (the 1800 tax statute); II Va. Stat. at Large 149 (Shepherd's) (the 1799 disestablishment bill).

40. In the District of Columbia an 1802 act exempted church property from taxation in the City of Washington, and the exemption was left in place by Congress when it incorporated the city in 1804. Act of October 6, 1802, ch. 5, *Rothwell's Laws of the City of Washington* 20 (1833) (tax exemption); Act of February 24, 1804, ch. 14, 2 Stat. 254 (incorporation).

41. A wave of revisions in the mid-nineteenth century eliminated what were perceived to be cumbersome and complicated lists of exempt entities, but there is no indication that the

The federal government, too, has always exempted religious institutions from tax collection. The first comprehensive federal income tax law,<sup>42</sup> the Revenue Act of 1894,<sup>43</sup> exempted "corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes."<sup>44</sup> The Payne-Aldrich Tariff Act of 1909 included an income tax bill that exempted corporations and associations "organized and operated exclusively for religious, charitable, or educational purposes."<sup>45</sup> And the 1913 income tax law attached to the Underwood-Simmons Tariff Act<sup>46</sup>—enacted shortly after the ratification of the Sixteenth Amendment—contained a similar exemption.<sup>47</sup> Indeed, every federal income tax law since the Revenue Act of 1894 has contained the religious and charitable organization exemption that eventually became § 501 of the Internal Revenue Code.<sup>48</sup> The Revenue Act of 1894 also contained a

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legislative revisions were a response to anti-establishment challenges. Witte, *supra* note 19, at 383-86. In any event, the revisions did not eliminate religious and charitable exemptions. *Id.*

42. This was not the first federal revenue measure to tax income. The federal government had been levying taxes on income since at least the Civil War. See generally RANDOLPH E. PAUL, TAXATION IN THE UNITED STATES 9-15 (1954) (discussion of 1862 revenue measure and subsequent measures taken to finance the war effort). For better or for worse, the possibility of a regularly levied federal income tax has been a part of the political landscape since that point. See, e.g., *id.* at 30-31 (noting the many income tax bills introduced in Congress in the last half of the nineteenth century and discussing the debate over the appropriateness of such a tax).

43. Act of August 27, 1894, 28 Stat. 556 (1894), *found unconstitutional*, Pollock v. Farmer's Loan & Trust Co., 157 U.S. 429 (1895). For a discussion of the Act and the case, see PAUL, *supra* note 42, at 32-64.

44. 28 Stat. 556. Britain's first comprehensive income tax, enacted half a century earlier, similarly exempted income generated by property used for charitable—including religious—purposes. Whitehead, *supra* note 7, at 531. The legislative history of the American law contains no discussion of its exemption, which supports Professor Colombo's argument that the federal legislature believed itself simply to be including a noncontroversial practice already universal at the state and local level. Colombo, *supra* note 7, at 845. This was not, however, the first federally-enacted tax exemption for churches. An 1815 statute had levied a tax on household furniture (an "annual duty on all household furniture kept for use, the value of which . . . shall exceed two hundred dollars"), exempting the property of any charitable, religious, or literary institution. Act of Jan. 18, 1815, § 14, 3 Stat. 186, 190.

45. Corporate Income Tax of 1909, Act of August 9, 1909, ch. 6, § 38, 36 Stat. 112-13. At the time, income tax bills usually took the form of a minor amendment to a larger tariff act. PAUL, *supra* note 42, at 91. For a history of the 1909 Act and of Congressional disinclination to pay heed to the Pollock decision, see *id.* at 90-96. The 1909 measure did not ultimately follow the model of its unconstitutional predecessor, and it was deemed distinguishable (and constitutional) by the Supreme Court in 1911. Flint v. Stone Tracy Co., 220 U.S. 107, 147 (1911).

46. Revenue Act of 1913, Act of October 3, 1913, ch. 16, § 2(G), 38 Stat. 172.

47. Whitehead, *supra* note 7, at 541-42.

48. Colombo, *supra* note 7, at 845.

deduction for charitable contributions including contributions to religious institutions—the precursor to § 170 of the current code.<sup>49</sup> This provision, too, was consistently included in subsequent income tax legislation.<sup>50</sup> The federal income tax parsonage exclusion (§ 107) dates to the Revenue Act of 1921,<sup>51</sup> and has only been modified once.<sup>52</sup>

### C. *The Social Benefit Theory*

The most common explanation for religious and charitable tax exemptions in the modern world is the “social benefit” theory, sometimes labeled the “public benefit theory” or the “quid pro quo theory.” The basic idea is that tax exemption is appropriate because of the “benefit” that accrues to society by virtue of the organization’s activities. In the case of a church, these benefits accrue by virtue of the church’s secular activities (e.g., its soup kitchen or homeless shelter) and, some maintain, its religious activities.<sup>53</sup> In one articulation, the value of tax exemption<sup>54</sup> is viewed as

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49. See Act of August 27, 1894, ch. 349, § 32, 28 Stat. 556 (1894); Joseph M. Kuzinsky, Comment, *Section 170, Tax Expenditures, and the First Amendment: The Failure of Charitable Religious Contributions for the Return of a Religious Benefit*, 61 TEMPLE L. REV. 443, 463 & n.130 (1988) (discussing history of § 170).

50. For instance, when Congress levied a stiff income tax to finance World War I, it included a charitable contributions deduction expressly to ensure that taxpayers would not respond to the tax by reducing their charitable deductions. War Revenue Act of 1917, ch. 63, § 1201(2), 40 Stat. 300, 330 (1917) (inclusion of deduction); 55 CONG. REC. 6728 (1917) (discussion of need for deduction); Mark L. Geier, Case Note, 13 HAMLINE L. REV. 433, 444 (1990).

51. Revenue Act of 1921, § 213(b)(11), Pub. L. No. 67-98, 42 Stat. 227, 239.

52. Act of August 16, 1954, ch. 736, 68A Stat. 32. The original act allowed a minister of the gospel to exclude from his taxable income the rental value of his “dwelling house and appurtenances thereof furnished . . . as part of his compensation.” 42 Stat. 239 (1921). In 1954, the legislature substituted the word “home” for “house” and added an exclusion of cash housing allowances. The legislative history, which can be found at H.R. REP. NO. 1337, S. REP. NO. 1622, and CONF. REP. NO. 2543, reprinted in 1954 U.S.C.C.A.N. 4171, 4822, and 5280, suggests the principal author of this latter provision, Representative Mack of Illinois, perceived this exclusion as a necessary part of the “fight” against Communism. See *Hearings on General Revenue Revision Before the House Comm. on Ways and Means*, 83d Cong., 1st Sess. pt. 3 at 1576 (1953) (“Certainly in these times when we are being threatened by a godless and antireligious world movement we should correct this discrimination against certain ministers of the gospel who are carrying on such a courageous fight against this foe. Certainly this is not too much to do for these people.”). Ironically, a tax court 30 years later denied the exclusion to a Baptist minister who preached against Communism, noting as it did so that the “preaching of anticommunism is not a tenet or practice of the Baptist faith.” *Colbert v. Commissioner*, 61 T.C. 449, 452 (1974); see also Foster, *supra* note 6, at 151 (history of the parsonage exclusion).

53. See Witte, *supra* note 19, at 386-88. Professor Witte argues that churches provide “intangible but invaluable” secular benefits through their religious activities. *Id.*

54. It would be disingenuous to argue that tax exemptions are not of value to the entity exempted. Clearly a church that pays no property tax or income tax has more of its property

"compensation" for the cost of performing services that otherwise would have to be, or simply would be, performed by the government.<sup>55</sup> In another articulation, the benefit of exemption is deemed appropriate because the entity provides goods or services that are viewed as socially useful, even though the government would not itself endeavor to provide them.<sup>56</sup> Alternatively, the entity provides goods or services that, although socially useful, the government *could not* provide—either because it lacks the financial resources, or because of a legal impediment such as a constraint on its power to spend.<sup>57</sup> In another articulation, the exempt entity's mere exis-

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and income at its disposal than if it were required to pay such taxes. "Churches," as Professor Bittker wrote in 1969, "like any other potential targets of taxation, are better off if the legislature chooses to tax other groups, or to tax events or activities in which they engage rarely or not at all." Bittker, *supra* note 7, at 1304.

55. See, e.g., H.R. REP. NO. 75-1860, at 129 (1938) (Revenue Act of 1938) ("[E]xemption from taxation of money and property devoted to charitable and other purposes is based upon the theory that Government is compensated for the loss of revenue by its relief from financial burdens which would otherwise have to be met by appropriations from other public funds . . ."). For a recent case discussing and rejecting the notion of tax exemption as compensation, see *Camps Newfound, Inc. v. Town of Harrison, Maine*, 117 S. Ct. 1590, 1604-07 (1997) (Stevens, J.) (rejecting argument that Maine property tax exemption for charitable organizations serving residents was a government "purchase" of charitable services so as to fall within a narrow exception to the dormant commerce clause for states in the role of market participant); see also *id.* at 1605 (discussing *Walz* and the "constitutionally significant difference between subsidies and tax exemptions").

56. Charles O. Galvin & Neal Devins, *A Tax Policy Analysis of Bob Jones University v. United States*, 36 VAND. L. REV. 1353, 1365 (1983). For instance, the legislative history of the Revenue Act of 1894, which exempted organizations "organized and conducted solely for charitable, religious, or educational purposes," indicates plainly that the exemption was included *because* such organizations were deemed to serve "desirable public purposes." *Id.* The legislative histories of subsequent federal tax acts contain similar statements. *Id.* at 1366 (citing 44 CONG. REC. 4147 (1909); 50 CONG. REC. 1305 (1913)).

57. The former (lack of financial resources) can be seen playing a role in the enactment of tax exemptions in the Revenue Act of 1894. Once the statute is placed in its historical context (the depression of 1893), comments in the legislative history about churches being "effective suppliers of public relief" suggest that tax exemption was seen as a way to encourage the shifting of certain "public responsibilities" from government to private organizations during a time of economic hardship. Hoff, *supra* note 34, at 79.

Deductions for charitable contributions, also, have been seen as a way for government to encourage a shifting of financial responsibility for social welfare from government to private individuals. See, e.g., 55 CONG. REC. 6714, 6728 (1917) (Sen. Hollis) ("For every dollar that a man contributes for these public charities, educational, scientific, or otherwise, the public gets 100 per cent."). The legislative history of the 1938 charitable contributions deduction confirms that Congress believed it could use the deduction to shift the burden of supporting charity from the government to voluntary private contributors. See Geier, at 444-45 ("Congress was well aware that allowing taxpayers a charitable contribution deduction on their federal income tax returns would result in lower collection of tax revenues . . . [However,] Congress believed that financial support from private donors would eliminate the need for public funds to be used for charitable purposes."); see also H.R. REP. NO. 1860, at 19 (3d Sess. 1938).

tence is a social good because it contributes to a diversity of viewpoints in the community.<sup>58</sup> Variations on the "social benefit" theme appear throughout the legislative history of property tax exemptions, income tax exemptions, the charitable contribution deduction, and the parsonage exclusion, and the theory has been picked up by the courts.<sup>59</sup>

Woven into the subtext of the social benefit justification is a vague notion of the exempt entity as an "agent" of the state. This was explicitly true of established churches in colonial America: when the church was literally an arm of the state, it made no more sense to tax that church than to tax the gaol or the courthouse.<sup>60</sup> And it is implicitly true now, when supporters of exemptions rely on (or when the legislative history speaks of) "compensation" for tasks the government chooses not to undertake or is precluded from undertaking. And when the exempt entity is a church rather than a charitable institution, the quid pro quo theory turns the American experiment in separation on its head.<sup>61</sup>

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Opponents have argued, however, that this shifting of responsibilities is not economically efficient—at least not when one is shifting responsibility to a religious organization. Professor Lashbrooke, for instance, argues that "religious organizations are less efficient on a cost/benefit analysis than other charitable organizations because a large portion of every dollar donated to religious organizations is devoted to worship," concluding that "this defeats the efficiency rationale for shifting the social welfare burden to the private sector to cut government overhead and costs." E.C. Lashbrooke, Jr., *An Economic and Constitutional Case for Repeal of the I.R.C. Section 170 Deduction for Charitable Contributions to Religious Organizations*, 27 DUQ. L. REV. 695, 703 (1989). Whatever the economic merit of this point, however, the legislative histories do not suggest that it has won adherents.

58. See, e.g., Slye, *supra* note 6, at 249 (arguing that government derives an intangible benefit from fostering diversity).

59. See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 588 (1983) ("Tax exemptions for certain institutions thought beneficial to the social order of the country as a whole, or to a particular community, are deeply rooted in our history, as in that of England."); *Trinidad v. Sagrada Orden*, 263 U.S. 578, 581 (1924) ("Evidently the [charitable] exemption is made in recognition of the benefit which the public derives from corporate activities of the class named, and is intended to aid them when not conducted for private gain.").

60. Hoff, *supra* note 34, at 108-09; Witte, *supra* note 19, at 374-75 (arguing that established churches "were discharging the state's responsibility for the established religion" and that in return "the church corporations received the tax support, tax exemptions, and other protections and privileges normally afforded to state agencies"); see also Pfeffer, *supra* note 15, at 211.

61. Professor Laycock, for instance, has argued that an entity fully taking over a state function (whether de jure or merely de facto) ought to be considered a state actor and ought to be therefore subject to the various constraints on state actions. "A church," he writes, "that . . . exclusively takes over a state function should become subject to the state's obligation not to discriminate on the basis of race." Douglas Laycock, *Tax Exemptions for Racially Discriminatory Religious Schools*, 60 TEX. L. REV. 259, 275 (1982), (citing *Democratic Party v. Wisconsin*, 450 U.S. 107, 126 (1981) (holding that if a political party effectively commandeers a state's electoral process, it must allow blacks to vote in its pri-

*D. Tax Policy*

Income tax exemption of nonprofit organizations (including, therefore, religious ones) also makes sense because it is difficult to construct a workable system for income tax collection that includes these entities.<sup>62</sup> This argument draws compelling support from the observation that a nonprofit organization by definition has no meaningful "income" in the ordinary sense of the word. Nonprofit organizations are not, and some would say were never thought to be, "suitable targets" for an income tax.<sup>63</sup> The argument also draws support from the fact that it is difficult to apply some of the basic concepts of income tax to nonprofit organizations.<sup>64</sup> Are membership dues paid into a church's coffers "gifts" (and thereby excludable under § 102 of the Internal Revenue Code) or are they business income?<sup>65</sup> Can a "nonprofit" truly have a "business expense" when the I.R.S. has taken to looking for profit-seeking as an identifying marker of such expenses?<sup>66</sup> While one can work around these conceptual problems, the basic point is that there is something fundamentally nonsensical about imposing an "income" tax on an entity that is primarily in the business of "not making money."<sup>67</sup> As Professor Bittker concluded in 1969, "the very concept of 'taxable income' for charitable or other public service organizations is an exotic subject more suited to academic speculation than to practical administration."<sup>68</sup>

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62. See Boris I. Bittker & Kenneth M. Kaufman, *Taxes and Civil Rights: "Constitutionalizing" The Internal Revenue Code*, 82 YALE L.J. 51, 64-65 (1972) (making this argument about the income tax exemption in § 501(c)(3) of the Internal Revenue Code).

63. Boris I. Bittker & George K. Radhert, *The Exemption of Nonprofit Organizations from Federal Income Tax*, 85 YALE L. J. 299, 304 (1976). Bittker and Radhert argue that in the early days of the federal income tax, the few lawmakers who commented on the issue or tried to articulate a theory "suggested that an income tax could appropriately be imposed only on activities conducted for profit, and that crucial statutory notions like 'net income' and 'business expenses' do not ring true when applied to nonprofit organizations." *Id.* at 302. Indeed, the principal author of the Revenue Act of 1913 (the first income tax legislation after the ratification of the sixteenth amendment), Cordell Hull, opposed an explicit exemption, arguing that the concept of "net income" per se excluded such organizations. *Id.* at 303.

64. See generally *id.* at 307-14 for the examples that follow and for other examples.

65. Section 102 excludes gifts and bequests from taxation. 26 U.S.C. § 102 (1994). The paradox is that nonprofit organizations are "in the business" of soliciting them. See Bittker, *supra* note 7, at 1299.

66. See, e.g., *Pasternak v. C.I.R.*, 990 F.2d 893, 898 (6th Cir. 1993); *Kartrude v. C.I.R.*, 925 F.2d 1379, 1383 (11th Cir. 1991); *In re Adirondack League Club*, 55 T.C. 796, 807-08 (1971).

67. Bittker, *supra* note 7, at 1299.

68. *Id.*; see also Bittker & Radhert, *supra* note 64, at 314; Slye, *supra* note 6, at 247-48 (nonprofit organizations have no meaningful income); Colombo, *supra* note 7, at 857-58

A related point is that one has difficulty conceiving of the appropriate tax rate for a nonprofit organization.<sup>69</sup> The economic burden of a tax on an organization at the organization level ultimately falls on the organization's beneficiaries.<sup>70</sup> Accordingly, the organization's income should be imputed to these individuals, so that they can be taxed indirectly at their own personal tax rates.<sup>71</sup> The ultimate rate for the organization as proxy for its beneficiaries should be the average of the personal tax rates of those beneficiaries.<sup>72</sup> In the case of a charitable religious organization, "the beneficiaries are too diffuse for a satisfactory imputation of the group's income to individuals, and so divergent in economic status that it would be difficult to establish a fair average rate at which to tax the church as their surrogate."<sup>73</sup> Moreover, the church must pass along the cost of the tax in the form of reduced distributions to its beneficiaries, of whom the poorest can least afford a reduced handout. In other words, the distribution of the ultimate "burden" of the tax conflicts with the basic premise of a progressive income tax.<sup>74</sup>

State legislatures and Congress have, since the early days of this country's history, consistently exempted religious and charitable organizations from property and income taxes. For the most part, religious exemptions have been granted in the same manner, to the same extent, and for the same reasons, as charitable exemptions.

## II. THE TAX-AND-SPEND PRINCIPLE OF THE ESTABLISHMENT CLAUSE

The prevalence of established churches in colonial America and the history of the disestablishment movement in the 1780s and 1790s suggest that the Establishment Clause was meant to do at least two things: to prohibit the federal government from interfering with state establishment or

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(explaining that income tax exemption is justified by its proponents as a "natural outgrowth of the inability to accurately measure the income of nonprofit organizations or to assess the incidence of tax that would occur if exemption were not available"). Colombo argues, however, that at present many nonprofit organizations (hospitals and universities more often than churches) do, in fact, operate very much like businesses. Colombo, *supra* note 8, at 859-60.

69. See Bittker, *supra* note 6, at 1290; Bittker & Radhert, *supra* note 63, at 305; Colombo, *supra* note 7, at 859.

70. Bittker & Radhert, *supra* note 63, at 315.

71. *Id.* In the case of a religious organization, of course, many of these individuals fall below the minimum tax level, and their shares would be "zero." Bittker, *supra* note 7, at 1290.

72. Bittker & Radhert, *supra* note 63, at 315.

73. *Id.*

74. *Id.* This is the case unless the higher tax rates prompt the *benefactors* of the church to increase their gift giving.



disestablishment of religion *and* to prohibit the federal government from coercing support of religion in the form of taxation and subsequent disbursement of those tax dollars to religion. It follows from both that the Establishment Clause was designed to protect religious liberty just as much as was the Free Exercise Clause—which of course is consistent with the notion that “separation” protects *both* religious liberty *and* the state.

The *first* principle, a federalist interpretation of the clause, draws support from the fact that so many colonies did have some sort of established religion at the time of the clause's ratification and the fact that the exact arrangement varied from colony to colony. The constitution obviously does not *give* Congress any affirmative power to interfere in such matters; the powers enumerated in Article I do not include any power in the matter of religion or state establishment of religion.<sup>75</sup> The notion is that the clause was in part a response to forces—both anti-establishment and anti-disestablishment—that desired memorialization of this fact. Once wrangling over the drafts was completed, convention delegates were left with a provision prohibiting Congress from making any law respecting an establishment of religion—i.e., any law concerning, on the topic of, perhaps even affecting (or tending to preclude, or tending to interfere with) establishment of religion by the states.<sup>76</sup> If this interpretation is correct, then the clause standing alone would appear to prohibit the federal government from interfering with a state government's decision to do exactly what Madison (as explained below) deplored—tax a man for the support of religion. The application of the Fourteenth Amendment to the clause as thus interpreted presents something of a paradox. If the clause prohibits Congress from interfering with state decisions to establish or disestablish churches, it is conceptually troublesome to view this precept as now “similarly applicable” to the states. Whose decision (to establish or disestablish) is the state now, itself, similarly, forbidden to disrupt? And because section five of the Fourteenth Amendment gives Congress the power to enforce this new “prohibition” on the states, the Fourteenth Amendment would now appear to permit Congress to do exactly what the First Amendment forbids it to do—enact a law respecting religion (it is thus entirely possible that the civil war amendments were not meant to disrupt the balance of power embodied in the First Amendment).<sup>77</sup> This view of

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75. See U.S. CONST. art. 1.

76. See Rubinfeld, *supra* note 21, at 2356 (making the argument); *id.* at n.62 (noting others who make the argument).

77. See *id.* at 2376-77; Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 N.D. L. REV. 311, 317-18 (1986). One might note in connection with this point that neither the original Bill of

the clause has been consigned to the scrap heap of historical could-have-beens, but particularly since much taxation and exemption of churches occurs at the state and local level, it is worthy of renewed attention.

The *second* principle, the tax-and-spend principle, has been thoroughly and unquestioningly adopted, in one form or another, by court and commentator alike.<sup>78</sup> It draws particular support from the experience of disestablishment in Virginia in the 1780s.

### A. The Virginia Experience

Virginia was, at the time, predominantly Anglican,<sup>79</sup> that church having been supported by taxes collected from all citizens of the state, whether Anglican or dissenting, for some time.<sup>80</sup> After the revolution, the state began gradually to reduce the Anglican Church's dominance and to provide for religious liberty.<sup>81</sup> Thus, for instance, in 1776 the state legislature disestablished the Anglican Church, at the urging of the Presbyters, decreeing

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Rights nor the Fourteenth Amendment has ever been thought to bind the Indian tribes in their capacity as sovereigns; that is to say, conventional wisdom holds that the Indian tribes are not "constitutionally" prohibited from, e.g., requiring self-incrimination in tribal court or searching and seizing private property at will. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-58 (1978); see generally FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 664-70 (1982 ed.). In 1968, Congress enacted the Indian Civil Rights Act, 25 U.S.C. §§ 1301-41, which imposes the Bill of Rights, clause by clause, on the Indian Tribes in their management of their internal affairs. Section 1302, the First Amendment equivalent, does not include an Establishment Clause. See also Rodney K. Smith, *Sovereignty and the Sacred: The Establishment Clause in Indian Country*, 56 MONT. L. REV. 295, 298 (1995) (containing a brief policy-based argument that the principles of the Establishment Clause should not apply in Indian country).

78. See Jesse H. Chopper, *The Establishment Clause and Aid to Parochial Schools*, 56 CAL. L. REV. 260, 267 (1968) ("[T]he Establishment Clause sought to protect taxpayers from being forced by the federal government to support religion."); *id.* at 268 ("Whatever other historical bases for the establishment ban, it is beyond reasonable dispute that it purported to secure religious liberty, in particular by prohibiting taxation for religious purposes.").

79. I DOCUMENTS OF AMERICAN HISTORY 125 (Commager & Cantor, eds., 10th ed., 1988).

80. The Anglican Church in Virginia was also privileged in other ways in the century leading up to the revolution; it had, for instance, the exclusive right to perform weddings and funerals (and to collect fees for doing so), and dissenters were largely disqualified from holding public office. See WEBER & GILBERT, *supra* note 15, at 8-10.

81. Thus, for instance, article 16 of the VIRGINIA DECLARATION OF RIGHTS, drafted in 1776, provided that "the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force and violence." VA. DECL. OF RIGHTS art. 16 (1776) (emphasis added). The committee of Virginia convention delegates convened to compose this document included George Mason, who produced the first draft of article 16, Patrick Henry, and James Madison, who is responsible for the amendment that added the language emphasized. RALPH KETCHAM, *JAMES MADISON: A BIOGRAPHY* 68-73 (1990).

that "all dissenters . . . shall . . . be totally free and exempt from all levies, taxes, and impositions whatever supporting and maintaining the [Anglican] Church," and simultaneously relieving Anglicans from those same taxes.<sup>82</sup>

Adequate public support for an assessment in favor of religion remained for Patrick Henry to present to the legislature "A Bill Establishing A Provision For Teachers of The Christian Religion."<sup>83</sup> Pursuant to this bill, each Virginian would have paid a moderate tax to the state for the support of teachers of the Christian religion, designating the church—or even a "seminary of learning"—to which his tax dollars would flow.<sup>84</sup> In response, James Madison penned his "Memorial and Remonstrance Against Religious Assessments," which then circulated throughout the state during the summer of 1785, before the final vote on Henry's bill.<sup>85</sup>

Madison argued that it is fundamentally wrong for civil authority to use its coercive powers to take a person's money for the support of a church—even to take a mere pittance for that purpose.<sup>86</sup> "[I]t is proper," he wrote, "to take alarm at the first experiment on our liberties . . . [T]he same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever."<sup>87</sup> A legisla-

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82. IX Statutes at Large of Virginia 164 (Henning, ed.). Specifically, in 1776 lawmakers exempted dissenters from payment of the "ministerial tax" for the benefit of the Anglican church. Simultaneously, and apparently partly in response to the prospect of Anglicans pretending to be dissenters in order to avoid payment of that tax, the legislators suspended collection of the tax altogether until the next year. That suspension was renewed, yearly, until the tax was eliminated in 1779. *E.g., id.* at 312, 469, 579; *see* CURRY, *supra* note 23, at 134-48; *see also* LEVY, *supra* note 24, at 63; MARVIN MEYERS, *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON* 6 (1973); Weber & Gilbert, *supra* note 15, at 11. *See* KETCHAM, *supra* note 81, at 75-76, for an overview of the Presbyterian and other petitions received by the House of Delegates in 1776, requesting the disestablishment of the Anglican church.

83. LEVY, *supra* note 24, at 61-62.

84. WEBER & GILBERT, *supra* note 15, at 11-12. Supporters of the bill included Washington and Marshall. COBB, *supra* note 22, at 495. The bill is reproduced in its entirety in the Supplemental Appendix to Justice Rutledge's dissent in the *Everson* case. *Everson v. Board of Educ.*, 330 U.S. 1, 72-74 (1947). Henry's position on "establishment" is more complicated than his support of the assessments bill suggests. Nearly a decade earlier, during the drafting of the Virginia Declaration of Rights, Henry introduced a proposed amendment to article 16 (albeit drafted by Madison) that would have disestablished the Anglican Church—in the sense of eliminating its privileges and emoluments. The amendment was rejected. CURRY, *supra*, at 135; KETCHAM, *supra* note 81, at 68-73; *see also* *Everson*, 330 U.S. at 11 n.10.

85. LEVY, *supra* note 24, at 63; MEYERS, *supra* note 82, at 6.

86. *James Madison, Memorial and Remonstrance* ¶¶ 1-9 (1785), reprinted in MEYERS, *supra* note 82, at 6-13.

87. *Id.* ¶ 3, at 8.

ture which may establish one church today may establish another tomorrow;<sup>88</sup> because the sphere of religion is necessarily separate from the civil sphere—even, in Madison's words, "exempt from its cognizance"<sup>89</sup>—such a power in the legislature would be tyrannical.<sup>90</sup> Quoting the Virginia Declaration of Rights, Madison noted that man must be left to his own relationship with "the Creator," and to his own sense of what religion demands of him.<sup>91</sup> The point, Madison argued, is that "the Religion . . . of every man must be left to the conviction and conscience of every man," that this "unalienable right" is personal, private, and cannot be "abridged by the institution of Civil Society."<sup>92</sup> The view of civil authority embodied in the assessments bill would have contravened the mutual respect, equality, and tolerance, by which the new country defined itself.<sup>93</sup>

In October, when the state legislature met, the religious assessments bill died without a formal vote.<sup>94</sup> In its stead, due in part to the arrival of signed copies of Madison's *Memorial and Remonstrance*, Thomas Jefferson's "Act For Establishing Religious Freedom"—which had been rejected by the Virginia assembly in 1779<sup>95</sup>—was passed, by the House in 1785 and by the Senate in 1786.<sup>96</sup> This bill was of a piece with Madison's petition. "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical," the preamble warned.<sup>97</sup> So, too, "even the forcing [of] him to support this or that teacher of his own religious persuasion."<sup>98</sup> Thus it was "enacted by the General Assembly, that no man shall be compelled to frequent or sup-

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88. *Id.*

89. *Id.* ¶ 1, at 7.

90. *Id.* ¶ 2, at 7-8.

91. *Id.* ¶ 1, at 7.

92. *Id.*

93. *Id.* ¶ 9, at 10-11 ("[T]he proposed establishment is a departure from that generous policy, which, offering an asylum to the persecuted and oppressed of every Nation and Religion, promised a lustre to our country, and an accession to the number of its citizens."). Additionally, noted Madison, Henry's proposal was neither necessary for religion, *id.* ¶ 6, at 9, nor necessary for civil government, *id.* ¶ 8, at 10, and it threatened to foster political discord, *id.* ¶ 11, at 11.

94. MEYERS, *supra* note 82, at 6.

95. CURRY, *supra* note 23, at 139.

96. MEYERS, *supra* note 82, at 6; 1 DOCUMENTS OF AMERICAN HISTORY, *supra* note 79, at 125. By the time Jefferson's bill was presented to the House, Henry had become Governor and Jefferson had himself gone to Paris. See generally Peck, *supra* note 15, at 1130-34. Curry points out that a multitude of other petitions in opposition to the bill were also submitted to the legislature and argues that Madison's was not the most influential of the lot. CURRY, *supra* note 23, at 143-44.

97. An Act for Establishing Religious Freedom § 1, XII Statutes at Large of Virginia 84 (Henning, ed.).

98. *Id.*

port any religious worship, place or ministry whatsoever.”<sup>99</sup>

There is, thus, considerable support for the proposition that Madison and Jefferson opposed vigorously the practice whereby civil authority taxes a citizen for the forcible support of a church, whether or not a church of the taxpayer's choosing.<sup>100</sup> Disestablishment in Virginia—i.e., the Madisonian model of state disestablishment—involved rejection of forcible aid for *any* church, even for “all churches” (as in the model of the Henry bill). There is also considerable support for the proposition that in drafting the Establishment Clause—and a parallel, but not identical provision that would have applied to the states—Madison meant to embody exactly this principle, that civil authority may not tax its constituents and disburse those tax dollars in support of religion, even if non-preferentially.<sup>101</sup>

Thus conceived, the Establishment Clause constrains Congress's exercise of its powers to tax and spend.<sup>102</sup> This is precisely the view of the

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99. *Id.* § 2 (emphasis added).

100. Madison and Jefferson were of course not the first to voice opposition to the collection of taxes for the support of the ministry. Pamphlets arguing that such levies were “immoral” and “contrary to justice” date in the colonies to at least the 1640s. See COBB, *supra* note 22, at 170.

101. Madison introduced the prototype religion clauses to the Congress on June 8, 1787. In Section 9 of Article I, between Clauses 3 and 4, was to be placed a self-executing provision applicable to Congress, that “The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or in any pretext, infringed.” In Section 10 of Article I, between Clauses 1 and 2, was to be placed the provision that “No state shall . . . violate the equal rights of conscience.” 1 *Annals of Congress* at 450-52. The state provision did not contain a non-establishment provision. See also WEBER & GILBERT, *supra* note 15, at 15. The provision applicable to the states was approved in the House but rejected by the Senate. LEVY, *supra* note 24, at 147. For a detailed argument that the framers of the clause did not intend to permit non-preferential direct aid, using various considered drafts of the clause, see Douglas Laycock, “Non-preferential” Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875, 875-83 (1985). Professor Levy also rejects the merely non-preferentialist interpretation of the clause (i.e., the notion that “establishment” means only “aid to one chosen religion to the exclusion of others”) in part because so many state establishments were non-preferential. See LEVY, *supra* note 24, at 8-12, 29, 76-77.

102. This is true no matter what position one takes on the scope of Congress's power to spend, whether or not one takes Madison's view that the power to spend for the general welfare amounts to no more than a reference to the more specific powers enumerated in the subsequent clauses. The alternative view, that the general welfare clause confers a spending power separate and distinct from (and broader than) the enumerated legislative powers in Section 8 is largely a fait accompli as a matter of federal constitutional law, see *United States v. Butler*, 297 U.S. 1, 64-65 (1936), but it continues to garner considerable academic criticism. The dearth of judicial decisions on the scope of the spending power is, of course, attributable to the general ban on taxpayer standing, see *Massachusetts v. Mellon*, 262 U.S. 447, 481-82 (1923), but the exception carved thereto by the Court in *Flast v. Cohen*, 392 U.S. 83, 85 (1968) makes it quite clear that the Establishment Clause constitutes an express

Establishment Clause taken by the Supreme Court in *Everson v. Board of Education*, although the Court additionally assumed that the ratification of the Fourteenth Amendment meant the prohibitions of the First Amendment's Establishment Clause apply identically to the states.<sup>103</sup> "This Court has previously recognized," Justice Black wrote, "that the provisions of the First Amendment, in the drafting of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute."<sup>104</sup> Then follows the oft-quoted paragraph declaiming what it is, at the very least, the Establishment Clause means—including that "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."<sup>105</sup> Although the *Everson* dissenters took issue with Justice Black's application of the principle to the facts before the Court that day, every member of the Court agreed with his explication of the Establishment Clause's meaning

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limitation on the power of Congress to spend. *See Flast*, 392 U.S. at 104 (The Establishment Clause "operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, § 8.").

103. 330 U.S. 1, 14-15 (1947) ("The meaning and scope of the First Amendment, preventing establishment of religion or prohibiting the free exercise thereof, in the light of its history and the evils it was designed forever to suppress, have been several times elaborated by the decisions of this Court prior to the application of the First Amendment to the states by the Fourteenth. The broad meaning given the Amendment by these earlier cases has been accepted by this Court in its decisions concerning an individual's religious freedom rendered since the Fourteenth Amendment was interpreted to make the prohibitions of the First applicable to state action abridging religious freedom. There is every reason to give the same application and broad interpretation to the 'establishment of religion' clause."); *see also Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) ("The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws."). It is, however, arguable that the Fourteenth Amendment did not mean to apply this concept identically in every way to the states. This argument draws support from the 1876 rejection of the "Blaine Amendment" which would have provided, among other things, that "No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof." H.R.J. Res. 1, 44th Cong. (1st Sess. 1876). The Amendment passed in the House of Representatives (180 to 98), but failed in the Senate (28 in favor, 16 opposed, and 27 not voting) and was thus never submitted to the states for ratification. 4 CONG. REC. 5190, 5453 (1876) (House and Senate votes, respectively); *see CORD*, *supra* note 22, at 162. The temporal proximity of this amendment's proposal to the ratification of the Fourteenth Amendment strongly suggests the Fourteenth Amendment was *not* viewed (by those who passed it in Congress and presented it to the states) as applying the First Amendment's Establishment Clause to the states. *See, e.g., LEVY*, *supra* note 17, at 148.

104. 330 U.S. at 13 (citing *Davis v. Beason*, 133 U.S. 333, 342 (1890)); *Reynolds v. United States*, 98 U.S. 145, 164 (1878); *Watson v. Jones*, 80 U.S. (13 Wall) 679, 728 (1871).

105. 330 U.S. at 15-16.

agreed with his explication of the Establishment Clause's meaning and his evocation of Virginia's disestablishment experience.

### B. Direct Aid and Subsidies

Religious property and income tax exemptions do not violate the tax-and-spend prohibition articulated in *Everson*. If a municipal government levies a property tax and refrains from collecting that tax from certain entities or people (the local hospital, the local church, the local legal aid clinic, and families in rented housing), it is ipso facto not handing them a check (especially not one composed of monies coercively levied from others).<sup>106</sup> Thus with respect to the question whether a tax exemption is "direct aid"—whether a tax exemption is a violation of the "tax-and-spend" prohibition—plainly it is not.<sup>107</sup> This is precisely the conclusion drawn by the Court in *Walz* where the Court held that a city property tax exemption scheme did not run afoul of the tax-and-spend prohibition because it did not involve an actual transfer of funds.<sup>108</sup> The Court wrote, "The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state."<sup>109</sup>

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106. See DEAN KELLEY, WHY CHURCHES SHOULD NOT PAY TAXES 70 (1977) ("[T]ax exemption, in and of itself, conveys no money whatever to an organization, which cannot build a birdhouse or buy a bathmat with it. The only money such an organization has is what its supporters contribute to it because they believe in it. All that a tax exemption does [is] to permit the full value of such contributions to go to the purposes intended without diversion to the government . . . . No one is compelled by tax exemption to support the organization, as they would be by taxation and appropriation."); Donald A. Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development*, 81 HARV. L. REV. 513, 533 (1968).

107. This is even clearer when one tries to imagine a suitable plaintiff to challenge such an exemption. Plainly a taxpayer would not have standing under the *Flast* exception to the *Frothingham* ban on taxpayer suits which permits a taxpayer to challenge a congressional exercise of the spending power on the ground that it violates the Establishment Clause (because that clause is a specific restraint on that power). There is simply no expenditure to identify and challenge. Cf. *United States Catholic Conf. v. Baker*, 885 F.2d 1020, 1031 (2d Cir. 1989) (denying standing to taxpayer plaintiffs challenging 501(c)(3) exemption for church on ground that church violated proscription on political activity). This makes it clear that an exemption is not a direct expenditure. This is not to say, of course, that no plaintiff would have standing. A proper plaintiff might be one, for instance, who complained of being similarly situated and yet differently treated (e.g., because he himself was not tax exempt) in violation of a First and/or Fifth amendment guarantee of equal protection.

108. 397 U.S. 664, 680 (1970).

109. *Id.* at 675. The "actual transfer of funds" principle adopted by *Walz* has been criticized as overly formalistic. See Donna D. Adler, *The Internal Revenue Code, The Constitution, and the Courts: The Use of Tax Expenditure Analysis in Judicial Decision Making*, 28 WAKE FOREST L. REV. 855, 888 (1993). But of course it is beyond dispute that the para-

### 1. "Subsidy" Rhetoric

This aspect of *Walz*—the proposition that an exemption is nothing more than failure to collect a tax and that there is something different about direct cash handouts—has come under fire in the last thirty years.<sup>110</sup> Indeed, it is now commonplace for judges and scholars to treat tax exemptions as privileges, benefits, or even gifts from the legislature. Professor Bittker became alarmed by this trend thirty years ago, warning that "once this characterization is accepted, it is only a short step to such pejoratives as 'loophole,' 'preference' and 'subsidy.'" <sup>111</sup> Precisely what he warned of has come to pass. The word "subsidy" has crept into our day-to-day characterization of tax exemptions.<sup>112</sup> And it is only a short step further—one that some have already taken—to the proposition that "giving" a church such a "subsidy" is for all intents and purposes the same as handing a cash disbursement to the church and, thus, just as unconstitutional under the Establishment Clause.<sup>113</sup>

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digmatic constitutional violation involves coercive taxation and cash disbursement. *See id.*; *see also* Matthew S. Steffey, *Redefining the Modern Constraints of the Establishment Clause: Separable Principles of Equality, Subsidy, Endorsement, and Church Autonomy*, 75 MARQ. L. REV. 903, 918 (1992). An actual transfer of funds is additionally fraught with symbolism of government approval repugnant to the Establishment Clause. *See Developments in the Law—Religion and the State*, 100 HARV. L. REV. 1675, 1692 (1987) ("affirmative governmental support for religion sends a stronger message of symbolic endorsement"); *id.* (suggesting the benefit of a tax exemption "is less obvious because the interposition of the complex state tax-collecting apparatus attenuates the appearance of government support").

110. Although the decision was 7 to 1, the vote on this particular point was 6 to 2, Justice Harlan noting in his concurrence that he agreed with the dissent that "a tax exemption is a subsidy." *See Walz*, 397 U.S. at 704 (Douglas, J., dissenting); *id.* at 699 (Harlan, J., concurring).

111. Bittker, *supra* note 6, at 1290.

112. *See, e.g., Mueller v. Allen*, 463 U.S. 388, 404-09 (1983) (Marshall, J., dissenting) (joined by Brennan, Blackmun, and Stevens, JJ.) (discussing Minnesota tax deduction for educational expenses) ("The Establishment Clause of the First Amendment prohibits a State from subsidizing religious education, whether it does so directly or indirectly . . . . By taking this deduction, a taxpayer reduces his tax bill by a sum equal to the amount of tuition multiplied by his tax bill . . . . By ensuring that parents will be reimbursed for tuition payments they make, the Minnesota statute requires that taxpayers in general pay for the cost of parochial education . . . . [I]t makes no difference whether the qualifying 'parent receives an actual cash payment [or] is allowed to reduce . . . the sum he would otherwise be obliged to pay over to the State.' The statute is little more than a subsidy of tuition masquerading as a subsidy of general educational expenses.") (emphasis added); *Taxation with Representation v. Regan*, 461 U.S. 540, 544 (1983) ("Both tax exemptions and tax deductibility are a form of *subsidy* that is administered through the tax system.") (emphasis added) (suggesting that income tax exemptions for groups that engage in political lobbying amount to *paying for the lobbying with public money*).

113. *Mueller*, 463 U.S. at 404-09.



## 2. Tax Expenditure Analysis

The source of the tendency now to characterize an "exemption" as a "subsidy" is tax expenditure analysis. Tax expenditure analysis begins with the proposition that the statutory provisions making up a tax code consist of two sorts: first, baseline provisions that effect the revenue raising (e.g., those establishing the tax base, setting up an accounting period, defining taxable units, and laying out a rate schedule), and second, everything else (i.e., provisions that permit or define deviations from the baseline).<sup>114</sup> All provisions in a tax code, it is said, are either one or the other; "[one] part provides a structure for the raising of revenues, and the other part carries out social and economic goals."<sup>115</sup> The general idea is that there is some sort of identifiable normative tax, and any provision not essential to establishing its normative attributes is "really" a reflection of social and economic policy. Tax expenditure theorists posit that provisions of the tax code that "really" carry out social and economic policy goals should be considered the equivalent of direct spending decisions. As explained by Professor Adler, granting a taxpayer an exemption from a tax that would otherwise accrue (i.e., from the "normative tax") is the same—in purpose and in effect—as *collecting* that tax and giving the taxpayer a *direct subsidy*.<sup>116</sup> Hence these provisions are called "tax expenditures."<sup>117</sup>

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114. STANLEY SURREY, *PATHWAYS TO TAX REFORM* 6 (1973).

115. Adler, *supra* note 109, at 860.

116. *Id.*, at 858; STANLEY SURREY & PAUL MCDANIEL, *TAX EXPENDITURES* 25 (1985). With respect to charitable deductions, the argument is made that the government provides a subsidy to the charity in question. Thus, to borrow an example from Professor Adler, suppose that a taxpayer donates \$100 to the Salvation Army and that the tax code permits him then to deduct \$100 from his taxable income. (Assume he itemizes). If the taxpayer is in the 31% tax bracket, the net result is that he will pay \$31 fewer in taxes to the government. Tax expenditure analysis posits that, by foregoing the \$31 in revenue, the government effectively provides \$31 (of the \$100 donation) to the Salvation Army. See Adler, *supra* note 109, at 858. The private choice of the individual is deemed irrelevant, as is the fact that the government's only "contribution" is in agreeing to forgo a corresponding amount in income tax. Tax expenditure theorists would apply the same analysis to generally applicable tax credits for donations to (all) private schools. A recent and even more attenuated example can be found in *Kotterman v. Killian*, 972 P.2d 606, 613 (Ariz. 1999), in which the Arizona Supreme Court correctly sustained a state tax credit of \$500 for persons who donate to primary or secondary school educational scholarships. "Arizona's statute provides multiple layers of *private choice*," the court wrote. *Id.* at 614. "Important decisions are made by two distinct sets of beneficiaries—tax payers taking the credit and parents applying for scholarship aid in sending their children to tuition-charging institutions . . . . [S]chools are no more than indirect recipients of taxpayer contributions . . . ." *Id.* An interesting contrast would be tuition *grants* made generally available without regard to the nature of the institution attended. See, e.g., *Witters v. Washington Dept. of Servs. for Blind*, 474 U.S. 481, 489 (1986) (allowing state to issue vocational tuition grant to blind student so he could attend a Christian college and possibly become a pastor). In such a situation, the private individual

The theory is not new,<sup>118</sup> but its use as a budgetary tool by the federal government is a development of the last twenty-five years, and is largely due to the work of Professor Surrey, who not only taught the theory to several generations of Harvard students, but wrote about it extensively and argued for its adoption when serving as Assistant Secretary of the Treasury in the Johnson Administration.<sup>119</sup> The Congressional Budget Act of 1974 made the concept of tax expenditures an integral part of the annual federal budget process.<sup>120</sup> "Tax expenditures" are now defined by law as "those revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability."<sup>121</sup> It is now mandated by federal statute that *both* the budget submitted to Congress by the President<sup>122</sup> and the report accompanying the (Congressional) concurrent resolution on the budget<sup>123</sup> include a "tax expenditure budget," which is defined as an "enumeration" of tax expenditures.<sup>124</sup> The Office of Management and Budget publishes the annual budget, each year, and includes therein its own tax expenditure analysis.

Professor Surrey's goal, in arguing for the characterization of tax exemptions as tax expenditures and in creating the tax expenditure budget, was two-fold: it was to draw attention to policy decisions he believed to be embedded in the tax code,<sup>125</sup> and it was to ensure that "tax expenditures" would be subjected to the same policy analysis as their corollary spending decisions (e.g., by the government agencies ordinarily responsible for the equivalent cash outlay).<sup>126</sup> The argument for public disclosure is self ex-

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has a choice—a choice of where to direct the *government's* "handout" from taxpayer money. This arrangement more closely parallels Patrick Henry's assessment bill and is equally offensive to the tax-and-spend principle. Notwithstanding the distinction between such schemes, the recent opinion in *Agostini v. Felton*, 521 U.S. 203 (1997) suggested the Witters arrangement is "no different from a State's issuing a paycheck to one of its employees, knowing that the employee would donate part or all of the check to a religious institution." *Id.* at 226.

117. See Lashbrooke, *supra* note 57, at 697.

118. For an overview of the history of tax expenditure analysis, see *id.*, at 698.

119. See Adler, *supra* note 109, at 861 & n.21.

120. Congressional Budget Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (codified in scattered sections of the U.S.C. including Title 2 and Title 31).

121. 2 U.S.C. § 622(3) (1994).

122. 31 U.S.C. § 1105(a)(16) (1994).

123. 2 U.S.C. § 632(e)(2)(E) (1994).

124. 2 U.S.C. § 622(3).

125. See Victor Thuronyi, *Tax Expenditures: A Reassessment*, 1988 DUKE L. J. 1155, 1158, 1181.

126. See, e.g., SURREY, *supra* note 114, at 40 ("Governmental financial assistance, if made available through the income tax, should be viewed and judged in the same manner as

planatory. The argument for shifting the locus of policy evaluation is premised on the notion that the organs of government ordinarily responsible for direct expenditures are better equipped than congressional tax-writers and the Department of the Treasury—by virtue of their substantive expertise—to make “expenditure” decisions.<sup>127</sup>

### 3. Critiques of Tax Expenditure Analysis

Tax expenditure theory has been heavily criticized in the last thirty years, and the criticism begins with the very assumption the theory makes about the proper relationship between citizen and government. Implicit in Surrey’s work—implicit in labeling an exemption a “subsidy”—is a presumption that the fruits of a person’s labor “naturally” belong to the government, and that each time the government refrains from taking a portion of his income, it is choosing not to take something that is “rightfully” the government’s for the mere asking.<sup>128</sup> But, simply put, the money that he earns and the property that he owns do not “by nature” belong to the government.<sup>129</sup> And when we focus our attention on decisions *not* to tax, when

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direct assistance.”); *id.* at 50-60. For a restatement of this argument, see Adler, *supra* note 109, at 856 (complaining that through the device of tax expenditures the government spends billions of dollars each year without oversight or scrutiny).

127. See SURREY, *supra* note 114, at 141-46. For a detailed discussion and critique of Surrey’s argument for the substantive expertise of non-tax institutions, see Edward A. Zelinsky, *James Madison and Public Choice at Gucci Gulch: A Procedural Defense of Tax Expenditures and Tax Institutions*, 102 YALE L. J. 1165 (1993). Professor Zelinsky argues, for instance, that the tax process through the Ways and Means Committee is more pluralistic than an expert-oriented career civil service non-tax agency that can be captured by narrow interest groups and limited constituencies. See *id.* at 1176. Surrey’s conviction that placing tax “expenditures” in the hands of specialized government agencies would enhance both efficiency and professionalism ultimately amounts to a conviction that government can be best managed by a civil service system of experts—a view of government firmly rooted in the legacy of the New Deal and progressivism. *Id.* at 1170.

128. For a variation of this argument, see Galvin & Devins, *supra* note 56, at 1370. See also Irving Kristol, *Taxes, Property, and Equality*, 37 PUB. INT. L. J. 3, 14-15 (1974). For an interesting counter-example involving creditors (i.e., in a very different posture from the government), see Daniel Keating, *Bankruptcy, Tithing, and the Pocket-Picking Paradigm of Free Exercise*, 1996 U. ILL. L. REV. 1041, 1043 n.9 (asking, but not answering, “whether allowing a debtor to tithe in bankruptcy amounts to forcing unsecured creditors to subsidize the debtor’s religion” in violation of the Establishment Clause) (emphasis added). In recent years, a considerable number of courts have ordered churches to return to creditors tithes paid by bankrupt debtors. See, e.g., Kate Thomas, *Court Tells Church to Return Tithes*, NAT’L L.J., Sept. 29, 1997 at A8 (noting Texas trial court ruling in favor of air conditioning company against local baptist church) (not relying on Establishment Clause).

129. See *Kotterman*, 972 P.2d at 618 (rejecting argument that “because taxpayer money could enter the treasury if it were not excluded by way of the tax credit,” it is public money that cannot be used to support a religious establishment) (“[F]unds remain in the taxpayer’s ownership at least until final calculation of the amount actually owed to the gov-

we demand item-by-item justification for every decision *not* to tax, we can lose sight of this fact, and of the fact that the government's primary burden is that of justifying each time it chooses to *take* a person's money. The use of the word "subsidy" for tax exemptions subtly but inexorably shifts the focus of the discussion away from the more fundamental question—why the government claims any portion of our income in the first place, and how it proposes to spend it. In short, the use of the word "subsidy" for tax exemptions effectively ratifies an assumption that there is nothing remarkable about the government's claim on private property.

A less abstract criticism of tax expenditure analysis is that there is no way to tax everything. In Professor Bittker's words, a legislature "no matter how avid for revenue, can do no more than pick out from the universe of people, entities, and events over which it has jurisdiction those that, in its view, are appropriate objects of taxation."<sup>130</sup> The nature of the legislative task, in short, is to choose what is within the scope of the tax, and what is not. "In specifying the ambit of any tax," he wrote, "the legislature *cannot avoid* 'exempting' those persons, events, activities, or entities that are outside the territory of the proposed tax."<sup>131</sup>

Similarly, there is often no principled way to distinguish between an exemption carved out of a code, and a code-level redefinition of what is taxable in the first instance. Take, for example, the fact that nonprofit organizations are immune from taxation. This immunity, Professor Bittker noted, "is conferred by a statutory provision that is labeled 'exemption from taxation,' but"—and here is the key—"substantially the same result could have been achieved without using the term 'exemption,' by rephrasing the statutory language to provide that 'the income of organizations conducted for profit and of natural persons shall be taxed.'"<sup>132</sup> Immunity from taxation written in the form of exemptions and credits may merely reflect a legislative choice to omit certain transactions, entities, or activities from the tax base.<sup>133</sup>

The most forceful objection to tax expenditure analysis, however, is

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ernment.").

130. Bittker, *supra* note 6, at 1288.

131. *Id.*

132. *Id.* at 1288-89.

133. See Galvin & Devins, *supra* note 56, at 1369; see also Zelinsky, *supra* note 127, at 1165-66 (classification of a particular feature as normative or subsidizing "cannot always be made with confidence"). Some would characterize the deduction for charitable contributions and the deduction for medical expenses, for instance, as a refinement in our notion of what is properly "income" in the first place. See, e.g., William D. Andrews, *Personal Deductions In An Ideal Income Tax*, 86 HARV. L. REV. 309, 331-75 (1972); see also Thuronyi, *supra* note 125, at 1167.

one that Professor Surrey himself spent a considerable amount of energy addressing—it is an objection to the notion that there even *exists* an objective identifiable “ideal tax,” deviations from which would constitute tax expenditures.<sup>134</sup> It is the argument that there *is* no normative income tax and that Surrey’s own efforts to define it more than adequately prove its inherent subjectivity.<sup>135</sup>

Surrey began with the Haig-Simons definition of income—an individual’s consumption plus the change in his net worth over the period in question.<sup>136</sup> It would have been both administratively burdensome and conceptually problematic for Surrey to stop here, as Professor Thuronyi points out, and define the normative income tax as one of income in the Haig-Simons sense.<sup>137</sup> Not only, for instance, is “consumption” not self-defining, but administration would require annual appraisal of each taxpayer’s assets.<sup>138</sup> Accordingly, Surrey used Haig-Simons only as a starting point.<sup>139</sup> Haig-Simons was then refined in ways Surrey argued were defensible and objective—ways that took into account, for example, the historical treatment of certain items, the political and administrative realities of tax administration, and the needs of modern methods of accounting.<sup>140</sup> And of course, almost immediately, reasonable minds will begin to differ. Professor Andrews would not consider medical expense deductions or charitable contribution deductions tax expenditures.<sup>141</sup> Professor Thuronyi, pointing out that departure from an “arbitrary norm can be viewed not as disguised spending, but as an expression of an alternative norm,”<sup>142</sup> might not count business expense deductions as tax expenditures.<sup>143</sup> Professor Bittker suggested the normative income tax could be a “tax on income that

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134. Thuronyi, *supra* note 125, at 1163-70.

135. A detailed discussion of this problem can be found in Thuronyi, *supra* note 125, at 1163-70.

136. *Id.* at 1164.

137. *Id.* at 1164-65.

138. *Id.* Additionally, as Thuronyi points out, Surrey “intended the list of tax expenditures to serve at least in part as a realistic ‘hit list’ for reform.” *Id.* Naturally, “[i]dentifying all departures from the Haig-Simons definition as tax expenditures would have been overbroad and ineffective, implicitly advocating reforms that would be administratively infeasible or politically untenable.” *Id.*

139. *Id.*

140. See SURREY, *supra* note 114, at 12 (advising that one look to deviations “from widely accepted definitions of income and standards of business accounting and from the generally accepted structure of an income tax”); *id.* at 16-19 (that the normative model of an income tax necessarily reflects policy-like choices by society that have somehow over time become structural); see also Thuronyi, *supra* note 125, at 1165-66.

141. See *supra* note 133.

142. Thuronyi, *supra* note 125, at 1170.

143. *Id.* at 1164 n.55.

inures in measurable [sic] amounts to the direct or indirect personal benefit of identifiable natural persons,"<sup>144</sup> and that, accordingly, exemption for non-profits in Title 26 might simply reflect a Congressional realization that money received by non-profit organizations is outside the basic concept of the income tax.<sup>145</sup> In short, as Bittker wrote in 1969, the case for tax expenditure analysis "presupposes a consensus on the 'proper' ambit of a tax."<sup>146</sup>

#### 4. *Some Implications of Subsidy Rhetoric*

If one accepts the Surrey notion that an exemption is tantamount to a direct subsidy, then one must give thought to the various statutory and constitutional restrictions that attach to federal funding and federal subsidies.<sup>147</sup> The Civil Rights Act, for instance, prohibits racial discrimination by any program "receiving" federal financial assistance.<sup>148</sup> If tax exemption is tantamount to direct subsidy, then arguably the strictures of the Civil Rights Act apply to entities that are tax exempt. For that matter, when the government supports or encourages private discrimination, that private discrimination can sometimes be imputed to it by virtue of the state action doctrine, such that it may be found to have violated the equal protection clause. Might a tax exemption ("subsidy") constitute such encouragement and assistance?

The lower court decision of *McGlotten v. Connally*, which concerned the federal tax status of the Elks Lodge, demonstrates this implication of tax expenditure analysis.<sup>149</sup> The three-judge federal district court panel in *McGlotten* adopted Professor Surrey's approach, taking the position that provisions of the Internal Revenue Code that can be explained as "pure tax policy" are not aid (for either statutory or constitutional purposes), and that

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144. Bittker, *supra* note 6, at 1290-91.

145. *Id.* at 1291.

146. *Id.* at 1296. The debate between proponents and opponents of tax expenditure analysis has largely been fought in the context of the income tax, although the points made translate equivalently into the context of the property tax. See SURREY, *supra* note 114, at 26-27 ("ab initio all forms of real property should be assessed in the same way and taxed at the same rate"). Although Surrey did not belabor the point, others have argued for the application of tax expenditure analysis to property tax schemes, see, e.g., Colombo, *supra* note 7, at 858, and pointed out that in this context there will be far less disagreement about the scope of the normative tax, see Witte, *supra*, note 19, at 385 n.78.

147. See generally SURREY & MCDANIEL, *supra* note 116, at 118-55.

148. See 42 U.S.C. § 2000d (1994) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

149. 338 F. Supp. 448, 457-58 (D.D.C. 1972).

provisions which cannot be thus explained essentially operate as subsidies.<sup>150</sup> Relying on the premise that the government allows the deduction of charitable contributions in order to relieve itself of the burden of meeting public needs (the social benefit theory) and the premise that § 170 status carries with it the imprimatur of government approval, the court ruled that by virtue of the charitable contribution provision, "the Government has become sufficiently entwined with private parties to call forth a duty to ensure compliance with the Fifth Amendment by the parties through whom it chooses to act."<sup>151</sup> The court reasoned that:

[t]he public nature of the activity delegated to the organization in question, the degree of control the government has retained as to the purposes and organizations which may benefit, and the aura of government approval inherent in an exempt ruling by the Internal Revenue Service, all serve to distinguish the benefits at issue from the general run of deductions available under the Internal Revenue Code.<sup>152</sup>

On the question of § 501(c)(7) income tax exemption for the "exempt function income" of nonprofit groups, however, the court explicitly rejected the "subsidy" rationale, writing that "the deduction for 'exempt function income' does not operate to provide a grant of federal funds through the tax system."<sup>153</sup> Rather, the court reasoned, "it is part and parcel of defining appropriate subjects of taxation."<sup>154</sup> Nor was there, in the court's view, any indication of government approval in the designation of a group as exempt. "Congress does not violate the Constitution," the court wrote, "by failing to tax private discrimination where there is no other act of Government involvement."<sup>155</sup> Failure to tax, in and of itself, would not constitute, could not constitute, state action. "To find a violation solely from the State's failure to act would . . . eliminate the 'state action' doctrine."<sup>156</sup> By way of contrast, the exemption given to fraternal organizations under § 501(c)(8) *does* amount to state action, partly because the exclusion is "provided only to particular organizations with particular purposes" and partly because the exemption attaches to "unrelated business income" (e.g., passive investment income) and seemed to the court

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150. *See id.* at 462.

151. *Id.* at 456.

152. *Id.* at 457.

153. *Id.* at 458.

154. *Id.*

155. *Id.*

156. *Id.*

unlike a refining of the appropriate subjects of taxation.<sup>157</sup>

As to the argument that exemption from taxation and deductibility of contribution constitutes federal financial assistance in violation of the Civil Rights Act, the court agreed that "the provision of a tax deduction for charitable contributions is a grant of federal financial assistance within the scope of the 1964 Civil Rights Act."<sup>158</sup> Citing Professor Surrey's work, the court noted that the deduction "operates in effect as a Government matching grant" and is no different from the provision of federal property for reduced consideration.<sup>159</sup> Tax exempt status under § 501(c)(7) does not constitute a grant of federal funds, but tax exempt status under § 501(c)(8), which "cannot be explained simply as a matter of pure tax policy . . . operates in fact as a subsidy" and thus falls within the coverage of the Civil Rights Act.<sup>160</sup> Under the *McGlotten* court's analysis, closer scrutiny is deemed appropriate when a scheme's structure is "suspicious" or "unusual"—i.e., when it cannot be justified or rationalized by the court as a reflection of the court's understanding of tax policy.

There is another implication of the notion that tax exemptions are functionally the equivalent of direct subsidies. The alleged indistinguishability of the two, and the presumed constitutionality of tax exemptions, can be used syllogistically to defend as constitutional direct cash aid to churches.<sup>161</sup> After all, if tax exemption is unremarkable, and if direct subsidies and tax exemptions are "the same," then surely direct subsidies are unremarkable. This is the flip side of Professor Adler's argument (that direct subsidies are plainly unconstitutional, that tax exemptions are the same as direct subsidies, and that therefore tax exemptions are unconstitutional as well). Professor Adler would question the premise of the first syllogism. Justice Rehnquist would question the premise of the second. The point is that if one accepts the constitutionalization of Professor Surrey's theories, then *either* direct aid to churches is perfectly constitutional, *or* tax exemptions are not. Perhaps, instead, the error lies in constitutionalizing tax expenditure doctrine. Perhaps the syllogisms fail because tax exemptions

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157. *Id.* at 459.

158. *Id.* at 462.

159. *Id.*

160. *Id.* On the *McGlotten* decision, see Boris I. Bittker & Kenneth M. Kaufman, *Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code*, 82 YALE L.J. 51, \_\_\_\_ (1972). See also SURREY, *supra* note 114, at 42-46; SURREY & MCDANIEL, *supra* note 116, at 124-26; Harvey P. Dale, *Standing to Challenge Tax Exempt Status*, 307 PLI TAX 491; Galvin & Devins, *supra* note 56, at 1375-76. For another decision employing similar analysis, see *Jackson v. Statler Found.*, 496 F.2d 623, 629 (2d Cir. 1974) (finding that activities of tax-exempt charitable organization are state action).

161. SURREY, *supra* note 114, at 129 n.12.



really *are not* "for all intents and purposes" the same as direct subsidies.<sup>162</sup>

### III. THE SEPARATION PRINCIPLE OF THE ESTABLISHMENT CLAUSE

#### *A. The Unworkability of the Absolute Separation Model*

Some argue that the principle of separation of church and state embodied in the Establishment Clause requires tax exemption for churches, whether or not also provided to non-profit organizations.<sup>163</sup> It is said that the state actually lacks the power to tax both the property and the income of churches.<sup>164</sup> Thus, one scholar recently wrote, "[t]he issue . . . is not whether the state is allowed to grant tax [exemptions] to entities dedicated to fulfilling the role of religion in civil society, but whether the state has any power to tax such entities at all."<sup>165</sup>

The logical corollary to this, however, is that the state need not (and perhaps must not) provide to churches any of the benefits that would otherwise accrue to members of civil society—the idea being that the church is "outside" the civil society, somewhat like a foreign embassy on American soil. There is little historical support for the proposition that the framers of the amendment viewed separation in this extreme sense<sup>166</sup> rather than in the more benign sense of "noninterference" (either one with the other, both to protect religious liberty in the Williams sense and to protect government in the Jefferson sense). Further, the view of state tax exemptions as mandated by the Establishment Clause is conceptually incompatible with the federalist ("no-interference") view of the clause, whereby the clause itself merely

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162. See Bittker & Kaufman, *supra* note 160, at 64 ("Whatever may be said for the usefulness of this intellectual construct for other purposes, we question the validity of allowing constitutional violations to hinge on it."); see also Kotterman, 972 P. 2d at 619 ("Modern economic theory, under some circumstances, may be helpful to our understanding . . . . [I]t does not necessarily govern constitutional interpretation").

163. See, e.g., Brief of the Synagogue Council of America & Its Constituents at 9, *Walz*, 397 U.S. 664.

164. The argument would clearly lose some of its force if applied to the deduction for charitable contributions.

165. Titus *supra* note 28, at 516; see also Glenn Goodwin, Note, *Would Caesar Tax God? The Constitutionality of Governmental Taxation of Churches*, 35 *DRAKE L. REV.* 383, 398 (1986); Oliver S. Thomas, *The Power to Destroy: The Eroding Constitutional Arguments for Church Tax Exemption and the Practical Effect on Churches*, 22 *CUMB. L. REV.* 605, 610 (1992).

166. It is a view, however, consistent with some early influential American religious writing. See COBB, *supra* note 22, at 485-86 (discussing the writings of Jonathan Edwards and his notion that "the Church was greater than the State, and in an entirely different sphere," that it "was not of this world and could not be subject to the kingdoms of this world").

serves to protect state establishment (the epitome of non-separation) from federal intervention.<sup>167</sup> Finally, however, as explained below, the absolute separation model poses significant practical problems within the context of the complicated economic relationship between today's government and its citizens.<sup>168</sup>

It follows from the tax-and-spend prohibition that the Establishment Clause speaks to some direct non-cash outlays from government to church. After all, if the federal government may not give the Presbyterian Church cash from its coffers, surely it may not give the Methodists twenty acres of the public's land on which to build a church building, or spend taxpayer funds on prayer books and choir robes for the local Catholic diocese. We presume this to be true, as well, of items not inherently religious—pens and pencils for the Sunday school, for instance, a guest ledger for the front entrance of the church, or a personal computer for every (parochial as well as public) classroom.<sup>169</sup> One would assume that this extends to churches built at taxpayers expense, and to ministers trained at taxpayer expense or salaried at taxpayer expense and then employed wherever the government might think it expedient to do so.

Such non-cash outlays are paid for with taxpayer funds, and then handed over to a church for the church's use, in its sole discretion. This sort of coerced support of religion is virtually indistinguishable from the model of "establishment" that Madison and Jefferson aimed to prevent—the primary distinction being the addition of an extra step (i.e., taxes raised, taxes spent on item, item given to church)—a step that should not, under

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167. Obviously the First Amendment on its face could be read to forbid *federal* taxation. One very literal interpretation of the Establishment Clause holds that in enacting the Internal Revenue Code provisions that pertain to churches, religious organizations, and ministers of the gospel, Congress *has* made a law respecting "an establishment of religion" (i.e., it equates the latter with "religious establishments") and, thus, quite literally, has contravened the clause. See, e.g., John M. Swomley, *The Impact of Tax Exemption and Deductibility on Churches and Public Policy*, 22 CUMB. L. REV. 595, 597 (1991-92). This would be true as well of I.R.S. regulations that implement the statutory directive, as legislative agencies are wholly derivative from acts of Congress and presumably their actions are identically constrained. The argument is that the clause prohibits the Congress (and its agencies) from passing legislation and regulations that purport to apply to churches qua churches. The Court suggested nearly a century ago that this reading of the clause might be too restrictive, noting that "an establishment of religion" is not the same thing as "a religious establishment." *Bradfield v. Roberts*, 175 U.S. 291, 297 (1899).

168. See discussion of absolute separation model *infra* part IV.A.

169. See, e.g., *Wolman v. Walter*, 433 U.S. 229, 251 (1977) (striking Ohio statute that authorized expenditures of funds for purchase of instructional material and equipment) (Burger, C.J., Rehnquist and White, JJ., dissenting) (Powell, J., concurring only in the judgment). "If a grant in cash to parents is impermissible, we fail to see how a grant in kind in goods furthering the religious enterprise can fare any better." *Id.*

Madison's logic, make any difference. Here, still, civil authority forces a man to contribute his own money to support the propagation of religious opinion and doctrine.<sup>170</sup> Thus, President Madison wrote in 1811, vetoing a bill that would have granted to a Baptist congregation the federal land on which it had erroneously built its church, that the grant would constitute a "precedent for the appropriation of funds of the United States for the use and support of religious societies, contrary to the article of the Constitution which declares that 'Congress shall make no law respecting an establishment of religion.'" <sup>171</sup>

Notably, however, both state governments and the federal government have provided—and in some instances still provide—exactly these sorts of taxpayer-funded non-cash gifts to religion. Individual states, for instance, underwrote the cost of Bibles and prayer books for rural churches well into the nineteenth century.<sup>172</sup> States also donated land and services,<sup>173</sup> and the United States Code still authorizes the federal government to give surplus land to churches.<sup>174</sup> Both the early Congress and the early state legislatures funded missionary work among the Native Americans.<sup>175</sup> The federal government has built churches and has paid priest salaries, even as recently as one hundred years ago.<sup>176</sup> Common or not, however, these practices—at

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170. Suppose, instead, the government were to sell at auction all of the items collected by the DEA pursuant to federal drug forfeiture laws, and were to use the auction proceeds to purchase prayer books for the Catholic Church. This is still a "grant in kind in goods furthering the religious enterprise," *Wolman*, 433 U.S. at 251, and should not be sustainable on the ground that the originating funds were not levied by tax.

171. Veto Message of February 28, 1811, *THE WRITINGS OF JAMES MADISON* 40 (Hunt ed., 1900); see also LEVY, *supra* note 17, at 119. Madison's opposition to land grants extended to nonpreferential land grants—for instance, land set aside in each township for any church. *Id.* at 129-30.

172. Witte, *supra* note 17, at 406.

173. *Id.*

174. The Surplus Property Act of 1944, ch. 479, 58 Stat. 765 (1944) (codified as amended at 40 U.S.C. §§ 484(j), 484(k) (1994)) had by 1961 resulted in nearly 500 grants of land and/or buildings to sectarian schools. Brief of the State of N.Y. at 10, *Walz*, 246 N.E.2d 517. Indeed, it was the donation of a 77-acre tract of government surplus land to a nonprofit educational institution with a Christian orientation, pursuant to § 484(k), that prompted the Establishment Clause challenge in *Valley Forge College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1981). The Supreme Court never reached the Establishment Clause question, finding (over a strong dissent) that the plaintiffs lacked standing insofar as they challenged an exercise of the power in Congress vested by the property clause of the federal constitution, U.S. CONST. art. IV, § 3, cl. 2. The statutory scheme remains in place today. See 40 U.S.C. § 471-92 (1994).

175. Witte, *supra* note 17, at 406-07; see also Laycock, *supra* note 101, at 914-16. Professor Laycock argues that the missionaries were seen as a cheap way to educate Native Americans, and that the civil authorities in question did not perceive themselves to be providing tax support to churches.

176. President Jefferson signed a treaty with the Kaskaskia Indians, for instance, pur-

least when engaged in by the federal government—are not in a relevant way distinguishable from the model of establishment that the drafters of the Establishment Clause sought to prohibit.<sup>177</sup>

By way of contrast, it is widely presumed that the Establishment Clause *permits* state and federal government to provide directly to churches fire and police protection, as well as the services of the United States military, the national guard, and the local dog catcher, and also the benefit of the availability of the civil justice system (for example, to protect their property both by enabling prosecution of trespassers and arsonists and by recording their property deeds).<sup>178</sup> This is true, even though the government uses tax revenue to fund these services, which are then provided “free of charge” to churches, other nonprofits, and anyone else not subject to the particular tax.<sup>179</sup> That the government uses tax revenue to fund some services which are then provided free to churches and others, and that this is ordinarily not thought to violate the Establishment Clause, is critical because it suggests that the Establishment Clause permits a church to receive at least some benefits (i.e., some things indisputably of actual value to the church) ultimately at taxpayer expense.<sup>180</sup>

One might argue that the class of benefits legitimately provided at taxpayer-expense (the class containing police protection, fire protection, and dog catchers) is distinguishable because the government *never* attempts

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suant to which the federal government agreed to build a church and support its Catholic priest in return for tribal land. CORD, *supra* note 22, at 38-39; Laycock, *supra* note 101, at 914-16. Presidents Adams, Jackson, and Van Buren signed similar treaties with the Osages, Kickapoo, and Oneida Indians, respectively. CORD, *supra* note 22, at 59-60. Indeed, by the time tax support for religious instruction on Indian reservations was terminated in 1897, Act of June 7, 1897, ch. 3, 30 Stat. 62, Congress was appropriating over \$500,000 annually for the practice. CORD, *supra* note 22, at 80.

177. One context in which non-cash disbursements have been sustained—over vigorous dissent—is that of textbooks “loaned” to parochial students. See Board of Educ. v. Allen, 392 U.S. 236, 243-44 (1968). “I still subscribe to the belief that tax-raised funds cannot constitutionally be used to support religious schools, buy their school books, erect their buildings, pay their teachers, or pay any other of their maintenance expenses, even to the extent of one penny . . . . [A]ny government that supplies such aids is to that extent a tyranny.” *Id.* at 253-54 (Black, J., dissenting).

178. See, e.g., Steffey, *supra* note 109, at 918-19.

179. This would include, for example, a member of the community below the minimum tax level, if the source of revenue in question were the income tax, or a person without real property, if the source of revenue in question were the local property tax.

180. See Mueller v. Allen, 463 U.S. 388, 393 (1983) (“One fixed principle in this field is our consistent rejection of the argument that ‘any program which in some manner aids an institution with a religious affiliation’ violates the Establishment Clause.”); see also Meek v. Pittinger, 421 U.S. 349, 359 (1975) (“[I]t is clear that not all legislative programs that provide indirect or incidental benefit to a religious institution are prohibited by the Constitution.”).

to (and as a practical matter could not) link the individual's actual tax contribution to the corresponding benefit he receives. The very nature of this sort of intangible benefit necessitates that it be provided to everyone without any clear and crisp accounting and billing.<sup>181</sup> How, indeed, could the church (or a tax protester, or an indigent person) not be provided the benefit of the United States Army, if everyone else is still to receive that benefit? One might argue that the Establishment Clause necessarily bows to this reality of accounting.

Take a local property tax, which in part funds the local fire station. One might say that a family living in a rented apartment receives the benefit of this fire station's services (or the benefit of merely knowing the services are available), even though it does not pay property tax. So, too, does a church exempt from that tax. And for that matter, a homeless person living in a makeshift cardboard shanty. One might say the family, the church, and the homeless person receive the benefit "for free" even while others are paying for the same benefit.<sup>182</sup> Indeed, one might even say that those who actually *pay* this tax are paying for the fire station to service the renters and homeless as well as the church—because, of course, their tax dollars flow into the fund in question, and are then disbursed to the fire station, which services all members of the community, without regard to whether they were required to pay the property tax in question. (Really, without regard to whether they *paid* it. A tax protester obligated to remit his property taxes and simply refusing to do so receives the same police protection, fire protection, and dog catching services.) The point is that the Establishment Clause does not require some sort of quid pro quo for these benefits (i.e., we do not require a final accounting) because it is next to impossible to determine with precision the value of the benefit received, and the amount paid in actually allocated to that benefit.<sup>183</sup> For instance, does one look at the amount one paid during one year, or over a decade, or over

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181. "It is difficult to measure the consumption of certain public services, such as fire or police protection, traffic control, or road maintenance." Rebecca S. Rudnick, *State & Local Taxes on Nonprofit Organizations*, 22 CAP. U. L. REV. 321, 345-46 (1993). Additionally, of course, the person who ultimately bears the burden for the tax is not always the person who receives the associated service. A sophisticated analysis would need to account for this. Bittker, *supra* note 6, at 1306; *see also id.* at 1308-09.

182. The family in rented housing probably "pays" the tax indirectly in the form of higher rent to its landlord (who does pay property tax), but the same cannot be said of the church or the homeless person.

183. Some sort of final accounting would presumably be necessary if the "fair share" system were to be perfectly accurate, so that corrections could be made if entities were taxed too heavily. Bittker, *supra* note 6, at 1305 n.40. This would be additionally complicated by the various levels of government to which one might have paid taxes, and from whom one might have received service. *See id.* at 1307.

a lifetime, when determining whether a person paid his "fair share?" Are police and fire protection conceived of in an insurance model rather than a fee-for-service model? Is the value in the actual receipt of the service or in its availability, or both? Is the value of the service measured objectively or subjectively?

If one accepts this explanation, however, one is left to wonder what would result if the government *could* earmark taxes and draw a crisp accounting link between an entity's actual contribution and the corresponding benefit it receives (take, for instance, the postal service, which provides the government's services on a fee-for-service basis, and reduces the fees for nonprofit organizations, including churches).<sup>184</sup> One might, for example, conclude that if the government did charge for police and fire services in the model of a private insurance company—i.e., if one paid a tax earmarked for "fire insurance" and the amount were not based on property value but rather the likelihood of fire and projected cost of putting such a fire out (a risk assessment)—then perhaps the government could not exempt churches from premiums and nevertheless provide such services to them.<sup>185</sup>

This is, of course, why proponents of tax exemptions have been cautious about endorsing the *quid pro quo* ("social benefit") theory to justify religious tax exemptions. The social benefit theory is in a sense an implicit acknowledgment of and effort to rebut the "fair share" argument—the notion that churches inappropriately (and perhaps unconstitutionally) receive certain benefits (like police and fire protection) without paying their "fair share" in taxes. And the same concerns apply. Not only is it next to impossible to determine whether a church is actually paying (in services rendered, or in taxes surrendered) for its "fair share" of benefits received (i.e., whether the *quid* and the *quo* are roughly equivalent in value)<sup>186</sup>—but once

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184. "The United States Postal Service . . . grants a special bulk rate to written material disseminated by certain nonprofit organizations—religious, educational, scientific, philanthropic, agricultural, labor, veterans', and fraternal organizations." *Arkansas Writers Project v. Ragland*, 481 U.S. 221, 238 (1987) (Scalia, J., dissenting) (citing *Domestic Mail Manual* § 623 (1985)).

185. Certainly if one were committed to a fair share arrangement, one would want to think carefully before exempting any entities from the premiums and still providing the service. There might be good public policy reasons so to treat nonprofit organizations, but clearly one would have to confront the Establishment Clause issue with respect to churches.

186. A related concern is implicit in the *Walz* Court's rejection of the *quid pro quo* theory as the secular "legislative purpose" behind tax exemptions. It was "unnecessary," Justice Burger wrote for the Court, "to justify the tax exemption on the social welfare services or (good works) that some churches perform for parishioners and others," noting that churches "vary substantially in the scope of such services" and that "to give emphasis to so valuable an aspect of the work of religious bodies would introduce an element of govern-

one argues that churches should and do pay for police and fire protection, one must logically extend the argument further, and require them similarly to pay for such things as foreign aid, national defense, and the waging of war.<sup>187</sup> And, of course, if tax exemptions are conceived and intended as a quid pro quo, then one must at least confront the possibility that the prohibition on direct cash outlays to churches extends to this sort of arrangement, that perhaps the government may not enter into such arrangements with religious entities to perform tasks it chooses not to do (or may not do) itself.<sup>188</sup>

Perhaps the better distinction is that fire protection and police protection (and the national guard) are incidents of belonging to civil society.<sup>189</sup> That is, the benefit of their availability (albeit at general taxpayer expense) is simply incidental to being a *part of* a civil and political body.<sup>190</sup> And that our notion of government would neither permit their cost to be assigned to the individual, nor permit the citizen to be conceived of as a

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mental evaluation and standards as to the worth of particular social welfare programs, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize." *Walz*, 397 U.S. at 674.

187. Bittker, *supra* note 6, at 1308. Ultimately, Professor Bittker concludes, "fair share" is an (inappropriate) effort to "extract a rule of constitutional obligation from a concept of fairness in the distribution of public obligations." *Id.* at 1305. He also points out that the fair share system (which focuses more on "benefit received" than "ability to pay") is contrary to the basic principle of a "progressive" tax. *Id.*

188. *See id.*

189. The fact that such incidental benefits inevitably "free up" funds that can be turned to religious purposes (i.e., the church is relieved of the financial burden of paying for private fire protection or the financial burden of self-insuring for fire loss) does not necessarily make them unconstitutional. *See, e.g.,* Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 337 (1987) ("A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose."); *Hunt v. McNair*, 413 U.S. 734, 743 (1973) ("[T]he Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends."); *Everson*, 330 U.S. at 17-18 (noting that without provision of policemen, fire protection, and sewage disposal, some parochial schools might be unable financially to operate and some parents might be unwilling to enroll their children in such schools, but rejecting suggestion that Establishment Clause requires "cutting off church schools from these services" which are general in nature and safety-oriented).

190. A similar notion of "incidental benefit" has been articulated by various members of the Court in the nonpublic school aid cases—i.e., health services, diagnostic psychological evaluations, and diagnostic speech services have been described as "fall[ing] within that class of general welfare services for children that may be provided by the state regardless of the incidental benefit that accrues to church related schools." *Meek v. Pittinger*, 421 U.S. 349, 371 n.21 (1975). The idea is that children receive certain benefits from the state and that the benefit incidentally accruing to the parochial school they attend is neither here nor there. Perhaps one might say this of nutritionally balanced school lunches, annual tuberculosis tests, rubella shots, eye exams, and sewage disposal.

"consumer." The danger is that "incidental to civil society" may be a somewhat subjective standard, and that the framers unquestionably envisioned a narrower set of benefits "incidental" to belonging to civil society than our continually-expanding welfare state currently taxes us for and then provides to us.<sup>191</sup>

### B. *The Question of Entanglement*

The ban on "entanglement" of government and church, a corollary of the separation principle, has also been invoked by both supporters and opponents of religious tax exemptions. Dicta in *Walz* raised the question whether tax exemptions (or taxation instead of exemption) might cause an unconstitutional "entanglement" of church and state. "Elimination of exemption," the *Walz* Court wrote would "expand the involvement of government by giving rise to valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes."<sup>192</sup> On the other hand, it noted, granting tax exemptions to churches "also gives rise" to involvement.<sup>193</sup> On balance, the Court concluded, granting tax exemptions would cause less involvement.<sup>194</sup>

Although the discussion was brief, the entanglement question has been debated ever since. Some argue that the prohibition on government entanglement with religion requires tax exemption for churches. The basic notion is that the relationship that results from administration of property and/or income taxes is entangling.<sup>195</sup> In theory, for instance, administration of property taxes will require measurement of the value of an unmarketable property of primarily religious significance. Administration of income taxes might plunge the Internal Revenue Service into examination of the nature of the relationship between a church and its employees. Perhaps deriving a special solution to the accounting problems noted earlier, a solu-

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191. See, e.g., *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993) (sustaining application of Individuals with Disabilities Act so as to finance a deaf student's use of a state-employed sign-language interpreter at a Roman Catholic high school); *Agostini*, 521 U.S. at 234 (allowing provision of Title I public school teachers to parochial schools to provide remedial instruction or premises).

192. 397 U.S. at 674.

193. *Id.* at 674-75; see also *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 393 (1990) (noting that both taxation and exemption involve some level of involvement between government and religion).

194. 397 U.S. at 675-76 ("The exemption creates only a minimal and remote involvement between church and state and far less than taxation of churches. It restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other.").

195. Cf. *Barham*, *supra* note 6, at 413-14 (arguing that the parsonage exclusion promotes separation of church and state by restricting the fiscal relationship between the two).



tion fitted to the unique needs of the non-profit organization, will also necessarily require government to intrude into church concerns.

None of these arguments is particularly persuasive. While it may be true that tax exemption would "alleviate the possibility of a hostile relationship between church and state"<sup>196</sup> (no one would dispute the point—tax exemption of most private individuals would "alleviate the possibility of a hostile relationship" with the state), that is not what the entanglement prohibition seeks to prevent. And while it may be true that tax exemption (particularly property exemption) furthers the values of separation and institutional autonomy, it seems unlikely the clause requires treatment of churches as separate sovereignties that simply happen to lie within the boundaries of a particular city or state. This interpretation of "separation" is inconsistent with the proposition that generally applicable laws (health codes, criminal laws, and fire codes) at least presumptively apply to churches and religious persons as much as to anyone else. The prospect of genuinely "intermeddling" in church affairs is hardly implicated and religious liberty barely threatened, when the government assesses the value of a tract of land or the resale value of a church building, or when the government defines "income" in a way that accounts for the special situation of non-profit entities.

At the other end of the spectrum lies the somewhat more plausible argument that it is the tax exemption, instead, that creates the unconstitutional entanglement.<sup>197</sup> The argument is made of property and income tax exemptions, for instance, on the ground that administration of these exemptions requires the legislature or the taxing authority or the courts to define and identify "religion" or "church."<sup>198</sup> Similar definitional inquiries are demanded by the parsonage exclusion of the federal income tax code, which allows an exclusion only to a "minister of the gospel."<sup>199</sup> But this argument, too, is a red herring.

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196. Witte, *supra* note 19, at 367.

197. See Adler, *supra* note 109, at 900-01 (arguing that while both taxation and exemption cause "entanglement" concerns, the kinds of questions that arise with respect to the former—e.g., the value of property and the measure of income—are less constitutionally troublesome than the kinds of questions that arise with respect to the latter—e.g., what constitutes a religion).

198. The Internal Revenue Code distinguishes between a "church" and a "religious organization," giving the former more favorable treatment, by e.g., dispensing with the requirement that an income tax return even be filed, see 26 U.S.C. § 6033 (1994).

199. See, e.g., Elliott M. Schachner, *Religion and the Public Treasury After Taxation with Representation of Washington, Mueller, and Bob Jones*, 1984 UTAH L. REV. 275 (arguing that the parsonage exclusion violates the "entanglement" prohibition). But see Barham, *supra* note 6, at 398 (arguing that parsonage exclusion does not violate the First Amendment).

Indisputably, the federal income tax code has drawn the government into definitional inquiries.<sup>200</sup> For instance, the I.R.S. has developed a "fourteen factor test" to determine whether an entity is a "church" within the meaning of the various code provisions using the term (such as 26 U.S.C. § 170).<sup>201</sup> Among the criteria that the I.R.S. considers relevant are (1) a recognized creed and form of worship; (2) a distinct ecclesiastical government; (3) a formal code of doctrine and discipline; (4) membership not associated with any other church; and (5) an organization of ministers who serve the church's congregation(s) and submit to formal study.<sup>202</sup> An entity typically does not need to satisfy each criterion to qualify as a "church"; rather, the criteria serve as guidelines, giving the I.R.S. flexibility in its decision whether to grant or deny applicability of the provision in question.<sup>203</sup> Nevertheless, plenty of instances can be found where the I.R.S. applied the fourteen factors and concluded that a particular entity was simply not a "church."<sup>204</sup>

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200. The Internal Revenue Service has, for instance, interpreted § 107 to require that the person claiming the exclusion be one who is "duly ordained, commissioned, or licensed" and who performs "ordinary ministerial services." 26 U.S.C. § 1402 (1994). The tax courts have thus gotten into the business of defining both "minister of the gospel" and ordinary ministerial duties. See generally Foster, *supra* note 6, at 153-55 (overview of I.R.S. regulations governing the parsonage exclusion); see e.g., Salkov v. Commissioner, 46 T.C. 190, 194 (1966) ("By definition a 'minister' is one who is authorized to administer the sacraments, preach, and conduct services of worship. And 'gospel' means glad tidings or a message, teaching, doctrine, or course of action having certain efficacy or validity. 'Gospel,' when used with a capital G, generally means the teachings of the Christian church as originally preached by Jesus Christ and his apostles . . ."). For examples of specific rulings, see Toavs v. Commissioner, 67 T.C. 897 (1977) (ruling that clergy operating nursing home operated by nonprofit organization associated with Assemblies of God Church was not entitled to parsonage exclusion); Colbert v. Commissioner, 61 T.C. 449 (1974) (denying parsonage exclusion to person who claimed to be Baptist minister but who primarily lectured from the pulpit about anticommunism); Silverman v. Commissioner, 57 T.C. 727 (1972) (finding that cantor of Jewish faith is a minister of the gospel and entitled to parsonage exclusion); Haimowitz v. Commissioner, 73 T.C.M.(CCH) 1812 (U.S. Tax Ct. Jan. 23, 1997) (finding retired temple employee not a minister of the gospel because he did not perform services considered to be "those of a minister").

201. See Remarks of I.R.S. Commissioner Jerome Kurtz, PLI Seventh Biennial Conference on Tax Planning (Jan. 9, 1987), reprinted in Fed. Taxes (P-H) ¶ 54,820 (1978) (announcing fourteen-factor test).

202. See, e.g., Spiritual Outreach Soc'y v. Commissioner, 927 F.2d 335, 338 (8th Cir. 1991) (applying fourteen factor test on appeal from the tax court, finding that Spiritual Outreach was not a church, noting that it lacked an established congregation, a ministry, and any provision for religious education of the young).

203. See Flynn, *supra* note 6, at 788.

204. See, e.g., Church of the Visible Intelligence v. United States, 4 Ct. Cl. 55, 63-64 (1983) (finding plaintiff a "religious organization" for § 501(c)(3) purposes, but not a "church" for § 170 purposes, using fourteen-factor test). Despite the existence and application of the so-called fourteen-factor test, the I.R.S. tends to approach these questions with

The fourteen factors and the specific decisions applying them notwithstanding (which may raise legitimate establishment concerns insofar as they tend to favor religions with which I.R.S. employees and tax courts are familiar—i.e., “established” religions, in the colloquial sense of the word), the basic definitional inquiry required by the Internal Revenue Code (“is this a church or a religious organization”) is not inherently forbidden of government or, more specifically, of the courts. Nor may the Court’s decision in *Employment Division v. Smith* be taken to mean that threshold definitional concerns preclude government from granting religious exemptions at all.<sup>205</sup> The *Smith* Court, after all, simply held that nothing in the Free Exercise Clause *requires* the government to do so. More specifically, it rejected the argument for a free-exercise exemption from generally applicable criminal law for religiously motivated conduct and an alternative plea for the rigid scrutiny of *Sherbert v. Verner*<sup>206</sup> to apply (so as to favor an exemption *unless* strict scrutiny were satisfied), and concluded that “the government’s ability to enforce generally applicable prohibitions of socially harmful conduct ‘cannot depend on measuring the effects of a governmental action on a religious objector’s spiritual development.’”<sup>207</sup> The Free Exercise Clause, it ruled, does not require the government to assess the impact of its generally applicable laws on religion.<sup>208</sup> This is *not* to say,

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caution, denying exemption on any other plausible grounds before reaching the definitional one. This avoidance policy has, no doubt, permitted a number of fraudulent claimants to proceed with impunity. Fraud is an inevitable byproduct of tax exemption schemes, however, and in the context of religious tax exemptions has a long and notorious history. See, e.g., CAROLYN WEBER, *A HISTORY OF TAX & EXPENDITURE IN THE WESTERN WORLD* 106 (1986) (discussing tax fraud under Emperor Constantine after his conversion to Christianity and specifically problems with the exemption of Christian clergy from municipal taxes and liturgies, and noting his solution—“Constantine rescinded this immunity and forbade decursions from taking hold orders [and] [i]f a man wished to enter the priesthood, he was required to demonstrate his faith by surrendering one-fourth of his property to the state”); see also Christopher S. Jackson, *The Inane Gospel of Tax Protest: Resist Rendering Unto Caesar—Whatever His Demands*, 32 GONZ. L. REV. 291, 318-20 (1996-1997) (describing two ways people attempt to avoid personal income tax using religious exemption provisions currently available under Internal Revenue Code, and describing such attempts as “pervasive”).

205. See Wayne McCormack, *Subsidies for Expression and the Future of Free Exercise*, 1993 B.Y.U. L. REV. 327, 327-28 (arguing that *Smith* implies that judicial granting of religious exemptions from laws of general applicability would be tantamount to the establishment of religion because it would force the judiciary to define religion); see also *id.* at 328 (“Elimination of legislative exemptions for religious practices may well be the next stage of separation of church and state.”).

206. 374 U.S. 398, 404-07 (1963).

207. 494 U.S. at 885 (quoting *Lyng v. Northwest Indian Cemetery Ass’n*, 485 U.S. 439, 451 (1988)).

208. *Id.*

however, that the Establishment Clause, as well, would prohibit the sort of inquiry involved (the exact nature of the particular religious belief, the particular seriousness with which a plaintiff holds that belief, the extent to which the law in question truly conflicts with the belief, and the like). While Justice Scalia's opinion suggested that courts should not engage in this sort of inquiry,<sup>209</sup> this view of judicial incompetence would prohibit administration of the religious exemptions carved into a great number of our laws, including, for instance, the Universal Military Training and Service Act which permits exemption for any person "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."<sup>210</sup> One danger here is that government might simply enact an across-the-board exemption from generally applicable laws for anyone able to prove that a particular law burdens his religion. This was precisely the reaction of Congress to Justice Scalia's writings in *Smith*; it was the theory of the Religious Freedom Restoration Act.<sup>211</sup> The problem with such an across-the-board exemption is that it amounts to a wholesale preferencing of religion and of explanations for non-participation clothed—whether falsely or truthfully—in religious terms and phrases.<sup>212</sup>

The Internal Revenue Code indisputably draws the Internal Revenue Service and the courts into foundational definitional inquiries. It also requires application of those definitions to persons claiming religious exemptions; that is, it requires assessments of religious claims, some of which have been drawn out and hotly contested.<sup>213</sup> But *Walz* does not support the

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209. See *id.* at 887 ("The courts must not presume to determine the place of a particular belief in a religion, or the plausibility of a religious claim.").

210. See *Welsh v. United States*, 398 U.S. 333, 335 (1970). Even much more cumbersome administrative schemes are thought sometimes not to cause constitutionally problematic entanglement. The lower courts are split, for instance, on the question of whether the no-entanglement prohibition requires an exemption for religious institutions from the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1994) (ADEA). Compare *Soriano v. Xavier Univ. Corp.*, 687 F. Supp. 1188, 1188 (S.D. Ohio 1988) (finding Establishment Clause does not require religious institution exemption from ADEA) with *Cochran v. St. Louis Prep. Seminary*, 717 F. Supp. 1413, 1415-16 (E.D. Mo. 1989) (holding ADEA cannot apply to church-operated schools because application of *McDonnell-Douglas* test and enforcement by EEOC raise entanglement concerns).

211. 42 U.S.C. § 2000bb (1994) (found unconstitutional, *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997)).

212. Cf. William Van Alstyne, *The Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment*, 46 DUKE L. J. 291, 307 n.46 (arguing that the RFRA's flaw was *not* that it required courts to inquire into the substantiality of a particular burden on the free exercise of religion).

213. The most famous of these quarrels, of course, has been the forty-year dispute between the Internal Revenue Service and the Church of Scientology which—despite a Supreme Court ruling for the I.R.S.—the Scientologists ultimately won. The battle began in 1967, when the I.R.S. revoked the organization's § 501(c)(3) tax exempt status on the

theory that the clause embodies some sort of "least entangling alternative" requirement.<sup>214</sup> (This may well be a desirable policy, but it is certainly not required by the Establishment Clause.<sup>215</sup>) And in any event, a general taxation scheme providing for exemptions for nonprofit organizations including churches does not require the government to parse the tenets of a faith or to determine their relative centrality—no more so than does the conscientious objector exemption from the military draft.<sup>216</sup>

#### IV. THE EQUAL TREATMENT THEORY OF THE ESTABLISHMENT CLAUSE

Barring federal interference with state decisions to establish or disestablish religion, prohibiting direct federal aid to religion, and precluding government entanglement with religion are among the core principles that the Establishment Clause advances. This does not mean, however, that the clause does not serve other purposes or embody other principles. For in-

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grounds that the organization was operated for the financial betterment of private individuals rather than for religious purposes. *Church of Scientology v. Commissioner*, 83 T.C. 381, 443 (1984), *aff'd*, 823 F.2d 1310 (9th Cir. 1987). Deductibility of charitable contributions under § 170 was, accordingly, also denied by the I.R.S. Appellate court reactions to this denial varied from jurisdiction to jurisdiction. *Compare* *Foley v. Commissioner*, 844 F.2d 94 (2d Cir. 1988) (holding payments deductible), *vacated*, 490 U.S. 1103 (1989) with *Christians v. Commissioner*, 843 F.2d 418 (10th Cir. 1988) (holding payments nondeductible), *cert. denied*, 109 S. Ct. 3174 (1989). The Supreme Court reached the issue in 1989, affirming the I.R.S. decision to reject the deductibility of contributions. *Hernandez v. Commissioner*, 490 U.S. 680, 692-93 (1989). In the wake of this ruling, the Scientologists began a campaign of constant litigation against the I.R.S., and also began to reformulate their internal structure and creed. See James Walsh, *Tax Treatment of the Church of Scientology in the United States and the United Kingdom*, 19 SUFFOLK TRANSNAT'L L. REV. 331, 338 (1995). The I.R.S. then acquiesced, granting the Scientologists tax-exempt status under § 501(c)(3) in 1993. Rev. Rul. 93-73, 1993-2 C.B. 75.

214. *But see* Paulsen, *supra* note 76, at 350 (arguing for a least-entangling-alternative reading) ("Simply put, 'excessive entanglement' means that the institutions of church and state are more entangled than they need to be in order for government to accomplish its otherwise legitimate purposes in the program or policy at issue."); Thomas, *supra* note 165, at 608 (arguing that the *Walz* Court "suggested" tax exemption is constitutionally required); *Developments in the Law*, *supra* note 109, at 1688 (arguing that the *Walz* Court "upheld the exemption in order to avoid the entanglement of religion and the state that would result from any attempt to tax religious organizations").

215. See *Agostini*, 521 U.S. at 233 ("Not all entanglements, of course, have the effect of advancing or inhibiting religion. Interaction between church and state is inevitable, and we have always tolerated some level of involvement between the two. Entanglement must be 'excessive' before it runs afoul of the Establishment Clause.").

216. Nor is it true that an audit by the I.R.S. (or state equivalent) would necessarily entangle the government in the church's affairs (such that taxation must necessarily be prohibited). The prohibition on entanglement is *not* a guarantee of "immunity" from government scrutiny. While it derives its force from the separation principle, it is primarily a guarantee that the government will not weigh in on religious questions or use its power or force in an influential or intrusive manner that might interfere with religious liberty.

stance, it has also been identified as a constraint on practices that carve divisive political lines on the basis of religion.<sup>217</sup> It has been read by the Court to prohibit government practices that give an appearance of “endorsement” of a particular (or all) religion.<sup>218</sup> While not explicit on the face of the clause, these have been inferred over time, whether correctly or incorrectly, and usually as corollaries to the Jeffersonian notion that there should be an impenetrable wall of separation between church and state. These principles appear not to be contravened by conventional religious property and income tax exemptions.

This does *not* end the Establishment Clause inquiry. As explained below, the Supreme Court’s press tax jurisprudence shows that when the provision at issue is a legislative tax scheme, the First Amendment *also* requires us to delve into legislative motive and the structural aspects of the scheme in question. Both “purpose and effect” principles and notions of equal treatment inform the assessment of religious tax exemptions and suggest their possible weakness.

### A. *The Press Cases*

Without a doubt, many provisions in tax codes have two functions—to encourage or to discourage certain economic behaviors, and to raise revenue. Similarly it is clear that as to some provisions, the non-revenue purpose predominates—i.e., the primary purpose of the scheme is the encouragement or discouragement of certain behaviors.<sup>219</sup> There can be no

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217. See, e.g., *Meek*, 421 U.S. at 372 (finding that Pennsylvania statute providing for loan of instructional equipment to nonpublic schools, due to recurring appropriations process, “provides successive opportunities for political fragmentation and division along religious lines, one of the principle evils against which the Establishment Clause was intended to protect”).

218. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring) (“The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”).

219. Protective tariffs are an example of the latter. The Supreme Court sustained the validity of protective tariffs in *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 412 (1928) (holding that “[s]o long as the motive of Congress and the effect of its legislative action are to secure revenue for the benefit of the general welfare, the existence of other motives in the selection of the subject of taxes cannot invalidate Congressional action”). It is worth noting, however, that in *J.W. Hampton*, the secondary motive in question (influencing imports) was itself independently sustainable on the strength of a freestanding power in Congress (the power to regulate commerce with foreign nations). The case thus stands as a bookend to the Child Labor Tax Case decided six years earlier, in which the Court struck down a tax structured so as to accomplish a goal (deterring child labor) wholly beyond the scope of Congress’s enumerated powers. *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 43-

doubt that legislatures sometimes enact tax legislation with another goal in mind entirely—hoping that the incentives and disincentives built into the legislation will encourage behaviors and choices the legislature deems it desirable to encourage. Although few would question the constitutionality of a general revenue-raising tax on all property or on all income that happens also to fall on entities deemed somehow “especially protected” by virtue of the First Amendment (e.g., newspapers or churches<sup>220</sup>), it also seems likely that the First Amendment must place *some* constraint on a legislature’s enactment of legislation that is only partly, if at all, designed to raise revenue. Surely intentional use of the tax code to indirectly effect substantive goals unrelated to revenue raising must be scrutinized just as if the legislature had sought to effect these goals directly.<sup>221</sup> It is in this regard that the Court’s jurisprudence on taxation of the press is instructive.

The press tax cases begin with the classic case—a tax which has as its primary purpose not the raising of revenue but the discouraging or punishing of the exercise of a constitutionally protected right. The Louisiana legislature had enacted a “license tax” of two percent of the gross receipts from the selling of advertisement space by any newspaper with a circulation of at least 20,000 copies per week.<sup>222</sup> The license tax thus applied, as

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44 (1922). A third permutation would be where the secondary purpose of the tax actually contravenes a freestanding prohibition on legislative enactments (such as the First Amendment).

220. A generally applicable tax that happens to apply to entities exercising First Amendment rights and that happens to affect or even to hamper such exercise does not for that reason alone run afoul of the First Amendment. *See, e.g., Jimmy Swaggart Ministries*, 493 U.S. at 389 (unanimously sustaining application of California’s Sales and Use Tax to distribution of religious materials by religious organization) (“California’s generally applicable sales and use tax . . . applies neutrally to all retail sales of tangible personal property made in California.”); *Minneapolis Star & Trib. Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575, 588 n.9 (1983) (The Court’s “cases have consistently recognized that nondiscriminatory taxes on the receipt or income of newspapers would be permissible.”); *id.* at 586 (“[T]he State could raise the revenue by taxing businesses generally.”); *id.* at 589 n.12 (“Nothing . . . prevents the State from taxing the press in the same manner that it taxes other enterprises.”). We typically afford a legislature considerable latitude in determining the subjects of taxation, the governing tax rates, and the appropriate taxable periods. The First Amendment entitles neither the press nor the church to immunity from the burdens incident to belonging to organized society.

221. This is, after all, the lesson of *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 40 (1922). This period marks the birth of the unconstitutional conditions doctrine, in such cases as *Frost Trucking Co. v. Railroad Comm’n*, 271 U.S. 583, 593 (1926) (striking California law that forbade private carriers by automobile for hire from operating between fixed points in the state over state highways unless they obtained a certificate of convenience and submitted to regulation as common carriers). *See also Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (discussed below).

222. *Grosjean*, 297 U.S. at 233. Note by way of comparison the municipal ordinance at issue in *Murdock v. Pennsylvania*, 319 U.S. 105, 106 (1943), which prohibited sollicita-

counsel for the appellees pointed out to the Court, to thirteen of the state's 163 newspapers, twelve of which opposed the dominant political party in the state.<sup>223</sup> The purpose of the statute was plain in its legislative history—it was to inhibit the circulation of information reflecting a particular political viewpoint<sup>224</sup> by effectively reducing the net revenue realized from advertising in papers likely to express such a viewpoint.<sup>225</sup> “Papers with a circulation of 20,000” was the legislature’s proxy for “papers opposing Huey Long.” The Court deemed the statute unconstitutional, as “a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled by virtue of constitutional guarantees.”<sup>226</sup> It is difficult to imagine a tax on the press more like the British “taxes on knowledge” that prompted the Free Press Clause<sup>227</sup> in the first instance.<sup>228</sup> Surely the case would have turned out no differently if, with the same legislative history in place and the same co-incidence of circulation and viewpoint, Louisiana had enacted a two percent license tax on all newspapers, fully exempting those with a circulation of fewer than 20,000

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tion without a purchased license. The convictions of eight Jehovah’s Witnesses were reversed by the Supreme Court, on the theory that the government may not condition one’s exercise of his constitutional rights on prior payment of a licensing fee. *See id.* at 108, 110; *id.* at 115 (citing *Grosjean*); *see also* *Follett v. Town of McCormick*, 321 U.S. 573, 577-78 (1944) (reversing conviction of Jehovah’s Witness under town ordinance that imposed a license tax on business, occupations, and professions); *id.* at 577 (citing *Grosjean*). Imagine by way of variation a tax on the distribution of newspapers—not on sales or profits, but a flat five cents for every person handed a paper. Would this not fall within the literal scope of *Murdock*? *See id.* at 112 (“It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon.”).

223. *Grosjean*, 297 U.S. at 240.

224. *See id.* at 251 (noting that the tax in question had “the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers”).

225. *Id.* at 244-45.

226. *Id.* at 250.

227. *See* U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom . . . of the press . . .”).

228. *See Minneapolis Star*, 460 U.S. at 583 n.6 (describing *Grosjean* tax as tax on knowledge). The *Grosjean* Court described as “obnoxious” such taxes on the press as the “newspaper stamp tax and the tax on advertisement” where “revenue [is] of subordinate concern” and “the dominant and controlling aim [is] to prevent, or curtail the opportunity for, the acquisition of knowledge by the people in respect of their governmental affairs.” 297 U.S. at 247. Such schemes harken back to centuries of English efforts to restrain “popular” (anti-government) press via licensing, censorship, writs of attachment, seditious libel prosecutions, injunction proceedings, and stiff taxation. The historical background of the press clause is partly discussed in *Grosjean*, 297 U.S. at 245-49, and fully discussed in *Near v. Minnesota*, 283 U.S. 697, 712-21 (1931). *See also* RANDALL BEZANSON, TAXES ON KNOWLEDGE IN AMERICA: EXACTIONS ON THE PRESS FROM COLONIAL TIMES TO THE PRESENT (1994); Gregory S. Asciorla, Note, *Leathers v. Medlock: Differential Taxation of The Press Survives Under the First Amendment*, 41 CATH. U. L. REV. 507, 515-16 (1992).



copies a week. Cast either way, the measure is a penalty (in the guise of a tax) on opposition to Huey Long.

However, the Court was strangely reluctant to attribute the unconstitutionality of the Louisiana statute to the state legislature's clearly improper motive. While Justice Sutherland dwelled at length on the history of "taxes on knowledge," he declined to mention the political and historical context of the Louisiana tax in the Court's reported opinion.<sup>229</sup> Tension implicit in the *Grosjean* decision regarding the weight to be given to the legislature's motive was a harbinger of things to come. The Court wrote in 1968 that legislative motive was irrelevant in *Grosjean*<sup>230</sup> and then in 1978 suggested that legislative motive was instead relevant.<sup>231</sup> In 1983 the Court concluded that *Grosjean* had turned on legislative motive,<sup>232</sup> but in the same decision suggested that *Grosjean*-like evidence of improper motive was not necessary in order to find a press tax scheme unconstitutional.<sup>233</sup>

Indeed, in the cases that followed *Grosjean*, the Court turned to inferring improper intent from the structure, alone, of a tax scheme. This was, for instance, the essence of its approach to the Minnesota sales and use tax at issue in *Minneapolis Star*.<sup>234</sup> Minnesota imposed a "use tax" on the cost of paper and ink products consumed in the production of publication, with an exemption for (i.e., no use tax imposed on) the first \$100,000 worth of paper and ink consumed by a publication in any calendar year.<sup>235</sup> No sales tax was imposed on newspapers sold at retail. (Other industrial and agricultural "manufacturers" were not taxed on the components used in the production of goods sold at retail.<sup>236</sup>) Only a small percentage of the state's newspapers exceeded the \$100,000 threshold and were required to remit a

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229. See, e.g., *Grosjean*, 297 U.S. at 246 (discussing taxes imposed by the British government, in England and in the colonies, that "had, and were intended to have, the effect of curtailing the circulation of newspapers, and particularly the cheaper ones whose readers were generally found among the masses").

230. *United States v. O'Brien*, 391 U.S. 367, 384 (1968) ("[T]he purpose of the legislation was irrelevant.").

231. *Houchins v. KQED, Inc.*, 438 U.S. 1, 9 (1978) (emphasizing the "plain purpose" of the Louisiana scheme).

232. *Minneapolis Star & Trib.* 460 U.S. at 579-80; see also *Leathers*, 499 U.S. at 444-45 (noting that the *Grosjean* Court had described the "tradition of taxes imposed exclusively on the press" as an "invidious form of censorship . . . intended to curtail the circulation of newspapers and thereby prevent the people from acquiring knowledge of government activities" and that the "Court held that the tax at issue in *Grosjean* was of this type and was therefore unconstitutional").

233. *Minneapolis Star*, 460 U.S. at 580.

234. *Id.*

235. *Id.* at 575.

236. *Id.* at 577.

use tax—fourteen out of 388 in 1974, and sixteen out of 374 in 1975.<sup>237</sup> Nothing in the statute's legislative history, however, suggested anything inappropriate or unusual in the minds of the legislature when crafting this scheme (certainly nothing like the Louisiana legislature's motive in *Grosjean*).<sup>238</sup> The Court, per Justice O'Connor, found this scheme "facially discriminatory" and thus subject to exacting scrutiny for two reasons.<sup>239</sup> First, the scheme "single[d] out publications for treatment that is unique in Minnesota law"<sup>240</sup>—i.e., other manufacturers were not subject to a use tax in lieu of a sales tax; "the Minnesota use tax treated the press differently from other enterprises."<sup>241</sup> Second, the scheme "targeted a small group of newspapers"—i.e., only a handful of publishers [paid] any tax at all."<sup>242</sup>

As to the first: the *Minneapolis Star* Court took the position that application to the press of an economic regulation to which "other businesses" (similarly situated?) are not subject per se triggers strict scrutiny.<sup>243</sup> "The 'differential treatment' standard that the Court has conjured up," Justice Rehnquist complained, "is unprecedented and unwarranted."<sup>244</sup> "To my knowledge," he added, "this court has never subjected governmental action to the most stringent constitutional review solely on the basis of 'differential treatment' of particular groups."<sup>245</sup> Justice O'Connor explained, however, that "differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression."<sup>246</sup> (Thus although the Court had five pages earlier suggested that a finding of improper legislative motive would not be necessary in order to invalidate a press tax scheme on First Amendment grounds, it returned to the paradigm of taxes on knowledge. Differential treatment in a tax scheme, Justice O'Connor suggested, gives rise to a suspicion of illicit motive.)<sup>247</sup> This portion of *Minneapolis Star* makes some sense. If a legislature enacts one economic regulation for "the press" and another, wholly different, for "all others" (or "all other busi-

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237. *Id.* at 578.

238. *See id.* at 580 & n.3.

239. *Id.* at 581.

240. *Id.* at 582.

241. *See* Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 227-28 (1987) (describing *Minneapolis Star* scheme).

242. *Minneapolis Star*, 460 U.S. at 581-82.

243. *Id.* at 585.

244. *Id.* at 598 (Rehnquist, J., dissenting).

245. *Id.*

246. *Id.* at 585 (emphasis added).

247. As Justice O'Connor would later note, however, the Court "found no evidence of impermissible legislative motive in *Minneapolis Star* apart from the structure of the tax itself." *Leathers*, 499 U.S. at 445.

nesses" or "all others who use paper"), this surely merits a raised eyebrow and a closer look. Still, Minnesota offered a plausible explanation for the substitution of a use tax for a sales tax—difficulties with administration of a sales tax, given the proliferation of newspaper vending machines and paperboys on street corners.<sup>248</sup>

The second aspect of *Minneapolis Star* is troubling, however. It is the notion that a tax scheme (a) applying a use tax to all newspapers, and (b) affording to every newspaper a \$100,000 credit, somehow targets those few papers whose use exceeds the threshold and who must thus pay tax on the use exceeding the threshold. The notion is that a generally available credit limited in amount somehow targets those who avail themselves of the credit just as much as everyone else but who find they still have "uses" (or sales, or income) on which tax must be paid.<sup>249</sup> Thus, if rather than receiving a property tax exemption, charitable organizations were allowed to exempt from taxation their first \$20,000 in property value (i.e., if they were allowed a \$20,000 credit), presumably the *Minneapolis Star* decision would require us to conclude that the legislature had actually *targeted* charitable organizations with real property valued at more than \$20,000.<sup>250</sup> This result, despite the fact that such organizations pay far less in taxes under the scheme than they otherwise would. If it were true that *all* Catholic churches owned property valued at less than \$20,000 and *all* (or most) Protestant churches owned at least \$100,000 in property, then indeed one would want to look twice.<sup>251</sup> But Justice O'Connor took the position that

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248. One might posit for comparison a state legislature's decision that the administrative and conceptual difficulties attendant to taxing the income of non-profit entities require it to adopt a special alternative tax for such entities, perhaps a fixed percentage of each entity's increase in net worth (or a fixed percentage of its annual operating expenses, or some other figure). The explanation would be less persuasive if this special alternative were to apply only to *some* non-profit entities—say, religious ones.

249. See *Minneapolis Star*, 460 U.S. at 603 (describing the scheme as providing "a \$4,000 credit which benefits all newspapers") (Rehnquist, J., dissenting).

250. Suppose that the city of New York, rather than enacting the scheme at issue in *Walz*, enacted a property tax on all privately held real property, and exempted as to all non-profit organizations (including churches) the first \$100,000 altogether worth of real property. The state is, as we already know, free to exempt the property. It is also, we assume, free to tax the property just like all other real property. Instead, however, it chooses to do as Minnesota did in *Minneapolis Star*, and afford a limited exemption to *all* nonprofits. Motivated by nothing more than a desire not to unduly burden entities that are deemed socially useful and that are thought often to be financially struggling, applicable to all nonprofits (thereby not "preferring" religion to irreligion), such a scheme is unremarkable.

251. Indeed, one might want to look twice *even if* the legislature was unaware of this fact. A hypothetical will illustrate the point. Suppose the legislature of Oregon were concerned about deforestation and the resulting harm to both the state's spotted owl population and the state's appeal to tourists. Suppose the legislature decided to impose a use tax on all entities using non-recycled paper—whether the entity is McDonalds (Big Mac cartons) or

the mere possibility of disparate impact justified strict scrutiny. "[T]he danger from a tax scheme that targets a small number of speakers is the danger of censorship," she would write, and "a tax on a small number of speakers runs the risk of affecting a limited range of views."<sup>252</sup> But in the absence of an effect on content, such a scheme is, as Justice Rehnquist wrote, merely an economic classification and subject only to rational basis review.<sup>253</sup> There is time enough later for the Court to strike down schemes that actually have a discriminatory effect.<sup>254</sup>

In 1987, in the course of reviewing an Arkansas sales tax exemption, the Court "uncovered" yet a third type of "differential taxation." *Ragland*

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Scott (toilet paper) or Time Warner (*Time Magazine*)—in an effort (a) partly to build a fund for reforestation efforts, and (b) partly to discourage the use of non-recycled paper. A use tax on paper is not unlike a use tax on ink and paper (as in *Minneapolis Star*)—it goes to a product at the very heart of the "free press" process, to a product incontrovertibly part of the process of communication. That it is a tax merely on the use of non-recycled paper is interesting, but there is nothing about non-recycled paper per se that makes one suspect that the tax is "even more" about the free press than a tax on the use of all paper. Nor is the use tax applied only to press users of non-recycled paper; it applies to all uses of the paper, by any entity whatsoever. Let us stipulate, however, that at least for the first dozen years the scheme is in place, recycled paper is considerably more expensive than non-recycled paper, and that some of the cheaper newspapers, some of the more specialized and less widely read ones, are *both* unable to pay the stiff use tax *and* unable to purchase non-recycled paper.

Another example using products less obviously associated with expression might be a use tax on "aluminum parts," meant to discourage the use of aluminum and encourage the use of steel, in light of the fact that the production of aluminum parts requires the use of enormous quantities of water, which is in increasingly short supply. We might stipulate that aluminum engraving plates are less expensive to make than steel ones, and that the trade-off is a less crisp image. We might also stipulate that cheap printing press parts made of aluminum are widely used by the "cheap" end of the publishing trade. Imagine again here that some of the "low end" publications are unable to make a go of it—too undercapitalized to invest in steel parts, but also too "cash poor" to pay an annual use tax on aluminum parts.

In these examples, the legislature's motives are irreproachable. But one must surely consider the possibility that the schemes violate the First Amendment Free Press Clause, despite being innocently motivated and despite the fact that they do not treat the press any differently than other enterprises, because they threaten the very core of the free speech and free press process—i.e., they will have the indisputable effect of favoring entrenched interests and squelching less popular voices. It will be the extreme case, however, that will violate the First Amendment. *Cf. Jimmy Swaggart Ministries*, 493 U.S. at 391 ("The Free Exercise Clause . . . does not require the State to grant appellant an exemption from its generally applicable sales and use tax. Although it is of course possible to imagine that a more onerous tax rate, even if generally applicable, might effectively choke off an adherent's religious practices, we face no such situation in this case.").

252. *Leathers*, 499 U.S. at 448.

253. *Minneapolis Star*, 460 U.S. at 599 (Rehnquist, J., dissenting).

254. See *Panhandle Oil Co. v. Knox*, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting) ("[T]his Court which so often has defeated the attempt to tax in certain ways can defeat the attempt to discriminate or otherwise go too far without wholly abolishing the power to tax. The power to tax is not the power to destroy while this Court sits.")

involved a sales tax on all receipts on the sale of tangible personal property, with an exemption for certain publishers deemed by the state legislature to be "fledgling" and "struggling" and to have limited market share and advertising revenue.<sup>255</sup> Rather than indicating, however, that exemption would be afforded to publications with "a market share below *X* percent" or "an annual advertising budget of fewer than *X* dollars," the legislature explicitly exempted religious, professional, trade, and sports journals. *Without* regard to the fact that the statute explicitly exempted journals by content (religious, professional, trade, and sports journals) and *solely* by virtue of the fact that some publications were taxed and some were not,<sup>256</sup> Justice Marshall held the Arkansas scheme to be one of the differential taxation schemes that "suffers from the second type of discrimination identified in *Minneapolis Star*" (i.e., that only *some* publishers pay sales tax).<sup>257</sup> The Arkansas scheme was not, however, like the Minneapolis scheme: Minnesota exempted—as to all publications—the first \$20,000 of use, taxing only those whose use exceeded \$20,000 and only to the extent it did; Arkansas fully exempted some publications and fully taxed others. (The same would be true of a modified *Ragland* scheme, wherein a complete exemption was afforded to "all publications with a market share below *X* percent" or "all publications with a circulation below *X*." This

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255. *Ragland*, 481 U.S. at 232.

256. That the statute on its face distinguished between publications by content for the purposes of taxable status was addressed *later* in the opinion. The mere fact that some were taxed and some were not was deemed adequate to trigger strict scrutiny. Nor did the Court appear to contemplate distinguishing between legislative distinctions that serve as a legitimate proxy for fledgling or small-revenue status and distinctions intended to suppress information (e.g., a variation of the *Ragland* scheme wherein exemption is afforded to magazines opposing Huey Long). A content-based distinction truly intended to favor some content over other content would be difficult, perhaps impossible, to justify. Take by way of example a state property tax levied on certain churches but not others, that levy depending by its very terms on whether the church adhered to the doctrine of transubstantiation. Imagine that non-profits are ordinarily exempt and that churches are ordinarily exempt, and that one sentence in the portion of the tax code addressing such exemptions provides: *this exemption shall not apply, however, to churches that adhere to the doctrine of transubstantiation*.

Putting aside the obvious questions about administration and enforceability, it should be fairly obvious that the equal protection clause does not permit the legislature to draw distinctions between churches based on the religion doctrine (or between individuals based on their religious beliefs), to classify people or churches in this way and treat them differently in the tax code. It seems unlikely a legislature could articulate a sufficiently compelling reason for this differential treatment. Not only could the scheme be challenged under the Equal Protection Clause, but it also fits comfortably within the usual notion of an "unconstitutional condition" insofar as the local Catholic diocese must choose between renouncing the doctrine of transubstantiation, on the one hand, and paying a tax on its real property, on the other.

257. *Ragland*, 481 U.S. at 229.

variation simply eliminates the worrisome designation of taxable status by content.)

The theory of First Amendment constraints on press taxation schemes elaborated in *Minneapolis Star* and *Ragland* has been dubbed the theory of “differential taxation of the press.” It amounts to the notion that the First Amendment Free Press Clause (and presumably also the First Amendment Free Exercise Clause and Establishment Clause) prohibits a legislature from drawing *any* lines in its taxation schemes that divide (intentionally or incidentally) those who exercise First Amendment rights, or that separate them from those who do not, without regard to what the legislature meant to do and without regard to the scheme’s actual effect (if any) on the exercise of the First Amendment rights in question. The analysis of the Court in these cases—particularly *Minneapolis Star*—is vaguely reminiscent of the *McGlotten* court’s reliance on its own sense of what is “normal” in a tax scheme and what is not.<sup>258</sup> This is far removed from the straightforward purpose-and-effect doctrine at the heart of *Grosjean*—the notion that the legislature may not seek to do indirectly (through a tax scheme) what it may not, consistent with the constitution, do directly (through licensing, regulation, or the criminal law).<sup>259</sup>

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258. As should be apparent from the textual discussion, the Court’s way of describing and characterizing press tax schemes is in places oddly dissonant with its characterization of similarly structured religious tax schemes—sometimes structural choices are imbued with substantive significance and sometimes they are not. This inconsistency over substantive treatment of structural choices lies at the heart of the cacophony in the press tax cases and is ultimately a focal point in the debate over tax expenditure analysis.

259. See, e.g., *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 43 (1922). Dissenting in *Ragland*, Justice Scalia summarized what he perceived to be the problem with the new approach. The problem, he wrote, is that “failure to exempt” (taxation) is deemed tantamount to “regulation” (i.e., to legislating with a view to achieving some goal other than revenue raising). 481 U.S. at 236 (Scalia, J., dissenting). In his view this is error because failure to exempt is equivalent to failure to subsidize. And the government’s failure to subsidize the exercise of constitutional rights is not subject to strict scrutiny. See *id.* (citing *Taxation with Representation of Wash.*, 461 U.S. 540, 544, 549; *Harris v. McRae*, 448 U.S. 297, 324-26 (1980)); see also Adler, *supra* note 109, at 873 (noting that the implication of treating exemptions as subsidies is that unconstitutional conditions subsidy cases apply); Swomley, *supra* note 167, at 598 (“Tax exemption and deductibility of contributions also affect religious liberty when the government can curb church efforts to influence legislation by proscribing certain communication [via the § 501(c)(3) ban on lobbying] . . . . [T]he government tells the churches that in exchange for certain material benefits, they may not engage in certain written or spoken communication.”). Prior to Congress’s 1934 inclusion in the Internal Revenue Code of an explicit prohibition on lobbying, the I.R.S. and the courts tended to infer such a restriction in the word “charity.” See also *Slee v. Commissioner*, 42 F.2d 184, 185 (2d Cir. 1930) (Hand, J.); see generally Slye, *supra* note 6, at 273-74. The 1934 amendment provided that “no substantial part” of the activities of an organization seeking exemption under § 501(c)(3) could be the “carrying on of propaganda, or otherwise attempting to influence legislation.” This portion of the 1934 legislation was added in the

In 1991, Justice O'Connor and the Court stepped away from the differential taxation theory. Like *Ragland, Leathers v. Medlock* involved the Arkansas sales tax scheme pursuant to which a four percent tax was imposed on receipts from sales of all tangible personal property and on receipts from sales of selected (i.e., enumerated) services. Prior to 1987, receipts from subscription newspaper sales, over-the-counter newspaper sales, and subscription magazine sales were not taxed, nor (by virtue of omission from the enumeration) were the sales of cable television services or satellite services to home dish owners.<sup>260</sup> In 1987, the state legislature amended the statute, adding cable television services to the list of services the sale of which would be taxed.<sup>261</sup> Thus the first issue before the Court was the constitutionality of the post-1987 scheme whereby (a) cable television service sales were taxed, while (b) satellite service sales were not, and (c) newspaper and magazine sales were not.<sup>262</sup> In 1989, the legislature again amended the statute, adding *all* television, video, and radio service sales to the list of taxed services—leaving a scheme, the constitutionality of which was also before the Court, whereby (a) the sale of all television services was taxed and (b) the sale of newspapers and magazines was not.<sup>263</sup>

In both the 1987 and the 1989 schemes, the legislature drew lines (i.e., these entities are taxed and these are not) between different media—print and satellite versus cable in 1987, then print versus all audiovisual in 1989. If all of these entities constitute “the press” for First Amendment Free Press Clause purposes, then it is difficult to see why this scheme is not subject to strict scrutiny under the sweeping “differential taxation of the press” theory developed in *Minneapolis Star* and *Ragland*. And yet Justice O'Connor wrote, for seven members of the Court, that “the fact that cable is taxed differently from other media does not by itself . . . raise First Amendment concerns.”<sup>264</sup> Neither “intermedia” nor “intramedia” dis-

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Senate as a floor amendment, and was apparently aimed at curbing the activities of the National Economy League. 78 CONG. REC. 5861 (1934) (remarks of Sen. Reed) (amendment sponsor). The present formulation dates to a floor amendment introduced to the Senate in 1954 by then-Senator Lyndon Johnson; it was primarily intended to prevent sham nonprofit organizations from lobbying for their major donors. See Anne Berrill Carroll, *Religion, Politics, and the IRS: Defining the Limits of Tax Law Controls on Political Expression by Churches*, 76 MARQ. L. REV. 217, 228 (1992); KELLEY, *supra* note 106, at 12.

260. *Leathers*, 499 U.S. at 442.

261. *Id.*

262. *See id.*

263. *Id.* at 443.

264. *Leathers*, 499 U.S. at 444. The Court has, of course, permitted differential treatment of media in other First Amendment contexts. Compare *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 254-55 (1974) with *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367,

crimination, she wrote, violates the First Amendment absence evidence of intent to suppress speech or an actual effect on the expression of particular ideas.<sup>265</sup> “[D]ifferential taxation of speakers, even members of the press,” the Court wrote, “does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing particular ideas.”<sup>266</sup> This was a significant retreat from *Minneapolis Star*. “Inherent in the power to tax,” the Court wrote, “is the power to discriminate in taxation.”<sup>267</sup> Both schemes were sustained.<sup>268</sup>

A great deal of ink has been spilt over the Court’s press tax jurisprudence—much, for instance, about how (if at all) these cases can be reconciled with each other and how (if at all) they are to be squared with the Free Press Clause. The point of this extended excursion through the press cases is to do neither. It is to demonstrate the ways in which the Court has worked through, and indeed for a time strayed from, the basic principle that a legislature may not (ab)use its taxing power to penalize the exercise of constitutional rights or to achieve an end that infringes on rights protected by the First Amendment. This principle is as important in the church-state context as it is in the free press context, and necessarily bears on the question of religious exemptions, tax and otherwise. One must ask whether the legislature intended to accomplish something other than revenue raising, i.e., whether the legislature sought to accomplish something indirectly rather than directly, and then whether this end is forbidden to the legislature, either because it lies outside the scope of the legislature’s powers (as will be the case with Congress more often than with a state legislature) or because it runs afoul of a free-standing constraint on the exercise of legislative power (like the First Amendment).

One other aspect of the press tax cases bears on religious tax exemptions. Justice O’Connor suggested in *Minneapolis Star* that the “granting” of exemptions provides a legislature with inappropriate leverage over the exercise of constitutional rights. “[T]he very selection of the press for special treatment threatens the press,” she wrote,

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386-87 (1969).

265. *Leathers*, 499 U.S. at 450. Justice Marshall (who had written the *Ragland* opinion) and Justice Blackmun dissented, noting that *Leathers* marked a significant departure from the earlier press tax cases. *Id.* at 454.

266. *Id.* at 453.

267. *Id.* at 451; see *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 526-27 (1959) (“The States have a very wide discretion in the laying of their taxes . . . . [T]he States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests. The States may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products.”).

268. *Leathers*, 499 U.S. at 453.



with the possibility of subsequent differentially *more burdensome* treatment. Thus, even without actually imposing an extra burden on the press, the government might be able to achieve censorial effects, for "[t]he threat of sanctions may deter [the] exercise [of First Amendment rights] almost as potently as the actual application of sanctions."<sup>269</sup>

In other words, the "power to exempt" *could be* abused, and the First Amendment protects the press from the *potential* of abuse.<sup>270</sup> This met with vigorous dissent from Justices Rehnquist and White, who pointed out that the Court does not ordinarily invalidate legislative power on the theory that it could be abused.<sup>271</sup> In both the press context and the religious context, we must of course be on guard for instances where a legislature has "granted" tax-exempt status (refrained from taxing) and retained for itself some degree of discretion in its continuance—discretion which can be (and then actually is) wielded in a way so as to interfere or obstruct the exercise of constitutionally protected rights.<sup>272</sup> To expand this to encompass all tax

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269. *Minneapolis Star*, 460 U.S. at 588 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)); see also Benjamin Lombard, Note, *First Amendment Limits on the Use of Taxes to Subsidize Selectively the Media*, 78 CORNELL L. REV. 106, 134 (1992) ("[T]he logic of *Minneapolis Star* dictates that a subsidy has at least as great a potential for censorial abuse as does the direct imposition of a burden on the press. Once the legislature subjects a medium to a general tax, the state loses any potential leverage with respect to that medium. Any changes in the taxes on the medium must similarly affect all other businesses also subject to the tax. By granting a tax subsidy, however, the state can [force] financial dependence on the medium if the state retains the discretion to remove the subsidy.").

270. See *Leathers*, 499 U.S. at 458 (Marshall, J., dissenting) ("The nondiscrimination principle protects the press from censorship prophylactically, condemning any selective-taxation scheme that presents the 'potential for abuse' by the state.").

271. See *Minneapolis Star*, 460 U.S. at 601-02 (Rehnquist, J., dissenting); *id.* at 594, 596 (White, J., concurring in part and dissenting in part).

272. One might make this point about the *Bob Jones* case, for instance. *Bob Jones Univ. v. United States*, 461 U.S. 574, 595-96 (1983) (holding 8 to 1 as a matter of statutory construction that private schools with racially discriminatory policies are not "charities" for the purposes of the charitable contribution deduction in 26 U.S.C. § 170 or tax-exempt status of 26 U.S.C. § 501(c)(3), because these provisions refer to "charity" in the common law sense of the word, which incorporates national public policy); *id.* at 586 (noting "unmistakable evidence that underlying all relevant parts of the Code is the intent that entitlement to tax exemption depends on meeting certain common law standards of charity—namely that an institution seeking tax exempt status must serve a public purpose and not be contrary to established public policy"). Professor Whitehead argues that this holding effectively permits the I.R.S. to revoke the tax-exempt status of churches if their religious doctrine does not coincide with national public policy. Whitehead, *supra* note 7, at 556-57. Although one would assume that the unconstitutional conditions doctrine would prohibit the I.R.S. from doing so, this is precisely what happened in *Bob Jones*. Racial discrimination was deemed incontrovertibly contrary to national public policy, and thus organizations (even institutions committed to racial segregation for religious reasons, as *Bob Jones University* itself claimed to be) were to be denied tax-exempt status if they discriminated ra-

exemptions applicable to entities exercising protected rights, however, is to eviscerate the legislative power to write tax schemes and to raise revenue.

*B. Justice Harlan's Equal Protection Theory*

*1. Texas Monthly*

In 1989 the Court had an opportunity to bring its press tax jurisprudence to bear on religious tax exemptions. The fragmented result stands as a testament to the continuing confusion over the constitutional relevance of structural choices in a tax code.

Prior to 1984, Texas exempted from sales and use tax all magazine subscriptions running half a year or longer and classified as second class mail.<sup>273</sup> Texas repealed the exemption in 1984 and began to tax such magazines just as it taxed other items sold at retail, but continued to exempt "periodicals published or distributed by a religious faith consisting entirely of writings promulgating the teaching of the faith, along with books consisting solely of writings sacred to a religious faith."<sup>274</sup> Before the Supreme Court, Texas offered the explanation that it wished to avoid the entanglement it thought inherent in taxation and to avoid any violation of the Free Exercise Clause.<sup>275</sup> A plurality of the Court noted, however, that Texas's fears were unfounded; taxation would have violated neither the Establishment Clause nor the Free Exercise Clause.<sup>276</sup>

The scheme of course involved no direct subsidy—no violation of the tax-and-spend prohibition of the Establishment Clause (assuming it applicable to the states). We can lay aside as mooted by history the question whether the scheme should have been sustained as the state's own determi-

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cially. A variation on *Bob Jones* might be an I.R.S. decision that "abortion" is contrary to national public policy, and its subsequent revocation of § 501(c)(3) "tax exempt" status from any non-profit hospitals and health clinics performing them or mentioning them.

273. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 5 (1989).

274. *Id.* at 5-6. Such a provision is commonplace in state tax codes. See, e.g., FLA. STAT. ANN. § 212.06(b)(9) (1989) (exempting from sales tax sale of "religious publications, bibles, hymn books, prayer books, vestments, altar paraphernalia, sacramental chalices, and like church service and ceremonial raiments and equipment"); GA. STAT. § 48-8-3 (1998) (exempting "sale or use of Holy Bibles, testaments, and similar books commonly recognized as being Holy Scripture").

275. *Texas Monthly, Inc.*, 489 U.S. at 17.

276. *Id.* at 21 ("[T]he 'routine and factual inquiries' commonly associated with the enforcement of tax laws bear no resemblance to the kind of government surveillance the Court has previously held the pose an intolerable risk of government entanglement with religion."); *id.* at 18 (Free Exercise Clause); see also *Jimmy Swaggart Ministries*, 493 U.S. 378, 384-90, 392 (collection of generally applicable sales and use tax from religious organization did not violate Establishment Clause or Free Exercise Clause).

nation of the proper treatment of religion, un-addressed by the First as well as the Fourteenth amendments. The wrinkle here is that religious publications were clearly treated differently from other publications under the law, as written. Treated differently, and, indeed, better. The Texas scheme "benefited" religion insofar as publishers of religious magazines were exempted from a financial burden imposed on publishers of non-religious magazines.<sup>277</sup> And the scheme was clearly *intended* to have an effect on religious publishers qua religious publishers; it was not merely intended to assist fledgling publishers (*Ragland*) or to avoid administration of a cumbersome or awkward tax (*Minneapolis Star*) that then simply happened coincidentally to apply only to religious publications. Given the special place that religion has under our constitutional scheme, given the existence of a constitutional amendment addressing both "free exercise" and "establishment," such a law is worth at least a second look. Given the unassailable fact that so-called revenue raising schemes are sometimes designed to have a secondary effect unrelated to the raising of revenue, or sometimes even a *primary* effect unrelated to the raising of revenue, one *must* pause here.

Both plurality (striking the scheme) and dissent (which would have sustained the scheme) thought *Walz* directly on point.<sup>278</sup> The plurality took *Walz* to approve benefits flowing to religious organizations if and only if such benefits also flow to a large number of non-religious organizations.<sup>279</sup> The dissent contended, however, that "[t]his is not a plausible reading of the opinion."<sup>280</sup> Instead, *Walz* was based on the principle of "accommodation"; it was, Justice Scalia wrote "just one of a long line of cases in which we have recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause."<sup>281</sup>

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277. Consistent with Professor Surrey's theories, the plurality characterized this as a subsidy. See *Texas Monthly, Inc.*, 489 U.S. at 14 ("Every tax exemption constitutes a subsidy that affects nonqualifying taxpayers, forcing them to become 'indirect and vicarious donors.'") (quoting *Bob Jones Univ.*, 461 U.S. at 591).

278. See *id.* at 11 (plurality) (Brennan, Marshall, Stevens, JJ) (*Walz* is "the case most nearly on point") (striking the scheme); *id.* at 33 (dissent) (Rehnquist, CJ, Scalia, Kennedy, JJ) (*Walz* is "in all relevant respects identical") (voting to sustain the scheme).

279. See *id.* at 11-12 (suggesting *Walz* would have turned out differently if the property tax in question had not been available to "a wide array of nonprofit organizations"); see also *id.* at 11 ("The provision of benefits to so broad a spectrum of groups is an important index of secular effect.") (citing *Widmar v. Vincent*, 454 U.S. 263, 274 (1981)).

280. *Id.* at 36 (Scalia, J., dissenting).

281. *Id.* at 38. This principle, he wrote, supports the exemption of "religious groups (and only religious groups) from Title VII's antidiscrimination provisions," *id.* at 39, as well as the parsonage exclusions in the various state income tax codes and the federal in-

*Walz*, however, was not on point. The Texas scheme and the New York scheme were structured differently, had different purposes, and had very different effects. The explicit goal of the Texas legislation was “accommodation of religion”—no other goal seems even plausible—in the sense of relieving religion (qua religion) from a burden imposed on others, so as to further the constitutional value of free exercise and to avoid any troubling (if not particularly constitutionally problematic) entanglement between state and religion. The property tax exemption at issue in *Walz* had been carved, since the beginning, for churches *and* for other nonprofit entities. And although various explanations have been offered over time—in New York and elsewhere—for such arrangements, they largely relate (and, in New York, did relate) to the things that churches and nonprofits have in common with each other—e.g., the social benefit they are deemed to provide and the extra hardship that taxation might cause in light of their low coffers. In short, the New York scheme embraced both churches and other nonprofit organizations and was justified by an explanation reasonably and fairly related to what such entities had in common. This makes the *Walz* scheme unlikely to be a situation of legislative “accommodation of religion” and thus, very much unlike the *Texas Monthly* scheme.<sup>282</sup>

Justice White offered an attractive alternative in his short concurrence. He believed the Texas scheme violative of the free press clause and wrote that *Ragland* was “directly applicable here.”<sup>283</sup> In his view, both the Texas scheme and the Arkansas scheme in *Ragland* were flawed because they differentiated between publications on the basis of content for tax purposes, in violation of the Free Press Clause.<sup>284</sup> (Of course, the Free Press Clause does not “absolutely” forbid legislative distinctions carved by content, any more than the Free Speech Clause “absolutely” forbids content-based discrimination.<sup>285</sup> There may well be a presumption against the constitutionality of both, but it does not end the inquiry to observe that the Texas legislature had differentiated by content.) The schemes, however, are distinguishable on the point of the legislature’s *purpose*: Arkansas claimed to be concerned about financially-struggling magazines and to have selected by topic (choosing those it viewed as likely to be struggling) as a

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come tax code, *id.* at 33 n.3.

282. A *Texas Monthly*-like variation of *Walz* would have been a state property tax exemption available *only* to churches, in the name of “accommodating” religion.

283. *Texas Monthly, Inc.* 489 U.S. at 26 (White, J., concurring).

284. It is worth noting, however, that Justice Marshall’s opinion in *Ragland* purported to strike the Arkansas scheme without regard to the fact that it distinguished by content, *see supra*, and that Justice Marshall did not join Justice White’s concurrence. *Id.*

285. *See id.* at 44-45 (Scalia, J., dissenting); *see generally, id.* at 27 (Blackmun and O’Connor, JJ., concurring).

proxy for conducting individualized inquiries;<sup>286</sup> Texas claimed nothing more than to be selecting religious magazines *as such* and *because* they were religious.<sup>287</sup> Thus, *Ragland* is not on point. But Justice White's point is well-taken.

Ultimately the question at the heart of the *Texas Monthly* discord is the extent to which government may deliberately exempt religion (religious organizations, religious persons, and religious publishers) from burdensome laws. Might—for instance—a religion-only exemption raise legitimate and troubling questions about government endorsement or approval of religion? Might it at some point cross some sort of “line” into an impermissible preferencing of religion over non-religion? What is one to do about the possibility that “other entities” (non-religious ones) may in some instances be able to articulate a plausible reason for being included within the scope of such an exemption (a plausible reason in the form of a showing that in some way they are “relevantly similar”)?

When the legislature carves an exemption in the name of accommodation and means in particular to further the free exercise of religion (rather than to further the separation of church and state), the answer may well lie in Justice Harlan's opinion in *Welsh v. United States*, and specifically his theory of the “equal protection mode of analysis” required by the Establishment Clause.<sup>288</sup> In concluding that the Establishment Clause required conscientious objector status to be extended to Elliott Welsh—whose objection to military service stemmed from a “belief in and devotion to goodness and virtue for their own sakes” and a conclusion that war is “unethical”<sup>289</sup>—Justice Harlan wrote that (a) “the critical question is whether the scope of legislation encircles a class so broad that it can be fairly concluded that [all groups that] could be thought to fall within the natural perimeter [are included]”; and (b) the radius of the conscientious objector statute was “the conscientiousness with which an individual opposes war in general.”<sup>290</sup> And, thus, if the exemption were to be applied, it would necessarily (logically, and fairly) include individuals “whose beliefs emanate from a purely moral, ethical, or philosophical source.”<sup>291</sup> Anything else would be, in Harlan's terms, a “religious gerrymander.”<sup>292</sup>

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286. *Ragland*, 481 U.S. at 231.

287. *Texas Monthly, Inc.*, 489 U.S. at 5.

288. 398 U.S. 333, 356. (1970).

289. *Id.* at 338.

290. *Id.* at 357.

291. *Id.* at 358.

292. *Id.* at 357; see also *City of Boerne v. Flores*, 521 U.S. 507, 537 (1997) (Stevens, J., concurring) (RFRA violates Establishment Clause because “the statute has provided the Church with a legal weapon that no atheist or agnostic can obtain,” which amounts to “gov-

The equal treatment inquiry is, by necessity, a case-by-case inquiry and a relatively intuitive one. It involves an examination of the legislature's purpose in carving a religious exemption in the first instance, and an inquiry into whether there exist other entities who are *relevantly* similar (given the legislature's purpose or given the logical and fair radius of the exemption), such that exempting them would serve effectively the same purpose and *thereby* avoid any implicit preferencing of religion over non-religion.<sup>293</sup> This principle ultimately echoes the lessons of *Grosjean* and *Bailey*: if the legislature, under the guise of exercising its power to raise revenue, seeks to achieve other goals, those other goals should be independently measured against the Constitution. This is why the "equal protection" concept is helpful in the exemption context; it requires an examination of the categories created and the lines drawn by the legislature and an examination of the legislative motive in so doing.<sup>294</sup> This is consistent with the notion of equal treatment (in the sense of not preferring religion to lack thereof, as well as not preferring one religion to another) that weaves throughout the history and theory of the Establishment Clause. If the legislature exempts churches from property tax and claims to be doing so in order to avoid administration of an "income" tax on a "nonprofit" entity, then surely the Kiwanis Club and the local YMCA should be similarly ex-

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ernment preference for religion, as opposed to irreligion"). An analogy can be drawn between the selective service exemption at issue in *Welsh* and *Seeger* and § 1402 of the Internal Revenue Code. Section 1401 of the Code imposes a tax on the self-employment income of individuals. 26 U.S.C. § 1401 (1994). Section 1402(g) provides an exemption to taxpayers conscientiously opposed on religious grounds to accepting the benefits of any public or private insurance scheme, if certain requirements are met. *Id.* § 1402(g) (1994). Among the requirements: the taxpayer must be a member of a "recognized religious sect" and he must adhere to its "established tenets or teachings" regarding the inappropriateness of accepting such benefits. *Id.* The exemption is thus not available to a person with identical religious beliefs who does not belong to a "recognized religious sect" with "established tenets" on the exact point, *see, e.g.,* *May v. Commissioner*, 71 T.C.M. (CCH) 2498 (1996), nor is it available to a *Welsh*-like conscientious objector, *see, e.g.,* *Hughes v. Commissioner*, 81 T.C. 683, 683-84 (1983) ("the basis of [his] moral and conscientious objection is not a theistic one or one arising out of a belief in a supreme being or a higher moral authority, but . . . his deeply felt, personally held moral beliefs transcend philosophy, religion, theology, or politics, and occupy in his own mind a position parallel to that set of beliefs held by persons with a belief in God or supreme being, who would otherwise qualify for the exemption under the Code") (stipulation of the parties). It is difficult to envision this narrowly carved exemption (preferring some religions to others and preferring religious objectors to secular moral objectors) surviving a Harlanesque review for religious preferentialism.

293. For an elaborate argument that "the Establishment Clause 'right' is essentially one of equal treatment with respect to religious belief or nonbelief, exercise or nonexercise," and "equal" protection of the free exercise of religion, *see* Paulsen, *supra* note 77, at 324-25.

294. *See* *Washington v. Davis*, 426 U.S. 229, 239-40 (1976).

empted. If instead the legislature exempted churches from income tax *only* because it believed that to do so would further the separation of church and state, then logically there would be no need to include the Kiwanis Club.

In *Texas Monthly*, no obvious party lays claim to an equal exemption grounded in *Welsh*, except—perhaps—an entity like the Ethical Culture Society (an organization devoted to questions of “right conduct” and “ethics”) if it were to produce and sell pamphlets or lay out its creed in book form. But then one might ask whether the works of Aristotle should be exempt from sales tax, and whether the novels of Ayn Rand should be exempt from sales tax, as both seek to address basic questions about how one should live one’s life and what values are fundamental. The Ethical Culture claim seems less convincing than Elliott Welsh’s claim. But it is certainly more easy to imagine a plausible *Welsh* claim in the Texas context than to imagine one in the context of, say, a federal armed forces uniform exemption permitting the use of yarmulkes, turbans, and other religious headwear. It is difficult to imagine who might plausibly claim an adequately “similar” situation.<sup>295</sup>

## 2. *An Application*

The Federal Unemployment Tax Act (FUTA),<sup>296</sup> establishes a cooperative federal-state unemployment taxation and compensation scheme whereby federal and state government levy a tax on employers, whose employees are then entitled to collect unemployment compensation should the need arise.<sup>297</sup> Under FUTA, the federal government imposes an excise tax on those employers who pay wages to employees in covered employment.<sup>298</sup> It also grants a ninety percent credit (toward that federal excise tax) for payments made by the employer into a federally-approved state-run

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295. If one accepts the proposition that in some instances the Establishment Clause and the equal protection clause require the government to sweep within the scope of a so-called religious exemption persons or entities with a *Welsh*-like claim of sufficient similarity given the purpose of the exemption and its natural scope, then one must consider the possibility that in some instances the tax-and-spend prohibition must also extend to such organizations and persons. That is, presumably a person cannot be forced to contribute three pence to the propagation of (the advocacy of, the preaching of) the teachings of Ayn Rand or the ethical writings of William Bennett. If it is true, as Madison wrote, that the care of souls is not entrusted to the civil magistrate, then government has no business *advocating* Aristotle’s notion of the virtuous life.

296. 26 U.S.C. §§ 3301-11 (1994).

297. See *Stewart Mach. Co. v. Davis*, 301 U.S. 548, 585 (1937) (sustaining scheme against Tenth Amendment challenge); *California v. Grace Brethren Church*, 457 U.S. 393, 396-98 (1982) (detailing a history of FUTA).

298. 26 U.S.C. § 3301 (1994).

unemployment compensation scheme.<sup>299</sup> FUTA provides minimum standards for a state scheme: a participating state must cover certain organizations, but as to others, it may levy unemployment compensation taxes on such organizations and provide unemployment compensation to their employees, as it sees fit.<sup>300</sup> At present, the scheme permits states to decline coverage to several segments of the labor force, including persons employed by churches, employees of very small nonprofit organizations, elected state officials, and inmates at penal institutions.<sup>301</sup> Generally speaking participating states *must* cover nonprofit organizations; however they *need not* cover religious employers.

The Rhode Island state-run federally-approved unemployment compensation scheme was recently the subject of an unsuccessful Establishment Clause challenge.<sup>302</sup> In Rhode Island, churches and individual parishes may choose whether to be exempt from the state's unemployment compensation scheme, but § 501(c)(3) entities may *not* choose.<sup>303</sup> Rather, the participation of § 501(c)(3) entities is mandatory, although each may choose to "self-insure" with substantial regulatory oversight.<sup>304</sup> The Salvation Army, for instance, which is considered a church, may choose—and has chosen—to be exempt. A non-religious non-profit employer in Rhode Island performing substantially the same functions and services as the Salvation Army—if indeed there is such an entity—could not similarly choose to be exempt.<sup>305</sup>

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299. 26 U.S.C. § 3302 (1994).

300. 26 U.S.C. §§ 3304, 3309 (1994).

301. *Id.*

302. *Rojas v. Fitch*, 127 F.3d 184, 188 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 2341 (1998). Rhode Island's unemployment compensation scheme can be found at R.I. GEN. LAWS §§ 28-42 to 28.44 (1997).

303. R.I. GEN. LAWS §§ 28-42 to 28.44 (1997).

304. R.I. GEN. LAWS §§ 28-42 to 28.44 (1997).

305. A religious organization in Rhode Island is unlikely to bring any sort of challenge to this scheme, of course, since it has the option to participate or not, as it sees fit. A taxpayer (whether a citizen paying general state taxes or an employer paying the specific unemployment compensation tax) would have little reason to complain, since employees of exempt organizations are not entitled to collect unemployment compensation. Nor, then, would such a person have standing to argue a violation of the Establishment Clause's tax-and-spend prohibition. The scheme clearly involves no expenditure of tax funds. But one can easily imagine legitimately aggrieved parties: General Motors, a for-profit organization, noting that it is obligated to participate in a government-run insurance scheme when it might prefer to self-insure (like non-profits) or to have the choice of entirely opting out (like religious non-profits); Planned Parenthood, a non-profit organization, arguing that although offered the option of self-insuring, it is denied the option of exemption that is afforded to religious non-profits; the local homeless shelter, also non-profit and performing some of the same functions as the Salvation Army, arguing that it is relevantly similar and entitled accordingly to opt out; or even an employee of the Salvation Army, arguing that she was de-



One thing that makes the federal scheme particularly interesting is the complicated thirty-year history of FUTA exemptions. Prior to 1970, all "religious, charitable, educational, or other tax-exempt organization[s]" were exempt from FUTA.<sup>306</sup> They were not required to pay the federal excise tax and only paid a state tax if the state's program went beyond the federal program.<sup>307</sup> Congress revised FUTA in 1970, maintaining the § 3306(c)(8) exemption for nonprofits from the federal excise tax, but now requiring nonetheless under § 3304(a)(6)(A) that state plans cover them.<sup>308</sup> In 1970 Congress also enacted § 3309(b) which exempted from mandatory state coverage several classes of employees, including religious and educational employees (composed of employees of churches or primarily religious organizations, ministers and members of religious orders, and those in the employ of a school which was not an institution of higher education). Then, in 1976, Congress eliminated the educational employee exemption.<sup>309</sup> The present scheme includes a variety of exemptions in addition to the exemption for religious organizations, but it has been argued that in revoking exemptions over time, Congress studiously avoided revoking the religious exemption.<sup>310</sup> Herein, it is argued, lies proof of an emergent legislative intent to "favor" religion.

The claim that the federal government has impermissibly allowed the state governments to do as they see fit with respect to religious employers is an unpalatable argument at best, especially given the federalist interpretation of the Establishment Clause. But what of the claim that the federal government is violating the Establishment Clause because, despite repeatedly amending the scheme over time, it continued to preserve an exemption from mandatory coverage for religious employers? On different facts, this might be a plausible claim. If New York steadily repealed its property tax exemptions until the only one left were the religious one, *Walz* would suddenly look very different. Perhaps New York would answer that it felt it could no longer afford the sweeping property tax exemptions it had traditionally offered, but that it preferred to "steer clear" of church land and enmeshing itself in a dispute with local churches. The question that *Rojas* asks is whether we treat *Walz-Rojas* (exemptions repealed until only church

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nied unemployment compensation by the state government simply because her employer was a church and was therefore allowed to choose that its employees not be insured. It is the latter plaintiff that emerged to challenge the scheme.

306. *Grace Brethren Church*, 457 U.S. at 397.

307. *Id.*

308. *Id.*

309. *Id.*; see 26 U.S.C. § 3309(a)(1) (1994).

310. *Grace Brethren Church*, 457 U.S. at 397.

exemption left) differently from *Walz-Texas Monthly* (only church exemption to begin with). The answer is probably not. Obviously the final product is the focus of the constitutional inquiry. And the legislative purpose will weigh in, appropriately, in both scenarios. The most the federal government's "exclusion from mandatory coverage" accomplishes (i.e., the extent of its effect) is the delegation of the decision (coverage or not) to the state level. If the scheme is to fall on First Amendment grounds, then, surely it is to fall at the state level.

One can imagine a fairly coherent explanation for a three-tiered classification scheme at the state-level—the distinction between for-profits and non-profits stemming from the need to reduce administrative burdens and the need for flexibility in the case of institutions with high turnover, small staffs, and less-than-stellar accounting practices—and the distinction between religious non-profits and other non-profits stemming from a desire to afford flexibility to religious institutions that might prefer for religious reasons not to participate in mandatory government-run insurance schemes (i.e., "accommodation"). The question must ultimately be whether the distinction between religious non-profits and non-religious non-profits can stand; whether—assuming at least *some* accommodation (in the sense of exemption from burden imposed on others) is permissible even when not required by the Free Exercise Clause—there exists an entity that might be able to articulate a *Harlan-Welsh* claim of religious gerrymandering in the Rhode Island scheme and make a plausible claim for similar treatment. A homeless shelter and a non-profit clinic cannot make a plausible *Welsh* claim because they are not *relevantly* similar: the legislature's purpose was to accommodate religious organizations that prefer for religious (conscientious) reasons not to participate in insurance schemes.<sup>311</sup>

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311. For an example of a religion-only exemption sustained by the courts, see *Cohen v. City of Des Plaines*, 8 F.3d 484, 491 (7th Cir. 1993) (sustaining zoning ordinance that required operators to day-care centers to obtain special use permits before operating in single-family residential district and that exempted churches running non-profit day-care centers from permit requirement). This arrangement, the Court of Appeals wrote, did not *establish* religion any more than did the property tax exemption of issue in *Walz*. *Id.* at 490. Noting that care and instruction of the young is often deemed vital by a church, the Seventh Circuit reasoned that Des Plaines intended to minimize government meddling in religious affairs and in the decisionmaking process of religious organizations. *Id.* at 490. Especially given the implication of the Free Exercise Clause (in the right of religious organizations to educate their young) and in the absence of what the court called a "subsidy" (in the form of a discernible increase in everyone else's tax bill to compensate), the arrangement was deemed benign both in purpose and effect. *Id.* at 491. The Court of Appeals did not have occasion to address whether other entities would properly belong within the scope of the exemption, but it seems unlikely given the hybrid nature of the free exercise interests.

The North Carolina Supreme Court recently invalidated a statute exempting from the

## CONCLUSION

Churches and others exercising special First Amendment rights are not immune to the ordinary burdens or benefits of belonging to civil society. However, we clearly stand on a precipice with respect to the notion that "incidental benefits" may permissibly accrue to religious institutions. Although absolute separation is unworkable, our ever-expanding concept of government cannot, consistent with the vision of the framers of the Establishment Clause, justify an infinitely expanding collection of permissible incidental benefits. The Establishment Clause must ultimately place some brakes on this process.

The traditional direct aid prohibition of the Establishment Clause is not implicated by the typical exemption of a church from state or federal property and income tax. The tax-and-spend prohibition of the clause is narrow; it does not and can not extend to exemptions from financially burdensome schemes (taxation or otherwise). The future of the Establishment Clause does not lie in expanding this prohibition—which is strict (not even "three pence") but limited in scope—to encompass Professor Surrey's tax expenditures. The possibility of a federalist non-interference interpretation of the clause (and a narrow reading of how, if at all, the Fourteenth Amendment might have meant to apply the clause to the states) is probably forever banished to the scrap heap of historical could-have-beens. How, if at all, this approach can be resurrected (or even "acknowledged") within the constraints of our present jurisprudence, with any doctrinal integrity, is unclear. This may be another challenge for the Clause's future.

It is the primary thesis of this article that religious tax exemption schemes should be scrutinized with both "purpose and effect" analysis and an "equal treatment" principle in mind. It is the notion that the clause, or some combination of the Clause and the Fifth or Fourteenth Amendments, prohibits the favoring of religion over non-religion. The difficult task of determining when and to what extent others are "similarly situated" and must be "similarly treated" remains to be explored, and perhaps the most

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property tax base "not all bona fide nonprofit homes for the aged but only homes for the aged owned by religious or Masonic bodies." *In re Appeal of Springmoor, Inc.*, 498 S.E.2d 177, 182 (N.C. 1998) (striking down N.C. GEN. STAT. § 105-275(32) (1998)). The exclusion was said to promote and encourage homes for the aged, sick, and infirm. *Id.* at 184. This, the court held, for reasons largely identical to those outlined in the text, "results in the favoring of the religious over the secular." *Id.* "Religiously affiliated homes are singled out," the court wrote, "for a tax benefit denied to others that are similarly capable of carrying out the secular objectives" in question. *Id.* Not at issue in the case was the statutory framework exempting property used for "educational, scientific, literary, cultural, charitable, or religious purposes." *Id.* at 181, (citing N.C. GEN. STAT. § 105-278.3), and calling that framework "equivalent to that challenged in *Walz*."

vexing questions relate to the concept of accommodation—what the word means, and whether (and to what extent) the practice is permitted. When a legislature means to further distance government from religion, one can hardly claim an Establishment Clause violation. But when a legislature means to further, or to assist, free exercise, one must be on one's guard for precisely the sort of institutionalizing favoring of religion that the framers sought to preclude with a wall of separation. It is only in this way that the wall of separation between church and state will protect *both* religious liberty *and* our secular government.

