

The Yale Law Journal

Volume 78, Number 8, July 1969

Churches, Taxes and the Constitution

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In *Walz v. Tax Commission of the City of New York*,¹ the plaintiff attacked the validity, under the first and fourteenth amendments, of provisions in New York's Constitution² and Real Property Tax Laws³ exempting from state and local property taxes real property owned by a religious corporation and used exclusively for religious purposes. The New York Court of Appeals rejected the challenge, pointing out that "courts throughout the country have long and consistently held that the exemption of such real property from taxation does not violate the Constitution of the United States."⁴ The plaintiff has appealed his case to the United States Supreme Court, which, in June, noted probable jurisdiction and placed the case on the summary calendar.⁵

The *Walz* case concerns the exemption of religious buildings from real property taxation, but the same constitutional objection—violation of the establishment clause—has been raised to religious exemptions from federal, state, and local taxes on income, sales, and other events and activities. So far, courts have consistently refused to accept the anti-exemption rationale; the New York Court of Appeals disposed of the

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1. *Walz v. Tax Comm'n.*, 30 App. Div. 2d 778, 292 N.Y.S.2d 353 (1968), *aff'd.* 24 N.Y.2d 30, 246 N.E.2d 517, 298 N.Y.S.2d 711 (1969), *prob. juris. noted*, 89 S. Ct. 2105 (1969) (No. 1415). The New York Court of Appeals commented that "[t]he question of the plaintiff's standing to maintain this action has not been raised." 24 N.Y.2d 30, 31; 246 N.E.2d 517, 518; 298 N.Y.S.2d 711, 712. It may be that the plaintiff in the *Walz* case purchased a building lot in order to qualify as a taxpayer in bringing his suit. N.Y. Times, June 20, 1969, at 1, col. 3 (city ed.).

2. N.Y. CONST. art. XVI, § 1.

3. N.Y. Real Property Tax Law § 420(1) (McKinney 1960).

4. 24 N.Y.2d 30, 31, 246 N.E.2d 517, 518, 298 N.Y.S.2d 711, 712 (1969).

5. 89 S. Ct. 2105 (1969) (No. 1415).

Walz contention solely on the basis of precedent, and the Supreme Court dismissed two previous appeals "for want of a substantial federal question."⁶ Nevertheless, the issue has become a King Charles' Head for the commentators in recent years.⁷

In the nineteenth century, defenders of tax exemptions for religious organizations usually justified them as appropriate contributions by the state to the spiritual and moral objectives of the nation's churches. Indeed, they often asserted that the churches were carrying on activities that would otherwise have to be financed directly by the state.⁸ Whatever the strength of this rationale might be for activities like welfare programs, it does not validate state assistance to the primary functions of religious organizations.⁹

As this flaw in the traditional argument came increasingly to be conceded, judicial and academic defenders of religious exemptions began to argue from history, asserting that religious exemptions have been granted by legislatures and accepted by the public for so many decades that neither the first nor the fourteenth amendment can be properly

6. *General Finance Corp. v. Archetto*, 93 R.I. 392, 176 A.2d 73 (1961), *appeal dismissed*, 369 U.S. 423 (1962) (tax on tangible and intangible personal property); *Lundberg v. County of Alameda*, 46 Cal. 2d 644, 298 P.2d 1 (1956), *appeal dismissed, sub. nom. Heisey v. County of Alameda*, 352 U.S. 921 (1956) (tax on real property). In addition, certiorari was denied in a third case raising the same issue, *Murray v. Comptroller of the Treasury*, 241 Md. 383, 216 A.2d 897 (1966), *cert. denied*, 385 U.S. 816 (1966) (tax on real property).

7. C. ANTIEAU, P. CARROLL & T. BURKE, *RELIGION UNDER THE STATE CONSTITUTIONS* 122-88 (1965) (extensive historical material); Cohen, *Constitutionality of Tax Exemptions Accorded American Church Property*, 30 ALBANY L. REV. 58 (1966); R. DRINAN, *RELIGION, THE COURTS, AND PUBLIC POLICY* 7-14 (1963); Kauper, *The Constitutionality of Tax Exemptions for Religious Activities*, in D. OAKS (ed.), *THE WALL BETWEEN CHURCH AND STATE* 95-116 (1963); Korbelt, *Do the Federal Income Tax Laws Involve an "Establishment of Religion"?* 53 A.B.A.J. 1018 (1967); Paulsen, *Preferment of Religious Institutions in Tax and Labor Legislation*, 14 LAW & CONTEMP. PROBS. 144 (1949); L. PEEFFER, *CHURCH, STATE AND FREEDOM*, 183-91, 721-26 (1967); J. SANE, *CHARITABLE EXEMPTION FROM TAXATION IN NEW YORK STATE ON REAL AND PERSONAL PROPERTY* (1933); Van Alstyne, *Tax Exemption of Church Property*, 20 OHIO ST. L.J. 461 (1959); Note, *Constitutionality of Tax Benefits Accorded Religion*, 49 COLUM. L. REV. 968 (1949); C. ZOLLMAN, *AMERICAN CHURCH LAW* 237-84 (1933); Note, *Church-State Religious Institutions and Values: A Legal Survey—1964-66*, 41 NOTRE DAME LAWYER 681, 695-701 (1966).

See also M. LARSON, *CHURCH WEALTH AND BUSINESS INCOME* (1965) (estimates of amount of exempted property); A. BALK, *THE RELIGION BUSINESS* (1968) (includes statements by church groups on propriety of exemptions); A. STOKES, *3 CHURCH AND STATE IN THE UNITED STATES* 418-28 (1950).

8. E.g., *City of Hannibal v. Draper*, 15 Mo. 634 (1852) ("in a Christian land, no argument is necessary to show that church purposes are public purposes"); see also cases cited by C. ZOLLMAN, *supra* note 7, at 327-28.

9. In rejecting the attack on religious exemptions in *Murray v. Comptroller of the Treasury*, 241 Md. 383, 402, 216 A.2d 897, 908 (1966), the Maryland Court of Appeals offered a broader "secular" rationale for state aid to religious institutions, viz., "to attract persons to communities and [thus] to increase the general tax assessment base," citing the donation of church sites by real estate developers as proof of this economic advantage derived by the state from aid to churches. A self-styled atheist, the plaintiff on losing her lawsuit might have pondered the thought that if God did not exist, our urban renewal authorities would have to invent Him.

interpreted to outlaw the practice. Though not as objectionable as saying that the law as laid down in the days of Henry the Fourth is forever binding, this appeal to history is less than conclusive for a generation that is accustomed to an ambulatory Constitution. It is not uncommon, therefore, to find it asserted that religious tax exemptions are anomalous, but that they will be perpetuated because the courts—here the commentator usually implies that judges unfortunately lack his ability to strike off the intellectual fetters of the past—will be unwilling to decide the question on its merits.

In my view, the anti-exemption case is much weaker than has been recognized. Defenders of the status quo have failed to put their best foot forward because they have conceded too readily the validity of two essential but unarticulated premises on which the anti-exemption case rests:

1. That the term “tax exemption” has so self-evident a meaning that it need not be subjected to analysis; and
2. That tax exemptions *ipso facto* relieve religious organizations or their members from paying their “fair share” of government expenditures.

In this article, I should like to examine both of these premises.

I. The Meaning of “Tax Exemption”

Under the Supreme Court’s most recent generalization, an act of government violates the establishment clause if its purpose or primary effect “is the advancement or inhibition of religion.”¹⁰ I see no reason why a provision in a taxing statute, whether it is an exemption, deduction, credit, rate schedule, or other element, is not to be tested by this standard.¹¹ The anti-exemption case, however, leaps over this step in the process of constitutional adjudication, evidently on the assumption that “exemptions” automatically serve to establish religion. Despite its importance to this position, I know of no attempt in the extensive judicial and academic discussions of religious exemptions to analyze the meaning of the term “tax exemption.” As a result, the scope of the

10. Board of Ed. v. Allen, 392 U.S. 236, 243 (1968), quoting Abington School Dist. v. Schempp, 374 U.S. 203, 222 (1963).

11. Although the anti-exemption case is very sweeping, it is curiously limited in one respect, viz., its concentration on “exemptions” as the major if not sole potential target of the establishment clause in the tax area. As any first year law student knows, there is more than one way to skin a cat: deductions, credits, rate schedules, etc. can be easily manipulated to take the place of a dead exemption. Let me write the technical provisions of the tax law, and I care not who eliminates its exemptions.

anti-exemption case is unclear. At its broadest, it appears to condemn any tax as unconstitutional if its boundaries do not include churches, no matter how many other groups or activities are also "exempted." In a more sophisticated version—not, however, elaborated by the anti-exemptionists themselves—the theory may be that the exclusion of churches is unconstitutional only if the tax, had it been enacted in its "ideal," "correct," or "normal" form, would have included them. A still narrower theory would condemn an exemption only if churches, and no other groups, were immunized.

A close examination of the nature of tax exemptions reveals a serious weakness in the contention that exemptions automatically serve to establish religion. There is no way to tax *everything*; a legislative body, 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. In specifying the ambit of any tax, the legislature cannot avoid "exempting" those persons, events, activities, or entities that are outside the territory of the proposed tax. In describing a tax's boundaries, the draftsman may choose to make the exclusions explicit ("all property except that owned by nonprofit organizations"), or implicit ("all property owned by organizations operated for profit"), but either way, the result is the same—taxpayers are separated from non-taxpayers. Leaving churches outside the taxing boundary is no more an automatic violation of the establishment clause—I hope to show—than locating them within the taxing statute is an automatic violation of the free exercise clause. In either case, the constitutional validity of the boundary should depend on whether—to revert to the Supreme Court's formulation—its purpose or primary effect "is the advancement or inhibition of religion."

I would like to illustrate these introductory remarks with a discussion of the exemption of churches from the federal income tax, returning thereafter to the implications of the anti-exemption argument.

The income of churches, like that of most other nonprofit organizations, is not taxed by the Internal Revenue Code. Their immunity is conferred by a statutory provision that is labeled "exemption from taxation,"¹² but 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 pro-

12. INT. REV. CODE OF 1954, §§ 501(a), 501(c)(3).

fit and of natural persons shall be taxed"¹³ Unless the statutory form by which immunity is granted, rather than the existence of the immunity itself, is to be determinative, there must be some way to ascertain when such immunity is equivalent to an "exemption." If we must decide whether the immunity created for nonprofit organizations is an "exemption" by looking to the "ideal" income tax as envisioned by theorists, however, we find little to guide us. Though their mood is sometimes resignation rather than enthusiasm, most commentators seem to accept the exemption of nonprofit organizations, except for such peripheral issues as unrelated business income, accumulations by private foundations, and "nonprofit" groups that serve the personal or business objectives of their members (*e.g.*, social clubs and business leagues).¹⁴ There is, in any event, no professional crusade against the basic Congressional decision to exclude genuine nonprofit groups and activities and to focus on the income of natural persons and organizations operated for profit.

Indeed, much can be said for imposing the federal income tax on natural persons only, exempting business organizations, trusts, and other entities from tax but imputing their income to their shareholders, beneficiaries, or other interested natural persons. Applied to nonprofit organizations, this theory might lead to the imputation of the income of some groups (for instance, chambers of commerce, social clubs, and labor unions) to their members, on the ground that they are the persons who enjoy the economic benefit of the entity's income.

In the case of other nonprofit organizations (for example, the Salvation Army or the Red Cross), the beneficiaries are too diffuse for a satisfactory imputation of the association's income, even on the theory that every potential victim of misfortune can go to bed at night knowing that he possesses a hypothetical insurance policy protecting him against disaster. Recognizing this, a legislature might tax the entity itself, as a surrogate for all its beneficiaries, at the estimated average rate at which the income would be taxed to them if an imputation were feasible. In the alternative, a legislature might conclude that justice would be better served by foregoing a tax on the entity's income,

13. But some nonprofit groups (*e.g.*, political parties) are not exempted by § 501(c) of the Internal Revenue Code. See generally note 22 *infra*, for the possibility of excluding them, in a paraphrase of the statutory provisions, from the favored group by specific mention; see also note 20 *infra*, regarding the exemption of churches from § 511, taxing the "unrelated business income" of other § 501(c)(3) organizations.

14. See Stone, *Federal Tax Support of Charities and Other Exempt Organizations: The Need for a National Policy*, 1968 So. CALIF. TAX INST. 27 and material cited in note 7 *supra*.

lest the estimated rate be higher than an accurate imputation would have produced. This decision would draw strength from the fact that an "average" rate is bound to overtax the most needy beneficiaries of the organization's philanthropy by reducing the amount available for distribution to them. The fact that recipients of gifts, whether they benefit from personal or institutional philanthropy, are allowed by existing law to exclude these receipts from their gross income would also buttress the decision. Similarly, the income of colleges and other educational institutions might reasonably be thought to inure to the benefit of so diffuse a group, in amounts so unascertainable, that complete immunity would accord better with the assumed function of income taxation (to collect revenue from natural persons in proportion to their economic status) than would a tax at a flat rate on the entity's income.¹⁵

A parallel analysis of the income of religious organizations might lead to the conclusion that the beneficiaries (whether they are the parishioners of today, or world-wide and age-old bodies of believers) 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. To the argument that a flat rate at a modest level would be better than nothing, the response can be made that, unless the rate were so low as to be inconsequential, it might be worse than nothing; if a large percentage of the putative beneficiaries of a church's income are below the minimum tax level (because of poverty, childhood, or other reasons), the amount imputed to them ought to go untaxed (unless it would bring them above the minimum level), and *any* tax on the entity's income would be *pro tanto* objectionable. This being so, is not Congress justified in concluding that immunity is less likely to do injustice than a flat tax, even though the former will aid rich beneficiaries of the church's work by allowing their *pro rata* shares of the organization's income to go untaxed?

The federal income tax of current law, then, "exempts" nonprofit groups; and this quite naturally leads, on a quick glance, to the conclusion that they have been granted the "privilege" of "immunity." Once this characterization is accepted, it is only a short step to such pejoratives as "loophole," "preference," and "subsidy." Unless blinded by labels, however, one can view the federal income tax instead as a tax on income that inures in measureable amounts to the direct or indirect

15. See Bittker, *Income Tax Reform in Canada: The Report of the Royal Commission on Taxation*, 35 UNIV. OF CHI. L. REV. 637, 656-58 (1968).

personal benefit of identifiable natural persons. So viewed, the Internal Revenue Code's "exemption" of nonprofit organizations is simply a way of recognizing the inapplicability to them of a concept that is central to the tax itself.¹⁶

A similar analysis of other federal, state, and local taxes would disclose comparably persuasive reasons for most, if not all, of the "exemptions" enjoyed by such organizations. The gravamen of *Walz v. Tax Commission of the City of New York*, for example, is an exemption accorded to property "used exclusively for religious, educational or charitable purposes" if owned by a nonprofit group that is organized or conducted exclusively for one or more of these purposes.¹⁷ If the state constitution had permitted property to be taxed only if used for personal occupancy, rental, business, or other purposes inuring to the economic benefit of the owner, however, it could have achieved substantially the same results without any explicit "exemptions." In this event, there would be no need to "exempt" school buildings, art galleries, museums, churches, and poorhouses from the tax; their immunity would follow as automatically as a teetotaler's immunity from taxes on liquor. In focusing on personal residences and business property, New York's real property tax—representing, be it noted, only one segment of the state's fiscal structure—is surely not beyond the pale of rationality.

It may be asserted that New York's exemption of religious property would be permissible if *all* other property devoted to nonprofit purposes were also exempt, but that New York is not this generous: although most nonprofit property is exempt, some is not (*e.g.*, property owned by political parties, labor unions, chambers of commerce, and social clubs). By putting religious groups into the same boat as exempt organizations, rather than into the less-favored category of taxable nonprofit organizations, it may be argued, New York has violated the establishment clause. If there is a persuasive reason for thus classifying religious property (other than a desire to foster religious belief and observance), however, New York's decision is simply a natural out-

16. The denial of tax-exemption to organizations that, ostensibly of a nonprofit character, divert their assets to the benefit of their members (*e.g.*, by the "no inurement" clause of § 501(c)(3) or the "prohibited transaction" rules of § 503) is consistent with the views expressed in the text; these are instances of actual or threatened private profit. The exclusion of political organizations from the benefits of § 501(c), and the concomitant denial by § 501(c)(3) of exemption to otherwise qualified organizations that engage in political activities, may reflect a legislative theory that this will minimize the influence of wealth in the political process.

17. N.Y. CONST. art. XVI, § 1.

growth of the unavoidable process of defining the appropriate tax base. For example, if the distinction between exempt and taxable non-profit groups is based on a judgment that political parties, labor unions, chambers of commerce, and social clubs are more likely to serve the personal ambitions or financial objectives of their members (and hence are less "deserving" of tax immunity) than educational, charitable, scientific, and literary groups, the legislature must then decide whether religious groups have more in common, as respects the criterion that is to be controlling, with the taxable or the exempt organizations. Assuming a good faith judgment that religious groups "belong" in the exempt circle, I would suggest not only that the decision to put them there is consistent with the establishment clause, but that a contrary decision might run afoul of the free exercise clause unless based on a countervailing non-religious reason.

It will no doubt be asserted, however, that the rationality of New York's fiscal structure is not relevant in deciding whether it violates the establishment clause. Before turning to this argument, which requires an examination of the intended scope of the anti-exemption case, I would like to note that the approach I have been suggesting does not imply that religious exemptions are invariably consistent with the establishment clause. Exemptions or any other provisions of a taxing statute are obviously improper if they favor one religious group over another; thus, § 107 of the Internal Revenue Code, excluding the rental value of a home furnished to "a minister of the gospel" from his gross income, would violate the establishment clause if "gospel" were given its literal meaning.¹⁸ As to non-discriminatory provisions, a state constitutional prohibition on any taxation of churches under

18. *Salkov v. Commissioner*, 46 T.C. 190 (1966). Perhaps the reasoning of *United States v. Seeger*, 380 U.S. 163 (1965), would require the benefits of § 107 to be extended to persons who are not "ministers" but who perform similar functions for secular institutions; but see *Kirk v. Commissioner*, 51 T.C. No. 8 (1969) (refusing to consider whether denial of exclusion to a non-ordained person performing ministerial functions serves to "establish religion").

Since it uses religion as a standard for governmental action, § 107 presumably violates the Kurland doctrine, note 22 *infra*. On the other hand, it resembles § 119 (meals and lodging furnished to an employee for the convenience of his employer are excludable from income), except that § 119 requires proof in each case that the quarters furnished to the employee contribute to the efficient performance of the duties, while § 107 provides an unqualified exclusion. If it is reasonable for Congress to determine that a minister's home is almost always used for pastoral duties, however, the blanket exclusion granted by § 107 might be regarded as a rule of evidence that does not "prefer" religion but merely reduces the administrative burden of applying § 119 to clergymen. See also Rev. Rul. 55-422, 1955-1 CUM. BULL. 14 (pensions paid to retired clergymen treated as tax-exempt gifts, partly because there is "a far closer personal relationship between the recipient and the congregation than is found in lay employment relationships").

any circumstances might be objectionable;¹⁹ the exemption of churches from the "unrelated business income" provisions of the Internal Revenue Code is suspect;²⁰ and it may be that a close scrutiny of the thousands of pages of federal, state, and local taxing laws would turn up some other dubious instances.²¹ They would be rare, in my view, but this should be no more surprising than the fact that other exercises of governmental authority are rarely held to violate the establishment clause even though nonprofit groups, including churches, are often excluded from coverage or given other "special" treatment.

Returning now to the theory of the anti-exemptionists, I should like to illustrate the ambiguity of their use of the term "exemption" and the troublesome if not fatal implications of this defect in their argument.

Let me start with a simple example, *viz.*, a tax on all persons and corporations whose principal activity is the exhibition of motion pictures for profit, at the rate of 10% of the price charged for admission. The statutory language contains no explicit "exemptions," but it takes little imagination to see that this levy is "really" a tax on the admission charge to public performances and that it implicitly but unmistakably "exempts" all performances other than motion pictures, such as plays, concerts, lectures, and sports events. Seen from a slightly different perspective, however, the tax is "really" imposed on passive recreation, with "exemptions" for the purchase or rental of television sets, phonograph records, books, etc. Or is it "really" a tax:

On frivolous expenditures, with "exemptions" for such competing amusements as jewelery, perfume, and night clubs?

On methods of transmitting ideas, with "exemptions" for newspapers, books, lending libraries, radio, and television?

19. A constitutional prohibition on any taxing statute of any kind, by placing churches beyond the normal exercise of legislative authority, may be within the unpredictable range of *Reitman v. Mulkey*, 387 U.S. 369 (1967) (California constitutional provision violates equal protection clause of fourteenth amendment by precluding any legislative or administrative interference with private discrimination); *see also* *Hunter v. Erickson*, 393 U.S. 385 (1969).

20. Churches are the only "§ 501(c)(3) organizations" to be exempted by § 511(a)(2) from the tax on related business income. If churches were thought to be less likely than colleges and other targets of the tax to engage in aggressive or predatory competition with private enterprise, however, the exemption might pass muster under the *Allen-Abington* formulation, *see* note 10 *supra*. Moreover, some other nonprofit groups (*e.g.*, social welfare organizations and fraternal societies) are also exempted—not explicitly, but by omission—from coverage under § 511(a)(2).

21. *See*, for example, N.Y. REAL PROPERTY TAX LAW § 460 (McKinney 1950), exempting real property owned by a clergyman or a deceased clergyman's widow to the extent of \$1500.

On the fair market value of cinema tickets, with an "exemption" for free tickets?

On motion picture performances, with an "exemption" for persons who do not engage in exhibiting for profit as their principal activity?

On business, with an "exemption" for all business other than the exhibition of motion pictures?

One may withdraw from this maddening and endless pursuit of "exemptions" by stolidly insisting that the tax is nothing but what it purports to be—a tax on paid admissions to motion pictures exhibited by a specified type of sponsor—with no "exemptions" because all paid admissions to such motion picture performances are taxed. So viewed, its purity would not be impaired even if tickets costing less than \$1 or tickets sold to minors were "exempted." If we are willing to agree that it is a tax on tickets sold for profit to adults for \$1 or more—and on all such tickets—it will have been purged of "exemptions."

If the opponents of religious exemptions had to say whether the cinema ticket tax contains any forbidden "exemptions," I do not know whether they would assert that (a) it exempts every conceivable activity of man except the purchase of \$1 adult tickets to the cinema, (b) it exempts nothing, or (c) it exempts some activities or some tickets or some sellers, but not others. Since attendance at religious services, even if limited to dues-paying members of a church, would not be subject to the tax, it could be asserted that the law contains an "exemption" favoring worship over a secular pastime. Yet I suspect that even a rigorous anti-exemptionist would concede that worship and the cinema are different activities and that taxing one is not equivalent to exempting the other. Similarly, I presume that my hypothetical enemy of exemptions would tolerate the failure to tax a church that exhibited motion pictures in its Sunday School program, if tickets were sold only to minors; the statutory target, it could be said, is the sale of tickets to adults. Would he accord equal tolerance to a church's sale of tax-free tickets to adults for less than \$1? What about \$1 tickets sold to adults by a church, if it claims "exemption" from the tax because it is not "regularly engaged in exhibiting motion pictures for profit"?

The opponent of religious exemptions could summarily dismiss this barrage of questions as a red herring if the anti-exemption complaint were limited to statutory provisions that single out religious groups, activities, or property for treatment that is not accorded to any of their secular counterparts. The cinema tax would then be valid in its entirety; its "exemption" of churches would be submerged in its broader exemp-

tion of all nonprofit groups. This rationale would be consistent if not identical with the Kurland doctrine: "government cannot utilize religion as a standard for action or inaction because [the establishment and free exercise clauses], read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden."²²

To the anti-exemptionist, however, this theory would be embarrassing, since the exemptions afforded to religious groups are almost always enjoyed by other nonprofit organizations as well. The tax immunity attacked by the plaintiff in the *Walz* case, for example, is accorded to "real or personal property used exclusively for religious, educational or charitable purposes as defined by law and owned by any corporation or association organized or conducted exclusively for one or more of such purposes and not operating for profit."²³ If New York's exemption of church property is objectionable even though the same immunity attaches to educational and charitable property, it seems to follow that the exemption of churches from the cinema ticket tax described above is equally objectionable, despite the fact that many other groups are also exempt. But if the religious exemption is not submerged in, and

22. P. KURLAND, *RELIGION AND THE LAW* 112 (1962). I am not sure how the New York Constitution, which refers to "religious, educational or charitable purposes" would fare if tested by Kurland's principle. Since some nonprofit purposes and institutions are excluded from the list (e.g., political, social, and fraternal groups), the provision does not apply impartially to all nonprofit groups. Perhaps there is a genus of which "religious, educational or charitable" groups or purposes are merely species and which includes no other species; if so, the Kurland requirement would be satisfied. An alternative argument in favor of validity is that the provision, without changing its coverage, could be rephrased to omit any reference to "religion" (e.g., "no property owned by a nonprofit organization and used exclusively for nonprofit purposes shall be taxed, except for property (a) owned by a political group, (b) used for political purposes, (c)-(z) [here list all other nonprofit groups or purposes that are to be excluded from coverage]"). It it were violated by such a revision of the New York provision. Prof. Kurland's no-benefit-no-burden doctrine would be a counsel of unattainable perfection: any legislative classification requires religious groups, activities, or property to be put in one category rather than another. This unavoidable designation of religion's place in the legislative plan (either by explicit mention of religion, or by allowing it to fall into a catch-all clause) invites the charge that religion has either been favored in violation of the establishment clause or hampered in violation of the free exercise clause. Prof. Kurland surely implied, however, that there is a navigable channel between Scylla and Charybdis. I would conclude that the New York constitutional provision qualifies, either in its current form or as rephrased.

23. N.Y. CONST. art. XVI, § 1.

Although only religious, educational, and charitable property is granted constitutional immunity from real property taxation, New York's taxing statute is more generous, embracing all organizations "for the moral or mental improvement of men and women" or for scientific, literary, patriotic, historical, and cemetery purposes (N.Y. REAL PROPERTY TAX LAW § 420 (McKinney 1960)), veterans organizations (§ 452), and a number of other groups and purposes. Some nonprofit groups, however, are not entitled to immunity (e.g., political parties, labor unions, and social clubs), and some receive only a partial exemption (e.g., fraternal societies, whose real property is exempt only if devoted to the education or relief of members and their families). Other criteria are employed in granting complete or partial exemption from income, sales, and other taxes.

therefore excused by, the exemption of other nonprofit groups, I do not know why the exemption of tickets sold to minors is not also objectionable when claimed by a church. Once we go down this road, however, it can be asserted that the cinema ticket tax also unconstitutionally exempts tickets to lectures and picnics if sold by a church.

The only way to halt this infinite parade of exemptions in any tax, even the simplest, is to demarcate its boundaries. At bottom, the anti-exemption case presupposes a consensus on the "proper" ambit of a tax; unless we can see the tax whole, we cannot know if something has been carved out. Unfortunately for any hope of readily identifying "exemptions," however, "ideal" taxes are hard to come by, even if our models are academic projects rather than statutes shaped by the interaction between relentless lobbyists and harried legislators. In discussing the exemption of churches from federal income tax liability,²⁴ I pointed out the difficulty in deciding whether the image in the cave is accurate or distorted, unless the Platonic ideal that is being reflected can be described with precision.

The anti-exemption case, then, suffers from a crisis of definition. If "exemption" means a tax boundary that "artificially" excludes religious organizations, activities, or assets from coverage,²⁵ or that singles them out from all other taxpayers for exclusion, the anti-exemption case is narrow to the point of triviality; and the provisions that are most frequently cited in the anti-exemption literature turn out, on examination, to be free from defect. If, on the other hand, *every* tax boundary that fences religious groups, activities, or property out is an unconstitutional "exemption," the taxing structure is about to crash down on our heads. *Fiat justitia, of course, ruat coelum*. Before we accept this fate, however, another look at the anti-exemption argument may be in order; and it is profitable here, as often, to test the complaint by asking how, if valid, it should be remedied.

Whether "exemption" is used broadly or narrowly, a proper remedy for an unconstitutional exemption would evidently be a judicial order directing the state to administer the tax as though the exemption had been expunged from the constitution or statute.²⁶ This remedy might be applied with a modicum of success if the federal or state taxing structure consists of a single tax; for example, a tax on real property

24. See pp. 1288-91 *supra*.

25. See *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (gerrymandering political subdivision to alter its shape "from a square to an uncouth twenty-eight sided figure").

26. This is not the only possible remedy; a court might enjoin any tax collections under the offending statute.

could be applied to religious organizations along with the other taxpayers specified by statute.²⁷ If churches do not engage in the taxed activity, however, the proper remedy is less clear. The federal estate tax, for example, is imposed on “the transfer of the taxable estate . . . of every decedent, citizen or resident of the United States dying after [a specified date].”²⁸ Would the elimination of “exemptions” require that an “imputed death” tax be imposed on church wealth at intervals comparable to the life expectancy of natural persons? Would the cinema tax described above²⁹ be applied to \$1 adult tickets sold by churches, even if they are not regularly engaged in exhibiting motion pictures for profit?

Another set of problems would arise if the “exemption” to be expunged is linked with other statutory provisions that do not “fit” religious organizations (*e.g.*, the federal income tax, whose provisions for deductions, credits, and other allowances frequently refer to transactions entered into for profit, business activity or purpose, etc.). Although this problem is tangential to the *Walz* case, I should like to discuss it at some length in the context of the federal income tax since comments on the establishment clause frequently cite the exemption of religious organizations from this tax.³⁰

From its inception, the federal income tax has been imposed not on gross receipts or gross income, but on an adjusted net amount—

27. Even in so simple an instance as the New York constitutional provision, however, there could be some difficulty in identifying the exemption to be nullified. This provision now exempts the following types of property, among others:

1. Property owned by a religious organization if used exclusively for religious purposes.
2. Property owned by a religious organization if used exclusively for educational or charitable purposes.
3. Property owned by an educational or charitable organization if used exclusively for religious purposes.

If the *Walz* theory is that the character of the owner is critical in determining whether an exemption violates the establishment clause, the exemption of categories 1 and 2 would be improper; if the use to which the property is put is critical, categories 1 and 3 would be improperly exempted; if both the owner and the use must be religious to bring the establishment clause into play, only category 1 would be objectionable.

28. INT. REV. CODE OF 1954, § 2001.

29. See p. 1293 *supra*.

30. See, *e.g.*, the concurring opinion of Mr. Justice Douglas in *Engel v. Vitale*, 370 U.S. 421, 437 (1962):

The point for decision is whether the Government can constitutionally finance a religious exercise. Our system at the federal and state level is presently honeycombed with such financing. Nevertheless, I think it is an unconstitutional undertaking whatever form it takes.

Presumably to illustrate the pervasive unconstitutional financing of religion, Mr. Justice Douglas cited the exemption of religious organizations from federal income tax. On the other hand, Mr. Justice Douglas wrote for the Court in *Follett v. Town of McCormick*, 321 U.S. 573 (1944), holding that a license tax on book agents violated the free exercise clause when imposed on a clergyman selling religious books. According to the separate opinion of Justices Roberts, Frankfurter, and Jackson, this gave the plaintiff “a subsidy for his religion.”

roughly speaking, gross income less business expenses. As a guide in computing "net" or "taxable" income, there exists an extensive body of legal and accounting principles derived from business and financial practice, but it is awkward to apply these principles to nonprofit organizations.

An illustration may help. Assume that a church's receipts and expenses for the year are as follows:

<u>Receipts:</u>	(thousands)
1. Investment income (dividends, interest, etc.)	\$100
2. Gifts and bequests	75
3. Total receipts	<u>\$175</u>
<u>Disbursements:</u>	
4. Salaries of clergymen, maintenance of buildings, etc.	\$100
5. Medical and social welfare program for indigent persons	50
6. Total disbursements	<u>\$150</u>
7. Total receipts (line 3) less total disbursements (line 6)	<u>\$25</u>

How should a court, seeking to nullify all religious exemptions, compute the taxable income of this organization? At first blush, the computation of gross income seems simple: It is \$100,000, the investment income on line 1; § 102 of the Internal Revenue Code excludes the gifts and bequests of \$75,000 (line 2). Perhaps, however, Congress did not intend this statutory exclusion to inure to recipients who actively solicit gifts and bequests as a regular and indispensable activity; if begging is a business, the "gifts" and "bequests" it generates may not be the "gifts" and "bequests" that § 102 embraces. Moreover, whatever Congress may have authorized, a court that is asked to eradicate all exemptions without fear or favor may conclude that § 102 is an improper "exemption" when invoked by a mendicant church that seeks out donors as aggressively as a cigarette company pursues customers. Maybe, then, the church's gross income is \$175,000, rather than \$100,000.

Turning now to its deductions, are the salaries and other disbursements of line 4 deductible under § 162 of the Internal Revenue Code, which speaks of "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business"? The activities of a church or other nonprofit organization do not constitute a "trade or business," it will no doubt be argued, so that it is impermissible to deduct the line 4 expenses. On the other hand, the "business of religion" has for centuries evoked despair from the

pious, jeremiads from reformers, and sneers from unbelievers; perhaps churches should be allowed to pluck an advantage from this criticism by treating the salaries of clergymen, the maintenance of houses of worship, and the like as business expenses under § 162.

The next issue is the proper classification of the medical and social welfare program, costing \$50,000 (line 5). If the church must rely on the statutory allowance for the deduction of charitable contributions (§ 170), it would encounter an obstacle, in that § 170 permits contributions to be deducted only if they are funneled through a non-profit organization. (Natural persons and business organizations cannot deduct charitable contributions made directly to individuals; and since philanthropic organizations are themselves tax-exempt, there has heretofore been no need to allow them to deduct such benefactions.) Even if § 170 is twisted into an allowance for direct contributions in the case of churches, our hypothetical exemption-eradicating court would then have to decide whether the church should be subjected to the percentage restrictions imposed by § 170 on the charitable deductions of other taxpayers. If the court imposes a limit, should it be 30% of adjusted gross income (as with natural persons) or 5% (corporations)? Or should it be the unlimited charitable deduction that is granted to trusts by § 642(c) of existing law? As will be suggested shortly, this focus on § 170 may distort our vision; perhaps the cost of the medical and social welfare program, like the salaries of clergymen and the maintenance of religious buildings, should be deductible as a business expense because it serves the church's primary objectives in the same manner that § 162 expenses advance the functions of a profit-oriented business.³¹

Depending on the answers to these questions, the church's "net income" or "loss" is one of about a dozen different amounts. As a teacher of taxation, I would not pretend to be surprised by this conclusion, nor would I suggest that there are never any difficulties in computing the taxable income of profit-oriented groups; but I am prepared to testify that the very concept of "taxable income" for a charitable or religious organization is an exotic subject, more suited to academic speculation than to practical administration.³² The central

31. To paraphrase the words of *United States v. Seeger*, 380 U.S. 163, 166 (1965), a sincere and meaningful belief in charity occupies a place in the life of nonprofit organizations parallel to that filled by the worship of Mammon by organizations operated for profit.

32. If an allegedly charitable or religious organization is denied or loses an exemption because it is being exploited for personal profit (*see* discussion in note 16 *supra*), it may

problem is whether to compute the "income" of a nonprofit organization on the assumption that "charity" is its "business." This approach, as suggested above,³³ derives support from analogy; since the "taxable income" of a business organization is defined in terms of its function (the conduct of profit-oriented activities), it would be reasonable to define the "taxable income" of a charity by reference to *its* objective, the betterment of mankind's moral, spiritual, and physical condition. This would lead to a deduction for all amounts distributed to achieve these ends, whether in the form of gifts to the needy, below-cost education for students, and so on.

Moreover, it is now but a short further step to the conclusion that *all* amounts irrevocably earmarked for charitable purposes have been set aside with sufficient definiteness to justify a deduction. To be sure, a business organization may not deduct reserves for future expenses; but this is because circumstances may change and the liabilities disappear, in which event the reserves will inure to the benefit of the shareholders or partners of the enterprise. By contrast, a nonprofit institution's income is, at the very moment of receipt, *irrevocably* dedicated to nonprofit purposes, with no possibility of reversion to the donor, directors, or other managers. For this reason, it would be logical to allow a deduction *at that time* in computing the organization's income.³⁴ If this suggestion were to be adopted, of course, the deduction would offset the nonprofit organization's income, leaving nothing to be taxed.

While I do not suggest that this is the only reasonable method of computing the net income of nonprofit organizations,³⁵ I do assert that it provides strong support for a legislative decision that the appropriate object of income taxation is the income of natural persons and of entities operating for profit. If this approach were to be implemented by statutory deductions, credits, and other allowances, rather than

not be necessary to stretch the usual standards in computing income. *See, e.g.,* Parker v. Commissioner, 365 F.2d 792 (8th Cir. 1966). If the organization is operated for genuinely nonprofit purposes, however, and loses its exemption for an extraneous reason (*e.g.,* lobbying for legislation), the computation of taxable income is more obscure.

The Tax Reform Act of 1969, as passed by the House of Representatives (H.R. Doc. No. 13270, 91st Cong., 1st Sess. 506 (1969)), imposes a 7½% tax on the "net investment income" of private foundations. The taxable base is the excess of the foundation's gross investment income and net capital gain over its net capital loss and the expenses of producing its investment income and maintaining its income-producing property. By defining the tax base in this restricted fashion, the bill avoids the troublesome problem, discussed in the text, of defining the business or operating expenses of a nonprofit organization.

33. *See* pp. 1298-99 *supra*.

34. *Cf.* INT. REV. CODE OF 1954, § 642(c) (trusts and estates allowed unlimited charitable deduction for amounts distributed or *permanently set aside* for charitable, etc., purposes).

35. For discussion of some other possibilities, *see* Stone, *supra* note 14.

by the blanket exemption allowed by current law, how would a court apply the no-exemption demand of the *Walz* complainant? Unless the no-exemption theory is to become a dead letter, courts would have to undertake the formidable task of comparing every step in the computation of a church's income tax with the comparable steps in computing the tax of quite dissimilar taxpayers, lest churches be the beneficiaries of "back-door exemptions" masquerading as accounting principles, deductions, and so on.

The difficulty of applying a no-exemption policy increases when we recognize that neither the federal government nor any state relies on a single tax. Thus, though it is customary to speak of "the" federal income tax, Subtitle A of the Internal Revenue Code refers to "Income Taxes," and it in fact imposes taxes at different rates, using divergent definitions of income, on many different constituencies. To mention only three of the most prominent groups:

1. Natural persons are taxed at rates ranging from 14% to 70%, with a minimum exemption of at least \$900.
2. Trusts are taxed at the same rates as natural persons, but the exemption is either \$100 or \$300. They are allowed to deduct any amount distributed to beneficiaries, so that the taxable base is, in general, undistributed income.
3. Corporations are taxed at 22% on the first \$25,000 of taxable income, and at 48% thereafter. "Taxable income," however, is defined very differently for corporations than for natural persons and trusts.

If the exemption of religious organizations from federal income taxation is to be nullified as an unconstitutional establishment of religion, are churches to be classified as natural persons, trusts, or corporations? If they are taxed as trusts, they will continue to be "exempted" from the income taxes imposed on natural persons and corporations; similarly, to tax them as corporations is to "exempt" them from the taxes on natural persons and trusts; and so on. Does this mean that churches are benefiting from *three* exemptions under existing law, and that the establishment clause requires that all three be nullified? If so, are they also currently enjoying unconstitutional exemptions from the taxes on the income of insurance companies, banks, cooperative societies, personal holding companies, and non-resident aliens—all of which groups are subject to separate taxing systems under existing law—and must all of *these* exemptions be nullified?

The answer, perhaps, will be that churches should pay only one

income tax—the one that is most appropriate to their status. But which is the one? Should form be controlling, so that a church would be taxed as a corporation if it is organized in corporate form, and as a trust if that is its legal form? If so, could religious corporations properly enjoy an “exemption” if Congress chose to repeal the corporate income tax and to tax only natural persons? If the church’s bishop holds its property as a “corporation sole,” would the “proper” classification be corporation or, if this common law concept is not recognized by the Internal Revenue Code, natural person?³⁶ If form is not to be controlling, what principle should govern in assigning churches to their “proper” place in the federal income tax system?

It is common to exempt some categories of persons, property, and events from one tax in recognition of their subjection to some other tax. Public utility companies, for example, are sometimes exempted from local property taxation because they are subject to a state-wide tax on their property or income; conversely, those companies that pay the local property tax are exempt from the state tax on utility companies. Low income taxpayers may be exempt from a state income tax because they pay a substantial percentage of their income for commodities that are subject to sales tax. Businesses may be exempt from the sales tax on some types of property because they pay a franchise tax.

Whether such a pattern of reciprocal exemptions is praised as a delicately articulated web or damned as a crazyquilt, it is bound to make trouble for a court that attempts, under the establishment clause, to nullify a religious organization’s exemptions. If nonprofit organizations are exempt from the state income tax, for example, but pay sales taxes on their purchases, must the income tax exemption for churches be nullified even though the state legislature may have thought it was a fair exchange for being subjected to the sales tax? If so, it will soon fall out that churches are singled out from all other taxpayers (unfairly, and possibly in violation of the free exercise clause) as the only group that cannot participate in this universal process of reciprocal exemptions.

Can a court avoid this horn of the dilemma by picking and choosing among a church’s exemptions, nullifying those that give it a “preference,” and validating those that serve only to counterbalance the

36. See LARSON, *supra* note 7, at 57-58, seeming to imply that assets held by Catholic bishops as corporations sole ought to be treated as their personal property for tax purposes.

church's economic burden under other taxing provisions? This endeavor would require the court either to probe the intent or motive of the legislature in creating or preserving the exemption in question, or to establish standards by which the nature of the exemption ("preference" or "fair trade-off") is to be ascertained.³⁷ Before the courts are asked to embark on either voyage, the critics of religious exemptions ought to chart the route. In my opinion, you can't get there from here, at least not with the navigational instruments that judges now use.

A final point, closely related to the "fair share" version of the anti-exemption case to which I am about to turn: it is often asserted that a tax "exemption" is the equivalent of a "subsidy" to the exempted persons.³⁸ Superficially appealing, this proposition suffers from the same difficulty in defining "exemption" that has been discussed above. If there is any residual doubt about it, one can test the strength of the exemption-as-subsidy point by asking which of the following receive a subsidy, and in what amount, by reason of the fact that they are "exempted" from federal income taxation:

1. The British Ambassador to the United States.
2. Mao Tse-Tung.
3. A Mississippi sharecropper whose family income (\$2000) is below the exemption level.
4. The inmate of a home for the aged, who is supported by a charitable organization.
5. A rich Texas oilman whose taxable income, after deductions for percentage depletion and charitable contributions, is \$500.
6. A person whose income of \$10,000 consists entirely of tax-exempt interest on state and municipal bonds.

In exempting the British Ambassador and Chairman Mao from United States taxation, we may be "subsidizing" them (under pressure, to be sure, from diplomatic usage or international law), but I do not detect even an incipient call for a re-examination or cost-effectiveness

37. Another possibility would be to nullify exemptions in the order in which the volunteer plaintiffs get to the court house with their lawsuits, until enough have been eliminated to insure that churches will pay their "fair share."

38. See, e.g., PFEFFER, *supra* note 7, at 212, to the effect that "practically everyone" recognizes that "exemption is the substantial equivalent of direct subsidy." *Accord*, Snyder v. Town of Newton, 147 Conn. 374, 386, 161 A.2d 770, 776 (1960):

Exemption from taxation is the equivalent of an appropriation of public funds, because the burden of the tax is lifted from the back of the potential taxpayer who is exempted and shifted to the backs of others.

For other ramifications of this theory, see Bittker, *Accounting for Federal "Tax Subsidies" in the Nation's Budget*, 22 NAT'L TAX J. 244 (1969).

study of these "expenditures." As to the Mississippi sharecropper and the aged indigent, perhaps their exemptions also operate as subsidies; but few would recommend that the war on poverty could be fought on the premise that taxing the rich is the same as subsidizing the poor, and this suggests that the exemption-as-subsidy theory requires close attention lest it get out of hand. Its limits emerge from obscurity when we focus on the Texas oilman and the investor in state and municipal bonds (cases 5 and 6), the types of taxpayers who are usually cited to establish the equivalence of tax allowances and subsidies.

Even as to them, one can only say that if their deductions and exclusions were repealed without offsetting reductions in the tax rate or other changes, they would pay more taxes. In this sense, the failure to change the definition of taxable income benefits them to the extent of this hypothetical additional burden. (This modest insight would be even more pallid if qualified to acknowledge that the burden would be lessened if it could be avoided or shifted to others by a change in the taxpayer's business or investment practices.) In short, the assertion that an exemption is equivalent to a subsidy is untrue, meaningless, or circular, depending on context, unless we can agree on a "correct" or "ideal" or "normal" taxing structure as a benchmark from which to measure departures.

Churches, then, like any other potential targets of taxation, are better off if the legislature chooses to tax other groups, or to tax activities or events in which they engage rarely or not at all. To turn this fact of life into a violation of the establishment clause, however, one must either confer constitutional status on a boundary for the tax under examination (encountering in the process the obstacles discussed above), or show that the "exemption" relieves its beneficiary of its obligation to bear its fair share—again a term implying a constitutional standard to test the validity of what is ordinarily a compromise among conflicting social, economic, and political ideas and pressures—of the burdens of government.

II. The Church's "Fair Share" of Government Expenses

I should like now to turn to the claim that exemptions enable churches to pay less than their fair share of government expenditures and thus serve to "establish" religion in violation of the first and fourteenth amendments.³⁹ There are so many difficulties in this at-

39. I am assuming, of course, that the demand that churches pay their "fair share" is

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tempt to extract a rule of constitutional law from a concept of fairness in the distribution of public obligations that I scarcely know where to start.

Perhaps I should begin by pointing out that the "fair share" point has no necessary relationship to tax exemptions. A church might be exempt from a dozen taxes, but nevertheless pay its "fair share" of governmental expenditures (however this fraction or amount may be computed) because it is subject to a thirteenth tax; indeed, the burden imposed by this one tax might exceed the church's fair share, despite its twelve exemptions.⁴⁰

Conversely, a church may be subject to all existing taxes, with no exemptions, but still pay less than its "fair share" because the rates on those taxable activities in which it indulges most frequently are too low to produce the "proper" amount of revenue. Thus, a community might finance itself with a single tax, *e.g.*, on sales, gifts and bequests, or automobiles. Even though churches would pay taxes on purchasing goods, receiving donations, or operating automobiles, the amount paid would not necessarily correspond to their fair share of governmental expenditures. Nor is there any assurance that a mixed grill of levies will in combination impose the "right" burden on churches. If the taxing system consists of a capitation tax on natural persons, a license tax on cigarette-smokers, and a tax on income from the extraction and sale of natural resources, for example, churches would pay neither of the first two, and only those churches engaging in the extraction of natural resources would pay the third. Would churches in such a community bear their "fair share" of the fiscal burden? Another instance: the community finances itself with an income tax graduated from 5% to 75% for natural persons, coupled with an income tax of 10% on corporations, trusts, and other entities. Would churches, by paying the corporate income tax, bear their fair share?

not automatically satisfied by the absence of exemptions; otherwise, the "fair share" point is a mere repetition of the "no-exemption" argument.

40. The "fair share" concept would evidently call for judicial correction of a tax system that taxed churches too heavily, lest the free exercise clause be violated—a possibility that has been unaccountably overlooked by "fair share" enthusiasts. Dissenting in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (the predecessor of *Follett v. Town of McCormick*, *supra* note 30), Mr. Justice Frankfurter implied a willingness to consider whether "the state [by taxing a seller of religious tracts] has demanded unjustifiably more than the value of what it gave," but he suggested no standards for this calculation. The decisions in *Murdock* and *Follett* did not rest on the "fair share" idea, but on a distinction between a "license tax" and "taxes on income and property." *But see Cox v. New Hampshire*, 312 U.S. 569 (1941), implying that a "license fee" (identical with a "license tax"?) imposed on the exercise of a constitutional right (parades) may not exceed the expense of maintaining public order at the event in question.

In short, to focus on exemptions is to disregard the fact that the *tax base* (income, wealth, real property, sale of goods, purchase of luxuries, manufacture of products, etc., etc.) and the *tax rate* directly affect the tax burden, even though no exemptions are granted. The fiscal burden is very differently distributed with a 5% sales tax and a 50% income tax than if the rates were reversed. This means that neither the existence of exemptions nor their absence establishes that a church is paying too little, too much, or the right amount. If the establishment clause requires that churches pay their "fair share" of governmental expenditures, the nullification of exemptions is not a promising method of reaching this objective.

A second point to be noted at the outset is that the persons who by statute are denominated "taxpayers" and are required to make remittances to the tax collector do not necessarily bear the ultimate burden of the tax in whole or even in part. This separation between formal payment and economic burden is familiar to every purchaser of cigarettes, liquor, gasoline, and automobiles, who knows that the price he pays reflects a hierarchy of state, local, and federal taxes imposed in form on manufacturers and distributors. Though the economic impact of taxes is obscure, shifting clearly occurs: the prices of goods and services are affected by the cost of business operations; resultant changes in consumer demand influence business decisions to expand or reduce the level of operations, to favor machinery over labor, and to enter or depart from a line of commerce; these decisions in turn will affect prices at a later time; and so on.

Thus, it is no sophism to say that taxes may affect non-taxpayers more than taxpayers, or that non-taxpayers may pay more for governmental services than taxpayers.⁴¹ Moreover—and this is especially important in assessing a proposal to impose a constitutional touchstone of "fairness" on our fiscal structure⁴²—economists do not agree

41. See generally Bittker, *The Case of the Fictitious Taxpayer: The Federal Taxpayer's Suit Twenty Years After Flast v. Cohen*, 36 UNIV. OF CHI. L. REV. 364 (1969).

42. Although the issue under discussion is whether the establishment clause embodies a requirement of "fiscal fairness," a similar contention might be based on the due process clause of the fourteenth amendment. Such an effort to extend the "fair share" argument to all members of the body politic would have drastic ramifications; it would first, however, have to come to terms with the difficulties in ascertaining whether one is paying more, or less, than his "fair share" that are described hereafter in the text. An interesting excursion into this area is article I, § 2 of the Rhode Island Constitution, which provides that:

All free governments are instituted for the protection, safety and happiness of the people. All laws, therefore, should be made for the good of the whole; and the burdens of the state ought to be fairly distributed among its citizens.

When tax exemptions have been attacked as violating this section, the Rhode Island courts

on the mechanism or extent of tax-shifting. In this primitive state of the art, a legislative body ought to be excused if it makes the prudential judgment that churches, despite nominal exemptions, are in reality burdened by taxes imposed on others and that they, in company with other nonprofit organizations, are poorly equipped to shift the burden of taxes laid directly on their activities. To overrule such a legislative decision in the name of the establishment clause requires either a woefully simplistic view of life, or an economic model more sophisticated than the profession has yet devised.

A third threshold issue, equally ignored in the anti-exemption literature, is the selection of the governmental unit whose expenditures are relevant in deciding whether churches are paying their "fair share." If the churches' nationwide tax burden (either in the form of direct payments or, if tax-shifting is to be taken into account, in the form of economic burden) is a reasonable fraction of aggregate national expenditures, is the establishment clause satisfied? Or must they pay their "fair share" at each level of government—federal, state, county, municipal, school district, irrigation area, etc.—with no allowance for an "overpayment" at another level? Militating in favor of a nationwide perspective is the increasing importance of federal grants to state and local governments. Even if fiscal segregation is to be the order of the day, however, much can be said for at least treating each state with all of its political subdivisions as a single entity, not only because of the complexity of intra-state fiscal relationships, but also because the fourteenth amendment is addressed to "states" as such. This would require a revision of the no-exemption theory, since the constitutionality of any one exemption would then depend on the fairness of the state's entire fiscal structure. The *Walz* attack on the exclusion of church property from New York property taxes, for example, would be incomplete unless coupled with a showing that the burden imposed on New York's churches by other state and local taxes does not counterbalance their property tax immunity.

Another uncertainty in the anti-exemption case is whether it is the

have responded that it sets out "principles of legislation rather than rules of constitutional law—addressed rather to the [legislature] by way of advice and direction, than to the courts, by way of enforcing restraint on the law-making power." *In re Dorrance-Street*, 4 R.I. 230, 247 (1856), quoted in *General Finance Corp. v. Archetto*, 93 R.I. 392, 396, 176 A.2d 73, 75 (1961) (upholding exemptions for religious groups and for professors at Brown University).

This experience suggests that the "fair share" argument is best addressed to legislators, who can compromise competing claims with the expectation that their decisions will be accepted by a public that has participated in their selection.

appropriate governmental unit's *expenditures* or its *tax revenues* that should determine the "fair share" allocable to churches. The distinction between these alternative measures of fiscal responsibility can be readily seen if we assume a community that has discovered oil on the village green or has received a bequest from a public-spirited citizen. If the community finances all governmental expenditures from these windfalls, imposing no taxes on anyone, would the resulting free ride for churches violate the establishment clause? The fiscal immunity of the community's churches would impose no direct burden on private citizens; but if the churches contributed to the cost of government, community services could be improved or a municipal "dividend" could be paid in cash to the citizenry. Although few if any communities finance themselves without taxes, there is often a substantial gap between expenditures and tax revenues; and it is not clear which of these amounts is thought to be crucial in ascertaining whether churches are bearing their "fair share."

On moving from these critical but preliminary issues to the core of the claim that tax exemptions for religious institutions relieve them of their proper fiscal burden, we find a similar failure to scratch beneath the surface. The "fair share" version of the anti-exemption case usually starts, and ends, with the assertion that churches should pay for police and fire protection and other "essential" services; the focus is on municipal services fostering the physical integrity or comfortable occupancy of religious buildings. If fairness in the distribution of the economic burden of government is to become a constitutional imperative,⁴³ however, one must confront the possibility that churches also have an interest in, and benefit from, governmental expenditures for education, public health, housing, and social welfare at the federal and state levels. And if the utterances of clergymen in and out of the pulpit can be taken as evidence of religion's proper sphere of influence, perhaps we should also estimate the benefits derived by churches from federal expenditures for foreign aid, veterans' benefits, national defense, and war.

Even after the relevant governmental programs have been identified, measurement of the benefits received by specific persons or categories of persons requires a host of debatable allocations. Even so basic an expense as fire protection can be plausibly allocated by any of a variety of conflicting standards, *e.g.*, the assessed value of buildings (with or

43. See note 42 *supra*.

without allowance for their physical structure, use, location and popularity as targets), the number of occupants who would be threatened by fire, the income or wealth of owners and occupiers of real property or of all citizens of the community, etc. When we turn to education, welfare, agricultural price supports, the exploration of outer space, foreign aid, veterans' benefits, and military expenditures, the allocation of benefits is still more dependent on assumptions about the nature of society, and it becomes increasingly difficult to keep the ostensibly factual question "Who benefits?" separate from the ethical question, "Who should pay?"

An examination of pioneering efforts to allocate the cost of government expenditures to all interested parties on a national scale is instructive; the competing assumptions used in these allocations are ingenious and plausible, but not compelling. Thus, highway expenses have been allocated by various scholars proportionately to personal income, automobile expenditures, general consumption, and real estate ownership; police, fire, and sanitation expenditures have been allocated per capita, as well as proportionately to real property holdings, income, residential property taxes, and consumption expenditures; health and hospital expenditures have been allocated per capita, exclusively to low income persons, and proportionately to income and hospital occupancy; and so on.⁴⁴ Useful though they may be as starting points for debating the fairness of public policies, it would be arbitrary to select one set of these competing criteria for constitutional enthrone-ment, even for the limited purpose of applying the establishment clause. Moreover, these studies have customarily allocated all governmental expenditures to natural persons, treating legal entities as mere intermediaries. Thus, there is no body of speculative thought, let alone professional agreement, on ways of measuring the benefits conferred on corporations, trusts, or other groups by governmental expenditures.

I wish to add one final point to this catalogue of defects in the anti-exemption case. By asking that churches pay for the benefits received by them, opponents of religious exemptions accept a theory of fiscal obligation that has an antiquated ring in an age when "ability to pay" has come to overshadow the "benefit theory" of public finance.⁴⁵ Although it is not without its own riddles, the criterion of "ability to pay" ordinarily takes little account of the benefits received by the

44. The major studies are analyzed in TAX FOUNDATION, *TAX BURDENS AND BENEFITS OF GOVERNMENT EXPENDITURES BY INCOME CLASS, 1961 AND 1965*, Table E-1 (1967).

45. See B. MUSGRAVE, *THE THEORY OF PUBLIC FINANCE* 61-115 (1959).

taxpayer, either because their measurement depends too heavily on fiat, or because they are irrelevant to the very concept of "ability" (except to the extent that benefits received may increase one's ability). On "ability to pay" grounds, Scrooge may be a better target for the school tax than the old woman who lives in a shoe; it is wealth or income, rather than enjoyment of governmental programs, that is controlling.

If "ability to pay" is the standard of fiscal fairness, the establishment clause would be violated if churches paid less than their "ability" warranted, regardless of the value of the benefits received by them. Given this content, the constitutional imperative would not be easier to apply than the standard of "payment for benefits received," but it would lead to a different result. As a guiding principle, "ability to pay" would also conjure up the prospect that the churches—if sufficiently rich—would be contributing more to the support of the state than their benefits were worth. Conversely, churches might turn out, individually or collectively, to be so poor that a tax burden based on their ability to pay would cover less than the value of their benefits.

One might try to amalgamate the two theories of public finance, requiring churches to pay in proportion to the benefits received by them, while asking other institutions and persons to pay according to their "ability." But a fiscal system that has been devised on the latter principle is not readily merged with a partial entronement of benefits received. In any event, as suggested above, the foes of religious exemptions have not indicated whether they regard "benefits received" as the only constitutionally permissible principle for the allocation of the fiscal burden.

Use of "ability to pay" as the controlling criterion would raise still another problem: whether the economic status of the beneficiaries of the church's income and property should control, rather than the wealth or income of the church as an independent entity. If religious wealth is regarded as owned beneficially by its potential recipients, a group that may include the wretched of the earth, the ability to pay criterion would suggest a modest rate of taxation for the organization, if not complete immunity.⁴⁶ A different conclusion about the proper rate of tax might be reached if the relevant "ability to pay" depends upon the economic status of the organization's contributors, members, or directors. If the establishment clause can guide us to the right conclusion, however, there must be more in it than meets my eye.

46. See p. 1290 *supra*.