CHAPTER TEN

FISCAL REGULATION

Changes in the American constitutional system are as clearly registered in the relationship of church and state as in any other area. Conflicts arising out of the changing legal status and moral condition of the church within the larger community are especially evident with respect to three issues: property, education, and church autonomy. A Fundamentalist attorney, David Gibbs, has summarized the issues as follows: who owns the church, who owns the children, and who owns the land?¹ The very starkness of these questions directs attention immediately to the basic perceptions about jurisdiction that help shape the public agenda of the nation. Regardless of the cordiality or animosity that may color personal relations between church and state officials, the terms of discourse are set by underlying religious and political beliefs about authority.

The first question--who owns the church?--goes directly to the heart of the age-old conflict. On the surface, it is simply a question of title: who owns the buildings, the pews, the endowments, or the real estate? But more importantly, it is a constitutional question about sovereignty that has serious legal and practical implications for the church. Changes in fiscal policies may do more to redefine the status and role of the church in American society than all the regulatory innovations in other policy areas combined. Much of the current
controversy centers on the stipulations attached to some church tax exemptions.

Taxation, in fact, has a long history of regulatory uses. For example, some taxes are regarded as a means of promoting public health, safety, welfare, morals, or peace. High taxes on products considered to be socially useless or harmful indulgences, such as tobacco and liquor, are often justified as disincentives designed to suppress their demand. In this respect, regulatory taxes have taken the place of the sumptuary laws of earlier generations. But far from remedying perceived moral or social problems, their double function may be self-defeating. Such taxes give the state an economic interest in the products it regulates and, at the same time, shift the tax burden to those who can least afford it. To the extent they succeed as revenue measures, they may fail as regulatory devices.

Subsidies also provide an effective "conduit for regulation." For example, the strings attached to federal grants-in-aid are used to promote national policy by encouraging state and local governments to adopt a variety of new laws, procedures, programs, and other innovations. Similarly, if tax exemptions are defined as privileges rather than immunities, they are equally susceptible to such regulatory uses.

The Supreme Court has acknowledged that there are inherent dangers in the power to tax. In affirming the principle of intergovernmental tax immunity, Chief Justice John Marshall commented in McCulloch v. Maryland, 4 Wheat. 316, 431 (1819) that "the power to tax involves the power to destroy." If the power to create involves the power to
preserve, the agencies of a sovereign government may not lawfully be
taxed by another.

The behavior of churches, like that of individuals, may be
effectively and predictably governed by manipulating their purse strings
through taxes and subsidies. But there is historical evidence to
suggest that the principle of tax immunity originally applied to
American churches, as well. Even though there was no statute expressly
providing for the exemption of church property in the District of
Columbia until 1871, church property was never assessed for taxes.6
Church property enjoyed similar immunity from state taxes. In recent
years, the Supreme Court has held in Walz v. Tax Commission, 397 U.S.
664, 677 (1970), that tax exemptions are a legitimate way to prevent an
"excessive entanglement" between church and state.

What complicates the picture today is the use of taxation as a
means of regulating social, political, and economic behavior. Tax
exemptions are widely regarded as subsidies rather than immunities.
Indeed, the Supreme Court has recently adopted this view in Regan v.
Taxation With Representation, 103 S.Ct. 1997, 2000 (1983), although its
ramifications are only beginning to be spelled out. Income taxation has
grown into a sophisticated actuarial science by which a wide range of
policy goals may be pursued through various "tax incentives."

In this connection, and perhaps due to the perennial quest for new
sources of revenue, the tax exemptions enjoyed by religious groups have
been narrowed by complex and abstruse ecclesiastical distinctions
prescribed by administrative agencies and further complicated by endless
debate and litigation. But the basic problem is the old one of
reconciling a variety of religious traditions and the legal requirements of a state that lacks an official church. According to Charles Whelan, the "civil law structure of American churches rarely corresponds closely with their internal ecclesiastical organization. . . . In order to establish an identity in American civil law, most of these ecclesiastical entities have created one or more civil law corporations or trusts." For example, there is no civil law counterpart to the ecclesiastical unity of hierarchical churches, like the Roman Catholic Church, or even that of congregational churches which maintain separately incorporated ministries. But apart from these difficulties, the very act of classifying religious bodies for tax purposes has created some serious anomalies that have extended into other legal areas, such as land use, the licensure of particular ministries, and corporate rights.

Both income and property taxation create a potentially entangling relationship between church and state when tax exemption is treated as a privilege rather than as an immunity. In recent years a multitude of stipulations--such as filing requirements for some religious organizations and restrictions on lobbying and political activities--have been attached to exemptions that may be every bit as inhibitory in effect as the strings attached to outright grants. Since tax agencies today exercise legislative as well as executive power in the area of administrative law, their formidable regulatory reach can easily short-circuit the sort of restraints on official power that sustain a republican form of government. First Amendment privileges and immunities are consequently at stake. Peter Berger and Richard Neuhaus
see a threat to church independence:

The danger today is not that churches or any one church will take over the state. The much more real danger is that the state will take over the functions of the church, except for the most narrowly construed definition of religion limited to worship and religious instruction.

Background

The concept of "a free church in a free state" has long been translated in America to mean that religion is essentially private and voluntary. As a reaction against the inequities that plagued the earlier religious establishments, this attitude is understandable. But it has also made interpretation of the historical record more difficult and has left the boundaries between church and state in dispute. The dichotomization of religion into belief and practice is a logical extension of the American voluntary church tradition. Glenn T. Miller has remarked:

The philosophy on which the Republic was based interpreted religion primarily in terms of conscience. Whatever value such an identification may have had in theory, it ignores the fact that religion throughout its history has been more than conscience. Religious faith almost always involves some participation in a religious community that supports and sustains that faith.

The comparative neglect of this side of religious life in American political thought after the War for Independence is important to an understanding of the peculiar status of the church in American law. As Miller has noted, the legal system reflected and reinforced the dominant congregationalism that influenced even the hierarchical traditions by the time. This influence may be seen in the incorporation laws that were gradually adopted as a means of legitimizing church property and which further contributed to the dichotomization:
The local churches simply added the trustees to their list of officers and restricted their powers to secular matters. The religious questions before the congregation remained in the hands of the appropriate body, whether the deacons, the elders, or the vestry. In the main, this arrangement worked well.  

Miller also noted a tendency for the laws to favor doctrinal modernization. Courts have tended to shy away from doctrinal questions in the event of a church split and a dispute over disposition of the property except where an express trust is involved. Before the decision in Watson v. Jones, 13 Wall. 679 (1871), in which the Court deferred to the decision of the highest authority in the church polity, the courts had generally favored the majority faction of the congregation. This still held true where the church was congregational in form. In Bouldin v. Alexander, 15 Wall. 131 (1872), a church property case involving two factions of a Baptist church, the Court held: "In a congregational church, the majority, if they adhere to the organization and to the doctrines, represent the church" (15 Wall. 131, 140). More recently, the Court's decision in Jones v. Wolf, 443 U.S. 595 (1979), has demonstrated a new willingness to recognize the majority of a local church, just as long as control is not clearly vested in a hierarchy and only purely secular evidence is considered. The concept of an implied trust cannot be extended to include questions of faithfulness to doctrine.  

Carl Zollmann, the foremost early interpreter of church property law, treated the privatization of religion as a positive development. He accepted the maxim that "Christianity is part of the law of the land" but did not acknowledge the dependence of American political and legal institutions on Christianity. Zollmann maintained that since religious
belief is "entirely relegated to the domain of the individual conscience" it is legally irrelevant, so that when, for example, "the guardianship of children comes in question the question of the religion of the proposed guardian will not be considered." 12

The private status of religion in American law is also quite evident in laws affecting the incorporation of churches. But the nature of corporations has changed considerably since the time of Constantine. After the Roman Catholic Church was allowed to accept legacies in the time of Constantine, according to Paul Kauper and Stephen Ellis, it "recognized the usefulness of corporate status and soon adopted the idea into the canon law." Voluntary associations with the power to hold land could be formed without prior consent or approval by the state. But the situation changed under English common law when powerful monarchs asserted that "organizations exercising collegiate or corporate powers could exist only with the prior approval of the monarch."

The requirement of prior approval by the state stressed the supremacy of the state over the church, a notion that was at variance with the church's view of itself and with traditional medieval notions of church-state relations. The Catholic Church saw itself as a moral person, founded in divine law, with the power to administer its own property independently of any sovereign. However, the Reformation, at least in England, destroyed any notion that the church existed as a separate spiritual entity immune from rule by the civil authorities. The use of the corporate form was limited to organizations upon which the privilege had been expressly bestowed. The church could no longer reside in England as a recognized entity with the power to take and hold property. It was now reduced to the level of any other voluntary, unincorporated association, dependent upon the state's grant of power. 13

The earliest religious corporations during the colonial period were public municipal corporations. 14 As such, these church establishments were instruments of the state and often exercised police and taxation
powers. Some dissenting churches were eventually granted similar charters and became recipients of state revenue. Finally, even church societies that were unable to obtain corporate charters won recognition as private corporations:

Under such circumstances the common law doctrine of prescription was applied. A presumption was raised, from the long exercise of corporate powers, that a charter had been granted but had been lost. Under the theory of this fictitious lost charter the society was recognized as capable of making contracts and taking devices. But changing legal circumstances made prescription too unreliable, so that—usually following a challenge in court—the state legislatures were compelled to formalize the legal privileges and immunities of churches. General incorporation acts and constitutional or statutory tax exemptions were the common responses by the middle of the nineteenth century. Religious corporations typically took one of three forms: the trustee corporation, the membership corporation, and the corporation sole. The latter was favored by the Roman Catholic Church.

In regard to the tax exemption of churches, the record of colonial and early state practice still awaits a thorough study but a few conclusions are generally accepted. It has been the common practice of the states to exempt churches from a variety of taxes since earliest times. But opinions were not uniformly favorable even at the beginning. D. B. Robertson notes that James Madison was critical of a proposed exemption for churches in Kentucky and later, as President, vetoed bills to incorporate the Protestant Episcopal Church in Alexandria and reserve a parcel of land in the Mississippi Territory for a Baptist church: If Madison's opposition to the incorporation of churches appears to be extreme in terms of its possible establishment of a church, it must be understood in the context of interpretations of
incorporation in his time. First, corporate power in the colonial period was rarely given even to business institutions. Then, a corporation was the state's creature, and into it the state "breathed fictitious life." Note that a part of Madison's Veto Message dealt with the danger of the state's entry into the inner life of the church. Third, in the colonial establishments, the state church, with its corporate status, had special privileges denied to other religious societies. Fourth, corporate powers in the colonial period had often included the power to tax; one has to remember the explosive import of taxation in the pre-Revolutionary colonies. Finally, it was a cause for suspicion that churches with the capacity to hold property in their own right could, as an "endowed church," become too powerful. These factors must be taken into account in association with another point. We deliberately avoided the creation in this country of ecclesiastical corporations such as existed in England. Many states included constitutional provisions that all organizations, when incorporated, be incorporated under a general law covering all groups alike. 18

This "danger of the state's entry into the inner life of the church" should not be minimized. Under common law, a corporation is a creature of the state, a secular entity. In the words of Carl Zollmann, "it is not a spiritual entity with spiritual powers to preach the gospel and administer the sacraments, but a humble secular handmaid whose functions are confined to the creation and enforcement of contracts and the acquisition, management and disposition of property." 19 This is only too easily forgotten. The incorporation of a religious society places the title to church property into the hands of the trustees and subjects the corporate body to all the obligations of a secular association, including taxation in the form of a filing fee. The intricate web of finance and regulation now entangling the church gives substance to Madison's doubts.

If these early experiments in religious liberty showed signs of uncertainty and ambivalence, this may be readily explained by the freshness of the sectarian animosities that had been generated by and eventually brought down the religious establishments. Even so, churches
continued to be well protected under common law and were regarded as centers of community life. In the Terrett decision and similar cases which followed, such as Society for the Propagation of the Gospel v. New Haven, 8 Wheat. 464 (1823), and Mason v. Muncaster, 9 Wheat. 445 (1824), the Supreme Court upheld the property succession rights of formerly established churches.

Private property in general was constitutionally protected against unwarranted searches and seizures, thus enjoying a sanctity once reserved to recognized churches. Public taxation and expenditure were expected to spread the costs and benefits of public services equitably and not be used for private gain. Police powers—including the regulation of property with respect to fire prevention, public highways, sanitation, and zoning—were held to be delegated by the local citizenry to their town and county officers, reflecting a tradition of local self-government that reached back to feudal times. Yet churches were not only exempted from taxes but were also recipients of a variety of social benefits without being subjected to obtrusive social regulation. Although their immunities may have been largely customary, it is unlikely that the early legislatures ever foresaw a day when police regulations might be used to exclude churches from some neighborhoods in advance, be kept from improving their facilities by restrictive zoning laws, or even be forbidden to hold prayer meetings in private homes without a permit. This growing emphasis on external regulation—as opposed to internalized moral control—supports the thesis that American society has been in the midst of a transition between an inner-directed culture to an other-directed one. But this change is by no means
completely assured.

Early American law made a distinction between the church itself and the religious society that held church property in trust. Zollmann explored the legal implications of this distinction:

An unincorporated church, so-called, if it has any interest in property at all, presents a two-fold aspect. It has a body, that society, with which courts can deal, and a soul, the church, with which courts cannot deal. . . . The church is subject to spiritual censure, the society is subject to the temporal powers that be. The object of the church is the preaching of the gospel, the object of the society is the management of property.

He thus removed the problem of temporal control over the church by defining away its possibility. But this makes the church virtually nonexistent as far as the law is concerned. Such a definition is susceptible to the charge—often lodged against excessive piety—that "it is so heavenly minded it is no earthly good." Zollmann apparently failed to recognize the importance of upholding tax exemptions as an immunity from interference with religious free exercise rather than simply as an admirable custom:

This exemption is not so easily justified on principle as it is supported by authority. It is in fact easier to admire the motive which prompted it than to justify it by any sound reasoning. While charity and education may be said to be established in the policy of the state, an establishment of religion is expressly prohibited both in the federal constitution and in most if not all the state constitutions. The strictly religious features of church societies can therefore furnish no valid reason for this exemption. The only rational ground remaining on which it can be justified is the benefit accruing to the state through the influence exerted by various churches on their members.

The view of Carl Zollmann that church tax exemptions were awarded as a mere afterthought, and that they are justifiable only on the basis of some presumed public benefit, has been an influential one. Lee Pfeffer articulated it from a separationist rationale:
Objective consideration of the opinions in the Everson and McCollum cases leads to the conclusion that tax exemption for churches violates the First Amendment as interpreted by these decisions. ... Under these decisions, government aid to religion, even if not preferential or discriminatory, is barred by the Constitution, and few would deny that exemption of church property constitutes government aid.\textsuperscript{26}

Robert Drinan similarly reiterated this position from an accommodationist perspective:

No entirely satisfactory rationale for tax exemption has ever been stated in any American judicial decision. It may be that the only possible ultimate justification is a public policy consciously encouraging religion as a valuable aid to good citizenship. Courts and commentators quite understandably are reluctant to reach such ultimates and, if they must give a plausible reason for tax immunity for religious bodies, tend to urge one of the three following justifications:

1. Tax exemption for churches and related institutions has always existed in American law; in fact, it can be traced back to Constantine or even to the Talmud, according to which rabbis were given certain tax exemptions.
2. Churches by means of the educational programs which they sponsor participate in the work of the state and thereby relieve it of some of its burdens.
3. No Court decision in American jurisprudence has ever ruled that tax exemption to religious groups is a discrimination against nonbelievers.\textsuperscript{27}

There is no historical evidence to conclude that the tax immunity of churches was regarded as a subsidy. Any exemption, credit, or deduction could be viewed in the same manner. While the benefits of tax immunity are quite evident, the public and governmental nature of the church should not be overlooked. This lies at the heart of the matter. Zollmann argued that churches were originally exempted because they were public agencies and were the public property.\textsuperscript{28} This is true only in a very qualified sense because they were neither the property of the parish nor the property of the state. Prior to the Dedham case, only covenanted church members participated in determining church policy in
While the character of churches as taxing authorities helps account for their traditional exemption, a different explanation must account for the continuation of the exemption after disestablishment. But, in fact, the practice of exempting churches was not so unconscious as the belated statutory recognition of it might seem to indicate. The wording of a New York statute of 1801 suggests that churches, which had been disestablished in 1777, were still regarded as public rather than private entities. The statute provided:

That no houses or lands belonging to the United States or to the people of this state, nor any church or place of public worship, nor any personal property belonging to any minister or priest not exceeding in value of one thousand five hundred dollars, nor any college or incorporated academy, nor any schoolhouse, courthouse, goal [sic], alms house, or property belonging to any incorporated library, shall be taxed by any law of this state.

A similar understanding of the public nature of church ministries may be found in City of Hannibal v. Draper, 15 Mo. 634 (1852), which upheld tax immunity:

It is presumed that in the nineteenth century, in a Christian land, no argument is necessary to show that church purposes are public purposes. . . . To deny that church purposes are public purposes is to argue that the maintenance, support, and propagation of the Christian religion is not a matter of public concern. Our laws, although they recognize no particular religious establishment, are not insensible to the advantages of Christianity, and extend their protection to all in that faith and mode of worship they may choose to adopt.

If the tax exemption of churches is to be regarded as a relic of the era of state religion, it would appear to be an expensive and often inconvenient relic. But the church was not under the patronage of the sovereign, as in England, where it was one of the estates of the realm. The encouragement of religion was not equated with an establishment of
religion in the narrow sense of an established church. The kind of separation of church and state the founders sought would not have permitted this.

The exemption of churches from taxes only became a salient political issue long after independence, particularly during two periods of social and economic upheaval in the nineteenth century. The first period coincided with the era of Jacksonian Democracy, the Workingmen's Party in New York, and the early reform movement fostered by various benevolent societies. It was also a time of nativist agitation, anti-Masonic, and the denunciation of all forms of privilege. D. B. Robertson quoted one expression of this sentiment:

One obvious form of privilege to be destroyed as "the exemption from taxation of churches, church property, and the property of priests under fifteen hundred dollars, for it was nothing short of a direct and positive robbery of the people."

The second period coincided with the Civil War and Reconstruction, the sundering of three major denominations, and the controversy over a proposed Christian Amendment and, later, the Blaine Amendment. Churches divided over the Grant Administration's appeal for the establishment of a national public school system coupled with the taxation of church property. Since support tended to be mild and opposition was intense, the proposed amendment failed. Although lobbying against the tax immunity of churches flared from time to time afterwards, one commentator concluded by 1949 that "the tax-exemption battle of the churches seems to have been won by exhaustion."

Dean Kelley's characterization of this immunity as "a condition almost of 'extraterritoriality'" is a singularly appropriate one, both in light of historical courtesy and with reference to the vulnerability
of foreign enclaves and diplomatic missions. Like the rest of society, churches have been similarly affected by changing legal, economic, and political conditions at home and abroad.

But the traditional accommodation may be most threatened by a shift in the major policymaking arena from the legislatures to the courts and now to the administrative agencies: which is to say, from fairly visible to very invisible organs of civil government. Numerous pieces of social legislation--often worded in general terms--have spawned a variety of sometimes competing administrative programs and bureaus that seek to define, often as broadly as possible, the scope of their delegated authority. With reference to the role played by the Internal Revenue Service (IRS) in applying charitable benefit criteria in determining tax exemptions, Justice Powell argued in Bob Jones University v. United States, 103 S.Ct. 2017, 2039 (1983): "It is not appropriate to leave the IRS 'on the cutting edge of developing national policy'.... The contours of public policy should be determined by Congress, not by judges or the IRS." Indeed, compared with the incremental revision of traditional accommodations amidst the tangle of administrative law created by federal agencies, the limited lobbying and legal successes of Americans United for Separation of Church and State, New York's Committee for Public Education and Religious Liberty, the American Civil Liberties Union, and other separationist organizations seem fairly pallid.35 Ironically, Americans United lost its status as a tax-exempt educational organization in Alexander v. "Americans United" Inc., 416 U.S. 752 (1974), as a result of its own extensive lobbying on religious issues.
Income Taxation

Edwin R. A. Seligman, an early American proponent of progressive income taxation, maintained that the income tax per se evolved only gradually out of earlier faculty taxes: poll taxes, property taxes, and consumption taxes. By the 1840s, it had been introduced in a fairly mature form in Pennsylvania, Maryland, Virginia, and other states. Although the income tax was suggested as a source of federal revenue following the War of 1812, it was not adopted until 1862 by the Union and 1863 by the Confederacy as a war measure. The Socialist and Populist parties promoted the idea through their platforms but the income tax lapsed following the war. It was revived by Congress in 1894 but the Supreme Court ruled it unconstitutional a year later. Passage of the Sixteenth Amendment in 1913 enabled Congress to add income tax provisions to a tariff act later that year.

At first, the personal income tax was not a major source of federal revenue and served instead more as a supplement to tariffs and excises. Even in 1938, as Henry G. Simon noted, it contributed less than ten percent of all revenues. Today, personal income taxes represent nearly half of net federal receipts.

The utility of the income tax as a source of revenue is perhaps exceeded only by its potential as a means of information-gathering and regulation. Although exemptions were recognized from the beginning, a lobbying limitation on exempt organizations was added in 1934, followed twenty years later by provisions against influencing legislation or "intervening" in political campaigns. In the meantime, the Treasury Department itself introduced a regulation denying deductibility to
contributions to "associations formed to disseminate controversial or partisan propaganda." This helped establish a pattern of bureaucratic initiative, followed later by congressional authorization or judicial permission after the fact.

The Internal Revenue Service (IRS) has been given a series of congressional authorizations since 1939 to establish an elaborate monitoring system for tax-exempt organizations. Sharon Worthing has described the system as follows: "The system has five basic components: the information return, the notice requirements for entitlement to treatment as an exempt organization, the Exempt Organization Master File, various types of IRS audits, and IRS cooperation with state attorneys general." She believes that an inordinate amount of attention is directed at a "particular category of organizations which includes churches and their officers" and observes that while "there is a reasonable limit on information obtained for the purpose of collecting taxes . . . there is no limit on the information which may be sought when the motive is one of surveillance only." She believes that, due to "the ease with which tax laws can be used to control an organization's functions even without loss of exempt status," the requirement that some church-related organizations file information returns "can be seen as a first step whose ultimate end is full government surveillance of religious institutions."

Even though churches are included within the mandatory exceptions from the filing requirement, church-related ministries are less secure unless they are readily identifiable as "integrated auxiliaries." This term had been interpreted by IRS to mean church-affiliated organizations
whose "principal activity is exclusively religious." Despite the vagueness of the original congressional wording, IRS has determined "integrated auxiliaries" to include seminaries, youth groups, and adult fellowships, but to exclude hospitals, homes for the elderly, orphanages, and grade schools.\(^{44}\)

But apart from difficulties created by differing conceptions of what activities are properly called church ministries, even bona fide churches are having their exemptions challenged by IRS. Pastor Dale Dykema of the Church of Christian Liberty in Brookfield, Wisconsin, has been ordered by a federal circuit court to turn over fourteen categories of church records subpoenaed so that IRS could make a determination on its tax-exempt status. The church, which follows the Westminster Confession, has not been accused of violating the law or operating an unrelated business. To date, it has refused to comply with the order.\(^{45}\) This is not an isolated case. A Mennonite church has been denied tax exemption because it maintains a medical aid plan for its members. Other churches have been sent demands for church records.\(^{46}\)

The rationale for church tax exemptions is also a matter of dispute in the current literature. Two major theories of income tax exemption have been competing for support in recent years. The first of these, known as the tax expenditure theory, treats tax exemption as "an affirmative benefit extended by legislative grace to those organizations that benefit the public (and withdrawable at will from those the legislature deems no longer deserving of its favor)."\(^{47}\) From this viewpoint, exemptions are regarded as "revenues foregone by the government as though granted to the exempt entity in fulfillment of
When viewed in this light, church exemptions would fail the secular purpose and neutral effect portions of the tripartite test. As for the entanglement test, the tax expenditure theory might even tip the scales against exempting churches because from the viewpoint of political expediency, if for no other reason, it would be difficult to reject a strict accounting from the recipients. The Chief Justice indicated as much in the Lemon case. All such information would be necessarily a matter of public record, greatly increasing the risks of political and economic coercion—either by the state or by private groups—against churches.

Rules against political activity, lobbying, unrelated business income, and various types of religion-based discrimination may have a similar chilling effect. Churches are not more inclined than anyone else to bite the hand that feeds them. The monitoring of religious organizations by IRS even now tends to produce "the kind of continuing day-to-day relationship" which the Court tried to obviate in its Walz decision. Although Chief Justice Warren Burger rejected the "social welfare yardstick" as a rationale for church exemptions because of its quid pro quo implications, he weakened his overall case for exemptions by arguing that they necessarily involved some degree of entanglement.

The other current theory of tax exemption is known as the tax base theory. Its statement by Boris Bittker is considered definitive:

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.49

Bittker's argument from technical impracticality weakens his case.
Recent advances in communications technology suggest that the taxable
"universe" may be expanded or restructured indefinitely. The tax base
theory also fails to address the issue of whether it is within the
jurisdiction of the state to tax the church. Bittker appears to assume
that legislative bodies possess inherent power to seek revenue from any
available source. This might include churches.

The tax base theory treats churches in the same way as nonprofit
organizations in general. This can create difficulties if authorities
try to draw the logical conclusion that churches are also public trusts.
Establishment clause issues would be unavoidable. The defensibility of
tax exemptions for churches must rest on some other basis.
Separationists argue that such exemptions effectively give churches
favored status and, in addition, give public officials some leverage
over the conduct of church affairs. If exemptions are indeed treated as
subsidies, it is difficult to escape the conclusion reached by Justice
Jackson about the effects of such aid in his Everson dissent:

If the state may aid these religious schools, it may therefore
regulate them. Many groups have sought aid from tax funds only to
find that it carried political controls with it. Indeed this Court
has declared that 'It is hardly lack of due process for the
Government to regulate that which it subsidizes' (330 U.S. 1,
27-28).50

Given the state's technical ability to oversee and regulate church
activities, further constitutional precautions against such an
eventuality would need to be taken, particularly if the taxation of
churches were favored under a new interpretation of the establishment clause favored the taxation of churches. As a practical matter, the tax exemption of churches could be sustained under the tax expenditure theory only if churches as churches are regarded as immune from the jurisdiction of the state in this respect. But the issue is larger than a tax immunity. If the state were to assert jurisdiction over every activity that takes place within its territorial boundaries, it would effectively claim whatever authority the church possesses as its own. If the state were to limit its direct interest in certain activities, such as the exercise of religion, simply as a matter of expediency, then what seems inexpedient at one point may become expedient under different circumstances. Only by recognizing that the jurisdiction of the state is inherently limited and that churches are protected from interference can the inevitable involvement of the church with the state and the state with the church be addressed in a manner that respects the authority of the church as a self-governing entity.

Adequate constitutional protections already exist. But constitutional practice tends to follow suit when constitutional theory changes. Thus far, the operations of comparatively few churches have been called into question for failure to comply with rules established for tax-exempt organizations. In the absence of income tax filing requirements for churches, most churches have had little or no direct contact with IRS until recently.

But as a result of recent changes in the Social Security Act, which took effect on January 1, 1984, churches are now required to pay withholding taxes for nonministerial staff employees. It is widely
believed to be the first instance of a direct tax being imposed on churches. Ordained ministers are still able to apply for and receive self-employment exemptions.

Particular concern has been expressed that this precedent may have a snowball effect if it is allowed to stand. Many Fundamentalist churches—perhaps numbering a few thousand—have already refused to file the required tax forms. At the same time, many of these churches have dissolved their corporations in order to free themselves from an entangling relationship with the state and possibly escape liability for the tax.51

Court challenges can be anticipated if an attempt to amend or delay the law fails in Congress. But a ruling favorable to the churches may be considered unlikely in view of the Court's decision in United States v. Lee, 102 S.Ct. 1051 (1982), unanimously reversing a lower court ruling that an Amish employer is exempted from having to pay social security taxes for his Amish employees. The Court narrowly construed a statutory exemption accommodating self-employed Amish and self-employed members of other religious groups who objected to the taxes. Chief Justice Burger wrote that "mandatory participation is indispensable to the fiscal vitality of the social security system. Most revealing of all, however, was his treatment of religious exemptions:

The difficulty in attempting to accommodate religious beliefs in the area of taxation is that 'we are a cosmopolitan nation made up of people of almost every conceivable religious preference.' Braunfeld, 366 U.S. at 606, 81 S.Ct. at 1147. The Court has long recognized that balance must be struck between the values of the comprehensive social system, which rests on a complex of actuarial factors, and the consequences of allowing religiously based exemptions. To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good. Religious beliefs
can be accommodated . . . but there is a point at which accommodation would "radically restrict the operating latitude of the legislature." **Braunfeld, supra** at 606, 81 S.Ct. at 1147.

Unlike the situation presented in **Wisconsin v. Yoder**, . . . it would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs. The obligation to pay the social security tax initially is not fundamentally different from the obligation to pay income taxes; the difference--in theory at least--is that the social security tax revenues are segregated for use only in furtherance of the statutory program. There is no principled way, however, for purposes of this case, to distinguish between general taxes and those imposed under the Social Security Act. If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax. The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief (102 S.Ct. 1051' 1056).

By implication, the Court here treats tax exemption on religious grounds as an act of grace by the sovereign, as many lower courts have done in the past. The decision also makes evident some of the disadvantages for churches of the broadened definition of religion. The accommodation of religious belief, as exemplified by the Sherbert, Yoder, and Thomas rulings, is now described in purely discretionary terms. It is no longer simply a matter of restricting religious conduct which diverges from commonly accepted moral standards. Religious liberty is now effectively limited by considerations about the consequences of generally available exceptions. Its independent constitutional value is also reduced, which has a tendency to narrow the boundaries of religious liberty. The competing claims of a wide variety of religious beliefs may consequently make the recognition of religion-based exceptions more difficult to justify or sustain.
Although the intricacies of the income tax system may pose the greatest potential hazard for fiscal entanglements between church and state, this potential is likely to remain latent as long as churches enjoy generally favorable public opinion. The fiscal crises of major American cities, which wax and wane with greater intensity than ever, may pose a greater immediate challenge as local governments seek new sources of revenue. One idea that is already gaining strong support is the restriction of property tax exemptions to the sanctuary of the church, the classroom building of the school, and the land immediately beneath.  

Assuming such a plan to be practicable and equitable, it leaves unanswered an important question: What happens when new sources of revenue are required?

Church property tax exemptions, which are well established in historical precedent, are similarly regarded as subsidies by many critics. According to Arvo Van Alstyne: "One of the most pervasive and firmly established anomalies in American law is the permissibility of subsidization of religious institutions through tax exemption in a legal order constitutionally committed to separation of church and state." This assumes that the practice is not only inconsistent with general tax policy, as it well may be, but that it also violates the constitutional commitment to separation of church and state. The last point is debatable. But Van Alstyne recognized the inherent problem with a vaguely worded exemption, which, as he noted, "constitutes a veritable invitation to aggressive and conscientious tax officers to resolve any doubts against exemptions."
Vagueness of exemption language, coupled with the institutional dynamics of the assessor's position, tends, by inviting litigation, to impose a practical tax discrimination upon those churches which are most in need of financial assistance and least able to afford the costs, financial and otherwise, of such litigation.

This observation holds just as true today as it did when it was written in the 1950s. It is part of the danger of the entanglement problem that its effects are generally hidden from public view.

But the hazards of overzealous law enforcement are only part of the story. Legislative vagueness invites creative interpretations by the revenue agencies themselves. An atmosphere of general uncertainty tends to dampen enthusiasm and innovation. Van Alstyne attributed a "particularly vicious impact" to what he calls legislative buck-passing, then added:

Another feature of the church exemption pattern, with respect to which little has been said, relates to the influence which tax exemptions may exert in motivating or perhaps even controlling decisions of church policy. The array of special conditions which statutes frequently impose upon the availability of exemption may impose realistic barriers to freedom of action. For example, statutory emphasis upon "use" for exempt purposes, although perhaps without any conscious legislative intent to reach that result, has frequently resulted in denial of exemption to church buildings under construction. Paradoxically, such denial normally occurs at the very time when the fundamental considerations justifying tax exemption are at their strongest.

As long as tax exemptions are considered subsidies, they are difficult to square with current separationist doctrine. Financial need and social utility are unlikely to be accepted as arguments in favor of continuing them. The major difficulty with the tax expenditure theory from the standpoint of churches is the possibility that conditions would be attached to tax exemptions.

These problems may be inherent in the nature of the general property tax and, particularly, in the dependence of local taxing
districts on property taxes as a source of revenue. The dwindling urban
tax base—coupled with the deterioration of its existing capital, the
growing expense of maintenance, the geographical containment of its
taxing authority, and the anachronization of its economic
infrastructure—is both the cause and the effect of the flight to the
suburbs, urban sprawl, and general social dislocation. Property
taxes, particularly as they are normally assessed, tend to work against
improvements. Zoning regulations are sought to help protect property
values, but the segregation of property according to use and population
characteristics may have the effect of further aggravating these
conditions. In this light, the church may be seen as one of many
drains on the tax base, one of many anomalies in land use plans, and one
of many possible supplicants for relief.

Cases and Controversies

The entanglement problems associated with property taxes and the
use of church property generally arise in conjunction with other
regulations relating to schools, zoning, income taxes, or corporate
privileges. Trouble in one area may spell trouble in others. Internal
church disputes, neighborhood complaints, political controversies, and
law enforcement policies are among the usual catalysts.

A property tax dispute that involved over sixty churches in
California is illustrative of the interrelatedness of the factors that
may create entanglement problems. Before the controversy was resolved
through special legislation signed by the governor on June 22, 1983,
several churches had lost all corporate privileges, including use of
their name and their right to representation in court. At least thirty-five churches of these churches faced public auction for back taxes.

The dispute originated over several related issues. Attorney General George Deukmejian, who became the Governor of California in 1983, issued an opinion in 1979 that made the following points. First, he maintained that churches and their schools may be classified separately. For tax purposes, churches were then being required to file annual "Church Exemption" forms. This exemption was applicable only to property "used exclusively for religious worship." Schools were required to file "Welfare Exemption" forms. Second, he concluded that churches are liable for the payment of taxes just as long as a particular tax or fee is not exacted for the privilege of exercising their religion. Third, he characterized the tax exemption of churches as "a bounty or gratuity on the part of the sovereign and when once granted may be withdrawn." Finally, he held that churches are charitable public trusts. By definition, this means that churches hold property in trust for the state.58

The immediate catalyst of the dispute was the insertion of a clause in the Franchise Tax Board's Form 199B for 1978. It simply read:

a. If exempt under Section 23701D and you have during the year (1) attempted to influence legislation or any ballot measure, or (2) participated in any political campaign, or (3) made an election under Section 23704.5 (relating to lobbying by public charities), complete and attach Form FTB 3509 (available from your local Franchise Tax Board Office). (See Instruction f.)

Below this new section was a note concerning failure to file: "The corporate rights, powers and privileges may be suspended, or the exemption from tax may be revoked for failure to file an information
statement." Instruction f defined "influencing legislation" as including advocating "the adoption or rejection of legislation."

These instructions posed a dilemma for many pastors who had made statements from the pulpit on sensitive political issues. Rev. Roy Morawski of Fundamental Baptist Church in Santa Maria even sent an inquiry to the Franchise Tax Board early in 1980 stating that periodically he spoke against abortion and homosexuality from the pulpit and had recently encouraged church members to vote against a statewide initiative concerning homosexual rights. A tax auditor replied: "The political activity disclosed in your letter of February 5, 1980, is considered influencing legislation and you will be required to file form FTB 3509 with this office." Filing the form meant that the church would be assessed for taxes. Failure to file meant the loss of corporate privileges for incorporated churches. Filing Form 199B without acknowledging political activities would have had the same result.

Several churches chose not to file and formed an organization to work toward changing these rules. In fact, the 1980 Form 199B dropped the stipulation relating to influencing legislation but added a note to an otherwise inapplicable section of the instructions: "Public charities (but not churches) are allowed to carry on propaganda or otherwise influence legislation on a limited basis if they make the election provided by Section 23704.5." California's public trust doctrine first became a political issue when the attorney general's office cited it to justify its intervention in a dispute involving the Worldwide Church of God. On January 3, 1979,
a court-appointed receiver arrived without notice at headquarters in Pasadena and had public officials remove dozens of cartons of church records on the basis of an ex parte court order obtained hours earlier by the attorney general. Months later, the state legislature formalized the attorney general's power through a revision of the Nonprofit Religious Corporation Law. Almost immediately, a movement was begun by religious and political leaders to repeal this revision. State Sen. Nicholas Petris, a Democrat from Oakland, introduced legislation in 1980, SB 1493, to repeal the new law. A major political battle took shape involving state legislators, civil liberties organizations, the press, and religious organization. Governor Edmund G. Brown, Jr., threw his support behind the bill and, after it passed, signed it into law at the end of September. Almost immediately, Attorney General George Deukmejian dropped legal action against the Worldwide Church of God, Synanon, and other religious groups accused of misusing tax-exempt income, claiming that effective date of the new law allowed him insufficient time to conclude the cases. This became a source of election year controversy.

Meanwhile, more than sixty churches were attempting to sue the state over their lost exemptions. They were warned that they must pay back taxes or forfeit their property. Some of them received notices that their corporate rights were suspended. Blocked from seeking relief in the courts because they were stripped of their corporate identity, the churches sought a legislative solution. State Senator H. L. Richardson introduced a bill that created an alternative "Religious Exemption" which simply required a one-time filing notice. A
week before Pastor Hans Nikoley's Pomerado Road Baptist Church of Poway was scheduled to be sold, Governor Deukmejian signed a bill cancelling the churches' liability for back taxes.64

**Subsidies**

Even a brief survey of the numerous tax-related problems faced by churches suggests that a considerable degree of entanglement may be inherent in the very structure of the existing tax system. Although exemptions offer some limited protection against direct involvement with the government, they may eventuate in further entanglements if exemptions are made conditional. Furthermore, these problems would be unlikely to vanish if churches were taxed. Whether formally incorporated or not, churches operate within the context of a highly visible secular state that dominates all their horizons. The earlier institutional pluralism that allowed churches a considerable degree of independence from daily involvement with the state and its programs has given way to a growing institutional centralization within a highly integrated economic system.

The entanglement hazards inherent in the tax system may also be inherent in the plethora of grant programs funded by the federal and state governments. Whether or not churches become formal recipients of aid, they may become unavoidably entangled in the conditions attached to such aid or be affected by an increasing scarcity of funding alternatives. Moreover, current patterns of giving tithes and offerings in the churches are substantially affected by the high level of public taxation and expenditure as well as by tax deductibility.
The fiscal relationship between church and state that has grown over the years is so comprehensive that the change of one factor, like the abolition of deductibility for church contributions, would have an enormous impact on church operations. A reduction of church property holdings could be expected as a result. The trend toward home churches and home Bible studies might be reinforced. But new developments never take place in a vacuum. Special precautions would still be required in order to safeguard religious liberty. Restrictive zoning regulations, stipulations on the use of public property, and other factors must be taken into account.

The same motives that led originally to religious establishments may be at work in efforts to subsidize religious organizations. Churches were often entrusted with the responsibility of defending the moral and ideological standards of the community and reproducing the culture through education. The disestablishment of churches did nothing to change the demand for an institutionalized bulwark. It appears that churches continue to fill this function unofficially. Some financial ties with the state linger, although on an incidental basis.\textsuperscript{65} Bradfield v. Roberts, 175 U.S. 291 (1899), was an early example of involvement by the federal judiciary in questions about aid to religion. If for no other reason, the Court's decision is significant for asserting the principle that religious bodies may form and operate secular corporations.\textsuperscript{66} Corporations are by definition creatures of the state, a fact that holds great significance for incorporated churches. While incidents such as the placement of the Worldwide Church of God into receivership and the loss of corporate privileges by a number of
California churches may be rare, they point up some of the political realities that currently define the relationship between church and state.

Systematic federal aid was initiated—if tax exemptions are excepted—after the Second World War with passage of the Hill-Burton Act, which provided federal funds to assist the expansion of public and non-profit hospitals, which included denominational hospitals. Leo Pfeffer notes that opposition to such aid was less pronounced within Protestant and Jewish circles than it was toward aid to parochial schools. Later, during the Kennedy Administration, the Peace Corps program fostered alliances between public and private agencies, half of which were religious.

The year 1964, however, proved to be a watershed in the growing cooperation between church and state in the promotion of federally-funded programs. It was the year the Johnson Administration succeeded in pushing a comprehensive package of programs through Congress as part of its recently declared War on Poverty. Numerous new agencies, particularly the Office of Economic Opportunity (OEO) and Volunteers in Service to America (VISTA), were created to reach directly into local communities. Churches were mobilized in part of the effort.

Observers were awed by the speed with which a national political consensus was reached and the direct cooperation of churches was enlisted. In many respects, the new mood resembled a religious revival and the President played the role of a Jonathan Edwards or a Charles Finney in orchestrating it. But emotional fervor was not the only element in the equation. As Lyle Schaller noted not long afterward,
another factor was the willingness of the federal government "to share the resources in its arsenal with its allies. There was money to be allocated, patronage to be dispensed, and dreams to be fulfilled. Many of the new allies quickly saw that here was an opportunity that would enable them to enlarge their own programs, accelerate their rate of progress, and strengthen their own institutional position." Some churches shared in the resultant windfall but all churches were affected by the new political reality. Even as new interfaith alliances were forged, new frictions also developed as churches variously welcomed or resisted this warm political embrace. New centers of power emerged in local communities at a time when the political power structures in many states were being redefined through court-mandated reapportionment.

The availability of grants-in-aid for sundry purposes—construction loans, student grants, aid to conduct poverty programs—brought the relationship of church and state to a new level of public awareness and political entanglement. It was the use of churches as channels of public programs and public money that evoked the greatest doubts. Subsidies that began as channels for promoting the general welfare became conduits also of government regulation.

David Kucharsky observed in 1967 that six billion dollars a year in government subsidies was available to churches and other religious institutions. A variety of educational and social programs had been served this way since the Housing Act of 1950. The National Defense Education Act of 1958, the Higher Education Facilities Act of 1963, the Higher Education Act of 1965, and the Elementary and Secondary Education Act of 1965 were among the new instruments through which federal funds
were channeled into religious organizations. These subsidies inspired separationist organizations to seek judicial remedies.

Indirect aid has also contributed to a tightening of controls. Surplus land sales, unrelated business income, lease backs, feeder corporations, and special low postage rates were among the loopholes and forms of assistance that separationists protested. Arthur Herzog summarized the state of affairs that existed in 1968:

Sensibility for the feelings of organized religion seems to have dictated that "private" or "non-public" be used in government policy descriptions, but nonetheless, as of 1965, there were 115 federal programs in which churches could participate. The Treasury gives confiscated wines and liquors to churches; the Office of Economic Opportunity's Project Headstart uses church buildings and pays for upkeep; under the recreation or urban renewal programs the churches can buy land with cheap loans; the National Institutes of Health awarded a large grant to Western Reserve University in Cleveland for internships for clergymen in urban ministries; even the Department of Agriculture was conducting a seminar called "The Christian Farmer and His Country" while rural churches were asked to observe "Soil Stewardship Week." "It is doubtful," writes Dr. LaNoue, "that there is a legislature in the land so tongue-tied that it could not find a multitude of secular purposes to cover any religious interest it wished to accommodate."

Where these practices have not been abolished, they have been subjected to stricter regulations. Many persist, such as the disposal of surplus property at little or not cost to religious institutions. The Supreme Court upheld this practice on a five to four vote in in Valley Forge Christian College v. Americans United, 454 U.S. 464 (1982) when it held that Americans United lacked standing to sue.

To date, complaints about entanglements have generally come from religious colleges. Hillsdale College in Michigan and Grove City College in Pennsylvania have both declined to participate in federal subsidy programs but have nevertheless been confronted with intrusive federal requirements because some of their students received federal
assistance. But another possible area of entanglement was opened up by the Court's ruling in *Mueller v. Allen*, 103 S.Ct. 3062 (1983), when it upheld a Minnesota tuition tax credit program. This decision may further encourage congressional efforts to provide tuition tax relief at a national level.

**Conclusions**

While the fear that the church may become too powerful is historically understandable, the present reality is that the jurisdictional authority of the church has been severely circumscribed. It commands no troops and controls no territory. Its primary defense is the power of public opinion, which is changeable.

Part of the conflict over fiscal regulation of churches is clearly economic in motivation. Many churches pursue investment options, operate profitable business activities, acquire real estate holdings, accept large bequests, and receive tax breaks for parsonages, cemeteries, and other property not directly connected with the church sanctuary or exclusively used for worship. As with the mortmain laws of an earlier time, some states and municipalities restrict such acquisitions or refuse to exempt them from taxation. This may lead to difficulties for churches that must pay taxes until they complete their church building on newly acquired property.

The fiscal crises of government at all levels is a primary motivating factor. Although the fiscal and monetary policies of the state may be faulted for creating the serious budgetary problems that have provoked some of these conflicts, the demand for solutions is not
any the less pressing. D. B. Robertson, who is critical of many exemptions enjoyed by churches, has clearly delineated the points of conflict:

The increasing size of the public debt is a symptom of the pressure upon, or within, the Federal Government for ever higher revenues. But even though increasing amounts of federal money are being "shared" with states and local governments, pressures continue to build on these levels for for more tax money. At the 1966 meeting of representatives of state legislatures, the following recommendation was offered as one requisite for improving the effectiveness of state legislatures: "Constitutional limits on the taxing power, constitutional ear-marking of funds, constitutional requirements that bond issues be submitted to popular vote, and other limitations on the legislature's power to appropriate public funds, and to address itself to public questions, should be eliminated." ¹⁴

It is an ironic testament to the deep-rooted nature of the fiscal problem of the modern state that 1966 was at the peak of the postwar economic boom. The tendency toward compromise is endemic to contemporary politics, particularly when two or more competing goods are at stake. But Robertson noted the danger here:

A spokesman for the citizens of New York State warned the delegates to the 1967 Constitutional Convention against removing the constitutional restraints that limit the real estate [sic] taxing powers of municipalities. If these restraints are removed, he said, "the taxpayers will be at the mercy of local governments that instinctively turn to real estate to solve fiscal problems." ¹⁵

A major source of the problem with regard to taxes and exemptions, then, is not logic but ambition. Ambition is what prompts people to reach beyond the ambit of their authority, as James Madison understood when he proposed in Federalist No. 51: "Ambition must be made to counter ambition." ¹⁶ It is political ambition that lies at the base of what R. J. Rushdoony calls "the modern priestly state." ¹⁷ The unitary conception of the indivisible sovereign state— or the sovereign people—easily lends itself to ambition, even the ambition to do
Like most taxes, the income tax is not primarily a tax on the yield or profit. Apart from the variety of loopholes that tend to channel investments and savings in highly structured ways, the basic tax itself might best be described as a transaction tax, like sales and inheritance taxes. The mere act of transferring or receiving a good or service does not itself constitute income and the exchange of one commodity for another of equal market value does not generate income. The real income or profit that may result from a particular transaction derives from its subsequent use as capital or from the "release of energy" it permits by freeing capital for productive uses.

The point is this: the income tax is to an appreciable degree a tax on productive capital. As with so many regulatory devices, it often has the effect of narrowing economic opportunities and channeling them through public or officially approved agencies. To a large extent, social and economic risks are shifted out of the marketplace and into the political system itself where they are ultimately borne collectively by the taxpayers. Life outside these regulated areas tends to become even more insecure. Small businesses and farms are particularly vulnerable to inflation and high interest rates. But the hazards to those inside these areas may be just as formidable if they raise costs and reduce productivity. The politicization of taxation, employment, commerce, and so many other areas of social life is one consequence as official programs and agencies provide new opportunities for making friends, rewarding allies, and subduing foes. As George J. Stigler has pointed out: "With its power to prohibit or compel, to take or give
money, the state can and does selectively help or hurt a vast number of industries. 81

The income tax, like other taxes on capital, is perhaps a better mirror of human psychology than a measure of productivity or profit. 82 The most characteristic features of the tax are its exemptions, deductions, adjustments, and credits. These betray its regulatory purpose and effectively introduce an element of psychological game-playing into the relationship between the people and their governors. John W. Burgess's appraisal of the motive behind the Sixteenth Amendment sharply contrasts with that of Edwin Seligman:

The professional politicians were tumbling over each other to find a popular issue. The redistribution of wealth by governmental power was the winning idea of the day . . . and they framed this Amendment to meet that idea. The masqueraded, indeed, under the high-sounding patriotic principle that the Government should be empowered to get adequate revenues in times of emergency. But they were understood as they expected to be and intended to be. They framed the crudest, most reckless bit of constitutional legislation known to our history. It simply made waste paper of the Constitution in respect to the relation of Government to the constitutional rights of the Individual to his property. 83

An amorphous revenue-collecting and regulatory system evolved over the years that has probably more than fulfilled Burgess's expectations. Not only are its loopholes or incentives regulatory in purpose but, for middle and lower income classes, they are also often disincentive in effect. They could not be better calculated to diminish productive capital or better designed to control or subdue economic growth if such were their purpose. 84 Apart from information-gathering, redistribution, or social control, this channeling of economic growth appears to be their only possible utility.

The churches themselves must bear a considerable share of the
burden if they cooperate with fiscal and monetary schemes that reflect the techniques and ethics of a gambling casino. The framers of the Constitution had the palace intrigues of the urban courts of Europe firmly in mind as they sought to provide constitutional safeguards against political corruption. But the centralization of the money supply—whether in the form of the regulation of markets or some other means—eventually brings every other area of social and economic life into step behind it. The church—of all institutions—has the least excuse to allow itself to become a dependent of the state. It is called to a higher loyalty than either its own security or the changing policies of the political regime.

The constitutionality of any law or policy should be considered suspect if an exemption or exception is required in order to protect religious liberty. If liberty is only for those who wish it or claim it, there is little to prevent its use as a carrot or a stick. The founders were suspicious of "energetic government." Their intent was that the state be limited by more substantial restraints than its own lack of energy or ability. Paper guarantees offer little protection in a world of covenant breakers. It was this recognition that led the framers of the Constitution to devise safeguards in the form of checks and balances within the framework of an institutional separation of powers. As Thomas Jefferson suggested, men must be bound by the chains of the Constitution.
Notes

1 Address in Portland, Oregon, September 20, 1982.


5 This sentiment was once underscored by Justice Miller in *Loan Association v. Topeka*, 20 Wall. 655, 663-64 (1875): "A striking instance of the truth of the proposition is seen in the fact that the existing tax of ten percent, imposed by the United States on the circulation of all other banks than the National banks, drove out of existence every State bank of circulation within a year or two after its passage. . . . This power can be be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other if there is no implied limitation of the uses for which the power may be exercised. . . . [T]here can be no lawful tax which is not laid for a public purpose." Similarly, the Bible contains warnings about the use and abuse of financial power. For example, Deut. 23:19-20; 24:14-15; Prov. 16:11; Is. 1:21-25; Ezek. 22:23-31; Luke 16:13; Rev. 13:16-17. See Steven Alan Samson, "The Character of Inflation," *Biblical Economics Today*, 6 (February/March 1983): 3-4.


7 Charles M. Whelan, "'Church' in the Internal Revenue Code: The Definitional Problems," *Fordham Law Review*, 45 (March 1977): 904-05. In accounting for much current church-state conflict on taxation, a factor noted by Sharon Worthing is the concept of public accountability of tax-exempt organizations: "At the root of the concept of 'public accountability' is the notion that because tax-exempt organizations exist to benefit the public, they are 'owned' by the public; and because they do not pay taxes, they are 'subsidized' by the public. Because the organization is 'public,' the public--i.e. the government--ought to have information on the organization's activities." Sharon L. Worthing, "The Potential in Recent Statutes For Government Surveillance of Religious Organizations," p. 3. Paper presented at the Conference on Government Intervention in Religious Affairs, Washington, D.C., February 11-13.
Another factor, according to Elliott Wright of the National Conference of Christians and Jews, is the favor being given the tax expenditure theory of tax exemption by tax officials in preference to the tax base theory. Personal conversation, September 27, 1983.


10Ibid., pp. 93-94.

11Ibid., pp. 95-96.


15Ibid., p. 39.


Ibid., pp. 59-60. The third point of the Veto Message of February 21, 1811 opens with this observation: "The bill enacts into and establishes by law sundry rules and proceedings relative purely to the organization and policy of the church incorporated. . . ." Ibid., p. 59.


The concept that taxation must be based on the consent of the people through their elected representatives—expressed by John Locke, James Otis, and leaders of the colonial resistance—was directed to this object: that taxes would not be used oppressively or for private gain. A delightful illustration of the principle—and the ease with which it is violated—may be found in Edward S. Ellis, comp., The Life of Colonel David Crockett (Philadelphia: Porter & Coates, 1884), reprinted in "Not Yours to Give," The Trinity Review, special issue.


Zollmann, "Nature," p.44.


31. Robertson, Churches, p. 65.

32. Ibid., pp. 69-88.


37 Ibid., pp. 430, 435-40, 482-93, 586-89. See Pollock v. Farmers' Loan and Trust Company, 158 U.S. 601 (1895), in which the Court held that the income tax was a direct tax that must be apportioned according to representation in Congress.

38 The Supreme Court upheld the constitutionality of the act in Brushaber v. Union Pacific Railroad Company, 240 U.S. 1 (1916).


40 Kelley, Churches, pp. 22-23, 70-71. For a discussion of changing judicial attitudes towards the use of the taxing power as a regulating power, see Alpheus Thomas Mason and William M. Beaney, American Constitutional Law: Introductory Essays and Selected Cases, 6th ed. (Englewood Cliffs, N. J.: Prentice-Hall, 1978), pp. 310-15. Although innumerable "anomalies" can be cited with regard to which organizations pass muster with regard to various stipulations, it might be more accurate to view the "anomalies" as indicative of a manipulative purpose. It may be instructive to consider some of the political activist organizations that receive exemptions as charitable or educational organizations. See, for example, Haven Bradford Gow, "Tax Status Challenged," Liberty, May/June, 1981, p. 9.


42 Ibid., pp. 946, 947.


44 Ibid., pp. 934-35. Controversy has resulted from disagreements over what is "religious" and what is "secular." In 1982, the Supreme Court summarily affirmed Rusk v. Espinosa, 634 F.2d 477 (10th Cir. 1980), affirmed, 456 U.S. 951 (1982), in which a charitable solicitations ordinance was ruled to violate the First Amendment: "The setting up of a city agency to make distinctions as to that which is religious and that which is secular so as to subject the latter to regulations is necessarily a suspect effort." Whether an exemption is considered a privilege or an immunity, the very similar actions of IRS must also be considered constitutionally suspect. For several years,
various Lutheran groups have disputed IRS's narrow conception of the religious mission of the church and have refused to file information returns. A suit has been filed in federal court by Lutheran Social Service of Minnesota to recover penalties assessed against it for failing to file Form 990. Religious Freedom Reporter, 3 (July 1983): 188. See also Elliott Wright, "Lutherans Dispute I.R.S. on 'Integrated Auxiliaries,'" TR.axis, 1 (July-August 1981): 3, published by the National Conference of Christians and Jews. The distinctions made within the Internal Revenue Code itself fall into fifteen separate categories, according to Charles Whelan, about which there is much disagreement. Most attention has centered on the revisions in §6033 of the Code made by the Tax Reform Act of 1969. As amended, the section distinguishes between "churches, their integrated auxiliaries, and conventions or associations of churches," which are not required to file annual returns, and various other religion organization, which must file. For a legislative history, see Charles M. Whelan, "'Church' in the Internal Revenue Code: The Definitional Problems," Fordham Law Review, 45 (March 1977): 885-928.

45 Robert McCurry, "Court Orders Church to Give All Records to I.R.S.--Sanctions State Church," Temple Times, December 27, 1981, pp. 1-4; Robert McCurry, "Supreme Court Sanctions IRS Approved State Church," Temple Times, December 12, 1982, pp. 1-3; Religious Freedom Reporter, 2 (September 1982): 264. Among the factors considered in determining whether a church will be recognized are: 1) affiliation with a recognized denomination; 2) numerical size; 3) proper organization and incorporation; 4) engagement in acceptable religious activities. The Circuit Court ruled that the IRS has an "inquisitorial function that is akin to that of a grand jury, and no 'probable cause' is necessary before a summons is issued." It also asserted the following: "It is necessary and proper for the IRS to survey all the activities of a church." This entitles it to examine financial records to determine if "the pastor is receiving an unreasonable or excessive salary," which was put at 10% of the church's gross income. The classification of religious organizations along with charitable, scientific, and educational organizations under §501(c)(3) of the Internal Revenue Code practically subjects them to the same regulations that apply to the others. The entanglements have been unobtrusive for the most part. But see Chapter Twelve, especially note 20. See also McCurry, "Supreme Court," p. 2; Alan Stang, "What the War Is Really About," Christianity and Civilization, 2 (1983): 24-39. Richard R. Hammar, Pastor, Church, and Law (Springfield, Mo.: Gospel Publishing House, 1983), p. 353, comments: "Churches, like any other exempt organization, have the burden of proving that they meet each of the prerequisites to exempt status. The burden of proof is not on the IRS to disprove eligibility for exempt status." On this assumption, there is no good reason why churches do not file information returns if no legal protection is afforded them against administrative "fishing expeditions." Furthermore, this exercise by a statutory creation--possessing only dedicated powers--of a power vested in the citizenry itself--that of the grand jury--radically undercuts the constitutional separation of powers safeguard. The old legal maxim--which is now riddled with exceptions--was that "delegated
powers may not be delegated."

46"Mennonite Church Denied Exemption Because of Medical Plan," Gammon & Grange Nonprofit Newsletter, March 3, 1983, p. 2. The case, Bethel Conservative Mennonite Church v. Commissioner, was decided in Tax Court on February 7, 1983. See also "Church Loses Tax-Exemption for Not Submitting Records," Gammon & Grange Nonprofit Religious Liberty Newsletter, August 1983, p. 12. The case was Basic Bible Church of America v. Commissioner, Tax Court, May 24, 1983. Similar demands have also been sent to Calvary Temple, East Point, Georgia; Church of Christian Liberty, Prospect Heights, Illinois; Lord's Covenant Church, Scottsdale, Arizona. See Robert McCurry, "IRS Seeks to 'Approve' Calvary Temple Ministries," Temple Times, January 29, 1978, pp. 1-3. Calvary Temple was sent two questionnaires, the first of which directed 31 questions regarding the church, its membership, organization, and finances. The second related to its Christian school. See also Robert McCurry, "I.R.S. Subpoenas Calvary Temple Records," Temple Times, January 17, 1982, pp. 1-3. The Church of Christian Liberty is the home of Christian Liberty Academy and numerous satellite schools through a home-study program it developed. A letter from Dr. Philip E. Bennett, May 23, 1981, states: "The IRS is no longer threatening court action. What they simply are saying, in effect, is that unless CCL complies with their ungodly demands, the IRS will begin to notify the local state authorities to begin taxing all church property (parsonage, Church buildings, school playground, etc.). And no contributions to the Church will be deductible as the IRS 'will treat your organization as a taxable entity' (quote from IRS letter)." On May 11, 1983, Rep. Mickey Edwards of Oklahoma introduced H.R. 2977, the Church Audit Procedures Act and Sen. Charles Grassley introduced it into the Senate as S. 1262. But this well-meaning effort to eliminate "fishing expeditions" will also sanction IRS investigation of churches. On regulatory uses of the auditing power, see John W. Whitehead, The Stealing of America (Westchester, Ill.: Crossway Books, 1983), pp. 102-105. On the classification tests used by IRS, see Kenneth E. Peacock, "Emerging Criteria for Tax-Exempt Classification for Religious Organizations," Taxes--The Tax Magazine, January, 1982, pp. 61-65.

47Dean Kelley, "Theories of Tax Exemption," TR.axis 1 (May/June 1982): 6. The definitive statement of the tax expenditure theory is by Stanley S. Surrey. See Stanley S. Surrey, Pathways to Tax Reform: The Concept of Tax Expenditures (Cambridge: Harvard University Press, 1973). One writer has commented: "In the United States, federal tax policy illustrates the government's unconscious rush to be the god of its citizens. When a provision in the tax laws permits the taxpayer to keep a portion of his money, the Internal Revenue Service calls this a 'tax expenditure,' or an 'implicit government grant.' This is not tax money that the state has collected and expended but money it has allowed the citizen to keep by not taking it. In other words, any words, any money the citizen is permitted to keep is regarded as if the state had graciously given it to him. Everything we have is from the state, to which we owe gratitude. In fact, we are the property of the state, which therefore has the right to the fruit of our labor." Herbert
Schlossberg, Idols for Destruction: Christian Faith and Its Confrontation with American Society (Nashville: Thomas Nelson Publishers, 1983), p. 187. A logical consequence of this attitude is that various stipulations are attached to tax exemptions, credits, or deductions of any sort: for example, compliance with public policy. See also Richard John Neuhaus, Christian Faith and Public Policy: Thinking and Acting in the Courage of Uncertainty (Minneapolis: Augsburg Publishing House, 1977), pp. 172-73: "The relatively recent notion of 'tax expenditure' should be viewed with great caution. It comes close to implying that the whole of society's income and wealth is, in principle, subject to the state's direction. Any income or wealth, therefore, that is 'exempted' is to be viewed as an expenditure by the state in furtherance of the state's purposes. A corollary says, 'That which the state funds (by 'tax expenditure') the state ought to control.' This direction, pushed far enough and consistently enough, has troubling and even totalitarian implications that could be in serious conflict with the democratic pluralism of American society." Neuhaus also upholds the tax exemptions of churches as a matter of right and recognizes the need for careful definition of what is meant by the church and its property or income. An even greater need is a careful definition of the state and its powers and limitations.

48 Ibid., p. 6. It should be noted that support for this theory may even be found among proponents of church exemptions. For example, Paul J. Weber and Dennis A. Gilbert, Private Churches and Public Money: Church-Government Fiscal Relations, Contributions to the Study of Religion, Number 1 (Westport, Conn.: Greenwood Press, 1981), pp. 181-90. The authors argue for "fiscal neutrality," which would entail the filing of information returns, end restrictions on political activity, and treat religious organizations like any other nonprofit organizations. The placement of a California church into receivership by the application of the charitable public trust doctrine indicates one place this proposal might lead. See Morton B. Jackson, "Socialized Religion: California's Public Trust Theory," Philanthropy Monthly, October 1980, pp. 15-24; Dean M. Kelley, "A Church in Receivership: California's Unique Theory of Church and State," The Christian Century, June 18-25, 1980, pp. 669-72. Sen. Nicholas Petris introduced legislation that repealed a section of the Nonprofit Corporation Code used to put the Worldwide Church of God under receivership, but the common law doctrine that charitable funds--including church donations--are public funds is far from dead, judging by the Supreme Court's citation of the English common law of charities in Bob Jones University v. United States, 103 S.Ct. 2017 (1983).

49 Boris I. Bittker, "Churches, Taxes and the Constitution," The Yale Law Journal, 78 (July 1969): 1285. This argument lends little aid or comfort to supporters of any particular exemption. Opponents of exemptions focus on the genuine problem of the shrinking tax base, but often fail to address the larger dimensions of the problem. Adding churches to the tax rolls is unlikely to reduce the overall burden of high property taxes, which are tied to the push and pull of growing budgets, inflation, wage schedules, unemployment, and housing. For a


Such a statute has been proposed in Oregon several times but has failed each time, most recently as HB 2708.


Ibid., p. 505.

Ibid., p. 505.


On the problems engendered by land use regulation in general, see Peter Hall, Harry Gracey, Ray Drewett, and Ray Thomas, The Containment


59 California, Exempt Organization Annual Information Statement, Form 199B, Income Year 1978. See Form FTB 3509 (10-77), Part III, "Public Charities—Election to make expenditures to influence legislation," which includes the following: "NOTE: An election is not permitted if you a church, an integrated auxiliary of a church or a private foundation. State and federal law is the same with regard to this election, except that State law does not provide for an excise tax on excess lobbying."


62 Dean M. Kelley, "A Church in Receivership: California's Unique Theory of Church and State," The Christian Century, June 18-25, 1980, pp. 669-72; Jerry Wiley, "Post-Guyana Hysteria: State of California Occupies Headquarters of the Worldwide Church of God," Liberty, May/June, 1979; Jeanne Rayphand, "Does Court Ordered Receivership Breach the Wall of Separation Between Church and State?" Western State University Law Review, 6 (1979): 269-79. Nontraditional religious cults have been the focus of much of the controversy but the handling of these disputes about practices, tax exemptions, and property have spillover effects that influence official and public attitudes about religious liberty in general. For an account by one of the principal figures in the case, see Stanley R. Rader, Against the Gates of Hell: The Threat to Religious Freedom in America (New York: Everest House, 1980). For an account of a long-standing conflict involving Scientology, Inc., and several federal agencies, written by a journalist, see Omar V. Garrison, Playing Dirty: The Secret War Against Beliefs (Los Angeles: Ralston-Pilot, 1980).


Cord, Separation, pp. 49-82; Pfeffer, Freedom, p. 184.

Justice Rutledge characterized the Bradfield ruling's reasoning as "highly artificial" in his dissent in Everson, 330 U.S. 1, 28 (1947).


Ibid., pp. 202-04.


Schaller, Churches' War, p. 80.


Robertson, Churches, p. 234.

Ibid., p. 234.

Alexander Hamilton, John Jay, and James Madison, The Federalist:

77 Rousas John Rushdoony, Politics of Guilt and Pity (Fairfax, Va.: Thoburn Press, 1978), p. 291. The "priestly state" has ancient roots, as such historical examples as ancient Egypt, Babylon, and the Inca Empire testify. In Spain's American colonies, the secular government had power to grant permission to erect churches, control by license the importation of clergy, appoint bishops, fix the boundaries of episcopacies, reprimand priests, collect taxes, control religious communications, and settle disputes. William George Torpey, Judicial Doctrines of Religious Rights in America (Chapel Hill: The University of North Carolina Press, 1948), p. 7.

78 See, generally, Hymen Ezra Cohen, Recent Theories of Sovereignty (Chicago: The University of Chicago Press, 1937). Cohen concluded with a prediction: "The theories of 'sovereignty' may disappear with changes in terminology; but the substance of sovereignty will remain so long as the problems of social control divide men into rulers and ruled, into leaders and led." Ibid., p. 148. Chief Justice Marshall dealt with the subject of the divided and limited sovereignties associated with the federal constitutional system in McCulloch v. Maryland, 4 Wheat. 316 (1819). Following the Civil War, an expansion of national powers has been generally asserted or assumed. Seligman's argument for graduated income taxes, for example, was based on an assumption of national sovereignty, which was consistent with his desire to have income taxes administered by the central government. See Seligman, Income Tax, pp. 649-55.

79 The term "release of energy" was used by the legal historian, James Willard Hurst, to refer to the nineteenth century capitalistic legal revolution. James Willard Hurst, Law and the Conditions of Freedom in the Nineteenth-Century United States (Madison: The University of Wisconsin Press, 1956), p. 32.

80 Walter E. Williams contends that a host of politically-motivated interventions into the economic marketplace tend to exclude the most disadvantaged groups. Walter E. Williams, The State Against Blacks (New York: McGraw-Hill Book Company, 1982), p. 72: "The Dorsey study concludes that the occupational licensing of cosmetologists: (1) screens out people on the basis of characteristics unrelated to job performance; and (2) causes an overinvestment in education and formal training. . . . In addition, licensing serves to reinforce handicaps suffered by disadvantaged minorities." This raises the initial capital outlay. A comparable economic effect may be obtained by reducing the available capital for investment, as by a tax on the capital. Such a tax structure can be sustained politically only by introducing various supplementary incentives and benefits, including social welfare programs, few of which offer much opportunity become independent from them. See Frances Fox Piven and Richard A. Cloward, Regulating the Poor: The Functions of Public Welfare (New York: Vintage Books, 1971), pp. 341-48.
See R. M. Hartwell, "Introduction," in The Politicization of Society, ed. Kenneth S. Templeton, Jr. (Indianapolis: Liberty Press, 1979), p. 14: "Politicization can be defined as that now pervasive tendency for making all questions political questions, all issues political issues, all values political values, and all decisions political decisions." In a general way, all questions are political but what has changed is the degree to which the sphere of direct legislative and administrative regulation has expanded. The use of political office to win friends and influence people is nothing new, of course, and the vast bureaucracy provides additional opportunities for political tradeoffs. The high cost of winning political office is indicative the high value that contributors place on political influence. Lobbying and campaign contributions by regulated industries and public employees' organizations are major factors in electoral contests. Because of the possibilities for corruption, elaborate campaign finance reforms have been introduced, but it is not clear that they have done anything more than alter and even multiply the channels for using public power on behalf of private interests. New regulations are often designed to curb abuses engendered by earlier regulations and subsidies. The liaisons between public power and private interest are many and varied, as illustrated by railroad rights-of-way, mineral depletion allowances, general laws favoring local wines and cheeses, the revolving personnel door between regulatory agencies and regulated industries, and the leasing or restriction of public lands for purposes that range from cattle grazing to mining. See also Chapter Eleven, note 35.

82 Envy—which is akin to what Nietzsche called ressentiment—and guilt are among the psychological factors that some critics have seen underlying the system. Besides Burgess, see Helmut Schoeck, Envy: A Theory of Social Behavior (New York: Harcourt, Brace & World, 1966), pp. 250-51, 306-08. Frederick Bastiat claimed over a century ago that modern political economy is based on "legal plunder." Frederick Bastiat, The Law, trans. Dean Russell (Irvington-on-Hudson, N.Y.: The Foundation for Economic Education, Inc., 1950). The economic historian, Gary North, also suggests a strong psychological component in economic—and tax—policy. "Modern politics is based on the systematic manipulation of guilt. In fact, without guilt feelings, the whole modern political structure would collapse. If the State passes enough laws, so that everyone has to break many of the daily—sometimes competing Federal bureaucracies mandate mutually contradictory requirements—then the bureaucrats can make people feel guilty constantly. They feel guilty, and they fear exposure. This makes even more manipulation necessary, for people seek salvation through political action." Gary North, Successful Investing in an Age of Envy (Sheridan, Ind.: Stedman Press, 1981), p. 18. North sees the problem, which is often treated solely as a political or economic one, as fundamentally moral and theological in nature: "The tax revolt will not work. You cannot wipe away two generations of bad theology with a few years of political hoopla. If we see a few taxes cut, of the budget balanced (officially), then the off-budget Federal agencies will multiply like
flies... and the Federal Reserve System will buy up private debt (laundered through some modern version of the Reconstruction Finance Corporation) with fiat money. The modern theology of guilt-atoning taxation will destroy the dollar... The tax revolt will only hasten the demise of the dollar, and every other fiat currency in the West. To have a successful tax revolt, we have to find a way to deal with the problem of real guilt, and the State (as well as the anti-State) cannot rectify the problem of guilt." Ibid., p. 19. "Fiat currency" has long meant paper currency without backing in gold or silver. See Andrew Dickson White, Fiat Money Inflation in France (Irvington-on-Hudson, N.Y.: The Foundation for Economic Education, 1959), which was first publicly read before members of Congress in 1876. White contended that the inflationary policies of the National Assembly in 1790 contributed to the downfall of the ancien regime.
