

**Of Budgets and Benevolence:
Philanthropic Tax Exemptions in Nineteenth Century America***

by

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Typically, modern commentators justify the tax exemption for philanthropic organizations by the public services that they perform. Sometimes the analogy is made to the exemption of some governmental units: it is inefficient to tax with one hand what would otherwise have to be supported by public expenditures. The exemption is thus the reflection of a policy choice, a calculation that the social value of the services performed by the exempt organization is greater than the revenues foregone. Ever since the Progressives, and the late 19th century development of budgets, there has been periodic pressure to subject the exemption to a more particularized review and to tailor exemptions - if they be permitted at all - to the level of public goods and services created and performed by the organization or to demand that the organization increase its output of goods and services to justify its present exemption.

Such commentators do not find the source of their criterion for legitimate exemptions in history, but rather in theory, in their at least loose adherence to a contractual, benefit theory of taxation. Since Thomas Cooley's publication of his Treatise on Taxation,¹ it has been commonplace to see taxes as the reciprocal obligation, or price, that persons and property pay for the protection provided by the state. It has thus been increasingly plausible to see exemptions as recognition by the state that the institution so rewarded is meeting its obligation to contribute to the state through other means than tax payments.

1. Treatise on Taxation 2 (1876).

Commentators armed with this theoretical approach did, however, claim that history also supported their position, that such calculations had always - or at least for a long time - been made by governments. This claim, however, was typically asserted rather than demonstrated. It was insisted that any exemption must have originated - whether recently or in the dim past - in some such calculation that the benefits provided by the institution outweighed the foregone tax obligations.²

Such imaginative recreations of history are not uncommon in modern legal argument. It is often suggested that the original motivations for current practices were anachronistic policy considerations. Thus, history, if we can call it this, was hypothesized to explain the origins of exemptions. Needless to say, there was no particular evidence of these primal cost-benefit calculations. In a sense, this insistence upon the existence of an original policy decision was as ideologically impelled and as empirically unconfirmed as was the opposite conclusion, the insistence of the common lawyers of the late 16th and early 17th centuries that all common law rules had existed since the memory of man runneth not to the contrary.³

This approach reflects a common and deeply held American messianic belief in the possibility of creating a political - or religious or moral - regime on a clean slate, unfettered by outmoded, old world and feudal - or monarchical - institutions and

2. The Exemption from Taxation of Privately Owned Real Property Used for Religious, Charitable and Educational Purposes in New York State 19-20 (1934); Claude Stimson, "The Exemption of Property for Taxation in the United States," 18 Minn. L. Rev. 411, 412 (1934); Harold Hughes, Tax Exemptions," 13 Tenn. L. Rev. 79 (1935).

3. J. G. A. Pocock, The Ancient Constitution and the Feudal Law (1957).

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practices. It posits an America of the new-born or reborn. But there was never such a beginning point, a moment when the social compact was created, or when the primal tax calculations were made.⁴ The original colonists brought exemptions with them. Death, taxes, and exemptions run endlessly in our past and probably in our future. Exemptions in the national period were institutionalized in practice - in particular with regard to churches - long before they were codified in law. No one decided on a clean slate that exemptions were appropriate. They already existed. This is not to say that cost/benefit calculations were never made, explicitly or implicitly, but that legislators, for instance, determining whether to grant Trinity College exempt status had to consider that Yale College was already exempt from taxes by the terms of its charter.⁵ If the alleged primal calculation is redefined to mean a choice, explicit or implicit, given all the constraints and circumstances then present - including, for instance, pressures to continue or liberalize past practices in the name of equality - then it only implies, quite banally, that the action taken was not intentionally perverse.

In this description of the origins of exemptions, history is skimpy and asserted rather than discovered. It is thin history, as it were. There is also a thick historical explanation of exemptions that, interestingly, was offered contemporaneously with the other, in the early decades of the 20th century, and is not really antithetical to it. It

4. Pocock, supra; cf. various writings of Michael Oakeshott.

5. Alvin Warren, Thomas Krattenmaker, Lester Snyder, "Property Tax Exemptions for Charitable, Educational, Religious and Governmental Institutions in Connecticut," 4 Conn. L. Rev. 181, 212 (1971).

looks to actual events, but usually relatively ancient ones. In 1923, the Westchester County Commissioners faced a major problem. A significant proportion of Westchester real estate was occupied by philanthropic foundations, religious institutions, etc. which were exempt from property taxes, the main source of local revenues. The Commissioners commissioned Philip Adler to write a history of the exemption; his work in many ways is typical of this approach.⁶ Adler began his treatment with exemptions in the ancient world, but spent most of his pages detailing the expansion of the scope of public welfare, with its concomitant support of private philanthropic ventures, in medieval and Tudor and Stuart England. These institutions were largely religious. Adler, at least implicitly, treated their exempt status rather as a response to their welfare activities than as, for instance, a recognition of their separate jurisdictional status.⁷ Adler found in the past "historical justification", that is, precedent for exemptions of philanthropic and educational institutions, but not of benevolent ones, like the YMCA or fraternal organizations.⁸ He also found that history supported denying exemptions to institutions which earned rent from property or charged fees for their services. Adler was unwilling to let history, past practices, alone define current norms. Church exemptions were inappropriate, given the separation

6. Philip Adler, Tax Exemptions on Real Estate: An Increasing Menace (1922). See also Claude Stimson, "The Exemption of Property from Taxation in the United States," 18 Minn. L. Rev. 411 (1934).

7. Church institutions were indeed sometimes taxed. Theodore F. T. Plucknett, "The Lancastrian Constitution," in Tudor Studies, ed. R. W. Seton-Watson (1924); Charles Gray, "Plucknett's 'Lancastrian Constitution'" in On the Laws and Customs of England, ed. Morris Arnold, Thomas Green, Sally Scully, and Stephen White (1981).

8. Adler, supra at p. 80.

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of Church and State, although, of course, they were still in effect. He also suggested that the expansion of the state's public welfare activities would make unnecessary, and therefore inappropriate, state support through exemption of parallel private ventures.

Adler's use of history, tracing long pedigrees of exemption practices wrenched out of context, reflected his deeper lack of interest in history. He sharply distinguished historical reasons from reasons of policy or what he called "expediency." History was turned to when no other explanation of a practice was available.⁹ History, especially over long periods, created the inertia which was one of the chief obstacles to reform. History was really the source of problems, not of solutions.

One approach largely ignores history, the other, to paraphrase Marc Bloch, obsesses about its origins. This was typical of legal history early in this century. Law reflected policy; and history is something that is long over, certainly not worth discussing after the reception of the common law into the new states. The nineteenth century, the period which shaped the experiences and values of those who created the modern federal income tax, is largely ignored. I propose simply to begin to fill this gap by offering a very sketchy treatment of the history of the issue of exemptions from the property tax in nineteenth century America, which largely shaped the debate for the draftsmen of the federal income tax. I will briefly describe four periods in the century, the early decades before the establishment of the general property tax; the 1840's and 1850's when the general property tax became, at least in theory, America's

9. See Seabury C. Mastick, "The Problem of Tax Exemption," Proceedings of the Eighteenth Annual Meeting of the Conference of Mayors, 76, 77 (1927).

preferred fiscal practice; the 1870's, when some serious challenges to exemptions were articulated and politically pressed, and the 1890's, when the exemption of philanthropic institutions in the federal income tax was first codified.

Early Period

For several reasons, tax exemptions in this period were less controversial than they later became and were not understood as covert public subsidies.

1. There was no formal institutionalized practice of tax exemption at the time of independence, though there were a variety of institutions which had been given exemptions in their charters of incorporation. The special privileges of municipal corporations were generally withdrawn or abandoned, but those of educational institutions and others were not. Thus, American exemption policy, as we have seen, did not begin on a clean slate. Church exemptions, for instance, simply continued even as churches were disestablished. There was apparently little discussion of this. The explanations for this practice were largely articulated and codified post hoc, only when, as we shall see, exemptions were increasingly challenged as violations of the emerging legal norms of equality, universality, and generality. Exemptions may have been suspect as privileges, but, in spite of this, they were, for instance, when granted by charter or treaty, protected as vested rights. Chief Justice Marshall was so concerned to protect such privileges that, in *New Jersey v. Wilson*¹⁰ he even held that

10. 7 Cranch 164 (1812). This case was later much criticized. Usually, Indian property tax exemptions applied to land which they could not alienate and was another expression of an intent that, in spite of their poverty and profligacy, they be protected in their possession of the land. *New Jersey v. Wilson* was also anomalous in its early expression (continued...)

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a tax exemption granted Indians ran with the land and could be claimed by subsequent purchasers.

2. There was as yet no universal system of taxation, no general property tax which attempted to identify all property within the jurisdiction and tax it at the same ad valorem rate. Thus, the very fact of exemptions, which on the one hand incited criticism because, like other charter privileges, it represented feudal or royal favoritism, on the other was less controversial in the abstract since it did not flout a generally held and codified norm. In the absence of universal taxation, exemption still functioned, in a sense, expressively rather than instrumentally. Exemption served to demonstrate that an institution was favored by the state, although the extent of the favor was obscure.

In addition, in the early decades of the nineteenth century, property to be taxed was often chosen for its income-producing capacity.¹¹ Unoccupied land was commonly not taxed. Not to tax charities and churches, therefore, was not particularly controversial when it did not flout a general prescription that all property be taxed and when it reflected a general practice not to attempt to get fiscal blood

10. (...continued)
of subsidy language. Marshall gave as an additional reason for permitting the transfer of the exemption that this would raise the value of the land and thus profit the Indians, as was apparently the intent of those who granted the exemption. See James F. Colby, "Exemption from Taxation by Legislative Contract," 13 American Law Review 26-39 (1879).

11. Maurice Robinson, A History of Taxation in New Hampshire 85-87 (1902); Thomas S. Adams, Taxation in Maryland, 28-29 in Studies in State Taxation, ed. J. H. Hollander (1900).

from a stone.

3. There was also as yet no pattern of regular, annual taxation. This did not become a feature of American fiscal life until after the crash of 1837. There was thus no way to estimate the dollar value of an exemption since state taxes typically were only imposed during emergencies such as war time. The exemption was thus not a regular subsidy, the equivalent of an annual appropriation of a specific amount. The decision not to tax could never be translated into a dollar figure when there was no settled expectation of a regular tax with predictable rates. Early national taxation, being neither universal in aspiration nor regular in application, could not support an understanding of exemptions as specific covert subsidies.

4. As a matter of legal theory, taxation was understood to be the quintessential sovereign act. Chief Justice Marshall expressed this in asserting that the power to tax was the power to destroy.¹² Subsequent commentators, both judicial and otherwise, somehow extrapolated from Marshall's apothegm to conclude that the sovereign power to apportion, and consequently to exempt, was also absolute.¹³ Unless and until the state taxing power was constitutionally constrained - and this did not occur until the norms of equality and uniformity began being mandated in the 1830's and became increasingly common over the next several decades¹⁴ - the powers

12. *McCullough v. Maryland*, 17 U.S. 316, 431 (1819).

13. *Griffin v. Mayor of Brooklyn*, 4 N.Y. 419, 426-27 (1851); W. H. Burroughs, A Treatise on the Law of Taxation 6-8 (1877).

14. Wade Newhouse, Constitutional Uniformity and Equality in State Taxation (2nd ed. 1984).

to tax, or not to tax, were rarely used, but essentially legally uncontestable.

The General Property Tax

In the 1830's, state property taxation became routinized as an annual obligation. It also became regulated as ascendent Jacksonianism demanded open and equal opportunity. Individual privileges and special treatment were challenged. For a time, local government - as opposed to general legislation for the sovereign state, special corporate charters, private divorces, justa, special assessments - allocated according to benefit accruing to the taxpayer rather than ad valorem, and tax exemptions were among the practices that were unfavorably evaluated. Some indeed, were abandoned. States began either constitutionally or statutorily mandating the general property tax. All property was to be treated equally, the only discrimination permitted being a reflection of its value. Taxation was to be universal; exemptions, therefore became anomalous.

Such criticism did not, however, mark the end of tax exemptions, as is revealed by the experience of California. Although the original state constitution of 1850, adopted during the period of greatest popularity of the general property tax, mandated equal and uniform taxation, the California legislature initially granted the traditional exemptions that had existed before statehood.¹⁵ These enactments survived judicial challenges until 1868, when the state Supreme Court held that the

15. F. D. Bovard, "Taxing Churches in California", 36 Overland Monthly (2nd ser.) 332 (1900).

exemption of any but state or federal property was constitutionally prohibited.¹⁶

Individual assessors apparently usually continued their prior practices ignoring church property or minimally assessing it. California's new constitution of 1879 again opted for the general property tax, declaring all but "growing crops" to be taxable property. Churches were at least potentially taxable in California for the rest of the century, the only liberalization of the almost non-existent free list being the exemption of libraries and museums - so long as they charged no fees - in 1894.

It was with the critique of exemptions at least implicit in the general property tax that the apologetics of exemption also emerged and that exemptions became common matters of explicit constitutional or statutory regulation. Massachusetts did not have church exemption laws until 1837, New Hampshire until 1842, and New Jersey in 1851.¹⁷ Only in Massachusetts did explicit exemption follow relatively closely on disestablishment. It was rather the general property tax which was the precipitating factor. It was only in 1859 that the first state constitution (that of Kansas) expressly exempted churches from taxation.¹⁸

The language of subsidy, or implicit subsidy, was still uncommon. A Pennsylvania court explained the statutory exemption of churches as inspired by "the

16. *People v. McCreery*, 34 Cal. 432 (1878).

17. Carl Zollmann, "Tax Exemptions of American Church Property," 14 *Michigan L. Rev.* 646, 649 (1915).

18. *Id.* at 649.

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almost universal, innate promptings of the human heart."¹⁹ At least there is no surviving pamphlet evidence of an extensive debate on exemptions. Exemptions were challenged by the general property tax, but, usually, at this time, explicitly reinstated.

The exemptions that emerged from this process of legislative, constitutional, and judicial tailoring usually exempted the church and land on which it sat, but not any other property. In particular, church land earning rental income was not exempt, nor typically was any endowment. Ministerial funds, for instance, were taxable.²⁰ Educational institutions likewise were taxed on any rent-producing property, although some states exempted their endowments. During the rest of the century, exemptions on endowments were gradually extended,²¹ perhaps because tax administrators and reformers both increasingly objected to the taxation of intangible personal property, since much of it was assumed to be successfully hidden in any event. Exemption of such property thus appeared over time to be less serious a violation of the canons of equal and uniform taxation. It also became possible to create a tax-exempt

19. *Howell v. Philadelphia*, 1 Leg. Gaz. R. 242, 8 Phila. (Pa.) 280, quoted in Zollmann, *supra* at 649.

20. Arvo Van Alstyne, "Tax Exemption of Church Property", 20 *Ohio St. L. J.* 461 (1959); Exemption of Church Property in the Several States of this Union (1878); Protestant Episcopal Church in the U.S.A., Laws and Usages in All the States in Relation to the Taxing of Churches (1875?).

21. William E. Hannan, Property Exempt from Taxation in the Forty-Eight States, New York State Library Legislative Bulletin 42 (1917).

endowment in any event through the purchase of state or federal bonds,²² but church endowments continued to be taxed, as did real estate used for commercial purposes.

This pattern of partial exemption, with the critical criterion being whether or not the property was being commercially exploited, suggests yet again that exemption was not being conceived as a subsidy. With a subsidy, the critical question is not the use of specific property, but the ultimate dollar value of the exemption. This latter position was sometimes supported, but usually unavailingly. If the exemption be a subsidy, then the particular mechanism by which it is engineered should be irrelevant. If the rent earned was used for the support of the institution, then the property should have been at least potentially exempt. Money subsidies are fungible; exemptions, however, were not. It was later feared that exempting rental property would permit unfair because unequal competition against fully taxpaying businesses. Initially, the argument was simpler: if income existed, there was something to tax.²³ There was also a frequently expressed concern that general exemption would lead to vast ecclesiastical holdings, such as those confiscated in England by Henry VIII. This conjured up fears of an establishment of European landlord-tenant relationships, and with this the end of political liberty, in the United States.

It is possible to force a description of the mid-century pattern of exemptions as the summation of a desire to subsidize certain institutions and to maintain a level

22. Henry Foote, "The Taxation of Churches", part 2, 7 Unitarian Review and Religious Magazine 465, 468 (1877).

23. See State v. Carleton College, 154 Minn. 280 (1923).

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playing field for economic competition and relatively widespread land ownership. More plausibly, however, the practice reflects a continuation of the fiscal strategy of taxing only what was income-producing. Moreover, the expressed concern behind exemption of the land and buildings actually used by churches and charities was not that they needed and deserved some public support, but that, if taxed, they might be unable to pay - especially since the property in question was not income-producing - and would therefore be seized in tax foreclosure proceedings and disappear. Thus viewed, the question was not whether such an institution was deserving of support, and if so, how much, but instead, more starkly, whether or not the institution should continue to exist.

Throughout the century, cemeteries were exempted because of doubts that anyone would pay taxes on them - it was noted that the dead could not meet fiscal obligations - and a concern that cemeteries would accordingly be seized and sold.²⁴ Unlike business corporations, cemeteries, churches, and charities were all expected to have eternal life, the latter, presumably, because donors expected that the beneficiaries of their generosity would reciprocate with prayers for their salvation. Likewise, exemption of Indian land was required to preserve its inalienability.²⁵ It was suggested that the perpetual nature of charitable gifts implied tax-exempt status. The correlation between exemption and the eternal dedication of property to non-commercially productive use was made explicit when a Pennsylvania judge upheld an

24. Henry Foote, *supra* at 491-492.

25. Robert Brown, "The Taxation of Indian Property," 15 *Minn. L. Rev.* 182 (1930).

exemption of the American Philosophical Society's real estate holdings in Philadelphia's Independence Square, in the absence of any clear statutory requirement that this be done, because the Society could not alter its use of this property in any way.²⁶ While, at the end of the century, the justification of cemetery exemption was anomalous - as subsidy-like arguments were made with regard to other exempt institutions - at mid-century, it was, to the contrary, paradigmatic.

The reluctance to exempt income-producing property was reflected in statutes that barred exemptions to institutions which charged fees. In a similar spirit, the United States Congress, in the income taxation imposed during the Civil War, made no general exemption for philanthropic institutions. The tax on institutions, unlike that on individuals, was not actually an income but was rather an excise tax, imposed not on profits, but for the privilege of doing business. Churches and many philanthropies would presumably not have been included within the terms of the tax. Hospitals were, however, apparently taxed. When Representative Morgan, in 1869, at the instance of the hospital to be established by the terms of the will of James Roosevelt, proposed that all hospitals be exempt from the tax so long as they offered free treatment to sick or disabled United States soldiers, Representative Fessenden, the floor manager of the bill, explained his committee's disagreement.

"There are many cases in which it seems to be a little hard, to use that expression, to exact revenue; but the same reasoning that applies to this institution would apply to all eleemosynary institutions which have capital invested; and yet, if we undertake to make distinctions in connection with revenue, there is no knowing where we shall stop. . . .

26. *Philadelphia v. American Philosophical Society*, 42 Pa. St. 9, 19-20 (1862).

The committee on thinking this matter over came to the conclusion that to begin to make exceptions would lead to infinite confusion; the amount would be very large in the end; every effort would be made to bring cases within the principle, if we tried to adopt a principle in reference to it, and we thought it would be entirely unsafe. We therefore objected to introducing anything of this kind into the general bill providing for the raising of revenue. . . . But the best reflection . . . led us to the conclusion that it would be entirely unsafe to begin a system of exemptions anywhere, and that it is best to leave all the property of the country to the operation of the general law.¹²⁷

The motion was overwhelmingly rejected, presumably in part because of wartime demands for revenue. But the limited appeal for exempting institutions which were revenue producing was apparent.

The 1870's

The intensity of debate over tax exemptions increased markedly in the 1870's, at least as measured by pamphlet warfare and proposed legislation. The focus was on the exemption for churches, but both critics and advocates expected that what was decided with regard to churches would, and should, eventually be the fate of secular philanthropic and educational institutions as well. In many states, indeed, the tax treatment of religious, educational, and philanthropic institutions was still regulated by a single provision. The conflict may have been triggered by the post-Civil War efforts of evangelical conservatives to amend the United States Constitution to provide

27. The Congressional Globe 2755-56 (1869). Museums were not taxed if they charged no fees. The Congressional Globe 1819 (1864). Several participants in the conference brought to my attention that George Boutwell, the Commissioner of Internal Revenue, determined in 1863 not to tax the "income of literary, scientific, or other charitable institutions." George S. Boutwell, A Manual of the Direct and Excise Tax System of the United States 275 (1863).

for explicit acceptance of religion - and Christianity in particular - in upholding civil order. The Civil War was to such reformers God's warning that the American people and their political system were off course. This campaign disturbed the largely unarticulated compromise by which such exemptions had existed, first simply as a matter of custom after formal church support was ended and then through a ratification by specific constitutional amendments offered in the decades just before the Civil War. The American Liberal League, led from Boston by Francis Abbot, resisted the evangelical movement. In its magazine, The Index, founded in 1870, it attacked not just the proposed amendment, but the tax exemption as well.²⁸ Tax exemption opponents were also motivated by a fear, which they shared with much of the evangelical community, of the growing wealth and power of the Catholic Church, which they hoped to constrain significantly by ending exemptions.

The opposition to tax exemptions was supported by national leaders. James Garfield called in the House in 1874 for the end of any ties between church and state.²⁹ In 1875, President Grant warned of the "evil" of "the accumulation of vast amounts of untaxed church property."³⁰ He grimly warned that failure to deal with this through taxation "may lead to sequestration without constitutional authority and through blood," and proposed "the taxation of all property equally, whether church or

28. D. B. Robertson, Should Churches Be Taxed? 71-86 (1968). See the letter from Francis Abbot to the Massachusetts Tax Commission, 6 The Index 145 (April 1, 1875).

29. Some of Garfield's June 22 speech is quoted in R. B. Westbrook, "Taxation of Church Property," 2 Current Comment and Legal Miscellany of Philadelphia 360, 362 (1890).

30. 9 A Compilation of the Messages and Papers of the Presidents 4288 (1897).

corporation, exempting only the last resting place of the dead and possibly, with proper restrictions, church edifices."³¹ No federal legislation ever followed; there were doubts whether any was constitutionally appropriate.

Congress did, however, enact a tax statute in 1874 for the District of Columbia under which local authorities imposed property taxes on churches. Churches refused to pay, and many were apparently seized in tax foreclosure proceedings. For five years, churches requested individual relief, which was apparently often granted, and a change in the enabling legislation. In 1879, Congress, with no debate, changed the law to prohibit such taxation in the future and also voted to return the \$2,566.68 which had already been collected.³²

A number of states also considered anti-exemption legislation. The Pennsylvania legislature rejected it in 1873, Iowa in 1874, Wisconsin in 1880.³³ In 1875, the Commission appointed to propose tax legislation for Massachusetts considered, but rejected, any change in existing exemptions. The debate in Massachusetts was the most extensive of that in any state and was influential elsewhere. James Parton, in a pamphlet published in 1873 by the Free Religious

31. *Id.* at 4289.

32. Congressional Record 2334 (1879); A. W. Pitzer, "The Taxation of Church Property," 131 North American Review 362-363 (1880).

33. Missouri apparently taxed churches from 1863 until the mid 1870's. Robertson, *supra* at 78; Wisconsin Senate, "Report of the Committee on Charitable and Penal Institutions on . . . the taxation of church property" (1880); Lyman Atwater, "Taxation of Churches, Colleges and Charitable Institutions," Presbyterian Q. and Princeton Review 340-341 (1874). New Jersey considered and rejected prohibiting tax exemptions at its constitutional convention. *Id.* at 341.

Association elaborated on the objections to the tax exemption and made it clear that he opposed all exemptions. His argument was classically liberal, suspicious of all privileges awarded to groups intermediate between the individual and the state.

"Whatever property the state protects ought, I think, to contribute its proportion to the State's support."³⁴ He suggested that the typical American city had too many under utilized protestant churches, which were, in addition, not justified by the insignificant doctrinal differences between them, and that taxation would speed up the process by which only the fit survived. Taxation was increasingly being lauded as an aid to evolution in weeding out the inefficient. The point of competition was not to provide permanent choice, but to determine which alternative was to survive; taxation, by making existence more difficult, facilitated this process.³⁵

Parton was clearly concerned about the growth of the Catholic Church, including himself among those liberal free-thinking Protestants who were "American citizens first, and EVERYTHING ELSE SECOND." He expressed a widely held fear that democratic institutions were threatened by the potentially unlimited growth of untaxed institutions; like President Grant, he believed that such growth provoked "sequestration by blood." To him this was desirable; he praised the confiscations of

34. James Parton, Taxation of Church Property 3 (1873). For an argument against exemption by a minister who favored a church supported entirely by voluntary contributions, see Henry J. Van Dyke, "The Taxation of Church Property," 3 The Congregationalist 560, 565 (1874). "Simple, Equitable Taxation," Banker's Magazine 605, 607 (1874).

35. Josiah P. Quincy, "The Argument for Tax-Exemption," 11 Old and New 529, 534 (1876). But see Henry Foote, part 2, supra at 487.

the French Revolution and related approvingly how Henry VIII destroyed ecclesiastical institutions and secularized their property, "that is, stopped exempting it from taxation!"³⁶ This mortmain concern, and Henry VIII as a heroic ancestor, was typical of anti-exemption literature.

Defenders of the tax exemption regularly noted that such limitless growth in real estate was less than likely, since most states only exempted land on which the church was sited and that Trinity Church in New York City, for instance, paid taxes on its rent-producing property. Church land-holding also invited criticism when churches sold valuable urban sites and relocated. This seemed to be prospering through the efforts of others; it was the sense of injustice over such windfalls that motivated the single-taxers. Defenders sometimes admitted the force of this, but argued that only a few urban churches were of this type, or noted that the money earned was not distributed as profit, but was used for church purposes. One defender asserted that it was such earnings - rather than new contributions - that supported large and luxurious churches and thus attempted to deflect criticism of ecclesiastical ostentation, directed against Catholic churches generally as well as rich Protestant ones.³⁷

Parton criticized ostentatious churches, providing luxurious comfort for the rich - it was an implicit given of American tax theory that luxuries invited and deserved taxation. Other critics suggested that, for the rich, the church functioned as a social

36. Parton, supra at 7.

37. T. Edwin Brown, Some Reasons for the Exemption of Church Property for Taxation (1881) which argues for the exemption of endowments, at 9.

club rather than as a house of God.³⁸ Defenders replied that architectural ornament and grandeur was valuable spiritually and also materially, as they raised property values in the neighborhood.³⁹

Parton also offered an argument that combined Jacksonian invocations of self-reliance and denigrations of benevolence, at least when compared to justice, with a critique of the new wealth which supported the new benevolent institutions. The combination is classic mugwump - suspicious of charity and hostile to modern commerce. "Hard old money-makers, after a long life of hard-dealing, amuse a dreary, childless, friendless, and loveless old age by founding institutions, of which we have too many already, and consigning masses of ill-gotten property to the spoliation and mismanagement of trustees."⁴⁰ This attitude survived decades later in the Congressional opposition to the federal incorporation of the Rockefeller Foundation.

Parton made clear that his target was not just the churches. He criticized the United States for having become a nation of dead-heads. Many mugwumps disapproved of the tariff for exactly this reason. Parton cited in particular the franking privilege of Congress and free railroad passes. It was corrupt not to pay for what one enjoyed. Reform, however, was in the air. In a curious use of the passive voice, he wrote: "The free list is, everywhere and in everything, struggling to get suspended. At

38. Parton, supra at 11. See 22 The Nation 23-24 (Jan. 13, 1876).

39. Hamilton Hills, The Exemption of Church Property from Taxation. 35 (1876). See discussion of Charles Eliot, infra.

40. Parton, supra at 12.

least", he more cautiously added, "a notice to that effect is stuck up."⁴¹ Special favors granted to individuals were not just unfair to others, but demoralizing - in the nineteenth century sense of destructive of morals - to those who received them. They endangered self-reliance.⁴²

The debate over exemptions in Massachusetts divided the Protestant elite, forcing a choice between one's own exemption and one's fears of Catholic expansionism. Charles Eliot, president of Harvard, chose to protect all exemptions in a long letter to the tax commission which was widely quoted thereafter by exemption supporters. Eliot treated the college and the church as posing equivalent cases. He wrote: "There is a return, both from a church and a college, and from a sewer and a highway, in the benefits secured to the community; but the money which built them is no longer to be counted as property, in the common sense. It can never again be productive, except for the program of the trust for which it was set apart."⁴³ Here Eliot simultaneously offered two arguments, one the economic one, as it was classified

41. Id. at 13. R. B. Westbrook, "Taxation of Church Property," 2 Current Comment and Legal Miscellany of Philadelphia 360, 365 (1890).

42. The question, of course, is whether the background condition is one of taxation - so that exemptions constitute special treatment, or not - in which case exemptions is an exercise in neutrality.

43. Charles Eliot, "The Exemption from Taxation of Church Property, and the Property of Educational, Literary and Charitable Institutions," Appendix to the Report of the Commissioners Appointed to Inquire into the Expediency of Revising and Amending the Laws Related to Taxation and Exemption Therefrom 369 (1875).

by Hamilton Hill,⁴⁴ that churches do provide public services, and the other that, being unproductive property, it was both unjust and impractical to attempt to tax them. They are not owned like ordinary property, nor are they remunerative, he argued.⁴⁵

Eliot provided an early and clear articulation of a subsidy argument. The exemption was a calculated decision: "[T]he State believes, or at least believed when the exemption statute was adopted, that the indirect gain to its treasury which resulted from the establishment of the exempted institutions is greater than the loss which the exemption involves."⁴⁶ He seemed additionally to suggest that the exemption ideally should include all the property owned by the institution, since universities and churches needed the financial support and provided even more valuable services in return. Eliot insisted that "[s]uch is the absolute necessity of the public work which the institutions of religion, education and charity do, that if the work were not done by these private societies, the State would be compelled to carry it on through its own agents, or at its own charge."⁴⁷ Eliot was vague, as he had to be given his discussion of churches, as to whether these were services that the state was traditionally obligated or functionally compelled to provide. He magisterially wrote of

44. Hamilton Hill, "The Exemption of Church Property from Taxation," A Paper read before the American Statistical Association 28-36 (1876).

45. We will see that in analyzing income tax exemptions there was a similar dual response: the institution provided public services and the institutions were simply not for profit - they did not earn income in the ordinary sense.

46. Eliot, *supra* at 370.

47. *Id.* at 372. It was, of course, noted by others that the state could not directly sponsor religion, at least not without constitutional adjustments.

the needs of civilization as well as of government and simply insisted that "churches, colleges, and hospitals serve the highest public ends" and "there is no reason for making them contribute to the inferior public charges",⁴⁸ such as schools, roads, prisons, and police. The higher public uses were the ones which shaped the public character.

At this point, Eliot's argument ceased being one of at least implicit budget efficiency and became moral. Exemption reflected a recognition of the distinction between benevolence and commerce. Eliot explained why the economic calculation that benefits offset revenues foregone should not be applied in granting exemptions to socially beneficial private business enterprises as well. The answer was apparently that businesses would still be undertaken,⁴⁹ whereas higher education, religion and philanthropy could never be self-supporting. Moreover, private gain was simply not in the minds of the benefactors of the tax exempt institutions. "In short, they do not live for themselves and could not if they would."⁵⁰ To tax these institutions was thus not only illogical - since they provided public services without the vicious tendencies of state centralization - but mean, because it would tax those of benevolent disposition and society should, it was implied, support and not hinder benevolence, which should be favored over self-seeking.⁵¹ Arthur Perry, professor of economics at

48. Id. at 374.

49. He ignored the practice of exemption for infant industries.

50. Eliot, supra at 375.

51. Id. at 374.

Williams College, and the author of a popular economics textbook in this period, made a similar argument. Taxation and government should deal with economic activities, that is commercial activities. It should leave unhindered both as a matter of policy and as a matter of respect acts of benevolence. Perry argued for instance that benevolent gifts to philanthropic institutions or to family members should never be taxed as were commercial transactions.⁵²

Eliot finally offered an argument for exemptions given the nature of politics in general, or American politics in particular. He directly challenged the criticism that the exemption of taxation was a subsidy. This was true only in its fiscal impact, he wrote, but not in its political process.

"The exemption method is comprehensive, simple, and automatic; the grant method, as it has been exhibited in this country, requires special legislation of a peculiarly dangerous sort, a legislation which, inflames religious quarrels, gives occasion for acrimonious debates, and tempts to jobbery. The exemption method leaves the trustees of the institutions fostered untrammelled in their action; and untempted to unworthy arts and mean compliances. The grant method as practiced here, puts them in the position of importunate suitors for the public bounty, or, worse, converts them into ingenious and unscrupulous assailants of the public treasury. Finally, and chiefly, . . . the exemption method fosters public spirit, while the grant method, persevered in, annihilates it"⁵³

Eliot concluded with a rhetorical flourish. "The proximate effects of the two methods of state action are as different as well-being from pauperism, as republicanism from

52. Arthur Latham Perry, Political Economy 586-87 (1873). This was quoted by Representative Andrew Hunter in Congressional Record-Appendix 183 (1894). During these debates, Senator Hill disapproved of taxing charities or gifts, Congressional Record 6823 (1894).

53. Eliot, supra at 382.

communism."⁵⁴

The Massachusetts commissioners, who included Thomas Hills, Boston's tax collector, and Julius Seelye, professor of moral philosophy at Amherst, considered Eliot's letter to be a persuasive defense of church exemptions, although, not surprisingly, Eliot had devoted most of his attention to institutions of higher learning. They were not particularly swayed by Eliot's budget argument: that exempting benevolent institutions was economically efficient. The Massachusetts commissioners, in concluding not to alter existing exemption practices, made what was largely a more traditional and old-fashioned argument. They rejected the emerging cliché of tax theorists, made holy writ by Cooley in his Treatise on Taxation, that taxation was the price paid by persons and property to government for protection. They were not inclined to so contractualize citizenship and to so commodify taxation. Their image of taxation was more austere. Taxation was coerced by government and, simultaneously, was voluntarily and cheerfully undertaken by citizens who thereby achieved the highest aim of personal life: the suppression of selfish desires and the subsumption of self-interest into the common good. "[T]axation is not a payment to society for certain social privileges and immunities, but it is the enforcement of the right, and the fulfillment of the obligation revealed in the very existence of the state and its subjects. Like all the service which the state requires, this involves the righteous surrender or

54. Id. at 383.

subjection of the individual will to the will of the community."⁵⁵ The suppression of the self and its sublimation into something larger was the goal of the Christian vis a vis God and of the citizen vis a vis the state.

For the commissioners, the moral benefits of tax exemption were great: exemption was both respect paid to and encouragement of the transcendence of self-interest which was the ultimate goal of individual and social progress. "When this self-surrender is free and complete, there is nothing more to be desired, either on the part of the individual or the state. The perfect individual and the perfect state would both be found in the free and full surrender of every individual to the welfare of every other. Whatever favors this most desirable attainment, should receive every encouragement."⁵⁶ At a high level of abstraction, charities and government both existed for the same purpose, as vehicles for the perfection of the individual. At a lower level, however, exemptions, for the commissioners, reflected the division of property and of human pursuits into two fundamentally different spheres: that of self-interest and personal gain, and that of altruism and benevolence. "Property, which passes out of private hands a free-will offering for public uses, and which loses thereby its entire power of reproducing itself for private gain or emolument, deserves

55. Report of the Commissioners, supra at 154. In 1876, the Massachusetts Legislature rejected, 116 to 64, a bill to tax churches. 7 The Index 595 (Dec. 14, 1876).

56. Report of Commissioners, supra at 154. The commission conceded that virtuous stupidity might pose a problem. "An individual may be truly unselfish, and yet not wholly wise, and might generously, but ignorantly, direct his gifts in a way for the public injury. But in such a case the proper course for the state would be, not to tax such gifts, but to refuse or prohibit them. Id. at 156.

very different treatment, for it must ever stand in a very different relation to the state from that which private parties can still control for private ends."⁵⁷

The exemption of philanthropic and religious institutions was thus both expressive and facilitative of the pursuit of civilization, the highest purpose of the state. It was also, usually, an instrumental means to further more immediate ends. The commissioners noted, in a phrase which combined equivocation with assertion, "As a general rule, all such gifts are in the exact line of what the state seeks to secure by its taxation, and there is really just as great an absurdity in taxing them as there would be in retaxing the taxes themselves."⁵⁸ Indeed, the commissioners added, "Instead of taxing such gifts, the state might more profitably encourage them by bounties."⁵⁹

With the 1870's came the articulation of just about all of the positions with respect to exemptions, pro and con, that continue periodically to be asserted. That the exemption was granted by the state to further its own ends was now clearly stated. Edward Everett Hale conceived of private benevolent institutions as agents of the state.⁶⁰ What was publicly and what was privately pursued was just a matter of

57. Id. at 155.

58. Id. at 157.

59. Id. at 154. Thomas Hills dissented from the final report because he wanted a dollar limit on the exempt real estate of churches and because he favored the taxation of philanthropic endowments.

60. Edward Everett Hale, "Shall Church Property Be Taxed?," 133 North American Review 255, 256 (1881).

administrative convenience.⁶¹ Others, like Eliot, saw more at stake in preserving the private sector, in particular, the avoidance of political corruption and divisive political controversy. That subsidy of private philanthropic, religious and educational institutions was, in effect, a good investment for the state was compatible with two positions: a more old-fashioned one, focusing on sovereign power, suggesting that the state should exempt, and a newer one, deriving from a more contractual conception of citizenship, that individuals who supported such private organizations deserved to have their tax burdens correspondingly reduced.

Arguments from expediency became increasingly asserted, yet controversy continued. Perhaps this was to be expected. George Santayana somewhere observed that moral norms, when justified by a utilitarian calculus, became forever vulnerable to recalculations. Yet expediency was still only one - and not yet the dominant argument. Exemption supporters also appealed to justice: the unfairness of changing the rules and taxing institutions whose benefactors had never expected that this would be done.⁶² Even more, as we have seen, exemption supporters distinguished the sphere of benevolence from that of commerce and lauded the role of exemptions in sustaining the former.⁶³ Their position combined

61. This position potentially might lead to the end of exemptions, if political evolution was seen as gradually replacing private with official state involvement in matters of public welfare.

62. Lyman Atwater, supra at 348; Henry Foote, part 2, supra at 477.

63. See notes 51 and 52, supra; T. Edwin Brown, supra at 30-31 offers both budget efficiency and respect for benevolence arguments. For an argument combining efficiency concerns with an invocation of nobler concerns than commercial calculation, see E.

(continued...)

both expressive and instrumental elements. It was wrong and it was unwise to tax such property. Exemption advocates like Eliot often made contradictory arguments. They suggested that taxing benevolent institutions was unfair because benevolently disposed people would pay the tax and this would be a form of double taxation because they additionally were paying to contribute to the institution; they also suggested that it might be that no one would pay the taxes and that therefore the institution would disappear. Supporters also were ambiguous about the instrumental function of exemptions: did they foster the advance of civilization or did they supplement the narrower end more immediate activities of the state.⁶⁴ If the former, their value was clearly incalculable and their exempt status was not really subject to review or to limitation.

The tax exemption survived the challenges of the 1870's relatively unscathed, although not unlimited. It was noted by defenders of church exemption, in responding to President Grant's attack, that income-earning ecclesiastical real estate was not exempt from property taxation.⁶⁵ Moreover, apparently few churches had

63. (...continued)

McChesney, "Taxation of Church Property," 18 Methodist Q. 243 (1876); Henry Vedder, "Should Church Property Be Taxed?," 1 The Magazine of Christian Literature 265, 267, 271 (1890).

64. See M. Slade Kendrick, "Property Tax Exemptions and Exemption Policies," 51st Annual Conference of the Nat'l Tax Assoc. 84, 87 (1958).

65. George Andrews, the New York State Tax Commission, wrote four letters to the New York Times criticizing Grant's speech on December 20, 1875, and January 1, 2 and 5, 1876; Henry W. Foote, "The Taxation of Churches," 7 Unitarian Review and Religious Magazine 349, 355-56 (1877); the rebuttal of General Dix, ex-governor of New York and comptroller of Trinity Church is quoted in 12 Ave Maria 375 (1876); see T. Edwin Brown, supra at 44.

endowments and these were taxed in most states.⁶⁶ Even other philanthropic endowments were often taxed, although exemption was becoming more common. Personal property was apparently seen as passive wealth, not posing the risk of the creation of a landlord-tenant regime nor permitting unfair commercial competition.

To exempt endowments was clearly to expand the realm of exemptions beyond property which was not income-producing and therefore could not pay. This remained problematic, just as did the exemption of institutions which charged fees.⁶⁷ Roosevelt Hospital was liable to Civil War taxes, after all, on the revenues that it received. Statutory exemptions were sometimes limited to philanthropic organizations which did not charge fees.⁶⁸ There were even challenges to the exemption of churches because they were not, it was argued, commercially unproductive, when, for instance, Henry Ward Beecher's Plymouth Church in Brooklyn rented pews for \$50,000 per year.⁶⁹ Even some church exemption supporters hoped for a system of free pews in which churches would truly be open to the entire public.⁷⁰

66. Henry Foote, supra at 368.

67. Lyman Atwater, supra at 344 argued that endowments should be exempt, because local improvements did not benefit them, but that rent-paying real estate should be taxable.

68. California in 1894, for example. See supra, text at note 15. See N. J. Session Laws, 1866 at 1079; William Hannan, Property Exempt from Taxation in the Forty-Eight States, New York State Library Legislative Bulletin 42 (1917).

69. R. B. Westbrook, supra at 364.

70. A. W. Pitzer, "The Taxation of Church Property," 131 North American Review 362, 373.

The 1890's and The Federal Income Tax

In the 1890's, there was a renewed flurry of pamphlet debate about church exemptions, perhaps associated with an attack on such exemptions made by Canadian Protestants, angered by a government payment to the Jesuits in compensation for the confiscations undertaken at the time of the English conquest. The anti-exemption protesters in the United States seem to have been fewer in numbers, and the most prominent were fiercely, anti-Catholic Protestant ministers.⁷¹ The controversy never had the political impact experienced twenty years previously, although church exemption was debated at the 1890 Kentucky Constitutional Convention.⁷²

More importantly, the scope of exemptions was widening, with more organizations being granted exemptions and - gradually - for more of their property. Increasingly, the exemption was being characterized as a subsidy, a purchase of services by the state for a price. The increasing tendency to see exemptions as a subsidy is highlighted by the evolving justification of the non-exemption of otherwise exempt institutions from special assessments. Special assessments were specific impositions for such improvements as road opening or paving and were theoretically justified by and allocated according to the relative benefit accruing to property in a

71. Duane Mowry, "Ought Church Property to be Taxed?," 15 Green Bag 414 (1903); William Laird, "Should Church Property Be Taxed?," 6 American Magazine of Civics 543 (1895); James E. Larmer, Jr., "Why Not Tax Church Property?," 1 American J. of Politics 503 (1892); Speed Mosby, "The Taxation of Church Property," 163 North American Review 254 (1896); Madison Peters, "The Taxation of Church Property," Id. at 633; Madison Peters, "Why Church Property Should Be Taxed," 17 The Forum 372 (1894); John Farley, "Why Church Property Should Not Be Taxed," Id. at 434.

72. Robertson, supra at 78.

limited area by those improvements. The leading ante-bellum case was from New York.⁷³ In it, the court held a church liable to assessments, since its exemption was only for taxes. The court did not limit itself to this formal linguistic distinction - which did permit some fiscal impositions upon institutions exempt by their charters.⁷⁴ The court explained, "The word 'taxes' means burdens, charges or impositions, put or set upon persons or property for public uses. . . . But to pay for the opening of a street, in a ratio to the 'benefit or advantage' derived from it, is no burden There is no inconvenience or hardship in it, and the maxim of law that qui sentit commodum debet sentire onus is perfectly consistent with the interests and dictates of science and religion."⁷⁵ It is hard to see why there is no hardship involved, unless the church were to sell its increasingly valuable property and relocate.⁷⁶ The judicial language does, however, reflect a conception of special assessments as prices for particular improvements, and of taxes, to the contrary, as impositions coerced by the sovereign which were within its prerogative to waive.

In *Illinois Central Railroad v. Decatur*, 147 U.S. 201 (1892), the United States Supreme Court, after reviewing the ante-bellum cases, defended the results reached in

73. In the Matter of the Mayor of New York, 11 Johns 77 (1814).

74. Except in rare instances, such as Harvard University, whose charter exempted it from both taxes and assessments. *Harvard College v. Aldermen of Boston*, 104 Mass. 470 (1870).

75. In the Matter of the Mayor of New York, supra at 80.

76. When churches did sell valuable downtown sites and relocate, they were strongly criticized and such sales were used to challenge their tax exempt status. See Josiah Quincy, "The Secularization of Church Lands, A Deacon's Conversion," 7 Old and New 580 (1872).

them as more than "a mere arbitrary distinction created by the courts."⁷⁷ Rather, Justice Brewer insisted that they rested "upon strong and obvious reasons". Brewer cautioned that "[a] grant of exemption is never to be considered to be a mere gratuity - a simple gift from the legislature. A consideration is presumed to exist."⁷⁸ This is the full-blown contractual model of taxation, enunciated in a charter exemption case, but applicable to a statutory one as well. The reciprocal of the exemption "may be supposed to be" the performance of services that would otherwise be the obligation of the state. A college or an academy spare the state the burden of educating the young. In such a contractual analysis, exemption of institutions not fulfilling traditional state functions typically were not emphasized. This argument could, however, be used to justify one of the most controversial of all exemptions and the one at issue in the case. "The state is bound to provide highways for its citizens, and a railroad company in part discharges that obligation." At this point, the analysis became vague. "Or the recipient may be doing work which adds to the material prosperity or elevates the moral character of the people; manufactories have been exempted, but only in the belief that thereby large industries will be created and the material prosperity increased; churches and charitable institutions, because they tend to a better order of society."⁷⁹

With this contractualized model almost any kind of exemption has become

77. 147 U.S. 190, 201 (1892).

78. Ibid.

79. Ibid.

plausible. It is not just that, for Brewer, taxes have become contractualized, but that they have become routine. "In a general way it may be said that the probable amount of future taxes can be estimated. While of course no mathematical certainty exists, yet there is a reasonable uniformity in the expenses of the government, so that there can be in advance an approximation of what is given when an exemption from taxation is granted, if only taxes proper are within the grant."⁸⁰ But when you enter the domain of special assessments, there is no basis for estimating in advance what may be the amount of such assessments."⁸¹ The exemption has here become an element in budgetary planning.

Given this history, one might have expected debate over the merits of exempting religious, philanthropic, and educational institutions when Congress deliberated and enacted the 1894 income tax. The absence of exemptions in the Civil War Tax and the caution with which states had extended the property tax exemption to income-producing property might have supported a policy of no or of limited exemptions. A conception of exemptions as subsidies for services performed might have encouraged a particularized review of exemptions, to at least roughly correlate benefits received by the state with tax revenues foregone. Instead, the proposed tax was levied upon certain specified types of business and "all other corporations,

80. This could not, of course, have been done at the time many grants of exemption were made.

81. Illinois Central Railroad, supra at 202.

companies, or associations doing business for profit in the United States."⁸² Further language specifically exempted

"corporations, companies, or associations organized and conducted solely for charitable, religious or educational purposes [the three are still regulated as one], including fraternal beneficiary societies, orders or associations operating upon the lodge system and providing for the payment of life, sick, accident, and other benefits to the members of such societies, orders, or associations, and dependents of such members, ... the stocks, shares, funds, or securities held by any fiduciary or trustee for charitable, religious, or educational purposes; . . . building and loan associations, or companies which make loans only to their shareholders; . . . such savings, banks, savings, institutions, or societies as shall, first, have no stockholders or members except depositors and no capital except deposits: . . ."⁸³

The exemption for philanthropic, educational and religious organizations was not debated at all in Congress or in whatever Committee records I have been able to find. It is not that exemptions were not controversial. The proposed exemption of individual income below \$4,000 was challenged as socialist, communist, or whatever other epithet came to critics who argued that all persons should be taxed equally.⁸⁴ There also was much debate about whether or not to exempt mutual insurance companies and mutual savings banks; they were not included in the initial draft.⁸⁵

82. Sec. 32 in Charles W. Eldridge, ed., The United States Internal Revenue Tax System 530 (1986).

83. Id. at 531-32.

84. Congressional Record, 6621 and 6637 (Remarks of Senator Hill); 6706 (Remarks of Senator Platt).

85. The exemption of fraternal organizations was also the result of lobbying during the course of congressional proceedings. Congressional Record 6697 (Remarks of Senator Patton; 4168 (Remarks of Senator Cullom); 6623 (Remarks of Senator Hill); 6630 (Remarks of Senator Hoar); 6706 (Remarks of Senators Perkins and Platt); 6870 (Remarks (continued...))

The exemption of the former was apparently limited to those operating on the lodge system to permit taxation of large mutual insurance companies based in Hartford whose size was a matter of concern to some Congressmen. The argument against taxing them was twofold: what they were doing was in the public interest, and what they were doing was not for profit. This suggests that the exemption of philanthropic, religious, and educational institutions in general may have proved so non-controversial simply because they were not organized for profit and the tax was on profits.

The tension between what are, in effect, positive and negative definitions of philanthropy was not concluded by the enactment of the tax. The positive definition looked to the program of the institution: did it resemble the traditional charitable purposes included in the Statute of Charitable Uses or subsequently generally accepted. Ostensibly philanthropic ventures became more problematic in this definitional regime the more they diverged from the traditional understanding of charity and the more they invoked purposes that could not easily be described as obligations of the state which were simply being administered by the private sector. They were also vulnerable to challenge when they appeared to be motivated by self-interest even if not the pursuit of profit, to deviate from the strict definition of

85. (...continued)
of Senator Perkins). See also the discussion of farmer's cooperatives at 6833 (Remarks of Senator Frye). See "Taxation of Church Property," New England and Yale Review 177, 178 (1892), where the author defends church exemptions in part by noting that "semi-charitable, and semi-commercial" property, such as savings banks and mutual life insurance associations are partially exempted from taxation.

benevolence articulated, for instance, by Horace Binney in the Girard College case:

"whatever is given for the love of God, or for the love of your neighbor, in the catholic and universal sense - given from these motives, and to these ends - free from the stain or taint of every consideration that is personal, private or selfish."⁸⁶ The negative definition simply required that the venture not be for profit, that it not resemble an ordinary business activity in methods and aims. It is unclear whether the exemption results from an association of not-for-profit with benevolent activity - and a desire to encourage it or leave it untouched by the cost-benefit calculations involved in ordinary government and business activities - or from a practical desire to tax where it is easiest to collect, i.e. profits.

The treatise on the 1894 Act, noting that the exemption of religious, philanthropic, and educational institutions was new, anticipated controversy over whether charitable was to be defined as synonymous with not-for-profit.⁸⁷ Most problematic, presumably, were institutions such as mutual insurance companies or savings banks. In his concurrence to the decision in Pollock holding the 1894 tax act unconstitutional, Justice Field sharply criticized the exemption of mutual banks and insurance companies arguing that they were engaged in commercial activity and were of pecuniary value to those who invested in them even though the corporations were

86. Quoted in Jackson v. Phillips, 14 Allen (Mass.) 539, 556 (1867). The criticism of the exemption of prosperous churches used as rich men's clubs flowed from this definition.

87. Roger Foster and Everett V. Abbot, A Treatise on the Federal Income Tax Under the Act of 1894 110-11 (1895).

themselves not for profit.⁸⁸ Others would criticize the exemption of fraternal organizations.

In the early twentieth century, the property tax exemption of philanthropic, religious, and education institutions was routinely criticized as a covert subsidy by tax administrators.⁸⁹ These administrators, usually typical Progressives, themselves often had no great respect for democratic decisionmaking. What offended them was rather that exemptions removed implicit funding decisions from the budget process which they hoped to rationalize and to control. Mark Graves, the tax commissioner of New York State, wrote that he hoped that all exemptions would be abandoned because the result would be more "business like."⁹⁰ It is perhaps because their references to democratic budget-making were, if not insincere, at least not heart-felt, that they usually ignored the fact that the legislative budget-making process - which they preferred to exemptions - was less than a reasoned one. Whatever their motives these administrators professed themselves frustrated with popular ignorance and inertia, which permitted the continuation of outmoded and inefficient exemptions.

Public passivity is not surprising. Taxation was looking increasingly complicated. With over a century of national tax history, with an increasing variety of

88. 157 U.S. 429, 597-99 (1895); See Henry Campbell Black, A Treatise on the Law of Income Taxation Under Federal and State Laws 51, (1913).

89. Nat'l Tax Assoc. "Unnecessary Exemptions," Bulletin of the Nat'l Tax Ass'n 13 (1915); Farwell Knapp, "Tax Exemptions," 27 Proc. Nat'l Tax Assoc. 24 (1934); "Report of the Committee on Tax Exemptions," 13 Proc. Nat'l Tax Assoc. 232 (1920). See Report of the Connecticut Tax Commission 242 (1934); Comments of Commissioner Blodgett of Connecticut, 18 Proc. Nat'l Tax Assoc. 352 (1925).

90. Quoted in Seabury Mastick, supra at 82.

40 Diamond

taxes, any individual tax practice, rather than being emblematic of American political ideals, could be seen as compensatory or supplementary, part of a larger system which itself was increasingly difficult to comprehend. Exemptions were not covert, but, when considered as subsidies, they were, en masse, increasingly difficult to evaluate. Equal treatment and no favoritism was a mid-nineteenth century rallying cry that could generate enthusiastic support. No dead-headism likewise in the later nineteenth-century saw exemptions as symptomatic of the flaws of the paternal state. If exemptions were just subsidies, the consequences were much less apocalyptic. The citizen was not suffering from discrimination or infantilization; the taxpayer was just being overcharged.