

ARE TAX "BENEFITS" FOR RELIGIOUS INSTITUTIONS CONSTITUTIONALLY DEPENDENT ON BENEFITS FOR SECULAR ENTITIES?

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Abstract: The Supreme Court generally conditions tax exemptions, deductions, and exclusions for religious organizations and activities upon the simultaneous extension of such benefits to secular institutions and undertakings. The Court's position flows logically from its acceptance of the premise that tax exemptions, deductions, and exclusions constitute subsidies. However, the "subsidy" label is usually deployed in a conclusory and unconvincing fashion. The First Amendment is best understood as permitting governments to refrain from taxation to accommodate the autonomy of religious actors and activities; hence, tax benefits extended solely to religious institutions should pass constitutional muster as recognition of that autonomy.

INTRODUCTION

Does it matter constitutionally whether tax exemptions, exclusions, and deductions for religious institutions and activities are matched by comparable exemptions, exclusions, and deductions for secular entities? The U.S. Supreme Court has, on several occasions, answered this question affirmatively. For example, in *Texas Monthly v. Bullock*, the Court struck a sales tax exemption for religious periodicals, principally on the ground that the exemption was limited to sectarian publications.¹

The plurality opinion in *Texas Monthly* relied, *inter alia*, upon the Court's decision in *Walz v. Tax Commission*.² In *Walz*, the Court had sustained New York's exemption of religious properties from real property taxation, characterizing that exemption as part of a larger policy that excluded from taxation "a broad class of property owned

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¹ 489 U.S. 1, 5 (1989).

² See *id.* at 11 (citing *Walz v. Tax Comm'n*, 397 U.S. 664 (1970)).

by nonprofit, quasi-public corporations."³ The *Walz* Court upheld New York's tax-exemption of religious properties on several grounds, one of which was the simultaneous exemption of other types of properties owned by secular groups in the nonprofit sector.⁴

This Article explores the extent to which the constitutionality of tax benefits⁵ for religious institutions depend upon the simultaneous extension of such benefits to secular organizations. The issue is a hardy perennial⁶ and of topical concern: while the final form and impact of President Bush's faith-based charitable initiative is to yet be determined, an expansion of tax benefits is a likely component of this initiative.⁷ The issue thus arises whether, as a constitutional matter,⁸ such benefits must extend to all charitable organizations and activities or whether expanded charitable deductions could, consistent with the First Amendment, be limited to religious entities and undertakings.

In Section I of this Article, I consider the three rationales for providing tax exemptions, deductions, and exclusions: (1) that such exemptions, deductions, and exclusions subsidize, (2) that they define the base for taxation, and (3) that they minimize entanglement between government and religious institutions.

³ *Walz*, 397 U.S. at 664, 673.

⁴ It was particularly important to Justices Brennan and Harlan in their separate concurring opinions that New York exempted not just religious properties, but also the real estate owned by a broad array of nonprofit entities. As we shall see *infra*, the concerns of these concurring justices have become central to the Court's current doctrine in this area.

⁵ I use the term "tax benefits" advisedly since many tax provisions commonly denoted as "benefits" arguably define the tax base, rather than subsidize, and the term "benefits" carries the possible connotation that these tax provisions constitute subsidies. See *infra* Part I; see also Edward A. Zelinsky, *Are Tax 'Benefits' Constitutionally Equivalent to Direct Expenditures?*, 112 HARVARD LAW REV. 379, 394-95 (1998). In deference to convention, I use the term "tax benefits" in this Article but I do not intend the term to indicate that these provisions are properly characterized as tax subsidies or expenditures.

⁶ For example, as I write this Article, the Pennsylvania Legislature is considering a sales tax exemption for all publications, the Pennsylvania Supreme Court having stricken an exemption limited to religious publications. See Ken Dilanian, *Pennsylvania Lawmakers Propose Exemption For All Books*, STATE TAX NOTES, Mar. 20, 2001, at 54-28.

⁷ See Fred Stokeld, *Bush Budget Plan Would Promote Charitable Giving*, TAX NOTES TODAY, Mar. 22, 2001, at 69-2; see also Brant Goldwyn, *Faith-Based Bills Would Offer Tax Breaks For Charitable Giving, Self-Help Accounts*, DAILY TAX REPORT, Mar. 22, 2001; Patti Mohr, *Bipartisan Faith-Based Bills Include Incentives For Charitable Giving*, TAX NOTES TODAY, Apr. 10, 2001, at 56-3. On the President's faith-based initiative more generally, see Donald F. Kettl, *Having Faith in Faith*, 14 GOVERNING No. 7, 12 (Apr. 2001).

⁸ Of course, tax benefits focused exclusively upon religious actors might be constitutional but less desirable as a matter of policy than benefits extending to secular institutions as well. My focus in this Article is limited to the constitutional considerations.

Section II reviews the Supreme Court case law exploring the constitutionality of tax benefits for religious entities and discusses these cases in the context of the three rationales outlined in Section I. In addition to *Walz* and *Texas Monthly*, these cases include *Murdock v. Pennsylvania*,⁹ *Follett v. Town of McCormick*,¹⁰ *Jimmy Swaggart Ministries v. Board of Equalization*,¹¹ and *Mueller v. Allen*.¹²

The final section summarizes my conclusions: As a matter of positive law, the question whether tax benefits for religious institutions depend constitutionally on benefits for secular entities must be answered with a qualified "yes." In its present form, the Supreme Court's case law generally conditions tax exemptions, deductions, and exclusions for religious organizations and activities upon the simultaneous extension of such benefits to secular institutions and undertakings. The Court's position flows logically from its acceptance of the premise that these tax exemptions, deductions, and exclusions constitute subsidies.

However, as a normative matter, my conclusion is to the contrary. In the context of tax exemptions, exclusions, and deductions, the "subsidy" label is usually deployed in a conclusory and unconvincing fashion. In this setting, the First Amendment is best understood as permitting governments to refrain from taxation to accommodate the autonomy of religious actors and activities; hence, tax benefits extended solely to religious institutions should pass constitutional muster as recognition of that autonomy. Since it is most convincing to think of religious tax exemption as the acknowledgment of sectarian sovereignty (rather than the subsidization of religion), there is no compelling constitutional reason to link that exemption to the simultaneous extension of comparable tax benefits to secular entities and undertakings.

In final analysis, tax exemption does not subsidize churches, but leaves them alone.

⁹ 319 U.S. 105 (1943).

¹⁰ 321 U.S. 573 (1944).

¹¹ 493 U.S. 378 (1990).

¹² 463 U.S. 388 (1983).

I. THE THREE RATIONALES FOR TAX BENEFITS

Perhaps the most common characterization of tax exemptions, exclusions, and deductions is that they subsidize.¹³ From this perspective, the tax benefits extended to religious institutions and activities constitute a subsidy from the public fisc.

Likely the most famous statement of this perspective is Ulysses Grant's warning that religious property,

receiving all the protection and benefits of Government without bearing its proportion of the burdens and expenses of the same, will not be looked upon acquiescently by those who have to pay the taxes. In a growing country, where real estate enhances so rapidly with time, as in the United States, there is scarcely a limit to the wealth that may be acquired by corporations, religious or otherwise, if allowed to retain real estate without taxation. The contemplation of so vast a property as here alluded to, without taxation, may lead to sequestration, without constitutional authority and through blood.¹⁴

From a variety of vantages, Grant's observations are curious. The exemptions to which he was objecting were exemptions from local and state property taxes, a surprising subject of presidential attention. Arguably, Grant's statement articulated a nativist subtext, a warning against the growing power and property ownership of the Catholic church.¹⁵

Despite its questionable provenance, Grant's statement represents a classic articulation of the notion that tax exemptions for

¹³ See Erika King, *Tax Exemptions and the Establishment Clause*, 49 SYRACUSE L. REV. 971, 993 (1999) ("The word 'subsidy' has crept into our day-to-day characterization of tax exemptions.").

¹⁴ Grant made these observations in his 1875 State of the Union Message. See *Walt*, 397 U.S. at 715 n.17 (Douglas, J., dissenting); see also JEAN EDWARD SMITH, GRANT 570 (2001). Grant's observations are widely quoted by those opposing tax exemptions for churches. See Rev. L. M. Birkhead, *A Preacher Advocates Church Taxation*, at http://www.infidels.org/library/historical/rev_lm_birkhead/church_taxation.html (Apr. 7, 2001).

¹⁵ Grant was certainly not immune from sentiments of this sort, having issued the anti-Semite General Orders No.11 during the height of the Civil War. See GEOFFREY PERRET, ULYSSES S. GRANT 237-38 (1997); BROOKS D. SIMPSON, ULYSSES S. GRANT 163-65 (2000); SMITH, *supra* note 14, at 225-27, 459-60. Moreover, others writing at the same time as Grant's statement explicitly linked the issue of tax exemption with the growing power of the Catholic Church. See Stephen Diamond, *Efficiency and Benevolence: Philanthropic Tax Exemptions in Nineteenth Century America*, in PROPERTY-TAX EXEMPTION FOR CHARITIES: MAPPING THE BATTLEFIELD (Evelyn Brody ed., forthcoming 2001).

churches constitute a public subsidy of religion, which enables religious institutions to acquire real estate they otherwise could not afford.

In a similar vein (but, of course, without any of Grant's subtext), my colleague Professor Marci A. Hamilton has recently written that "[t]he entrenchment of property tax exemption has created a powerful financial incentive for religious institutions to expand their range of activities."¹⁶

Among contemporary tax policy theorists, the subsidy approach is today usually articulated in the vocabulary of tax expenditure analysis.¹⁷ The central premise of this analysis is that tax provisions fall into two categories, normative provisions, which properly define the base of the tax, and expenditure provisions, which deviate from the normative tax base in a fashion economically equivalent to direct government expenditures.¹⁸ There is nothing in this framework which necessarily requires an expansive or restrictive approach to labeling particular deductions, exclusions, or exemptions as either normative or expenditure provisions. In practice, however, tax expenditure stalwarts have applied the expenditure label broadly, leading them to characterize many well-known tax provisions as expenditure-type subsidies from the public treasury.

Thus, Professors Surrey and McDaniel declare the federal income tax exemption of nonprofit institutions¹⁹ an expenditure, rather than a normative, tax provision.²⁰ They similarly characterize the federal income tax's charitable deduction²¹ as a tax expenditure.²² The federal tax expenditure budgets reflect this view that the charitable deduction constitutes a tax expenditure.²³

¹⁶ Marci A. Hamilton, *Free? Exercise*, 42 WM. & MARY L. REV. 823, 861 (2001).

¹⁷ See King, *supra* note 13, at 994 ("The source of the tendency now to characterize an 'exemption' as a 'subsidy' is tax expenditure analysis.")

¹⁸ For more extensive discussion of tax expenditure analysis, see Edward A. Zelinsky, *James Madison and Public Choice at Gucci Gulch: A Procedural Defense of Tax Expenditures and Tax Institutions*, 102 YALE L.J. 1165, 1168-71 (1993).

¹⁹ See I.R.C. § 501 (1994).

²⁰ STANLEY S. SURREY & PAUL R. MCDANIEL, TAX EXPENDITURES 219 (1985) ("[T]he U.S. tax treatment of nonprofit organizations should be classified as a tax expenditure.")

²¹ See I.R.C. § 170 (1994).

²² SURREY & MCDANIEL, *supra* note 20, at 170 ("the code's charitable contribution tax expenditure").

²³ See, e.g., Office of Management and Budget, "Budget Analytical Perspectives, Chapter 5—Tax Expenditures," TAX NOTES TODAY, Feb. 29, 2000, at 40-36 item 82 (listing as a tax expenditure the deductibility of contributions for education), item 92 (listing as a tax expenditure the deductibility of all charitable contributions other than those for education and health), item 101 (listing as a tax expenditure the deductibility of contributions for health).

From the tax expenditure perspective, tax provisions which exempt religious entities from taxation or which provide deductions for contributions to such entities are simply public subsidies of religion, equivalent to direct outlays. Thus, Professors Surrey and McDaniel, in their analysis of *Walz v. Tax Commission* and the property tax exemption for churches, indicate that only Justice Douglas understood the case correctly: the exemption of churches and synagogues from real property taxation is unconstitutional as an expenditure-type subsidy of religion.²⁴

An alternative understanding of deductions, exclusions, and exemptions is that they define the base of the relevant tax, rather than subsidize. The best known academic proponent of this view is Professor Bittker, the leading critic of tax expenditure analysis. It is meaningless, Professor Bittker argues, to label a particular provision as a deviation from a normative tax system unless and until there is agreement on the contours of that system, agreement which is often elusive and illusory.²⁵

From this perspective, Professor Bittker contends, it is plausible to characterize the base of the New York real property tax as "personal residences and business property."²⁶ Hence, there is no "exemption" or "subsidy" for religious or charitable properties since excluding these properties from taxation "is simply a natural outgrowth of the unavoidable process of defining the appropriate tax base."²⁷

Similarly, Professor Andrews defends the charitable deduction as base-defining.²⁸ According to Professor Andrews, one of the two components of the income tax base is "private, preclusive household consumption."²⁹ Resources given to charity are not privately consumed in a fashion which precludes others but are, instead, devoted to public purposes.³⁰ Hence, a deduction for such resources is not a subsidy, but a necessary step in measuring the taxpayer's income, a step which

²⁴ SURREY & MCDANIEL, *supra* note 20, at 133 ("More to the point was Justice Douglas's question in dissent.").

²⁵ Boris I. Bittker, *Accounting for Federal 'Tax Subsidies' in the National Budget*, 22 NAT'L TAX J. 244 (1969).

²⁶ Boris I. Bittker, *Churches, Taxes and the Constitution*, 78 YALE L. J. 1285, 1291 (1969).

²⁷ *Id.*

²⁸ William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309 (1972).

²⁹ *Id.* at 371. The other component of the income tax base is savings. This formulation reflects the well-known Haig-Simons definition of income as the sum of savings and consumption.

³⁰ *Id.* at 344.

recognizes that the taxpayer has not privately consumed these donated resources and thus has no income from them.³¹

On numerous occasions, the courts, while not using contemporary nomenclature about tax base definition, have in substance articulated the same notion.³² For example, the Connecticut Supreme Court, in an 1899 decision about Yale's tax-exempt status, characterized that status in terms remarkably similar to Professor Bittker's:

The non-taxation of public buildings is not the exception but the rule. The corporations, whether municipal or private, which own and are by law charged with the maintenance of such untaxed buildings, are not the recipients of special privileges, in any sense obnoxious to the law. The seats of government, State or municipal, highways, parks, churches, public school-houses, colleges, have never been within the range of taxation; they cannot be exceptions from a rule in which they were never included.³³

Yet a third defense of exemptions, exclusions, and deductions for religious institutions travels under such labels as "entanglement" and "accommodation." From this perspective, churches and other religious institutions are removed from taxation to minimize conflict with government. If, on the other hand, religious properties are taxed, the inevitable result is discord between religious institutions and government.

Professor Brody formulates this notion through the evocative term "sovereignty perspective,"³⁴ a term which captures the autonomy considerations underlying entanglement concerns in their strongest form: "For all its imprecision, tax exemption keeps government out of the charities' day-to-day business, and keeps charities out of the business of petitioning government for subvention."³⁵

³¹ Professor Andrews also defines the deduction for medical expenses as base-defining. Professor Andrews' analysis is logically extended to the deduction for state and local taxes. See Edward A. Zelinsky, *The Deductibility of State and Local Taxes: Income Measurement, Tax Expenditures and Partial, Functional Deductibility*, 6 AM. J. OF TAX POL'Y 9, 31-32 (1987).

³² See *infra* notes 53-79, 144-58 and accompanying text.

³³ *Yale Univ. v. Town of New Haven*, 42 A. 87, 91 (1899).

³⁴ Evelyn Brody, *Of Sovereignty and Subsidy: Conceptualizing the Charity Tax Exemption*, 23 IOWA J. CORP. L. 585, 586 (1998) [hereinafter *Sovereignty and Subsidy*]; see also Evelyn Brody, *Legal Theories of Tax Exemption: Sovereignty Quasi and Real*, in PROPERTY-TAX EXEMPTION FOR CHARITIES: MAPPING THE BATTLEFIELD (Evelyn Brody ed., forthcoming 2001).

³⁵ *Sovereignty and Subsidy*, *supra* note 34, at 586.

The entanglement/accommodation approach squarely places exclusions, exemptions, and deductions for religious entities and activities in the American tradition of separating church and state. As Professor Jaffa has recently observed, with the emergence of Christianity,

the political history of Western man for the next millennium and a half was dominated, especially in the High Middle Ages, by the contest for preeminence between emperors and popes, the two ultimate forms of rule in the post-classical world. . . . [T]he solution to the problem of that relationship of emperor and pope, or of Caesar and Christ, was only discovered in the American Revolution and the American Founding, in the separation of church and state.³⁶

A key portion of that solution has been the financing of the state through taxes which respect the autonomy of religious institutions and activities.

As we shall see,³⁷ entanglement/accommodation doctrine in the tax context comes in three different forms. In its weakest version, concern about entanglement is concern about secular authorities and religious groups fighting over the boundaries of tax exemption. In this incarnation, entanglement theory indicts tax benefits restricted to religious institutions as engendering borderline conflicts and justifies the denial of tax benefits to religious actors and activities to eliminate such borderlines.

In a stronger version of the doctrine, exemplified by Chief Justice Burger's *Walz* opinion, respect for the autonomy of sectarian persons permits the state to refrain from taxing them. This form of permissive accommodation justifies tax exemptions, exclusions, and deductions which cover only religious institutions.

In its strongest form, entanglement considerations inform a reading of the First Amendment as compelling tax exemptions for religious persons. The critical normative issue in this area is which of these three versions of entanglement doctrine is ultimately to control the interpretation of the First Amendment.

³⁶ HARRY V. JAFFA, *A NEW BIRTH OF FREEDOM* 140 (2000).

³⁷ See *infra* Part II.

II. THE CASES

This section reviews the Supreme Court's cases exploring the constitutionality of tax benefits for religious entities. As we shall see, those cases, starting with *Murdock v. Pennsylvania*³⁸ and *Follett v. Town of McCormick*,³⁹ have frequently split the Court. In its current state, the Court's First Amendment doctrine conditions tax benefits for religious institutions on the concurrent extension of such benefits to secular entities. This position ultimately rests on the characterization of tax exemptions, exclusions, and deductions as subsidies, a characterization which, when probed, proves unpersuasive.

For purposes of the present discussion, the most interesting features of *Murdock* and *Follett* are that, in those cases, the tax exemption for religious activity was created by the Court itself, based on its understanding of the imperatives of the First Amendment, and that this judicially-created exemption is exclusively for religious activity.

Murdock and *Follett* were both decided 5-4 and both involved municipal ordinances imposing flat licensing fees on persons selling goods and merchandise in the community.⁴⁰ As the dissenters pointed out, the challenged fees applied to all such persons and were not proved excessive in amount.⁴¹ Nevertheless, the *Murdock* Court held, in an opinion by Justice Douglas, that the First Amendment required exemption for Jehovah's Witnesses' canvassing activities.⁴²

Although the majority did not use the term "entanglement," it reasoned in those terms. The fees imposed by the challenged ordi-

³⁸ 319 U.S. 105 (1943).

³⁹ 321 U.S. 573 (1944).

⁴⁰ The license fee in *Murdock* was \$1.50 for one day, \$7.00 for one week, \$12.00 for two weeks, and \$20.00 for three weeks. See 319 U.S. at 106. The license fee in *Follett* was \$1.00 per day or \$15.00 per year. See 321 U.S. at 574. The fees were thus unrelated to the amount of sales made by the licensed canvasser. See *Follett*, 321 U.S. at 574; *Murdock*, 319 U.S. at 106. The flat nature of the fees assessed in *Murdock* and *Follett* became particularly critical in subsequent consideration of these cases. See *infra* notes 102-108 and accompanying text.

⁴¹ See *Murdock*, 319 U.S. at 118 (Reed, J., dissenting) ("No evidence is offered to show the amount is oppressive. . . . There is no contention in any of these cases that such discrimination is practiced in the application of the ordinances.").

⁴² *Id.* at 105, 111-12. The Court did not come to this conclusion easily. The Court initially upheld these kinds of fees as applied to Jehovah's Witnesses and then reversed itself. Compare *Follett*, 321 U.S. at 573, and *Murdock*, 319 U.S. at 105, with *Jones v. Opelika*, 316 U.S. 584, 597 (1942) ("When proponents of religious or social theories use the ordinary commercial methods of sales of articles to raise propaganda funds, it is a natural and proper exercise of the power of the State to charge reasonable fees for the privilege of canvassing."). *Opelika* was authored by Justice Reed who dissented in *Murdock* and concurred in *Follett* only because, at that point, he viewed *Murdock* as controlling precedent. See *Follett*, 321 U.S. at 578.

nances imposed unacceptably intrusive burdens on the exercise of religious rights, i.e., the Jehovah's Witnesses' canvassing. It does not matter, for First Amendment purposes, that comparable burdens are imposed on commercial activity: "The constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books."⁴³

While "religious groups and the press" can be taxed to defray the costs of government, the flat license fees imposed constitutionally unacceptable burdens directly on the exercise of the Jehovah's 'Witnesses' First Amendment rights: "It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon."⁴⁴

The *Murdock* minority would have none of this. The ordinances, they contended, imposed "nondiscriminatory, nonexcessive taxation."⁴⁵ The *Murdock* majority thus created "a tax subsidy" by holding the Jehovah's Witnesses immune from the fees imposed by municipal ordinance.⁴⁶

A year later, *Follett* confirmed the Court's division. The narrow majority concluded again that the First Amendment requires exemption from a municipality's flat license fee for Jehovah's Witnesses' religious solicitors. The majority further denied that this conclusion "mean[s] that religious undertakings must be subsidized" or that religious groups and actors cannot be subject to taxation: "But to say that they, like other citizens, may be subject to general taxation does not mean that they can be required to pay a tax for the exercise of that which the First Amendment has made a high constitutional privilege."⁴⁷

Concurring with Justice Douglas's opinion for the *Follett* Court, Justice Murphy took particular aim at the minority's claim "that the effect of our decision is to subsidize religion:"⁴⁸ "[T]his is merely a harsh way of saying that to prohibit the taxation of religious activities is to give substance to the constitutional right of religious freedom."⁴⁹

⁴³ *Murdock*, 319 U.S. at 111.

⁴⁴ *Id.* at 112.

⁴⁵ *Id.* at 121 (Reed, J., dissenting).

⁴⁶ *Id.* at 130 (Reed, J., dissenting).

⁴⁷ *Follett*, 321 U.S. at 577-78.

⁴⁸ *Id.* at 578-79 (Murphy, J., concurring).

⁴⁹ *Id.* at 579 (Murphy, J., concurring).

The minority remained unconvinced. The challenged license fee was neither "discriminatory" nor "onerous."⁵⁰ As a result of the majority's decision exempting him from the municipal license fee, Mr. "Follett will enjoy a subsidy for his religion."⁵¹

Justice Murphy's observations presaged those of Professor Bittker a generation later and highlight the problematic nature of the tax subsidy label. It is only compelling to declare a tax exemption a subsidy after one has established the normative tax base from which such exemption is a departure. There is no subsidy if the activity excluded from taxation should not have been taxed in the first place. However, the *Murdock/Follett* minority never specifies the normative tax from which exemption for religious solicitors constitutes a subsidizing deviation.

The implicit premise of the minority's position is that the municipal ordinances in question establish normative taxes so that any deviation from the mandate of those ordinances constitutes a subsidy. But this unstated premise confronts, without answering, the entanglement concerns of the majority: if the ordinances unacceptably intrude upon the exercise of First Amendment rights by directly burdening religious solicitation, those ordinances cannot constitutionally establish a baseline from which deviations can be deemed subsidizing. By definition, an unconstitutional tax cannot serve as a normative baseline.

In short, the *Murdock/Follett* minority reasons circularly when it characterizes the judicially-created exemption for religious canvassers as a "subsidy." If one starts with the premise that the challenged municipal ordinances are a normative standard, it indeed creates an expenditure-type subsidy to exempt from their coverage religious solicitors. However, the premise that the ordinances can constitutionally serve as a normative baseline assumes away the majority's concern, i.e., that, as a First Amendment matter, entanglement considerations in the first instance preclude the application of these ordinances and their fees to religious solicitors. If entanglement concerns do forbid localities from assessing license fees from sectarian canvassers, tax statutes imposing such fees violate the First Amendment and, hence, cannot constitutionally serve as a baseline for measuring subsidization.

⁵⁰ *Id.* at 579-80 (Murphy, J., concurring).

⁵¹ *Id.* at 581 (Murphy, J., concurring).

The opinions of the *Murdock/Follett* minority further suggest why the Court's subsequent case law often focuses upon the simultaneous extension *vel non* of tax benefits to secular as well as religious institutions. If exemptions, exclusions, or deductions do constitute subsidies, subsidies restricted to religious entities and activities raise troubling Establishment Clause issues. Indeed, a subsidy underwriting only religious activity would appear to be the classic target at which the Establishment Clause is aimed. If, on the other hand, such tax provisions are characterized as subsidies but extend to broad categories of nonprofit institutions, it is arguably not religion as such being subsidized, but eleemosynary activity more generally.

While *Murdock* and *Follett* divided the Court, *Walz v. Tax Commission*, upholding New York's tax exemption for religious properties, was an 8-1 decision.⁵² However, the Court's near-unanimity as to result did not reflect near-unanimity as to reasoning as two of the eight justices who sustained the New York exemption did so on grounds quite different from those of their colleagues. Indeed, the Court's subsequent decisions made these concurrences, not the *Walz* majority opinion, the controlling statement of the Court's jurisprudence in this area.⁵³

Writing for six members of the *Walz* majority, Chief Justice Burger sustained New York's real property tax exemption for religious institutions in entanglement/accommodation terms. The goal of the Court's First Amendment jurisprudence, Chief Justice Burger wrote, is to find a path between the Establishment and Free Exercise Clauses "to avoid excessive entanglement" of government and religious institutions,⁵⁴ thereby "prevent[ing] the kind of involvement that would tip the balance toward government control of churches or government restraint on religious practice."⁵⁵

Given a constitutionally-based concern with "the autonomy and freedom of religious bodies,"⁵⁶ it is plausible for New York and other states to determine that such bodies "should not be inhibited in their activities by property taxation or the hazard of loss of those properties for nonpayment of taxes."⁵⁷

⁵² *Walz v. Tax Comm'n*, 397 U.S. 664, 669-70 (1970).

⁵³ See *infra* notes 91-159 and accompanying text.

⁵⁴ 397 U.S. at 669-70.

⁵⁵ *Id.*

⁵⁶ *Id.* at 672.

⁵⁷ *Id.*

Grants of exemption historically reflect the concern of authors of constitutions and statutes as to the latent dangers inherent in the imposition of property taxes; exemption constitutes a reasonable and balanced attempt to guard against those dangers. . . .⁵⁸

Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes. . . .⁵⁹

The hazards of churches supporting government are hardly less in their potential than the hazards of government supporting churches. . . .⁶⁰

The exemption creates only a minimal and remote involvement between church and state and far less than taxation of churches. It restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other.⁶¹

There is an important distinction between the *Murdock/Follett* version of First Amendment entanglement doctrine articulated by Justice Douglas and the entanglement jurisprudence enunciated by Chief Justice Burger in *Walz*. In *Murdock* and *Follett*, the Court held tax exemption to be constitutionally required. This represents entanglement concerns in their strongest possible formulation: exemption is constitutionally compelled to separate church and state. In contrast, the *Walz* Court held tax exemption to be constitutionally "permissible state accommodation" of religious institutions.⁶²

While entanglement concerns constitute the crux of Chief Justice Burger's *Walz* opinion, the opinion expounds two subthemes, both of which are important to the topic of this Article. First, Chief Justice Burger placed New York's exemption for religious institutions within the context of simultaneous exemption for the real property of secular eleemosynary institutions, "a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic

⁵⁸ *Id.* at 673.

⁵⁹ *Walz*, 397 U.S. at 674.

⁶⁰ *Id.* at 675.

⁶¹ *Id.* at 676.

⁶² *Id.* at 673.

groups."⁶³ New York thus does not exempt "churches as such."⁶⁴ Rather, New York "has an affirmative policy that considers these groups as beneficial and stabilizing influences in community life and finds this classification useful, desirable, and in the public interest."⁶⁵

These observations do not fit comfortably with the entanglement/accommodation theory at the core of the Chief Justice's *Waltz* opinion. There is, after all, no First Amendment restraint on government involvement with hospitals or playgrounds.

It is, accordingly, tempting to dismiss these observations as *dicta*. I think, however, that it is more sensible to read these comments as an answer to Justice Douglas's *Waltz* dissent.⁶⁶ Justice Douglas indicted the New York tax exemption as a subsidy. If there is a subsidy, Chief Justice Burger replied for the majority, it is not a subsidy of religion "as such" but a subsidy of eleemosynary activity more generally.

A second subtheme of the Chief Justice's *Waltz* opinion is the legislative discretion to determine tax classifications and rates. In *Gibbons v. District of Columbia*, the Supreme Court in 1886 construed a federal statute for the District of Columbia which limited tax exemption to church buildings and the land underlying such buildings.⁶⁷ On the basis of this statute, the *Gibbons* Court denied exemption to church-owned property which had been left vacant in anticipation of it becoming income-producing.⁶⁸ In *Waltz*, Chief Justice Burger quoted from the *Gibbons* decision:

In the exercise of this (taxing) power, Congress, like any State legislature unrestricted by constitutional provisions, may at its discretion wholly exempt certain classes of property from taxation, or may tax them at a lower rate than other property.⁶⁹

Chief Justice Burger cited this passage from *Gibbons* to demonstrate that the Court at that time implicitly accepted the constitutionality of tax exemptions for religious institutions.⁷⁰ This reading is fair as far as it goes. However, the passage from *Gibbons* implies more than

⁶³ *Id.*

⁶⁴ *Waltz*, 397 U.S. at 673.

⁶⁵ *Id.*

⁶⁶ *See id.* at 707.

⁶⁷ *See* 116 U.S. 404, 406 (1886).

⁶⁸ *See id.* at 428.

⁶⁹ *Waltz*, 397 U.S. at 679-80 (quoting *Gibbons*, 116 U.S. at 408). The parenthetical was added to the language of *Gibbons* by the Chief Justice.

⁷⁰ *See id.* at 680.

this: Congress "may at its discretion" tax certain properties at lower rates and may wholly exempt from taxation other kinds of properties.⁷¹

Read in the context of the original *Gibbons* opinion, the statement is consistent with the claim that legislatures possess great latitude in defining tax bases.⁷² That "discretion," in turn, suggests the challenge inherent in identifying normative tax bases and the consequent difficulty proclaiming any particular exclusion, exemption, or deduction as subsidizing rather than base-defining: there is no subsidy until there is a generally-accepted normative base from which such exclusion, exemption, or deduction is a deviation. Since, however, legislatures have great discretion when defining tax bases, it is often problematic to label a tax provision as a subsidy.

Justice Brennan's concurrence in *Walz*, while supporting the majority's result, does not embrace its entanglement/accommodationist reasoning⁷³ but, rather, focuses upon the broad range of secular institutions and activities supported by the exemption. Indeed, there is a straight line from Justice Brennan's *Walz* concurrence, supporting tax exemption for churches as part of a broad exemption for sectarian and secular eleemosynary property, to Justice Brennan's *Texas Monthly* opinion, rejecting sales tax exemption limited to religious publications.⁷⁴

While Justice Brennan opined that "[t]ax exemptions and general subsidies. . . are qualitatively different" from one another, his doctrinal support for the property tax exemption of religious property ultimately rests on subsidy grounds.⁷⁵ New York's exemption of church properties serves the secular purpose of encouraging churches'

⁷¹ See *id.*

⁷² See, e.g., Bittker, *supra* note 25, at 244; Edward A. Zelinsky, *For Realization: Income Taxation, Sectoral Accretionism, and the Virtue of Attainable Virtues*, 19 CARDOZO L. REV. 861, 889-93 (1997).

⁷³ Justice Brennan does mention entanglement concerns. See *Walz*, 397 U.S. at 691-92 ("the termination of exemptions would give rise" to entanglement problems.). However, Justice Brennan makes these comments almost in passing; they are not central to his analysis. See *id.*

⁷⁴ See *Texas Monthly v. Bullock*, 489 U.S. 1, 5-25 (1989).

⁷⁵ See *Walz*, 397 U.S. at 690. Much of Justice Brennan's concurrence is historical in nature, designed to demonstrate that, as a matter of past practice, property tax exemptions for churches were considered acceptable under the First Amendment. See *id.* at 681-88. As I suggest, *infra*, this historical data ultimately suggests that the founding generation conceived of tax exemption as a form of separation, not subsidy.

public service activities and of a pluralistic society. During their ordinary operations, most churches engage in activities of a secular nature that benefit the community; and all churches by their existence contribute to the diversity of association, viewpoint, and enterprise so highly valued by all of us.⁷⁶

It was, moreover, critical to Justice Brennan that this exemption covers both the properties of secular institutions and the properties in which churches conduct secular activities:

[T]hese [religious] organizations are exempted because they, among a range of other private, nonprofit organizations contribute to the well-being of the community in a variety of nonreligious ways, and thereby bear burdens that would otherwise either have to be met by general taxation, or be left undone, to the detriment of the community. . . .⁷⁷ Government may properly include religious institutions among the variety of private, nonprofit groups that receive tax exemptions, for each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society.⁷⁸

It is thus not surprising that, when *Texas Monthly* confronted the Court with a sales tax exemption limited to religious publications, Justice Brennan found that narrow exemption distinguishable from the broad exemption at issue in *Walz*.⁷⁹

Justice Harlan's *Walz* concurrence endorses Justice Brennan's emphasis on the breadth of the New York exemption.⁸⁰ Moreover, Justice Harlan linked that breadth with entanglement concerns, concluding that there is less entanglement danger when an exemption is broad:

⁷⁶ *Id.* at 692-93.

⁷⁷ *Id.* at 687. Chief Justice Burger, for the *Walz* majority, specifically rejected any linkage between churches' property tax exemptions and their secular good works. See *id.* at 674.

⁷⁸ *Id.* at 689.

⁷⁹ See *Texas Monthly*, 489 U.S. at 14.

⁸⁰ See 397 U.S. at 697 (Harlan, J., concurring) ("As long as the breadth of exemption includes groups that pursue cultural, moral, or spiritual improvement in multifarious secular ways, including, I would suppose, groups whose avowed tenets may be antitheological, atheistic, or agnostic, I can see no lack of neutrality in extending the benefit of the exemption to organized religious groups.").

In the instant case noninvolvement is further assured by the neutrality and breadth of the exemption. In the context of an exemption so sweeping as the one before us here its administration need not entangle government in difficult classifications of what is or what is not religious, for any organization—although not religious in a customary sense—would qualify under the pervasive rubric of a group dedicated to the moral and cultural improvement of men. Obviously the more discriminating and complicated the basis of classification for an exemption—even a neutral one—the greater the potential for state involvement in evaluating the character of the organizations.⁸¹

These observations highlight the ambiguity, in the tax context, of the concept of entanglement. Justice Harlan suggested that a property tax exemption limited to only religious organizations is more entangling than no exemption at all since a limited exemption involves litigation and controversy as to its boundaries. Thus, at its core, Justice Harlan's concept of entanglement is the avoidance of conflict as opposed to the accommodation of autonomy or, in Professor Brody's apt phrase, the sovereignty of religious institutions. From the latter perspective, an exemption applicable only to religious actors, like the judicially-created exemption of *Murdock* and *Follett*, can represent non-entanglement at its most fundamental—the recognition that Free Exercise entails a zone of religious autonomy into which the government may not intrude via taxation.

In short, Justice Harlan's entanglement doctrine represents that doctrine in its weakest form, unconcerned in the Free Exercise context with the institutional and communal autonomy of religious entities and individuals, but merely concerned with the avoidance of litigation and conflict between church and state. Under this approach, tax statutes which tax religious organizations and practices are defensible in First Amendment terms, as such statutes avoid borderline disputes over narrowly drawn exemptions.

In contrast, Justice Burger's opinion for the *Walz* majority exemplifies entanglement theory in a stronger form, sensitive to the sovereignty of religious organizations and actors, allowing the state to exempt religious institutions from taxation to avoid governmental intrusion upon the resources and autonomy of religious institutions

⁸¹ *Id.* at 698–99 (Harlan, J., concurring).

and actors. Under this permissive/accommodationist approach, the state has wide latitude to grant tax benefits to religious persons because such benefits are understood as recognizing sectarian autonomy, protected by the First Amendment.

Finally, *Murdock* and *Follett* represent entanglement theory in its strongest form, compelling government to grant tax exemption to protect the sovereignty of religious organizations and actors.

Justice Douglas, the author of *Murdock* and *Follett*, was the dissenter in *Walz*. For purposes of the present discussion, three aspects of Justice Douglas' *Walz* opinion are noteworthy. First, Justice Douglas based his dissent on the theory that "[a] tax exemption is a subsidy."⁸² "I would suppose that in common understanding one of the best ways to 'establish' one or more religions is to subsidize them, which a tax exemption does."⁸³

Second, Justice Douglas rejected the contention, accepted by Justices Harlan and Brennan, that the subsidization of religious entities is constitutionally permissible when matched by equivalent subsidization of secular nonprofits:

Government could provide or finance operas, hospitals, historical societies, and all the rest because they represent social welfare programs within the reach of the police power. In contrast, government may not provide or finance worship because of the Establishment Clause any more than it may single out "atheistic" or "agnostic" centers or groups and create or finance them.⁸⁴

Finally, Justice Douglas, not surprisingly felt compelled to reconcile his *Murdock* and *Follett* opinions with his constitutional condemnation of New York's property tax exemption. *Murdock*, Justice Douglas noted, distinguished between a constitutionally forbidden tax imposed directly on religious activity and a constitutionally acceptable levy imposed on the income of religious actors or on the "property used or employed in connection with those activities."⁸⁵

However, this observation, accurate as far as it goes, does not fully address the tension between, on the one hand, the exemption-as-subsidy argument embraced by Justice Douglas in *Walz* ("[a] tax ex-

⁸² *Id.* at 704 (Douglas, J., dissenting).

⁸³ *Id.* at 701 (Douglas, J., dissenting).

⁸⁴ *Id.* at 708-09 (Douglas, J., dissenting).

⁸⁵ 397 U.S. at 707 (Douglas, J., dissenting) (quoting *Murdock*, 319 U.S. at 112).

emption is a subsidy"⁸⁶), and, on the other hand, the rejection of the subsidy label in *Murdock* and *Follett* (*Murdock* and *Follett* do not "mean that religious undertakings must be subsidized"⁸⁷).

The divisions manifest in *Murdock*, *Follett*, and *Waltz* reappear in *Texas Monthly*.⁸⁸ Like *Waltz*, *Texas Monthly* produced four separate opinions. However, unlike *Waltz*, in *Texas Monthly*, no single opinion garnered the support of more than three justices. Quite aptly, Judge Noonan has labeled *Texas Monthly* an "enigma."⁸⁹

Texas Monthly involved a Texas sales tax statute which applied to all secular publications but not to religious literature. In a plurality opinion joined by Justices Marshall and Stevens, Justice Brennan found this narrowly focused sales tax exemption for religious publications distinguishable from the broad property tax exemption upheld in *Waltz*. Hence, the Texas sales tax statute violated the Establishment Clause.

The central focus of Justice Brennan's *Texas Monthly* opinion is the same as of his *Waltz* concurrence: the breadth of the tax exemption. According to Justice Brennan, in *Waltz*, it was critical that the property tax exemption sustained by the Court excludes from taxation "real estate owned by a wide array of nonprofit organizations."⁹⁰

The breadth of New York's property tax exemption was essential to our holding that it was 'not aimed at establishing, sponsoring, or supporting religion,' but rather possessed the legitimate secular purpose and effect of contributing to the community's moral and intellectual diversity and encouraging private groups to undertake projects that advanced the community's well-being and that would otherwise have to be funded by tax revenues or left undone.⁹¹

As a summary of Justice Brennan's own *Waltz* concurrence, as well as Justice Harlan's separate opinion, this characterization is accurate.⁹² It is, however, not a convincing portrayal of Chief Justice Burger's majority opinion for himself and five of his colleagues, an opinion which concentrates upon "the autonomy and freedom of religious

⁸⁶ *Id.* at 704 (Douglas, J., dissenting).

⁸⁷ *Follett*, 321 U.S. at 577-78.

⁸⁸ *Texas Monthly*, 489 U.S. at 1.

⁸⁹ JOHN T. NOONAN, JR., *THE LUSTRE OF OUR COUNTRY* 195 (1998).

⁹⁰ See *Texas Monthly*, 489 U.S. at 5.

⁹¹ *Id.* at 12 (internal citation omitted).

⁹² See *Waltz*, 397 U.S. at 690-704.

bodies" and which addresses the breadth of the New York exemption as a secondary theme.⁹³

Justice Brennan's emphasis upon the reach of the New York property tax exemption, and the contrasting narrowness of the Texas sales tax exemption, is understandable in light of his other critical move in *Texas Monthly*: "Every tax exemption constitutes a subsidy."⁹⁴ It is a short step from this premise to the conclusion that "Texas' narrow exemption"⁹⁵ for sales of religious literature violates the Establishment Clause as a forbidden government subsidy of religion.

Once again, difficulties appear if we probe beneath the "subsidy" label. Suppose a state with no corporate income tax but with a sales tax. Few, if any, would say that such a tax scheme subsidizes religious corporations by exempting their incomes from taxation. In this instance, no corporate income is taxed. The generally-accepted characterization of this hypothetical state's tax code would be that this state has, for better or worse, selected sales as a tax base and excluded corporate income from taxation as a matter of base definition.

It is consequently not true that "[e]very tax exemption constitutes a subsidy."⁹⁶ As Professor Bittker noted over a generation ago, it is only sensible to speak of exemptions as subsidies if there is an agreed upon tax base from which such exemptions deviate.⁹⁷

The inquiry thus becomes whether there is a generally-accepted normative tax base from which the Texas exemption for sales of religious literature deviates. The implicit premise of Justice Brennan's opinion is that the normative base is a tax on all sales; hence, to exclude from taxation sales of religious literature is a subsidizing departure from the normative base. This, in turn, raises the question whether "all sales" is a constitutionally proper tax base from which to measure subsidizing deviations or whether, as a First Amendment matter, it is normatively appropriate for Texas to define its sales tax base to accommodate religious activity.

In sum, that Texas' sales tax exemption for religious literature constitutes a "subsidy" is a conclusion, not an analysis. That conclusion depends upon whether such an exemption entangles secular and sectarian authority unacceptably, or whether exemption is required (or permitted) to prevent such entanglement. If that exemption is

⁹³ *Id.* at 672.

⁹⁴ 489 U.S. at 14.

⁹⁵ *Id.* at 15.

⁹⁶ *Id.* at 14.

⁹⁷ See Bittker, *supra* note 25, at 260-61.

constitutionally mandated or permitted, the exemption is not a "subsidy" but, rather, implements a constitutionally proper tax base.

Consequently, it is critical which version of entanglement doctrine is applied to the Texas sales tax statute. The *Murdock/Follett* rendition of entanglement theory indicates that Texas' sales tax exemption for religious literature is constitutionally required. Justice Burger's accommodationist version of entanglement doctrine suggests that this exemption is constitutionally permissible. Justice Harlan's formulation of entanglement theory indicates that this narrow exemption is constitutionally forbidden. Not surprisingly, Justice Brennan, and his two colleagues who constituted the *Texas Monthly* plurality, opted for Justice Harlan's approach.

To nudge aside *Murdock, Follett*, and their strong form of entanglement theory, Justice Brennan deployed a dual strategy: to "disavow" parts of the *Murdock* and *Follett* opinions and to cabin what is subsequently left of those opinions into the particular factual circumstances of those cases.⁹⁸ The plurality's outcome in *Texas Monthly* is, Justice Brennan acknowledged, "admittedly in tension with some unnecessarily sweeping statements in" *Murdock* and *Follett*.⁹⁹ Indeed. As noted earlier, the *Murdock* Court declared: "The constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books."¹⁰⁰

For the *Texas Monthly* plurality, precisely the opposite is true: differential sales tax treatment for religious and nonreligious publications constitutes an unacceptable subsidization of religion. Hence, to the extent *Murdock* and *Follett* suggest otherwise, Justice Brennan and his colleagues "disavow[ed]" those opinions.¹⁰¹

Since Justice Brennan and his two colleagues did not overrule *Murdock* and *Follett*¹⁰² (but just "disavow[ed]" those opinions' "unnecessarily sweeping statements"), they sought to distinguish *Murdock* and *Follett* from *Texas Monthly* by emphasizing three aspects of the municipal license fees challenged in those earlier cases. First, the fees challenged in those cases were "occupation tax[es]" unlike the sales tax at

⁹⁸ See *Texas Monthly*, 489 U.S. at 21-22.

⁹⁹ *Id.* at 22.

¹⁰⁰ 319 U.S. at 111.

¹⁰¹ *Texas Monthly*, 489 U.S. at 21.

¹⁰² Indeed, it is not clear what it would mean for three justices to overrule prior precedent.

issue in *Texas Monthly*.¹⁰³ Second, the *Murdock/Follett* municipal fees were "flat"¹⁰⁴ levies which imposed upon religious canvassers burdens "far from negligible."¹⁰⁵ Finally, the municipal taxes imposed in *Murdock* and *Follett* "restrain[ed] in advance"¹⁰⁶ by requiring payment before the Jehovah's Witnesses engaged in religious solicitation.

Little of this is persuasive. Why is it constitutionally relevant that the *Murdock/Follett* fees were structured as license fees on the occupation of soliciting while the Texas levy is denominated a sales tax? Justice Brennan never tells us why the formalistic distinction is relevant. The economic incidence of the two levies is the same. To the extent the taxes are passed onto purchasers, both increase the final price of religious materials; to the extent the taxes are absorbed by the sellers, both levies discourage the purveyors of religious materials. Thus, as a substantive matter, it makes no difference whether the tax is styled as an occupational fee or as a sales tax.¹⁰⁷

It, moreover, rewrites *Murdock* and *Follett* to characterize the burdens imposed by the municipal ordinances as "far from negligible."¹⁰⁸ The *Murdock/Follett* dissenters consistently noted the absence of evidence that the challenged municipal license fees were onerous; the majority never disagreed. It thus revises the story of *Murdock* and *Follett* to suggest that the Court invalidated the municipal fees as economically burdensome.

It is, finally, true that the license fees imposed in *Murdock* and *Follett* are payable prior to solicitation and sales while the Texas tax is collected after the sale occurs and the seller has cash with which to pay the tax. From a cash flow perspective, a tax collected earlier, prior to the event giving rise to taxpayer liquidity, is obviously tougher on the taxpayer than a tax collected later, when the taxpayer has the cash with which to pay.¹⁰⁹ It is, however, difficult to see that the broad con-

¹⁰³ *Texas Monthly*, 489 U.S. at 24.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 23.

¹⁰⁶ *Id.* at 24 (quoting *Murdock*, 319 U.S. at 114).

¹⁰⁷ Indeed, in *Swaggart Ministries v. Board of Equalization*, Justice O'Connor distinguished *Follett* and *Murdock* on the other two grounds suggested by Justice Brennan in *Texas Monthly* but did not pursue his distinction between occupation and sales taxes. See generally *Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378 (1990).

¹⁰⁸ *Texas Monthly*, 489 U.S. at 23.

¹⁰⁹ Such liquidity concerns constitute a major justification for the income tax rule of realization which generally postpones taxation until the taxpayer has cash. See Zelinsky, *supra* note 72, at 889-93.

stitutional assertions of *Murdock* and *Follett* come, in the final analysis, down to this.

In short, Justice Brennan's approach to *Murdock* and *Follett* is unpersuasive. However, by rejecting the *Murdock/Follett* version of entanglement doctrine in its strongest form, Justice Brennan set the groundwork for his embrace of the weaker version of entanglement theory exemplified by Justice Harlan's *Walz* concurrence. Under that theory, Texas' narrow exemption of religious publications from sales taxation "produce[s] greater state entanglement with religion than the denial of an exemption" since the state must determine the borders of that restricted exemption and such determination will enmesh the state in conflict with groups claiming the protection of the exemption.¹¹⁰

As the *Texas Monthly* dissenters noted,¹¹¹ Chief Justice Burger's *Walz* opinion offers an alternative view of entanglement, one which justifies a narrow tax exemption as accommodating the autonomy of religious actors. In this sense, the *Texas Monthly* plurality assumes the answer to the critical question of the case, i.e., whether a narrow tax benefit restricted to religious entities causes more entanglement (because of the need to define the benefit's borders) or less entanglement (because the state respects the autonomy of the religious sector by not taxing it).

By assuming the former version of entanglement doctrine, Justice Brennan and his two colleagues answer in the affirmative the inquiry of this Article: tax exclusions, deductions, and exemptions for religious institutions are, as a constitutional matter, dependent upon the extension of the same exclusions, deductions, and exemptions to secular entities; narrow exemptions for religious bodies and undertakings enmesh government and sectarian institutions in constitutionally unacceptable conflict over boundary definitions.

Justice White concurred in striking down the Texas sales tax exemption, relying solely on the Press Clause of the First Amendment.¹¹² Hence, the critical fifth and sixth votes against the Texas exemption came from Justices Blackmun and O'Connor.

Writing for them both, Justice Blackmun was uncomfortable with the plurality's approach to *Follett* and *Murdock*. Ultimately, however, Justice Blackmun's concurrence comes to the same conclusion as Jus-

¹¹⁰ *Texas Monthly*, 489 U.S. at 20.

¹¹¹ *See id.* at 33-41.

¹¹² *See id.* at 25 (Blackmun, J., concurring).

tice Brennan's plurality opinion: a narrow sales tax exemption restricted to religious publications violates the Establishment Clause; a broader exemption, for a larger class subsuming religious literature, passes constitutional muster.

On the one hand, the plurality, according to Justice Blackmun, unnecessarily "repudiat[es] *Follett* and *Murdock*,"¹¹³ both "longstanding precedents."¹¹⁴ On the other hand, "a tax exemption *limited to the sale of religious literature by religious organizations* violates the Establishment Clause."¹¹⁵

For Justice Blackmun, *Follett* and *Murdock* might be reconciled with an Establishment Clause prohibition on state sales taxes "exempting religious literature alone."¹¹⁶ While the task of such reconciliation "may be left for another day,"¹¹⁷ the implication is that states must exempt religious literature from sales taxation but must also structure their sales tax exemptions broadly to include significant nonreligious publications as well. "[W]hether or not *Follett* and *Murdock* prohibit taxing the sale of religious literature, the Establishment Clause prohibits a tax exemption limited to the sale of religious literature."¹¹⁸

Thus, while the tone and reasoning of Justice Blackmun's concurrence differs from that of the *Texas Monthly* plurality, the bottom line is the same: a sales tax exemption limited to religious publications violates the Establishment Clause; to pass constitutional muster, an exemption covering sales of religious literature must cover sales of secular literature as well.

In *Texas Monthly*, Justice Scalia dissented for himself, Chief Justice Rehnquist, and Justice Kennedy and denounced the opinions of Justices Brennan and Blackmun "[a]s a judicial demolition project"¹¹⁹ which invalidated, not just sales tax exemptions of the sort at issue in *Texas Monthly*, but a variety of tax benefits which apply only to religious actors and activities. Such tax benefits "permeate the state and federal codes," including the federal income tax exclusion for parsonages and parsonage allowances.¹²⁰

¹¹³ *Id.* at 27 (Blackmun, J., concurring).

¹¹⁴ *Id.* (White, J., concurring).

¹¹⁵ *Texas Monthly*, 489 U.S. at 28 (Blackmun, J., concurring).

¹¹⁶ *Id.* at 29 (Blackmun, J., concurring).

¹¹⁷ *Id.* at 28 (Blackmun, J., concurring).

¹¹⁸ *Id.* at 29 (Blackmun, J., concurring).

¹¹⁹ *Id.* at 29. While disagreeing with Justice White, Justice Scalia was somewhat more understated in describing that disagreement. See *id.* at 44-45 (Scalia, J., dissenting).

¹²⁰ *Texas Monthly*, 489 U.S. at 33 (Scalia, J., dissenting).

Citing *Walz* as an exemplar of the "accommodation principle,"¹²¹ Justice Scalia correctly observed that Justice Brennan had conflated his and Justice Harlan's *Walz* concurrences with Chief Justice Burger's majority opinion.¹²² While that majority opinion had noted the breadth of the New York property tax exemption, that breadth was not critical to the majority's reasoning.¹²³ Rather, the central theme of *Walz* was the "accommodation principle":¹²⁴ "The [*Walz*] Court did not approve an exemption for charities that happened to benefit religion; it approved an exemption for religion as an exemption for religion."¹²⁵

Moreover, the Texas sales tax exemption, like the New York property tax exemption, reduces entanglement:

[H]ere as in *Walz*, it is all but certain that elimination of the exemption will have the effect of *increasing* government's involvement with religion. The Court's invalidation of [the sales tax exemption] ensures that Texas churches selling publications that promulgate their religion will now be subject to numerous statutory and regulatory impositions, including audits, requirements for the filing of security, reporting requirements, writs of attachment without bond, tax liens, and the seizure and sale of property to satisfy tax delinquencies.¹²⁶

There is an important distinction in Justice Scalia's use of the terms "accommodation" and "entanglement." He used the latter term in a sense similar to Justice Harlan's, i.e., the avoidance of litigation and enforcement-based conflict, and reserved the term "accommodation" to describe more fundamental governmental respect for the autonomy and sovereignty of religious bodies. In the end, such accommodation/entanglement concerns led Justice Scalia and his colleagues to conclude that tax benefits for religious institutions and actors properly recognize the autonomy of religious institutions and do not depend upon the simultaneous extension of such benefits to secular entities and undertakings. Hence, such tax benefits are constitu-

¹²¹ *Id.* at 39 (Scalia, J., dissenting).

¹²² *Id.* at 33 (Scalia, J., dissenting).

¹²³ *Id.* at 36-37 (Scalia, J., dissenting).

¹²⁴ *Id.* at 38-41 (Scalia, J., dissenting).

¹²⁵ *Texas Monthly*, 489 U.S. at 38 (Scalia, J., dissenting).

¹²⁶ *Id.* at 44 (Scalia, J., dissenting) (internal citations omitted).

tional when extended to religious groups alone along such lines as the Texas sales tax exemption.

The *Texas Monthly* dissenters also found greater force in *Follett* and *Murdock* than did Justice Brennan. While *Follett* and *Murdock* "are narrowly distinguishable," wrote Justice Scalia, since the Texas sales tax "exemption comes so close to being a constitutionally required accommodation, there is no doubt that it is at least a permissible one."¹²⁷

In short, for the *Texas Monthly* dissenters, *Follett*, *Murdock*, and the "accommodation principle" articulated by Chief Justice Burger in *Waltz* indicate that the Texas sales tax exemption for religious literature is, as a First Amendment matter, "not only permissible but perhaps required."¹²⁸

Judge Noonan has characterized *Texas Monthly* as marking the end of the Supreme Court's "*Murdock* mind."¹²⁹ Perhaps so. But in *Texas Monthly*, two concurring justices struggled with the scope of the *Murdock/Follett* principle while the three dissenters professed their adherence to those earlier decisions.¹³⁰

It is therefore all the more striking that the Court's subsequent decision in *Jimmy Swaggart Ministries v. Board of Equalization* resulted in a single unanimous opinion which effectively eviscerated *Murdock* and *Follett*, and which, for all practical purposes, embraced Justice Brennan's opinions in *Waltz* and *Texas Monthly* as the Court's controlling doctrine.¹³¹

California's sales tax statute contains no exemption for religious items. Jimmy Swaggart Ministries sold religious merchandise in California and claimed a constitutional right to sales tax exemption per *Murdock* and *Follett*.¹³² Justice O'Connor, writing for a unanimous Court, rejected this claim to constitutional exemption from California's sales tax.

Justice O'Connor, echoing Justice Brennan's *Texas Monthly* opinion,¹³³ found the key distinctions between the California sales tax and

¹²⁷ *Id.* at 41-42 (Scalia, J., dissenting).

¹²⁸ *Id.* at 41 (Scalia, J., dissenting).

¹²⁹ NOONAN, *supra* note 89, at 193.

¹³⁰ See *supra* notes 111-128 and accompanying text.

¹³¹ *Swaggart Ministries*, 493 U.S. at 378.

¹³² Jimmy Swaggart Ministries also sold admittedly nonreligious items in California, but did not claim sales tax exemption for these.

¹³³ While Justice O'Connor, like Justice Brennan, focused upon the flat and prepaid nature of the *Murdock/Follett* license fees, Justice O'Connor did not pursue Justice Bren-

the municipal license fees at issue in *Murdock* and *Follett* to be the flat and prepaid nature of those municipal fees.¹³⁴ In *Murdock* and *Follett*, Justice O'Connor wrote, the "primary vice of the ordinances at issue was that they operated as prior restraints of constitutionally protected conduct," i.e., the rights of the Jehovah's Witnesses to engage in religious solicitation.¹³⁵ Such fees "act[ed] as a *precondition* to the free exercise of religious beliefs" unlike the California sales tax, collected after a sale had occurred.¹³⁶ Moreover, the California sales tax is calibrated to the quantum of the taxpayer's sales; indeed, the tax "represents only a small fraction of any retail sale."¹³⁷

In short, in *Follett* and *Murdock*, it was "the particular nature of the challenged taxes" which violated the Free Exercise Clause as these were "flat license taxes that operated as a prior restraint on the exercise of religious liberty."¹³⁸

Justice O'Connor also concluded that the California sales tax, applied to Jimmy Swaggart Ministries, did not result in excessive entanglement of religion and government. In this context, Justice O'Connor used the term "administrative entanglement,"¹³⁹ signaling a limited definition of entanglement concerns:

Most significantly, the imposition of the sales and use tax without an exemption for appellant does not require the State to inquire into the religious content of the items sold or the religious motivation for selling or purchasing the items, because the materials are subject to the tax regardless of content or motive. From the State's point of view, the critical question is not whether the materials are religious, but whether there is a sale or a use, a question which only involves a secular determination.¹⁴⁰

This is Justice Harlan's conception of entanglement theory, the avoidance of conflict and litigation over borderlines. From this vantage, no sales tax exemption is less entangling than an exemption lim-

nan's third distinction between occupational taxes and sales taxes. See *Swaggart Ministries*, 493 U.S. at 387-89.

¹³⁴ *Id.*

¹³⁵ *Id.* at 387.

¹³⁶ *Id.*

¹³⁷ *Swaggart Ministries*, 493 U.S. at 389.

¹³⁸ *Id.* at 386.

¹³⁹ *Id.* at 393.

¹⁴⁰ *Id.* at 396.

ited to sales of religious items, given the borderline problems arising from such a limited exemption.

Indeed, once Justice O'Connor rejected the *Follett/Murdock* vision of constitutionally-required exemption to avoid intrusion into religious activity, the Harlan form of entanglement theory was the only approach available to her. By definition, the permissive, accommodationist version of entanglement doctrine articulated by Chief Justice Burger in *Walz* is inapplicable in a case like *Swaggart Ministries*, as California chose against accommodation by adopting a sales tax statute with no religious exemptions.

Particularly significant for the topic of this Article is Justice O'Connor's observation, in the context of her entanglement analysis, that *Walz* approved property tax exemption only "as part of a general exemption for nonprofit institutions."¹⁴¹ This observation effectively elevates the concurrences of Justices Brennan and Harlan into the Court's official understanding of *Walz*: tax exemptions, exclusions and deductions can only be granted to churches if such benefits are simultaneously extended to a broad class of properties.¹⁴² Moreover, while Justice O'Connor never formally uses the term "subsidy" in *Swaggart Ministries*, it is difficult to read that opinion as other than an embrace of Justice Brennan's perspective for the *Texas Monthly* plurality.

Indeed, the conflict between *Swaggart Ministries* (which finds little life in *Follett* and *Murdock*) and the analysis of the *Texas Monthly* dissenters (which sees greater vitality in those older decisions) leaves the reader wondering why those dissenters joined Justice O'Connor's opinion. At one level, the *Texas Monthly* dissent and *Swaggart Ministries* can be reconciled via the permissive nature of the accommodation principle: that Texas may constitutionally exempt religious literature from sales taxation does not mean that California must exempt in this fashion. At another level, however, the *Texas Monthly* dissent is more difficult to harmonize with Justice O'Connor's opinion in *Swaggart Ministries*, given their different perceptions of the scope of *Follett* and *Murdock*. If, as Justice Scalia wrote, *Texas Monthly* was a "judicial demolition project,"¹⁴³ *Swaggart Ministries* carted away the rubble—with no complaint from the *Texas Monthly* dissenters.

In contrast to the unanimously-decided *Swaggart Ministries*, the Court's earlier decision in *Mueller v. Allen* reflected another 5-4 split

¹⁴¹ *Id.* at 393.

¹⁴² See *Swaggart Ministries*, 493 U.S. at 393.

¹⁴³ See *Texas Monthly*, 489 U.S. at 29 (Scalia, J., dissenting).

among the justices.¹⁴⁴ In *Mueller*, the Court sustained against First Amendment challenge a Minnesota income tax deduction for parents' expenses for their children's elementary and secondary educations. A critical factor for the five justice majority was the facial breadth of the deduction, available not just to parents sending their children to sectarian schools but also to parents educating their offspring in public schools and in secular private institutions. For example, the Minnesota deduction is available if a parent living in one public school district pays tuition to send her child to a public school in another district.¹⁴⁵ The deduction is also available if a public school parent pays for "[c]ertain summer school tuition."¹⁴⁶ The deduction is specifically disallowed for the purchase of religious materials.¹⁴⁷

The majority's principal doctrinal problem in *Mueller* was to distinguish the Minnesota income tax deduction sustained in that case from the New York tax provision previously struck in *Committee for Public Education v. Nyquist*.¹⁴⁸ Among the relevant distinctions, according to the *Mueller* Court, was the limited availability of the *Nyquist* tax benefits, obtainable only by "parents of children in nonpublic schools."¹⁴⁹ In contrast, the Minnesota "deduction is available for educational expenses incurred by all parents, including those whose children attend public schools and those whose children attend nonsectarian private schools or sectarian private schools."¹⁵⁰

Since Minnesota grants the deduction for educational outlays "neutrally" to a broad spectrum of citizens, that deduction "is not readily subject to challenge under the Establishment Clause."¹⁵¹

In response to the assertion that, in practice, "the bulk of deductions" are taken by Minnesota parents sending their children to religious schools, the majority replied that the relevant consideration is the facial neutrality of the challenged statute.¹⁵² In response to the assertion that the Minnesota deduction requires excessive entanglement as "state officials must determine whether particular textbooks qualify for a deduction" by virtue of their secular content, the majority, without extensive analysis, concluded that that determination is no

¹⁴⁴ *Mueller v. Allen*, 463 U.S. 388 (1983).

¹⁴⁵ *Id.* at 391 n. 2, item 2.

¹⁴⁶ *Id.* at 391 n. 2, item 3.

¹⁴⁷ *Id.* at 390 n. 1 (reproducing MINN. STAT. § 290.09 (22) (2000)).

¹⁴⁸ 413 U.S. 756 (1973).

¹⁴⁹ 463 U.S. at 398.

¹⁵⁰ *Id.* at 397.

¹⁵¹ *Id.* at 398-99.

¹⁵² *Id.* at 401.

more entangling than other similar judgments the Court had previously approved as consistent with the First Amendment.¹⁵³ Finally, in language reminiscent of Chief Justice Burger's *Walz* opinion,¹⁵⁴ the *Mueller* Court noted the "broad latitude" of the Minnesota legislature in designing the state's income tax base.¹⁵⁵

In sum, for the *Mueller* Court, the facial breadth of the Minnesota tax deduction, available to public school parents and to parents sending their children to secular private schools, immunized the deduction from Establishment Clause challenge.

The *Mueller* minority accepted none of this. For the minority, the Minnesota tax deduction is indistinguishable from the New York tax provision struck in *Nyquist*. Each constitutes a "subsidy" of sectarian education in violation of the Establishment Clause.¹⁵⁶ Moreover, in practice, this tax subsidy is focused upon parents who utilize religious schools because such parents constitute "the vast majority of the taxpayers who are eligible to receive the benefit" of the deduction.¹⁵⁷ Even if, in practice, the deduction conferred benefits more broadly, according to the *Mueller* minority, the deduction would fail constitutional muster as furthering "the religious mission" of sectarian schools.¹⁵⁸

In short, for the *Mueller* dissenters, the breadth of the Minnesota deduction is illusory and irrelevant. The Minnesota deduction is a subsidy that, as a practical matter, subsidizes religious schools. Even if the deduction in practice subsidized more broadly, it would violate the Establishment Clause as supporting religious instruction.

III. ANALYSIS

In light of all of this, are tax benefits for religious institutions constitutionally dependent on benefits for secular entities?

As a matter of positive law, the answer is today a qualified "yes." The Court's current doctrine, as articulated in *Texas Monthly* and *Swaggart Ministries*, is that exemptions, exclusions, and deductions

¹⁵³ *Id.* at 403.

¹⁵⁴ See *Walz*, 489 U.S. at 680.

¹⁵⁵ *Mueller*, 463 U.S. at 396 (quoting *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 547 (1983)).

¹⁵⁶ *Id.* at 408-09 (Marshall, J., dissenting) ("The statute is little more than a subsidy of tuition masquerading as a subsidy of general educational expenses.").

¹⁵⁷ *Id.* at 405 (Marshall, J., dissenting).

¹⁵⁸ *Id.* at 409 n.2 (Marshall, J., dissenting).

limited to religious actors and activities constitute unconstitutional subsidies in violation of the Establishment Clause.

The strongest statements to the contrary remain *Murdock* and *Follett*, which indicate that exemption is constitutionally compelled for sectarian entities and undertakings when taxation intrudes too deeply upon the autonomy of religion. However, *Texas Monthly* and *Swaggart Ministries* indicate that there is little vitality left to *Follett* and *Murdock*. After *Texas Monthly* and *Swaggart Ministries*, it is hard to envision cases beyond the specific facts of *Follett* and *Murdock* in which tax benefits limited to religious organizations or activities are constitutionally compelled or permitted.

The qualification to this conclusion is that, strictly speaking, *Texas Monthly* and *Swaggart Ministries* did not inter *Follett* and *Murdock*. Indeed, in *Swaggart Ministries*, Justice O'Connor, writing for all nine members of the Court, was careful to observe that "it is of course possible to imagine that a more onerous tax rate, even if generally applicable, might effectively choke off an adherent's religious practices."¹⁵⁹ In practice, however, it is difficult to conceive of a sufficiently "onerous tax rate" which, if generally applied, would today cause the Court to invoke *Follett* and *Murdock* to exempt religious entities or actors.

The other support for tax benefits limited to religious institutions is the majority opinion in *Walz*, premised on a concern for the sovereignty of such institutions. The solicitude for "the autonomy and freedom of religious bodies"¹⁶⁰ which animated Chief Justice Burger's *Walz* opinion supports, in the name of accommodation, exemption from taxation for religious actors and activities, even if other non-profit institutions and undertakings (without the same First Amendment status) are not so exempted.

However, today it is not *Walz*, but the *Walz* concurrences of Justices Brennan and Harlan which guide the Court. Those concurrences approve of tax benefits for religious institutions only in the context of benefits applying broadly to secular eleemosynary entities and indicate that exemptions restricted to religious groups create unacceptable entanglement between church and state as they fight over the boundaries of such exemptions.

Finally, the *Mueller* Court grounded its approval of state tax deductions for parochial school expenses upon the availability of such

¹⁵⁹ 493 U.S. 378, 392 (1990).

¹⁶⁰ 397 U.S. 664, 672 (1970).

deductions for parents sending their children to public schools and to secular private schools.

The proverbial bottom line is that, given the Court's current case law, tax benefits extended to religious institutions are constitutional only as part of benefits granted more broadly to secular persons. In light of the Court's present predilection to characterize tax exemptions, exclusions, and deductions as subsidies, it is not surprising that the Court would, as a First Amendment matter, require such subsidies to be granted broadly and not just concentrated on religious entities and activities.

These conclusions do not end all inquiry. Most obviously, there is the question: How broad must a tax benefit be to be broad enough for First Amendment purposes? If, for example, a state granted property tax exemptions to churches and hospitals, but not to schools, museums, or other charitable institutions, would that exemption be broad enough to pass constitutional muster?

I leave detailed consideration of this question, and others, for another day. For purposes of this Article, I would simply paraphrase Lincoln and answer the inquiry—How broad must tax benefits be?—by responding: Broad enough to satisfy the Court.¹⁶¹

Although, as a matter of positive law, tax exemptions, exclusions, and deductions for religious institutions are today constitutional only if such benefits are simultaneously extended to secular entities, as a normative matter, I come to the opposite conclusion: the constitutionality of tax benefits for sectarian actors and undertakings should not depend upon benefits being granted concurrently to secular institutions.

The path to this conclusion starts with the recognition that the Court has often used the "subsidy" label in a conclusory fashion and ends with the judgment that Chief Justice Burger's accommodationist version of entanglement theory is, in the tax context, the most compelling of the available approaches.

As noted earlier, in discussion of tax exemptions, exclusions, and deductions, the term "subsidy" is typically invoked in a reflexive fashion which ignores the reality that much tax exemption is best understood as base defining.¹⁶² If, to modify an earlier example,¹⁶³ a municipality is financed exclusively by property taxes, it is not compelling

¹⁶¹ When asked "How long must a man's legs be?" President Lincoln is said to have answered, "Long enough to reach the ground."

¹⁶² See *supra* notes 13–24 and accompanying text.

¹⁶³ See *supra* notes 26–27 and accompanying text.

to characterize the municipality's failure to tax income and sales as a "subsidy" of income and sales. Rather, that the locality's taxing power excludes income and sales is a matter of tax base selection. Similarly, in *Murdock and Follett*, it is, as Justice Murphy noted,¹⁶⁴ unconvincing to characterize the Court as creating subsidies since, under the Court's holdings, the municipalities could not, consistent with the Free Exercise clause, impose their license taxes on religious canvassers. If the constitutionally-mandated tax base excludes such taxes to begin with, it is not a "subsidy" to refrain from taxation but, rather, the implementation of the constitutionally-required tax base.

In sum, no one has ever refuted Professor Bittker's observation of a generation ago¹⁶⁵ that the "subsidy" moniker is convincingly applied to an exemption, deduction, or exclusion only after there is agreement about a¹⁶⁶ normative tax base from which such exemption, deduction, or exclusion deviates.¹⁶⁷

Hence the analytical weakness of the Court's deployment of the "subsidy" designation: an exemption is a subsidy only if it deviates from a normative tax base. However, entanglement/accommodation concerns tracing back at least to *Walz* suggest that exemptions for religious entities are normatively appropriate recognitions of the autonomy of such entities. The reflexive invocation of the "subsidy" label, explicitly or implicitly, thus assumes away the key issue, i.e., whether tax exemption is a constitutionally proper acknowledgment of the sovereignty of sectarian institutions. If so, the resulting tax benefits are not subsidies because they implement, rather than deviate from, a normative tax base.

Consider again, in this context, *Texas Monthly*. If one grants the plurality's premise that Texas' sales tax exemption is a subsidy, the plurality's conclusion is compelling: because the subsidy extends only to religious publications, that subsidy runs afoul of the Establishment Clause as a subvention of religion. However, the "subsidy" label is only

¹⁶⁴ See *Follett v. Town of McCormick*, 321 U.S. 573, 578-79 (1944) (Murphy, J., concurring).

¹⁶⁵ See Bittker, *supra* note 25, at 260-61.

¹⁶⁶ Implicit in the use of the article "a" is an important contention: Since tax base definition typically involves selection from a range of plausible alternatives, there is typically no single normative tax but, rather, a spectrum of normatively plausible tax bases. Hence, it makes sense to speak of "a" normative tax, rather than "the" normative tax. Of course, tax expenditure stalwarts reject this approach. See Edward A. Zelinsky, *Qualified Plans and Identifying Tax Expenditures: A Rejoinder to Professor Stein*, 9 AM. J. TAX POL'Y 257, 259-62 (1991).

¹⁶⁷ See Bittker, *supra* note 25, at 260-61.

convincing after one rejects the proffered justification for the sales tax exemption—that it is a constitutionally permitted accommodation of the autonomy of religious institutions and activity. If that justification is correct, there is no “subsidy” in exempting sales of religious literature since, in respecting religious sovereignty, the Texas sales tax statute defines a constitutionally appropriate tax base.¹⁶⁸

Moreover, the emphasis of the *Mueller* majority on the breadth of the Minnesota tax deduction is only understandable if the majority implicitly accepted the “subsidy” label pinned by the minority on the deduction. If the deduction is a subsidy, it is sensible to defend that subsidy, as the majority did, by its facial breadth, breadth which suggests that the deduction subsidizes education, not religious education. If, in contrast, the deduction is not a subsidy, but, rather, a recognition of religious autonomy, the relevant issue is whether, under the First Amendment, such recognition of religious autonomy is constitutionally permissible.

There is, thus, an intimate relationship among the concepts of subsidy, tax base definition, and entanglement/accommodation: the “subsidy” label is convincing only after we define a normative tax base from which the alleged subsidy deviates. However, a tax base can constitutionally serve as a normative baseline only if it passes First Amendment muster in entanglement/accommodation terms.

In short, the underlying issue in these cases is not the classification *vel non* of a particular tax provision as a subsidy. Once we pierce through the “subsidy” label, the fundamental choice in these cases is the version of entanglement theory to be applied under the First Amendment.

Justice Harlan’s theory indicates that exemptions, deductions, and exclusions limited to religious institutions and actors are exces-

¹⁶⁸ From this vantage, *Swaggart Ministries* was correctly decided even if *Texas Monthly* was not. Once constitutionally-compelled exemption *a la Follett* and *Murdock* is foreclosed, the two remaining approaches to entanglement concerns are the contrasting vantages of Justice Harlan (exemption limited to religious entities creates unacceptable entanglement) and Chief Justice Burger (exemption of religious institutions is a constitutionally permissive accommodation of religion).

From both perspectives, there is no infirmity to California’s sales tax statute since, per the Burger formulation, accommodation is permitted but not required while, per the Harlan approach, California’s statute properly avoids entanglement by taxing religious publications, thereby foregoing border-defining conflict over the contours of a narrow exemption for religious literature.

Indeed, from this vantage, there is logic to the participation (if not the silence) of the *Texas Monthly* dissenters in *Swaggart Ministries*: Texas can recognize the autonomy of religious actors but California is not required to.

sively entangling because of the borderline conflict such narrowly-focused tax benefits engender. Chief Justice Burger's accommodationist vantage, on the other hand, suggests that taxing religious entities is entangling because of enforcement problems and that, in any event, respect for sectarian autonomy permits states to refrain from taxing. Insofar as these contrasting perspectives represent empirical disagreement, there is evidence on both sides and no yardstick of which I know with which to measure whether borderline or enforcement controversies entail greater entanglement.¹⁶⁹

The issue, at its core, turns, not on the much used "subsidy" label, but on one's conception of the mandate of the First Amendment. If the First Amendment permits governments to refrain from taxation in recognition of the sovereignty of religious actors and activities, Justice Burger wins the debate and tax benefits extended solely to religious institutions pass constitutional muster as acknowledgments of that sovereignty. If, in contrast, tax exemption limited to religious institutions constitutes impermissible governmental involvement in sectarian affairs, Justice Harlan wins the debate because such exemption involves borderline conflict of the sort against which Justice Harlan warned in *Walz*.

Reasonable and public-spirited persons disagree as to these matters. Let me suggest, however, that, in the context of tax exemptions, there are two tax-specific reasons for privileging the "accommodation principle"¹⁷⁰ over its competitor, the Harlan avoidance-of-conflict approach—reasons I think should be persuasive even for those generally unsympathetic to the accommodationist perspective.

The first of these reasons is historical: the accommodationist account explains the thoughts and actions of the founding generation. Much ink has been spilled addressing the apparent paradox that the founding generation proclaimed the separation of church and state while simultaneously confirming and extending tax exemption for churches.¹⁷¹ From a subsidy perspective, there is indeed a paradox to

¹⁶⁹ In recent times, the best known boundary dispute has been the protracted conflict between the IRS and the Church of Scientology over the federal income tax charitable deduction. See Paul Streckfus, *Scientology Case Redux*, 87 TAX NOTES 1414 (June 5, 2000). As to enforcement controversies, the most recent such controversy receiving national attention has been the IRS's seizure of the Indianapolis Baptist Temple to enforce tax liens. See *Government Seizes Indianapolis Church in Tax Dispute*, 2001 TAX NOTES TODAY, Feb. 14, 2001, at 36-108.

¹⁷⁰ *Texas Monthly*, 489 U.S. at 39 (Scalia, J., dissenting).

¹⁷¹ See, e.g., *Walz*, 397 U.S. at 661-68 (Brennan, J., concurring), 704-07 (Douglas, J., concurring), 716-27 (appendix to Justice Douglas' dissent).

proclaiming that religion should be disestablished while concurrently confirming the subsidization of religion via tax benefits.

However, the contradiction disappears if the founding generation did not think of tax exemption as subsidy, but as neutrality. We should apply our intellectual categories to the past with great care. As Professor Diamond observes, the irregular nature of taxation in colonial times suggests that exemptions carried different meaning then than now.¹⁷² Moreover, the colonists continued many pre-existing exemptions with little discussion, almost as a matter of inertia.

On balance, the most sensible resolution of the asserted paradox of the founding generation simultaneously propounding separationism and exemption is that that generation thought of exemption as a form of separationism, in our vocabulary, a recognition of sectarian autonomy. The founders thus, by their actions, implicitly sided with the Chief Justice in the Burger-Harlan debate: tax exemption properly recognizes sectarian autonomy and is accordingly compatible with the separation of church and state.

The second reason, in the tax context, for preferring the accommodationist version of entanglement theory is the illusory nature of Justice Harlan's promise that conflict will be avoided by taxing churches. Whether the state taxes or exempts religious groups, there will be conflict between secular and sectarian authority. If churches are tax exempt, the conflict will, as Justice Harlan observed, be over the boundaries of exemption; if churches are taxed, the conflict, as Chief Justice Burger suggested,¹⁷³ will be over enforcement. Indeed, the problems of valuing religious assets for property taxation seem particularly severe.¹⁷⁴

If Justice Harlan's account of taxation as conflict avoiding were persuasive, it might convince us to disregard the lessons to be drawn from history and conclude that taxing religious institutions entangles government and church less than exempting such institutions. But that account is ultimately unpersuasive since taxing sectarian actors and activity is as litigation-engendering as granting them exemption.

¹⁷² See Diamond, *supra* note 15.

¹⁷³ See *Waltz*, 397 U.S. at 674; *id.* at 698-99 (Harlan, J., concurring).

¹⁷⁴ The valuation of real estate is often difficult under real property and transfer tax systems. See Edward A. Zelinsky, *For Realization: Income Taxation, Sectoral Accretionism, and the Virtue of Attainable Virtues*, 19 CARDOZO L. REV. 861, 881-83 (1997). For much single purpose religious property, valuation problems are even greater, given the infrequency with which such property is sold and such property's non-income producing nature.

The upshot, I suggest, is that the accommodationist perspective is the most convincing of the alternatives in the tax context. If, in accordance with that perspective, the First Amendment permits governments to refrain from taxation as a recognition of the autonomy of religious institutions and undertakings, tax benefits extended solely to religious institutions should pass constitutional muster as acknowledgments of that autonomy and should not be dismissed in conclusory fashion as subsidies of the sectarian.¹⁷⁵

CONCLUSION

Today, the Supreme Court's case law generally conditions tax exemptions, deductions, and exclusions for religious institutions upon the concurrent extension of such benefits to secular entities and activities. The Court's position flows logically from its acceptance of the premise that tax exemptions, deductions, and exclusions constitute subsidies.

However, as a normative matter, my conclusion is to the contrary. In the context of tax benefits, the "subsidy" label is usually deployed in a conclusory and unconvincing fashion. The First Amendment is best understood as permitting governments to refrain from taxation to accommodate the autonomy of religious actors and activities; hence, tax benefits extended solely to sectarian institutions should pass constitutional muster as recognition of that autonomy. Since it is most compelling to conceive of religious tax exemption as the acknowledgment of sectarian sovereignty, rather than the subsidization of religion, there is no convincing constitutional reason to link that exemption to the simultaneous extension of comparable tax benefits to secular entities and undertakings.

In the final analysis, tax exemption does not subsidize churches, but leaves them alone.

¹⁷⁵ As noted previously, tax benefits limited to religious institutions may raise policy considerations which suggest that such benefits should be offered more broadly. My conclusion is that tax deductions, exclusions, and exemptions restricted to religious institutions are constitutional, not that they are necessarily wise.