NEW JERSEY POLICY PERSPECTIVE

Free New Jersey:
The Burden of Property Tax Exemptions
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INTRODUCTION

Imagine a colonial New Jersey town 300 years ago. It has one church; the townspeople are predominantly of one faith. The town is miles from its nearest neighbor, so everyone lives, works and goes to school there. There is a town doctor, but no hospital. The town has businesses that trade on the river and serve surrounding farmers from time to time, but for the most part the residents consume what services the town provides. And these services are relatively few, so government expenses are low and paid for entirely by a tax the town levies on residents' homes and land-a property tax, as it were.

In this era-before "separation of church and state"-religious institutions were closely identified with the government, in the tradition of the divine right of kings. No property taxes were levied on the church nor were they on the school because they were considered-like the church-to be no more than extensions of the private property of the townspeople, who already carried the tax burden. The people who would pay a tax on the church and school were the same people whose property already was being taxed, so taxing the institutions themselves would be duplicative.

Now imagine this same place today-a city, say, like New Brunswick. It is an old and complex city, densely packed into a county of 25 municipalities. Instead of one church there are 56 churches and synagogues. Many of their congregant families moved to the suburbs a generation ago. A major state university-attracting students from around the world-sprawls throughout the city, with a faculty that lives all over New Jersey and in neighboring states. A seminary trains pastors for a large national Protestant denomination. The incomes of city residents, largely working class, are among the lowest in the state. Revitalized commercial development and new upscale homes carry substantial property tax abatements.

Two large hospitals fiercely compete to supply the region with the best medical services money can buy. Numerous county government buildings crowd into high-value downtown space. The public schools struggle near the bottom of academic ratings for the region. Nonprofits, charities, medical and educational organizations concentrate in the city.

To pay for the schools as well as services offered by the city and county, property taxes are high. Yet, property amounting to 47 percent of the value of all the buildings and land within the city limits is not taxed at all.

This is a situation in which many of the services supported by property taxes-police, firefighting, street lighting, roads just to name a few-are used by thousands of people who do not pay those taxes, either because they reside outside the city or because they are within the city but exempt from property taxes. And many of those who *do* pay are not getting the value of the institutions that do not pay. These are people whose children do not attend the state university, whose churches do not benefit from the seminary's training. They do not practice medicine in the hospitals or law in the county courts or teach at the university.

Everything else being equal, residents are paying higher taxes than they would pay if everyone using the services shared the burden of paying for them. In short, piety, charity, government and the tax laws of the state help to keep this city poor. "Where is the justice," asks Richard D. Pomp, professor of law at the university of Connecticut and Director of the New York Tax Study Commission, "in a state law that forces a city to subsidize those who live in the suburbs?" (Pomp 2002, 385). Indeed, where is the justice in public policy that heaps the burden of many onto the few least able to bear it?

This report will examine those questions. It will present data on the nature and extent of property tax burdens in New Jersey and its municipalities, look at the reasons and arguments for and against property tax exemptions and offer recommendations to deal with a situation resulting at least in part from sleepy villages evolving into modern New Jersey-while the system for funding government services still closely resembles that of colonial times.

THE BURDEN OF PROPERTY TAX EXEMPTIONS IN NEW JERSEY

The total value of property in New Jersey (defined as buildings and land) in 2000 was $648.5 billion. Of that, 13.5 percent paid no property tax. Most of it paid no tax because it was, under law, exempt from doing so. Just over 99 percent of this fully exempt property is public, private and religious schools, other public property, churches and charitable institutions and cemeteries; another six-tenths of one percent is for partial exemptions and abatements for pollution control and fire suppression equipment, fallout shelters, water and sewage facilities, urban enterprise zones and eight classes of dwellings and commercial and industrial properties; and finally just under one tenth of one percent of the total is for deductions from the property tax for senior citizens, disabled persons, and veterans.

Table 1
Value of Real Property in New Jersey-Non-Exempt and Exempt, 2000

Type of Property	2000 Assessed Values Equalized	Type of Property as % of All Exempts, Abates, Deducts	Type of Property as % of All Property Values
Total Value Non-Exempt Property	$561,246,971,772		86.54 %
Fully Exempt Property	**$86,714,660,309**	**99.3 %**	**13.37 %**
Public Schools	14,805,749,474	17.0 %	
Other Schools	6,397,102,223	7.3 %	
Public Property	35,279,932,323	40.4 %	
Church & Charitable Property	10,696,760,849	12.3 %	
Cemeteries & Graves	1,428,872,629	1.6 %	
Other	18,106,242,811	20.7 %	
Partial Exemptions and Abatements	**$519,842,663**	**0.6 %**	**.08%**
Deductions: Senior Citizens, Disabled & Veterans	**$70,841,488**	**0.1 %**	**.01%**
Total	$648,552,316,232	100 %	100%

Note: All values are equalized.
Source: Abstract of Ratables and Exemptions 2000 (Division of Taxation 2002).

So what's the big deal? The vast majority-almost 87 percent-of property value, in fact, is taxed.

One problem is not so much the *amount* of property exempt from taxation but the *distribution* of these exemptions across New Jersey's 566 municipalities. Exempt property is concentrated in relatively few municipalities. The extremes range from New Hanover Township in Burlington County, where Fort Dix is located and where 96 percent of property is tax exempt, to Pine Valley Borough in Camden County, where none was exempt.

Because of the allowance for tax exempt property, the average municipality in New Jersey loses just over 13 percent of the taxes it could collect if all property within its borders were taxed. Further analysis of the distribution of exemptions shows that 157 municipalities are above that average and 409 are below it. And it often is the case that municipalities with the most exempt property are the ones that can afford it the least. That is to say, there is a tendency overall for municipalities whose residents have higher incomes to have fewer exempt properties and for those whose residents have lower incomes to have more exempt properties. A noticeable trend is that municipalities with a lot of exempt property also tend to have more people living in them than those with relatively little exempt property.

To an extent, it is difficult to come to any hard and fast rules when looking at all 566 municipalities of New Jersey. There are poor communities that do not have high exemptions. Not all rich communities are free of exemptions. Not all places with many exemptions are big, not all places with few exemptions are small-and high taxes can be found across the board.

But when the question is asked: Are property tax rates higher in towns with higher exemptions? The answer is: Generally, yes. Using a tax rate of $3.00 per $100 of valuation as a cutoff point, such municipalities tend to have more exempt property.

However, when we look at several of these factors simultaneously, the results are dramatic.

Take, for example, only those municipalities where more than 25 percent of property value is exempt and per capita income is less than $15,000, well below the state average of $25, 816. (CGS 2003, p. 5). From that group, select only those with effective tax rates greater than $3.00 (the state average was $2.32) (CGS 2002). There are 10 municipalities that fit all of those categories, shown in Table 2. Though they make up less than 2 percent of the state's municipalities, they contain nearly 10 percent of the state's population. And they have property tax exemption burdens ranging from 75 percent in Newark to 25 percent in West New York. These are mostly older, poorer, urban areas of the state: Newark, Trenton, Camden, New Brunswick, Orange, East Orange, Asbury Park and Paterson. More than 800,000 people are crowded into these communities.

Table 2
10 Municipalities at the Intersection of
Low Income, High Exemptions and High Taxes

Municipality	County	2000 Population	1999 Per Capita Income Less Than $15,000	2000 Exempt Property More Than 25%	2000 Effective Tax Rate Greater Than $3.00
Newark	Essex	273,546	$11,363	75.2%	$3.40
Trenton	Mercer	85,403	$12,708	49.8%	$3.63
Camden	Camden	79,904	$7,844	48.5%	$3.89

New Brunswick	Middlesex	48,573	$14,555	46.6%	$3.41
Orange	Essex	32,868	$13,532	42.6%	$4.36
East Orange	Essex	69,824	$12,775	39.0%	$6.15
Asbury Park	Monmouth	16,930	$11,044	35.6%	$4.18
Paterson	Passaic	149,222	$11,058	34.8%	$4.09
Lakehurst	Ocean	2,522	$14,074	25.4%	$3.25
West New York	Hudson	45,768	$13,200	25.3%	$3.94
Total		804,560			

Sources: Center for Government Services, Rutgers University 2001 and
2002 New Jersey Legislative District Data Books, New Jersey Division of Taxation. Abstract of Ratables, 2000.

Now let's see who is in the opposite position? Here are 10 municipalities with tax rates less than $3.00, less than 10 percent of property value exempt from tax and income per person of more than $100,000: Pine Valley, Saddle River, Far Hills, Rumson, Bernardsville, Franklin Lakes, Mendham, Peapack-Gladstone, Millburn and Harding Township. This is a veritable "who's who" of New Jersey's most fortunate. These communities are home to a little over one-half of one percent of the population of the state, fewer than 60,000 persons.

Table 3
10 Municipalities at the Intersection of
High Income, Low Exemptions and Low Taxes

Municipality	County	2000 Population	1999 Per Capita Income More than $100,000	2000 Exempt Property Less Than 10%	2000 Effective Tax Rates Less Than $3.00
Pine Valley	Camden	20	$172,440	0.0%	$2.34
Saddle River	Bergen	3,201	$214,556	2.8%	$0.98
Far Hills	Somerset	859	$145,555	3.8%	$1.37
Rumson	Monmouth	7,137	$115,061	5.1%	$2.00
Bernardsville	Somerset	7,345	$127,277	5.6%	$1.79
Franklin Lakes	Bergen	10,422	$111,512	6.5%	$1.49
Mendham	Morris	5,400	$153,360	6.6%	$1.91
Peapack-Gladstone	Somerset	2,433	$108,573	8.2%	$1.74
Millburn	Essex	19,765	$106,666	8.2%	$1.95
Harding	Morris	3,180	$189,418	9.5%	$0.96
Total		59,762			

Sources: Center for Government Services, Rutgers University 2001 and
2002 New Jersey Legislative District Data Books, New Jersey Division of Taxation. Abstract of Ratables, 2000.

The extent to which New Jersey property is becoming exempt from taxes is not increasing. Indeed, since 1970 there has been a slight overall decline in exemptions from 20.1 percent in 1970 to the current 13.4 percent. There may be several ways to interpret this. Part of the explanation might be that most of the large tracts acquired for parks, military bases, highways and port facilities-and thus taken off the tax rolls-was done so by 1970. Another part may have to do with assessment practices themselves-that assessors have no incentive to update tax exempt assessments because they yield no new taxes, so the stated value lags behind the true value. And, as difficult as it is to assess individual homes, vacant land, apartments and industrial property, it is even more difficult to determine a true value for a one-of-a-kind property like a church or a government building. A third explanation may be that during this time period, population and private land development have expanded greatly, outpacing the aggregate state growth of exempt properties.

Table 4
Statewide Change in Percent of Taxable and Tax Exempt Property: 1970-2000

	1970	1980	1990	2000
TOTAL TAXABLE PROPERTY	**80.0%**	**82.9%**	**87.0%**	**86.6%**
Tax Exempt Property				
Public schools	4.6%	3.7%	2.3%	2.3%
Other schools	1.6%	1.2%	0.9%	1.0%
Public property	5.2%	6.5%	5.5%	5.4%
Church & Charitable	2.9%	2.3%	1.6%	1.7%
Cemeteries & Graves	0.3%	0.3%	0.2%	0.2%
Other	5.5%	3.1%	2.5%	2.8%
Total Tax Exempt Property	20.1%	17.0%	12.9%	13.4%

Note: The chart above excludes property that is partially exempted and abated and deductions for senior citizens, disabled citizens and veterans, which is less than 1 percent of property in New Jersey.
Source: New Jersey Division of Taxation. Annual Report, 1970, 1980, 1990, 2000.

Although the amount of tax exempt property on the whole is declining as a percent of total property, this varies among the municipalities. And the disparities that exist are worsening. As you can see in Table 5, the three largest cities in the "unfortunate 10"-Newark, Paterson, and Trenton-have all seen substantial increases in exemptions as a percent of total property over the last 30 years. Newark itself has seen a 30 percentage point increase. Meanwhile, the three largest municipalities among the "fortunate 10" all saw a decline in tax-exempt property. The most dramatic case was Bernardsville, where 5.6 percent of property value was tax exempt in 2000, compared to 18.9 percent in 1970.

Table 5
Different Fortunes in Percentage of Exempt Property: 1970-2000

Municipality	County	1970	2000
3 Largest of the Unfortunate 10			
Newark	Essex	45.3%	75.2%
Paterson	Passaic	25.7%	34.8%
Trenton	Mercer	47.2%	49.8%
3 Largest of the Fortunate 10			
Franklin Lakes	Bergen	9.0%	6.5%
Millburn	Essex	10.7%	8.2%

Bernardsville	Somerset	18.9%	5.6%

TAX EXEMPTION OVER TIME AND PAYMENTS IN LIEU OF TAXES

Although it long was customary to exempt certain property from taxation, it was not until 1851 that the New Jersey Constitution specifically exempted property used exclusively for religious, educational, charitable or cemetery purposes. Until that time it is likely that the number of exempt institutions was small enough and the amount of land they owned was insignificant enough that whether they were tax exempt or not mattered little.

As one might expect, assessment practices were not systematic which made the process subject to abuse and easy to criticize. What to one might be a legitimate educational, religious or charitable organization to others might not be legitimate. Abuses of tax exempt claims prompted some assessors to put onto the tax rolls property they felt was not being used strictly for its chartered tax exempt purposes. But assessment practices at the time were seen to be highly subjective and susceptible to local pressures.

In the 1930s, in an attempt to understand the potential scope of the problem, two surveys were taken: the first examined the tax exempt property of universities and colleges and of state and county governments; the second took a comprehensive look at all tax exempt property. Although this led the Legislature to establish standards for assessors to follow, little more was done until the 1970s.

The 1947 Constitution reaffirmed the belief that property devoted exclusively to religious, educational, charitable and cemetery uses served a public function that the state itself would have to spend money to fulfill in the absence of these exempt organizations. And it also recognized that if these services were not provided, life in our society would be immeasurably harmed.

While the 1947 Constitution upheld exemptions for religious, educational, charitable and cemetery uses, state law further expanded exemptions for nonprofit organizations to include-among others-historical societies, public libraries, buildings used and owned by first aid squads, associations for the prevention of cruelty to animals, hospitals and parsonages. Throughout the years the courts have ruled on whether the parking lots and homes owned by exempt organizations should also be exempt; whether an exemption should be provided to a nonprofit making a profit; whether a college football field had an educational purpose; whether gym facilities at a YMCA were used by recipients of charity; or whether fraternal organizations, lodges and college fraternities were educational.

In 1971 the Tax Policy Commission (the Apy Commission) set up by Gov. William T. Cahill, directed the state Division of Taxation to compile a list of the approximately 100,000 exempt properties across the state. In addition to ascertaining the scope of exempt property, the commission studied and reviewed the justification for the exemptions.

One of the Apy Commission's recommendations was that the burden of exemption from real property taxes for property of religious, educational, charitable and other nongovernmental organizations should be equalized among the taxing districts in each county-that when exempt property provides services to a wider area than the municipality where it is located, the burden should be distributed over the actual service area. The Commission also recommended some administrative changes and statutory clarifications.

Although nothing came of the recommendation to assign tax exempt property to the county, the state did recognize the need to reimburse municipalities for services they provided to its own property. In 1977 the Legislature enacted a state program called PILOT, for "payments in lieu of taxes." Under PILOT, the state reimbursed municipalities for the loss of property taxes due to the tax-exempt status of state-owned property. The payments were based on assessed value and were made only to municipalities-not to schools or counties-at the effective municipal purpose tax rate. The payments were not meant to cover the full amount that would be paid if the property were privately owned and not exempt from taxation. Most municipalities received at best about 30 percent of what the PILOT was supposed to provide. For a few municipalities, however, the program was expanded to provide additional aid if prisons were either built or expanded or where State Building Authority property was located, using cost of construction instead of assessed value to determine the amount of aid.

In 1985 the New Jersey Tax Assessment Study Commission looked into the tax exempt property issue and determined that there were inconsistencies. On the one hand, owners of exempt property paid a "ready and available fee" to their local water utility to make sure water came out of the tap on demand. But by virtue of being tax exempt, these properties paid no similar fee to make sure they received service from the police or public works department. No action was taken by the Legislature to enact such a fee that would be uniformly paid by all exempt property.

In 1994, the PILOT program that reimbursed municipalities for state-owned property was folded into a new Consolidated Municipal Property Tax Relief Aid (CMPTRA) program, along with more than a dozen state aid programs, into one line item in the state budget. The amount each municipality received was frozen at the 1994 level. Adjustments have been made by including language in the state budget to increase the appropriation to a particular town in the first year then freezing the new aid at that level for future years. Because the state PILOT program is no longer a separate program, it is now impossible to find out how much aid municipalities are receiving from the state for services provided to state-owned property.

Several other PILOT programs have been intermittently included in the state budget. These include programs that require the state to make payments to municipalities that are negatively affected by their proximity to the Pinelands or the Palisades Parkway or lose ratables because property is designated for open space. The state has also usually made a PILOT payment to New Brunswick on behalf of Rutgers University to cover some of the municipal services that Rutgers University uses.

In addition to these more formal PILOT programs, municipalities have set up individual PILOT programs with tax exempt and tax abated organizations. These have tended to be lump sum contributions and tend to vary in amount according to the size, financial capability or generosity of the institution.

According to the *Report Of The Mayor's Task Force On Payments In Lieu Of Taxes, City of Newark, New Jersey* which was issued on November 12, 1976, Harvard University and the Massachusetts Institute of Technology set a precedent in 1928 when they agreed to make in lieu of tax payments to Cambridge, Massachusetts for any property acquired after 1928 regardless of its use. By the 1960s, many colleges including the University of North Carolina, Pennsylvania State University, Iowa State University, Brown University, Cornell University, Purdue University and the University of Toledo were making payments for fire fighting equipment, sewerage treatment plants, city police for special events, street lighting and street improvements. In 1969 the General Assembly of the United Presbyterian Church passed a resolution urging all affiliated churches not to claim exemption on income producing property and to make contributions in lieu of taxes for municipal services on their tax exempt property. According to the Mayor's Task Force, many Presbyterian Churches made voluntary payments as a result.

An analysis in 2003 by Moody's Investors Service described PILOT agreements as "typically beneficial," in that they provide revenue where there would otherwise be none and also come with less risk than private properties, whose owners might go bankrupt or for some other reason might stop paying. The report noted that some states, such as Connecticut, tie PILOTs to how much economic benefit a particular property brings to the municipality where it is located. For example, the state might pay 100 percent of the property tax levy for a prison but only 45 percent for a university-because the university is the source of so many more jobs and is a magnet for considerable private, tax-paying enterprises.

The report noted that municipalities often enter into PILOT agreements with private, tax-exempt institutions, usually colleges and universities. These payments tend to range from "no more than a symbolic gesture" to a much more lucrative source of revenue. Princeton University, according to the report, falls into the former category, traditionally paying $100,000 a year to a municipality that had assessed the university's property value at $1.5 billion.

REASONS FOR PROPERTY TAX EXEMPTIONS

What has led public policy to this result? We turn now to a critical examination of the arguments for and against exemptions.

As noted earlier, New Jersey is a far more complicated place than it was three centuries ago. Today laws direct which types of property must have taxes levied upon them and which are exempt. And while behind those laws there is no comprehensive rationale that explains why we have exemptions, there are three theories that come at the question from different directions. They are based on the concepts of tax base, sovereignty, and benefit (the latter also known as quid pro quo or subsidy).

Tax base theory attempts to define the basis, or quality, that obligates taxation, such as wealth or property held for profit. *Sovereignty theory* argues that certain institutions-such as churches and governments-are immune from taxation either because they are the taxing authority or because they are autonomous institutions, beyond the taxing authority's jurisdiction. *Benefit theory* argues that certain institutions provide public benefits that substitute for government's services, and so deserve relief from taxes as a *quid pro quo* or *subsidy* for their services. Benefit theory may be thought of as a special case of sovereignty theory-sovereignty by proxy.

None of these theories makes a strong case for exemptions. They have long been the subjects of debate and they often contradict each other. After an examination of each, a fourth approach, based on a theory of community, will enter the picture.

Tax Base

The tax base theory suggests that not all property is meant to be taxed. It would argue that only property which represents wealth and thus has the capacity to pay for services should be taxed - all other property should be exempt. But having the resources to own property is itself a measure of wealth and in itself indicates an ability to pay taxes.

Joan Youngman, senior fellow at the Lincoln Institute for Land Policy, points to circular reasoning about the tax base that is at the heart of the ambiguities of exemptions. The circular reasoning begins with a
fundamental consensus that charitable organizations should be tax-exempt, an equally basic belief that local governments should be reimbursed for the property-related services they render, and a sense that property wealth indicates an ability to pay... (Youngman 2002, 25)

This might suggest that charitable organizations wealthy enough to own property should not be tax exempt. Indeed, many charities serve primarily the wealthy-either directly as in the case of private colleges, theatres and art museums, or indirectly by fulfilling the obligations of the wealthy to the needy and unfortunate of society. Evelyn Brody, professor of law at Chicago-Kent College of Law, at the Illinois Institute of Technology, confirms that, "the few studies of the distributional effects of charity suggest that most charities do not focus their services on the poor" (Brody 2002, 148). She further points out
If charities are to be exempt because they do not engage in business activities, then how does the base-defining theory account for the fact that householders form the backbone of any property tax scheme? (Brody 2002, 148).

Her point is that homes are not usually considered to be for-profit businesses, yet they pay property taxes.

In 1997, residential buildings nationwide had an aggregate value of $6.82 trillion-70 percent of the total private and generally taxable value of structures (Netzer 2002, 63). Two-thirds of them were owner-occupied. But is it true that homeowners do not engage in business activity? The problem with Brody's argument is that the owners of owner-occupied housing are engaged in business activity. Rental properties are considered to be businesses and are already taxed. But owners of owner-occupied homes also can be said to engage in a business activity, investment for capital gain-the profit made when the house is sold. In addition, there is the income to homeowners from effectively renting to themselves, called imputed rent-income that would be taxed if they rented their home to someone else, but which is not taxed when they rent it to themselves. Apropos of this, Thomas Heller has suggested that the property tax "operates as a compliment to the federal personal income tax, which fails to tax the imputed rental value of owner-occupied housing" (Brody 2002, 148). In other words, the property tax picks up where the income tax leaves off.

Brody extends this idea by suggesting that "one could conceive of nonprofits themselves as a proxy for the taxable consumers of the imputed income from owner-occupied property" (Brody 2002, 149) implying that taxation of nonprofits would be another way of recouping the lost income to government from the federal income tax exemption of imputed rental income for owner-occupied housing. Of course, the wrong level of government would be recouping the loss.

Brody goes on to criticize tax base theory by arguing: "If, instead, charities are to be exempt because their property does not benefit from local expenditures funded by the property tax (such as schools), then why should business owners pay property tax?" (Brody 2002, 148). But one must ask if it is true that charities and businesses do not benefit from local expenditures (such as schools) funded by the property tax? Robert T. Grimm, Jr., research director of the American Philanthropists Project at the Center on Philanthropy at Indiana University, notes that, "Many nonprofits operate without occupying any property and thus have no need for the municipal services paid for through property taxes" (Grimm 2002, 343). Quoting the work of Pamela Leland at the University of Delaware, he notes that, "Numerous other nonprofit organizations already 'are paying market-rate rent on office or program space, thus paying taxes through rents to landlords' (Leland 1994, 1372)" (Grimm 2002, 343).

If exempt charities own property, then clearly they consume services. They access their property via local streets and are protected by local police and fire services. The value of their property is protected by local codes and ordinances, the quality of the school system that educates their labor force and the local parks that provide recreation and amenities for the neighborhood. It is impossible to avoid participation in these benefits. Perhaps it should also be impossible to avoid paying for those benefits.

There is, on the matter of tax base theory, a taxation practice that bears mention because it has theoretical merit. This is the practice of exempting a basic level of property value, say the first $40,000 of assessed value, but then taxing any value on the property over that base. This practice was applied to Yale University in 1745. In that year the legislature exempted Yale's "lands and ratable estate" from all taxes up to a limit of 500 pounds sterling. Also exempt were "the persons, families, and estates" of the president, professors, tutors, students and servants of the college. The personal exemption represented a revenue loss to New Haven of $13,000, an amount roughly equal to the entire annual budget of the college at the time. The exemption for the real and personal property of faculty and students imposed an additional burden on the city. (Hall 2002, 257). In 1834, the Connecticut legislature revoked the real and personal property tax exemptions for faculty and students and limited the college's tax exemption to $6,000 (Hall 2002, 261-2).

Several other states, such as Texas, have set similar basic exemption levels on residential property. All adults have a basic "residence homestead" exemption from county and school district taxes in that state. In Florida, the first $5,000 of residential value is exempt. West Virginia's constitution authorizes exemptions up to $20,000 for residential property (Zelinsky 2002, 374). In 1880, the New Hampshire Supreme Court upheld an exemption to "the first $10,000 worth of property used exclusively as a place of worship" (Brody 2002, 159-60). This practice of recognizing a basic level of exempt value reflects a distinction between basic needs and other needs, sometimes referred to as wants, that lie above and beyond what is basic.

Many theoreticians have recognized this difference, as in the distinction between household needs and retail needs in Aristotle (Christman 1994), between use value and exchange value of property in Adam Smith (2000) and Karl Marx (1976), between personal and fungible property in Margaret Jane Radin (1993), and between control rights and income rights in John Christman (1994). It is the basis for the standard deduction for the federal income tax which allows a deduction for basic needs. The idea is that every legitimate human activity has to happen somewhere: it requires property at some time and place. To tax this is to tax life. The poor and indigent, along with everyone else, have a right to life even if they cannot afford to pay taxes. So to exempt some basic level of human need and the property serving that need from taxation may be just.

Sovereignty

Sovereignty argues that certain institutions-such as churches and governments-are immune from taxation either because they *are* the taxing authority or because they are autonomous institutions, beyond the taxing authority's jurisdiction. At the simplest level, sovereignty protects higher levels of government from being taxed by local communities. Municipalities do not have power over-are not sovereign over-the federal government and consequently the property of the federal government is exempt. Because municipalities, counties, special districts, port authorities and the like are creatures of the state and derive their powers to tax from the state, so state property also is exempt. Indeed, roughly 20 percent of the property taxes collected in New Jersey goes to support the services provided by the county government. Finally, towns and cities do not tax themselves for property they own because it would make no net difference in the amount of taxes residents would pay.

Does it make sense for higher levels of government to not pay local property taxes? Probably not. If a national park serves a national purpose, and not just a local community, then the nation should pay its share of the local burden. The same goes for the state and other regional entities. What stands in the way of properly accounting for and allocating these responsibilities? The tradition of sovereignty.

The more heated debate about sovereignty focuses on the religious exemption. The establishment and free exercise clauses of the Constitution state: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." On the one hand, the intimate connection between government and religion in Europe made the founding fathers predisposed to exempting religious property; on the other, the American Revolution and the Constitution rejected the divine right of kings and demanded instead a separate, secular government and the separation of church and state.

Tax exemption of churches raises two conflicting concerns. One is that the exemption might be considered a subsidy and therefore might establish the exempted religion as an arm or endorsed faith of the state. The second is that if tax exemptions were not granted, the expense of paying taxes might inhibit the free exercise of religion by making that exercise unaffordable.

Is exemption a subsidy? In 1970, the US Supreme Court in *Walz v. Tax Commission* (397 U.S. 644) held, "The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state" (397 U.S., 675 quoted in Brody 2002, 162). But the exemption relieves the religious use of its potential tax obligation, by transferring that obligation to the entire base of taxpayers. The church's exemption is its neighbor's burden. Is it any less of a burden if it is called an exemption rather than a subsidy or grant? In *Texas Monthly, Inc. v. Bullock* (1989), the Court held "every tax exemption constitutes a subsidy that affects nonqualifying taxpayers, forcing them to become 'indirect and vicarious donors'" (Brody 2002, 163). The argument that exemption is somehow arm's length involvement, while subsidies and grants allow government and religion to get too close is unsupportable. It is a distinction without a difference.

Do exemptions, subsidies and grants violate the establishment clause-that the government should not establish a state

religion or prohibit the exercise of religious freedom? This really seems to depend on the definition of religion. Very narrowly defined as worship and allegiance to a sovereign power, the answer seems to be yes. This is the view of Justice Douglas of the US Supreme Court who, dissenting in the Walz decision, concluded that both exemptions and grants were unconstitutional:
There is a major difference between churches on the one hand and the rest of the non-profit organizations on the other. 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... (Brody 2002, 162).

If, on the other hand, we define religion broadly, as most of the courts and recent faith-based programs do, the notion of religion or religious practice goes beyond simply the act of worship becoming indistinguishable from the activities of other charities, to which Justice Douglas referred. Homes for the aged and religious magazines are claimed as elements of religious practice. In fact, the courts have tended to strike down exemptions for religious institutions when their secular counterparts are denied exemptions. Indeed, where religion is indistinguishable from other charities there is no sovereignty, leading recent Supreme Court cases to "call into question what is left of the Establishment Clause" (Brody 2002, 164).

Could taxation violate the free exercise clause-that the state should not violate the exercise of religious freedom? Can we accept the argument that the free exercise of religion, in a congregation wealthy enough to own its own house of worship, would be restrained by taxation? Could that congregation find those taxes so burdensome that it would sell its property and be unable to worship? The irony is that churches not wealthy enough to own property already rent and do pay property taxes through their landlords, yet no one considers their taxes a violation of the free exercise clause. Supporters of the free exercise defense of tax exemptions would need to explain why the wealthy church, owning property, should be tax exempt while the poor church, renting property, should not. The free exercise clause must apply evenhandedly to all religious practices, not just to those who own property.

Benefit, Quid Pro Quo or Subsidy

This theory of exemption holds that charities confer a benefit on the community that relieves government of its burden, making the exemption tax-neutral. In other words, if the charity did not perform the beneficial service, or paid property taxes like everyone else, the government would have to increase its own spending to replace the foregone charitable services. Hence, tax or no tax, the outcome is the same-one thing in return for another: *quid pro quo*. In order to be truly tax neutral, the value of the benefits of the charitable actions would have to be equal to or greater than the value of the tax exemption. If the benefits are less than the taxes foregone, the charity is getting a subsidy, which might explain why the benefit theory is also called a subsidy theory. Stephen Diamond, professor of law at the University of Miami, warns that any suggestions that such a calculation historically took place and can account for present-day exemption practices are "imaginative recreations of history" (Diamond 2002, 116).

Two states in recent history have attempted to construct an empirical test for the qualification of charitable exemptions, Minnesota in 1975 and Pennsylvania in 1985. Minnesota's six-part test (Gallagher 2002, 11) asks:

- The stated purpose of the undertaking
- Is the organization supported by charitable contributions?
- Are recipients of charity required to pay for its services?
- Does income received produce profit?
- Who are the charity's beneficiaries ?
- Upon dissolution of the charity, are dividends or assets available to private interests?

The Pennsylvania Supreme Court created a five-part test for qualification as a "purely public charity" and eligibility for tax exemption (Glancey 2002, 214). The entity in question must:

- Advance a charitable purpose
- Donate or render gratuitously a substantial portion of its service
- Benefit a substantial and indefinite class of persons who are legitimate subjects of charity
- Relieve government of some of its burden
- Operate entirely free from private profit motive.

Both tests fall short of determining the value of a charity's public benefit and weighing that benefit against the potential tax debt. The Pennsylvania test produced results that were often considered unacceptable. For example, how could colleges ever qualify for tax exemptions if postsecondary education was not a service that government was obliged to offer? They could never relieve government of a burden it did not have (Glancey 2002, 215). The Commonwealth Court of Pennsylvania applied a narrow interpretation of the five criteria and "denied exemption to virtually every charity that came before it" (Gallagher 2002, 13):
Surpluses were considered evidence of a private profit motive. Groups that received government funding could not be said to be reducing a government burden. Serving the elderly did not fulfill a charitable purpose, unless recipients were also poor and received financial assistance. Religious activities could not be charitable because the U.S. Constitution bars governments from offering religious services. (Gallagher 2002, 13).

As one might imagine, the political backlash to these decisions was enormous, resulting after several years of legislative work in a measure that codified and refined the original five criteria in great detail. It said "a non-profit could credit up to 350 percent of its actual voluntary contribution to a local government toward meeting the community service prong of the test" (Glancey 2002, 227). The main thrust was to encourage voluntary contributions to government, similar to the idea of payments in lieu of taxes (PILOTs).

Also, nonprofits could "form a community service foundation to defray the costs of public services provided by a local government, so long as any contributions received by the local government were to be used to pay for services that help nonprofit institutions fulfill their charitable mission" (Glancey 2002, 227). In 1999, 25.2 percent of Philadelphia's assessed value was non-governmental tax-exempt nonprofits, worth $45.6 million in city property taxes and $55.1 million in school district property taxes (Glancey 2002, 213). In 2001, Philadelphia had 22 participants in its voluntary program, whose total contributions were about $800,000-less than one percent of the value of all nonprofit exemptions (Glancey 2002, 231)!

The Minnesota and Pennsylvania tests are the exceptions, not the rule. In 1894 Congress exempted mutual insurance companies and mutual savings banks from taxation on the grounds they were nonprofits whose services promoted the public welfare. This was held unconstitutional in *Pollack v. Farmers' Loan and Trust Co.* when Justice Field argued that these banks and companies "engaged in commercial activity and were of pecuniary value to those who invested in them even though the corporations were themselves not for profit" (Diamond 2002, 133).

One might ask whether a similar argument would hold in the case of universities, whose students have a pecuniary interest in the returns to their investments in the form of their degrees. In Philadelphia, David B. Glancey, chair of the Real Property Assessment and Appeals Office for the City of Philadelphia, concludes, "Whether nonprofits wish to admit it or not, the general public has lost confidence in the notion that certain nonprofits, particularly health care organizations and educational institutions, are still charitable" (2002, 224). Indeed, Robert Zemsky, director of the University of Pennsylvania's Institute for Research on Higher Education, concludes that public colleges "are not places of public purpose any more. They're educational deliverers with some public funds" (Selingo 2003).

Legislative latitude in defining charitable benefit has followed a path similar to the definition of public purpose in takings litigation, a path of continuous expansion. Brody confirms that, "states have not adopted a narrow 'essential government function test' (e.g., *American Museum of Fly Fishing, Inc. v. Town of Manchester*, 557 A.2d 900 (Vt.

1989)), adopting instead a 'public use' test" (Brody 2002, 150). Richard D. Pomp, professor of law at the University of Connecticut, sums up the irrationality of the system this way:

[I]f the state were to grant cash subsidies to organizations that are presently exempt, would it purposely adopt a program that gave nothing to organizations so poor that they could not afford to own real estate, and, instead, distributed money on the basis of how much real property they owned? …. [I]f the state would not be willing to grant a cash subsidy in the same amount and to the same organizations that are now benefiting from the statutory exemptions, why should the existing system be continued? Is it because the local jurisdictions are footing the bill? (2002, 386-7).

Community Theory of Property Taxation

The early character of charity and taxation is captured in Stephen Diamond's description of Massachusetts in the nineteenth century.

Taxation...was an act of benevolence…. Charities and government both existed as vehicles for the perfection of the individual. Exemptions reflected and sustained a merger of government and society. The Massachusetts Commission of 1875 had thus resisted the commodification of taxation and the effort to treat exemption as legitimate and efficient only when revenue-neutral. Taxation was an act of cheerful self-surrender; so was benevolence (Diamond 2002, 131).

This level of comfort and unconcern for efficiency reflected a homogeneous and highly integrated society. Today, "all state tax systems have, to some extent, been made obsolete by economic and demographic change" (Carbone and Brody 2002, 245). Hall describes the scene in New Haven:

Thus, by the 1990s, the city's nonprofits were unlikely to be located in or near communities in need. The most important of them-the hospitals, colleges and universities, and arts organizations-had come to serve largely suburban regional constituencies (and even their employees tended to live in the suburbs). The small to mid-size agencies serving populations at risk appeared to prefer space in the middle-class neighborhoods where their executives and staff lived-or, if suburban, felt less threatened.…the new service-provider nonprofits, rather than being community organizations in the sense of being "of, for, and by" the communities in which they were located and which they served, were community-serving organizations run by credentialed professionals, funded by public agencies, foundations, and corporations, and pursuing agendas set by constituencies other than those being served. (2002, 278).

"Battlefield" might be a better characterization of relations between cities and their suburbs as they compete for property tax ratables and fortify their walls against unwanted land uses. William Fischel, professor of economics at Dartmouth College, has captured this quality of community life in his book, *The homevoter hypothesis: how home values influence local government taxation, school finance, and land-use policies* (Fischel 2001). Anthony Downs, senior fellow at the Brookings Institution, has formulated a corollary to Fischel's hypothesis which he dubs Fischel's Law:

The central purpose of most American suburban governments is to maintain the values of their constituents' homes, and those governments design zoning and other policies in order to achieve that purpose, mainly by excluding any influences they believe might reduce values (Downs 2002, 456).

The mechanism, long identified as fiscal zoning, although hardly limited to zoning actions, is simple. Property taxes are capitalized into property values. If the taxes in a town go up, other things being equal, property values go down to compensate. So it is desirable to exclude uses that consume more in service costs than they generate in tax payments. Tax-exempt uses tend to rise to the top of that list of undesirables. So if a town's citizens can manage to get their health care in another town, their education, their county welfare, court and park services, their religious services, their homeless shelters and transitional housing facilities, their public landfill, their public housing, their state prison, etc., all conveniently nearby but in another taxing jurisdiction, then their chances of keeping property taxes low and housing values high are excellent.

If these facilities were somewhat evenly distributed among communities, the distribution of benefits and costs might seem fair. But in reality they tend to be unevenly distributed, concentrating in older cities. When the suburbs succeed in this competition, the cities lose their more affluent residents to suburban islands of escape, increasing the already excess burden on the cities. The solution is to bring congruence between those who pay the property tax and those who benefit from it. The solution is to eliminate exemptions except for the uses whose service areas clearly conform to the taxing jurisdiction, such as local government and local schools.

Technological and social changes have also had an impact on who attends colleges and universities and they have altered the balance between those who pay and those who benefit. In the case of Yale University in New Haven, [O]ver the course of the 19th century, as more students came from out of town and out of state, and were steadily less willing to stay in the state, the public extending the tax subsidy was increasingly less likely to be the public benefiting from it (Hall 2002, 261).

Colleges and universities should pay property taxes. When they are public, these institutions themselves exercise the principle of place-based fees by charging out-of state tuition. A Maine law that similarly discriminated between summer camps that served chiefly Maine residents and camps serving mostly out-of-state clients was struck down on the rationale that the law interfered unfairly with interstate commerce. Colleges and universities must also be engaged in interstate commerce. But should the state of New Jersey subsidize students from Pennsylvania? Indeed, why should the citizens of New Brunswick, Ithaca, Philadelphia or New Haven subsidize the world with their property taxes?

As John D. Colombo, professor at the University of Illinois College of Law, put it, "If consumers prefer the special ethic in education provided by Harvard, why would they not continue to prefer Harvard even absent exemption?" (Colombo 1993, 869).

Richard Pomp reports that a recent study in Connecticut found that "less than half the patients treated in tax-exempt hospitals in Bridgeport, Hartford, New Haven, and New London actually live in those cities" (Pomp 2002, 385). Efforts at renewal and revitalization have tended to make the problem worse instead of better. In New Haven:
Large non-profits-Yale, Yale-New Haven Hospital, and St. Raphael's Hospital-took advantage of the flood of new federal funding to expand. Between 1950 and 1990, the proportion of exempt property increased from less than 40 percent of the grand list to nearly 70 percent. While these developments enhanced the range of cultural, educational, health, and human services available and improved the transportation infrastructure, ensuring that suburbanites would continue to work in the city, they made it easier to live outside the city, ensuring that increases in economic activity benefited the suburbs, since the tax system remained narrowly based on real estate (Hall 2002, 276).

The ideal tax system, Brody tells us, "is visible, systematic, and evenhanded" (2002, 155). The current practices of exemption are none of these. Some nonprofits compete with for-profit enterprises. Many are funded by state and federal sources, clear evidence that the responsibility for their necessary activities is largely not local. Insurance companies and Medicare, again non-local sources of funds, pay a large portion of medical expenses. The system is largely invisible, irrational, and unjust.

CONCLUSIONS AND RECOMMENDATIONS

Is charity a religious duty or a civil obligation? The American Revolution was fought for independence from a government that drew its legitimacy and authority from religion-from a system in which the king ruled by divine right-and replaced it with a government that ruled by the consent of the people. Religious and civil authorities were to maintain a respectful and tolerant separation. This hands-off policy for religion settled on not taxing religious institutions. But religion was a growing set of institutions, whose expansion today continues to reflect sympathy for good works, without doubt in part to address the shortcomings of government-sponsored charity. Because of these and other motives, the sovereignty of the church has now become the sovereignty of the cathedral, the college, the cemetery, the home for the aged, the hospital-and almost every other act of donation that enhances someone's general welfare: the music camp, the summer theatre, the fishing museum, etc.

"*Who benefits from the nonprofit sector?*" This question was asked by a distinguished group of scholars, led by Charles Clotfelter, professor of public policy studies and economics at Duke University (Clotfelter 1992). A survey of 1,474 social and human service agencies, involved in child care, job training, vocational rehabilitation, residential care, adoption services, foster care, legal services and advocacy found only 27 percent reported most of their clients below the poverty line (Salamon 1992). The nation's more than 300,000 religious congregations "collect and spend more than $50 billion each year," of which 70 percent is spent on services to their membership, what economists call "club goods" (Biddle 1992).

Institutions in the health services sector-community hospitals, nursing homes, mental health services and alcohol and drug treatment facilities-are of three kinds: nonprofit, profit, and public. "The conclusion, in general, is that public facilities serve the neediest, for-profit facilities serve the least needy, and nonprofits fall somewhere in between" (Aaron 1992, 237; Salkever and Frank 1992).

In general, the conclusion of these studies is that when people make voluntary payments to nonprofit organizations, they generally do so with the object of getting some private benefit in return. A minority of people may contribute altruistically to organizations serving the poor, and some nonaltruistic activities may generate externalities [that serve the poor] as a byproduct, but redistributive externalities are not the primary aim of a voluntaristic system. Thus, while government failure and supply-side theories help explain what nonprofits do and where they are found, these theories do not predict that privately funded nonprofits will be very redistributive, and indeed, empirically, privately funded nonprofits do not seem to be as redistributive as publicly funded activities. (James 1992, 255)

Today, religious properties, colleges and universities, hospitals, charitable nonprofits, parks, county offices and federal lands all are exempt from paying local property taxes. The problem with these free riders is that the burden of supporting them is unevenly and unfairly spread. In many cases, the greatest burden of this fiscal generosity falls on those who can least afford it and the greatest benefits accrue to those on the top of the economic ladder.

All of the issues raised in this report are exacerbated by the fact that New Jersey relies so heavily on local property taxes to pay for government services and education. On a per capita basis, New Jersey has the nation's highest property tax burden. By extension, relieving any property of this burden increases the burden on those who do pay by more than it would in other states. This is yet one more reason why New Jersey needs to reform its tax structure. Other responses to the problem should include:

- Tax-base sharing, under which all the municipalities in a region pool their property tax revenue and divide it up in ways that take into account the impact of traffic, pollution and the like. This would help to ease the inequity caused by one municipality having much more tax exempt property than another one nearby.
- Creation of a tax-exempt tax base sharing pool to spread among a region the costs that need to be made up because of property taxes not paid by each entity that serves more than the municipality that has exempted them from taxes. This is similar to the recommendation in the Apy Commission which suggested that all tax exempt property be assigned to the county and that their costs be shared.
- A state website listing every tax exempt property in every municipality and the reason for the exemption. This would allow citizens and policymakers to get a better grasp of the magnitude of the situation and examine whether traditional rationales for exemptions are standing the test of time.
- A list maintained and made public by the state of every tax exempt property in New Jersey, any payments in lieu of property taxes made by any tax exempt organization and copies of the agreements setting forth the terms. There is now no one place to find out if Princeton University, the Presbyterian Church, St Peter's Hospital or the local cemetery are making any payments towards the services they receive from the municipalities where they are incorporated.

Local property tax exemptions to charities and to non-local governments should be seen for what they are: a local subsidy to regional demands. These tax exemptions represent government protecting and expanding the wrong property rights. Public policymakers must reexamine this trend, rethink these reasons and establish a fair distribution of community responsibilities.

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