

The Normative Justification for Tax Exemption: Elements from Catholic Social Thought

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The United States has granted exemption from most federal taxes to a wide range of organizations going back to the beginning of the Republic. The earliest federal income tax statute, passed during the Civil War, applied only to individuals and exempted the trustees of charitable trusts.¹ This tax proved short-lived and expired in 1872. The ill-fated income tax of 1894, declared unconstitutional in 1895,² exempted all charities from tax.³ The modern federal income tax, which traces its origins to the Corporate Excise Tax of 1909⁴ and to the Revenue Act of 1913,⁵ has from its inception granted statutory exemption from income tax to religious, charitable, and other organizations.

Currently, the most important provision of the Internal Revenue Code in this area grants exemption to entities organized “for religious, charitable, scientific, testing for public safety, literary, or educational purposes” as well as for “fostering national or international amateur sports competition” and “prevention of cruelty to children

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¹ The following year, in the face of the enormous financial pressure of the war, the tax was expanded to include an excise tax on corporations without any general exemption for charities. This was, however, an exceptional measure, prompted by the special exigencies of wartime. See Evelyn Brody, *Of Sovereignty and Subsidy: Conceptualizing the Charity Tax Exemption*, 23 J. CORP. L. 585, 605 & n.95 (1998).

² See *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 637 (1895); *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 586 (1895).

³ See ROGER FOSTER & EVERETT V. ABBOTT, *A TREATISE ON THE FEDERAL INCOME TAX UNDER THE ACT OF 1894*, 103–04 (1895).

⁴ Corporate Excise Tax of 1909, ch. 6, § 38, 36 Stat. 11, 112.

⁵ Tariff Act, ch. 16, 38 Stat. 114 (1913).

or animals.”⁶ The list of potentially exempt purposes has developed over time without any overall guiding principle.⁷

To qualify for tax exemption, in addition to engaging in certain types of activities, an organization must also be structured in such a way that “no part of the net earnings . . . inures to the benefit of any private shareholder or individual.”⁸

Scholars have criticized both the list of activities that qualify for tax exemption⁹ and the requirement that they be carried out by non-profit organizations,¹⁰ but they have reached no consensus on how the law should be modified. This is due, at least in part, to the fact that they do not agree about the normative justification for tax exemption. Until less than forty years ago, scholars paid little attention to this question, taking the fact of tax exemption as a given.

In a groundbreaking article published in 1976, Boris Bittker and George K. Rahdert argued that the basic rationale for exemption is that “nonprofit organizations are not suitable targets for an income tax.”¹¹ They rejected the view that statutory exemptions for nonprofit organizations constitute departures from a normative tax structure that require affirmative justification.¹² Rather, they argued, exemption of public service nonprofit organizations (like the American Red Cross, museums, and universities) “is neither a special privilege nor a hidden subsidy. Rather, it reflects the application of established principles of income taxation to organizations that, unlike the typical business corporation, do not seek profit.”¹³

⁶ 26 U.S.C. § 501(c)(3) (2006). Numerous other subsections of the Internal Revenue Code grant exemption to a broad range of other organizations ranging from professional football leagues to mutual ditch and irrigation companies. *See, e.g., id.* § 501(c)(6), (c)(12)(A).

⁷ *See* BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 9–27 (9th ed. 2007). Some of the most important items in the list of exempt purposes can be traced to the English Statute of Charitable Uses of 1601. Others are of much more recent origin. *See, e.g.,* Tax Reform Act of 1976, Pub. L. No. 94-455, § 1313(a), 90 Stat. 1520, 1730 (1976) (exemption for “certain amateur athletic organizations”).

⁸ 26 U.S.C. § 501(c)(3).

⁹ *See, e.g.,* Rob Atkinson, *Theories of the Federal Income Tax Exemption for Charities: Thesis, Antithesis, and Syntheses*, 27 *STETSON L. REV.* 395 (1997).

¹⁰ *See, e.g.,* Anup Malani & Eric A. Posner, *The Case for For-Profit Charities*, 93 *VA. L. REV.* 2017, 2021 (2007).

¹¹ Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 *YALE L.J.* 299, 304 (1976).

¹² *See id.*

¹³ *Id.* at 357–58. With regard to mutual benefit organizations, like social clubs, Bittker and Rahdert argued that to the extent that their activities consist in the members’ doing together what they could do separately without incurring tax, the

Bittker and Rahdert noted that the author of the Revenue Act of 1913, Representative Cordell Hull, justified the exemption of all nonprofit organizations on grounds that they did not have “net income” within the meaning of the legislation.¹⁴ Hull seems to have understood this not as a technical matter based on some specific way of defining “net income” but rather simply as a way of saying that the tax was meant to affect only for-profit businesses.¹⁵ Bittker and Rahdert, however, developed an elaborate technical argument that it is impossible to measure the “income” of public service organizations.¹⁶ They contended that there are insurmountable problems in determining both what receipts should be considered gross income and what disbursements should be considered deductible.¹⁷ Even if those problems could be resolved, they contended that further intractable problems would arise in attempting to determine the appropriate rate of taxation, since tax theory would require basing the rate on the status of the beneficiaries of the organization’s activities.¹⁸

Five years later, Henry Hansmann largely demolished Bittker and Rahdert’s argument that exemption is justified by the technical difficulty of measuring the income of nonprofit organizations.¹⁹ He showed convincingly that any difficulty that might exist would be limited to those nonprofit organizations that receive a large proportion of their income from donations but not to the important class of nonprofit organizations that rely principally on fees for services, including most nonprofit health care institutions.²⁰ In addition, he pointed out that in the case of property taxes there would be no special difficulty in measuring the value of property held by nonprofit organizations.²¹ Finally, he argued that the purported difficulty in determining the appropriate rate rested on a false assumption that we need to determine the level of income of the beneficiaries of the ser-

fact of banding together to carry them out should not lead to tax consequences. *See id.* at 358. In the rest of this discussion, we will focus on Bittker and Rahdert’s treatment of the traditional charitable organizations they call “public service” nonprofits.

¹⁴ *Id.* at 303.

¹⁵ *Id.*

¹⁶ *See id.* at 307–14.

¹⁷ *See* Bittker & Rahdert, *supra* note 11, at 307–14.

¹⁸ *See id.* at 314–16.

¹⁹ *See* Henry Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Tax*, 91 YALE L.J. 54, 58–62 (1981).

²⁰ *Id.* at 59–60.

²¹ *Id.* at 93.

VICES provided by nonprofit organizations rather than the income of the service provider.²²

Contemporary scholars approach consensus in rejecting Bittker and Rahdert's theory that the income of nonprofit organizations simply falls outside the normative tax base. They differ widely in their explanations of why organizations should be exempt from tax but generally concur in asserting that tax exemption represents a deviation from the norm that all income should be taxed. Therefore they consider tax exemptions for nonprofits a subsidy from the government to the organizations that enjoy exempt status.²³ A wide range of theories exist to justify this subsidy.

The most widely espoused theory, sometimes referred to as the public benefit subsidy theory, posits that tax exemption is justified by the fact that exempt organizations provide services to the public that the government otherwise would have provided. This theory views tax exemption as a subsidy to those who relieve the government of burdens which would otherwise fall upon it.²⁴ This, however, fails to account for the exemption of a large number of organizations ranging from churches²⁵ to country clubs,²⁶ and from fraternal organizations like the Knights of Columbus²⁷ to cooperative telephone companies.²⁸

The defect of the public benefit subsidy theory, and more broadly of all those theories that justify exemption on grounds that exempt

²² *Id.* at 64–66.

²³ For elaborations on this rationale, see Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C. L. REV. 501, 505 (1990) (describing the subsidy theory as “[t]he emerging orthodox account”); Ilan Benshalom, *The Dual Subsidy Theory of Charitable Deductions*, 84 IND. L.J. 1047, 1055–57 (2009); John D. Columbo, *The Marketing of Philanthropy and the Charitable Contributions Deduction: Integrating Theories for the Deduction and Tax Exemption*, 36 WAKE FOREST L. REV. 657, 698 (2001); Mark P. Gergen, *The Case for a Charitable Contributions Deduction*, 74 VA. L. REV. 1393, 1397–98 (1988); Hansmann, *supra* note 19, at 71–72; David Pozen, *Remapping the Charitable Deduction*, 39 CONN. L. REV. 531, 547, 552–53 (2006); Daniel Shaviro, *Assessing the “Contract Failure” Explanation for Nonprofit Organizations and Their Tax-Exempt Status*, 41 N.Y.L. SCH. L. REV. 1001, 1007 (1997); Brian D. Galle, *Foundation or Empire? The Role of Charity in a Federal System* 10 (FSU Coll. of Law, Public Law Research Paper No. 394, 2009), available at <http://ssrn.com/abstract=1473107> (“Most commentators . . . embrace the idea that the [exemption] is justified as a tool for encouraging the production of goods that would otherwise be under-produced by the private market.”).

²⁴ See JAMES J. FISHMAN & STEPHEN SCHWARZ, *NONPROFIT ORGANIZATIONS: CASES AND MATERIALS* 328 (3d ed. 2006).

²⁵ See 26 U.S.C. § 501(c)(3) (2006).

²⁶ See *id.* § 501(c)(7).

²⁷ See *id.* § 501(c)(8).

²⁸ *Id.* § 501(c)(12).

organizations fill gaps left by the operations of government and markets, is not, however, primarily that it cannot account for the full range of organizations that enjoy tax exemption. The practice of tax exemption has grown up in patchwork fashion over a long period of time, and it is possible that no single theory can provide a coherent explanation for all the various categories that Congress has created.

The real defect of these theories is that they rest, at least implicitly, on a flawed vision of society and ultimately of what it means to be human. Although the scholars who have developed these theories rarely make explicit their overall view of society, much less of human nature, their theories seem to reflect a vision of society in which government is ultimately charged with meeting all social needs that markets cannot meet because of various forms of market failure.

Many theorists would, it seems, be content to have government provide all necessary goods and services not furnished by markets, if only it could do so efficiently. They see nonprofit organizations as merely filling gaps in the goods and services the government provides and devote much of their attention to explaining why those gaps exist.²⁹ Approaching the problem in this way fails to provide a satisfying explanation of why people dedicate their energies to creating, supporting, and operating nonprofit organizations. Furthermore, it ignores the distinctive contribution to human flourishing of nonprofit organizations, which goes well beyond filling gaps in the goods and services provided by government.

It is at this level that I believe Catholic Social Thought offers valuable elements that can contribute to our understanding of tax exemption. It does not address the many specific issues that necessarily arise in deciding which organizations should enjoy tax-exempt status and which should not. To make that determination, one must take

²⁹ With the passage of time, these theories have become increasingly complex as scholars have criticized the explanations for exemption put forth by their intellectual predecessors. A very recent study by Brian Galle, for instance, critiques various aspects of the dual failure hypothesis, which assigns to government the role of providing those goods and services which would be underproduced by markets alone and exempts organizations from the role of providing those goods and services that are needed or desired by minorities who cannot wield sufficient influence to cause governments to produce them in the desired quantity. See Galle, *supra* note 23, at 4–5. Concretely, Galle argues that the existence of a federal structure and the insights of public choice theory both refute the claim that government will produce only those goods and services demanded by the median voter. See *id.* at 16–20. Nonetheless, he ultimately justifies exemption of charities on grounds that they “serve[] as gap-filler[s] when federalism mechanisms break down.” *Id.* at 1. Thus at the end of the day, he ultimately sees the activities of exempt organizations only as filling gaps in the services provided by government.

into account technical tax and economic questions that fall outside the purview of Catholic Social Thought, such as the degree to which granting tax exemption to certain organizations that carry on activities that fall outside the scope of traditional exempt activities (for instance, those often labeled as social entrepreneurship) would unduly burden for-profit organizations that compete with them.

What Catholic Social Thought does offer is a coherent view of human nature and of the nature of society and government that explains the existence of exempt organizations. It provides a reason for considering that the revenues of nonprofit organizations should be regarded as falling outside the normative tax base. Those insights can serve as a foundation for resolving narrower and more technical issues. Catholic Social Thought rests in large part on a philosophical and theological anthropology. Especially in the years since the Second Vatican Council, philosophical and theological anthropology have played a foundational role in Catholic social thought. John Paul II stressed that “man is the way of the Church.”³⁰ An in-depth analysis of the underlying anthropology exceeds the scope of this Essay. Nonetheless, it is necessary to highlight at least a few elements of that philosophical and theological vision of what it means to be human because those elements are the foundation for the entire structure.

One of the most basic tenets of Catholic Social Thought is that every human being is endowed with dignity and worth. From a theological perspective, human dignity derives from having been created in “the image and likeness of God,”³¹ and of being “the only creature on earth that God willed for itself.”³² The Church holds that human beings find the foundation and development of their freedom and dignity in Christ.³³ In him, whom the Church venerates as God-made man, “man has acquired full awareness of his dignity, of the heights to which he is raised, of the surpassing worth of his own humanity, and of the meaning of his existence.”³⁴

³⁰ Pope John Paul II, Encyclical Letter, *Centesimus Annus* [The Hundredth Year] ch. VI (May 1, 1991) [hereinafter *Centesimus Annus*], available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus_en.html.

³¹ *Genesis* 1:27.

³² Pope John Paul II, Encyclical Letter, *Redemptor Hominis* [Redeemer of Man] ¶ 13 (Mar. 4, 1979), available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_04031979_redemptor-hominis_en.html.

³³ *See id.* ¶ 11.

³⁴ *Id.*

Ultimately, the Church's view of human dignity is theological and closely linked to its belief in creation and in the incarnation of God in Christ. It is more immediately grounded, however, in the human faculties of intellect and free will, and in the fact that man is "a subjective being capable of acting in a planned and rational way, capable of deciding about himself, and with a tendency to self-realization."³⁵ The basis of human dignity and of human rights is found in freedom and the capacity for self-determination. Every human being has dignity because, as John Paul II put it, every human being is "capable of existing and acting 'for itself,' that is, capable of a certain *autoteleology*, which means capable not only of determining its own ends but also of becoming an end for itself."³⁶ At this level, Catholic Social Thought's position on human dignity can be shared by all who recognize the fact of human freedom and self-determination even without sharing the Church's belief that they are ultimately rooted in God's decision to make us in his own image and to take on in Christ our humanity.

Catholic Social Thought does not view freedom and the ability to be an end for ourselves as an unfettered ability to choose whatever happens to appeal to each individual. It is not the freedom described in *Planned Parenthood v. Casey* as "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."³⁷ Rather, Catholic Social Thought understands freedom as the uncoerced ability to know and embrace the truth and in the light of the truth to choose those things that contribute to human flourishing.³⁸

The function of government is to promote the conditions that permit human flourishing, conditions referred to in Catholic Social Thought as the common good. The common good is not simply the aggregate of the goods of all members of society. It is rather "the sum of all those social conditions which allow the human dignity of all to be respected, and their basic needs to be met, while giving men and women the freedom to assume responsibility for their own

³⁵ Pope John Paul II, Encyclical Letter, *Laborem Exercens* [On Human Work] ¶ 6 (Sept. 14, 1981), available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_14091981_laborem-exercens_en.html.

³⁶ KAROL WOJTYLA [POPE JOHN PAUL II], PERSONS AND COMMUNITY: SELECTED ESSAYS 317 (Theresa Sandok trans., 1993).

³⁷ 505 U.S. 833, 851 (1992).

³⁸ See *Centisimus Annus*, *supra* note 30, ¶ 41.

lives.”³⁹ It “involves an assessment and integration of [the] interests [of individuals] on the basis of a balanced hierarchy of values.”⁴⁰ Therefore, “ultimately, it demands a correct understanding of the dignity and the rights of the person.”⁴¹ Given this conception of the common good, the proper role of government will be determined by what constitutes human flourishing.

Catholic thought, especially since the Second Vatican Council in the early 1960s, has stressed the role of gift and gratuitousness in human flourishing. The Second Vatican Council proclaimed that a human being “cannot fully find himself except through a sincere gift of himself.”⁴² Pope John Paul II returned frequently to this concept. In the encyclical *Evangelium Vitae*, he stated that man’s vocation “consists in the sincere gift of self”⁴³ and that we find “fulfillment through the gift of self and openness to others.”⁴⁴ In his most recent encyclical, Benedict XVI echoed this idea: “The human being is made for gift, which expresses and makes present his transcendent dimension.”⁴⁵

Catholic thought, with its long tradition of belief in original sin, is far from unaware of the all-too-human inclination to selfishness and lack of concern for others. It has, however, maintained an ultimately optimistic view that despite original sin humans are capable of generous concern for others. Thomas Aquinas wrote in the thir-

³⁹ CATHOLIC BISHOP CONFERENCE OF ENG. & WALES, VOTE FOR THE COMMON GOOD 2 (2001), http://www.catholicchurch.org.uk/content/download/1506/11693/file/Vote%20for%20The%20Common%20Good_2001.pdf. This concept stands in sharp contrast to large strands of American liberal thought that reject altogether the idea of common good and substitute in its place “the preservation of the maximum possible individual choice according to one’s private conception of the good.” Louis Dupre, *The Common Good and the Open Society*, in *CATHOLICISM AND LIBERALISM* 172, 183 (R. Bruce Douglass ed., 1994).

⁴⁰ *Centesimus Annus*, *supra* note 30, ¶ 47.

⁴¹ *Id.*

⁴² SECOND VATICAN COUNCIL, PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD: *GAUDIUM ET SPES* ¶ 24 (1965).

⁴³ Pope John Paul II, Encyclical Letter, *Evangelium Vitae* [The Gospel of Life] ¶ 25 (Mar. 25, 1995) [hereinafter *Evangelium Vitae*], available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae_en.html.

⁴⁴ *Id.* ¶ 19.

⁴⁵ Pope Benedict XVI, Encyclical Letter, *Caritas in Veritate* [Charity in Truth] ¶ 34 (June 29, 2009) [hereinafter *Caritas in Veritate*], available at http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20090629_caritas-in-veritate_en.html.

teenth century that “it is natural to all men to love each other.”⁴⁶ Not only are humans capable of generosity and self-giving. It is precisely in overcoming selfishness and giving themselves to others that they find fulfillment. In John Paul II’s words, “life attains its fullness in the sincere gift of self.”⁴⁷

Like other aspects of Catholic anthropology, this stress on “living in the dimension of gift”⁴⁸ has a theological foundation. In this case the foundation lies in the doctrine of the Trinity. The Church understands God not as a solitary being but as a trinity of persons who live in communion with each other and give themselves unreservedly to each other. For this reason, each person created in the image and likeness of God finds fulfillment in relation to other persons. “[E]xisting and acting together with other human beings enables him to achieve his own development, that is, the intrinsic development of the person.”⁴⁹ More immediately, Christ’s commandment to “love one another as I have loved you”⁵⁰ justifies stress on the gift of self as the way to human completion and fulfillment.

Although its foundation is theological, Catholic anthropology’s position that we are called to find our fulfillment in communication with and concern for others also rests on observable facts. As Benedict XVI has noted, “Gratuitousness is present in our lives in many different forms, which often go unrecognized because of a purely consumerist and utilitarian view of life.”⁵¹ It is not surprising, therefore, that many who stand outside the Church’s tradition recognize the centrality of gift in human life. To cite just a few examples, our capacity for entering into a mutual relationship with another “I” is at the core of Martin Buber’s in-depth exploration of the reality of interpersonal relations and their consequences.⁵² Coming from an en-

⁴⁶ THOMAS AQUINAS, *SUMMA CONTRA GENTILES*, Bk. III, at 128 (Vernon J. Bourke trans., Hanover House 1956) (n.d.).

⁴⁷ *Evangelium Vitae*, *supra* note 43, ¶ 86.

⁴⁸ See John Paul II, Apostolic Letter, *Dilecti Amici* ¶ 8 (Mar. 31, 1985), available at http://www.vatican.va/holy_father/john_paul_ii/apost_letters/documents/hf_jp-ii_apl_31031985_dilecti-amici_en.html.

⁴⁹ KAROL WOJTYLA [JOHN PAUL II], *THE ACTING PERSON* 275 (Anna-Teresa Tymieniecka ed., Andrzej Potocki trans., rev. ed. 1979).

⁵⁰ *John* 15:12 (English Standard).

⁵¹ *Caritas in Veritate*, *supra* note 45, ¶ 34.

⁵² See generally MARTIN BUBER, *I AND THOU* (Ronald Gregor Smith trans., 2d ed. 1958) (describing how human existence may be defined by the way in which we engage in dialogue with each other, with the world, and with God). There are many English editions. One of the more recent is the 1996 Touchstone edition. See generally MARTIN BUBER, *I AND THOU* (Walter Kaufmann trans., 1996). In his book, *Crossing*

tirely different perspective, the psychologist and sociobiologist Frans de Waal argues for a biological and evolutionary foundation for altruism and illustrates both its presence in animals and its importance for the working of society.⁵³ Finally, in his often quoted speech at Northwestern University's commencement in 2006, then-Senator Barack Obama spoke of our "empathy deficit" and urged his audience to cultivate a concern for others because "it's only when you hitch your wagon to something larger than yourself that you will realize your true potential—and become full-grown."⁵⁴

The centrality of gratuitous self-giving in human flourishing underlies the vision of society in Catholic Social Thought and explains the existence of the organizations that make up the exempt sector. In his most recent encyclical, Pope Benedict XVI, drawing upon Pope John Paul II, described society as composed of three broad sectors: "the *market*, the *State*, and *civil society*."⁵⁵ Civil society roughly corresponds with the exempt sector. As the President of the Pontifical Council for Justice and Peace, Archbishop (later Cardinal) Martino, pointed out to the World Summit on Sustainable Development, the gift of self is the basis of the voluntary associations that make up civil society.⁵⁶ The exempt sector is the primary, although not exclusive, locus of activities based principally not on "*giving in order to acquire* (the logic of exchange) and *giving through duty* (the logic of public obligation, imposed by State law),"⁵⁷ but on "*gratuitousness and communion*."⁵⁸

If human beings attain their fulfillment in large part through the gift of self, the existence of organizations motivated by gratuitousness is fundamental to the well-being of society and is one of the conditions of human flourishing that make up the common good. As Be-

the Threshold of Hope, John Paul II recognized his indebtedness to Buber. See JOHN PAUL II, CROSSING THE THRESHOLD OF HOPE 36 (1994) (noting Buber's impact on religious philosophy by commenting that "[t]he *philosophers of dialogue*, such as Martin Buber . . . have contributed greatly to [religious] experience").

⁵³ See generally FRANS DE WAAL, THE AGE OF EMPATHY: NATURE'S LESSONS FOR A KINDER SOCIETY (2009).

⁵⁴ Senator Barack Obama, Northwestern University Commencement Address (June 16, 2006) (transcript available at <http://obamaspeeches.com/079-Northwestern-University-Commencement-Address-Obama-Speech.htm>).

⁵⁵ *Caritas in Veritate*, *supra* note 45, ¶ 38.

⁵⁶ H.E. Archbishop Renato Raffaele Martino, Address at the World Summit on Sustainable Development (Sept. 2, 2002) (transcript available at <http://www.un.org/events/wssd/statements/holyseeE.htm>).

⁵⁷ *Caritas in Veritate*, *supra* note 45, ¶ 39.

⁵⁸ *Id.*

nedict XVI wrote recently, “The *earthly city* is promoted not merely by relationships of rights and duties, but to an even greater and more fundamental extent by relationships of gratuitousness, mercy and communion.”⁵⁹

From this perspective, nonprofit organizations are important and should be fostered not merely because they fill gaps in the government’s provision of goods and services nor because they can in some instances provide them more efficiently than government. Their fundamental value and the reason for wanting to promote them (among other things through tax exemption) is that they provide a space in which the human inclination to gratuitous concern for others can easily be expressed. Although “civil society” as the locus of gratuitousness does not entirely translate into the “tax exempt” sector, the two concepts are closely related, and the rationale for tax exemption can be found precisely in the gratuitous character of the activity that characterizes the exempt sector.⁶⁰

The government clearly has a need for funds and a right to call upon the citizens to provide them. Not every activity that generates revenue is, however, a proper subject of taxation. The federal government does not, for instance, impose tax on the revenues of other governmental units, and it would be inappropriate for it to do so. The proper source of the government’s funds and the proper object of taxation are the profits generated by activities undertaken to increase the individual well-being of those who engage in them. Activi-

⁵⁹ *Id.* ¶ 6. Perhaps one of the most interesting aspects of the encyclical is Pope Benedict XVI’s suggestion that it is important to find ways of introducing gratuitousness into the market as well. *See id.* ¶ 36. That topic, however, lies well outside the confines of this Essay.

⁶⁰ This approach closely parallels the argument made by Professor Atkinson that altruism is a characteristic feature of exempt organizations and a major element in justifying their exempt status. *See* Atkinson, *supra* note 23, at 510. Atkinson noted that other theorists had occasionally stressed altruism. *See, e.g.*, Ira Mark Ellman, *Another Theory of Nonprofit Corporations*, 80 MICH. L. REV. 999, 1021 n.51 (1982) (“It has also been said that the core feature of charity is that it is not ‘self-regarding,’ but ‘other-regarding.’”); Albert M. Sacks, *The Role of Philanthropy: An Institutional View*, 46 VA. L. REV. 516, 519–20 (1960) (“To some . . . philanthropy is a working reflection of altruism, of ‘love of mankind,’ and therefore intrinsically inconsistent with private profit.”). However, they generally found this characteristic only in nonprofits that rely heavily on donations, whereas Atkinson finds it also in “commercial” nonprofits which derive a significant portion of their revenues from fees. Atkinson, *supra* note 23, at 542–43. Atkinson, however, focuses on what he, following Amartya Sen and James Douglas, describes as “weak altruism” (i.e., a transfer without a *quid pro quo*). *Id.* at 532; *see* JAMES DOUGLAS, WHY CHARITY? 160 (1983); Amartya Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFF. 317 (1970). Because of his focus on the simple lack of consideration, Atkinson does not need to and does not propose any definite anthropological theory.

ties inspired by gratuitousness and solidarity are not conducted to acquire something for the individuals who engage in them. They are not motivated by the pursuit of private profit but rather express communion and concern for others. Although they may in some instances generate an excess of revenues over expenses, that excess is not properly a "profit" in the sense of an increase in private well-being, which can appropriately be taxed by the government.

Viewed in this light, the revenues generated by activities inspired by gratuitousness and a sense of solidarity rather than by the pursuit of private gain fall outside the range of activities that the government may properly consider as a potential source of funds. They are not part of the tax base, but not (as Bittker and Rahdert argued) because of technical difficulties in measuring them or because of difficulties in determining the proper rate, but because income for tax purposes should be understood as comprising those revenues that are available for private consumption, not those that are dedicated out of gratuitous benevolence to contributing to the well-being of others.

Tax exemption for activities inspired by the gratuitous desire to help fellow human beings is appropriate as a way of contributing to the common good because they form part of the complex of conditions that contribute to human flourishing. They do so by providing goods and services, such as education and health care, which are essential to human flourishing. But so, in one degree or another, do a vast range of activities that the government should and must tax if it is to raise the funds it needs for its operations. Farmers who provide our food, contractors who build our houses, utility companies that supply our electricity, and a myriad of other people engaged in a vast range of activities contribute to the common good, arguably no less directly and no less importantly than do educators and health care providers who work in nonprofit organizations.

What justifies exempting from taxation activities of nonprofit organizations inspired by solidarity and a sense of community is not so much the goods and services they provide as the fact that tax exemption encourages and facilitates gratuitous and self-giving behavior, which is itself a central element of human flourishing.

Supporting nonprofit organizations through tax exemption contributes to the common good also by fostering the exercise of freedom, responsibility, and self-determination. This responds to one of the central tenets of Catholic Social Thought: the principle of subsidiarity. Before we can see why this is true, we need to explore briefly the principle of subsidiarity and its foundations.

The principle of subsidiarity rests on a vision of human nature and society. Because Catholic Social Thought sees humans as naturally social beings who achieve their fulfillment not in isolation but as members of diverse groups, it sees the good society not as a giant monolith but as a composite made up of a multiplicity of groups of all sorts and sizes that are formed to carry out diverse purposes. Among the smallest of these is the family, which Catholic thought sees as a “natural society” and as a fundamental building block of larger societies.⁶¹ At the opposite end of the spectrum, Catholic thought also considers the nation, which finds expression in the state, as a natural society required for human flourishing.⁶² Beyond the state lies the world community to which all humans belong by virtue of sharing the same God-given nature over and above the many differences that separate them.

In this vision, large social units, like the nation, “consist[] of plural and intrinsic forms, not ‘masses’ to be aggregated.”⁶³ The multiplicity of small social groups, which constitute civil society, are not creations of the larger units that constitute government. They are expressions of the innate human tendency toward friendship with others and the concrete expression of the solidarity that derives from it. Furthermore, they have distinctive functions for which they are formed and that their distinctive characteristics equip them to carry out.⁶⁴ Far from existing only by the sufferance of government, they are the essential building blocks of larger societies and the common good. “[T]hey bring about mutual perfection by free activity, with the emphasis upon the activity more than the product.”⁶⁵

It is in this light that Catholic thought has elaborated the principle of subsidiarity. Pope Leo XIII expressed the core of the principle in the encyclical *Rerum Novarum*:

The State should watch over these societies of citizens banded together in accordance with their rights, but it should not thrust

⁶¹ See John Paul II, *Gratissimam Sane* [Letter to Families] ¶ 7 (Feb. 2, 1994), available at http://www.vatican.va/holy_father/john_paul_ii/letters/documents/hf_jp-ii_let_02021994_families_en.html.

⁶² Robert P. George & Gerard V. Bradley, *Pope John Paul II (1920–2005)*, in 1 THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS, AND HUMAN NATURE 220, 242–43 (John Witte Jr. & Frank S. Alexander eds., 2006).

⁶³ Russell Hittinger, *Introduction to Modern Catholicism*, in 1 THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS, AND HUMAN NATURE, *supra* note 62, at 3, 22.

⁶⁴ See generally Patrick McKinley Brennan, *Harmonizing Plural Society: The Case of Lasallians, Families, Schools—and the Poor*, 45 J. CATH. LEGAL STUD. 131 (2007).

⁶⁵ Russell Hittinger, *Pope Leo XIII (1810–1903)*, in 1 THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS, AND HUMAN NATURE, *supra* note 62, at 39, 59.

itself into their peculiar concerns and their organization, for things move and live by the spirit inspiring them, and may be killed by the rough grasp of a hand from without.⁶⁶

The locus classicus for this doctrine is Pius XI's encyclical *Quadragesimo Anno* which does not employ the term subsidiarity but offers the following description of the principle:

Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them.

The supreme authority of the State ought, therefore, to let subordinate groups handle matters and concerns of lesser importance, which would otherwise dissipate its efforts greatly. Thereby the State will more freely, powerfully,⁶⁷ and effectively do all those things that belong to it alone

Both of these papal formulations express the principle in largely negative terms, as a limitation on state power and intervention. Pius XI's formulation could also be understood as justifying the principle primarily in terms of efficiency. Understood in these terms, subsidiarity would be about allowing functions to be carried out at the level where they can be done most effectively and as a justification for limited government.

While these are legitimate aspects of the principle, it is richer and more profound than that and more deeply linked to the central role of freedom in human life and the subjectivity of the human person. "It is not only that granting freedom to individuals and the voluntary associations that they form will release human creativity, but that the release of creativity is itself an intrinsic good. True development of the human person requires his or her participation."⁶⁸

⁶⁶ Pope Leo XIII, Encyclical Letter, *Rerum Novarum* [On Capital and Labor] ¶ 55 (May 15, 1891), available at http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum_en.html.

⁶⁷ Pope Pius XI, Encyclical Letter, *Quadragesimo Anno* [The Fortieth Year] ¶¶ 79–80 (May 15, 1931), available at http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno_en.html.

⁶⁸ Richard Esenberg, *A Good Crisis and an Opportunity: The Lessons of Catholic Social Teaching*, PRAWFSBLAWG.COM, Sept. 17, 2009, <http://prawfsblawg.blogs.com/prawfsblawg/2009/09/in-conjunction-with-some-papers-that-i-am-completing-i-have-been-thinking-a-lot-about-the-catholic-notion-of-subsidiarity-an.html>.

In Catholic Social Thought, the government does not graciously allow lower-level societies to carry out functions it could legitimately, if perhaps less efficiently, fulfill. Rather, subsidiarity involves “respect for a pluriform social order” in which “each person is capacitated . . . to contribute to the common good according to his proper office and role.”⁶⁹ According to the principle of subsidiarity, higher-order societies should not only allow lower-order societies to carry out their proper functions but should also remove barriers to their doing so and, when necessary, provide support and aid.

This is the second justification for extending tax exemption to organizations inspired by gratuitousness. Tax exemption (and perhaps more importantly, the deductibility of contributions) facilitates the operations of exempt organizations by freeing them from the burdens of taxation. It does so in an unobtrusive fashion, with a minimum of government interference in the operations of the exempt organizations. This not only permits those organizations to meet the needs of society in areas like education and health care, but it also encourages people to exercise their freedom, initiative, and responsibility. It is, therefore, a very direct and appropriate way for the government to foster the common good by providing the conditions that contribute to human flourishing.

In conclusion, Catholic Social Thought stresses freedom and self-determination as essential elements of human dignity. It holds that persons are the ultimate value, but that they are essentially social. It discovers in self-giving one of the principal elements of human flourishing, and it sees society as made up of groups that arise more or less spontaneously as a result of our innately social makeup. All of these elements suggest that those organizations that are motivated by gratuitousness rather than by the desire for personal profit deserve to be considered as lying outside the normative tax basis and therefore merit tax exemption.

⁶⁹ Hittinger, *supra* note 63, at 23.