THE TAX EXEMPT STATUS OF COMMUNITARIAN RELIGIOUS ORGANIZATIONS: AN UNNECESSARY CONTROVERSY?

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Introduction

A CHURCH is a community of believers. Just as a church’s belief may take many different forms, so too may its community. Its members may simply acknowledge that they hold certain shared beliefs, they may come together for weekly worship, or they may share all aspects of their lives through communal living. The fullest form of religious communion, because of its all-encompassing nature, is that in which the members share everything—not just praying, but also working, eating, playing and the other activities of daily life. It is, therefore, ironic that in two recent cases¹ the Internal Revenue Service (the Service) has successfully taken the position that communitarian religious organizations are ineligible for tax-exempt status² under section 501(c)(3) of the Internal Revenue Code (the Code).³

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³1. Martinsville Ministries, Inc. v. United States, 80-2 U.S. Tax Cas. (CCH) ¶ 9710, at 85,329 (D.D.C. 1979) (mem.); Beth-El Ministries, Inc. v. United States, 79-2 U.S.Tax Cas. (CCH) ¶ 9412, at 87,517-19 (D.D.C. 1979)(mem.); see also Basic Unit Ministry of Alma Karl Schurig v. Commissioner, No. 81-1247 (D.D.C. Jan. 15, 1982) (per curiam) (tax-exempt status denied to a communitarian religious group). Recently, in Mt. Bether Bible Ctr., Inc. v. Commissioner, No. 20363-81 "X" (T.C. filed Dec. 28, 1981), the Service stipulated that the communitarian religious organization at issue was tax-exempt. It remains to be seen whether this represents a change in Service policy or merely a tactical decision that the particular case was a poor litigation vehicle for the Service.


³I.R.C. § 501(c)(3). This section allows an exemption only if three conjunctive requirements are met. See infra note 32 and accompanying text. Failure to satisfy any of these requirements results in a denial of tax-exempt status. Harding Hosp., Inc. v. United States, 505 F.2d 1068, 1072 (6th Cir. 1974); Hancock Academy, Inc. v. Commissioner, 69 T.C. 488, 492 (1977).
This Article briefly discusses the history of communitarian religious organizations. It then examines the Service's position, as approved in recent court decisions, and discusses why that position may conflict with section 501(c)(3), fundamental principles of administrative law and the first amendment. Finally, the Article suggests how the Service could respond to legitimate concerns about possible abuse of exempt status by some organizations, without denying exempt status to all communitarian religious organizations.

I. COMMUNITARIAN RELIGIOUS ORGANIZATIONS: AN OVERVIEW

In the Christian tradition, religious communal living can be traced back to the time of the apostles and is reflected in the Bible. During the third century A.D., the cenobitic, communal life monastery was originated by the "Desert Fathers" of Egypt. Cenobitism, which


5. Probably the most familiar scriptural description of this form of religious expression is from The Acts of the Apostles: "And the multitude of them that believed were of one heart and of one soul: neither said any of them that ought of the things which he possessed was his own; but they had all things common. . . . Neither was there among them that lacked: for as many as were possessors of lands or houses sold them, and brought the prices of the things that were sold, And laid them down at the apostles' feet: and distribution was made unto every man according as he had need." Id. 4:32-35 (King James) (emphasis in original). Many Christian communitarian religious organizations, both past and present, have found the mandate for their form of religious expression in the Scriptures. When Scripture is so interpreted, the communitarian religious life is not a matter of choice, but a dictate. For example, there is the notion that the members of a religious community constitute, in the aggregate, the body of Christ: "Now ye are the body of Christ, and members in particular." 1 Corinthians 12:27 (King James). Each member of such a community can supply, through Christian love, the needs of the others. This vital interrelationship, which some view as the cornerstone of corporate Christian living, is noted in Ephesians, which speaks of "the whole body fitly joined together and compacted by that which every joint supplieth." Id. 4:16 (King James). The mandate for daily fellowship and prayer is evidenced in such passages as: "And they continued steadfastly in the apostles' doctrine and fellowship, and in breaking of bread, and in prayers." The Acts of the Apostles 2:42 (King James). The "breaking of bread" has become only a sacramental observance for many Christians. Because the Last Supper was a partaking of the Passover Feast, complete with meat, bread and wine, however, many in Christian communitarian religious organizations view the "communion" of taking meals together as an integral part of their daily religious lives. Also binding together the members of a communitarian religious organization is the commonality of belief. The Bible is read as instructing believers to have fellowship only with those who are committed to Christ: "Be ye not unequally yoked together with unbelievers . . . ." 2 Corinthians 6:14 (King James).

required eating, sleeping and living together,\textsuperscript{7} embodied the principles on which all later Christian monasticism was based.\textsuperscript{8} Although modern Christian communitarian life is not limited to monasticism, with its emphasis on celibacy and the renunciation of worldly goods, monasteries and convents were the most important form of Christian communal life for many centuries.\textsuperscript{9} While the traditional Christian monastic orders exerted their greatest influence in the Middle Ages,\textsuperscript{10} they continue to thrive today.\textsuperscript{11} Their importance to Christianity, both historically and presently, can hardly be overstated.\textsuperscript{12}

Non-monastic Christian communities, modeled after the type of religious community described in The Acts of the Apostles, have thrived primarily in Protestant countries.\textsuperscript{13} In the United States, Protestant common-life organizations have proliferated since the colonial period.\textsuperscript{14} The longest lasting of the American Protestant commu-

\textsuperscript{7} See W. Nigg, Warriors of God 54-59 (M. Ilford trans. 1959).
\textsuperscript{8} D. Knowles, supra note 6, at 2-3.
\textsuperscript{9} Eastern monasticism was given uniformity by the rules of St. Basil the Great in the fourth century. W. Nigg, supra note 7, at 66-97, 128-54. In the West, the sixth century Rule of St. Benedict served as a model for all subsequent Roman Catholic orders. J. Leclercq, The Love of Learning and the Desire for God 19-32 (C. Misrahi trans. 1961).
\textsuperscript{10} See F. Gasquet, Monastic Life in the Middle Ages 197-242 (1922).
\textsuperscript{11} See The Official Catholic Directory for the Year of Our Lord 1981, at 1083-123 (P.J. Kenedy & Sons Publ. 1981). This directory for the United States lists 100 orders of priests, 24 orders of brothers and 365 orders of sisters. Typically an order will have a number of communities throughout the country.
\textsuperscript{12} In A New Charter for Monasticism (J. Moffitt ed. 1970), the Benedictine monk Dom Jean Leclercq stated: "'A religion flourishes with its monasticism, ... so much so that the decadence of the monasticism is not only the sign but also the cause of the decadence of the religion.' Likewise, the vitality of a monasticism will be the proof of the vitality of the religion." Id. at 44 (quoting F. De Grunne, Hinduisms, in Rythmes du Monde 224 (1967)).
\textsuperscript{13} See F. Biot, The Rise of Protestant Monasticism 60-63 (W. Kerrigan trans. 1963). Although most Protestant communitarian organizations are not monastic, Protestant monasticism does exist and is given its best known expression by the Taizé communities in France, which were founded in the 1940's. Id. at 83-94.
\textsuperscript{14} See W. Sweet, Religion in the Development of American Culture 1765-1840, at 299-305 (1952). See generally A. Bestor, Backwoods Utopias: The Sectarian And Owenite Phases Of Communitarian Socialism In America: 1663-1829, at 231-42 (1950); R. Handy, A History of the Churches in the United States and Canada 221-24 (1976). "The beginnings of communitarian experiments in America were definitely associated with religion and were either the direct or indirect by-product of revivalism. ... [T]he early religious socialistic experiments in America were preceded by [periods] of revival in which the great stress was placed upon the salvation of the souls of individuals; the banding of these 'saved' individuals into communities where the environment would be most suitable for the saved was but a natural next step. The sect also, accepting the Bible as the only rule of faith and practice, followed the pattern of the early Christians as set forth in the Book of Acts where it is stated that they 'had all things in common' and 'that no one said that any of the things which he possessed was his own, but they had everything in common.'" W. Sweet, supra, at 292 (quoting The Acts of the Apostles 2:44, 4:32 (King James)).
nitarian societies has been the Shakers—the United Society of Believers in Christ's Second Coming—which originated in the late eighteenth century in New England and still exists today.\(^{15}\) Their official narrative explains the impetus behind Christian communal living:

To constitute a true church of Christ, there must necessarily be a union of faith, of motives and of interest, in all the members who compose it. There must be "one body and one bread" and nothing short of this union in all things, both spiritual and temporal, can constitute a true church, which is the body of Christ.\(^{16}\)

In recent years, there has been a resurgence of interest in communities of this type in the United States.\(^{17}\) Although the reasons for renewed interest may be rooted in dissent from the values of modern secular society,\(^{18}\) the adherents of many of these new communities express themselves by acknowledging and working with the larger society, rather than by withdrawing, as was done in classical monasticism.\(^{19}\)

Christian communitarianism, despite its long history and continued vitality, possesses no monopoly on religious common-life organizations. Buddhist monasticism, which was well-established by the time of Christ,\(^{20}\) emphasizes the monastic life-style more than does Christianity.\(^{21}\) Also pre-dating Christianity were the Jewish Essene communities which inhabited the Judaean desert from 110 B.C. to 68 A.D.\(^{22}\) Monasticism is also a tradition in Hinduism,\(^{23}\) Taoism,\(^{24}\) Islam\(^{25}\) and Jainism.\(^{26}\)

The historical foundations of religious communitarianism demonstrate that its practitioners are trying nothing new. Neither cultists nor faddists, they are simply trying to live by age-old religious precepts.

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16. C. Green & S. Wells, A Summary View of the Millenial Church or United Society of Believers (Commonly Called Shakers) 51 (1823) (footnote omitted) (quoting 1 Corinthians 10:17 (King James)).
that have fallen into disuse. Whatever their theological differences, these diverse religious organizations agree on the value of communal living. Almost all would be in accord with the following passage from the Shaker’s narrative:

In this united capacity, the strength of the whole body becomes the strength of each member; and being united . . . they have a greater privilege to serve God than they possibly could have in a separate capacity, and are better able to be mutual helps to each other; and they also find a greater degree of protection from the snares of a selfish and worldly nature.

II. The Beth-El Decision

The statutory framework within which religious organizations enjoy tax-exempt status has developed over a number of years. The tax exemption for charitable or religious organizations was first enacted in 1894 and reenacted in 1913. Groups organized and operated exclusively for charitable or religious purposes were granted tax-exempt status because of the benefit the public obtains from their activities. The grant of exemption is qualified, however, by three requirements: 1) the organization must be organized and operated exclusively for one or more exempt purposes; 2) no part of the organization’s net earnings may inure to the benefit of a private individual; and 3) the organization may not be actively involved in legislative lobbying and political campaigns. In denying exempt status to communitarian religious organizations, the Service has made two basic arguments: That such organizations are not organized and operated exclusively for exempt purposes because furnishing the necessities of life to their members is a significant non-exempt purpose, and that

27. In recent years, very different religious communities have begun to realize how much common ground they have in their shared emphasis on community. A fascinating document of this growing realization is A New Charter for Monasticism, supra note 12, which records the proceedings of an unprecedented meeting of Christian Monastic Superiors in Bangkok, Thailand, to discuss the relationships between Christian, Hindu, Buddhist and other forms of Asian monasticism.


31. See H.R. Rep. No. 1860, 75th Cong., 3d Sess. 19 (1939) ("[T]he Government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from public funds, and by the benefits resulting from the promotion of the general welfare.").

32. I.R.C. § 501(c)(3).
the net earnings of such organizations inure to the private benefit of their members, through the members' receipt of food and shelter. 33

In Beth-El Ministries, Inc. v. United States, 34 the leading recent case in this area, the Service successfully defended its denial of exempt status to a communitarian religious organization. 35 Beth-El involved a group whose purpose was "to be a non-profit, interdenominational religious community." 36 The organization had two types of members—staff and associates. The staff members lived together as a Christian community in the fullest sense. 37 The community provided all staff members with the necessities of life and a parochial school education for their children. Each staff member committed all of his possessions to the community upon joining, and those members who were employed outside the community donated their entire salaries. 38

The district court upheld the Service's denial of tax-exempt status to the organization because "[t]he members of Beth-El receive benefits in the form of food, clothing, shelter, medical care, recreational facilities and educational services from the organization. Accordingly, private benefits inure to the members." 39 The court also relied on the 1928 Court of Claims decision in Hofer v. United States, 40 and accepted the Hofer court's conclusion that "a corporation whose members devoted their time, services, and earnings to the corporation, whose property is owned for the common use and benefit of its members, is not a corporation organized and operated for religious purposes." 41 The Beth-El court thus apparently concluded that communitarian religious organizations inherently fail to satisfy two of the requirements of section 501(c)(3). First, the court's reliance on Hofer indicates that such groups cannot be "organized and operated exclusively for religious . . . purposes." 42 Second, in concluding that the receipt of

34. 79-2 U.S. Tax Cas. (CCH) ¶ 9412 (D.D.C. 1979) (mem.). The organization involved in Beth-El maintained its action under § 7428 of the Code, which permits an organization seeking initial or continuing qualification under § 501(c)(3) to sue for a declaratory judgment in either the Tax Court, the Court of Claims or the District Court for the District of Columbia, after its administrative remedies have been exhausted. I.R.C. § 7428(a)-(b).
35. 79-2 U.S. Tax Cas. (CCH) at 87,518.
36. Id.
37. See supra notes 4-28 and accompanying text.
38. 79-2 U.S. Tax Cas. (CCH) at 87,518.
39. Id.
40. 64 Ct. Cl. 672 (1928).
41. 79-2 U.S. Tax Cas. (CCH) at 87,518.
42. I.R.C. § 501(c)(3).
meals and lodging constituted private benefit, the court found that Beth-El was an organization "part of the net earnings of which inures to the benefit of [a] private shareholder or individual."43

It is surprising that the Beth-El court took such a narrow view of the issues before it. In its terse opinion, the court did not even hint at the existence of the historical and scriptural foundations for the way of life practiced by the Beth-El community, nor did it engage in the kind of close statutory analysis which proper treatment of this issue demands.44

III. A STATUTORY ANALYSIS

A. Operated Exclusively for Religious Purposes

Communitarian religious organizations, by definition, care for the temporal, as well as the spiritual, needs of their members.45 Given the nature of religious communitarianism, tending to these temporal needs is an aspect of religious observance46 and is consistent with being organized exclusively for religious purposes within the meaning of section 501(c)(3).

It has long been recognized that, in order to decide whether an organization is operated exclusively for religious purposes, the activities in which the group engages must be distinguished from the purpose behind those activities.47 The statute itself states that it is the purpose, and not the activity, which must be exclusively religious.48 The regulations promulgated under section 501(c)(3) also recognize this distinction: "An organization will be regarded as 'operated exclusively' for one or more exempt purposes only if it engages primarily in activities which accomplish one or more of such exempt purposes.

43. Id. In Martinsville Ministries, Inc. v. United States, 80-2 U.S. Tax Cas. (CCH) ¶ 9710 (D.D.C. 1979) (mem.). Judge Richey, author of the Beth-El opinion, noted simply that he found the facts of the case indistinguishable from those of Beth-El, and therefore, granted summary judgment for the government on the issue of exemption. Id. at 85,339.


45. See supra notes 5-12 and accompanying text.

46. See supra note 5.


specified in section 501(c)(3)." Thus, in determining whether an organization is operated exclusively for religious purposes, the objective nature of the organization's activities is not dispositive. Activities take on their coloration by reason of the purposes for which they are undertaken. As the Tax Court noted in B.S.W. Group, Inc. v. Commissioner, "the purpose towards which an organization’s activities are directed, and not the nature of the activities themselves, is ultimately dispositive of the organization’s right to be classified as a section 501(c)(3) organization." Consequently, to the extent that the Beth-El court concluded that supplying the necessities of life was inherently non-religious, it did not properly interpret the statute. It should have focused on whether the necessities were supplied to accomplish an exempt purpose. Given the relationship between the communitarian way of life and the religious beliefs of the organization’s members, the argument is sound that the "purpose" of such activities was to create a totally religious environment.

The tax administrator may not decide whether a particular religious belief or way of life is fallacious or meritorious, true or false, reasonable or ridiculous, as long as the belief is sincerely held. In accordance with this principle, a wide range of activities has been held to be consistent with the operation of an organization exclusively for religious or charitable purposes. In Golden Rule Church Ass'n v. Commissioner, 41 T.C. 719 (1964), where the Tax Court said, "the statutory language treats as a touchstone, not the organization’s activity, but rather the end for which that activity is undertaken." Id. at 728; see Pulpit Resource v. Commissioner, 70 T.C. 594, 603 (1978); A.A. Allen Revivals, Inc. v. Commissioner, 22 T.C.M. (CCH) ¶ 281, at 1443 (1963); Worthing, "Religion" and "Religious Institutions" Under the First Amendment, 7 Pepperdine L. Rev. 313, 325-32 (1980).

50. 70 T.C. 352 (1978).
51. Id. at 356-57. The same principle had been expressed earlier in Golden Rule Church Ass'n v. Commissioner, 41 T.C. 719 (1964), where the Tax Court said, "the statutory language treats as a touchstone, not the organization’s activity, but rather the end for which that activity is undertaken." Id. at 728; see Pulpit Resource v. Commissioner, 70 T.C. 594, 603 (1978); A.A. Allen Revivals, Inc. v. Commissioner, 22 T.C.M. (CCH) ¶ 281, at 1443 (1963); Worthing, "Religion" and "Religious Institutions" Under the First Amendment, 7 Pepperdine L. Rev. 313, 325-32 (1980).
53. See Saint Germain Found. v. Commissioner, 26 T.C. 848 (1956) (organization that sold books, magazines, pamphlets, music and recordings and conducted classes throughout the U.S. to propagate its religious precepts held to be operated exclusively for religious purposes despite commercial activities); A.A. Allen Revivals, Inc. v. Commissioner, 22 T.C.M. (CCH) 1435 (1963) (organization that published and sold magazines, books, pamphlets, pictures, records and Bibles held to be operated exclusively for religious purposes). The Service itself embraced this concept.
tion v. Commissioner, for example, a church subsidiary managed several businesses—including a laundry, a hotel, a nursery, a ranch and a sawmill—in order to demonstrate to the world that the Church’s teachings applied to daily business life. The Tax Court held that the mere fact that religious organizations normally do not operate such businesses did not justify a refusal to recognize that the organization at issue had engaged in its activities for exclusively religious purposes. The court ruled that the organization was tax-exempt. Most American religious organizations do not furnish room and board to their members. That is no reason, however, to refuse to recognize that organizations which do furnish room and board may do so exclusively for religious purposes.

The position of religious communities is analogous to that presented in San Francisco Infant School, Inc. v. Commissioner. The Service claimed that the Infant School was not operated exclusively for educational purposes, because the school also supplied custodial day care services to its young students. The Tax Court rejected the Service’s argument, finding that “the custodial care was a necessary concomitant of the education. Without its custodial services, education could not have been furnished to its students.” Similarly, the furnishing of life’s necessities by a religious communitarian organization to its members can be an activity which is a concomitant part of the organization’s religious purpose.

In similar situations, the Service has accepted the assertion that room and board can be furnished exclusively for religious purposes. Monasteries, convents and religious orders routinely satisfy the tempo-

in Rev. Rul. 79-359, 1979-2 C.B. 226, which involved an organization that provided burial services that directly supported and maintained basic tenets and beliefs of a religion. Using this same distinction between purposes and activities, the Service ruled that the organization was operated exclusively for charitable purposes. Id.

54. 41 T.C. 719 (1964).
55. Id. at 721, 723-24.
56. Id. at 739; see Fowler v. Rhode Island, 345 U.S. 67, 69-70 (1953) (“Appellant’s sect has conventions that are different from the practices of other religious groups. . . . But . . . it is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment.”).
57. 41 T.C. at 732.
58. 69 T.C. 957 (1978).
59. Id. at 964.
60. Id. at 964; see Michigan Early Childhood Ctr., Inc. v. Commissioner. 37 T.C.M. (CCH) ¶ 186, at 810-11 (1978).
eral needs of their members. Most of these organizations are affiliated with well-established religious orders and have routinely been granted tax-exempt status by the Service.\textsuperscript{62} When established or long-standing communities are involved, the Service apparently has no problem with either of the issues raised in the Beth-El case.\textsuperscript{63} The Service’s treatment of new or unconventional communitarian religious groups is thus inconsistent with its treatment of long-acknowledged ones.\textsuperscript{64}

B. Serving a Public Interest

In elaboration of the statutory requirement that exempt religious organizations be operated exclusively for one or more exempt purposes, the Commissioner’s regulations state that “[a]n organization is not organized or operated exclusively for [religious purposes] unless it serves a public rather than a private interest.”\textsuperscript{65} This regulation provides the Service with an argument that communitarian religious organizations cannot be tax-exempt, because they serve only the pri-

\textsuperscript{62} Many of these monasteries, convents and religious orders are Roman Catholic, see supra note 11, and are covered by the annual group exemption letter the Service issues to the United States Catholic Conference. Determination Letter from Teddy R. Kern, District Director, U.S. Internal Revenue Service, to the United States Catholic Conference (June 16, 1980) (on file at Fordham Law Review). Thus, their exempt status is not approved individually, but simply as components of the Roman Catholic Church in the United States. But see Whelan, supra note 47, at 801-922 (difficulties with determining the exempt status of organizations under church auspices).

\textsuperscript{63} In a series of private letter rulings, the Service confirmed the tax-exempt status of eleven Cistercian monasteries. Private Letter Rulings Nos. 7838028-7838036 (June 21, 1978). One of the rulings notes that “[a]s long as [a] monk remains in [the] monastery . . . he [will receive] food, shelter, clothing and medical care [for life].” Private Letter Ruling No. 7838028 (June 21, 1978). The rulings found support of the monks to be an exempt function of the monastery. See also Rev. Rul. 76-323, 1976-2 C.B. 18 (order supplying room and board to member deemed to be operated “exclusively for religious purposes”); Rev. Rul. 63-209, 1963-3 C.B. 469 (convents exempt under § 501(c)(3)).

\textsuperscript{64} This violates the establishment clause of the first amendment. See infra notes 97-101 and accompanying text. It is difficult, however, to prove discriminatory enforcement by the Service. See Christian Echoes Nat’l Ministry, Inc. v. United States, 470 F.2d 849, 857 (10th Cir. 1972) (group must show “discrimination based on differences of religion, race, politics or an unacceptable classification” and that there is “no reasonable relationship to a proper governmental objective”), cert. denied, 414 U.S. 864 (1973).

\textsuperscript{65} Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (1981) (emphasis added). The regulation further states: “Thus, to meet the requirement of this subdivision, it is necessary for an organization to establish that it is not organized or operated for the benefit of private interests such as designated individuals, the creator or his family, shareholders of the organization, or persons controlled, directly or indirectly, by such private interests.” Id. This requirement of public benefit is consistent with the legislative history of the tax-exempt status of religious organizations. See supra note 31 and accompanying text.
vate interests of their members. This point was not raised in the Beth-El case. When the regulation is considered in light of the statutory language it interprets, however, it is clear that communitarian religious organizations do not violate the rule prohibiting operation for private benefit. The primary function of most, if not all, religious organizations, including communitarian groups, is to provide for the religious needs of their members. The regulation must therefore be interpreted to mean that when such needs are satisfied, a religious organization serves a public interest. To interpret the regulation in any other way would deprive the vast majority of religious organizations of their tax-exempt status.

Furthermore, if the Service interprets the statute to require an organization to do more than serve the needs of its immediate membership—by proselytizing, sponsoring social welfare programs or opening its services to the public—the Service would be violating both the free exercise clause and the establishment clause of the first amendment: first, by coercing a particular form of religious expression, and second, by discriminating between religions on the basis of whether their doctrines coincide with the Service's concept of contribution to a public interest.

C. Incurrence of Net Earnings to Private Individuals

The Beth-El court accepted the Service's argument that the provision of room and board by a religious organization to its membership violates the statutory prohibition against the incurrence of net earnings to members of the organization. Net earnings are the amount remaining after operating expenses have been deducted from gross receipts. Operating expenses, therefore, constitute no part of net

66. See Mail Order Ministries, supra note 47, at 968-69.
67. The Service has recognized that the public interest requirement can be met by serving the interests of the individual members of religious organizations. See Rev. Rul. 73-285, 1973-2 C.B. 174 (public interest served by organization providing funds to defend legal suits against sect members prosecuted for violations caused by religious practice); Rev. Rul. 56-403, 1956-2 C.B. 307 (foundation awarding scholarships to select fraternity served public interest).
70. 79-2 U.S. Tax Cas. (CCH) ¶ 9412, at 87,518 (D.D.C. 1979).
71. "The term 'net earnings' in the inurement-of-benefit clause, as stated in section 501 . . . has been construed to permit an organization to incur ordinary and necessary expenditures in the course of its operations without losing its tax-exempt
earnings. For communitarian religious organizations, the cost of supplying the necessities of life is a reasonable and necessary operating expense. If the religious purposes of the community are to be achieved, it is essential that the members live together. Indeed, their communal life style is an integral part of their religious expression.

It has been recognized that furnishing the necessities of life, under appropriate circumstances, can be an operating expense that does not result in private inurement. Religious orders, convents and monasteries all supply the necessities of life to their members. In such situations, the Service has not alleged that the order's net earnings inure to the individual members. The Service's position, therefore, must be that the cost of room and board is an operating expense of such organizations and that net earnings do not inure to the benefit of the individual members.

Because communal living is not essential to most religious organizations, the cost of supplying room, board and other necessities to members would not be a legitimate expense for most religious organizations. Costs of this nature are, however, necessary expenses of communitarian organizations, because the religious beliefs of their members require that they live together as a community.

IV. THE CONSTITUTIONAL REQUIREMENT OF CONSISTENCY

The Service has routinely recognized the tax-exempt status of the convents, monasteries and religious orders of familiar religious groups, despite their communal lifestyle. Yet, the Service's position is that the same conduct of supplying room and board, in the context of a new and unfamiliar religious group, constitutes a significant non-exempt purpose, serves a private interest and results in the private inurement of net earnings. This distinctive treatment by the Service conflicts with the due process clause of the fifth amendment, the first

72. See supra notes 5-28 and accompanying text.
73. See supra note 5 and accompanying text.
74. See Golden Rule Church Ass'n v. Commissioner, 41 T.C. 719, 731 (1964) (church subsidiary furnishing room and board to student ministers); Saint Germain Found. v. Commissioner, 26 T.C. 648, 658-59 (1956) (organization teaching religious principles in several cities paid all teachers' living expenses).
75. See supra note 63 and accompanying text.
76. See supra notes 62-63 and accompanying text.
amendment guarantee of religious freedom,\textsuperscript{78} and the principle of administrative consistency.\textsuperscript{79}

A. Administrative Consistency

It is a well-established principle of administrative law that an agency must treat all similarly situated parties alike.\textsuperscript{80} When a party challenging an agency's action is able to show apparent inconsistency, the reviewing court will place the burden on the agency to explain what relevant differences, if any, exist between the party challenging the action and other similarly situated parties that have been treated differently.\textsuperscript{81} If the agency does not explain the apparent inconsistency, or if the reasons it offers are not relevant differences within the applicable statutory framework, the reviewing court will order the agency to treat the aggrieved party in the same way that the agency has treated other parties.\textsuperscript{82}

The demand for administrative consistency is based upon the presumption that the policies committed to an agency by Congress will be best implemented if a settled rule is followed.\textsuperscript{83} "From this presumption flows the agency's duty to explain its departure from prior norms."\textsuperscript{84} This duty is to set forth clearly the grounds for the departure and to specify the factual differences between the cases.\textsuperscript{85} The "factual differences [will] serve to distinguish the cases only when some legislative policy makes the differences relevant to determining the proper scope of the prior rule."\textsuperscript{86} In the present context, it would thus be insufficient for the Service to point out that most of the communitarian religious organizations it has recognized as tax exempt

\textsuperscript{78} U.S. Const. amend. I.

\textsuperscript{79} W. Gellhorn, C. Byse & P. Strauss, Administrative Law 393-98 (7th ed. 1979).

\textsuperscript{80} Id. at 393-98; see Secretary of Agriculture v. United States, 347 U.S. 645, 654-55 (1954); Frozen Food Express, Inc. v. United States, 355 F.2d 877, 880 (5th Cir. 1966); International Union v. NLRB, 459 F.2d 1329, 1341 (D.C. Cir. 1972); CBS v. FCC, 454 F.2d 1018, 1026 (D.C. Cir. 1971); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971); Burinski v. NLRB, 357 F.2d 822, 827 (D.C. Cir. 1966); Melody Music, Inc. v. FCC, 345 F.2d 730, 732 (D.C. Cir. 1965).

\textsuperscript{81} See Atchison, T. & S.F. Ry. v. Wichita Bd. of Trade, 412 U.S. 800, 808 (1973). Alternatively, the agency may announce a general change in policy, so that it will henceforth treat all parties in the same way it is treating the party challenging its action. Id. In the context of the present discussion, this would mean revoking the tax-exempt status of all religious organizations that furnish food and shelter to their members.

\textsuperscript{82} W. Gellhorn, C. Byse & P. Strauss, supra note 79, at 394.

\textsuperscript{83} Atchison, T. & S.F. Ry. v. Wichita Bd. of Trade, 412 U.S. 800, 808 (1973).

\textsuperscript{84} Id.

\textsuperscript{85} Id.

\textsuperscript{86} Id.
are associated with an old, familiar religious body. The Service must
demonstrate the relevance of such a distinction in light of section 501
(c)(3). 87

One commentator has suggested that the Internal Revenue Service
often acts as if it had some special dispensation from the requirement
of consistency that applies to all other administrative agencies. 88 The
Service’s apparent belief that it need not be consistent may be based
partially on the recently enacted provision relating to the disclosure of
private letter rulings. 89 Section 6110(j)(3) provides in part: “Unless
the Secretary otherwise establishes by regulations, a written determi-
nation may not be used or cited as precedent . . . .” 90

It is possible to argue that this provision exempts the Service from
the otherwise universal rule that an administrative agency must be
consistent in its treatment of similarly situated parties. 91 Whatever
the validity of that argument in those situations where section 6110
(j)(3) applies, the argument has no application to rulings relating to
tax-exempt status. Section 6110(k)(1) specifically states that section
6110 shall not apply to “any matter to which section 6104 applies.” 92
Because section 501(a) tax exemption applications are governed by
section 6104, the language of section 6110(j)(3) is inapplicable. 93 Ad-
ditionally, the Service’s claim that it need not be consistent has been
rejected by courts outside the exempt organizations area. 94 Conse-

87. I.R.C. § 501(c)(3); cf. Niedert Motor Serv. v. United States, 583 F.2d 954, 962 (7th Cir. 1978) (ICC must explain departure from prior practice regarding application for carrier permits); Squaw Transit Co. v. United States, 574 F.2d 492, 495-96 (10th Cir. 1978) (same); Office of Communication of the United Church of Christ v. FCC, 560 F.2d 529, 532 (2d Cir. 1977) (FCC must explain variations in consideration of renewal applications); Greyhound Co. v. ICC, 551 F.2d 414, 416 (D.C. Cir. 1977) (per curiam) (ICC must explain departure from prior practice regarding regulation of securities transactions); Contractors Transp. Corp. v. United States, 537 F.2d 1160, 1162 (4th Cir. 1976) (ICC must explain departure from prior practice regarding application for carrier permits).

88. See 2 K. Davis, Administrative Law Treatise § 8:12 (2d ed. 1979). Davis states: “Of all the agencies of the government, the worst offender against sound principles in the use of precedents may be the Internal Revenue Service. . . . Its basic attitude is that because consistency is impossible, an effort to be consistent is unnecessary; therefore it need not consider precedents, and it may depart from precedents without explaining why.” Id. at 206, 208-09.


90. I.R.C. § 6110(j)(3).

91. 2 K. Davis, supra note 88, § 8:12, at 207-08.

92. I.R.C. § 6110(k)(1).

93. There is no language in § 6104 similar to that of § 6110(j)(3) regarding the precedential weight of rulings.

94. United States v. Kaiser, 363 U.S. 299, 308 (1960) (Frankfurter, J., concur-
ingen) (“The Commissioner cannot tax one and not tax another without some rational basis for the difference.”); Ogbonnaya v. Commissioner, 617 F.2d 14, 18 (2d Cir.) (“consistency over time and uniformity of treatment among taxpayers are proper
quently, the normal principle of administrative law, that an agency must treat similarly situated parties consistently, should apply to determinations of tax-exempt status under section 501(a).

This requirement of consistency is further mandated by the guarantee of equal protection of the laws and the recognition that "nothing opens the door to arbitrary action so effectively as to allow . . . officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected." 96

B. The First Amendment

The Supreme Court has repeatedly declared that the first amendment's prohibition of any law "respecting an establishment of religion" means that the government may not favor any one religion over another. 98 In Walz v. Tax Commission, 99 the Court said that the primary purpose of the religion clauses of the first amendment "is to insure that no religion be sponsored or favored, none commanded, and none inhibited." 100 Freedom of religious choice is assured by the bench marks [by which] to judge IRS actions") (Oakes, J., concurring). cert. denied, 449 U.S. 900 (1980); Sirbo Holdings, Inc. v. Commissioner, 476 F.2d 981, 987 (2d Cir. 1973) ("The Commissioner has a duty of consistency toward similarly situated taxpayers; he cannot properly concede capital gains treatment in one case and, without adequate explanation, disapprove it in another having seemingly identical facts which is pending at the same time."); IBM Corp. v. United States, 343 F.2d 914, 923 (Ct. Cl. 1965) (like treatment important for all tax rulings), cert. denied, 382 U.S. 1028 (1966). Contra Davis v. Commissioner, 65 T.C. 1014, 1022 (1976) (each case should be decided on its facts).

95. The due process clause of the fifth amendment requires equal protection of the laws as applied by a federal agency. See Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954) (striking down segregation of public schools as violative of the fifth amendment equal protection and due process guarantees); cf. American Sugar Ref. Co. v. Louisiana, 179 U.S. 69, 92 (1900) (discrimination based on "differences of color, race, nativity, religious opinions, political affiliations or other considerations having no possible connection with the duties of citizens [as taxpayers] . . . would be . . . a denial of the equal protection of the laws to the less favored classes"); Veeck Wo v. Hopkins, 118 U.S. 356, 369, 373-74 (1886) ("Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, . . . the denial of equal justice is still within the prohibition of the Constitution.").


97. U.S. Const. amend. 1.


100. Id. at 669.
clause’s proscription of all favoritism in matters of belief. By refusing to recognize the exempt status of communitarian organizations that lack the longevity and affiliation of the convents and monasteries of older religions, the Service violates the first amendment.101

Implicit in the many Supreme Court pronouncements concerning governmental neutrality among religions is an analysis similar to that employed under the equal protection clause of the fourteenth amendment. As Justice Harlan explained in his concurrence in Walz: “Neutrality in [the law’s] application requires an equal protection mode of analysis. The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.”102 The use of the term “religious gerrymanders” emphasizes that all departures from governmental neutrality among religions are forbidden, whether overt, or in the form of subtle gerrymandering that subjects religions to unequal treatment. The discriminatory treatment of communitarian organizations appears to be of the subtle gerrymander type. It is not officially acknowledged by the Service—perhaps not even recognized as discrimination—but it is nevertheless discriminatory, and thus unconstitutional.

In Gillette v. United States,103 the Court concurred with Justice Harlan’s language in Walz, but went on to add that “a claimant alleging ‘gerrymander’ must be able to show the absence of a neutral, secular basis for the lines government has drawn.”104 In the context of communitarian religious organizations, the only apparent distinction between organizations that have been granted exempt status and those that have not is that the latter tend to be newer organizations, not formally affiliated with large and well-established churches. This difference does not constitute a “neutral, secular basis” for distinguishing among organizations. On the contrary, favoring older, larger and more established organizations simply because they are older, larger and more established is a clear example of a forbidden establishment of religion.105

101. See Zorach v. Clauson, 343 U.S. 306, 313 (1952) (government must show “no partiality to any one group . . . [letting] each flourish according to the zeal of its adherents and the appeal of its dogma”).
102. 397 U.S. at 696.
104. Id. at 452.
105. See Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968); United States v. Ballard, 322 U.S. 78, 87 (1944). In a similar case in which the Tax Commission of New York denied tax-exempt status to the Unification Church because of its political activities, the special Referee stated: “[I]f you could point to a structure, a church structure similar to the Catholic Church with the well-defined sphere of activities of the Catholic Church, we wouldn’t be sitting here and this wouldn’t be a case. You would just fall within the well-recognized parameters.” Brief for Petitioner-Appellant at 16-17, Holy Spirit Ass’n for the Unification of World Christianity v. Tax Comm’n, 81 A.D.2d 64, 438 N.Y.S.2d 521 (1981), rev’d, No. 238 (N.Y. May 6, 1982).
New or unfamiliar religious groups are entitled to the same treatment afforded more familiar groups. Indeed, by very reason of their newness and unfamiliarity, such groups are particularly in need of fair and evenhanded treatment from the government. Unintentional discrimination is not immune from challenge: the Supreme Court has warned of the "danger of unintended religious discrimination—a danger that a claim's chances of success would be greater the more familiar or salient the claim's connection with conventional religiosity could be made to appear." Insofar as communitarian religious organizations are concerned, the danger has become a reality.

The result of the Service's distinction between religious groups is that the newer communitarian groups are being singled out and taxed because of their religious activities. Their communal life, as mandated by their religion, is the cause of the denial of their exempt status. The tax imposed on them is in reality a tax on their form of religious expression. The unlimited power to tax is the power to destroy, and withholding an otherwise available tax benefit is unmistakably a penalty. To validate the Service's action is to sanction a device that suppresses or tends to suppress the free exercise of religion as practiced by minority groups.

Given the Service's favorable treatment of traditional communitarian religious organizations, any communitarian religious organization should be able to obtain a favorable judicial decision based solely on the Constitution and the principle of administrative consistency.

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109. See Surinach v. Pesquera de Busquets, 604 F.2d 73, 78 (1st Cir. 1979) (The "allocation and expenditure of [church] funds is intimately bound up in [a church's religious] mission . . . and thus is protected by the free exercise clause . . . .").

110. McCulloch v. Maryland, 17 U.S. 315, 327, 4 Wheat. 316, 326 (1819). In Walz v. Tax Comm'n, 397 U.S. 664 (1970), the Court noted that taxation of religious organizations creates a greater degree of entanglement than does exemption. Id. at 674.


112. See First Unitarian Church v. County of Los Angeles, 357 U.S. 345, 348 (1958) (Douglas, J., concurring) ("There is no power in our Government to make one bend his religious scruples to the requirements of this tax law."); Cantwell v. Connecticut, 310 U.S. 296, 305 (1940) ("a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment")
out consideration of whether the organization actually meets the require-
ments of section 501(c)(3). Why, then, is discussion of the statutory issues meaningful? The answer is simple. The Service can solve its consistency problem in one of two ways. It can recognize the exempt status of all communitarian organizations, or it can refuse to recognize the exempt status of any communitarian organization. The Constitution and the principles of administrative law dictate that the Service adopt a consistent policy, but they do not dictate what that policy must be. The proper content of that policy can be determined only by a careful analysis of the requirements of section 501(c)(3).

V. CONSIDERATIONS INFLUENCING THE SERVICE’S POSITION

The Service’s consistent exemption of communitarian organizations connected with the Roman Catholic Church and other well-established religions\(^\text{113}\) indicates that the Service recognizes there is nothing inherently inconsistent with an organization being both communitarian and tax exempt. The Service correctly perceives, however, that the form of a communitarian religious organization can easily be misused by persons whose main purpose is to evade taxes.\(^\text{114}\) Nevertheless, its response of denying exemption to new communitarian religious groups has been overbroad. Potential abuses can be overcome without a per se denial of exempt status to communitarian organizations otherwise qualified.

A. The Specter of the “Hippie Communes”

The Service may fear that if it grants exemptions to unusual religious communities, it will have to grant exemptions to every “hippie commune” in the country. Although such communes may not be as numerous as they once were, the Service is understandably unable to view this prospect with equanimity. The Service’s concern, however, can be assuaged easily: Not all communes are exempt—only those that are organized and operated for a religious or other exempt purpose are entitled to that status.\(^\text{115}\) In Wisconsin v. Yoder,\(^\text{116}\) the Supreme Court very narrowly defined what constitutes such a religious purpose:

A way of life, however virtuous and admirable, may not be inter-
posed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses the claims must be rooted in religious belief.

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113. See supra notes 61-63 and accompanying text.
114. See Western Catholic Church v. Commissioner, 73 T.C. 196, 213-14 (1979), aff’d mem., 631 F.2d 736 (7th Cir. 1980).
115. See I.R.C. § 501(c)(3).
Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses. 117

This narrow definition provides the Service with a firm basis for denying demands for tax-exempt status by countercultural groups. The majority of these groups are based on precisely the kind of philosophical belief that the Supreme Court stated would not qualify as religious in nature. 118 Those few communal groups that would qualify as religious communities under the Yoder approach should be given tax-exempt status.

One problem presented by this case-by-case approach is that both the Service and the courts must inquire into whether particular communes are religious. Such an inquiry, however, does not rise to the level of excessive entanglement of government in religious matters. 119 Section 501(e)(3) continually requires the determination of whether an organization is religious. Communes present no greater difficulties in this respect than do other organizations that claim to be religious.

B. Untaxed Benefits

The greatest potential for abuse lies in the untaxed receipt by members of a religious community of substantial non-cash benefits from the community, such as food, shelter, clothing and health care. Yet, the solution to this problem could not be more simple: Tax the organization's members on the value of the benefits they receive. There is no inconsistency between treating the organization as tax exempt and taxing persons who receive economic value from the organization. 120 Exempt organizations commonly pay salaries that are taxable to the recipients without destroying the community's exempt status. 121 For example, a minister can receive a salary from his church, on which he is church on which is a necessary cost of the

117. Id. at 215-16 (emphasis added).
118. But see United States v. Seeger, 380 U.S. 163, 165-66 (1965) (required only that sincere belief be meaningful and parallel to that filled by orthodox belief in God).
119. See Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) (some involvement and entanglement are inevitable); Mail Order Ministries, supra note 47, at 977-81.
120. This taxation may, however, be barred by the existence of a particular exclusionary provision, such as the exclusion provided by § 107 for the rental value of parsonages.
operation of the organization. The benefits thus come out of operating expenses, rather than net earnings, and consequently result in neither prohibited private inurement nor loss of exempt status. In many religious communities, the benefits received would be sufficiently related to work performed for the community to justify treating the benefits as compensation for services rendered. Even in organizations where the benefits cannot be treated as compensation, they would nevertheless fall under the broad sweep of the definition of gross income in section 61 of the Code.

In any event, the question of whether benefits are taxable to the recipient is unrelated to the question of whether the community is exempt. Just as non-exempt entities can make distributions that are not taxable, such as gifts excludable under section 102 of the Code, exempt organizations can make distributions that are taxable, such as salaries. Denying religious communities exempt status is an ineffective and inappropriate way of dealing with the problem of untaxed benefits.

An advantage of taxing all members of religious communities on the value of benefits received is that it will tend to least affect members of legitimate religious organizations, and most affect members of sham or questionable organizations. The standard of living in most sincerely religious communities is quite low. The members of these organizations often receive insufficient benefits to generate any tax liability. On the other hand, the standard of living would naturally be higher among the members of organizations formed primarily to evade taxes. Thus, taxing individuals on the value of the benefits received would go far toward destroying the appeal of the “religious” community as a device for avoiding taxes, while having little, if any, effect on most valid religious communities.

C. The Quid Pro Quo Problem

In some religious communities members have outside income from investments or from part-time employment outside the community, some or all of which they donate to their community. The Service may deny exempt status to insure that contributing members will be unable to claim improper charitable deductions for their contributions. A full charitable deduction in this situation would be im-

122. See supra notes 74-75 and accompanying text.
123. I.R.C. § 61. Certainly, there would be few, if any, situations in which the benefits would qualify as excludable gifts under the “detached and disinterested generosity” standard of Commissioner v. Duberstein, 363 U.S. 278, 285 (1960) (quoting Commissioner v. LoBue, 351 U.S. 243, 246 (1956)).
125. Section 170 of the Code allows a taxpayer to deduct a contribution from his personal income tax if the beneficiary of the contribution is organized exclusively for religious, educational or charitable purposes. I.R.C. § 170. A similar deduction appears in the estate tax law, I.R.C. § 2055(a), and in the gift tax law. I.R.C. § 2522.
proper, because the member may have received substantial benefits from the organization "in exchange" for his contribution.\textsuperscript{126} Solving this problem, however, does not require the denial of exempt status to the organization. All that is needed is a determination of the value of the benefits the member has received in exchange for the donation. The member is entitled to a deduction to the extent, and only to the extent, that his contribution exceeds the value of the benefit received.\textsuperscript{127} This is precisely the approach the Service has long used in the analogous area of deductions for bargain sales to charities.\textsuperscript{128}

D. Private Churches

Perhaps the most common form of a sham religious organization is what might be termed the "private church" or "mail-order ministry."\textsuperscript{129} Typically, an individual forms a church and declares himself to be a minister. He donates or assigns his income to the church, claiming a charitable deduction for the amounts donated. The church's money is available to the individual to use as he sees fit in his capacity as the church's "minister," and he generally uses it to maintain the standard of living that he and his family enjoyed before his ecclesiastical transformation.\textsuperscript{130} He may also claim that some or all of the church funds used for his benefit are excludable parsonage allowances under section 107 of the Code. There are many variations in the details—a private church may be completely independent or it may be formally, although not financially, affiliated with some national mail-order ministry, an individual may form his own church or several individuals may form a church in which all are ministers, and so on—but the basic pattern is the same.\textsuperscript{131}

Although these private churches are not usually communitarian organizations, they do generally pay the expenses of members and their families.\textsuperscript{132} It may be that the Service is so wary of any new

\textsuperscript{126} See Riker v. Commissioner, 244 F.2d 220, 227-28 (9th Cir. 1957).

\textsuperscript{127} Of course, the member should not be, in effect, taxed twice for the benefits received from the organization. If he is taxed on the benefits as compensation, then the same benefits should not also be used to decrease the amount of his charitable deduction.

\textsuperscript{128} See Treas. Reg. § 1.170A-4(c)(2) (1972); cf. Rev. Rul. 72-506, 1972-2 C.B. 106 (denying a charitable deduction where the transfer is made in a quid pro quo context).

\textsuperscript{129} See Johnstone, Section 501(c)(3) Status for Nonreligious Family Associations Barred by Recent Cases, 53 J. Tax'n 168 (1980); Mail Order Ministries, supra note 47.

\textsuperscript{130} See Church of the Transfiguring Spirit, Inc. v. Commissioner, 76 T.C. 1, 4-6 (1981); Western Catholic Church v. Commissioner, 73 T.C. 196, 213-14 (1979), aff'd mem., 631 F.2d 736 (7th Cir. 1980).

\textsuperscript{131} See Mail Order Ministries, supra note 47, at 961-64, 968-69; infra note 143.

\textsuperscript{132} See Bubbling Well Church of Universal Love v. Commissioner, 74 T.C. 39 (1980) (single family "church," all funds support home and family expenses), aff'd.
religious organization that pays the living expenses of its members that it has decided to deny exempt status to all such organizations, regardless of whether they are sham private churches or sincere communitarian religious organizations. If so, the Service paints with too broad a brush—especially because the Service has the tools to attack sham private churches without also attacking sincere religious communities. 133

Both the Service and the courts have readily recognized that these private churches fail to satisfy the requirements of section 501(c)(3). 134 They are usually able to demonstrate little or no religious activity, 135 but rather are created and operated for the primary purpose of tax avoidance. 136 In addition, by serving only the private interests of their ministers, the churches arguably fail to satisfy the regulation's requirement that they serve a public, rather than a private, interest. 137 Finally, the private churches have no defense against challenges based on private inurement. 138 The benefits their ministers receive are, by the very nature of these sham churches, disproportionate to the services, if any, that the ministers render to the organizations and are often in direct proportion to the monetary contributions made. 139 The benefits cannot therefore be justified as reasonable compensation for services. Nor can they be justified as a legitimate cost of operation, because supplying the necessities of life to church members is not essential to the accomplishment of any religious purpose.

The Service has used these arguments to prevail consistently against sham private churches. 140 None of these arguments, which have proven so effective against sham private churches, has any relevance

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No. 80-7358 (9th Cir. Nov. 27, 1981); Unitary Mission Church v. Commissioner, 74 T.C. 507, 513-15 (1980) (all “church” funds supported travel and living expenses of three ministers), aff’d mem., 647 F.2d 163 (2d Cir. 1981).
134. Western Catholic Church v. Commissioner, 73 T.C. 106, 190-200 (1979) (self-appointed minister had no theological training, held no services and had no congregation), aff’d mem., 631 F.2d 736 (7th Cir. 1980).
135. See Mail Order Ministries, supra note 47, at 962.
137. See supra notes 65-66 and accompanying text.
138. See Mail Order Ministries, supra note 47, at 969-71.
140. See supra note 134 and accompanying text.
to legitimate communitarian religious organizations. The Service can continue to attack sham private churches without threatening the exempt status of religious communitarian organizations.

E. The Problem of Insincerity

Closely related to the problem of private churches is the problem of insincerity, which may be the most significant difficulty with granting exemptions to communitarian religious organizations. Because of the recent proliferation of unusual new religious organizations, and the obvious advantages of exempt status, this concern with the good faith of new organizations is understandable. A substantial minority of new religious communities may be organized and operated not for religious purposes but to avoid taxes. Traditionally structured monasteries and convents, however, are generally familiar and established, and the Service does not question their sincerity. This may be one of the reasons for the difference in treatment between monasteries and convents, on the one hand, and new communitarian organizations, on the other. But the effect of this approach is necessarily to discourage new religious organizations while entrenching old ones, resulting in an establishment of religion.

141. Some legitimate communitarian organizations also have characteristics that make them particularly suspect, such as an extremely small number of members or an accumulation of funds far in excess of those needed to meet operating costs. Even characteristics such as these, however, are not automatic bars to exemption. An extremely small number of members may serve as an indication to the Service that it should look for hidden inurement, but there is nothing inherently non-exempt about an organization with a small membership. Similarly, an accumulation of funds may be an indication of the existence of a non-exempt purpose, but funds may also be accumulated for exempt purposes—such as to finance an organization’s expansion. See Randall Found., Inc. v. Riddell, 244 F.2d 803, 804-05 (9th Cir. 1957); Western Catholic Church v. Commissioner, 73 T.C. 196, 212-13 (1979), aff’d mem., 631 F.2d 736 (7th Cir. 1980).

142. See Constitutional Definition, supra note 106, at 1069-72.

143. The concerns here are illustrated by the tax revolt in HARDENBURGH, NEW YORK. To protest high taxes, 90% of the adult population of the town became Ministers in the Universal Life Church (ULC) and claimed property tax exemptions as members of the clergy. N.Y. Times, July 17, 1977, at 14, col. 3. The ULC, whose only creed was “do your own thing,” mailed credentials of ministry to anyone requesting them and sent a doctor of divinity degree to anyone who made a $20 “free will offering.” Id., May 29, 1977, at 26, col. 3. Many of the citizens of Hardenburgh stated that their action was a direct protest against the erosion of the local tax base caused by exemptions given to other charitable and religious groups. Id., July 17, 1977, at 14, col. 4. Although the ULC has been granted exempt status, Universal Life Church, Inc. v. United States, 372 F. Supp. 770, 776 (E.D. Cal. 1974), its local “congregations” have not been as fortunate. See KELLMAN v. Commissioner, 42 T.C.M. (CCH) 1508, 1511 (1981); RIEMERS v. Commissioner, 42 T.C.M. (CCH) 838, 841 (1981); BROWN v. Commissioner, 41 T.C.M. (CCH) 542, 546 (1980).

144. See supra note 105.
The proper response of the Service to suspect claims of religious motivation is not to deny exemption requests of new or unfamiliar organizations by applying a standard to them that is not applied to traditional organizations. Rather, if the Service is concerned about sincerity, it should investigate sincerity. Although the government cannot evaluate a religious creed for its truth or falsity, orthodoxy or unorthodoxy, it is not without power to prevent the exploitation of the first amendment by religious frauds. A finding that beliefs are not sincerely held would preclude exempt status because it would mean that the organization was not, in fact, organized and operated for religious purposes.

While an inquiry into an organization's sincerity must be conducted with care and sensitivity, it can and must be done. The Service has recognized that it has "the right and the duty to inquire into the sincerity of the beliefs professed by a church or [religious] organization seeking preferred tax treatment . . . under [section] 501(c)(3)."

In addition, the Tax Court is willing to rely on the degree of sincerity of an organization's members in deciding the exemption issue.

Fortunately, it is usually unnecessary for either the Service or the courts to rely explicitly on insincerity when denying an exemption request. Because an organization with insincerely held religious beliefs is usually a mere tool for enriching those in control, such an organization will almost always be marked by prohibited inurement of its earnings. A denial based on inurement carries considerably less

147. I.R.C. § 501(c)(3). In Welsh v. United States, 398 U.S. 333 (1970), the Court stated that insincere beliefs would not be protected by the first amendment, and defined insincere beliefs to be those that did "not rest at all upon moral, ethical, or religious principle but instead rest solely upon considerations of policy, pragmatism, or expediency." Id. at 342-43.
151. 1980 Exempt Organizations, supra note 149, at 45.
potential for major controversy than does a denial based on lack of sincerity.

F. Section 501(d)

Section 501(d)\textsuperscript{152} of the Code grants exempt status to:

Religious or apostolic associations or corporations, if such associations or corporations have a common treasury or community treasury, even if such associations or corporations engage in business for the common benefit of the members, but only if the members thereof include (at the time of filing their returns) in their gross income their entire pro rata shares, \ldots of the taxable income of the association or corporation \ldots Any amount so included \ldots shall be treated as a dividend received.\textsuperscript{153}

The Service may feel that it is improper to grant communitarian organizations exempt status under section 501(c)(3) because certain communitarian religious organizations are specifically exempted under section 501(d). The latter exemption, however, is unsatisfactory to most communitarian organizations. First, many communitarian organizations do not have a common treasury, and so cannot qualify under section 501(d). Second, exemption under this provision does not carry with it eligibility to receive deductible charitable contributions.\textsuperscript{154}

Section 501(d) was added to the Code in 1936 by an amendment made on the Senate floor. Its legislative history consists solely of a short speech by Senator Walsh.\textsuperscript{155} Prior to its enactment, several court decisions had denied exempt status to religious communities that operated commercial businesses, primarily on the theory that the operation of the business constituted a substantial non-exempt pur-

\begin{footnotesize}
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\item[152.] I.R.C. § 501(d).
\item[153.] Id.
\item[154.] See supra note 125.
\item[155.] 80 Cong. Rec. 9074 (1936) (statement of Sen. Walsh). "Mr. President, under existing law religious, educational, and charitable corporations are exempt from taxation under the income-tax title. This amendment adds a new paragraph to section 101 of the revenue act, which exempts certain corporations from taxation under the income-tax title. It has been brought to the attention of the committee that certain religious and apostolic associations and corporations, such as the House of David and the Shakers, have been taxed as corporations, and that since their rules prevent their members from being holders of property in an individual capacity the corporations would be subject to the undistributed-profits tax. These organizations have a small agricultural or other business. The effect of the proposed amendment is to exempt these corporations from the normal corporation tax and the undistributed-profits tax, if their members take up their shares of the corporations' income on their own individual returns. It is believed that this provision will give them relief, and their members will be subject to a fair tax." Id.
\end{enumerate}
\end{footnotesize}
pose. Not only were these organizations non-exempt, but because their rules prevented members from holding property in an individual capacity, the organizations were also subject to what is now the tax on accumulated earnings. The only purpose of the 1936 amendment was to relieve such organizations possessed of commercial operations from the burden of the accumulated earnings tax. The amendment was to apply only to religious communities with commercial operations. Before the 1936 amendment, religious communities without commercial operations, including many monasteries, convents and religious orders, had been routinely treated by the Service as exempt under the predecessor of section 501(c)(3), and nothing in the amendment indicates any congressional intent to change the tax treatment of those organizations. Accordingly, it cannot be construed as designed to penalize communitarian organizations that were already eligible for exemption.

In any event, section 501(d) may have lost most of its importance since the enactment of the unrelated business income tax. The cases that held organizations with substantial commercial activity to be non-exempt and thus gave rise to the need for section 501(d) were decided prior to the enactment of the unrelated business income tax provisions. With the addition of that tax, the Service recognized that operation of a trade or business is not a bar to exempt status if the organization “is not organized or operated for the primary purpose of carrying on an unrelated trade or business, as defined in section 513.” This regulatory statement suggests that as long as the primary purpose of an organization is the operation of a religious community, rather than the maintenance of a commercial business, it should be exempt despite substantial commercial activity. The organization would, of course, be subject to tax on unrelated business income from its commercial activity. Such an organization would thus appear to have a choice of being treated as a section 501(c)(3) organization with unrelated business income or as a section 501(d) organization.

There might be support, however, for an argument that sections 501(c)(3) and 501(d) are mutually exclusive provisions. In the Su-

156. Hofer v. United States, 64 Ct. Cl. 672, 683-84 (1928); In re Hutterische Bruder Gemeinde, 1 B.T.A. 1208, 1211 (1925); see Whelan, supra note 47, at 905-13 (discussion of the Service's treatment of the Christian Brothers' Winery).
158. See supra note 155.
preme Court's recent decision in *HCSC-Laundry v. United States*, the Court concluded that a cooperative hospital laundry service cannot qualify for an exemption under section 501(c)(3). The Court noted that hospital laundry services are conspicuously absent from section 501(e) of the Code, which provides for the exempt status of various other kinds of cooperative hospital service organizations. Although Congress had explicitly considered including laundry service organizations within section 501(e), it had decided not to do so at the urging of commercial laundry services. The Court ruled that, given this legislative history, cooperative hospital service organizations could qualify for exemption only under section 501(d), thus precluding the possibility of exemption under section 501(c)(3).

If this analysis is applied to communitarian religious organizations, it could be argued that they must qualify for exemption, if at all, under section 501(d). That argument, however, will not survive careful analysis. Section 501(d) applies only if the organization's members include in their gross income their pro rata shares of the organization's taxable income. By its terms then, section 501(d) applies only to religious and apostolic organizations that have taxable income—in fact, the legislative history of the provision makes clear that it applies only to organizations with income from commercial activities. Thus, at most, section 501(d) might be the exclusive basis upon which exemption could be granted to communal organizations with commercial activities.

The legislative history of section 501(d) further demonstrates that its sole purpose was to confer a new exemption, not to limit the exemptions available to communitarian organizations under section 501(c)(3). When the addition of the unrelated business income provisions increased the extent to which an organization could engage in commercial activities without losing its exempt status under section 501(c)(3), communal organizations with substantial commercial activities were among the beneficiaries of that change. To say that they were not so benefitted, because of section 501(d), would be to turn a provision that was intended to assist communitarian organizations with commercial activities into a punitive provision. Such an approach would, of course, subvert the congressional intent. This situation is entirely different from section 501(e), wherein Congress inten-

164. Id. at 6 n.5.
165. Id. at 7.
166. Id. at 8 & n.7.
167. Id. at 4, 8.
169. See supra notes 155-58 and accompanying text.
170. See supra note 155.
tionally excluded cooperative hospital services from exempt status.\(^{171}\)
Nothing in section 501(d) indicates any congressional intent to exclude specific organizations from exempt status.

\section*{Conclusion}

The discriminatory manner in which the Service grants exemptions to familiar communitarian organizations, while denying them to the unfamiliar, cannot be justified or excused. There will always be some communitarian religious organizations whose qualifications for exempt status are doubtful, and drawing the line between the exempt and non-exempt communitarian organizations will not always be easy. Line-drawing problems will arise most frequently in relation to the issue of whether an organization is operated exclusively for religious purposes. Organizations whose activities do not fit the mold of traditional religious activities will receive especially close scrutiny from the Service and the courts. The Service must bear in mind, however, that the crucial issue is not the objective nature of an organization's activities, but the purpose behind those activities.\(^{172}\) An inherently non-exempt activity does not exist. Nor are there any activities in which a communitarian religious organization must engage in order to be exempt.\(^{173}\) No doubt, some allegedly religious organizations will be unable to demonstrate that they are operated exclusively for religious purposes.\(^{174}\) The Service and the courts will not be able to make this determination, however, simply by referring to checklists of exempt and non-exempt activities. A delicate inquiry into the purposes motivating an organization's activities is required. A case-by-case approach may place more of a burden on the Service, but it is the only approach that is consistent with the Internal Revenue Code, the principles of administrative law and the Constitution.

\begin{itemize}
\item \textit{171.} See HCSC-Laundry v. United States, 450 U.S. 1, 7 (1981) (per curiam).
\item \textit{172.} To some extent, the onus falls on the communitarian organization to provide adequate proof of its purposes and motivations. See Basic Unit Ministry of Alma Karl Schurig v. Commissioner, No. 81-1247, slip op. at 2-3 (D.C. Cir. Jan. 15, 1982) (per curiam); Beth-El Ministries, Inc. v. United States, 79-2 U.S. Tax Cas. (CCH) \$ 9412, at 87,518 (D.D.C. 1979) (mem.). Because the "focus of [\$ 7428] is on the review of the Service's administrative determination (or failure to make such determination)," the determination will be made on the basis of the administrative record in the absence of showing good cause to expand upon the record. Houston Lawyer Referral Serv., Inc. v. Commissioner, 69 T.C. 570, 573 (1978).
\item \textit{173.} See Western Catholic Church v. Commissioner, 73 T.C. 196, 210 n.29 (1979), aff'd mem., 631 F.2d 736 (7th Cir. 1980).
\item \textit{174.} See First Libertarian Church v. Commissioner, 74 T.C. 396, 404-05 (1980).
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