

REAPING WHERE THEY HAVE NOT SOWED: HAVE AMERICAN CHURCHES FAILED TO SATISFY THE REQUIREMENTS FOR THE RELIGIOUS TAX EXEMPTION?

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INTRODUCTION

*“Make no mistake: God is not mocked, for a person will reap only what he sows.”*¹

Section 501(a) of the Internal Revenue Code (IRC) provides for federal tax exemption for organizations described in § 501(c) or (d) or in § 401(a).² Section 501(c)(3) lists the so-called “charitable organizations” that benefit from the tax exemption provided for by § 501(a):

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals³

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¹ *Galatians* 6:7 (New American).

² See 26 U.S.C. § 501(a) (2000) (discussing exemption from taxation).

³ *Id.* § 501(c)(3) (listing exempted groups).

Section 501(c)(3) does not merely provide a list of classifications of tax-exempt organizations. Rather, the statute imposes certain responsibilities on the charitable organizations that benefit from tax exemption. In addition to ensuring that no part of their net earnings inures to the benefit of any private shareholder or individual, these organizations must ensure that:

[N]o substantial part of [their] activities . . . is [the] carrying on [of] propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which do[] not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.⁴

Notwithstanding the lobbying prohibition of § 501(c)(3), § 501(h), which is referred to in § 501(c)(3), allows certain public charities to expend monies for influencing legislation.⁵ Churches are not included among those public charities that may make § 501(h) legislation-influencing expenditures.⁶ Hence, in order to maintain their tax-exempt status, these churches must “religiously” observe the anti-lobbying, anti-political campaigning requirements of § 501(c)(3). In short, to receive the benefits of tax exemption, churches must fulfill the necessary statutory requirements.

Normally, that is not very difficult for churches to do. After all, Jesus Christ, the One after whom (and upon whom) the Christian Church is founded, once related a parable indicating that only wicked and evil people would attempt to receive benefits without fulfilling the necessary requirements.⁷ While at the home of Zacchaeus the tax collector, the Christ told a story of a “nobleman” who was aghast that his lazy servant likened him to an evil man who would take out what he did not put in, and reap what he did not sow.⁸

Christ’s parable notwithstanding, some commentators believe that the Christian Church in America is currently reaping where it has not sowed by receiving the benefits of

⁴ *Id.* (explaining the no political activity requirement).

⁵ *See id.* § 501(h)(1) (noting the general rule limiting expenditures by public charities to influence legislation).

⁶ *See id.* § 501(h)(5)(A) (finding that churches are considered a “disqualified organization” when they contribute to influencing legislation).

⁷ *See Luke* 19:11–26 (New American).

⁸ *See id.* 19:1–26.

federal tax exemption without fulfilling the necessary statutory requirements.⁹ Indeed, when the author considers recent activities of such organizations—the Roman Catholic Church’s involvement in the anti-abortion campaign, the Religious Right’s influence on American politics, and the practice in African-American churches of allowing political candidates to speak from their pulpits—he is left to wonder whether the charges against Christendom are true. This Article explores this question in six parts.

Part I will review the historical development of the religious tax exemption, tracing the progress of the exemption through Judeo-Christian history to post-revolutionary America. Part II will review current law regarding the religious tax exemption, discussing the benefits churches receive from the grant of the exemptions, as well as the responsibilities thrust upon them in exchange for such exemptions. Part III will review attempts over the last fifty years by American churches to engage in lobbying and political activities, detailing the political activities of three religious groupings: the Roman Catholic Church; the Religious Right; and African-American churches. It will show that notwithstanding the 1954 prohibition on church political campaigning, today’s churches have been engaging in ever-increasing amounts of political activity. Part IV will discuss efforts by the Internal Revenue Service (“the Service”) to enforce the law by discussing the sole recorded instance wherein the Service has revoked the tax-exempt status of a church for its failure to adhere to the anti-lobbying and anti-political campaigning requirements of the IRC. It will also discuss other efforts by the Service to enforce the law. Recognizing that the Service’s efforts have not stemmed the tide of lobbying and other political activity by American churches, Part V will propose a

⁹ See, e.g., Charles Capetanakis, *Abortion Rights Mobilization and Religious Tax Exemptions*, 34 CATH. LAW. 169, 193 (1991) (indicating that the Church’s tax exempt status may create difficulties in the future, because of its aggressive approach on the abortion issue); JoAnne L. Dunec, *Voter Standing: A New Means for Third Parties to Challenge the Tax-Exempt Status of Nonprofit Organizations?*, 16 HASTINGS CONST. L.Q. 453–54 (1989) (noting that the Abortion Rights Mobilization brought a suit contending that the Church had erroneously and illegally been granted tax exempt status); Norman Leon, *The Second Circuit’s Application of Standing in In re United States Catholic Conference: Another Plea for Clarity and Consistency*, 57 BROOK. L. REV. 429, 431–32 (1991) (finding that the tax exemption acts like a federal subsidy of the church’s political goals).

three-part solution to the problem. Section VI will conclude by reviewing the current debate regarding the religious tax exemption and will reiterate the author's opinion that the Service must act now to ensure that churches in America no longer reap where they have not sowed.

I. HISTORICAL DEVELOPMENT OF THE RELIGIOUS TAX EXEMPTION

No one can realistically pinpoint the moment in history when churches became tax-exempt. One commentator puts it this way:

No one can find that point in history where some great lawgiver declared, "Come now, and let us exempt the church from taxation, for behold! it is as part of the fabric of the state and a pillar of the throne." There is no time before which churches were taxed and in which we can seek the reason for exemption.¹⁰

Indeed, historical evidence indicates that some form of religious tax exemption existed in civilizations as ancient as the Sumerians.¹¹ While the author acknowledges this historical fact, inasmuch as this Article is concerned with tax exemption of churches, the following subsections will focus on the development of religious tax exemptions in Judeo-Christian history.

A. *Roots of the Religious Tax Exemption: Pre-Exodus to the Roman Empire*

The first instance of a religious tax exemption in the Judeo-Christian context occurred in ancient Egypt.¹² Jacob, a Hebrew living in Canaan, had twelve sons; ten of those sons sold their brother, Joseph, to the Ishmaelites as a slave.¹³ The seventeen-year-old Joseph served as a slave and prisoner in Egypt but

¹⁰ DEAN M. KELLEY, *WHY CHURCHES SHOULD NOT PAY TAXES* 5 (New York, Harper & Row 1977).

¹¹ John W. Whitehead, *Tax Exemption and Churches: A Historical and Constitutional Analysis*, 22 CUMB. L. REV. 521, 522 (1991-1992) (noting that there is no historical starting point for church tax exemptions).

¹² See *Genesis* 47:13-26 (New American) (noting that Joseph made it the law of Egypt that when it became harvest time the people had to give one-fifth of their harvest to the Pharaoh and keep the other four-fifths for themselves).

¹³ See *id.* 37:12-28 (indicating that they sold Joseph for twenty pieces of silver).

eventually transformed himself to a man second in stature only to the Egyptian king (“Pharaoh”) himself.¹⁴ In his new position, Joseph was responsible for feeding the Egyptians during a seven-year famine.¹⁵ As part of achieving this goal, Joseph took two significant actions. First, he purchased all the land in Egypt except the land of the priests.¹⁶ And, second, he established a law whereby Pharaoh had a claim to one-fifth of all the produce of the land, except for that produce grown on the land of the priests.¹⁷

Years later, after Moses had led the Hebrews out of Egypt on a journey to the “promised land,” these Hebrews waged war against the Midianites. The Bible records the following command Moses received from God concerning the spoils of battle:

With the help of the priest Eleazar and of the heads of the ancestral houses, count up all the human captives and the beasts that have been taken; then divide them up evenly, giving half to those who took active part in the war by going out to combat, and half to the rest of the community. You shall levy a tax for the Lord on the warriors who went out to combat: one out of every five hundred persons, oxen, asses and sheep in their half of the spoil you shall turn over to the priest Eleazar as a contribution to the Lord.¹⁸

As the wandering Hebrews began to settle down to nation building, the priests—the Church of the day—continued to be favored and to exercise much influence in society. Accordingly, the Levites—the designated religious personnel—received what two commentators have termed a “triple tithe.”¹⁹ One was to maintain them,²⁰ another was for distribution to the poor,²¹ and

¹⁴ See *id.* 41:37–46 (describing the fine linen robes, signet ring, gold chains, and power given to Joseph).

¹⁵ See *id.* 41:54–56 (noting that when the famine gripped the land, Joseph rationed the grain to the Egyptians).

¹⁶ See *id.* 47:22.

¹⁷ See *id.* 47:24, 26.

¹⁸ *Numbers* 31:26–29 (New American).

¹⁹ See MARTIN A. LARSON & C. STANLEY LOWELL, *THE CHURCHES: THEIR RICHES, REVENUES, AND IMMUNITIES*, 15 (Washington, R.B. Luce 1969).

²⁰ See *Numbers* 18:21–26 (indicating that for all generations only the Levites are to perform the service of meeting tent).

²¹ See *Deuteronomy* 14:28–29 (New American) (noting the importance of maintaining community stores for the aliens, orphans, and widows).

a third one that was either in cash, livestock, or produce, was to supply these priests for their feasts and sacrifices.²² Further, as the Hebrews prepared to settle into the Promised Land, the Levites received a grant of forty-eight cities “with all their pasture lands,” as well as all necessary cattle and equipment.²³

Several years later, two of Israel’s greatest kings, David and Solomon, levied significant taxes on the people. In David’s case, the taxes were levied to finance wars, and in Solomon’s case, to build a temple.²⁴ “The burdens heaped upon the people by David and Solomon became so intolerable that when the latter died and his son Rehoboam ascended the throne, the representatives of the Ten Tribes pleaded bitterly for relief.”²⁵ However, the new king showed no mercy, and instead warned the people that whereas his father had chastised them with whips, he would do so with scorpions.²⁶

While the general populace staggered under the burden of heavy taxation, one section of Hebrew society, the priestly class, remained untouched by these harsh taxation policies. “Not only was their income far in excess of the average: *it was also immune to every form of taxation.*”²⁷ In fact, the Scriptures strongly warned against the imposition of any form of taxation on the clergy and other religious personnel: “We [are] also [to] inform you that it is not permitted to impose taxes, tributes, or tolls on any priest, Levite, singer, gatekeeper, temple slave or any other servant of that house of God.”²⁸

With the advent of Jesus Christ, the early Christian Church—if one could call the movement a Church—espoused a complete separation of church and state. The Christ Himself, when questioned about the paying of taxes—albeit by some seeking to trap him with his own words—proclaimed, “[R]epay to Caesar what belongs to Caesar and to God what belongs to

²² See *id.* 14:22–24 (finding that the people get whatever they desired and “partake of it and make merry with [their] family”).

²³ See *Joshua* 21:41; (New American) *Numbers* 35:2–8 (explaining how Israelites were to give lands to the Levites).

²⁴ See *II Samuel* 1:1–*I Kings* 11:43 (New American) (describing the reigns of David and Solomon).

²⁵ *Larson & Lowell*, *supra* note 19, at 15.

²⁶ See *I Kings* 12:11 (stating that Rehoboam ignored the advice of the elders and instead consulted the young men who grew up with him).

²⁷ *Larson & Lowell*, *supra* note 19, at 15.

²⁸ *Ezra* 7:24 (New American).

God.”²⁹ On another occasion, when sending his disciples on a missionary journey, He instructed them as follows: “[T]ake nothing for the journey but a walking stick—no food, no sack, no money in [your] belts.”³⁰ The Christ was apparently giving his disciples a potent message: they were to concentrate on preaching the good news, healing the sick and demon-possessed, and calling people to repentance. They were to take no thought of acquiring wealth, or, by extension, seeking tax exemptions. Apostle Paul echoed this approach to tax exemption when he warned: “This is why you also pay taxes, for the authorities are ministers of God, devoting themselves to this very thing. Pay to all their dues, taxes to whom taxes are due.”³¹

As the Church grew, however, its leaders either forgot or chose to disregard the admonishments of The Christ and Paul. As early as during the third century:

[C]lerics began to appear who called themselves deacons, presbyters, priests, bishops, and pappas and who claimed authority over their congregations. In due course, these men accumulated vast amounts of wealth and aggrandized their power. Late in the third century, they began construction of great churches; penetrated the government at all levels; and assumed the role and perquisites of powerful princes.³²

Now that they had tasted power, the clerics desired to become even more powerful. “In order to consolidate their ecclesiastical and political positions, the bishops began holding synods or councils; their demands for tax-exemptions and other preferences brought them into periodic conflict with the state. The clerical establishment, however, grew apace and penetrated every level of society and government.”³³

It was in this setting that the Christian Church first became tax exempt. In the year 313, the Roman Emperor Constantine (307–337 A.D.) issued the Edict of Toleration, placing Christianity on equal footing with the cult of Isis and other pagan religions within the Roman Empire.³⁴ Constantine himself became a Christian, and then began a program to make

²⁹ *Matthew 22:21* (New American).

³⁰ *Mark 6:8* (New American).

³¹ *Romans 13:6–7* (New American).

³² *Larson & Lowell, supra* note 19, at 19.

³³ *Id.*

³⁴ *See Id.*

Christianity the Roman state church. He “issued a long series of repressive prescripts, first, against the pagan cults and then with even greater ferocity against the dissident forms of Christianity.”³⁵ The Emperor also granted several preferences to the Church. Among these preferences granted the new clericals were:

[G]enerous emoluments from the public treasury; a total exemption from all forms of taxation; immunity from military service; and the provision that Catholic[] [Christians] alone be eligible to hold political office. The Church was empowered to receive gifts and legacies; and the wealth of all who died intestate *or without direct heirs* was automatically conferred upon it.³⁶

Indeed, by the time Constantine died in 337 A.D., the Christian Church was the beneficiary of several forms of tax exemptions. Although later Roman rulers discontinued some of those exemptions, several remained entrenched in Roman law and policy.³⁷

B. Religious Tax Exemption in England

The precedent set by the Romans reared its head in England during the Middle Ages. During that period, although it was not recognized throughout the country, the religious tax exemption—and the related practice of taxing the general populace for the support of religious causes—certainly existed. For example, in 1188, King Henry II (1154–1189) levied a tax to support the Crusades.³⁸ While the 1188 ordinance taxed all other persons, property and sources of revenue, it exempted the “books and apparatus of clergymen” from the tax.³⁹ “British taxation of [churches eventually] ended when Great Britain enacted its first comprehensive income tax in 1842.”⁴⁰ Under the new law, all income generated by property used for charitable purposes,

³⁵ *Id.*

³⁶ *Id.*

³⁷ See ALFRED BALK, *THE FREE LIST: PROPERTY WITHOUT TAXES* 21 (Russell Sage Foundation 1971).

³⁸ ROUNDELL, *ANCIENT FACTS AND FICTIONS CONCERNING TITHES* 194 (Macmillan and Company 1888).

³⁹ Claude W. Stimson, *Exemption of Property from Taxation in the United States*, 18 MINN. L. REV. 411, 416 (1934).

⁴⁰ *Comm'r v. Pemsel*, 1891 A.C. 531, 574; see Whitehead, *supra* note 11, at 531.

including purposes deemed religious, was exempted from income taxes.⁴¹

The 1842 statute was actually an outgrowth of British common law. Indeed, early British common law included the ecclesiastical laws that governed the affairs of the established church, including its status as a tax-exempt entity.⁴² The common law granted tax exemptions for church property under three conditions.⁴³ First, only the property of incorporated established churches devoted to purposes prescribed by ecclesiastical law qualified for the exemption.⁴⁴ Second, the exemption covered only “the ecclesiastical taxes that were levied for the church’s own maintenance and use.”⁴⁵ Third, the state could eliminate the tax exemption “in times of emergency or abandon [it] altogether if the tax liability imposed on remaining properties in the community proved too onerous.”⁴⁶

The tax exemption of religious organizations received a boost when Britain enacted the Statute of Charitable Uses in 1601.⁴⁷ The statute’s preamble enumerated several examples of charitable uses.⁴⁸ These uses included the “repair of bridges, ports, havens, causeways, churches, seabanks, and highways.”⁴⁹ “Repair of churches” was the only reference to religion in the preamble. Yet, relying in part on the Statute of Charitable Uses, Lord McNaughten wrote in his 1891 opinion in *Commissioner v. Pemsel*: “‘Charity’ in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.”⁵⁰

Lord McNaughten’s *Pemsel* opinion undoubtedly influenced the English income tax law of 1894. Although the statute did

⁴¹ *Pemsel*, 1891 A.C. at 574, 583.

⁴² John Witte, Jr., *Tax Exemption of Church Property: Historical Anomaly or Valid Constitutional Practice?*, 64 S. CAL. L. REV. 363, 369 (1991).

⁴³ *Id.* at 372–74.

⁴⁴ *Id.* at 372.

⁴⁵ *Id.* at 373.

⁴⁶ *Id.* at 374.

⁴⁷ See generally An Act to Redress the Mis-employment of Lands, Goods and Flocks of Money Heretofore Given to Certain Charitable Uses, 1601, 39 Eliz., ch. 4 (Eng.).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Comm’r v. Pemsel*, 1891 A.C. 531, 583.

not clearly define “charitable,” it included exemptions for income generated by property used for “charitable” purposes.⁵¹ Among these purposes were “the advancement of religion” noted by Lord McNaughton in *Pemsel*.⁵²

C. *Religious Tax Exemption in the American Colonies*

Among those English citizens who came to America during the early colonial period, some “came seeking religious freedom for themselves and were willing to grant it to others. On the other hand, others came to establish religious freedom for themselves and, where possible, to deny it to others.”⁵³ In such a setting, religious tax exemptions varied from colony to colony and the colonies applied them differently to the various religious groups. Indeed, where the colonies allowed these exemptions, only established churches qualified. Meanwhile, dissenting religions were taxed.⁵⁴ Hence, during the period leading up to the American Revolution, nine of the thirteen colonies provided direct tax aid to churches.⁵⁵ Of these nine colonies, Massachusetts, Connecticut, and New Hampshire supported the Congregational Church, while New York, Maryland, Virginia, North Carolina, South Carolina, and Georgia supported the Church of England.⁵⁶ No state-supported church or churches existed in Rhode Island and the Middle Atlantic colonies.⁵⁷

Within the colonies having established churches, various statutes and constitutional provisions existed whereby those churches either received governmental aid or some form of tax exemption. For example, Georgia and Maryland both had constitutional provisions that permitted individuals to support the church of their own preference with monies collected from a general assessment.⁵⁸ Meanwhile, the Constitution of South Carolina declared Christian Protestantism as the state-established religion and forbade any tax on religion that was not

⁵¹ *Id.* at 583–85.

⁵² *Id.* at 583.

⁵³ D.B. ROBERTSON, SHOULD CHURCHES BE TAXED? 42 (1968).

⁵⁴ Witte, *supra* note 42, at 367.

⁵⁵ John K. Wilson, *Religion Under the State Constitutions 1776-1880*, 32 J. CHURCH & ST. 753, 754 (1990).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 756.

voluntarily engaged in by the taxpayer.⁵⁹ Massachusetts, a colony noted as a symbol “of intolerance of dissent during the early colonial period,”⁶⁰ adopted two significant laws: one imposing a tax upon all citizens for the support of the clergy, and another disenfranchising non-members of the established church.⁶¹ Connecticut instituted an assessment to establish the Connecticut Congregational and Anglican churches, but provided for dissenting Baptists and Quakers to be exempted from such assessment.⁶² Connecticut also enacted a series of exemptions and a certificate system allowing members to support their own churches while requiring the unchurched to support the established church.⁶³ Finally, in Virginia, governmental measures provided for the support of the clergy and required farmers to pay tithes to ministers.⁶⁴

In summary, during the early colonial period America experienced a period of governmental support for religion, implemented both through the levying of taxes for the support of churches and church personnel, and the exemption of churches from the various taxes and assessments. Yet, this support differed from colony to colony, for the governmental support given was largely in favor of the state-established churches. This was to change as time wore on.

D. Religious Tax Exemption in the Post-Revolutionary Period

Well before the beginning of the American Revolution, the religious situation in the colonies had changed dramatically from what it had been during the early colonial period. The politico-religious policy had moved from one of established churches to one of disestablishment. Indeed, at the time of the Revolution—or shortly thereafter—several of the colonies disestablished their

⁵⁹ *Id.* at 756–57.

⁶⁰ Robertson, *supra* note 53, at 42.

⁶¹ *Id.* at 44–45.

⁶² Wilson, *supra* note 55, at 760.

⁶³ See generally THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 180–82* (Oxford Univ. Press 1986); LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 41–42* (New York, MacMillan 1986).

⁶⁴ Robertson, *supra* note 53, at 47.

churches.⁶⁵ Robertson discusses the reasons underlying this disestablishment as:

No one group had a sufficient majority to gain official recognition; political and religious leaders saw the necessity, at least on a national level, of granting freedom to all groups and official establishment to none. The fact of population distribution, however, should not allow us to forget that there was also firm religious belief in freedom, and this fact was evident in various religious groups as well as religious rationalists among the founding fathers.⁶⁶

While the success of the American Revolution, the ratification of the Constitution in 1787, and the implementation of the First Amendment in 1791 provided for the separation of church and state and the disestablishment of religion, these events in no way ended religious tax exemptions. Yet, the new nation and the various states therein had no legal basis for granting such exemptions. Neither the Federal Constitution nor the newly adopted state Constitutions and laws provided for a religious tax exemption.⁶⁷ Indeed, to this day, nothing in the United States Constitution forbids the taxing of property or income of religious groups—notwithstanding the arguments being made by various church groups and spokespeople today that the exemption is implicit in the Free Exercise clause of the First Amendment.⁶⁸

Notwithstanding the lack of a constitutional mandate for the time-honored practice of granting religious tax exemptions, both the federal and state governments soon began enacting statutes granting—or recognizing—such exemptions. On the state level, Pennsylvania was the first to adopt a constitutional amendment specifically exempting church property from taxation.⁶⁹ Even Virginia—despite its early period of anticlericalism—restored tax exemption to church property in 1840–1841.⁷⁰

⁶⁵ *Id.* at 51.

⁶⁶ *Id.*

⁶⁷ *Id.* at 69.

⁶⁸ See, e.g., Jerry Falwell, *Politics in the Pulpit*, LISTEN AMERICA (Oct. 5, 2002) available at http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=29185 (last visited Mar. 30, 2004); Larry Witham, *Did You Think Churches Not Being Allowed to Be Involved in Politics (And Get a Tax Exemption) Was Based on the Constitution?*, WASH. TIMES (Aug. 27, 1998), available at <http://www.freerepublic.com/forum/a175.htm> (last visited Mar. 30, 2004).

⁶⁹ See Robertson, *supra* note 53, at 69.

⁷⁰ *Id.*

On the federal level, some early tax statutes contained provisions granting federal tax exemption to charitable organizations, including churches.⁷¹ For example, “[i]n 1802 the 7th Congress enacted a taxing statute for the County of Alexandria . . . which provided tax exemptions for churches.”⁷² Then, in 1813, “the 12th Congress refunded import duties paid by religious societies on the importation of religious articles.”⁷³ Finally among these early statutes, in 1815, Congress imposed a tax on household furniture but exempted therefrom the property of “any charitable, religious, or literary institution.”⁷⁴

Beyond these early statutes, Congress later provided for tax exemption of charitable organizations, including religious institutions. “The first federal income tax, imposed during the Civil War, exempted ‘[t]he income of literary, scientific, or other charitable organizations.’”⁷⁵ Then, “[i]n 1864, Congress enacted a five percent tax on gross receipts from lotteries, but exempted lottery receipts that were received by . . . ‘any charitable, benevolent, or religious association’ and that were used for ‘the relief of sick and wounded soldiers, or . . . some other charitable use.’”⁷⁶ Finally, in 1894, Congress enacted a more comprehensive income tax statute.⁷⁷ The Tariff Act of 1894 provided an explicit tax exemption for “corporations, companies, or associations organized and conducted solely for charitable, religious or educational purposes . . . [and] stocks, shares, funds or securities held by any fiduciary or trustee for charitable, religious, or educational purposes.”⁷⁸

One year later, the Supreme Court declared the income tax system contained in the 1894 Act unconstitutional for reasons unrelated to the charitable exemption provision.⁷⁹ However, the terms of that exemption were subsequently included in the

⁷¹ Whitehead, *supra* note 11, at 541–42.

⁷² Walz v. Tax Comm’n, 397 U.S. 664, 677 (1970).

⁷³ *Id.* (citing 6 Stat. 116 (1813)).

⁷⁴ Act of Jan. 18, 1815, ch. 23, § 14, 3 Stat. 186, 190 (1815).

⁷⁵ Whitehead, *supra* note 11, at 541 (quoting ROGOVIN, BACKGROUND OF THE PRESENT INCOME TAX EXEMPTION OF CHARITABLE ORGANIZATIONS 10 (quoting Treasury Decision No. 110, May, 1863)).

⁷⁶ *Id.* (quoting Act of June 30, 1864, § 111, 13 Stat. 223, 279 (1864)).

⁷⁷ Tariff Act of 1894, ch. 349, § 32, 28 Stat. 509, 556 (1894).

⁷⁸ *Id.*

⁷⁹ Pollock v. Farmers’ Loan and Trust Co., 158 U.S. 601, 637 (1895).

Payne Aldrich Tariff Act of 1909,⁸⁰ and, most importantly, in the Revenue Act of 1913.⁸¹

A similar exemption has been included in every income tax act since 1913.⁸² Indeed, it is this provision—and subsequent amendments thereto—that form the basis for the questions being raised by this article.

II. CURRENT LAW GOVERNING THE RELIGIOUS TAX EXEMPTION

Churches receive their tax-exempt status under § 501(c)(3).⁸³ The statute provides federal tax exempt status for organizations “organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . or for the prevention of cruelty to children or animals.”⁸⁴ Federal tax exemption carries significant benefits for these organizations, while placing certain responsibilities on them. Although the statute covers all § 501(c)(3) organizations, because this article is concerned with the activities of churches, this section will examine the benefits these religious entities enjoy by virtue of their tax exemption, and the responsibilities they are expected to comply with.

A. *Benefits of the Religious Tax Exemption*

As an initial matter, the term “religious purposes” as used in § 501(c)(3) has a very broad meaning. The term is not limited to traditional houses of worship.⁸⁵ Rather, it extends to religious book publishers, broadcasters, organizations conducting genealogical research, and burial societies.⁸⁶ As far as churches go, they are automatically entitled to tax exemption under § 501(c)(3), and thus to the receipt of tax-deductible donations, without even having to file an application for formal recognition

⁸⁰ Ch. 6, § 38, 36 Stat. 11, 112 (1909).

⁸¹ Ch. 16, § II(G), 38 Stat. 114, 172 (1913).

⁸² See Herman T. Reiling, *Federal Taxation: What Is a Charitable Organization?*, 44 A.B.A. J. 525, 525 (1958).

⁸³ 26 U.S.C. § 501(c)(3) (1986).

⁸⁴ *Id.*

⁸⁵ JAMES J. FISHMAN & STEPHEN SCHWARZ, *NONPROFIT ORGANIZATIONS* 421 (Foundation Press 1995).

⁸⁶ *Id.*

from the Service.⁸⁷ They are also exempt from most of the reporting requirements that the law places on other types of § 501(c)(3) organizations.⁸⁸ Thus, a self-declared religious organization is automatically treated as a § 501(c)(3) organization, exempt from taxes and eligible to receive tax-deductible gifts.⁸⁹

Churches derive great benefits from their tax-exempt status. As an initial matter, they are exempt from both federal income tax and federal unemployment tax.⁹⁰ Next, they qualify to receive tax-deductible contributions for income, estate, and gift tax purposes.⁹¹ With very few exceptions, other § 501(c)(3) tax-exempt organizations are not eligible to receive tax-deductible gifts. Finally, churches may issue tax-exempt bonds to finance some of their activities,⁹² enjoy preferred postal rates,⁹³ qualify to provide tax-deferred retirement plans for their employees,⁹⁴ qualify for exemption from various state and local taxes, and be exempt under labor, bankruptcy, and other regulatory regimes.⁹⁵

The many benefits these religious entities receive from their tax-exempt status have enabled them to become extremely wealthy.⁹⁶ Attributing the churches' wealth to their tax-exempt status, Balk describes the current situation thus:

American organized religion has become an economic behemoth and already, more than most devout local parishioners will allow themselves to admit, it has assumed the broad

⁸⁷ See LESTER M. SALAMON, *AMERICA'S NONPROFIT SECTOR: A PRIMER* 22–25 (Foundation Center 1992).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ 26 U.S.C. § 501(a)–(c). “[T]he term ‘employment’ [does not include] . . . service performed in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3)” 26 U.S.C. § 3306(c)(8). Prior to the Tax Reform Act of 1984, exempt organizations were also exempt from social security taxes. 26 U.S.C. § 3121(b)(8)(B).

⁹¹ *Id.* §§ 170, 2055, 2522.

⁹² *Id.* § 145.

⁹³ See United States Postal Service, Nonprofit Standard Mail Eligibility 5 (Pub'n 417, Oct. 1996), available at <http://pe.usps.gov/cpim/ftp/pubs/Pub417/Pub417.pdf>.

⁹⁴ 26 U.S.C. § 403(b).

⁹⁵ For a comprehensive survey of the privileges and benefits accorded section 501(c)(3) organizations by federal, state, and local governments, see Bazil Facchina, et al., *Privileges and Exemptions Enjoyed by Nonprofit Organizations: A Catalog and Some Thoughts on Nonprofit Policymaking*, 28 U.S.F. L. REV. 85 (1993).

⁹⁶ See ALFRED BALK, *THE RELIGION BUSINESS* 7 (John Knox Press, Richmond 1968).

characteristics of a business – emulating the corporate-oriented administrative, financial, and public relations objectives of the marketplace. And the internal yardsticks by which its leaders most often measure its progress have become those of the marketplace.⁹⁷

The beneficial impact of the law governing nonprofit entities on churches and other charitable organizations has not been lost on the judiciary. The Supreme Court itself has stated that “[b]oth tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization.”⁹⁸ The Court has also stated “in enacting both § 170 and § 501(c)(3), Congress sought to provide tax benefits to charitable organizations, to encourage the development of private institutions that serve a useful public purpose or supplement or take the place of public institutions of the same kind.”⁹⁹

It would seem, therefore, that churches are allowed to reap the benefits of tax exemption and tax deductibility of contributions with the expectation that they will in turn provide some benefits to society. Notwithstanding this responsibility, these religious entities would want to retain their tax-exempt status, essentially because the economic benefits thereof “provide strong incentives [for them] to attain and retain tax-exempt status and thus to receive tax-exempt, tax-deductible contributions.”¹⁰⁰

B. Responsibilities of Religious Tax Exemption

However, to maintain their tax-exempt status, American churches must satisfy certain requirements. Specifically, the IRC imposes two obligations on these organizations. First, propaganda or other attempts to influence legislation should not constitute a “substantial part” of a church’s activities.¹⁰¹ Second, the law prohibits churches from “participat[ing] in . . . or

⁹⁷ *Id.*

⁹⁸ *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 544 (1983).

⁹⁹ *Bob Jones Univ. v. United States*, 461 U.S. 574, 587–88 (1983).

¹⁰⁰ *Dunec*, *supra* note 9, at 455–56.

¹⁰¹ 26 U.S.C. § 501(c)(3) (2000).

interven[ing] in . . . any political campaign on behalf of (or in opposition to) any candidate for public office.”¹⁰²

In addition to risking the loss of its tax-exempt status, a church that expends its own funds on “influencing or attempting to influence the selection, nomination, [or] election . . . of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors, whether or not such individual or electors are selected, nominated, [or] elected,” will face a tax imposed by § 527(f).¹⁰³ Also, any funds paid or debts incurred by the organization in “participation in, or intervention in (including the publication or distribution of statements), any political campaign on behalf of (or in opposition to) any candidate for public office” will subject the church and its leaders to tax liability.¹⁰⁴ The Service may abate the taxes if it determines that the political expenditure was “not willful and flagrant” and the practice “was corrected within the correction period.”¹⁰⁵ On the other hand, if the Service determines that the political expenditures were willfully or flagrantly made, it may terminate the taxable year of the church, assess any taxes, and seek an injunction to prevent further political expenditures.¹⁰⁶

Although these provisions are now enshrined in American law, they were not always so. In fact, throughout early American history—right up to the early twentieth century—churches were free to engage in political activity without fear of losing their tax-exempt status. It was not until 1919 that a Treasury regulation first limited lobbying by charitable organizations, including churches.¹⁰⁷ From then on, the government used this regulation as the basis for arguing that § 501(c)(3) organizations should not expend substantial funds for lobbying purposes. This argument gained judicial acceptance in *Slee v. Commissioner*,¹⁰⁸ in which the Second Circuit held that

¹⁰² *Id.*

¹⁰³ *Id.* § 527(e)(2); see also Rev. Rul. 81-95, 1981-1 C.B. 332; S. REP. NO. 93-1357, at 29 (1974).

¹⁰⁴ 26 USC § 4955.

¹⁰⁵ *Id.* § 4962.

¹⁰⁶ See *id.* §§ 6852, 7409.

¹⁰⁷ Treas. Reg. 45, art. 517 (1919). The regulation stated in part: “[A]ssociations formed to disseminate controversial or partisan propaganda are not educational within the meaning of the statute.” *Id.*

¹⁰⁸ 42 F.2d 184 (2d Cir. 1930).

the American Birth Control League failed to qualify for tax exemption because it disseminated propaganda to both legislators and the public supporting the repeal of laws against birth control.¹⁰⁹ In 1934, four years after the *Slee* decision, Congress added the “no substantial part” lobbying limitation as a responsibility for the charitable tax exemption.¹¹⁰

The provision placing an absolute ban on political campaigning came twenty years later in the form of an amendment to the IRC of 1954.¹¹¹ According to the amendment’s sponsor, then-Senator Lyndon B. Johnson (D. Texas), the rule was intended to “extend” the limitation of § 501(c)(3).¹¹²

Some commentators view these two provisions of the Code as nothing less than severe limitations on the churches’ practice of religion.¹¹³ These commentators are mistaken. After all, the grant of tax exemption to churches is effectively a governmental subsidy of the churches’ activities. As the Supreme Court stated in *Regan v. Taxation With Representation of Washington*, the resulting ban on lobbying and political activities is an indication that Congress has chosen not to subsidize these activities “as extensively as it chose to subsidize other activities that [churches and other] nonprofit organizations undertake to promote the public welfare.”¹¹⁴ Accordingly, churches have a responsibility to conduct themselves within the scope of the rules laid down by Congress if they are to utilize the governmental subsidy.

Moreover, the limitations notwithstanding, a church can act “responsibly” even while engaging in what some people may consider political activity. For example, a church, without risking the loss of its tax-exempt status, may, even during a political campaign, conduct a public forum on a broad range of issues, provided that all legally qualified candidates for the applicable office are invited to participate and a nonpartisan, independent panel presents the questions to the candidates.¹¹⁵ Also, again without risking the loss of its tax-exempt status, a

¹⁰⁹ *Id.* at 185.

¹¹⁰ Revenue Act of 1934, Pub. L. No. 216, § 517, 48 Stat. 680, 760 (1934).

¹¹¹ 26 U.S.C. § 501(c)(3) (1954).

¹¹² 100 Cong. Rec. 9604 (1954).

¹¹³ See, e.g., Kelley, *supra* note 10, at 82. Kelley describes the current requirements as “a sword of Damocles [hanging] over the heads of all churches.” *Id.*

¹¹⁴ *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 544 (1983).

¹¹⁵ See Rev. Rul. 86-95, 1986-2 C.B. 73.

church may hold nonpartisan voter registration and get-out-the-vote drives, provided the drives are not specifically identified with any candidate or political party.¹¹⁶ In short, a church may engage in political activity provided it does so in a neutral and non-partisan manner. Hence, a church may:

- Invite all candidates for political office to address their congregation, provided there is a statement that says the views expressed are those of the candidates and that the church is not endorsing any candidate.
- Distribute a list of voting records of all members of Congress on major legislative issues involving a wide range of subjects, provided the publication contains no editorial opinion and its content and structure do not imply approval or disapproval of any members or their voting records.
- Sponsor a voter registration drive, provided it is done so in a neutral manner and is non-partisan.¹¹⁷

In summary, although § 501(c)(3) limits the involvement of churches in lobbying and political campaigning, the statute and related regulations leave much room for the religious bodies to educate the public in political matters. Should they stay within the confines of § 501(c)(3), churches would encounter no problems with the Service. It is when they cross the line and begin behaving like political activists that they risk the loss of their tax-exempt status. Even then, the Service and the courts have not stringently enforced the limitations; in the area of political campaigning, for example, a church would normally have to engage in multiple violations—or a very serious violation—of the political campaigning ban before a court would uphold the Service's revocation of the organization's tax exempt status.¹¹⁸ It is possible, therefore, for a church to engage in a very limited amount of political activity yet not incur the wrath of the Service.

¹¹⁶ Treas. Reg. § 1.527-6(b)(5) (2003).

¹¹⁷ Rob Hall, *When Faith and Politics Clash*, COVENANT NEWS, Sept. 21, 2000, available at <http://www.covchurch.org/cov/news/item1259.html> (last visited Mar. 30, 2004).

¹¹⁸ See generally *Hammerstein v. Kelley*, 235 F. Supp. 60 (E.D.Mo. 1964), *aff'd*, 349 F.2d 928 (8th Cir. 1965).

III. SINS OF THE CHURCH

Although the combined prohibitions against political campaigning and extensive lobbying have been part of the statutory landscape since 1954, churches have repeatedly engaged in activities that may well be in violation of the law. Yet, only once has the Service acted to revoke the tax-exempt status of a church.¹¹⁹ This section will discuss the “sins of the Church”—political activity by churches during the period since Congress enacted the political campaigning ban in 1954. The section will divide American Christianity into three camps—the Roman Catholic Church, the Religious Right, and African-American Churches—and examine how each of these groups has apparently failed to live up to the responsibilities thrust upon them by § 501(c)(3).

A. *Political Activity of the Roman Catholic Church*

Outside the United States, the Roman Catholic Church (“the Church”) has had a long history of political involvement. From 754 when Pepin the Short gave the papacy a gift of lands that eventually became the Papal States, until 1870 when Italy seized the property to make it part of a united Italian state, the Pope—the religious leader of the Roman Catholic Church—was a secular ruler.¹²⁰ For much of that period—from 962 when German King Otto I was crowned emperor, to 1806 when Francis II renounced the title—the Church was an integral part and driving force behind the Holy Roman Empire.¹²¹ Outside the veil of the Empire, other Catholic clergy were active in politics, the most prominent of these being Cardinal Armand Jean du Plessis Richelieu (1585–1642), who served first as France’s secretary of state, and then as the country’s chief minister.¹²²

Here in America, at least until 1913 in the case of substantial lobbying and 1954 in the case of involvement in political campaigning, the Church could legally participate in the

¹¹⁹ See *Branch Ministries v. Rossotti*, 211 F.3d 137, 145 (D.C. Cir. 2000) (upholding revocation of tax-exempt status of the Church at Pierce Creek operated by Branch Ministries, Inc.).

¹²⁰ CONCISE COLUMBIA ENCYCLOPEDIA 640 (1989).

¹²¹ *Id.* at 372–73.

¹²² CATHOLIC ENCYCLOPEDIA, 47–49 (Charles G. Herberman et al. eds., 1912).

political process.¹²³ Yet, the Church's political activism gathered much momentum after the 1973 *Roe v. Wade*¹²⁴ decision. Since then, many Church bishops and priests have issued calls for the Catholic faithful to vote "pro-life," using abortion as a litmus test.¹²⁵ Accordingly, the Church has virtually become a one-issue entity. Yet, Putney takes a different view, arguing that the Church has been opposed to abortion ever since the time of the Caesars.¹²⁶ Whether or not Putney is correct, it is true that the Canon Law—the Church's judicial, administrative, and penal law—definitely opposes abortion.¹²⁷

Not only does the Church oppose abortion, but it has also gone to great lengths to broadcast and propagate its anti-abortion doctrine in an attempt to have its position accepted as the standard for the entire country. In 1990, for example, the National Conference of Catholic Bishops¹²⁸ announced its plans to commence a new nationwide anti-abortion campaign.¹²⁹ As part of this campaign, the Conference indicated it would hire a public relations firm and would spend approximately five million dollars for public relations services.¹³⁰ Interestingly, the Conference's announcement came in the wake of the conclusion

¹²³ See *Can the IRS Shut Down the Catholic Church?: Crisis Interviews Robert Destro*, CRISIS, Apr. 1, 2002, available at <http://www.crisismagazine.com/april2002/feature4.htm> (last visited Mar. 30, 2004).

¹²⁴ 410 U.S. 113 (1973).

¹²⁵ See Joseph L. Conn, *The Bishops' Biased Blessing*, CHURCH & STATE, Dec. 2000, available at <http://www.au.org/churchstate/cs12003.htm> (last visited Mar. 30, 2004).

¹²⁶ Scott W. Putney, *The IRC's Prohibition of Political Campaigning by Churches and the Establishment Clause*, 64 FLA. B.J. 27, 30 (1990).

¹²⁷ See Codex Livis Canonici (Libreria Editrice Vaticana, ed., 1983) c.1398 ("*Qui abortum procurat, effectu secuto, in excommunicationem latae sententiae incurrit.*") The English translation reads, "A person who actually procures an abortion incurs [an automatic] excommunication." Mark Swift, *The Code of Cannon Law, Abortion, and Bishops*, available at http://www.otherside.com/cia/newsletter/archive/2001jan_feb/page_7.htm (last visited Mar. 30, 2004).

¹²⁸ The National Conference of Catholic Bishops is the organization through which Catholic Bishops act on a national level. According to Cardinal Joseph Bernadin, the Conference "provides a framework and a forum for [Catholic leaders] to share ideas, to teach and elucidate sound Catholic Doctrine, set pastoral directions and develop policy positions on contemporary social issues." THOMAS J. REESE, S.J., A FLOCK OF SHEPHERDS: THE NATIONAL CONFERENCE OF CATHOLIC BISHOPS iv (1992).

¹²⁹ Charles Capetanakis, *Abortion Rights Mobilization and Religious Tax Exemption*, 34 CATH. LAW. 169, 170 (1991) (citing James N. Baker, *The Bishops Under Fire*, NEWSWEEK, Apr. 23, 1990, at 24).

¹³⁰ *Id.*

of protracted litigation in the form of the so-called Abortion Rights Mobilization (“ARM”) cases.¹³¹

The ARM litigation brought to the forefront many allegations of § 501(c)(3) abuses by the Church.¹³² The “[p]laintiffs first alleged that the Church repeatedly violated § 501(c)(3) by engaging in [political] campaigning and lobbying.”¹³³ The complaint asserted that the Church lobbied extensively to promote the position that abortion is immoral and should, as a result, be illegal.¹³⁴ According to the plaintiffs, the Church was engaged in a “three-fold educational, pastoral, and political” plan designed to mobilize the Catholic faithful in an “effort to outlaw abortions in the United States.”¹³⁵ The plaintiffs further alleged that the Church, through its priests and officials, used various means to endorse and support pro-life political candidates and to oppose pro-choice ones.¹³⁶ Accordingly, the complaint alleged, Church officials “publish[ed] articles in [their] bulletins, attack[ed] and endors[ed] candidates from the pulpit, distribut[ed] partisan letters to parishioners, and urg[ed] its

¹³¹ The original ARM case was instituted in the Southern District of New York by nine organizations and twenty individuals committed to sustaining a woman’s right to obtain a legal abortion, and opposed to the Church’s stand against the procedure. The original individual and organizational plaintiffs brought suit collectively against Donald Regan, then Secretary of the Treasury, Roscoe L. Egger, Jr., then Commissioner of Internal Revenue, the United States Catholic Conference, Inc., and the National Conference of Catholic Bishops. The plaintiffs’ challenge concerned the Church defendants’ alleged politically partisan activities, § 501(c)(3) prohibitions against such activities, and the Service’s nonenforcement of those provisions against the Church defendants. The original suit spawned a series of further suits, counter suits, and appeals known collectively as the ARM cases. See *Abortion Rights Mobilization, Inc. v. Regan*, 544 F. Supp. 471, 473 (S.D.N.Y. 1982), *on reh’g*, 603 F. Supp. 970 (S.D.N.Y. 1985); *Abortion Rights Mobilization, Inc. v. Baker*, 110 F.R.D. 337 (S.D.N.Y. 1986), *on appeal sub. nom. In re United States Catholic Conference*, 824 F.2d 156 (2d Cir. 1987), *cert. granted sub nom. United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 484 U.S. 975 (1987), *rev’d and remanded*, 487 U.S. 72 (1988) (Court remanded to the Second Circuit for resolution of subject matter jurisdiction), *rev’d* 885 F.2d 1020 (2d Cir. 1989).

¹³² As used in this context, the term “Church” refers collectively to the two Roman Catholic entities named as defendants in the suit: The United States Catholic Conference, Inc. and the National Conference of Catholic Bishops.

¹³³ See Norman Leon, *The Second Circuit’s Application of Standing in In re United States Catholic Conference: Another Plea for Clarity and Consistency*, 57 BROOK L. REV. 429, 437 (1991).

¹³⁴ *In re United States Catholic Conference*, 885 F.2d 1020, 1022 (2d Cir. 1989).

¹³⁵ *Id.* (quoting from Complaint at ¶ 26).

¹³⁶ *Id.*

members to donate to and sign petitions of 'right to life' committees and candidates."¹³⁷ Finally, the plaintiffs contended that the Church distributed large sums of money to organizations that, either "directly or indirectly, supported the political candidacies . . . of persons favoring anti-abortion legislation."¹³⁸

The Church did not deny the allegations. Instead, asserting that it had not directly injured any of the plaintiffs, the Church moved to dismiss itself as a defendant in the suit.¹³⁹ The court granted the motion.¹⁴⁰ Accordingly, the Church has never had to answer to these serious allegations before a court.

In addition to the allegations made by the ARM plaintiffs, other evidence suggests that the Church has used tax-exempt and tax-deductible funds to engage in political activities.¹⁴¹ For example, articles in official Church newspapers have at times listed names of candidates the Church's membership should support or oppose for political office.¹⁴² Also, on one occasion, an official Church newspaper endorsed President Ronald Reagan, calling him "the only presidential candidate who is clearly opposed to abortion and is willing to use the political power of the presidency to support his position."¹⁴³

News reports have also surfaced of incidents where the Church has acted based on its philosophy on the abortion issue. According to one such report, in 1989, a bishop in San Diego barred a candidate for the California State Assembly from receiving communion because of her political stance in favor of readily obtainable abortions.¹⁴⁴ In New York, between 1989 and 1990, then-Governor Mario Cuomo, John Cardinal O'Connor, and Auxiliary Bishop Austin Vaughn engaged in a heated public debate on the abortion issue; Auxiliary Bishop Vaughn was later jailed for taking part in an anti-abortion protest.¹⁴⁵

¹³⁷ *Id.* (quoting from Complaint at ¶ 26).

¹³⁸ *Id.* (quoting from Complaint at ¶ 27).

¹³⁹ *Abortion Rights Mobilization, Inc. v. Regan*, 544 F. Supp. 471, 487 (S.D.N.Y. 1982).

¹⁴⁰ *Id.*

¹⁴¹ See *Harris v. McRae*, 448 U.S. 297, 318–20 (1980) (describing in detail some of the Church's lobbying and campaigning activities).

¹⁴² See Leon, *supra* note 133, at 431 n.9.

¹⁴³ *Id.* (citing Kirk Victor, *Not Praying Together*, NAT'L J., Oct. 10, 1987, at 2546).

¹⁴⁴ *A Mistake in San Diego*, AMERICA, Dec. 9, 1989, at 436.

¹⁴⁵ John Elson, *Bishops, Politicians and the Abortion Crisis*, TIME, Feb. 19,

Ten years later, as the 2000 general election campaign heated up, the Church once again engaged in political activity. Shortly after the October 3, 2000 debate between presidential candidates Al Gore and George W. Bush, Cardinal Bernard Law of Boston wrote in the diocesan newspaper, *The Pilot*:

How depressing . . . to hear the Vice President so explicitly on his pro-abortion position. He seems to have made his a one-issue party. Governor Bush, stating frankly his pro-life convictions, nonetheless acknowledged the complexity of the issue, the differences in viewpoint, and the fact that changes will not come overnight. Gore leaves little room for those who believe that the right to life is fundamental.¹⁴⁶

Two weeks later, in a call for a disciplined Catholic voting bloc to vote according to the teachings of the Church, Archbishop Charles Chaput of Denver criticized Catholics who refused to advance Church dogma through the political process.¹⁴⁷ The Archbishop criticized President John F. Kennedy, blaming him for creating “a ‘model of accommodation’ in which Catholic officeholders [do not] let their faith dictate their policies.”¹⁴⁸ According to Archbishop Chaput, “Four decades after John Kennedy . . . too many American Catholics—maybe most—no longer connect their political choices with their religious faith in any consistent, authentic way. The ‘Catholic Vote,’ as a meaningful bloc, just doesn’t exist anymore.”¹⁴⁹

Other examples of Catholic political activism abounded throughout the 2000 campaign. Among the Church’s political activities were:

- [On October 29, New York City Archbishop Edward M. Egan issued a] pastoral letter urging Catholics to choose leaders who ‘share our commitment to the fundamental rights of the unborn.’ The letter, which was read in all churches in the Archdiocese of New York, came just nine days after a 45-minute private meeting between [Republican Party candidate, George W. Bush] and Egan at the archbishop’s residence.¹⁵⁰

1990, at 75.

¹⁴⁶ See Conn, *supra* note 125, at 10.

¹⁴⁷ *Id.* at 11.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 10.

- [In Chicago,] Cardinal Francis George advised his parishioners that ‘abortion is a defining issue’ both morally and politically. Writing in his column in the archdiocesan newspaper *The Catholic New World* . . . [Cardinal George opined that abortion] ‘has become a defining position politically . . . not because of the Church but because of its use as a litmus test to screen candidates’ acceptability for party approval.¹⁵¹
- [In New Orleans,] [t]he *Clarion Herald*, the official newspaper of the Archdiocese of New Orleans, editorialized that Catholics have a ‘serious obligation to vote according to moral principles and with a conscience formed in line with sound Catholic moral teaching.’ Focusing on the abortion issue, [the editorial quoted Scranton, PA, Bishop James Timlin] who said, ‘I am a registered Democrat, but I can’t in good conscience vote for people who are pro-abortion.’¹⁵²
- [In September, Omaha, Nebraska, Archbishop Elden Curtiss derided] the Democratic Party for a platform plank on abortion that was ‘clearly anti-life and therefore anti-Catholic.’ Writing in the diocesan newspaper *The Catholic Voice*, he urged Catholics to ‘support those candidates who will protect human life in the womb.’¹⁵³
- [In Milwaukee, Wisconsin,] [o]n the Sunday before Election Day, the Rev. Joseph Noonan urged his parishioners at Our Lady of the Rosary Church to remember the Catholic position on abortion when they vote. . . . Noonan suggested that ignoring that stand could lead to excommunication. ‘I’m not telling you who to vote for,’ he observed. ‘I’m telling you who you may not vote for. In cases where there is not a 100 percent pro-life candidate, you do not vote.’¹⁵⁴
- [In Arlington, Virginia, Reverend Fr. Thomas Vander Woude] threatened a parishioner with denial of communion for displaying Democratic bumper stickers on her car. The week before the election, Billie Ingrassia emerged from services at St. Agnes Catholic Church to find a letter on her

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 10–11.

¹⁵⁴ *Id.* at 11.

windshield from the Rev. Thomas Vander Woude. The [letter] condemned Ingrassia's 'Vote Democratic' and 'Democrats: Take Back the House' bumper stickers. [Fr. Vander Woude informed Ingrassia:] 'If you support the democratic position of abortion then you have no business receiving Holy Communion since you placed yourself directly in opposition to this essential teaching of the Faith.'¹⁵⁵

Catholic involvement in the political process did not end with the 2000 elections. In February 2003, the *Daily Catholic* reported that Sacramento Bishop William Weigand warned California Governor Gray Davis "that he was placing his soul in jeopardy" because of his pro-abortion stance.¹⁵⁶ "Bishop Weigand noted that it was not right to let a pro-abortion Catholic have a forum of any sort in any Catholic institution."¹⁵⁷ Bishop Weigand's statements were made in support of Monsignor Edward Kavanagh, who had refused to let Governor Davis "distribute gifts to children at a Catholic orphanage in Sacramento."¹⁵⁸

While the vast majority of the Catholic hierarchy apparently clamors for the Church to be actively involved in the political process, some elements would prefer to see the Church acting within the confines of current law. To that end, the California Catholic Conference formulated its set of Guidelines for Advocacy, Lobbying, and Political Action.¹⁵⁹ The Guidelines warn Church leaders to "avoid endorsements or other political activity, contributions, or political activism even when acting in their individual capacity."¹⁶⁰ The Guidelines further warn that:

[N]o diocesan or parish entity or organization or other 501(c)(3) exempt church organization should engage in voter education communications which directly or indirectly suggest that a particular candidate or party should be supported or opposed. No candidate should be invited to a parish function during an

¹⁵⁵ *Id.*

¹⁵⁶ Thomas A. Droskey, Ph.D., *A Futile Gesture?*, 14 DAILY CATHOLIC 2, Feb. 2003, available at <http://www.dailycatholic.org/issue/2003Feb/2febccoc9.htm> (last visited Mar. 30, 2004).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ California Catholic Conference, *Guidelines for Pastors and Parishes on Advocacy, Lobbying and Political Action*, available at <http://www.catholic.org/advo/guide.html> (last visited Mar. 30, 2004).

¹⁶⁰ *Id.*

election campaign, unless all candidates for that office are invited.¹⁶¹

The Guidelines go on to categorize three types of political activities from the Catholic perspective: (1) acceptable activity (such as “educational efforts, which share the Church’s teaching on human life, human rights, social justice, and peace”); (2) activities that are encouraged but should be developed with caution (such as “[u]rging parishioners to register and vote and to participate actively in church-sponsored voter registration efforts, ‘get-out-the-vote’ drives, and other non-partisan voter-education initiatives”); and (3) activities which are not allowed (such as “[l]abeling a candidate or party as ‘pro-school aid’ or ‘anti-life’”).¹⁶²

Notwithstanding the development of the California Conference’s Guidelines, the activities of the rest of the Church suggest that the organization is acting in violation of § 501(c)(3). Still, the Service has yet to act against the Church or to revoke its tax-exempt status. Some commentators believe that the Service’s failure to take action is evidence of the agency’s policy to often wink at the statute’s limitations on lobbying and political campaigning, especially when the guilty party is an established religious body.¹⁶³ Regardless whether this claim is true, the current situation must be addressed, not only where the Catholic Church is concerned, but in every instance where a religious organization engages in lobbying or political campaigning.

B. Political Activity of the Religious Right

Over the last twenty-five years, the Religious Right has emerged as a formidable force in American politics and public life. During that period, the movement has played a significant part in “mobilizing previously apolitical Evangelicals, reshaping

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ See Stephen Schwarz & William T. Hutton, *Recent Developments in Tax-Exempt Organizations*, 18 U.S.F.L. REV., 649, 668–69 (1984). See generally Marianne Evans, *Challenge to IRS Enforcement of Ban on Political Activities by Churches Poses Difficult Questions for High Court*, 87 TAX NOTES TODAY 245-2 (1987).

party platforms, altering the outcome of elections—and in 1994, the entire shape of Congress.”¹⁶⁴

The story of the Religious Right began in Lynchburg, Virginia in 1954. In that year, Reverend Jerry Falwell, a young Evangelical, founded Thomas Road Baptist Church. “Over the years, the church grew to a membership of twenty thousand. By the late 1970s, Reverend Falwell’s ministries included The Old Time Gospel Hour, Liberty Baptist College (which became Liberty University in 1984), the Liberty Home Bible Institute, Lynchburg Christian Academy, and numerous other print and video outlets.”¹⁶⁵

In 1978, conservative New Right leaders sought a spokesman and ringleader for fundamentalist churchgoers. They turned to Reverend Falwell to fill the role. Promised the support of the New Right leaders, Reverend Falwell agreed “to target the almost 50 million evangelicals across the country with the aim of mobilizing them for political action and to redeem an increasingly “decadent” culture and return America to its ‘Christian roots.’ ”¹⁶⁶ Reverend Falwell’s “most effective tools were not scorecards or voter guides, but words, shocking public perception with clever monikers like ‘moral majority.’ ”¹⁶⁷ As leader of this “Moral Majority” (and the Religious Right), Reverend Falwell was able to engage in extensive political activity. He once described the movement as a “political organization providing a platform for religious and non-religious Americans who share moral values to address their moral concerns.”¹⁶⁸ Accordingly, Reverend Falwell “sent seven hundred delegates to the 1981 Republican nominating committee, successfully blocked parimutuel betting, and played part in the election of [Senator] John Warner in 1978 by endorsing him at Thomas Road [Baptist Church].”¹⁶⁹ “In 1980, the organization

¹⁶⁴ John Kriess, *The Religious Right*, at <http://cti.itc.virginia.edu/~hius316/religious/Religright.html> (last visited Mar. 30, 2004).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Sadira E. Furlow, *Religious Movements Homepage: Christian Coalition*, available at http://religiousmovements.lib.virginia.edu/nrms/xiancoal_draft.html (last visited Mar. 30, 2004) (quoting JUSTIN WATSON, *THE CHRISTIAN COALITION: DREAMS OF RESTORATION, DEMANDS FOR RECOGNITION* 9 (St. Martin’s 1997)).

¹⁶⁹ Kriess, *supra* note 164.

worked with other right-winged groups in support of Ronald Reagan's campaign for President."¹⁷⁰

Still, the Moral Majority was never able to fully penetrate the American political landscape. When the movement folded in the late 1980s, "a remnant of previously apolitical Evangelicals-turned politically-active conservatives lingered as the foundation for a second wave of Religious Right activism."¹⁷¹ This second wave resulted in the formation of the Christian Coalition, with Reverend Pat Robertson at the helm.¹⁷²

The Christian Coalition had its roots in the Freedom Council, formed by Reverend Robertson in 1981 to involve conservative Christians in the political process.¹⁷³ Freedom Council literature defined its purpose as "defending, restoring, and preserving religious liberty in America."¹⁷⁴ The Council's mission statement admitted that it was a Christian organization aiming "to encourage, train, and equip [Christians] to actively participate in government."¹⁷⁵

The Freedom Council was relatively shortlived as it folded in the fall of 1986 after Reverend Robertson announced the establishment of a committee for his own candidacy for the 1988 presidential elections.¹⁷⁶ At a September 17, 1986 rally, Reverend Robertson announced that if within one year, "three million registered voters have signed petitions telling me that they will pray—that they will work—that they will give toward my election, then I will run as a candidate for the nomination of the Republican Party for the office of the President of the United States of America."¹⁷⁷ Reverend Robertson eventually announced his candidacy on October 1, 1987.¹⁷⁸

Although Reverend Robertson lost his bid to become the Republican Party nominee for the 1988 elections, he used the momentum generated by his campaign to found the Christian

¹⁷⁰ Furlow, *supra* note 168.

¹⁷¹ Kriess, *supra* note 164.

¹⁷² *Id.*

¹⁷³ Furlow, *supra* note 168.

¹⁷⁴ *Id.* (citing JEFFREY K. HADDEN & ANSON SHUPE, *TELEVANGELISM: POWER AND POLITICS ON GOD'S FRONTIER* 249 (New York: Henry Holt 1988)).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ Quoted in CLIFFORD GOLDSTEIN, *THE SAVING OF AMERICA* 10 (Pacific Press 1988).

¹⁷⁸ Furlow, *supra* note 168.

Coalition in 1989.¹⁷⁹ Since its formation, the Christian Coalition has been leading the Religious Right in “pushing the envelope on political activity, testing [the] confusing ban on churches participating in partisan politics.”¹⁸⁰ The organization boldly proclaims that it is “committed to representing the pro-family agenda and educating America on the critical issues facing our society.”¹⁸¹ According to the organization’s Website, “Whether it is the fight to end Partial Birth Abortion or efforts to improve education or lower the family’s tax burden, the Christian Coalition stands ready and able to work for you.”¹⁸²

To that end, since its inception the Coalition has “lobbie[d] in support of traditional religious and family values, market capitalism, and school choice and prayer and oppose[d] secular influence in the United States, abortion, and gun control.”¹⁸³ It has also mailed out millions of “voter guides” nationwide in hope of giving voters “a clear understanding of where various candidates stood on the issues important to them.”¹⁸⁴ In actuality, these voter guides list the voting records of candidates for political office on issues considered key to the Christian Coalition-Religious Right agenda.¹⁸⁵ The organization has also worked to elect church members to local school boards and offices, and worked hard—but without success—to defeat President Bill Clinton in the 1996 general election.¹⁸⁶ Apart from openly opposing former President Clinton, the Coalition flexed its political muscle by supporting some political candidates and opposing others.¹⁸⁷

¹⁷⁹ *Id.*

¹⁸⁰ Beth Forbes, *Expert: Churches Muddy the Ban on Political Activity*, PURDUE NEWS, Oct. 18, 1996, available at <http://www.purdue.edu/UNS/htm14ever/961018.Davidson.ban.html> (last visited Mar. 30, 2004).

¹⁸¹ Christian Coalition of America website, at www.cc.org (last visited Mar. 30, 2004).

¹⁸² *Id.*

¹⁸³ THE COLUMBIA ENCYCLOPEDIA, Christian Coalition (Columbia University Press, 6th ed. 2001), available at <http://www.bartleby.com/65/ch/ChrisCo.html> (last visited Mar. 30, 2004).

¹⁸⁴ Christian Coalition of America, *supra* note 181.

¹⁸⁵ Larry Pahl, The Growth of the Religious Right, at <http://members.aol.com/larrypahl/rel-ritl.htm> (last visited Jan. 25, 2004). The author, himself a minister of religion, has often received “voter guides” mailed to him by the Christian Coalition.

¹⁸⁶ *Expert: Churches Muddy the Ban on Political Activity*, *supra* note 180.

¹⁸⁷ THE COLUMBIA ENCYCLOPEDIA, *supra* note 183.

With regard to lobbying, the Coalition's Website includes the following among its list of top issues from the organization's 2003 legislative lobbying agenda:¹⁸⁸

- Passing the ban on partial-birth abortions.
- Making permanent President Bush's 2001 federal tax cuts, including the marriage penalty tax cut.
- Confirmation of President Bush's judicial nominees.
- Passing the "Ten Commandments Display Act," H.R. 2045.

As can be seen from this partial list, the Christian Coalition is today deeply involved in the country's political life.

Arguably, the Coalition reached its zenith during the tenure of the 104th Congress. The Coalition, credited with engineering the Republican sweep that brought the 104th Congress into being, supported that Congress's so-called "Contract With America."¹⁸⁹ With its Congress in place, on May 17, 1995 the Coalition unveiled its own "Contract With the American Family."¹⁹⁰ The contract put forward ten suggestions to House Speaker Newt Gingrich and the other members of the 104th Congress:¹⁹¹

- 'Restoring Religious Equality' in America by amending the Constitution to include a Religious Equality Amendment 'allow[ing] voluntary, student and citizen-initiated free speech in non-compulsory settings such as courthouse lawns, high school graduation ceremonies, and sports events.'
- 'Returning Education Control to the Local Level' by transferring funding of the Federal Department of Education back to families and local school boards.
- 'Promoting School Choice' by enacting legislation to provide parents with a broader choice of schools for their children, through the use of Federal funds.

¹⁸⁸ Christian Coalition of America, *supra* note 181.

¹⁸⁹ Furlow, *supra* note 168.

¹⁹⁰ *Id.*

¹⁹¹ The following ten "points" are listed in Annie Laurie Gaylor, *Contract ON the Family Sets Agenda of Congress*, FREETHOUGHT TODAY, Apr. 1996, available at <http://www.ffrf.org/ftoday/april96/gaylor.html> (last visited Mar. 30, 2004). See Furlow, *supra* note 168.

- “Protecting Parental Rights” by enacting legislation ensuring ‘that parental rights are not violated and ensure that parents have the foremost duty and responsibility to direct the upbringing of their children.’
- ‘Family-Friendly Tax Relief.’
- ‘Restoring Respect for Human Life’ by enacting legislation to ban partial birth abortion.
- ‘Encouraging Support of Private Charities’ by enacting legislation to authorize houses of worship—using Federal government funds—to provide traditional welfare services.
- Restricting Pornography.’
- ‘Privatizing the Arts’ by making organizations like the National Endowment for the Arts, National Endowment for the Humanities, Corporation for Public Broadcasting, and Legal Services Corporation voluntary organizations funded through private contributions.
- ‘Crime Victim Restitution,’ urging Congress to condition ‘receipt of federal prison construction funding by the states on enactment of work and study requirements.’

With the release of its Contract With the American Family, the Christian Coalition took perhaps its biggest leap into the political arena. Admittedly, the Coalition, though made up of people who call themselves Christians, is not a church, and has never been a § 501(c)(3) organization. Rather, the organization sought tax exemption under § 501(c)(4).¹⁹² Regardless, while awaiting word from the Service on the grant of its tax-exempt status, the Coalition worked through and with § 501(c)(3) churches to achieve its political goals.

In 1999, however, following a ten-year review, the Service denied the Coalition’s application for federal tax-exempt status pursuant to § 501(c)(4), holding that some of the Coalition’s

¹⁹² 26 U.S.C. § 501(c)(3)–(4)(A). The statute relates to civic organizations and local associations of employees. With regard to political activities, the IRS stated that “[t]he promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office.” IRS, *Social Welfare Organizations: Exemption Requirements*, available at <http://www.irs.gov/charities/welfare/article/0id=9617800.html> (last visited Mar. 30, 2004).

activities—such as distributing voter guides through churches—were too partisan for the group to claim tax-exempt status.¹⁹³ In response, the organization announced that it would split into two separate entities: the Christian Coalition International, “a group devoted exclusively to partisan and political activity,”¹⁹⁴ and the Christian Coalition of America, which would “continue to be a force in American politics and w[ould] remain a prominent fixture on the political landscape as the nation’s number one pro-family, pro-life organization.”¹⁹⁵ Although the Coalition subsequently announced that it had filed suit against the Service over the denial of its tax-exempt status,¹⁹⁶ as of this date, the author has been unable to determine the progress or outcome of such lawsuit. Meanwhile, the Christian Coalition has apparently lost much ground on the American political landscape and is no longer the force that it once was.¹⁹⁷

While the Christian Coalition was acting as an umbrella organization for churches of the Religious Right, some of those churches became involved in political activity on an individual basis. The most publicized example of such conduct occurred in 1992 when, four days before the presidential election, a church in upstate New York placed full-page advertisements in two nationally-distributed newspapers urging Christians not to vote for then-presidential candidate Bill Clinton because of his positions on certain moral issues.¹⁹⁸ Each advertisement ended

¹⁹³ Mary Jacoby, *Christian Coalition Denied Tax Exemption*, ST. PETERSBURG TIMES, June 10, 1999, available at <http://pqasb.pqarchiver.com/sptimes/doc/42297676.html?MAC=062dca69dc8b32cb74fa871075232a7d&did=42297676&FMT=FT> (last visited Mar. 30, 2004); see also *Christian Coalition Sues IRS Over Tax-Exempt Status*, MARANATHA CHRISTIAN JOURNAL, Feb. 29, 2000, at <http://www.mcjonline.com/news/00/20000229d.htm> (last visited Mar. 30, 2004).

¹⁹⁴ *Christian Coalition Denied Tax Exempt Status*, THE DATA LOUNGE, June 10, 1999, available at <http://www.datalounge.com/datalounge/news/record.html?record=4339> (last visited Mar. 30, 2004).

¹⁹⁵ *Id.* (quoting Reverend Pat Robertson).

¹⁹⁶ *Christian Coalition Sues IRS Over Tax-Exempt Status*, *supra* note 193.

¹⁹⁷ See Steven Thomma, *Christian Coalition Trying to Reinvent Itself, Regain Power*, KNIGHT RIDDER NEWSPAPERS, Oct. 11, 2002, available at <http://www.realcities.com/mld/krwashington/4264843.htm> (last visited Mar. 30, 2004) (stating that the Christian Coalition’s diminished clout was evident in the organization’s failure to command personal attention from the Bush White House for its October 2002 Washington, D.C., meeting, which was poorly attended and no top Bush administration officials attended).

¹⁹⁸ See *Branch Ministries v. Rossotti*, 211 F.3d 137, 139 (D.C. Cir. 2000). The advertisements ran in *USA Today* and the *Washington Times*. *Id.* at 140.

with a plea for tax-deductible contributions to offset the costs of running it.¹⁹⁹

“The advertisements did not go unnoticed. [Rather,] they produced hundreds of contributions to the [sponsoring] [c]hurch from [individuals] across the country.”²⁰⁰ Moreover, the political nature of the advertisements was so obvious that they led to two articles in the *New York Times*. The day after the advertisements appeared, the *Times* published an article by Peter Applebome discussing the role of the Religious Right in the 1992 presidential campaign and mentioned the aforementioned advertisement as an example of such role.²⁰¹ Two months later, on November 30, 1992, the *New York Times* published an op-ed piece by Anthony Lewis discussing the alleged use of tax-exempt money for politics and, in making his case, focused on the October advertisement in *USA Today*.²⁰² Lewis suggested that the upstate New York church that sponsored the advertisement had “almost certainly violated the Internal Revenue Code.”²⁰³ The Service’s response to the church’s political activity will be discussed later in this article.²⁰⁴ Suffice it to say that the church’s conduct here lends credence to the view that churches have been violating the IRC’s proscription against involvement in political activity and thereby making themselves ineligible for the benefits of federal tax exemptions.

Two presidential elections after the Church at Pierce Creek sponsored its anti-Clinton advertisements, Reverend Jerry Falwell re-entered the political activism arena by launching “People of Faith 2000,” a campaign to register ten million voters for the 2000 election.²⁰⁵ Although Reverend Falwell claimed that the campaign was nonpartisan, he did state, “people who pray will probably vote all right, too.”²⁰⁶ The campaign was to depend on support and leadership from church pastors and according to

¹⁹⁹ *Id.* at 140.

²⁰⁰ *Id.*

²⁰¹ Peter Applebome, *Religious Right Intensifies Campaign for Bush*, N.Y. TIMES, Oct. 31, 1992, at A1.

²⁰² Anthony Lewis, *Tax Exempt Politics?*, N.Y. TIMES, Dec. 1, 1992, at A15.

²⁰³ *Id.*

²⁰⁴ See Section IV, *infra*.

²⁰⁵ Glen Johnson, *Falwell Announces Voter Drive for Religious Right*, THE DETROIT NEWS, April 15, 2000, available at <http://www.detnews.com/2000/politics/0004/17/20000415-37339.htm> (last visited Mar. 30, 2004).

²⁰⁶ *Id.*

Reverend Falwell, the seven-month drive to register ten million new voters would succeed if pastors, during church meetings, solicited the support of their congregants for the effort.²⁰⁷

In summary, the activities of the Religious Right are clearly political. The movement has lobbied extensively for the adoption of its agenda and has openly supported candidates for political office while opposing others. However, with the exception of the Church at Pierce Creek,²⁰⁸ the Service has not acted to revoke the tax-exempt status of any of the Religious Right churches. Yet, because many of the churches within this group are not “established churches” in the sense used by commentators like Schwarz, Hutton, and Evans,²⁰⁹ one must assume that some other reason lies behind the Service’s failure to take action. While the Service remains silent, the churches of the Religious Right continue to benefit from their tax-exempt status while not living up to the responsibilities thereof. To cast the situation in Biblical terms, these churches are allowed to continue to reap where they have not sowed.

C. *Political Activity of African-American Churches*

When confronted with their own political activity and the alleged illegality thereof, Religious Right and Catholic commentators often point out that African-American churches are actually at the forefront when it comes to the practice of mixing religion and politics and that the Service routinely “looks the other way” in response to such political activity.²¹⁰ These commentators point to “the famous African-American churches” that “seem to hold out-and-out political rallies, and . . . have political candidates standing in the pulpit . . . giving sermons,”

²⁰⁷ *Id.*

²⁰⁸ *See id.*

²⁰⁹ *See* Schwarz & Hutton, *supra* note 163, at 668; Evans, *supra* note 163, at 1196.

²¹⁰ *See, e.g.*, Gail Jarvis, *Stepping Over the Boundaries*, THE LIBERTARIAN ENTERPRISE, Aug. 12, 2002, available at <http://www.webleyweb.com/tle/libe186-20020812-08.html> (last visited Mar. 30, 2004); *Electioneering for me, but not for Thee - Wish I'd Said That*, ISSUES & VIEWS, Dec. 30, 2002, available at <http://www.issues-views.com/index.php?print=1&article=20051> (last visited Mar. 30, 2004); *Can the IRS Shut Down the Catholic Church?*, CRISIS, Apr. 1, 2002, available at <http://www.crisismagazine.com/april2002/feature4.htm> (last visited Mar. 30, 2004).

arguing that these churches are clearly “stepping over the boundaries” in violation of § 501(c)(3).²¹¹

Whether or not these claims are true, it is true that ever since its inception, the African-American Church²¹² has been involved “in a broad range of political activities, both reformist and radical.”²¹³ Indeed, as one commentator states, “[T]he story of the black church is a tale of variety and struggle in the midst of constant racism and oppression.”²¹⁴ Inasmuch as the African-American Church was founded during the period of slavery, a period during which church members had to deal with “the fact of racial discrimination and the desire for independence,”²¹⁵ it is understandable that the church would have served as an agent for social change.

True to that understanding, during the period of slavery African-American clergy, lay leaders, and churches in the South became involved in the underground railroad, working with white abolitionists to help facilitate the escape of slaves to the North.²¹⁶ For example, Bishop Richard Allen hid escaped slaves in the basement of the Mother Bethel A.M.E. Church in

²¹¹ See Jarvis, *supra* note 210; see also *Can the IRS Shut Down the Catholic Church?*, *supra* note 210.

²¹² The author uses the term “African-American Church” in the sense used by C. ERIC LINCOLN & LAWRENCE H. MAMIYA, *THE BLACK CHURCH IN THE AFRICAN-AMERICAN EXPERIENCE 1* (Duke Univ. Press, 1990). Lincoln and Mamiya limit their definition of the Black or African-American Church to those seven independent, historic, and totally African-American controlled denominations founded after the Free African Society of 1787—the African Methodist Episcopal (A.M.E.) Church; the African Methodist Episcopal Zion (A.M.E.Z.) Church; the Christian Methodist Episcopal (C.M.E.) Church; the National Baptist Convention, U.S.A., Incorporated (NBC); the National Baptist Convention of America, Unincorporated (NBCA); the Progressive National Baptist Convention (PNBC); and the Church of God in Christ (COGIC)—along with a scattering of smaller communions. Like Lincoln and Mamiya, the author does not use the term African-American Church to refer to local African-American congregations within predominantly Caucasian denominations. *Id.*

²¹³ LINCOLN & MAMIYA, *supra* note 212, at 202.

²¹⁴ Laurie F. Maffly-Kipp, *An Introduction to the Church in the Southern Black Community*, available at <http://docsouth.unc.edu/church/introduction.html> (last visited Mar. 30, 2004).

²¹⁵ LINCOLN & MAMIYA, *supra* note 212, at 202. See generally HARRY V. RICHARDSON, *DARK SALVATION: THE STORY OF METHODISM AS IT DEVELOPED AMONG BLACKS IN AMERICA* (Anchor/Doubleday 1976); JAMES M. WASHINGTON, *FRUSTRATED FELLOWSHIP: THE BLACK BAPTIST QUEST FOR SOCIAL POWER* (San Francisco Press 1986) (giving a historical overview of the founding of African-American denominations).

²¹⁶ See LINCOLN & MAMIYA, *supra* note 212, at 202.

Philadelphia. Meanwhile, the A.M.E. Zion Church became known as “the freedom church” because it was the spiritual home for legendary figures of the black abolitionist movement such as Frederick Douglass, Harriet Tubman, Sojourner Truth, Reverend Jermain Louguen, and Reverend Thomas James.²¹⁷

As early as the latter half of the nineteenth century—specifically, during the Reconstruction Period (1867–1877)—African-American clergy began seeking political office. In 1870, an A.M.E. clergyman, Reverend Hiram Revels of Mississippi, became the first African-American citizen and first African-American senator elected to Congress.²¹⁸ During that period, Reverend Richard Cain also served four years in the Mississippi state senate and two years in the United States House of Representatives.²¹⁹ While these two African-American clergymen were politically active on a national level, several other African-American clergy were involved in local and state politics.²²⁰

With the legitimization of segregation by the Supreme Court in *Plessy v. Ferguson*,²²¹ political activity by African-American clergy became limited to internal “church politics.” Indeed, from 1896 until the passage of the Voting Rights Act of 1965,²²² the African-American Church became the main arena for African-American political activity.²²³ In the South, the church expected the African-American clergy—particularly those that the larger churches in the community employed full-time—to speak out about the pressing issues of the day, especially the problems of racial discrimination.²²⁴ For example, in 1935 Reverend Martin Luther King, Sr. led several hundred members of the Ebenezer Baptist Church in Atlanta to the courthouse, where they registered to vote.²²⁵ Meanwhile, in the North, many African-

²¹⁷ GAYRAUD WILMORE, *BLACK RELIGION AND BLACK RADICALISM* 121 (1972).

²¹⁸ LINCOLN & MAMIYA, *supra* note 212, at 204.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ 163 U.S. 537, 552 (1896) (“If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.”).

²²² 42 U.S.C. § 1973 et seq.

²²³ See LINCOLN & MAMIYA, *supra* note 212, at 205.

²²⁴ *Id.* at 207.

²²⁵ See TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954–1963*, at 53 (Simon & Shuster, 1988). Branch provides various examples of how some of the leading African-American clergy in Atlanta continued to be politically active during the 1930s and 1940s.

American churches continued to play an active role in mobilizing African-American voters and providing a forum wherein political candidates could address members of the African-American community.²²⁶ A few preachers like Adam Clayton Powell, Jr., pastor of the 8000-member Abyssinian Baptist Church in Harlem, New York, adopted more radical strategies such as civil rights protests in the streets.²²⁷ Reverend Powell was elected to the House of Representatives in 1944, becoming the first African-American politician from the East to serve in Congress.²²⁸

The political activity of clergymen like Reverend Powell emboldened other African-American clergymen to become involved in the quest for civil rights. One such clergyman was Reverend Oliver Leon Brown of the St. Mark's A.M.E. Church in Topeka, Kansas. Reverend Brown sued the Topeka Board of Education on behalf of his nine-year old daughter, Linda, and all other African-American children similarly injured by segregation in public schools.²²⁹ The case found its way to the Supreme Court which, in a landmark 1954 decision, held that "in the field of public education the doctrine of 'separate but equal' has no place."²³⁰ Indeed, some African-American commentators believe that the *Brown v. Board of Education* decision served as the catalyst to the civil rights movement that ultimately led to the enactment of the Voting Rights Act in 1965.²³¹

Up to 1954, though, Congress had not banned political activity by the churches. Hence, any political activity by the African-American Church to that point could not have jeopardized the various churches' tax-exempt status. After 1954, however, any such activity could have been grounds for the Service to revoke a church's tax-exempt status. Yet, this possibility did not put a damper on the African-American Church's appetite to participate in political activity. In fact, shortly after Congress enacted the "political activity ban" amendment to § 501(c)(3), African-American minister Dr. Martin

²²⁶ LINCOLN & MAMIYA, *supra* note 212, at 209–10.

²²⁷ *Id.* at 210.

²²⁸ See ADAM CLAYTON POWELL, JR., *MARCHING BLACKS: AN INTERPRETIVE HISTORY OF THE RISE OF THE BLACK COMMON MAN* 161–62 (New York Dial Press 1945).

²²⁹ LINCOLN & MAMIYA, *supra* note 212, at 211.

²³⁰ *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

²³¹ 42 U.S.C. § 1973 et seq; see also LINCOLN & MAMIYA, *supra* note 212, at 211.

Luther King, Jr., orchestrated and led the year-long Montgomery bus boycott which culminated in the ending of segregation in the public transportation system.²³²

The boycott was one of the high points of the civil rights movement. The movement itself depended on the African-American Church for strength and support. Lincoln and Mamiya describe church involvement in the movement:

While King provided the public leadership, it was the black churchwomen of the Women's Political Council in Montgomery who provided the network of organization and support. Two years later King organized the Southern Christian Leadership Conference as the political arm of the Black Church. SCLC gave decisive focus and direction to local church involvement in the civil rights movement, and hundreds of black clergymen and their congregations made extraordinary sacrifices to move the cause forward.

Black churches were the major points of mobilization for mass meetings and demonstrations, and black church members fed and housed the civil rights workers from SNCC, CORE, and other religious and secular groups. Most of the local black people, who provided the bodies for the demonstrations, were members of the black churches acting out of convictions that were religiously inspired.²³³

Admittedly, up to that point, the church did not engage in any political activity forbidden by § 501(c)(3). After all, although the various churches engaged in mobilizing the masses for action, they were not supporting or opposing political candidates.

That scenario changed when Reverend Jesse Jackson ran for the Democratic Party nomination in the 1984 presidential election. Both for mobilizing the African-American vote and for fund-raising purposes, Reverend Jackson turned to the African-American Church.²³⁴ Cavanaugh and Foster describe the Church's involvement in the campaign as follows:

The black church was an important element in the Jackson campaign. Black ministers frequently emerged as the chairmen of local Jackson organizations. Virtually everywhere, black ministers solicited both financial and organizational support from their congregations, often through the simple

²³² LINCOLN & MAMIYA, *supra* note 212, at 211.

²³³ *Id.* at 211-12.

²³⁴ *Id.* at 214.

expedient of “passing the plate” during a service. The national Jackson for President Campaign Committee even sent a memorandum to thousands of black ministers in March detailing how they could raise funds for the candidate without violating federal election law. The first Sunday in April was set aside as “A Jackson for Jackson Day,” a plea for individual \$20 contributions in black churches across the nation.²³⁵

To some degree, this strategy was repeated during Reverend Jackson’s 1988 campaign, with African-American churches across the country taking up collections to fund the campaign.²³⁶

Two years after Reverend Jackson made his first bid for the Democratic Party’s presidential nomination, the sixth congressional district of New York City elected to Congress one of his supporters, Reverend Floyd Flake, pastor of the Allen A.M.E. Zion Church in Queens, New York.²³⁷ Reverend Flake had his first experience of electoral politics when he was elected as a Reverend Jesse Jackson delegate to the 1984 Democratic Convention.²³⁸ Flake himself helped lead the local Jackson effort by mobilizing black voter registration²³⁹ and those same mobilizing skills undoubtedly helped Reverend Flake in his successful run for Congress.

Even after he decided not to run for his Congressional seat in the 1996 elections, Reverend Flake remained active in politics. In fact, during the 2000 presidential election, Reverend Flake openly endorsed former Vice President Al Gore from the pulpit, urging his congregants to support the then-Vice President’s bid to become the country’s next president.²⁴⁰ This conduct raised the ire of the Service, forcing Reverend Flake to subsequently meet with Service agents and agree to sign a statement saying he would no longer endorse candidates from the pulpit.²⁴¹

More recently, allegations have surfaced that during the 2002 Louisiana Senate runoff election, Democratic incumbent

²³⁵ THOMAS E. CAVANAUGH & LORN S. FOSTER, *JESSE JACKSON’S CAMPAIGN: THE PRIMARIES AND CAUCUSES, ELECTION ’84 REPORT #2 13* (1984).

²³⁶ Mark & Tina Terry, *Presbyterian Propaganda*, available at <http://www.intp.us/pc-usa/presbyte.htm> (last visited Mar. 30, 2004).

²³⁷ LINCOLN & MAMIYA, *supra* note 212, at 217.

²³⁸ *Id.* at 218.

²³⁹ *Id.*

²⁴⁰ Barry W. Lynn, *The Ten Commandments for Mixing Religion and Politics*, *GOTHAM GAZETTE*, available at <http://www.gothamgazette.com/commentary/57.lynn.shtml> (last visited Mar. 30, 2004).

²⁴¹ *Id.*

Senator Mary Landrieu benefited from “the illegal use of black churches” in her successful campaign.²⁴² According to reports, Landrieu’s campaign received help from a coalition that claimed 300 historically African-American churches in Louisiana.²⁴³ The press also reported that Congressional Black Caucus leader, Rep. James Clyburn (D–SC), spoke from the pulpit of the Baton Rouge Shiloh Missionary Baptist Church to whip up support for Senator Landrieu.²⁴⁴ Senator Landrieu herself also addressed the congregants.²⁴⁵

The evidence indicates that notwithstanding the 1954 ban on political activity, African-American churches have been deeply involved in political activity. The same is true for the Catholic Church and the churches of the Religious Right. Yet, the Service has not moved to revoke the tax-exempt status of the vast majority of those churches, thereby allowing them to continue reaping where they have not sowed. The next section of this article will examine the Service’s attempts—or lack thereof—to police the churches.

IV. SERVICE EFFORTS TO ENFORCE THE LAW

Some commentators have argued that the Service typically turns a blind eye at violations of § 501(c)(3) by churches.²⁴⁶ While liberal commentators typically point to perceived abuses of the law by the Catholic Church and the Religious Right,²⁴⁷ conservatives point to those perceived abuses involving African-American churches.²⁴⁸ However, all sides apparently agree that the Service does not stringently enforce the law as written.

Admittedly, the Service has in the past revoked the tax-exempt status of some § 501(c)(3) organizations.²⁴⁹ For example, in *Christian Echoes National Ministry, Inc. v. United States*, the

²⁴² Rick Sellers, *Louisiana: Hypocritical Allies Helped Landrieu Win*, FREE CONGRESS FOUNDATION, Dec. 10, 2002, available at <http://www.freecongress.org/commentaries/02121rs.asp> (last visited Mar. 30, 2004).

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ See, e.g., Schwarz & Hutton, *supra* note 163.

²⁴⁷ See, e.g., Conn, *supra* note 125.

²⁴⁸ See, e.g., Sellers, *supra* note 242; Jarvis, *supra* note 210.

²⁴⁹ See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 578 (1983); *Christian Echoes Nat’l Ministry, Inc. v. United States*, 470 F.2d 849, 852 (10th Cir. 1972).

Service argued that a religious organization had violated § 501(c)(3) because: (1) a substantial part of its activities consisted of carrying on propaganda or otherwise attempting to influence legislation; and (2) it participated or intervened in political campaigns on behalf of candidates for public office.²⁵⁰ After reviewing several of the organization's activities—such as urging readers of its publication to lobby their elected representatives and using its publications and broadcasts to attack candidates and incumbents the organization considered too liberal—the court held that Christian Echoes had indeed influenced legislation and intervened in political campaigns.²⁵¹

In another example, *Bob Jones University v. United States*, the Supreme Court held that the Service properly denied religious tax exemption to Christian educational institutions that maintained racially discriminatory policies.²⁵² The Court held that the racially discriminatory practices were themselves contrary to public policy.²⁵³

The third and final example involved The Way International, a religious organization (but not a church). After a three-year audit, the Service revoked the § 501(c)(3) status of The Way International retroactively, in part because the organization engaged in political activity.²⁵⁴ The Way filed suit challenging the revocation and simultaneously applied to the Service for a § 501(c)(3) determination for the period after September 1, 1983.²⁵⁵ The parties eventually settled their litigation as the Service granted The Way a § 501(c)(3) exemption effective September 1, 1983, but the revocation for the prior three years was allowed to stand.²⁵⁶

Although two of the organizations against which the Service has acted—i.e., Christian Echoes and The Way International—incurred the agency's wrath because of their involvement in political activity, neither of those organizations was a church. Similarly, although the Service did not grant tax-exempt status

²⁵⁰ *Christian Echoes*, 470 F.2d at 853.

²⁵¹ *Id.* at 856.

²⁵² *Bob Jones Univ.*, 461 U.S. at 584–85.

²⁵³ *Id.* at 598–99.

²⁵⁴ See *Branch Ministries, Inc. v. Rossotti*, 40 F. Supp. 2d 15, 22 (D.D.C. 1999), *aff'd*, 211 F.3d 137 (D.C. Cir. 2000).

²⁵⁵ *Id.*

²⁵⁶ *Id.*

to the original Christian Coalition,²⁵⁷ that organization, though drawing its support and membership from various churches, is not itself a church.

The only instance in which the Service has revoked the tax-exempt status of a church occurred in 1995 with the Service's revocation of the tax-exempt status of Branch Ministries, Inc., or the Church at Pierce Creek.²⁵⁸ The facts of that case illustrated a clear violation of the political activity ban of § 501(c)(3). On October 30, 1992, four days before the presidential election, Branch Ministries ran an advertisement in which it expressed its concern about the moral character of then-Arkansas Governor Bill Clinton, the presidential candidate for the Democratic Party. The advertisement ran in the *Washington Times* and *USA Today*. It proclaimed: "Christian Beware. Do not put the economy ahead of the Ten Commandments."²⁵⁹

The rest of the advertisement asserted that then-Governor Clinton supported abortion on demand, homosexuality, and the distribution of condoms to teenagers in public schools. The advertisement cited various Biblical passages and stated "Bill Clinton is promoting policies that are in rebellion to God's laws." It concluded with the question: "How then can we vote for Bill Clinton?"²⁶⁰

The following words were included in fine print at the bottom of the advertisement: "This advertisement was co-sponsored by The Church at Pierce Creek, Daniel J. Little, Senior Pastor, and by churches and concerned Christians nationwide. Tax-deductible donations for this advertisement gladly accepted. Make donations to: The Church at Pierce Creek." The advertisement also included a mailing address for the church.²⁶¹

Subsequently, the Service informed the church that it was beginning an inquiry to determine whether it could maintain its tax-exempt status. The Service told the church that the inquiry stemmed from concerns that the church might have paid or

²⁵⁷ See Section III-B, *supra*.

²⁵⁸ See *Branch Ministries*, 40 F. Supp. 2d at 18.

²⁵⁹ *Id.* at 17.

²⁶⁰ *Id.*

²⁶¹ *Id.*

incurred political expenditures. The Service also requested certain information from the church.²⁶²

The church responded, maintaining that it had not engaged in any political activity, but that the advertisement carried in the *Washington Times* and *USA Today* merely constituted a warning to the members of the Body of Christ. Further, the church refused to respond to most of the requests made by the Service, including a request for the identities of persons who had contributed money in response to the *USA Today* and *Washington Times* advertisement. Thereafter, the Service conducted a two-year Church Tax Examination and, on January 19, 1995, issued a letter revoking the church's tax-exempt status retroactively to January 1, 1992.²⁶³

In upholding the Service's revocation order, the court held that the Service had correctly determined that while the Church at Pierce Creek remained a *bona fide* church, it "was not an organization described in Section 501(c)(3) because it had published or distributed a statement in opposition to a candidate for public office."²⁶⁴ In denying the church's claim that the Service was engaging in selective prosecution, the court stated that "the Church had run a print advertisement in two national newspapers that was fully attributable to the Church and that solicited donations."²⁶⁵ Moreover, the court noted, it knew of "no other instance in which a church so brazenly claimed responsibility for a political advertisement in a national newspaper and solicited tax-deductible donations for that political advertisement."²⁶⁶ The court also distinguished this case from instances in which candidates for political office had given speeches from pulpits or where churches had sponsored political debates or forums.²⁶⁷

That the Service has not revoked the tax-exempt status of more churches may not necessarily mean that it is sitting idly by while the churches violate § 501(c)(3). The Service may well be doing all it can to prevent the problems before they occur. For example, during the 1992, 1996, and 2000 elections, the Service

²⁶² *Id.* at 18.

²⁶³ *Id.*

²⁶⁴ *Id.* at 21.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 21–22.

issued election-year advisories warning tax-exempt churches and other charities that tax policy forbids political campaign activity.²⁶⁸ The Service's advisories warned these organizations that banned activities included "endorsements, donations, fund-raising and even programs that are nonpartisan and in the public interest but help or hurt a candidate."²⁶⁹ The Service concluded by warning the organizations that violators could be taxed on non-exempt activity or lose their tax exemption entirely.²⁷⁰

Furthermore, during the 2000 election campaign, the media reported that Reverend Floyd Flake, pastor of the Allen A.M.E. Zion Church in Queens, New York, called for his congregants to support then-Vice President Al Gore in his bid for the presidency.²⁷¹ Service agents met with Reverend Flake and, in return for his signed agreement to no longer endorse political candidates from the pulpit, the Service allowed Allen A.M.E. Zion to retain its tax-exempt status.²⁷²

Notwithstanding the Service's attempts at enforcing the law, as shown in this article, churches continue to engage in political activity. Obviously, something needs to be done to arrest this activity. On the one hand, Congress could simply amend the IRC to abolish the substantial lobbying and political campaign activity restrictions on § 501(c)(3) organizations, particularly churches.²⁷³ On the other hand, Congress could keep the law unchanged, and the Service would henceforth strictly enforce such law, regardless of whom the violators may be. The solution, however, could well lie somewhere between these two positions, at some point where churches would be free to take religiously-motivated positions on social issues without getting involved in

²⁶⁸ IRS Warning on Churches in Politics, UNNATURAL FAQs, July 13, 2000, available at <http://www.lightlink.com/trance/nlp/news/20000713APreligious.shtml> (last visited Mar. 30, 2004).

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ Lynn, *supra* note 240.

²⁷² *Id.*

²⁷³ During the year 2001, two such proposed pieces of legislation came before Congress. The first of these was "[t]o amend the [IRC] to permit churches and other houses of worship to engage in political campaigns." Houses of Worship Political Speech Protection Act, H.R. 2357, 107th Cong. (2001). The second was intended to amend the IRC "to clarify the restrictions on the lobbying and campaign activities of churches." Bright-Line Act of 2001, H.R. 2931, 107th Cong. (2001).

political activity of any kind, be it through lobbying or political campaigning.

V. TOWARD A SOLUTION—REAPING WHERE THEY HAVE SOWN

In proposing a solution to the current religious tax exemption crisis, the author acknowledges his belief that the exemption is a form of congressional grace. The churches have no constitutional right to such an exemption as it only exists because Congress wants it to exist. Congress, therefore, could remove the exemption if it so desires. Still, because the exemption has a long tradition in history, Congress would surely incur the wrath of the majority of the people should it revoke the religious tax exemption. Nevertheless, because the current law is confusing and ambiguous, Congress would make the churches, the general populace, and the Service—which is charged with enforcement of the statute—extremely pleased should it clarify the law. Subsequently, such clarification would also require the promulgation of new regulations by the Service.

Essentially, the amendments and new regulations should focus on two areas: first, erasing the ambiguity of the term “substantial part” in § 501(c)(3), and second, clearly defining exactly what constitutes participation or intervention in a political campaign.

A. *Abolishing the “No Substantial Part” Test*

The current law provides that to maintain its § 501(c)(3) status, an organization must ensure that “no substantial part” of its activities involve the “carrying on [of] propaganda, or otherwise attempting, to influence legislation.”²⁷⁴ Although the IRC provides for some charitable organizations to make a § 501(h) election allowing them to engage in lobbying, churches are not among those organizations permitted to make such an election.²⁷⁵ Nowhere, however, does the IRC define the term “no substantial part.” The Regulations are just as vague, and give no help in determining the meaning of the term. The current lack of specificity has resulted in chaos. After all, what is “substantial” to a small local church on a street corner in Gary,

²⁷⁴ 26 U.S.C. § 501(c)(3) (2000).

²⁷⁵ *Id.* § 501(h).

Indiana, may be very insubstantial to a large denomination like the Roman Catholic Church. Moreover, having no way of gauging what level of expenditure or activity may be considered “substantial,” churches “roll the dice” and engage in some measure of lobbying, hoping they will not thereby violate the prohibitions of § 501(c)(3).

To address this situation, Congress should do two things. First, Congress should amend the law to place a complete prohibition on lobbying by churches. In the same breath, Congress should provide a very narrow definition of lobbying, limiting the term to “direct or indirect contact with an elected official in an attempt to influence legislation.” Admittedly, this would be a narrower definition than what is found in Treas. Reg. § 1.501(c)(3)-1(c)(3) regarding an “*action* organization.” Here, the Regulation states that an organization attempts to influence legislation (i.e., lobbying) if it either “[c]ontacts, or urges the public to contact, members of a legislative body for the purpose of proposing, supporting, or opposing legislation;” or “[a]dvocates the adoption or rejection of legislation.”²⁷⁶ The language proposed by this article would allow churches to publicly—or privately—advocate the adoption or rejection of legislation, but would prevent them from either themselves contacting legislators or retaining lobbyists to make such contact on their behalf.

The proposed changes to the law would give churches a clear idea of what they can or cannot do *vis-à-vis* lobbying and influencing legislation. Churches would not have to be concerned whether their activities have crossed the “substantial part” threshold or whether their activities constitute lobbying or not. Instead, they could take public, religiously motivated stands on issues with political underpinnings without the fear of losing their tax-exempt status. Hence, for example, the Roman Catholic Church could safely run anti-abortion advertisements, organize pro-life marches, or have priests and bishops preach sermons and conduct public debates on the perceived evils of abortion. By the same token, African-American churches could hold civil rights rallies, publish articles on the evils of racism, or conduct seminars on the pros and cons of the Welfare-to-Work

²⁷⁶ Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii) (as amended by T.D. 8303, 1990-2 C.B. 112) (emphasis in original).

program. The list could go on and on, but the fundamental point is this: with the proposed change to § 501(c)(3), churches could engage in legislation-influencing activities so long as they did not directly or indirectly contact elected officials to push their agendas. This would not prevent individual church members, stirred by the sermons they have heard or moved by the religious rallies they have attended, from contacting their legislators and other elected officials in attempts to influence legislation. But that would be a matter for the individuals, not the various churches, and the churches should neither encourage nor discourage such individual initiative.

B. Strict Enforcement of the Prohibition on Political Campaign Activity

As an initial matter, the author believes that the Christian Church—the Body of Christ on Earth—has no business in political campaigns. After all, the Christ Himself, the example for all Christians, never participated in any political campaign. Although he criticized the Scribes and Pharisees—the religious leaders of the day—as a “brood of vipers,”²⁷⁷ “hypocrites,”²⁷⁸ and “whitewashed tombs,”²⁷⁹ he never engaged in a campaign of any sort against the Romans rule over Palestine.

Further, political campaigning is simply too divisive for the Church. In any given congregation, some members are Republicans, some Democrats, some Greens, and some belong to or support other political parties and groups. For a church to use tithes, offerings, and other funds provided by its members to support or intervene in a political campaign in support of any candidate is wrong. For example, if the candidate is a Democrat, how could the church justify to its Republican members that it is expending funds or energy in supporting a Democratic candidate? Even if one assumed that all members of the congregation supported one particular candidate, the church should still not support that candidate. After all, the church should be known as the Body of Christ on Earth, not as a Republican or Democratic or Green political camp.

²⁷⁷ *Matthew* 12:34 (New American).

²⁷⁸ *Id.* 23:27.

²⁷⁹ *Id.* 23:27.

Now, current law provides that churches and other § 501(c)(3) organizations may maintain their tax-exempt status if they do not “participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.”²⁸⁰ In defining an “action organization,” the Regulations define political campaign activities that “include, but are not limited to, the publication or distribution of written or printed statements or the making of oral statements on behalf of or in opposition to such a candidate.”²⁸¹

To further guide the churches, the Service publishes the Tax Guide for Churches and Religious Organizations.²⁸² The publication clearly defines political campaign activity as including “[c]ontributions to political campaign funds or public statements of position (verbal or written) made by or on behalf of the organization in favor of or in opposition to any candidate for public office.”²⁸³ The Guide also lists certain activities which, depending on the facts and circumstances, may not be prohibited. These include “certain voter education activities (including the presentation of public forums and the publication of voter education guides) conducted in a non-partisan manner,” and activities “intended to encourage people to participate in the electoral process, such as voter registration and get-out-the-vote drives.”²⁸⁴ With regard to churches inviting political candidates to speak at their services, the Guide states that a political candidate may so speak either in his or her individual capacity (i.e., not as a candidate) or as a candidate.²⁸⁵ If the politician is invited to speak as a candidate, then the church must ensure that: (1) “[i]t provides an equal opportunity to [all] the political candidates seeking the same office;” (2) “[i]t does not indicate any support of or opposition to the candidate;” and (3) “[n]o political fundraising occurs.”²⁸⁶

²⁸⁰ 26 U.S.C. § 501(c)(3) (2000).

²⁸¹ Treas. Reg. § 1.501(c)(3)-1((c)(3)(iii) (as amended by T.D. 8308, 1990-2 C.B. 112) (emphasis in original).

²⁸² INTERNAL REVENUE SERV., PUB. 1828, TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS (Rev. 7-2002).

²⁸³ *Id.* at 6.

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 8.

²⁸⁶ *Id.*

In yet another effort to guide churches on the matter of political campaign activity, the Service has provided in each election year since the 1992 election an advisory warning churches and other § 501(c)(3) organizations that tax policy forbids campaign activity.²⁸⁷ Typically, the advisories mirror the language of the Tax Guide for Churches and Religious Organizations.

Armed with all this information, churches are well aware what constitutes prohibited political activity. For example, they know that they may not “pass the plate” on behalf of a candidate for elected office, that a candidate may not make a campaign speech at Sunday or Saturday morning service, and that the pastor may not endorse a candidate from the pulpit. From the *Branch Ministries v. Rossotti*²⁸⁸ case, churches know that they may not run advertisements in support of or in opposition to political candidates. What the churches need to do is play within the rules and refrain from political campaigning.

Like the churches, the Service is also aware of these rules. What the country needs, therefore, is not legislation similar to House Report 2357,²⁸⁹ but strict enforcement by the Service of the existing laws. The Service must actively pursue those churches that engage in political activity, be they large or small denominations, established or non-established. Only then will the churches take seriously their obligation to preach the Gospel without being too involved in politics. Indeed, it is only then that the churches will truly reap where they sow.

CONCLUSION

With another election year approaching, political candidates will once again turn to the churches for help and support. While individual church members should feel free to assist the candidates of their choice, the churches themselves should stay above the fray. Alas, the history of church involvement in political activity since 1954 suggests that the churches are all too eager to disregard the law and engage in lobbying and political

²⁸⁷ IRS WARNING ON CHURCHES IN POLITICS, *supra* note 268.

²⁸⁸ 40 F. Supp. 2d 15, 20–21 (D.D.C. 1999), *aff'd*, 211 F.3d 137, 139 (D.C. Cir. 2000).

²⁸⁹ Houses of Worship Political Speech Protection Act, H.R. 2357, 107th Cong. (2001).

campaigning. To prevent this situation, Congress and the Service need to act, and the sooner the better. For its part, Congress must amend § 501(c)(3) to completely eliminate any provision allowing churches to engage in lobbying. Simultaneously, Congress must develop a narrow definition of lobbying to enable churches to mobilize the masses on social issues of a religious nature, but also to steer clear of making contact with legislators and other elected officials in an attempt to influence legislation. For its part, the Service must strictly enforce the law as regards the prohibition on campaign activity by churches. The Service must vigorously pursue violators of the IRC, be they large or small denominations, mainstream or "wayside," and revoke their tax-exempt status.

If both Congress and the Service act upon this matter, the day will soon come when the words of Jesus the Christ will have more meaning to the churches in America. They will better understand what it is to live up to the responsibilities of certain benefits, to give to Caesar the things that belong to Caesar, to God the things that belong to God, and to reap only where they have sowed.

