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Understanding the Lobbying Efforts of a Church: How Far Is Too Far?

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I do not know whether all the Americans have a sincere faith in their religion,—for who can search the human heart?—but I am certain that they hold it to be indispensable to the maintenance of republican institutions. This opinion is not peculiar to a class of citizens, or to a party, but it belongs to the whole nation, and to every rank of society.

Alexis de Tocqueville[1]

I. INTRODUCTION

The same song plays on the jukebox. It's the one that comes on every four years or so, beginning with thundering from small-town pulpits, reverberating in media channels, even finding its way to the annals of various law reviews. But the tune dies on the lips of Internal Revenue Service agents; barely an echo can be heard in the federal courts. The tune of the § 501(c)(3) lobbying restriction may become a bit catchier if it were clear exactly what it meant.

That clarity can be provided by understanding and then perhaps modifying the lobbying restriction on religious organizations that currently exists under § 501(c)(3) of the Internal Revenue Code of 1986, as amended (the "Code"). Such a modification to the lobbying restriction is both feasible and practical. Feasible, because courts have recognized the ability of government to restrict the lobbying activities of churches.[2] Practical, because (1) a modification would provide a safe harbor to churches that are "chilled" from entering the political arena under the current framework,[3] and (2) it would allow for better enforcement. Religion, as de Tocqueville and others have recognized, plays an essential role in defining American

1. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 391 (Francis Bowen ed., Henry Reeve trans., Cambridge: Sever and Francis 1862).

2. Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849, 854 (10th Cir. 1972) ("Tax exemptions are matters of legislative grace . . . ."); Branch Ministries v. Rosotti, 40 F. Supp. 2d 15 (D.D.C. 1999).

3. Stanley S. Weithorn & Douglas F. Allen, *Taxation and the Advocacy Role of the Churches in the Public Affairs*, *in* THE ROLE OF GOVERNMENT IN MONITORING AND REGULATING RELIGION IN PUBLIC LIFE 51, 57 (James E. Wood, Jr. & Derek Davis eds., 1993).

Democracy. But how expansive should that role be and what restrictions, if any, should be imposed?

These questions are particularly acute in the context of politics because religious issues often arise in political situations. For example, the elections of 2008 included referendums on gay marriage,[4] the adoption of children by gay couples,[5] stem cell research,[6] and limits on abortion.[7] On one hand, what is at stake for churches is the preservation of the moral fabric of society. On the other hand, at least from a tax perspective, they risk the potential loss of tax-exemption status under § 501.[8]

This Comment focuses on how to best address the tension between a church's right to free speech and the potential for excessive entanglement between church and state through the lobbying restriction. An analysis of the origin of the lobbying restriction demonstrates that Congress has placed a meaningful restriction on church activities. Although a restriction on church lobbying helps prevent excessive entanglement between church and state, the restriction's ambiguity makes adequate enforcement by the Internal Revenue Service ("IRS" or the "Service") difficult and at the same time discourages lobbying that would be beneficial for the church and society. A two-tiered approach—the first tier drawing clear lines to encourage some lobbying and strengthen enforcement and the second tier incorporating elements of the current approach to help prevent avoidance—is a possible solution.

Part II of this Comment discusses the background of the lobbying restriction on religious organizations and how lobbying,

4. S. Con. Res., 48th Leg., 2d Reg. Sess. (Ariz. 2008); Calif. Proposition 8, *available at* http://voterguide.sos.ca.gov/past/2008/general/title-sum/pdf/prop8-title-summary.pdf; Fla. Marriage Protection Amendment, *available at* http://election.dos.state.fl.us/initiatives/initdetail.asp?account=41550&seqnum=1.

5. An Act Providing that an Individual Who is Cohabiting Outside of a Valid Marriage May Not Adopt or be a Foster Parent of a Child Less than Eighteen Years Old, *available at* http://www.sos.arkansas.gov/elections/elections_pdfs/proposed_amendments/2007-293_Adopt_or_Foster_parent.pdf.

6. Mich. Proposals 08-1, 08-2, *available at* http://www.michigan.gov/documents/sos/ED-20_11-08_Props_Poster2_251561_7.pdf.

7. South Dakota Initiative 11: Abortion Limits; Colorado Amendment 48: Human Life from Moment of Conception; California Proposition 4: Abortion Limits.

8. Apart from the potential of retroactively paying taxes on the part of the church, donors to the church will lose the ability to take an itemized deduction for contributions made to the church. I.R.C. § 170(c)(2)(D) (2006). Churches, however, are not subject to the 5% excise tax on lobbying activities imposed by Section 4912. *See* I.R.C. § 4912(c)(2)(B) (2006).

even in furthering a tax-exempt purpose, can violate the law. Part III evaluates whether any type of restriction on lobbying by churches is necessary, or alternatively, whether there should be an absolute restriction on lobbying. Part IV discusses whether the current framework applies the correct approach to churches. Part V evaluates possible alternatives to the current approach. Part VI offers a brief conclusion.

II. BACKGROUND

Many churches see the need to advocate moral reforms through government policies.[9] But just because churches are not lobbying for economic gain, and rather are attempting to improve society, does not necessarily shield churches from the § 501(c)(3) restraint on lobbying. By definition, a charity that qualifies for tax exemption—regardless if it is a religious organization—is not in business to derive a profit.[10] Being concerned with making profits over the improvement of society would violate the exclusivity requirements for any charity under § 501(c)(3) whether or not it is a church.[11] Therefore, the argument that the *purpose* of a church's lobbying should somehow shield it from scrutiny does not automatically differentiate a church from § 501(c)(3) entities organized for educational purposes, scientific purposes, etc., because all of these organizations are also not primarily interested in deriving an economic gain.

A. Slee v. Commissioner

A church might argue, however, that even though the non-economic nature of its lobbying may not distinguish it from other

9. *See generally Review of Internal Revenue Code Section 501(c)(3) Requirements for Religious Organizations: Hearing on H.R. 2357 and H.R. 2931 Before the Subcomm. on Oversight of the H. Comm. on Ways and Means*, 107th Cong. (2002).

10. *See* NICHOLAS P. CAFARDI & JACLYN FABEAN CHERRY, TAX EXEMPT ORGANIZATIONS: CASES AND MATERIALS 3 (2d ed. 2008).

11. A charitable organization must be "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." 26 U.S.C. § 501(c)(3) (2006). "[T]he critical inquiry [into the purpose of an organization's operations] is whether [the organization's] primary purpose for engaging in its sole activity is an exempt purpose, or whether its primary purpose is the nonexempt one of operating a commercial business producing net profits for [the organization]." B.S.W. Group, Inc. v. Comm'r, 70 T.C. 352, 357 (1978).

charitable organizations, lobbying by a church is still permissible under § 501(c)(3) as long as it is *in line* with its charitable purpose. While churches disagree on whether lobbying should be permissible in any form,[12] litigation shortly before the enactment of the lobbying restriction demonstrates that lobbying, to some degree, should be permissible. In *Slee v. Commissioner*,[13] a taxpayer named Noah Slee[14] wanted to take a deduction for contributions he made to the American Birth Control League (the "League").[15] The League, however, had a declared objective to influence legislation, seeking "[t]o enlist the support and co-operation of legal advisors, statesmen and legislators in effecting the lawful repeal and amendment of state and federal statutes which deal with the prevention of conception."[16] The League worked continually to further this political objective.[17]

When the Board of Tax Appeals (the "Board") decided this case in 1929, it sided with the Commissioner, holding that the contributions were not deductible because the League did not operate exclusively for a charitable purpose.[18] The Board first noted that when organized, the League passed a resolution for "enlist[ing] the support and cooperation of Legal Advisors, Statesmen and Legislators."[19] Operationally, the court found that the League did not act as a charitable organization when it "distribut[ed] . . . literature seeking the repeal or amendment of statutes which the League felt hampered it in accomplishing its aims."[20] The court found that because this lobbying activity attempted to change the law, the activity fell outside the scope of engaging in a tax-exempt

12. *See generally Review of Internal Revenue Code Section 501(c)(3) Requirements for Religious Organizations: Hearing on H.R. 2357 and H.R. 2931 Before the Subcomm. on Oversight of the H. Comm. on Ways and Means*, 107th Cong. (2002).

13. 15 B.T.A. 710 (1929), *aff'd*, 42 F.2d 184 (2d Cir. 1930).

14. Mr. Slee was married at the time to the founder of the American Birth Control League, Margaret Higgins Sanger. *See* Andrea Tone, *A Medical Fit for Contraceptives, in* WOMEN, SCIENCE, AND TECHNOLOGY 166, 168 (Mary Wyer et al. eds, 2d ed. 2008).

15. *Slee*, 15 B.T.A. at 710. The gifts were made in excess of $50,000 over a six-year period during the 1920s. *Id.* at 711.

16. Slee v. Comm'r, 42 F.2d 184, 184 (2d Cir. 1930).

17. *Id.* at 185.

18. *See Slee*, 15 B.T.A. at 714. Indeed, apart from the exclusivity requirement, the Board also found that the American Birth Control League failed the organizational and operational requirement. *Id.*

19. *Id.* at 711.

20. *Id.* at 714.

purpose.[21]

This practically *per se* restriction on propaganda imposed by the Board was not without merit. The Treasury regulations in force at the time provided that a charity distributing partisan or controversial propaganda did so outside of its tax-exempt operations.[22] While propaganda has been defined as "the spreading of particular beliefs or opinions,"[23] some associate it with an ulterior motive, or see it as an attempt to radically change the status quo.[24] Thus, while there is a right to come to the foot of government with "'entreaty, supplication, and prayer,'"[25] if that supplication is viewed as propaganda, it will likely be viewed negatively.

Addressing this interpretation of lobbying, the Second Circuit affirmed the *Slee* decision on appeal but qualified the Board's decision. Judge Learned Hand stated that there are situations in which modifications of the law are ancillary to the furthering of a tax-exempt purpose.[26] If the law holds an organization back from fulfilling its exempt purpose, the court suggested that lobbying efforts, within reason, could be used to change the law.[27] As Judge Learned Hand noted in the case, there are acts by a charity, influencing law, that do not make that organization any less charitable; indeed, the legislation the organization influenced may enable it to become more charitable.[28]

B. Senator Pat Harrison's Proposal

In the wake of *Slee*, Congress debated whether to modify the Code regarding charitable organizations. In March of 1934, the

21. *Id.* at 715. The court found that the League engaged in propaganda, and that "[t]he dissemination of propaganda is usually thought of, not as a charitable, religious, or educational program, but primarily to accomplish the purpose of the person instigating it, which purpose here was a change or repeal of statutes." *Id.* Note that starting in 1919 regulations issued by the Treasury Department specified that partisan propaganda did not fall within the activities sanctioned by the tax-exempt statute. Haswell v. United States, 500 F.2d 1133, 1140 (Ct. Cl. 1974).

22. *Slee*, 15 B.T.A. at 715.

23. Seasongood v. Comm'r, 227 F.2d 907, 911 (6th Cir. 1955).

24. *See id.*

25. *Id.* (quoting John Quincy Adams)

26. Slee v. Comm'r, 42 F.2d 184, 185 (2d Cir. 1930) ("[T]here are many charitable, literary and scientific ventures that as an incident to their success require changes in the law. . . . [A charity] does not lose its character when it seeks to strengthen its arm.").

27. *See id.*

28. *Id.*

Senate Finance Committee met to discuss H.R. 7835. During the morning of March 21, Mississippi Senator Pat Harrison moved that there should be "no deductions from gross income . . . in the case of contributions made to organizations carrying on propaganda, attempting to influence legislation or participating in partisan politics."[29] The Committee approved Senator Harrison's provision without a vote.[30]

As originally enacted, the provision provided that the income tax should not apply "to any corporation or association organized and operated exclusively for religious, charitable, scientific, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual . . . ."[31] The Committee incorporated Senator Harrison's provision after the word "individual" so that the language presented before the Senate on April 2, 1934 added the words "and no substantial part of the activities of which is participation in partisan politics or is carrying on propaganda, or otherwise attempting to influence legislation."[32]

Although *Slee* purportedly precipitated the legislation,[33] the Congressional Record does not reflect an intent to distinguish between acceptable and harmful lobbying. Senator Harrison stated, "[T]he attention of the Senate committee was called to the fact that there [were] certain organizations which [were] receiving contributions in order to influence legislation and carry on propaganda."[34] An exclusive focus on Mr. Harrison's remarks may suggest that since the provision did not result from a concern about *church* lobbying activities, the provision was not intended to prohibit

29. *The Internal Revenue Act of 1934: Hearing on H.R. 7835 Before the S. Finance Comm.*, 73d Cong. 112 (1934).

30. *Id.*

31. An Act to Reduce Tariff Duties and to Provide Revenue for the Government, and for Other Purposes, Pub. L. No. 63-16, 38 Stat. 172 (1913).

32. 73 CONG. REC. 5,861 (1934).

33. *See, e.g.*, Haswell v. United States, 500 F.2d 1133, 1140 (Ct. Cl. 1974).

34. 73 CONG. REC. 5,959 (1934) ("I may say to the Senate that the attention of the Senate committee was called to the fact that there are certain organizations which are receiving contributions in order to influence legislation and carry on propaganda."). Wisconsin Senator Robert La Follette tried to go further, suggesting that while he understood that Congress wanted, in some cases, to encourage contributions, the allowance of a tax deduction does "not make a penny's worth of difference" in what a person contributes. *Id.* In his judgment, the government could "never . . . get away from mistakes of administration and from decisions which may seem like favoritism until all contributions to organizations of this kind are made subject to the income tax." *Id.*

lobbying by churches.

The Congressional Record also shows, however, that the Senate expressed no concern for churches when evaluating the adverse effects that result from the provision. The Senate Finance Committee had concerns that the scope of the remedy would be greater than the problem and, consequently, worried that the provision would adversely affect activities by organizations that did not warrant concern.[35] But the concern manifested on the Senate floor did not center on or even mention churches. Rather, the concern focused on organizations that had a direct reliance on legislation to advance their charitable cause, such as the Society for the Prevention of Cruelty to Children and the Society for the Prevention of Cruelty to Animals.[36]

Churches thus cannot necessarily rely on the *purpose* of the provision as a possible shield from the application of the lobbying restriction. Further, a plain reading of the statute does not differentiate between churches and other charitable organizations. A church, using *Slee*, may try to argue that the provision only applies to lobbying that is not in furtherance of its tax-exempt purpose.[37] This argument must fail, however, or else the lobbying restriction would be no different than the exclusivity requirement found under § 501(c)(3).

Under the exclusivity requirement, a church must "operate[] *exclusively* for religious . . . purposes."[38] The regulations clarify that *exclusively* does not mean that a charity cannot engage in a non tax-exempt activity. Rather, a charity will be regarded as operating exclusively for a tax-exempt purpose as long as any of its activities that are not in furtherance of an exempt purpose are insubstantial.[39] The lobbying restriction of § 501(c)(3) has a similar substantiality requirement. The lobbying restriction provides that "no substantial part of the [church's] activities . . . [involves] carrying on propaganda, or otherwise attempting, to influence legislation . . . ."[40]

35. Pennsylvania Senator David Reed acknowledged that the "amendment goes much further than the committee intended it to go." 73 CONG. REC. 5,861 (1934).

36. *Id*.

37. Or, in other words, lobbying that is in furtherance of a *private* interest rather than a *public* interest. *See* Seasongood v. Comm'r, 227 F.2d 907, 911 (6th Cir. 1955).

38. I.R.C. § 501(c)(3) (2006) (emphasis added).

39. Treas. Reg. § 1.501(c)(3)-1(c)(1) (as amended in 2008).

40. 26 U.S.C. § 501(c)(3) (2006).

Since both restrictions have a substantiality requirement, if the lobbying restriction only applied to activities not in line with a tax-exempt purpose, the only way a charity could violate the lobbying restriction would be to become substantially involved in legislation that would be for a benefit other than a charitable purpose. If the lobbying restriction only applied to activities not in line with a tax-exempt purpose, however, it would be redundant of the exclusivity requirement.[41]

Interpreting the lobbying restriction to apply to activities furthering a tax-exempt purpose, which avoids redundancy of the exclusivity requirement, is supported by the legislative history of the provision and by the judiciary.[42] The enactors of the provision realized the scope of the provision would militate against action taken to further a tax-exempt purpose.[43] Although selfish motivation could violate the restriction, an organization does not apparently need to have a selfish motive for a violation to occur.[44]

III. TO LOBBY OR NOT TO LOBBY

The legislative history demonstrates that a concern of the reach of the substantiality requirement did not include the effect on churches. Although the provision currently *can* reach churches, the question remains whether the provision *should* restrict churches, and if so, by how much. A look at the extremes—the use of no restriction

41. Thus a church arguing the point in court would most certainly lose, since courts construe the language of a statute to avoid redundancy. *See, e.g.*, TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001).

42. Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849, 854 (10th Cir. 1972) ("A religious organization that engages in substantial activity aimed at influencing legislation is disqualified from tax exemption, whatever the motivation.").

43. While the committee wanted to address the issue of selfish contributions—those contributions that would advance the personal interests of the giver—it realized that the scope of the proposal went further. 78 CONG. REC. 5,861 (1934). While there was discussion about rewording the provision, *see* Senator Reed's comment at 78 CONG. REC. 5,959 (1934), no meaningful revision was made.

44. In response to Senator Couzens' statement that the activities of the children's welfare societies could not be prohibited from lobbying, Senator Reed responded that he was "not so sure. Take the case of those who are urging the adoption of the child-labor amendment: Certainly they are not acting from selfish motives, and yet almost their entire activity is an effort to influence legislation." 78 CONG. REC. 5,861; *see also* Haswell v. United States, 500 F.2d 1133, 1142 (Ct. Cl. 1974) (citing Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849, 854 (10th Cir. 1972)) ("An organization that engages in substantial activity aimed at influencing legislation is disqualified from a tax exemption, whatever the motivation.").

or the use of an absolute restriction—suggests that a middle path that improves on the current approach would be best.

A. Evaluating Unfettered Lobbying

One option available to address any ambiguity under the current standard is to not have a lobbying restriction on churches at all. This approach would be a return to the treatment of churches by the Code for almost thirty years at the beginning of the twentieth century. This approach, however, fails to overcome two valid concerns: (1) the formation of churches in name only to funnel tax-free money into lobbying efforts and (2) the detrimental effect to legitimate churches if separation between church and state is impaired.[45] The formation of sham churches for the primary purpose of influencing legislation is a practical consideration that must be addressed to avoid revenue shortfall and other abuses, whereas the separation of church and state is more of a theoretical consideration that must be addressed to incorporate constitutional requirements. Despite these concerns, some churches feel that unfettered lobbying benefits both the church and the nation. On the other hand, the historical context of church and state in the United States suggests that unfettered lobbying is inappropriate.

1. The rise of the religious right

There is a difference between speaking out on moral issues and using legislation as a vehicle to change the moral landscape of the United States. While political viewpoints and religious values often overlap, the political arena is not the sole option to propagate a belief in a higher existence and to address moral decay. In fact, many churches have chosen to refrain from politics altogether. For example, during the twentieth century, many churches, which have always had a strong moral voice, have only recently re-emerged with a strong *political* voice.[46] Jerry Falwell reflected the common view of

45. Further, it should be noted that a vast majority of religious leaders purportedly oppose influencing politics, at least when it comes to endorsing political candidates. *Review of Internal Revenue Code Section 501(c)(3) Requirements for Religious Organizations: Hearing on H.R. 2357 and H.R. 2931 Before the Subcomm. on Oversight of the H. Comm. on Ways and Means*, 107th Cong. 39–41 (2002) (statement of Reverend C. Welton Gaddy, Executive Director, Interfaith Alliance) (stating that a Gallup/Interfaith Alliance Foundation poll found that 77% of religious leaders did not approve of the supporting of political candidates).

46. *See* PATRICK ALLITT, RELIGION IN AMERICA SINCE 1945: A HISTORY 154 (2003)

pre-1970s Baptist preachers when he stated that "[p]reachers are not called to be politicians but to be soul winners."[47]

But this hands-off approach soon gave way to an attitude of "[g]et them saved, baptized, and *registered*,"[48] as Falwell and others suddenly saw politics as a means to address the moral ills of a nation—a concern that in their eyes outweighed the need for separation of church and state.[49] Accordingly, Christian lobbying groups began to spring up, such as Christian Voice and Moral Majority.[50] The Moral Majority and other groups, in turn, created political action committees, which funded the campaigns of various conservative lawmakers.[51]

2. The Founders and the Court

From the inception of this nation, both the public and the Founders thought that the state should not get involved with directing the spiritual affairs of the populace.[52] What is not as clear, however, is the ability of churches to lobby for the government to interfere "civilly,"[53] through social programs such as faith-based initiatives. A look back at the historical relationship between

(stating that Christians started to flex political muscles in the 1970s after a half century of being withdrawn); *see also* Paul Boyer, *The Evangelical Resurgence in 1970s American Protestantism*, *in* RIGHTWARD BOUND 29, 33 (Bruce J. Schulman & Julian E. Zelizer eds., 2008) ("Pre-1970s evangelicals, focused on evangelism and denominational concerns, generally avoided overt political involvement."). In the 1960s, for example, the traditional Baptist principle was to focus on preaching the gospel of Jesus Christ and to ignore direct involvement in issues such as civil rights reform. *See* ALLITT, *supra* at 151.

47. Boyer, *supra* note 46, at 35 (internal quotation marks omitted)).

48. *Id*. at 35, 44 (emphasis added).

49. The phrase "separation between Church and State" originated in a letter from Thomas Jefferson to the Danbury Baptist Association. PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 1 (2002) ("'I contemplate with sovereign reverence that act of the whole American people which declared that *their* legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church & State.'").

50. *See* ALLITT, *supra* note 46, at 152; KAREN O'CONNER, NO NEUTRAL GROUND?: ABORTION POLITICS IN AN AGE OF ABSOLUTES 83 (1996).

51. *See* O'CONNER, *supra* note 50, at 82–83.

52. JAMES H. HUTSON, CHURCH AND STATE IN AMERICA: THE FIRST TWO CENTURIES 137 (2008).

53. For a discussion concerning the distinction between spiritual and civil involvement of government following the Revolutionary War, see *id*. at 126–33, 153–55 (contrasting the view of some that civil involvement was a backdoor to establishing religion with the view of others that by opposing civil involvement, protestors were mistaking "'their purses for their consciences'").

churches and politics, as well as the Supreme Court's interpretation of that relationship, provides the background for understanding that some limitations should be imposed.

Some of the Founders believed that this civil element of the separation of church and state would not only benefit the state but would also be to the overall benefit of the freedom of religious conscience.[54] One controversial aspect of state government involvement was the use of taxes to support religions. This practice continued into the beginning of the nineteenth century, despite the concerns of its impact by many around the country.[55] One such tax, or general assessment, was proposed by Patrick Henry in 1784.[56] The assessment did not seek to establish a certain religion. Instead, the assessment sought to benefit all churches in a jurisdiction and gave citizens the option of choosing the institution or, in the alternative, the public education fund.[57]

Thomas Jefferson and James Madison opposed such taxes; Jefferson expressing his views in, "An Act for Establishing Religious Freedom," and Madison in, "Memorial and Remonstrance Against Religious Assessments."[58] Madison asserts fifteen arguments against the allowance, including a protection of liberty argument and an equality argument. Although the assessment would supposedly apply to all Christian denominations, Madison still saw danger, asking, "[w]ho does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians."[59] Madison also

54. *See* Steven Waldman, *Why I'm Celebrating Madison's Birthday*, WALL ST. J., Mar. 16, 2009, *available at* http://online.wsj.com/article/SB123714297334033741. Note, however, that venerable American figures such as George Washington and James Monroe opposed the idea of separation of church and state. Joy Hakim, *A Forgotten Fight for Religious Freedom*, WALL ST. J., July 16, 1985, at 1. Washington, however, eventually opposed such measures as a general assessment (i.e., tax to support religion). HUTSON, *supra* note 52, at 136.

55. Massachusetts became the last state to outlaw the practice, abolishing the tax in 1833. HUTSON, *supra* note 52, at 166.

56. *Id*. at 117–18.

57. *Id*.

58. *See* Waldman, *supra* note 54.

59. JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), *reprinted in* THE WRITINGS OF JAMES MADISON: COMPRISING HIS PUBLIC PAPERS AND HIS PRIVATE CORRESPONDENCE, INCLUDING NUMEROUS LETTERS AND DOCUMENTS NOW FOR THE FIRST TIME PRINTED: VOLUME II 1783–1787, at 186 (Gaillard Hunt ed., Putnam 1901).

thought that the proposed law violated freedom of conscience: "Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yielded to the evidence which has convinced us."[60]

While the Madison and Jefferson view was not widely espoused by the populace at the end of the eighteenth century,[61] the Supreme Court has treated their view as such and consequently has restricted the ability of government to intervene in the non-spiritual aspect of religion in the United States.[62] The Court, in *Everson v. Board of Education*, stated that the "establishment of religion" clause of the First Amendment not only means that "[n]either a state nor the Federal Government can set up a church[,]"[63] but also means that neither state nor the Federal Government "can pass laws which aid one religion, *aid all religions*, or prefer one religion over another."[64]

Apart from the consideration of the subject by the Supreme Court, there are practical examples of the dangers of letting religion have too much influence in political affairs. As a result of religious influence on politics, various countries have recognized the validity of one religion to the detriment or other religions.[65]

B. Evaluating an Absolute Restriction

A complete prohibition against church lobbying, however, would also be undesirable. Just as there is a concern of religion having too much influence in politics, there is, of course, the related concern of general government oversight of religion;[66] the government would have to monitor church affairs to evaluate whether there is compliance with the prohibition. While interaction between

60. *Id.*

61. *See* HUTSON, *supra* note 52, at 176–82 (discussing the Court's interpretation of the originalist perspective of the separation of church and state and why he views it as incorrect).

62. *See* Everson v. Bd. of Educ., 330 U.S. 1, 8–13 (1947). Note that the Supreme Court previously ruled that the First Amendment protections apply to action by state governments through the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

63. *Everson*, 330 U.S. at 15.

64. *Id.* (emphasis added).

65. *See* DEPT. OF STATE, 110TH CONG., ANNUAL REPORT ON INT'L RELIGIOUS FREEDOM 2006, at 730 (Joint Comm. Print 2007) (reporting, for example, on religious freedom in Iran and in Pakistan).

66. U.S. CONST. amend. I.

government and religion is inevitable, the First Amendment religion clauses are concerned with excessive entanglement.[67]

In *Walz v. Tax Commission*,[68] the Supreme Court evaluated whether a provision exempting church property from property tax found in the New York Constitution violated the Establishment Clause of the United States Constitution.[69] First, the Court looked at the *purpose* of the exemption. It found that instead of attempting to advance or inhibit religion, New York had made a determination that certain organizations provide a benefit to the community that should not be hindered by taxation.[70]

Second, the Court looked at the *effect* of the constitutional provision: if the effect of the provision is to create excessive entanglement between the government and religion, then the provision violates the religion clauses.[71] In terms of tax relief, "[t]he exemption creates only a minimal and remote involvement between church and state and far less than taxation of churches," serving to insulate churches from having a fiscal *involvement* with government.[72]

The Court recognized that a tax on church property, on the other hand, "would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes."[73] This involvement, however, would pale in comparison to the involvement the government would have if it imposed a blanket restriction on lobbying. Churches often

67. Walz v. Tax Comm'n, 397 U.S. 664, 670 (1970) ("No perfect or absolute separation is really possible; the very existence of the Religion Clauses is an involvement of sorts—one that seeks to mark boundaries to avoid excessive entanglement.").

68. 397 U.S. 664.

69. *Id.* at 666–67. The religion clauses of the First Amendment, through the Fourteenth Amendment, are applicable to the states. *See supra* text accompanying note 62.

70. *Walz*, 397 U.S. at 672–73.

71. *Id.* at 674.

72. *Id.* at 676. The Court also uses the history of the non-taxation of churches and the lack of the establishment concerns to support its conclusion. *Id.* at 676–78. Note that this argument does not address that exemptions were originally given to established religions. Edward McGlynn Gaffney, Jr., *Exemption of Religious Organizations from Federal Taxation*, *in* RELIGIOUS ORGANIZATIONS IN THE UNITED STATES 409, 431 n.101 (James A. Serritella ed., 2006) (quoting John Witte, *Tax Exemption of Church Property: Historical Anomaly or Valid Constitutional Practice?*, 64 S. CAL. L. REV. 363, 367 (1991)).

73. *Walz*, 397 U.S. at 674.

"vigorous[ly] advoca[te] . . . legal [and] constitutional positions."[74] As a church advocates a moral position that correlates with a political topic, the line between moral advocacy and political lobbying is blurred. An absolute prohibition would not take into account this reality.[75]

Further, since even a minor violation under this approach would be intolerable, the IRS would need broad discretion in its church audits to prevent abuses. This broad discretion would pose constitutional concerns because going over church memos, questioning the intent of sermons, etc., would appear to create the excessive entanglement the First Amendment seeks to avoid.

1. The UBIT example

The need to avoid excessive entanglement is highlighted by the Unrelated Business Income Tax ("UBIT"). Congress has seen the need of auditing churches in the UBIT context and also has realized that certain protections are necessary. Congress enacted the UBIT in 1950, taxing unrelated business net income of tax-exempt organizations,[76] to address unfair competition between tax-exempt and taxable entities.[77] In 1969, Congress broadened the tax, which originally did not apply to churches,[78] to encompass all charitable organizations.[79]

Upon broadening the UBIT, however, Congress realized that the auditing of churches raised several concerns and added a subsection to § 7605 that dealt with examining churches.[80] When revisiting the issue in 1984, the Senate Finance Committee

74. *Id*. at 670.

75. While there is a blanket restriction on electioneering under I.R.C. § 501(c)(3), violating this requirement is easier to avoid since a church leader, rather than speaking in generalities, must either endorse or oppose a candidate.

76. 26 U.S.C. § 422 (1952).

77. S. REP. NO. 81-2375, at 28 (1950).

78. 26 U.S.C. § 421(b)(1) (1950).

79. 26 U.S.C. § 511 (1969).

80. *See* 26 U.S.C. § 7605(c) (1970) ("No examination of the books of account of a church . . . shall be made to determine whether such organization may be engaged in the carrying on of an unrelated trade or business . . . unless the Secretary [so] believes. . .[,] so notifies the organization in advance of the examination[, and the] examination . . . shall be made [only] to the extent necessary to determine the amount of tax imposed by this title."). As a result of these concerns, Congress restricts inquiries into and examinations of churches. I.R.C. § 7611 (2006) (originally enacted in Tax Reform Act of 1984, 98 Stat. 1034).

highlighted some of these concerns. While realizing that the church form could be utilized to avoid taxes, and thus some oversight is needed, the committee noted that there is an issue with the "separation of church and state," which is further "compounded by the relative inexperience of churches in dealing with the IRS and the resulting occasional misunderstandings between churches and the IRS."[81] The resulting Church Audit and Procedure Act limits the ability of the Service to audit churches by, for example, limiting the records that are necessary to complete an audit and limiting the amount of audits the Government can conduct.[82]

IV. EVALUATING THE CURRENT APPROACH

Unfortunately, the current approach to lobbying under § 501(c)(3), while on its face giving churches some breathing room but not an unfettered ability to lobby under a substantiality requirement, is inadequate because of its ambiguity. This ambiguity presents both enforcement concerns for the IRS and the potential to hinder the free speech of churches.

A. Enforcement Problems

Under the current statutory approach, the IRS has trouble imposing a tax even if that activity is clearly substantial. Churches do not have to file a Form 1023 with the Service to receive tax-exempt status,[83] nor do churches have to be registered in order for donors to take a charitable deduction on their tax returns.[84] Donors and church members have little incentive to monitor church activities because the deductibility of their donations, under § 170, depends on the continuing application of a tax-exempt status. The IRS is thus left to rely on tips from third parties.

The IRS also has little incentive to allocate the resources it has to regulating churches. Currently, there is an estimated tax gap of $300 billion.[85] Of that amount, $100 billion is estimated as collectible.[86]

81. S. COMM. ON FINANCE, 98TH CONG., DEFICIT REDUCTION ACT OF 1984: EXPLANATION OF PROVISIONS APPROVED BY THE COMMITTEE ON MARCH 21, 1984, at 873 (Comm. Print 1984).

82. *See* Gaffney, *supra* note 72, at 442.

83. I.R.C. § 508(c)(1)(A) (2006).

84. Internal Revenue Publication 526, at 2 (2008).

85. John McKinnon, *White House Leans Toward Tighter Enforcement of Taxes*, WALL ST. J., Mar. 26, 2009, at A4.

The IRS would be better served by having security dealers report the purchase price of sold securities and by having credit card companies report the revenue of small restaurants.[87] The IRS also is allocated funds that are invested "in high return-on-investment activities that generate improved compliance and fairness in the application of tax laws."[88] While revenue can be generated from evaluating church activities, auditing churches will likely not produce the return on investment that would result from prosecuting offshore tax shelters and regulating profitable corporations or wealthy taxpayers.[89]

B. Uncertainty

While some may argue that the ambiguity of the current approach provides an effective limit on religious interference with government,[90] on the other hand, the approach may hinder the exercise of religious conviction. When churches are left guessing whether something is political or not, and as a result they refrain from that activity, they may be missing out on a valid opportunity. The difficulty in deciphering what is political and what is not reflects that in certain contexts, religious and political matters overlap. Thus while the wall between religion and state may be firm and high, it might not run along a straight line.[91] While arguably all political and religious ideas are related, there are some that are so fundamental to religion, that although the legislation is clearly furthering its "charitable" mission, a church might not advocate its position in order to avoid the loss of its charitable status.

86. *Id.*

87. *Id.*

88. OFFICE OF MANAGEMENT AND BUDGET, A NEW ERA OF RESPONSIBILITY: RENEWING AMERICA'S PROMISE 91 (2009), *available at* http://www.whitehouse.gov/omb/assets/fy2010_new_era/A_New_Era_of_Responsibility2.pdf (budget for the fiscal year 2010).

89. The United States is currently pushing to require greater disclosure of U.S. funds deposited abroad. *See, e.g.*, Carrick Mollenkamp, Glenn Simpson & David Gauthier–Villars, *U.S. Wants More Client Names from UBS*, WALL ST. J., Feb. 20, 2009, at A1.

90. Irrespective of *how* religion is kept out of politics, the majority of Americans now believe that religion *should* be kept out of politics. *Some Social Conservative Disillusionment: More Americans Question Religion's Role in Politics*, THE PEW FORUM OF RELIGION AND PUBLIC LIFE (Aug. 21, 2008), *available at* http://pewforum.org/docs/?DocID=334.

91. For example, the government has seen the value of religion in promoting social programs by implementing a faith-based initiative. Initiated by President George W. Bush, President Barack Obama announced the continuance of a modified program on February 5, 2009. David J. Wright, *Taking Stock: The Bush Faith-Based Initiative and What Lies Ahead,* THE ROUNDTABLE ON RELIGION AND SOC. WELFARE POL'Y (2009).

Thus the current approach fails to provide much guidance to churches regarding when lobbying becomes too much lobbying. Because courts choose to look at the facts and circumstances of each case, churches are often left not testing the political water, unwilling to risk presenting a case that could be ripe for § 501(c) revocation. As an example of an unwillingness to risk negative repercussions, churches may read letters from the pulpit advising members that the church refrains from political activity.[92]

This chilling effect of § 501(c)(3), welcome or not, goes beyond the original purpose of the provision. As discussed previously, the intent of the drafters was to inhibit the funneling of money through charities supporting legislation for the purpose of avoiding taxation.[93] While in the context of churches there is the additional concern of the separation of church and state, an allowable amount of lobbying should not be muzzled by uncertainty.

V. ALTERNATIVE TESTS

While the current lobbying test under § 501(c)(3) could be modified to better address enforcement issues and to provide more certainty, it is not immediately clear what would be a better approach. Too much certainty provided by the IRS could spur avoidance, while an attempt to capture the actual lobbying activity of a church could create entanglement issues between church and state. A modified approach would ideally balance and address each of these concerns.

A. Applying § 501(h) to Churches

Currently, under § 501(h) of the Code, a § 501(c)(3) organization, but not a church,[94] can elect to subject itself to a quantified test evaluating lobbying by filing a Form 5768.[95] The organization can make up to $1 million in lobbying expenditures during a taxable year, based on a percentage test of expenditures for

92. Even though the Church of Jesus Christ of Latter-day Saints became involved in Proposition 8, it attempted to limit that involvement, such as avoiding the use of buildings, and communicated this by letter. *See* Jesse McKinley & Kirk Johnson, *Mormons Tipped Scale in Ban of Gay Marriage*, N.Y. TIMES, Nov. 15, 2008, at A1.

93. *See* discussion *supra* Part II.B.

94. I.R.C. § 501(h)(3)(B) (2006).

95. I.R.C. § 501(h) (2006).

exempt purposes.[96] This provision also gives an organization a reprieve if the organization exceeds its limitation during a single year; to cause revocation, the organization has to *normally* exceed the limitation,[97] which the Treasury Regulations defines as exceeding 150% of the limitation over a four-year period.[98]

Congress precluded churches from the § 501(h) election upon the request of various churches.[99] These churches believed that part of their mission encompassed legislative lobbying and did not want any explicit limitation put upon their freedom of speech right. Other churches that take the view that their mission does not include direct involvement in politics are also unlikely to accept the application of § 501(h) to churches on the grounds that it would condone some level of political activity by churches.

Whether or not desired by churches, the test inadequately addresses avoidance. Much of a church's activities may not constitute cash outlays at all. A church would likely be further incentivized to influence legislation through means other than expenditures in order to avoid exceeding the statutory cap. And unlike other charitable organizations, the policing of a church is more difficult to impose because of the desire to avoid excessive entanglement that is prohibited by the separation of church and state under the First Amendment.[100]

B. Modified § 501(h)

As suggested recently by one commentator, instead of applying § 501(h) directly to churches, Congress could take the basic premise of that subsection—the setting of a fixed line—and modify it to take into account not only actual expenditures, but also the intangible activities of a church.[101] This test would take into account such intangibles as mailing lists and goodwill, and in theory would partially incorporate the "fairness" provided by § 501(h) while

96. I.R.C. §§ 501(h)(2)(B), 4911(c)(2) (2006).

97. I.R.C. § 501(h)(1) (2006).

98. Treas. Reg. § 1.501(h)-3(b)(1)(i) (2000).

99. Kim Bouchillon, Comment, *Guiding Lobbying Charities into a Safe Harbor: Final Section 501(h) and 4911 Regulations Set Limits for Tax–Exempt Organizations*, 61 MISS. L.J. 157, 164 n.56 (1991).

100. *See* discussion *supra* Part III.A.2.

101. *See generally* Brian Galle, *The LDS Church, Proposition 8, and the Federal Law of Charities*, 103 NW. U. L. REV. COLLOQUY 370 (2009).

providing a clearer picture of all expenditures.

1. Fairness

Under a modified § 501(h) approach, churches appear to be on a level playing field; churches with very large expenditures cannot allocate a disproportionate amount, in dollar per dollar terms, as compared to a smaller church, which would otherwise allow the larger churches to wield great political influence.[102]

But while it is argued that "[i]t is hard to see a good justification for [the current law that gives], in effect, . . . political influence to only the largest charities,"[103] there appears a very good justification: the focus of the law is on promoting the activities of organizations that provide for the basic needs of society.[104] Since the purpose of § 501 is to provide an exemption for organizations that perform vital services to the American community that the government would otherwise have to provide; it follows that the limitation on lobbing should be secondary to that main concern. Shifting the focus from the primary purpose to a subsidiary purpose would allow the political tail to wag the charitable dog.

Also, the need for a fixed limit on lobbying should not be inferred from the structure of § 501(h).[105] While a charity cannot expend more than $1 million on lobbying under that subsection, that amount is the upper end of a sliding scale.[106] The more an organization spends the more that organization can use for lobbying, up to $1 million.[107] For example, an organization that expends $500,000 can only direct $100,000 of that amount towards lobbying.[108] Thus, § 501(h) could be viewed as recognizing that the more expenditures an organization makes, e.g., the larger the organization is, the more that it can spend on lobbying.[109]

102. *See id*. at 370, 376.

103. *Id*. at 370.

104. *See* H.R. REP. NO. 75–1860, at 19 (1939).

105. Professor Galle argues that the $1 million limitation of § 501(h) implies that Congress intended to impose a fixed ceiling on lobbying. Galle, *supra* note 101, at 376.

106. *See* 26 U.S.C. § 4911(c)(2) (2006).

107. *See id*.

108. *See id*.

109. A counterargument is that the sliding scale prevents a small organization from using 100% of its expenditures on lobbying. If, however, the concern is on the size of a contribution, there should not be a concern with the percentage of expenditures going towards lobbying as long as those expenditures are being used in furtherance of a tax-exempt purpose.

More importantly, commentators recognize that § 501(h) provides a safe harbor for charities that supplements, not replaces, the prior § 501(c)(3) construction.[110] Congress could have replaced the lobbying restriction of § 501(c)(3) but instead opted to provide an alternative test for charities—the test is optional, not mandatory. And despite an argument that a safe harbor test provides the most assurance to massive organizations that spend a large sum on lobbying,[111] it in fact provides greater guidance to comparatively smaller organizations because an expenditure equal in size to that made by a larger organization would more likely trigger the substantial test for the smaller organization. For example, if an organization spent $1.5 million on lobbying in a year, there is little doubt that an organization that has total expenditures of $10 million would be in more need of guidance than a "massive organization" that spends the same in lobbying but has total expenditures of $100 million to determine if that spending were substantial.

Further, lobbying by churches is most often in line with their charitable purpose. The activities of large churches would be more concerning if they were funneling money and other activities into lobbying efforts with a primary focus on driving a political agenda. The organization in this case would be both serving as a church and a political machine, in which case, the concern should not be addressed through the lobbying requirement, but rather through the exclusivity requirement of § 501(c)(3).[112]

Finally, under a bright-line test, large organizations would be incentivized to break up into several smaller organizations to avoid any spending limitation. Of course the IRS could react by imposing associational tests, looking at ownership and commonality in organizations, but once the line is drawn in the sand, the Service will always have to be one step ahead of a charity to continually prevent abuses.

2. Clearer picture

Apart from fairness concerns, an approach that is based on

110. Laura Chisholm, *Exempt Organization Advocacy: Matching the Rules to the Rationale*, 63 IND. L.J. 201, 225–26 (1988).

111. Galle, *supra* note 101, at 376–77.

112. *See* discussion *supra* Part II comparing the exclusivity requirement to the lobbying restriction.

applying a fixed amount, like a § 501(h) test, could provide more clarity in evaluating lobbying activity.[113] Allocation of actual expenditures, however, can prove difficult, and unfortunately, if a modification to § 501(h) is attempting to quantify intangibles such as volunteer work and goodwill of the organization, any clarity provided by § 501(h) is lost.

One commentator argues that goodwill needs to be quantified.[114] An example of such goodwill is when a leader of a church speaks to the members. Normally the associated costs would be calculated by looking at the value of the church's resources, such as time, that were used to conduct the activity. That calculation, however, overlooks the fact that the message shared possesses value for the listeners that, if given to an unrelated party, would not have the same effect. The difference is that the effect of the message reflects goodwill.[115]

Another intangible that may need to be measured is the value associated with any list a church uses to facilitate its lobbying efforts.[116] For example, phone lists can be used to solicit help and donations. The IRS would normally only take into account the salary and overhead costs attributed to the time church staff used the list, but not the cost of preparing the list.[117] In theory, part of that cost should be allocable to the lobbying efforts since the lobbying would not have occurred but for that unaccounted-for expenditure.

Finally, another expenditure that may be overlooked is the volunteer work and donations of church members directly to a cause. For example, leading up to the vote on Proposition 8 in California, members of the Church of Jesus Christ of Latter-day Saints ("LDS church") spent time knocking on doors, calling neighbors, posting signs, and otherwise advertising support for the proposed change to the California Constitution. The IRS has taken the position that, under the § 501(c)(3) test, the time involved in such volunteer efforts should be considered in determining whether substantial lobbying has occurred, as should the costs to the organization of preparing the volunteers.[118]

113. *See* Galle, *supra* note 101, at 372–73.

114. *See id.* at 375.

115. *Id.*

116. *Id.* at 374.

117. *Id.*

118. 26 C.F.R. § 56.4911-2(b)(4)(ii)(C) ex.8 (2008); IRS Pub. 1828, at 6 (2008). But

While taking the aforementioned expenditures into account would provide a more accurate picture of the lobbying of a church, such an approach obscures the clarity that a provision modeled after § 501(h) should provide. For example, how will goodwill be measured? Financial accounting recognizes the difficulty of measuring goodwill in that it does not permit goodwill to be recognized as an asset in a company's books unless the company is purchased and an excess is paid for the company. And even if the cost of an activity can be measured—such as the costs of producing lists—how is that cost to be allocated? If the church were a corporation that had terminated in the tax year in question, presumably one could find the total use of the lists and allocate the costs to produce the lists based on lobbying and non-lobbying use.[119] But since the church will also use the list in the future, an exact allocation of the costs to produce the lists would be impossible.

Allocation of volunteer work would be equally problematic. First, unless a thorough record is maintained, it will be virtually impossible to determine the total amount of hours expended on lobbying efforts. If those hours could be determined, how would they be quantified? Under the current application of § 501(c)(3), the amount of time can be a factor in determining lobbying activity, but if this approach is revised to reflect the fixed approach of § 501(h), a conversion from time to dollars would be needed. Should that cost be what a church would have to pay someone to do the work? Or should it be the foregone salary of the individual performing the volunteer work? For example, if an attorney bills $250 per hour at her regular job, and she volunteers ten hours, should there be an allocation of $2,500 to the church's lobbying efforts?

The problem with allocating volunteer work is further compounded by the different capacities in which a church member can act. When a church member volunteers time or gives money to a cause, does he or she do so in the capacity of a representative of the church, or in the capacity of an individual concerned citizen? Determining which hat an individual wears is crucial in respecting

the actual expenditures made by volunteers are not taken into account. 26 C.F.R. § 56.4911-2(b)(4)(ii)(C) ex.8 (2008).

119. Of course determining the total use would also be very burdensome. The IRS could operate under a presumption that the use was 100% for lobbying unless shown otherwise by the organization. In the case of a church, however, such a burden would be problematic under the Code and under the Religious Freedom Restoration Act.

freedom of speech and thus in correctly allocating costs. Some church members devote all of their time to their church and arguably all of their actions can be attributed back to the church. But most church members have full-time jobs outside of their church and do not devote their lives solely to church service.

Also, the permissibility of evaluating these activities by a church is uncertain. While churches may be required to give an initial report of the expenditures made in a lobbying effort,[120] the IRS is restricted under the Church Audit Procedures Act ("CAPA") as to when, and to what extent, an audit can be made of churches.

Even if the IRS could probe into the actual value of these costs, and if it in fact decided to spend the time and money investigating the matter, the IRS may not be justified in doing so. Members of the LDS church, for example, were estimated to have spent approximately $20 million in support of Proposition 8.[121] Using this amount to evaluate whether a church violated a lobbying restriction would not, however, be in line with the fear that legislators had when Congress originally passed the lobbying restriction; namely, the funneling of money through a charity to influence legislation tax-free.[122] Those donations were after tax donations, and thus the government was not subsidizing any lobbying by allowing such donations to occur.

Finally, if the goal is to prevent a § 170 deduction for lobbying efforts, a cogent rationale is also lacking for quantifying the value of volunteer work done in substitution of the giving of charitable contributions.[123] Under no circumstances is the rendering of services

120. For example, the Church of Jesus Christ of Latter-day Saints had to report to the state of California expenditures made in support of Proposition 8.

121. Galle, *supra* note 101, at 373 (citing Jesse & Johnson, *supra* note 92, at A1).

122. *See* 73 CONG. REC. 5,861 (1934) (statement of Sen. Reed).

123. Professor Galle cites the theory that lobbying should be limited because charitable deductions are more valuable to rich contributors to support his argument that there must be a more meaningful limitation on large charities. Galle, *supra* note 101, at 377. While this argument is viable to show that lobbying of charities in general should be limited, not only because of the higher after-tax benefit to the wealthy, but also because the wealthy are more able to donate, it does little to distinguish the giving between large and small charities. A small organization, for example, can get 100% of its donation from a patron that is taxed at the highest marginal rate, and thus who will get the highest maximum benefit for donating. Whereas a larger organization may get myriad donations that include donations from individuals at lower marginal rates. Professor Galle also applies a second theory to support his argument, one that supports a lobbying restriction to preserve the distinct spheres of government and charity. *Id*. This argument is more salient since there are set amounts that would impact politics, regardless of the size of the organization lobbying.

deductible for tax purposes under § 170.[124] If volunteer work is contributed instead of cash, such work is not taking the place of an otherwise deductible payment, because a contribution to a lobbying effort would only be deductible if made in the form of a tangible outlay to the church.

C. Percentage Test

Instead of imposing a set dollar threshold, another alternative proposed in the past is the imposition of a set percentage test. On September 21, 2001, Representative Phillip Crane introduced H.R. 2931, the "Bright-Line Act of 2001," in the House of Representatives.[125] Under Representative Crane's bill, the "substantial part" lobbying test would be modified, prohibiting lobbying only if expenditures exceeding twenty percent of gross revenues.[126]

While the bill never made it out of committee, the idea of a percentage test has been previously attributed to a pair of cases: *Seasongood v. Commissioner*[127] and *Haswell v. United States*.[128] These cases illustrate two different incidents of lobbying—one found to be an insubstantial activity, the other found to be substantial.[129]

In *Seasongood*, the Sixth Circuit found that the substantiality requirement had not been violated where a § 501(c)(3) organization had exerted less than five percent of its time and effort to influence

124. Treas. Reg. § 1.170A-1(g) (2000) ("No deduction is allowable under section 170 for a contribution of services."). If, however, the individual makes a cash outlay to help perform the services, such as an expenditure for transportation costs, the related unreimbursed portion can be deducted. *Id.* This provision most likely addresses the administrative difficulty of taking into account imputed income. *See* JOSEPH M. DODGE ET AL., FEDERAL INCOME TAX: DOCTRINE, STRUCTURE, AND POLICY 229 (3d ed. 2004).

125. 147 CONG. REC. 17,658 (2001); H.R. 2931, 107th Cong. (2001).

126. H.R. 2931, 107th Cong. (2001). The bill defined gross revenues as the sum of gross income and aggregate contributions and gifts. *Id.*

127. 227 F.2d 907 (6th Cir. 1955).

128. 500 F.2d 1133 (Ct. Cl. 1974). Some commentators believe these cases created a rough framework to determine whether lobbying activities are substantial.

129. Evaluating the percentage of expenditures on a certain activity has also been considered under the exclusivity requirement. In one case, the Tax Court found that expending ten percent of outlays on a non tax-exempt purpose did not violate the exclusivity requirement of § 501(c)(3). World Family Corp. v. Comm'r, 81 T.C. 958, 967 (1983). The Tax Court also noted, however, that substantiality has to be evaluated "under the facts and circumstances of each particular case." *Id.*

political activity.[130] The organization's Articles in *Seasongood* stated that the group had an educational purpose; namely to inform citizens of public health issues and to encourage participation in civic duties.[131] The organization, however, also distributed materials urging action on legislation and encouraging support of certain candidates.[132]

On the other end of the percentage spectrum, the United States Court of Claims found that expenditures used in an attempt to influence legislation that constituted over sixteen percent of total expenditures were substantial.[133] In *Haswell*, the taxpayer started an organization focused on stemming the tide in the decline of passenger railroad service.[134] While the organization attempted to influence the public through publications and speeches, it also initiated litigation against the Interstate Commerce Commission, gave direct testimony in front of congressional members, submitted writings to congressional committees, conducted informal meetings with members of Congress, and had an organization—the National Counsel Associates—meet with the Department of Transportation and the Interstate Commerce Commission to advocate on its behalf.[135] In finding substantial lobbying, the court noted that 17.04% and 16.6% of its expenditures in 1967 and 1968 respectively went towards political activity.[136]

While a percentage test appears to provide greater certainty in evaluating the lobbying activities of a church, in reality, great ambiguity still exists. As the Tenth Circuit stated in *Christian Echoes National Ministry v. United States*, "[a] percentage test to determine whether the activities were substantial obscures the complexity of balancing the organization's activities in relation to its objectives and circumstances."[137] The court in *Haswell* also recognized this complexity,[138] and while it informed its decision with a percentage

130. *Seasongood*, 227 F.2d at 912.

131. *Id*. at 909.

132. *Id*. at 909–10.

133. *Haswell*, 500 F.2d at 1146–48.

134. *Id*. at 1136.

135. *Id*. at 1137–39.

136. *Id*. at 1146.

137. Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849, 855 (10th Cir. 1972).

138. *Haswell*, 500 F.2d at 1142. The court in *Seasongood* avoided any complexity by taking the taxpayer's word at face value without actually evaluating what percentage of its

evaluation, the determination of the correct percentage in light of the organization's circumstances appeared highly subjective. Although, for example, the court determined that the charitable organization expended 20.5% of its cash outflow on lobbying in 1967, the government allocated 76.1% of the organization's expenditures to lobbying.[139]

Moreover, the court in *Haswell* looked strictly at cash expenditures. Lobbying efforts, however, can largely consist of volunteer efforts and other non-monetary activities.[140] As highlighted above, it is difficult to quantify many of these activities for comparison purposes. And if a court is to look at the non-monetary activities of a church used for lobbying, the court should also look at the church's total activities.[141] In other words, in order to be fair and accurate, if the numerator takes into account non-monetary activities (i.e., lobbying activities) so should the denominator (i.e., total activities). But again, there would be difficulty in determining what proportion of the activities by a church member is done in an individual capacity and what proportion is done in the capacity as a representative of the church.

Besides the complexity of quantifying these activities, an investigation attempting to discover a church's cumulative activities would most likely lead to the type of excessive entanglement contemplated in *Walz*.[142]

D. Involve the FEC

Another possible approach that has been suggested is to involve the Federal Election Commission ("FEC") in monitoring political activity.[143] Unlike the IRS, which depends on third party referrals, "[t]he FEC already has procedures in place for dealing with

expenditures actually constituted lobbying. *See* Seasongood v. Comm'r, 227 F.2d 907, 912 (6th Cir. 1955).

139. *Haswell*, 500 F.2d at 1146.

140. *See, e.g.*, IRS Pub. 1828, at 6 (2008).

141. While this is also a problem under a provision that is based on § 501(h), discussed previously, the percentage approach provides the additional complexity of attempting to determine the total amount of activity by a church.

142. *See supra* Part II.B.

143. *See* Kelly S. Shoop, Note, *If You are a Good Christian You Have No Business Voting for this Candidate: Church Sponsored Political Activity in Federal Elections*, 83 WASH. U. L.Q. 1927, 1946 (2005).

campaign finance regulations."[144] The FEC specifically regulates election activities, whereas the IRS has to deal with all situations regarding taxation.

This approach may very well help in the campaigning context. Since § 501(c)(3) imposes a blanket restriction on supporting or opposing candidates, enhanced enforcement may adequately address campaigning concerns. The involvement of the FEC, or the providing of any resources to help the IRS, however, would only solve half of the equation. The agencies, and churches, would still be unclear on what "substantial" means.

E. A New Approach

A compromise test would place a threshold dollar amount on lobbying activities by churches. If that dollar threshold were crossed, the church, under § 6001, would have the burden to show that it merits tax-exempt status.

1. Initial threshold

First, the expenditure test by churches would look at actual expenditures, not intangibles. For example, airline travel and hotel stay, purchases of supplies, and advertising spots would be measured, but items such as the use of church lists and volunteer time would not.[145] The threshold would have to be somewhat high so that it would not be easily violated, but low enough that a further analysis could be applied if necessary.[146] The FEC, or a different organization besides the IRS, would evaluate whether the threshold had been crossed.[147] The involvement of another agency could possibly resolve the problem of lack of resources that apparently plagues the IRS's ability to regulate the activities of churches.

Under state law, churches in various areas must already report their expenditures in funding measures aimed at influencing legislation. This self-reporting mechanism, if tailored to prevent easy

144. *Id.* at 1948.

145. Volunteer time and other factors can be taken into account once the threshold is crossed.

146. A possible weakness is that a small religious organization could theoretically use 100% of its resources to influence legislation.

147. Some states require that a church report expenditures it made while attempting to influence legislation. This information, combined with an objective expenditure test, will alleviate the FEC of an otherwise insurmountable burden.

avoidance, also helps alleviate CAPA concerns. Then, if the government knew that the threshold had been passed, a green light could be given to conduct an audit (at least to a certain extent) of the church's activities.

Aside from serving a useful purpose to government agencies, a threshold dollar amount would allow churches that might not be engaging in political activities a safe harbor to exercise free speech rights. This amount will thaw a church's inability to act that previously came from uncertainty on the consequences of its tax-exempt status.

While a dollar amount could potentially encourage the formation of small churches, and benefit existing churches, that does not mean that these churches could engage in political activity at will. First, an associational test could be used. Unfortunately, as previously mentioned, such a test would not catch all problems and would necessarily be reactionary in nature. A possible solution is a good-faith test—any activity that demonstrates bad faith, untoward results, selfish motivation, or controversial effect would disqualify small churches from tax exemption.[148]

2. Determination of substantiality once threshold has been crossed

If the government agency working with the IRS were to find that lobbying activity crossed the threshold amount, the IRS would perform an audit. At such point, in its discretion, the IRS could choose not to challenge the tax-exempt status. The burden would be on the church to show that its political activities were insubstantial under all of the relevant facts and circumstances. Apart from the shift in the burden, this prong of the test would mirror the current approach. It would give relief to larger organizations that would more easily cross the initial expenditure threshold. But there are important distinctions between the current approach, and a threshold approach. For example, the threshold test would account for intangibles once the monetary threshold has been surpassed. While intangibles may have been recognized as relevant facts and circumstances under the old approach, a threshold approach would mandate a clearer picture of the lobbying.[149] And since an attempt to

148. *See* Note, *Income Tax Disadvantages of Political Activities*, 57 COLUM. L. REV. 273 (1957).

149. But an exact dollar figure does not have to be derived.

quantify the activity in monetary terms is unnecessary under this prong of the test, the earlier valuation concern is not implicated. Further, the concern of possible entanglement of church and state would be partially alleviated since the government would have a standard procedure as to when a church's activities should be more closely scrutinized. In other words, such a scrutiny would occur only after a church had crossed the initial expenditure threshold.

3. Possible weaknesses

Arguably, an attack on the idea of providing certainty is that churches already appear to have the option of safely lobbying through § 501(c)(4) organizations and the use of PACs. This possible challenge to the need for an alternative approach, however, can be addressed by considering the difficulty a church has in operating under this paradigm. For example, the PAC cannot be controlled by the church and the donations to it must be distinct from those made to the church in order to determine to what donations § 170 applies.

Another possible weakness is that the threshold test could result in an equal protection violation. For example, there might be a violation if this provision is applicable to churches, but not to other charities. To the extent that this concern would actually exist, it can be eliminated by applying the same treatment to both churches and other charities.

VI. CONCLUSION

In a political atmosphere rife with issues of moral concern, churches must decide whether to become politically involved through lobbying. Churches must first realize that even if their political lobbying is done to further a tax-exempt purpose, the government can still scrutinize such activity for tax purposes. At the same time—in light of a church's legitimate concern in the moral issues of a society—the government should nonetheless provide churches with a level of certainty so that they are not politically muzzled.

An ideal lobbying test would provide a threshold safe-harbor figure, while at the same time avoiding the imposition of a significant burden on the church that would create excessive entanglement. Therefore, Congress, or the Treasury, should enact a test that takes into account all of the activities of a church while allowing larger

churches to keep their tax-exempt status even if an initial threshold is crossed.

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