DePaul Law Review

Volume 40
Issue 1 *Fall 1990*

Article 2

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ON NOT RENDERING TO CAESAR: THE UNCONSTITUTIONALITY OF TAX REGULATION OF ACTIVITIES OF RELIGIOUS ORGANIZATIONS RELATING TO POLITICS*

*Edward McGlynn Gaffney, Jr.***

INTRODUCTION: THE HISTORICAL ROLE OF RELIGION IN AMERICAN POLITICS AND THEOLOGICAL REASONS FOR THIS EXPERIENCE

> Each of the affiliates of the National Jewish Community Relations Advisory Council regards its program as an expression of the tenets of the Jewish faith which it is organized to advance. Their activities are inspired by the Prophets' mandate to pursue justice. They believe that mandate governs [their lives] in all its aspects and requires those who adhere to the principles of Judaism to let their views be heard in support of justice for all.[1]

> [T]here are important moral and religious dimensions to each of the problems facing the human community, and these dimensions must be taken into consideration in the development of public policy. . . .
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> The major issues of the day are not purely technical or tactical in nature; they are fundamental questions in which the moral dimension is a pervasive and persistent factor. . . .
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 This article will appear as a chapter in the author's forthcoming volume, SHOULD THE CHURCHES BE TAXED? (Oxford University Press, 1991).

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1. *Legislative Activity By Certain Types of Exempt Organizations, Hearings Before the House Ways and Means Committee*, 92d Cong., 2d Sess. 99 (1972) [hereinafter *House Hearings*].

> The participation of the Catholic bishops in public policy discussion is rooted in our conviction that moral values and principles relate to public policy as well as to personal choices. It is also rooted in a belief that we honor our constitutional tradition of religious freedom precisely by exercising our right to participate in the public life of the nation. Entering the policy debate as Catholic bishops we make use of a long detailed tradition of moral analysis and relationships with the universal Church which provide us with valuable perspectives about the influence of U.S. policy throughout the world.[2]

> Since the time of Calvin, Reformed Protestants have felt called to share their vision of God's intended order for the human community, and Presbyterians have recognized and acted on the responsibility to seek social justice and peace and to promote the biblical values of freedom and liberty as well as corporate responsibility within the political order. . . . In "attempting to influence legislation" churches speak to the moral aspects of political issues. Such witness flows directly from fundamental faith and is integral to its free exercise. It is essential to the church's identity and mission, and to the moral authority of its pronouncements, that it speak as "church" through its religious structures and leaders.[3]

Within Judaism, Catholicism, and Protestantism, the line between religious and political concerns is often a fine one, and these concerns often overlap. Even though it is obvious to religious believers that the teaching of their communities, even about matters of public concern, is bound to be *theological,* the point bears emphasis at the beginning of this Article.

Outsiders unfamiliar with these religious traditions can easily mistake religious conviction for mere partisan advocacy, which may be subject to governmental regulation.[4] Where theological discourse relates directly to questions that arise formally as legal controversies, the discourse is bound to be *legal* as well. The very fact that the discourse of churches[5] is often addressed to elected officials, let alone that its overt purpose may be to protest against the legitimacy of a public policy or to seek a change in public policy, means that the communication is also to some extent *political.*

Without much regard for the fragility of the lines demarcating theological,

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2. Bernardin, Marty & Adams, *The Role of the Religious Leader in the Development of Public Policy,* 34 DEPAUL L. REV. 1, 3, 4, 6 (1984) (section of article written by Cardinal Bernardin).

3. GOD ALONE IS LORD OF THE CONSCIENCE: A POLICY STATEMENT ADOPTED BY THE 200TH GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A) (1988) 10, 36 (1989), *reprinted in* 8 J.L. & RELIG. ___ (1990) [hereinafter GOD ALONE IS LORD OF THE CONSCIENCE].

4. Although speaking out on the moral implications of political issues is a religious function protected by the free exercise clause, it is also political speech, protected by the free speech and free press clauses. In this Article, the activities of religious organizations relating to politics are analyzed primarily as a dimension of their free exercise rights. For the view that religious rights ought to be seen only as a specific manifestation of free speech rights, see, for example, Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression,* 67 MINN. L. REV. 545 (1983).

5. The term "church" in this Article is not restricted to a particular religious body, but includes all such bodies.

legal, and political discourse, the Internal Revenue Code and many state statutes modelled on the federal tax code impose significant restraints on two principal activities of religious communities.[6] Since 1934, as a condition of their tax-exempt status, religious communities have been forbidden to expend substantial amounts of their resources in efforts to communicate to elected officials their moral convictions on matters of public concern (*lobbying* activities). After 1954, an absolute ban has been imposed on the efforts of religious organizations to persuade voters of the correctness of moral convictions that relate to candidates for public office, and a conditional[7] ban has been imposed on efforts to persuade voters of the correctness of moral considerations that relate to referenda and other ballot measures (*electioneering* activities).

This Article will explore the legislative history and the complicated administrative regulations issued by the IRS concerning the political speech of religious communities. Although no decision of the Supreme Court has squarely decided the constitutionality of the statutory and administrative regulation of the political activity of churches, this Article discusses the leading cases relating to this theme, culminating in *Regan v. Taxation With Representation*.[8] I conclude that the restraints imposed by federal tax regulations on activities of religious organizations violate the free exercise and free speech rights of these exempt organizations. Whether or not the Supreme Court in today's climate would adopt this position, I urge the Congress to reconsider the wisdom of these restraints in light of the constitutional history set forth here.

The Article also discusses the question whether the power to revoke the exempt status of a religious organization for illegal political activity is confided to the executive branch, or whether private parties opposed to the message of a religious group may use the federal courts to enforce the restraints placed by the tax code on the political activities of religious organizations. This issue was presented to the Court in the *Abortion Rights Mobilization* case.[9]

Before exploring these legal matters, this Article sketches: (1) a general view of the complex, organic interrelationships among law, history, politics, and religion; (2) the more particular historical experience of the role of religion in the shaping of American law and public policy; and (3) theological convictions underlying the participation of religious communities in American politics.

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6. *E.g.*, I.R.C. § 501(c)(3); CAL. REV. & TAX CODE § 23701d (Deering 1990).

7. The condition is fulfilled if the government determines that a religious body is engaged in "substantial" efforts to persuade voters about the moral dimensions of ballot measures.

8. 461 U.S. 540 (1983).

9. Abortion Rights Mobilization, Inc. v. Regan, 544 F. Supp. 471 (S.D.N.Y.), *certification denied*, 552 F. Supp. 364 (S.D.N.Y. 1982); Abortion Rights Mobilization, Inc. v. Regan, 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), *aff'd sub nom. In re* United States Catholic Conference, 824 F.2d 156 (2d Cir. 1987), *rev'd sub nom.* United States Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72 (1988) (remanding for determination of plaintiffs' standing), *on remand*, 885 F.2d 1020 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1946 (1990).

I. LAW, HISTORY, POLITICS, AND RELIGION

In his seminal lectures on the interaction of law and religion, Professor Harold Berman offered a dynamic understanding of both law and religion:

> Law is not only a body of rules; it is people legislating, adjudicating, administering, negotiating—it is a living process of allocating rights and duties and thereby resolving conflicts and creating channels of cooperation. Religion is not only a set of doctrines and exercises; it is people manifesting a collective concern for the ultimate meaning and purpose of life—it is a shared intuition of and commitment to transcendent values.[10]

Echoing Berman, Pastor Richard John Neuhaus has written that the purpose of the law is:

> to prevent harm, resolve conflicts, and create means of cooperation. Its premise, from which it derives its perceived legitimacy and therefore its authority, is that it strives to anticipate and give expression to what a people believes to be its collective destiny or ultimate meaning within a moral universe.[11]

If that is what the law is, and that is what religion is, it seems plain that, in a democracy that cherishes its commitment to pluralism, religion would be one of the guiding influences of the political discourse within which the law takes shape.

This view of the law, however, is not the only one or even the dominant one. Some scholars imagine that law is autonomous, a "law unto itself." This attitude is common in American legal education today. It is part of the legacy of Christopher Columbus Langdell, Dean of the Harvard Law School, who nearly a hundred years ago made the case to the administration of Harvard that law was not just a technique to be learned through apprenticeship to a practitioner, but an intellectual discipline worthy of inclusion in the university curriculum.[12] Langdell argued that law is a science. Its raw data were appellate cases craving organization and coherence; its laboratory, the library of those appellate cases.

Langdell thought of law as a discipline that may be understood apart from considerations of persons and groups caught up in legal controversies. A major controversy now rages within American law schools over the historical approach to the law. According to one school of thought, the substantive rules of tort, commercial transactions, and property appear as a coherent body of rational principles arising from a series of disputes between private individuals only when shorn of their historical context. Once the rules are situated within their historical context, it becomes easier to observe in whose interest the rules have functioned.

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10. H. BERMAN, THE INTERACTION OF LAW AND RELIGION 24 (1973).

11. R. NEUHAUS, THE NAKED PUBLIC SQUARE 253 (1984).

12. Stevens, *Two Cheers for 1870: The American Law School*, 5 PERSP. IN LEGAL HIST. 403 (1971).

It was also central to Langdell's view of law as a science that the reasoning process inherent in legal thought distinguishes law from politics, which deals merely with issues of power and with the expression of majority will. The notion that law is readily divorced from politics has been challenged by legal historians like Harvard law professor Morton Horwitz. Horwitz argued that the close association of "law" with current social attitudes and the decisions of an activist judiciary, has not only immersed American judges in contemporary social issues, but has made a rigid separation of law from politics appear artificial. Horwitz acknowledges the radical potential of legal history:

> Once legal history attempts to penetrate the distinction between law and politics by seeing legal and jurisprudential change as a product of changing social forces, it begins to undermine the indispensable ideological premise of the legal profession—indeed of any profession—that its characteristic modes of reasoning and its underlying substantive doctrines may not be universal or necessary, but rather particular and contingent.[13]

Whether or not one agrees with Horwitz's interpretation of particular aspects of legal history,[14] it seems beyond cavil that policy, morals, and law have been intertwined in American jurisprudence. In a similar vein, Yale Law professor Robert Cover wrote eloquently and movingly of the danger of law divorced from history, or what he called nomos without narrative.[15]

Although an intense political—if that term may fairly be attributed to academics—battle about these matters now rages within the very law school that Langdell founded, the propositions that I have sketched above are by no means the prerogative of the Left. For example, Boalt Hall law professor John Noonan, himself a graduate of Harvard, returned to his alma mater in 1972 to deliver, in his Holmes lectures, a scathing critique of the way that law is taught in many American law schools, as a bundle of rules without connection to the real flesh-and-blood persons caught up in the law's coercive power.[16]

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13. Horwitz, *The Conservative Tradition in the Writing of American Legal History*, 17 AM. J. LEGAL HIST. 275, 281 (1973).

14. For an example of a scholar who disagrees substantively with Horwitz, see G. WHITE, THE AMERICAN JUDICIAL TRADITION (2d ed. 1988).

15. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); *see also* R. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975).

16. J. NOONAN, PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS (1976). Oliver Wendell Holmes, Jr. is famous for his epigram, "a page of history is worth a volume of logic." New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921). In a chapter devoted to Justice Holmes' treatment of American Banana Co. V. United Fruit Co., 213 U.S. 347 (1909), Noonan, however, shows that Holmes gave far greater weight to the *logic* of corporate greed than to the sad *history* of "domination of [a] small country's government by a predatory American business [the United Fruit Company] which had brutally suppressed a challenge to its monopoly [by the American Fruit Company]. J. NOONAN, *supra* at 106.

Earlier, Noonan notes that Holmes viewed the Sherman Act as "a humbug based on economic ignorance and incompetence." *Id.* at 102. This chapter in Noonan's volume illustrates the view of Justice Holmes' father, the famous "autocrat of the breakfast table," who once remarked, "Junior is willing to trade a principle for an epigram any day." A page or two of history later, despite some recent gains in democratic reform in the hemisphere, the term "*Yanqui*" still connotes for

Now a federal circuit judge, Noonan knows well the value of impartiality of the rule of law.[17] But he has remembered what some of us have forgotten, that the common law has been forged not by contemplation of abstract principles but by hammering on the anvil of human experience. That experience was nearly always painful and often brutal to the losers in American legal history. Noonan's most powerful illustration of this theme is the treatment of slaves in Virginia by Thomas Jefferson and his law professor, George Wythe, both of whom made the law of slavery in that commonwealth more severe after the Revolution than it was in colonial Virginia.[18]

Although this emphasis on the flesh-and-blood historical persons who stand behind the masks of the law is clearly helpful, it fairly invites attention to the connection between law and politics. Legal rules do not simply resolve disputes between two individuals, but have enormous political consequences for groups within society. For that reason alone, it is appropriate to subject legal rules to class analysis. For example, the "fellow servant" rule, which excused the owners of the railroads for injuries caused to an employee by another employee, clearly did not serve the interests of the servants. In the eyes of some historians, the way in which at least some legal rules benefited a certain class was no accident, but was designed purposely to achieve this result from the beginning of our republic.[19]

Beyond obvious connections between law and history and between law and politics, the connection between law and religion is now being paid greater attention among scholars. One need not, of course, be a vulgar Marxist to recognize a conscious design in the law. One may, for example, ascribe the originating principles and driving goals of Western law to the general historical influence of biblical religion upon legal thought and legal institutions in the West.

Whether or not one accepts a class-based view of the law, it has by now become a common assumption in our culture that the law develops in response to historical pressures. Although this assumption may seem self-evident, it may not be taken for granted. It must be accounted for, if only because it was not always made. In the legal philosophy of the ancient Greeks and Romans, for example, law was thought of as temporal and unchanging.[20] Modern culture, by contrast, extols change as a virtue. John Henry Newman reflected this attitude in his famous *Essay on the Development of Christian Doctrine,* in which he noted that "[i]n a higher world it is otherwise; but here below to live is to change, and to be perfect is to have changed often."[21] In modern system-

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many Central Americans imperial domination by "*el pulpo,*" unfair exploitation of human and natural resources, and complicity with corrupt and brutal regimes.

17. J. NOONAN, *supra* note 16, at 14-16; J. NOONAN, BRIBES 183-86, 193-95, 234-37, 428-29 (1984).

18. J. NOONAN, *supra* note 16, at 29-64.

19. *See, e.g.,* M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1976).

20. *See, e.g.,* W. JAEGER, PAIDEIA: THE IDEALS OF GREEK CULTURE (1939).

21. J. NEWMAN, AN ESSAY ON THE DEVELOPMENT OF CHRISTIAN DOCTRINE (1845).

atical theology, Bernard Lonergan, a Canadian Jesuit, has likewise exploited this critical distinction between classical consciousness and historical consciousness.[22]

One of the first legal scholars to exploit these categories systematically was Harold Berman. Both in his 1975 lectures referred to above,[23] and again in his major study of the religious influence on Western law,[24] Berman has carefully explored how the classical ideal of an eternal and changeless order gave way in the West to the view that development and change are prominent features of the legal order precisely because that order is grounded in the contingencies of human history.

This major theme of modern consciousness came to pass, in no small part, because of the biblical world view with its profoundly different understanding of time and history.[25] In part because of these profoundly different attitudes towards time and history, the Hebrew scriptures are replete with concern about the political order and its mundane arrangements.

The biblical prophets demanded commitment both to stability of communal life and to radical change necessitated by the particularities of the present moment. This biblical attitude toward time infused the "new science" of the law as it came into flower at the University of Bologna in the high Middle Ages. Contrary to the views of Langdell, our medieval ancestors never imagined that what they were doing with this discipline could be undertaken without an understanding of philosophy and theology, as well as a study of what we now call history, anthropology, sociology, and political science.

Just as law cannot truly be understood as a series of abstract principles apart from the persons who shaped the law, so also, those persons cannot truly be understood as isolated individuals apart from the social context and communal forces in which they lived. To understand the growth of American law, one must understand the dynamic interrelationship between person and community which the law holds in constant tension. The rules of society emerge because of the demands of persons, and the demands of persons are conditioned by the social milieu in which they live.

Once the connection between law, history, politics, and religion is grasped, the central proposition of this Article begins to emerge: that groups, including religious organizations, as well as individuals, enjoy civil liberties. Several scholars have written thoughtfully on this theme,[26] which I will seek to illus-

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22. B. LONERGAN, METHOD IN THEOLOGY (1972).

23. H. BERMAN, *supra* note 10, at 34-35.

24. H. BERMAN, LAW AND REVOLUTION (1983).

25. About a quarter of a century ago, it was fashionable to draw a sharp contrast between Greek and Hebrew thought as to their conceptions of time and history. *See, e.g.*, T. BOMAN, HEBREW THOUGHT COMPARED WITH GREEK (1960); O. CULLMANN, CHRIST AND TIME (1950); C. TRESMONTANT, A STUDY OF HEBREW THOUGHT 17-38 (1960). Some scholars, however, have cautioned against overdoing the differences between the Greeks and the Hebrews on these matters. *See, e.g.*, J. BARR, THE SEMANTICS OF BIBLICAL LANGUAGE (1961).

26. *See, e.g.*, Garet, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001 (1983); Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989

trate here with just a few examples.

Civil liberties were achieved in this country largely through the collective efforts of people acting in concert. For example, political speech is deemed the civil liberty that represents the "central meaning of the first amendment"[27] because it is a condition precedent to other liberties. To be sure, this political freedom may be exercised by each of us privately through personal reflection,[28] but it is lamentable that so few of us in this nonthinking era move beyond such reflection to critical public discourse. Even though freedom of expression is cherished as an attribute of personal dignity and individual liberty, we should not lose sight of the fact that communication is always social, always mediated. For example, from the first decade of our constitutional order, *political parties* played a pivotal role in shaping political discourse.[29] They continue to do so today, even to the point of contributing to our current political malaise and ennui. *Labor organizations* have played an equally vital collective role in American politics,[30] and the price paid for political dissent by unions and their leaders has often been high.[31] Because, as President Coolidge put it, the business of America is business, it is also important to acknowledge the powerful role that *commercial corporations* have played in American politics. One has but to think of the advertisements of the Mobil Corporation that appear regularly in our newspapers expressing a viewpoint on matters of general public concern, not simply on issues directly related to the economic interest of the stockholders narrowly conceived.

In fact, the leading case on corporate free speech, *First National Bank of Boston v. Bellotti*,[32] merits discussion here because it introduces the theme of the speech rights of religious communities that forms a central concern of this Article. At issue in *Bellotti* was a Massachusetts statute prohibiting expenditures by banks and other for-profit corporations for the purpose of influencing the vote on referendum proposals on any question "other than one materially affecting any of the property, business or assets of the corporation."[33] The Supreme Court invalidated the statute. Justice Powell suggested that to ask whether corporations have free speech rights was to pose the wrong question, and that the inquiry should focus on whether a statute "abridges expression

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WIS. L. REV. 99.

27. New York Times v. Sullivan, 376 U.S. 254, 270 (1964); *see also* Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring).

28. In Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977), the Court gave greater weight to this point than to the claim of labor unions to represent collectively the interests of their members in political matters.

29. *See* Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 923 (1985).

30. *See, e.g.*, Hague v. CIO, 307 U.S. 496 (1939).

31. *See, e.g.*, Debs v. United States, 249 U.S. 211 (1919); *In re* Debs, 158 U.S. 564 (1895); *see also* B. BROMMEL, *EUGENE V. DEBS:* SPOKESMAN FOR LABOR AND SOCIALISM (1978).

32. 435 U.S. 765 (1978).

33. *Id.* at 768.

that the First Amendment was meant to protect."[34] The Court found that the activity that the for-profit corporation wanted to engage in—publicizing its views on a proposed amendment to the Massachusetts Constitution—lay "at the heart of the First Amendment's protection."[35]

Justice Powell articulated a general principle at the core of this Article's concerns:

> If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to *decision making in a democracy* . . . . [The] inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of its source . . . .[36]

Powell concluded:

> In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue. If a legislature may direct business corporations to "stick to business," it also may limit other corporations—*religious,* charitable, or civic—to their respective "business" when addressing the public. Such power in government to channel the expression of views is unacceptable under the First Amendment. Especially where, as here, the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended.[37]

II. The Historic Role of Religion in American Politics

Among the not-for-profit corporations or charitable organizations whose speech has truly been "indispensable to decision making in a democracy," religious organizations have played a prominent role in the debates over social issues of the highest moment. For this reason, the Williamsburg Charter, a bicentennial document celebrating the meaning of the religion clauses of the first amendment, could state:

> The assertion of moral judgments as though they were morally neutral, and interpretations of the "wall of separation" that would exclude religious expression and argument from public life . . . contradict freedom of conscience and the genius of the [first amendment religion clauses]. . . . Too often in recent disputes over religion and public affairs, some have insisted that any evidence of religious influence on public policy represents an establishment of religion and is therefore precluded as an improper "imposition." Such exclusion of religion from public life is historically unwarranted, philosophically inconsistent and profoundly undemocratic. . . . Many of the most dynamic social movements in American history, including that of civil rights,

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34. *Id.* at 776.
35. *Id.*
36. *Id.* at 777 (emphasis added).
37. *Id.* at 784-86. (emphasis added) (citation omitted).

were legitimately inspired and shaped by religious motivation.[38]

From the beginning of the American experience there has been a vivid connection between religion and politics.[39] This connection was not absent from the history of taxation in America. Because of its potentially comprehensive scope, taxation is the most significant mechanism of governmental power. It is the predicate for all the other functions of government. For that very reason, the most important tax revolt in this nation's history was joined to ideas of representative democracy in this country's revolution against the British Crown. That revolt was in turn linked to America's religious history, for the colonists had incorporated into the American experience a variety of practices related to the financial support of established or preferred religious groups.[40] The colonists who began the struggle over religious liberty, principally the Baptists and the Quakers in New England, reacted strongly against these practices.[41] The late seventeenth-century and early eighteenth-century struggle for exemption of dissenting Protestants from taxation to support the established church (Congregational in New England, Anglican in the southern colonies) turned out to be the seedbed of political revolt against the Crown under the rallying cry, "No taxation without representation." For example, in his famous Memorial to the Massachusetts Assembly in 1775, the prominent Baptist preacher Isaac Backus wrote:

> Our real grievances are that we, as well as our fathers, have from time to time been taxed on religious accounts where we were not represented. . . . Is not all America now appealing to Heaven against the injustice of being taxed where we are not represented, and against being judged by men who are interested in getting away our money? And will heaven approve of your doing the same thing to your fellow servants? No, surely. We have no desire of representing this government as the worst of any who have imposed reli-

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38. *The Williamsburg Charter: A Celebration and Reaffirmation of the Religious Liberty Clauses, reprinted in* 8 J.L. & RELIG. ____ (1990). For a lucid commentary on this passage from the charter, see Kelley, *The Intermeddling Manifesto, Or, The Role of Religious Bodies in Affecting Public Policy in the United States*, 8 J.L. & RELIG. ____ (1990).

39. For an excellent study of the interaction of religion and politics in the colonial era, see P. BONOMI, UNDER THE COPE OF HEAVEN: RELIGION, SOCIETY AND POLITICS IN COLONIAL AMERICA (1986); for studies of the founding generation, see J. EIDSMOE, CHRISTIANITY AND THE CONSTITUTION: THE FAITH OF OUR FOUNDING FATHERS (1987); E. GAUSTAD, FAITH OF OUR FATHERS: RELIGION AND THE NEW NATION (1988); "IN GOD WE TRUST": THE RELIGIOUS BELIEFS AND IDEAS OF THE AMERICAN FOUNDING FATHERS (N. Cousins ed. 1958); W. MILLER, THE FIRST LIBERTY: RELIGION AND THE AMERICAN REPUBLIC (1986); THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM: ITS EVOLUTION AND CONSEQUENCES IN AMERICAN HISTORY (M. Peterson & Robert C. Vaughan, eds. 1988).

40. For a description of these practices, see T. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 136-46, 151-57, 181, 189, 191-92, 210-11 (1986). *See also* C. ANTIEAU, A. DOWNEY, & E. ROBERTS, FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES (1964).

41. The definitive study of this movement is W. MCLOUGHLIN, NEW ENGLAND DISSENT, 1630-1833: THE BAPTISTS AND THE SEPARATION OF CHURCH AND STATE (1971).

> gious taxes; we fully believe the contrary. Yet, as we are persuaded that an entire freedom from being taxed by civil rulers to religious worship is not a mere favor from any man or men in the world but a right and property granted us from God, who commands us to *stand fast in it*, we have not only the same reason to refuse an acknowledgment of such a taxing power here, as America has the abovesaid power, but also, according to our present light, we should wrong our consciences in allowing that power to men, which we believe belongs only to God.[42]

Perhaps the clearest example of the shaping influence of religion on American public policy occurred in the debate over slavery. From the outset, the voice of some religious communities, notably the Quakers, was unambiguously clear about the matter, allowing slaves to be purchased only for the purpose of their emancipation.[43] Quakers such as Thomas Garrett were prominent among the "conductors" of the underground railroad,[44] and William Lloyd Garrison, perhaps the best known of the abolitionists, was reared as a Quaker in his early years.[45]

The shift in the 1830s towards radical abolitionism reached a fever pitch because of the revivalist preaching of evangelical Christians such as Charles Grandison Finney and Theodore Dwight Weld.[46] In the spring of 1834, Finney and Weld conducted a series of prayer meetings and intense lectures at Lane Theological Seminary in Cincinnati about the immorality of slavery.[47] They "won over almost the entire student body to the support of immediate abolition,"[48] but the cost of their success was that the trustees tried to restrain them. Rather than moderate their convictions, they left Lane and went to Oberlin College, which they transformed into a major institution of higher

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42. Memorial of the Warren Association, *reprinted in* 2 THE ANNALS OF AMERICA 366 (1968); *see also* W. MCLOUGHLIN, *supra* note 41, at 441-76.

43. *See* S. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE 650, 699 (1972); 2 A. STOKES, CHURCH AND STATE IN THE UNITED STATES 176-79 (1950).

44. *See* W. BREYFOGLE, MAKE-FREE: STORY OF THE UNDERGROUND RAILROAD (1958); H. BUCKMASTER (pseudonym), LET MY PEOPLE GO: THE STORY OF THE UNDERGROUND RAILROAD AND THE GROWTH OF THE ABOLITION MOVEMENT (1941); L. GARA, THE LIBERTY LINE: THE LEGEND OF THE UNDER-GROUND RAILROAD (1961); M. MCDOUGALL, FUGITIVE SLAVES (1891); W. SIEBERT, THE UNDERGROUND RAILROAD FROM SLAVERY TO FREEDOM (1967 ed.); W. STILL, THE UNDERGROUND RAILROAD (1872).

45. *See* M. NOLL, ONE NATION UNDER GOD?—CHRISTIAN FAITH AND POLITICAL ACTION IN AMERICA 114-15 (1988).

46. For the early period, see J. ESSIG, THE BONDS OF WICKEDNESS: AMERICAN EVANGELICALS AGAINST SLAVERY, 1770-1808 (1982). On Finney, see KEITH J. HARDMAN, CHARLES GRANDISON FINNEY, 1792-1875: REVIVALIST AND REFORMER (1987). On Weld, see R. ABZUG, PASSIONATE LIBERATOR: THEODORE DWIGHT WELD AND THE DILEMMA OF REFORM (1980).

47. For a classic study of the role of religion in the early period of the antislavery movement, see G. BARNES, THE ANTI-SLAVERY IMPULSE, 1830-1844 (1933). Other sources include L. FILLER, THE CRUSADE AGAINST SLAVERY, 1830-1860 (1960); E. MADDEN, CIVIL DISOBEDIENCE AND MORAL LAW IN NINETEENTH-CENTURY AMERICAN PHILOSOPHY (1968); Stewart, *Abolitionists, the Bible, and the Challenge of Slavery*, in THE BIBLE AND SOCIAL REFORM 31-57 (E. Sandeen ed. 1982).

48. M. NOLL, *supra* note 45, at 113.

learning (the first to admit women on a basis equal to men). Oberlin became an important stop on the underground railroad, and it turned out hundreds of abolitionist evangelists who spread across the northern Midwest preaching that the Gospel of Christ demanded the abolition of slavery.

As Finney put it in his *Lectures on Revivals of Religion* in 1835: "Let Christians of all denominations . . . give forth and write on the head of this great abomination, SIN, and in three years, a public sentiment would be formed that would carry all before it, and there would not be a shackled slave, nor a bristling, cruel slavedriver in this land."[49] Slavery did not disappear in 1838, but the flame had been fanned, and there would be no turning back until the adoption of the thirteenth amendment.

Abundant other examples of the use of religious discourse in the debates over slavery could be offered.[50] It is no accident that when the abolitionists burned a copy of the federal constitution because of its flawed compromise on slavery, they used the language of scripture to reflect their moral outrage, describing the constitution as a "compact with death, a covenant with hell."[51] Similarly, John Brown's last statement to the district court that had sentenced him to death for his part in liberating slaves is likewise shot through with religious imagery. Brown acknowledged his role in the underground railroad, yet denied everything but "the design on my part to free the slaves . . . without the snapping of a gun."[52] Denying in particular the charge that he intended "murder, or treason, or the destruction of property, or to excite or incite slaves to rebellion, or to make insurrection," Brown continued with a tissue of allusions to scripture:

> This Court acknowledges, as I suppose, the validity of the law of God. I see a book kissed here which I suppose to be the Bible. . . . That teaches me that all things whatsoever I would that man should do to me, I should even do so to them. It teaches me further to "remember them that are in bonds, as bound with them." I endeavored to act up to that instruction. I am yet too young to understand that God is any respecter of persons. I believe that to have interfered as I have done . . . in behalf of His despised poor, was not wrong, but right. Now, if it be deemed necessary that I should forfeit my life for the furtherance of the ends of justice, and mingle my blood with the blood of my children and with the blood of millions in this slave country whose rights are disregarded by wicked, cruel and unjust enactments,—I submit; so let it be done![53]

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49. C. FINNEY, LECTURES ON REVIVALS OF RELIGION 286 (1886), *cited in* M. NOLL, *supra* note 45, at 112.

50. *See, e.g.*, A. REICHLEY, RELIGION IN AMERICAN PUBLIC LIFE 188-98 (1985).

51. *See* P. PALUDAN, A COVENANT WITH DEATH: THE CONSTITUTION, LAW, AND EQUITY IN THE CIVIL WAR ERA (1975) (referring to *Isaiah* 28:15).

52. *John Brown's Last Statement to Court, Nov. 2, 1859, reprinted in* BLACK PROTEST: HISTORY, DOCUMENTS, AND ANALYSES, 1619 TO THE PRESENT 81 (J. Grant ed. 1968).

53. *Id.* at 82. The classic text stating the Golden Rule is *Matthew* 7:12. On remembrance of the fetters of an imprisoned person, see *Colossians* 4:18; *Matthew* 25:36. On liberation of those in bondage, see *Isaiah* 61:1, *Luke* 4:18. On intervention on behalf of the poor, see *Luke* 1:51-53. On

It is fair to note, however, the Bible was used authoritatively and with intense vigor both by opponents and proponents of slavery.[54] To put things mildly, some Christian denominations offered teaching on the slavery question that at best was ambiguous, and at worst was complicit in the cruelty of the "peculiar institution." For example, the Lutheran Synod of Virginia resolved in 1835, "That we discountenance the circulation of all so-called religious papers, which are designed to support the cause of the abolitionists."[55] In so doing the Synod was plainly acting out of Lutheran convictions in response to the well known abolitionist impulses of the Franckean Synod, which believed that "slavery as it exists in the United States [is] a sin . . . opposed to the spirit of the Gospel."[56] Similarly, Methodists in Baltimore asserted as early as 1790 that "slavery is contrary to the laws of God." When Methodists were required in 1844, during the heyday of radical abolitionism, to emancipate any slaves they owned, this move split the Methodist Church into northern and southern branches. A similar denominational rupture occurred among the Baptists and the Presbyterians. It has taken over a century for some of these breaches to heal; to this day not all of them have been healed. In any event, during the most decisive debates in American history on the issue of liberty, religious discourse played a significant political role.

The range of political or social issues about which religious groups have voiced their religious concerns is considerable. For example, however one assesses the impact of Marxist criticism of our economic order, it has not been nearly as effective on its own terms—in praxis—as the structural challenges emanating from religious leaders who have repeatedly addressed the recurrent problem of distributive justice in America. Once again, however, it would be appropriate to observe that these commentaries on the American economy have reflected a spectrum of views from the Social Gospel of Walter Rauschenbusch to Andrew Carnegie's famous sermon, "The Gospel of Wealth," from the Catholic Bishops' recent Pastoral Letter, to Michael Novak's spirited defense of "democratic capitalism."[57]

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suffering for the sake of justice, see *Matthew* 5:10-12; 1 *Peter* 3:14. "Amen" is the Hebrew word used throughout the Bible for acceptance of reality or submission in faith to God's word. For an account of Brown's activities as a conductor on the underground railroad, the raid on Harper's Ferry, Brown's trial, and the Northern reaction to his execution, see H. BUCKMASTER, *supra* note 44, at 256-70.

54. *See, e.g.*, Stewart, *Abolitionists, the Bible, and the Challenge of Slavery*, in THE BIBLE AND SOCIAL REFORM 31-57 (E. Sandeen, ed. 1982). I have discussed the use of religious discourse in American politics in a review of a chapter of Michael Perry's recent volume, MORALITY, POLITICS AND LAW (1988). *See* Gaffney, *Politics Without Brackets on Religious Convictions: Michael Perry and Bruce Ackerman on Neutrality*, 64 TUL. L. REV. 1143 (1990).

55. *Cited in 2* A. STOKES, *supra* note 43, at 184.

56. *Id.* at 182.

57. *Compare* ECONOMIC JUSTICE FOR ALL: PASTORAL LETTER ON CATHOLIC SOCIAL THINKING AND THE U.S. ECONOMY (1986) *with* M. NOVAK, THE SPIRIT OF DEMOCRATIC CAPITALISM (1982). *See also* D. MCCANN, NEW EXPERIMENT IN DEMOCRACY: THE CHALLENGE FOR AMERICAN CATHOLICISM (1987); M. MEEKS, GOD THE ECONOMIST: THE DOCTRINE OF GOD AND POLITICAL ECONOMY (1989); M. STACKHOUSE, PUBLIC THEOLOGY AND POLITICAL ECONOMY: CHRIS-

Problems in the administration of criminal justice have also been the subject of religious concern, from the attack on the brutal forms of incarceration at the dawn of the republic made by the Society of Friends, to recent statements on capital punishment issued by nearly every major religious body.[58] The recurrence of the retributive theme has also been a potent force.[59]

Now that technology has developed weapons of mass destruction with the capacity of global annihilation, the reflections of religious communities in the contemporary debate on the legitimacy of violence to resolve international disputes has become acute. Once again, however, even on these questions of supreme moment, there is nothing like unanimity among religious voices even on the principles, let alone on their application.[60]

Women's rights have been championed through powerful use of religious language; one has but to think of Elizabeth Cady Stanton's famous *Women's Bible*. It may come as a surprise to some that religious groups were instrumental in launching the movement for women's suffrage.[61] On the other hand, the predicates of the patriarchal culture of the ancient world from which most religious groups derive their origin still keep many of these groups from treating women with the equal dignity they deserve as persons in today's society.

Finally, religious organizations offer support and consolation to those afflicted with the disease of alcoholism and addiction to other drugs, both by sponsoring counselling programs and by offering hospitality to 12-Step programs of spiritual recovery such as Alcoholics Anonymous and Al-Anon.[62] On

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TIAN STEWARDSHIP IN MODERN SOCIETY (1987); P. WOGAMAN, CHRISTIAN PERSPECTIVES ON POLITICS 209-29 (1988); King, *The Biblical Base of the Social Gospel*, in THE BIBLE AND SOCIAL REFORM 59-84 (E. Sandeen ed. 1982).

58. *See, e.g.*, CRIME AND THE RESPONSIBLE COMMUNITY (J. Stott & N. Miller eds. 1980); THE DEATH PENALTY IN AMERICA (H. Bedau ed. 1982); G. MCHUGH, CHRISTIAN FAITH AND CRIMINAL JUSTICE: TOWARD A CHRISTIAN RESPONSE TO CRIME AND PUNISHMENT (1978); D. VANNESS, CRIME AND ITS VICTIMS: WHAT WE CAN DO (1986); P. WOGAMAN, *supra* note 57, at 247-61.

59. *See, e.g.*, W. BERNS, FOR CAPITAL PUNISHMENT: CRIME AND THE MORALITY OF THE DEATH PENALTY (1979).

60. *Compare, e.g.*, G. WEIGEL, TRANQUILLITAS ORDINIS: THE PRESENT FAILURE AND FUTURE PROMISE OF AMERICAN CATHOLIC THOUGHT ON WAR AND PEACE (1987) *with* J. FINNIS, G. GRISEZ & J. BOYLE, NUCLEAR DETERRENCE, MORALITY AND REALISM (1987). Similar contrast is afforded by the essays by John Howard Yoder, William Spohn, Paul Seabury, John C. Bennett, and George Weigel collected in WAR NO MORE? OPTIONS IN NUCLEAR ETHICS (J. Walters ed. 1989). *See also* Chatfield, *The Bible and American Peace Movements*, in THE BIBLE AND SOCIAL REFORM 105-31 (E. Sandeen ed. 1982).

61. *See, e.g.*, Zikmund, *Biblical Arguments and Women's Place in the Church*, in THE BIBLE AND SOCIAL REFORM 85-104 (E. Sandeen ed. 1982).

62. For a discussion of the spiritual character of the twelve steps of recovery recommended by Bill Wilson, the co-founder of Alcoholics Anonymous, see ALCOHOLICS ANONYMOUS (3d ed. 1976); CAME TO BELIEVE: THE SPIRITUAL ADVENTURE OF A.A. AS EXPERIENCED BY INDIVIDUAL MEMBERS (1979); THE TWELVE STEPS AND TWELVE TRADITIONS (1981); TWENTY-FOUR HOURS A DAY (1981). Al-Anon is a parallel movement for the recovery of those who are affected by the alcoholism of a friend or family member. For samples of the literature of this movement, see AL-ANON FACES ALCOHOLISM (2d ed. 1984); ALATEEN: HOPE FOR CHILDREN OF ALCOHOLICS (1985).

the other hand, some religious groups seem to think that the inducement of guilt and toxic shame is an appropriate way to deal with alcoholics and addicts.[63] Evangelical Christians provided the leadership and driving force in the movement to ban the sale and consumption of alcohol in the earlier part of the twentieth century. Though dubbed "the noble experiment," the eighteenth amendment is typically regarded as a failure because of its severe restriction of human freedom, and because of two persistent evils that arose in the Prohibition era: organized crime and massive governmental surveillance. The social benefit of other dimensions of Prohibition, including a marked decrease in heart disease, venereal disease, and births out of wedlock, is rarely factored into the calculus.[64] I, for one, am grateful for the repeal of Prohibition, but no matter how one assays the value of the eighteenth amendment, its repeal by the twenty-first amendment left the issue of the sale and consumption of alcohol subject to regulation at the state and local level, where several religious groups still campaign against the sale of liquor.[65]

In the face of the historical evidence sketched here, one cannot sustain the claim that religious bodies have been an unmitigated force for good whenever they have drawn connections between their religious convictions and American politics.[66] In this respect, religious organizations are like political parties. One

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63. For the distinction between shame that is related to moral responsibility and shame that is toxic, see J. BRADSHAW, HEALING THE SHAME THAT BINDS (1988).

64. For a good description of the role of the fundamentalists in the Prohibition movement, see G. MARSDEN, FUNDAMENTALISM IN AMERICAN CULTURE (1980). *See also* S. AHLSTROM, *supra* note 43, at 870-71, 902-04; R. FOWLER, RELIGION AND POLITICS IN AMERICA 140-45 (1985); M. NOLL, *supra* note 45, at 128-41; 2 A. STOKES, *supra* note 43, at 328-44. For more thorough treatment of this theme, see N. CLARK, DELIVER US FROM EVIL: AN INTERPRETATION OF AMERICAN PROHIBITION (1976); V. DABNEY, DRY MESSIAH: THE LIFE OF BISHOP CANNON (1949); L. ENGELMANN, INTEMPERANCE: THE LOST WAR AGAINST LIQUOR (1979); J. GUSFIELD, SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT (1963); J. KOBLER, ARDENT SPIRITS: THE RISE AND FALL OF PROHIBITION (1973); J. TIMBERLAKE, PROHIBITION AND THE PROGRESSIVE MOVEMENT, 1900-1920 (1966).

65. Thirteen local congregations in rural Tennessee that sponsored paid advertisements on a local referendum concerning the sale of liquor by the drink discovered to their amazement that the Attorney General of Tennessee insisted on applying to these churches the full force of the state's campaign financial disclosure act. In the view of the Tennessee Supreme Court, the state may require religious bodies wishing to express biblically based views on a matter of public concern: (1) to register with the state as a political campaign committee before accepting any contributions to further any kind of political speech; (2) to elect a special officer of the church designated as a political treasurer; and (3) to file with the state detailed financial statements, including the names and addresses of all persons who contribute more than $100 to the church for the purpose of voicing its moral concerns about a referendum issue. Bemis Pentecostal Church v. State, 731 S.W.2d 897 (1987), *appeal dismissed*, 485 U.S. 930 (1988).

66. For a thoughtful and nuanced discussion of the history of religious involvement in American politics, see M. NOLL, *supra* note 45; RELIGION AND AMERICAN POLITICS (M. Noll ed. 1989). The literature on this theme in the past decade alone has been impressive. *See, e.g.*, R. FOWLER, *supra* note 64; K. GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988); R. MCBRIEN, CAESAR'S COIN: RELIGION AND POLITICS IN AMERICA (1987); C. MOONEY, PUBLIC VIRTUE: LAW AND THE SOCIAL CHARACTER OF RELIGION (1986); M. PERRY, MORALITY, POLITICS AND LAW: A BICENTENNIAL ESSAY (1988); THE POLITICAL ROLE OF RELIGION IN THE UNITED

can, however, note a constant interaction between religion and politics on all the large issues confronted in American politics. Even where the churches have been wrong, in a pluralistic society they must nevertheless be given the dignity of their mistakes. Their errors are best corrected by stating counter-arguments, not by stilling their voices.

III. THEOLOGICAL REASONS FOR THE ROLE OF RELIGION IN AMERICAN POLITICS

Why do religious groups engage in political activity? As a prominent Methodist theologian, Philip Wogaman, notes in his recent volume, *Christian Perspectives on Politics*, the answers to that question are "many and varied."[67] Identifying himself as a mainstream liberal Protestant, Wogaman acknowledges that valuable insights are to be gained from three other distinctive generating centers of socio-political ethics: Christian pacifists and anarchists; Christian liberationists; and Christian neoconservatives. Wogaman locates Jacques Ellul, a prolific French Calvinist, at one end of the spectrum because of his seemingly antipolitical or "anarchist" stance. When subjected to closer scrutiny by Wogaman, however, Ellul turns out to be more complicated than the "anarchist" label lets on. For example, he urges Christians to engage in all political parties and movements, but without any illusion that our problems can actually be solved through politics.[68]

Wogaman also places John Howard Yoder, a leading American Mennonite theologian, in the same general camp as Ellul. He does so because of Yoder's insistence that the politics of Jesus (utter renunciation of violence) should be the way of Christians, who should not temporize in their obedience to God's will, as demonstrated by Jesus.[69] According to Yoder, such obedience should not even be temporized to be more "effective" because it is God's responsibility, not ours, to manage the course of history and to bring to pass the triumph of his justice and righteousness in his own time.[70] Wogaman notes, however, that in an earlier volume Yoder acknowledged the legitimacy of Christian witness to the state, and the moral superiority of some political alternatives over others: "No tyrant can be so low on the scale of righteousness that the Christian could not appeal to him to do at least a little better; no 'Christianized'

STATES (S. Johnson & J. Tamney eds. 1986); A. REICHLEY, *supra* note 50, at 168-339. For a thoughtful collection of essays on the resurgence of interest in politics among Evangelical Christians, see PIETY AND POLITICS: EVANGELICALS AND FUNDAMENTALISTS CONFRONT THE WORLD (R. Neuhaus & M. Cromartie eds. 1987); R. WUTHNOW, THE STRUGGLE FOR AMERICA'S SOUL: EVANGELICALS, LIBERALS & SECULARISM (1989). *See also* Commager, *Religion and Politics in American History*, in RELIGION AND POLITICS 37-56 (J. Wood, Jr., ed. 1983).

67. P. WOGAMAN, *supra* note 57, at 31.

68. J. ELLUL, THE ETHICS OF FREEDOM 379-80 (1976); *see also* J. ELLUL, THE POLITICS OF GOD AND THE POLITICS OF MAN (1972); J. ELLUL, THE POLITICAL ILLUSION (1967).

69. *See* J. YODER, THE POLITICS OF JESUS (1972).

70. *See id.* The summary of Yoder's central thesis is found in P. WOGAMAN, *supra* note 57, at 42.

society can be so transformed as not to need constant criticism."[71]

Wogaman does not discuss Johann Baptist Metz, a German theologian who coined the phrase "political theology." Like Ellul and Yoder, Metz insists that every abstract idea of progress and of humanity stands under God's future promises or "eschatological proviso":

> No doubt, these promises cannot simply be identified with any condition of society, however we may determine and describe it from our point of view. The history of Christianity has had enough experience of such direct identification and direct "politifications" of the Christian promises. In such cases, however, the "eschatological proviso," which makes every historically real status of society appear to be provisional, was being abandoned.[72]

Unlike Ellul and Yoder, however, Metz takes a sharp turn from this premise towards engagement in the socio-political order: "It is impossible to privatize the eschatological promises of biblical tradition: liberty, peace, justice, reconciliation. Again and again they force us to assume our responsibilities towards society."[73] He insists that the salvific relation of Jesus to the world is "not to be understood in a natural-cosmological sense but in a socio-political sense; that is, as a critical, liberating force in regard to the social world and its historical process."[74]

Picking up on this theme, Gustavo Gutierrez and a number of other Latin American theologians have explored a way of describing the entire theological enterprise as one of liberation.[75] As the debate over liberation theology demon-

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71. J. YODER, THE CHRISTIAN WITNESS TO THE STATE 59 (1964).

72. Metz, *The Church and World in the Light of a "Political Theology,"* in THEOLOGY OF THE WORLD 114 (1971). In this respect the distinguished American Catholic ethicist, Charles Curran, agrees: "The Christian strives to make the kingdom more present in this world, but the fullness of justice and peace will never be here. I maintain there can be some truly human progress in history, but such progress is ordinarily slow and painful." C. CURRAN, AMERICAN CATHOLIC SOCIAL ETHICS: TWENTIETH CENTURY APPROACHES 284 (1982). A Niebuhrian Protestant for whom the pervasive realities of original sin and original grace are equally important would doubtless agree about the slow pace of progress, but would perhaps stress that only God makes his kingdom present in this world. *See, e.g.*, R. NIEBUHR, THE CHILDREN OF LIGHT AND THE CHILDREN OF DARKNESS (1944). Echoing Niebuhr, Metz concluded his seminal essay on political theology: "The irrationalities of our actions in the social and political field are too manifest. There is still with us the possibility that 'collective darkness' will descend upon us. The danger of losing freedom, justice, and peace is, indeed, so great that indifference in these matters would be a crime." Metz, *supra*, at 124.

73. Metz, *supra* note 72, at 114.

74. *Id. See also* J. METZ, FAITH IN HISTORY AND SOCIETY: TOWARD A PRACTICAL FUNDAMENTAL THEOLOGY 49-83 (1980).

75. The principal Latin American theologians who have written in this vein are H. ASSMANN, THEOLOGY FOR A NOMAD CHURCH (1976); J. BONINO, TOWARD A CHRISTIAN POLITIC ETHICS (1983); J. BONINO, DOING THEOLOGY IN A REVOLUTIONARY SITUATION (1975); G. GUTIERREZ, LIBERATION THEOLOGY (1973); and J. SEGUNDO, LIBERATION OF THEOLOGY (1976). For a discussion of these theologians, see P. WOGAMAN, *supra* note 57, at 53-71; for a comparison of political theology and liberation theology, see Fiorenza, *Political Theology as Foundational Theology*, in 32 PROCEEDINGS OF THE CATHOLIC THEOLOGICAL SOCIETY OF AMERICA 142 (L. Salm ed. 1977).

strates, moreover, the answers to the complex question posed above—why do religious groups engage in political activity?—divide contemporary members of the same religious community, much in the way that the abolition of slavery divided the mainline Protestant communions in the nineteenth century.

In the North American context, there has likewise been considerable diversity of theological justifications for engagement by religious groups in politics. It must, however, be noted that some religious groups maintain that a strong case should be made for nonengagement. Representatives of this position include the Society of Friends (Quakers), the Mennonite Church and the Church of the Brethren.[76] James Reichley suggests that "Quakerism might survive and even flourish as a dedicated sect within or attached to a more worldly host community. It offered a spiritually attractive alternative way of life and could provide the host community with effective moral criticism and correction . . . ."[77] Reichley concludes that the Quakers' commitment to pacifism, however morally impressive, does not meet the acid test of "political realism."[78] To subject their views to this test, however, misses the point that the traditional peace churches are more concerned with the faithfulness of their witness and the integrity of their lives than with the result of transforming the society around them. If the propensity of American culture to resolve disputes by resorting to violence is diminished because of the witness of the traditional peace churches, so much the better. But even if our government insists on the legitimacy of war, Quakers, Mennonites, and other pacifists will nevertheless prefer to die than to kill.

As for religious theories encouraging engagement in the political order, Mark Noll finds Calvinist thought, with its emphasis on the need for the church to produce faithful witnesses to the sovereignty of God while serving as civil magistrates, to be central to American politics.[79] Roman Catholic social thought is reflected not only in the prodigious outpouring of the American hierarchy on a wide variety of social issues,[80] but also in the work of thinkers as diverse as John Courtney Murray[81] and Dorothy Day.[82] Another example

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76. For an empathetic description of the role of the peace churches in American history, see P. BROCK, PACIFISM IN THE UNITED STATES: COLONIAL ERA TO THE FIRST WORLD WAR (1968). For accounts of the Quakers, see M. BACON, QUIET REBELS: STORY OF THE QUAKERS IN AMERICA (1969); H. KERSHNER, QUAKER SERVICE IN MODERN WAR (1950); W. WILLIAMS, THE RICH HERITAGE OF QUAKERISM (1962). For a thoughtful and nuanced discussion of the political thought of the radical wing of the Reformation, see generally J. YODER, THE CHRISTIAN WITNESS TO THE STATE (1964).

77. A. REICHLEY, *supra* note 50, at 174.

78. *Id.*

79. *See* M. NOLL, *supra* note 45.

80. Two pastoral letters of the American Catholic Bishops during the past decade are well known: THE CHALLENGE OF PEACE: GOD'S PROMISE AND OUR RESPONSE (1983); ECONOMIC JUSTICE FOR ALL (1986). The collected statements of the bishops from the inception of the National Catholic Welfare Conference in 1917 to the present fill four volumes.

81. *See, e.g.*, J. MURRAY, WE HOLD THESE TRUTHS: REFLECTIONS ON THE AMERICAN EXPERIENCE (1960). For careful studies of Murray, see J. HOOPER, THE ETHICS OF DISCOURSE: THE SOCIAL PHILOSOPHY OF JOHN COURTNEY MURRAY (1986); R. MCELROY, THE SEARCH FOR AN AMERICAN PUBLIC THEOLOGY: THE CONTRIBUTION OF JOHN COURTNEY MURRAY (1989).

82. *See* D. DAY, THE LONG LONELINESS (1981); W. MILLER, DOROTHY DAY: A BIOGRAPHY

of fruitful interaction between religion and politics in America has been the Lutheran retrieval of the Augustinian tension between the two cities or kingdoms.[83]

What unifies these various approaches, however, is the conviction that political action by religious groups is not "meddling" in something beyond their ken, but an important (for some, even a constitutive) dimension of their religious experience and commitment.

In testimony before the House Ways and Means Committee in 1972, the late John Baker, a representative of the Baptist Joint Committee on Public Affairs, noted both the theological pluralism of approaches to political action, and the unity of conviction that this involvement is deeply religious:

> Some religious entities believe that their religious faith commits them to a complete withdrawal from the secular world. Others are compelled by their faith into an active participation in nearly every aspect of that secular world. If they are to be good stewards of their religious influence these people sincerely believe they must be involved in the formation of public policy. War and peace, human welfare, civil rights, abortion, and education are all public issues, but they have attributes which make them also religious issues. The list of these areas of governmental involvement with society which some of the churches assert also demand religious involvement is almost infinite.[84]

A representative of the National Jewish Community Relations Advisory Council ("NJCRAC") likewise supported participation by religious organizations in legislative matters on religious grounds:

> Not everyone, or even all Jews, will agree that every policy decision made by each of the organizations is inescapably required by the Jewish religious tradition. However, none may question the sincerity of these organizations in concluding that their activities are designed to express their view of what Jewish tradition requires. The members of these organizations have banded together because they are Jews and believe that they have a responsibility to express a Jewish point of view. If they were not moved by that belief, they would have formed or joined other organizations to speak for them on subjects such as freedom, equality, and urban unrest. They believe, however, that they have a responsibility to discover and express whatever guidance may be found in the Jewish tradition on such issues. Thus, their activity is a form of religious expression.[85]

(1982); W. MILLER, A HARSH AND DREADFUL LOVE (1970).

83. The policy statements of the Lutheran Church in America are reprinted as appendices in C. KLEIN & C. VON DEHSEN, POLITICS AND POLICY: THE GENESIS AND THEOLOGY OF SOCIAL STATEMENTS IN THE LUTHERAN CHURCH IN AMERICA 179-290 (1989). For the reflections of one of America's most distinguished Lutheran theologians, see M. MARTY, RELIGION AND REPUBLIC: THE AMERICAN CIRCUMSTANCE (1987).

84. *House Hearings, supra* note 1, at 282 (statement of John W. Baker).

85. *Id.* at 99.

On behalf of the United Methodist Church, Dr. J. Elliott Corbett entered into the record of these hearings the following policy declaration of the General Conference of his communion:

> We believe that churches have the right and the duty to speak and act corporately on those matters of public policy which involve basic moral or ethical issues and questions. Any concept of church-government relations which denies churches this role in the body politic strikes at the very core of the religious liberty. The attempt to influence the formation and execution of public policy at all levels of government is often the most effective means available to churches to keep before modern man the ideal of a society in which power [is] made to serve the ends of justice and freedom for all people.[86]

Corbett then testified as follows:

> This statement makes clear that the church should speak out on public policy questions and seek to influence the formation of public policy as it relates to the government. The declaration points out the inappropriateness of denying the church its role in relating to public policy and that such a denial would threaten religious liberty. The question here arises as to whether "the free exercise" of religion, as provided in the first amendment is denied if limitations are placed on church lobbying in areas affecting the church's purpose in society. In other words, the first amendment guarantees of "the free exercise" of religion should not permit the state to tell the church when it is being "religious" and when it is not. The church must be permitted to define its own goals in society in terms of the imperatives of its religious faith. Is the Christian church somehow not being religious when it works on behalf of healing the sick, or for the rights of minorities, or as peacemaker on the international scene? No, the church itself must define the perimeters of its outreach on public policy questions.[87]

Four years later, in similar hearings before the House Ways and Means Committee on legislation to regulate the lobbying efforts of exempt organizations, representatives of religious bodies were even more emphatic than in their earlier testimony that attempts to regulate the participation of religious bodies in matters of public concern create special constitutional problems of abridgement of free exercise of religion.[88]

The testimony referred to above illustrates the sense in which the separation of religiously-based morality from the realm of public policy choices would, in the well known phrase of Richard John Neuhaus, create a "naked public

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86. *Id.* at 303.

87. *Id.* at 305; *see also id.* at 307-12 (statement of the Most Rev. Joseph L. Bernardin, General Secretary, United States Catholic Conference).

88. *See, e.g., Influencing Legislation by Public Charities, Hearing Before the House Ways and Means Committee*, 94th Cong., 2d Sess. 68 (1974) (statement of James E. Woods, Jr. on behalf of the Baptist Joint Committee on Public Affairs); *id.* at 75-76 (statement of the Lutheran Council in the U.S.A.); *id.* at 81-82 (statement on Behalf of the National Council of Churches of Christ in the U.S.A.); *id.* at 90 (statement of the United States Catholic Conference).

square." Echoing Will Herberg,[89] Neuhaus notes that this kind of separation is an impossible project, and is undesirable even if it were possible:

> [T]he public square cannot and does not remain naked. When particularist religious values and the institutions that bear them are excluded, the inescapable need to make public moral judgments will result in an elite construction of a normative morality from sources and principles not democratically recognized by the society.
>
> The truly naked public square is at best a transitional phenomenon. It is a vacuum begging to be filled. When the democratically affirmed institutions that generate and transmit values are excluded, the vacuum will be filled by the agent left in control of the public square, the state. In this manner, a perverse notion of the disestablishment of religion leads to the establishment of the state as church.[90]

Whether or not one accepts all the turns in Neuhaus's argument,[91] it seems clear that the history of American politics has not been one in which social ethics have been totally secularized, or one in which religion has played no role. To the contrary, for many religious bodies political speech has been a form of religious ministry that is central to their religious convictions.

After years of practical experience dealing with the restraints placed by the tax code on the activities of religious bodies relating to politics, two attorneys in the Office of General Counsel of the United States Catholic Conference concluded that these restraints "seriously impair the practical ability of [exempt religious] organizations to participate in the public debate on socio-moral issues of vital concern to the nation's welfare" and have "an intimidating adverse effect upon the proper pastoral missions" of these organizations.[92] They argue:

> Whatever might be the legitimate interest of government in denying a public subsidy to political activity (however that phrase is defined), it cannot justify the Draconian thrust of a total legal mechanism which, at the instance of the government or third-party litigants, threatens the financial support of churches and others on the claim that public debate and voter education have crossed a murky regulatory line and been transformed into support of, or opposition to, a political candidate.[93]

This critical view of the existing legal arrangements is not unique to these

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89. *See, e.g.*, FROM MARXISM TO JUDAISM: COLLECTED ESSAYS OF WILL HERBERG (D. Dalin, ed. 1989).

90. R. NEUHAUS, *supra* note 11, at 86.

91. For the dismissive view that Neuhaus's position is a "neo-conservative [sic] myth," see J. CASTELLI, A PLEA FOR COMMON SENSE: RESOLVING THE CLASH BETWEEN RELIGION AND POLITICS 1 (1988). A more nuanced critique of Neuhaus' neoconservative tendencies is found in P. WOGAMAN, *supra* note 57, at 72-74, 76, 78, 82, 85. *See also* Skillen, *Review*, 8 J.L. & RELIG. ___ (1990).

92. Caron & Dessingue, *IRC § 501(c)(3): Practical and Constitutional Implications of "Political" Activity Restrictions*, 2 J.L. & POLITICS 169, 199 (1985).

93. *Id.*

two attorneys. For example, the 1988 policy statement of the General Assembly of the Presbyterian Church cited above also contains nine conclusions that are relevant to the theme of this article:

> The state may not use its power to tax or to exempt from taxation, to restrict, or place conditions on the exercise of religion.
>
> The state may not tax the central exercise of religion or property essential to the core functions of religion. We hold that the application of the restrictions in section 501(c)(3) of the Internal Revenue Code to the speech of the church and its leaders are an unconstitutional limitation on a central exercise of religion . . . .
>
> The corporate entities and individual members of the Presbyterian Church (U.S.A.) are obliged by the religious faith and order they profess to participate in public life and become involved in the realm of politics.
>
> Pastors and officials of the church, as well as lay members, have the right and responsibility to stand for and hold public office when they feel called to do so.
>
> The "free exercise of religion" must be understood to include and protect the right to practice faith in public and private as well as the right to believe and thus to include participation in public affairs by the individuals and church bodies for which such participation is an element of faith.
>
> As part of the church participation in public life, governing bodies of the Presbyterian Church (U.S.A.) at every level should speak out on public and political issues, taking care to articulate the moral and ethical implications of public policies and practices.
>
> We recognize that speaking out on issues will sometimes constitute implicit support or opposition to particular candidates or parties, where policy and platform differences are clearly drawn. Since such differences are the vital core of the political process, church participation should not be curtailed on that account; but we believe that it is generally unwise and imprudent for the church explicitly to support or oppose specific candidates, except in unusual circumstances.
>
> We reject and oppose any attempts on the part of the church to exercise political authority or to use the political process to achieve governmental sponsorship of worship or religious practice.
>
> We oppose attempts by government to limit or deny religious participation in public life by statute or regulation, including Internal Revenue Service regulations on the amount or percentage of money used to influence legislation, and prohibition of church intervention in political campaigns.[94]

The remainder of this Article explores whether the conclusions of the two church lawyers and the Presbyterian statement cited above are sound. Before reaching a conclusion on these issues, it is necessary to unravel the various ways in which the federal government has attempted to regulate the political activities of exempt religious organizations. The next three sections of this Article correspond to the tripartite separation of powers: legislative, executive,

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94. GOD ALONE IS LORD OF THE CONSCIENCE, *supra* note 3, at 38, 52. These conclusions, called "affirmations" in the policy document, are discussed at pages 32-38, 47-51 of the document.

and judicial.

IV. THE LEGISLATIVE HISTORY OF CONGRESSIONAL RESTRAINTS ON THE POLITICAL SPEECH OF RELIGIOUS BODIES

Under current tax policy, the government imposes restraints on activities of religious organizations relating to politics, principally on the view that it may do so because it refrains from collecting a portion of the income that is contributed to these organizations for exempt religious purposes.[95] There are two principal restraints on religious bodies triggered by virtue of their tax-exempt status. Section 501(c)(3) of the Internal Revenue Code imposes a restriction on substantial activities to influence legislation and on the use of substantial amounts of income in attempts to influence legislation,[96] and it imposes an absolute ban on efforts to influence the outcome of campaigns for elective office.[97]

One obvious place to turn for guidance in construing the meaning of a statute is its legislative history. The 1934 restraints on lobbying were not preceded by hearings in the Senate Finance Committee. The sponsor of the floor amendment, Senator Pat Harrison, asserted that the intent of the proposal was simply to exclude from exempt status sham organizations that were merely a "front" for lobbying for private interests; he had no desire to affect the legislative activities of any of the "worthy institutions."[98]

Apparently the Senator was irked by the activities of the National Economy League.[99] Because the constitutional prohibition against a bill of attainder[100] meant that the Senator could not single out this group for different treatment under the law, the inhibition had to be passed out more generally. It was on this sort of "in for a penny, in for a pound" reasoning that the activities of religious organizations "attempting to influence legislation" became subject to federal regulation. There is no evidence in the legislative history that Congress thought that any religious organizations were engaged in chicanery of the sort

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95. This statement of the problem concedes that income generated by an exempt organization from sources unrelated to its exempt purposes is taxable. *See* 26 U.S.C. §§ 511-513; J. GALLOWAY, THE UNRELATED BUSINESS INCOME TAX (1982). Indeed, it is significant to note that the major religious bodies, through the National Council of Churches and the United States Catholic Conference, actively sought, during the deliberations on the Tax Reform Act of 1969, to have such income taxed. *See* Gaffney, *Governmental Definition of Religion: The Rise and Fall of the IRS Regulations on an "Integrated Auxiliary of a Church,"* in ECUMENICAL PERSPECTIVES ON CHURCH AND STATE 73-110 (J. Wood, Jr., ed. 1988).

96. *See, e.g.*, Comment, *Church Lobbying: The Legitimacy of the Controls*, 16 HOUS. L. REV. 480 (1979).

97. *See, e.g.*, IRS EXEMPT ORGANIZATIONS HANDBOOK § 3(10)1 (IRM 7751); Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii). *See generally* Caron & Dessingue, *I.R.C. § 501(c)(3): Practical and Constitutional Implications of "Political" Activity Restrictions*, 2 J.L. & POLITICS 169 (1985). *See also id.* at 180 n.40, 181 n.41, 183 n.54.

98. 78 CONG. REC. 5959 (1934).

99. *See* B. HOPKINS, THE LAW OF TAX-EXEMPT ORGANIZATIONS 265 (5th ed. 1987).

100. U.S. CONST. art. I, § 9.

that had triggered the amendment. Nevertheless, they were included among the exempt organizations whose political freedoms were restricted under this provision of the tax code.

In the discussion of the floor amendment, a member of the Senate Finance Committee, Senator David Reed, stated that the drafters of the legislation were given "an impossible task" and that the language they proposed went "much further than the committee intended to go," namely, to withdraw the deductibility of contributions "made to advance the personal interest of the giver of the money."[101]

In the case of the 1954 amendment imposing restraints on involvement in political campaigns, there was no report by either of the congressional committees with expertise in tax matters recommending the legislation. Within a few seconds, or—if one is a slow reader—a few minutes, one can master all there is to know about the legislative history of this second significant conditional restraint on the political freedom of exempt organizations. What is to be known is that there is virtually nothing to be known from this standard source for statutory construction. Again, what is to be gleaned from the legislative history comes from the sparse record of the discussions of an amendment submitted on the floor of the Senate by Senator Lyndon Johnson, who was evidently piqued by the political involvement of an exempt family foundation that had the temerity to support one of Senator Johnson's opponents.[102] The voice vote on Senator Johnson's amendment was unrecorded. Again, although there is no evidence in the legislative history that Congress thought that religious organizations were engaged in the kind of behavior that Congress sought to control, they were nevertheless included within the regulation that imposed a flat ban on electioneering by exempt organizations.

V. Constraints Imposed by the Administrative Rule-Making Process on Religious Activities Relating to Politics

The biggest practical difficulty for the churches arises from the Internal Revenue Service's bizarre interpretations of a vague statute. The principal function of the Service is to collect revenue for the operation of the various programs of the government. Since those who are employed within the Service are not chosen because of their practical experience in political campaigns, it should be no surprise that the rules that the IRS has written in this area of the law have not reflected the realities of political life in America very well. Furthermore, tax collectors are not chosen to engage in this task because of any sophisticated understanding of the historical and theological concerns discussed earlier in this Article. Perhaps this is why the rules they write about exempt religious organizations seem so insensitive to the delicacy of religious freedom in this country.

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101. 78 Cong. Rec. 5861 (1934).

102. *See* B. Hopkins, *supra* note 99, at 281.

A. Lobbying Regulations

The IRS does not take the absolutist position that any attempt to influence legislation requires revocation of exempt status. Even the statute itself calls for more flexibility than that, since it prohibits only "substantial" attempts to influence legislation.[103] I will return to the problem of the vagueness of this standard later. For now, it is important to stress that some contacts between Congress and religious leaders clearly create no problem for the tax-exempt status of their organizations.

B. Electioneering Regulations

Unlike the regulations that restrict lobbying to an "insubstantial" amount, however that term is to be understood, the regulations governing electioneering activities of religious organizations constitute a total and virtually absolute ban on these activities. Vagueness still abounds as to the crucial threshold question of what is meant by the term "electioneering." As to *how much* electioneering—however it is defined—an exempt organization may engage in, vagueness is replaced by certainty, and with a vengeance. A more total and absolute ban on political activity—generally thought to be at the heart of first amendment protections—cannot be imagined.

Some regulation of political activity has been deemed constitutional.[104] Perhaps because the Federal Election Commission is staffed with personnel more familiar with the realities of political campaigns, the rules they promulgate on this matter seem like skillful surgery with a scalpel compared to the meat-ax approach of numerous IRS regulations written by tax collectors.[105] For example, the Federal Election Campaign Act ("FECA") bans corporate expenditures in federal campaigns.[106] The courts, however, have construed FECA to be limited to messages that expressly advocate support for or opposition to clearly identified candidates.[107] By contrast, as recently as 1989, the National

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103. I.R.C. § 501(c).

104. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976) (invalidating some provisions of the post-Watergate legislation reforming federal election campaigns, and sustaining other provisions of the same statute).

105. In the view of the 1988 Presbyterian statement:

> The Internal Revenue Service does not seem to be able to distinguish between discussion of issues and candidates, on the one hand, and intervention in campaigns on behalf of specific candidates on the other, though the Supreme Court emphasized the necessity of this distinction in interpreting laws dealing with political expression.

GOD ALONE IS LORD OF THE CONSCIENCE, *supra* note 3, at 49-50 (citing Buckley v. Valeo, 424 U.S. 1 (1976)).

106. 2 U.S.C. § 441b (1988).

107. "[A corporate] expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 249 (1986) ("*MCFL*"). The *MCFL* Court adopted this narrowing construction to avoid potential overbreadth, consistent with the Court's construction of other provisions of the FECA in Buckley v. Valeo, 424 U.S. 1 (1976). "[C]ommunications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,'

Office of the IRS rejected the view that the "express advocacy" standard applies to tax-exempt organizations. In the view of the Service, churches might forfeit exempt status by fostering discussion of war and peace issues during a presidential election campaign without identifying any candidate by name.[108]

Perhaps in response to pressure from some members of Congress who do not care much for religiously-grounded objections to their performance in public office,[109] the IRS got into the habit of pronouncing rules during campaign years that have been increasingly restrictive of the activities of exempt organizations in politics.[110] For example, in 1976 the IRS suggested that it was a prohibited campaign activity for an exempt organization to ask candidates for public office to endorse a code of campaign ethics, although the organization had not endorsed any candidate or even published the response to its request. Several of these administrative regulations, moreover, are constitutionally vulnerable because they severely inhibit voter education efforts by exempt organizations on topics of concern to the organization. Illustrative of the problems these rulings create for religious organizations is a Revenue Ruling issued in 1978, the chief virtue of which is that it reversed an even more Draconian ruling that the Service had issued only weeks before.[111] Revenue Ruling 78-248 bans voter education efforts by exempt organizations, which compile and publish voting records of all members of Congress, if the votes reported are not on a wide range of topics but are limited to selected issues of interest to the organization, or if there is even an implied indication of the organization's approval or disapproval of the voting records, or so much as an editorial comment offered by the organization.[112]

'vote against,' 'defeat,' [or] 'reject[]' " are therefore prohibited by § 441b. *Buckley*, 424 U.S. at 44 n.52; 11 C.F.R. § 109.1(b)(2) (1989).

108. Priv. Ltr. Rul. 8936002 (May 24, 1989). Although troubled by the timing and potential impact of television advertisements on the war/peace theme during a two-week period around the foreign policy debate on October 21, 1984 between President Ronald Reagan and Presidential candidate Walter Mondale, the Service "reluctantly" concluded that the advertisements might be viewed as "nonpartisan" and hence did not constitute prohibited electioneering activity.

109. For a discussion of religion in recent political campaigns, see J. CASTELLI, *supra* note 91; R. MCBRIEN, *supra* note 66; THE POLITICAL ROLE OF RELIGION IN THE UNITED STATES, *supra* note 66.

110. *See, e.g.*, Rev. Rul. 64-195, 1964-2 C.B. 138; Rev. Rul. 66-258, 1966-2 C.B. 213; Rev. Rul. 70-49, 1970-1 C.B. 127; Rev. Rul. 70-449, 1970-2 C.B. 111; Rev. Rul. 78-160, 1978-1 C.B. 153, *revised by* Rev. Rul. 78-248, 1978-1 C.B. 1545; Rev. Rul. 80-282, 1980-2 C.B. 178.

111. Rev. Rul. 78-160, 1978-1 C.B. 153 (announcing that an organization does not qualify for exempt status if it publishes in a newsletter responses to a questionnaire sent to candidates for public office in an upcoming election), *rev'd*, Rev. Rul. 78-284, 1978-1 C.B. 154.

112. Rev. Rul. 78-248, 1978-1 C.B. 154. This Revenue Ruling set forth four hypothetical fact situations, two of which were viewed as protected or at least permissible activity, and two of which were viewed as violating the prohibition in § 501(c)(3) on political activity. To facilitate an appreciation of the tortured and turgid prose that religious organizations must attempt to make sense of when they decide about religious activities relating to politics, I include here the entire text of this Revenue Ruling:

> Situation 1: Organization A has been recognized as exempt under section 501(c)(3) of the Code by the Internal Revenue Service. As one of its activities, the organization

It is by no means clear why the Sierra Club, for example, should not be able to engage in voter education on environmental matters without having to take on a host of other matters that may be of lesser moment to that organization. And why should the NAACP Education and Legal Defense Fund be told that it will lose its exempt status if it dares to report the votes of members of Congress exclusively on civil rights matters (never mind that it might have something to say about those matters in an editorial)? Several scholars have criticized the truncated version of the second amendment that the National Rifle Association usually trumpets (stressing the "right of the people to keep and bear arms" and ignoring the conditional clause referring to the purpose of

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annually prepares and makes generally available to the public a compilation of voting records of all Members of Congress on major legislative issues involving a wide range of subjects. The publication contains no editorial opinion, and its contents and structure do not imply approval or disapproval of any members or their voting records.

The "voter education" activity of Organization A is not prohibited political activity within the meaning of section 501(c)(3) of the Code.

Situation 2: Organization B has been recognized as exempt under section 501(c)(3) of the Code by the Internal Revenue Service. As one of its activities in election years, it sends a questionnaire to all candidates for governor in State M. The questionnaire solicits a brief statement of each candidate's position on a wide variety of issues. All responses are published in a voters guide that it makes generally available to the public. The issues covered are selected by the organization solely on the basis of their importance and interest to the electorate as a whole. Neither the questionnaire nor the voters guide, in content or structure, evidences a bias or preference with respect to the views of any candidate or group of candidates.

The "voter education" activity of Organization B is not prohibited political activity within the meaning of section 501(c)(3) of the Code.

Situation 3: Organization C has been recognized as exempt under section 501(c)(3) of the Code by the Internal Revenue Service. Organization C undertakes a "voter education" activity patterned after that of Organization B in Situation 2. It sends a questionnaire to candidates for major public offices and uses the responses to prepare a voters guide which is distributed during an election campaign. Some questions evidence a bias on certain issues. By using a questionnaire structured in this way, Organization C is participating in a political campaign in contravention of the provisions of section 501(c)(3) and is disqualified as exempt under that section.

Situation 4: Organization D has been recognized as exempt under section 501(c)(3) of the Code. It is primarily concerned with land conservation matters. The organization publishes a voters guide for its members and others concerned with land conservation issues. The guide is intended as a compilation of incumbents' voting records on selected land conservation issues of importance to the organization and is factual in nature. It contains no express statements in support of or in opposition to any candidate. The guide is widely distributed among the electorate during an election campaign.

While the guide may provide the voting public with useful information, its emphasis on one area of concern indicates that its purpose is not nonpartisan voter education.

By concentrating on a narrow range of issues in the voters guide and widely distributing it among the electorate during an election campaign, Organization D is participating in a political campaign in contravention of the provisions of section 501(c)(3) and is disqualified as exempt under that section.

Id.

the provision: "a well ordered militia"), but one dreads to think of the NRA being required by the IRS to expand its political agenda to arms control in the post-Cold War era.

In 1980, the Service modified its 1978 ruling slightly, but by no means removed all of its offensive restrictions. Absent any electioneering activity, Revenue Ruling 80-282 allows the publication of congressional voting records on selected issues with an indication of whether those votes correspond to the organization's views.[113] That sounds like progress, until one looks at the criteria which the IRS considered to demonstrate the absence of prohibited electioneering activity:

> (1) the voting records of all incumbents will be presented, (2) candidates for reelection will not be identified, (3) no comment will be made on an individual's overall qualifications for public office, (4) no statements expressly or impliedly endorsing or rejecting any incumbent as a candidate for public office will be offered, (5) no comparison of incumbents with other candidates will be made, (6) the organization will point out the inherent limitations of judging the qualifications of an incumbent on the basis of certain selected votes, by stating the need to consider such unrecorded matters as performance on subcommittees and constituent service, (7) the organization will not widely distribute its compilation of incumbents' voting records, (8) the publication will be distributed to the organization's normal readership (who number only a few thousand nationwide), and (9) no attempt will be made to target the publication toward particular areas in which elections are occurring nor to time the publication to coincide with an election campaign.[114]

In short, the IRS will only tolerate politically oriented religious speech that is feeble and ineffective.

The policy judgments of the IRS embodied in the 1978 and the 1980 Revenue Rulings raise grave constitutional doubt, yet churches and other exempt organizations are expected to accept them supinely. Most churches, if not all, do comply with these tax regulations because the stakes—forfeiture of exempt status—are so high that only the most hearty dare contravene rules that make little sense on their face.

One is led to wonder how the abolitionists would have coped with the constraints on free speech that section 501(c)(3) of the tax code and various rulings by the IRS now impose on religious bodies. As I suggested earlier in this Article, it seems clear that the virtually single-minded nature of their moral repugnance to slavery would have brought them into conflict with the tax code, for they were prepared to disobey many federal statutes that reinforced the slavery regime. On the strength of this example, one should not exaggerate the ability of the government to control American politics. But the bureaucratic stifling of critical religious opposition to a variety of governmental policies is a real danger in an era of deregulation of for-profit corporations and

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113. Rev. Rul. 80-282, 1980-2 C.B. 178.

114. B. HOPKINS, *supra* note 99, at 285-86.

increasing regulation of not-for-profit corporations. As the Presbyterian Statement put it, "If government were free to grant tax or withhold exemptions as different churches pleased or displeased it, government could control all but the most resolute of the churches."[115] This result—subjecting the churches to the control of the government—seems at the very least to be antithetical to the spirit of the first amendment, which needs "breathing space" in order to flourish.[116]

VI. The Constitutionality of the Administrative Regulations

A. General Principles Relating to the Civil Liberties of Religious Groups

Whether or not the IRS has construed the intent of Congress correctly, the restraints imposed by Congress or the Executive on the activities of religious bodies touching upon politics must, in any event, conform to constitutional standards. The evaluation of this issue is often clouded by one's perception of a particular group. Thus many liberals seem stuck with stereotypical images of evangelical Christians, lumping Pat Robertson's 700 Club with Ron Sider's Evangelicals for Social Action. And many conservatives fail to make very subtle distinctions about the perspectives of their ideological adversaries, lumping together as "liberal" all the "mainline" Protestant denominations that have articulated positions on controversial public policy matters. Assuming that it is desirable and possible to move beyond such inaccurate generalizations, I wish to emphasize that no matter what perception one has of a political opponent, the genius of liberal democracy is that speech should be corrected by more speech. When we allow the government to restrict the speech of an adversary, we diminish our own political freedom, for we thereby validate the ability of the government to regulate and control that which is essential to the survival of a democracy, namely, "uninhibited, robust, and wide open" advocacy of conflicting opinions.[117]

No decision of the Supreme Court has squarely decided the constitutionality of the statutory and administrative regulation of the religious activities of churches that touch on political realities.[118] Hence, any discussion of this theme must proceed by analyzing the basic principles of free speech and of religious freedom within the context of government benefits and the withholding of benefits.

Because presenting one's views on matters of public concern to legislators, otherwise known as lobbying, is activity that is clearly protected under the

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115. God Alone is Lord of the Conscience, *supra* note 3, at 34.

116. NAACP v. Button, 371 U.S. 415 (1963).

117. New York Times v. Sullivan, 376 U.S. 254 (1964).

118. It would be a lot easier to refer to the subject matter of this Article as the "political activity" of religious organizations. To do so, however would misunderstand the profoundly religious character and motivation of this activity. For this very reason, religious organizations should avoid the tendency to collapse their message into language that is indistinguishable from that of purely partisan politics.

petition clause of the first amendment,[119] there can be no serious doubt that the government may not *prohibit* the lobbying efforts of religious organizations. Similarly, since the "central meaning" of the first amendment is that political speech is so important to the democracy that it deserves special protection under the free speech and free press clauses, there can likewise be no serious doubt that a statute that actually *forbade* political campaign activity by a religious community would be unconstitutional.

These conclusions seem certain from the following precedents. In *New York Times v. Sullivan,*[120] Justice Brennan wrote that the law of libel had to be modified to accommodate the central meaning of the first amendment: "the profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attack on government and public officials . . . ."[121] In *McDaniel v. Paty,*[122] the Court invalidated a provision in the Tennessee Constitution that prohibited members of the clergy from running for public office. Concurring in *McDaniel,* Justice Brennan observed, "religious ideas, no less than any other, may be the subject of debate which is *uninhibited, robust, and wide open* . . . . [T]hat public debate of religious ideas, like any other, may arouse emotion, may incite, may foment religious divisiveness and strife, does not rob it of constitutional protection."[123] As Justice Powell explained a few days later in *First National Bank of Boston v. Bellotti,*[124] it is not the source of the speech, but the kind of speech that gives rise to special constitutional concern. The kind of speech that is in fact thought more worthy of protection under the free speech clause is political speech, which Justice Powell described as "the type of *speech indispensable to decision making in a democracy.*"[125] Powell noted that "the inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of its source. . . . In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue."[126]

In the face of these seemingly solid precedents, why is it impossible to predict with confidence that the Supreme Court would find the restraints on the activities of religious organizations relating to politics to be unconstitutional? The problem of the constitutionality of section 501(c)(3), and the regulations issued under that statute, is much more subtle than whether the government is

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119. *See, e.g.*, Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

120. 376 U.S. 254 (1964).

121. *Id.* at 270.

122. 435 U.S. 618 (1978).

123. *Id.* at 640 (Brennan, J., concurring) (citing New York Times v. Sullivan, 376 U.S. 254, 270 (1964)).

124. 435 U.S. 765 (1978).

125. *Id.* at 777.

126. *Id.* at 777, 784-88.

prohibiting protected activity.[127] For one thing, the statute and regulations have to do with taxing and refraining from taxing, so the more precise issue is whether Congress may condition the grant of tax-exempt status upon the apparent surrender of civil liberties.[128]

B. *Tax Exemption as a Subsidy*

In my view, the major reason why these restrictions in the tax code are thought permissible in the prevailing wisdom, indeed hardly ever subjected to serious constitutional analysis,[129] is that an exemption from taxation is commonly regarded by economists and budget planners not as merely leaving an exempt organization alone, but as the functional equivalent of a cash *subsidy* from the federal treasury to the exempt organization.[130] Moreover, if tax exemption is regarded as a matter of governmental grace, then the government may condition this benefit on a waiver of constitutional rights. Although the concept of tax expenditures is itself a matter worthy of full-length consideration, some discussion of the understanding of tax benefits as subsidies is necessary here because it is the underlying premise of the whole regulatory apparatus that I have described in this Article.

Once granted, the premise that exemption is a subsidy leads to the conclu-

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127. Precisely because the statute and regulations do not expressly prohibit such activity, some literalists would insist that no free exercise clause issue is presented at all, since that provision states that "Congress shall make no law *prohibiting* the free exercise [of religion]." U.S. CONST. amend. I (emphasis added).

128. For a carefully honed and skillfully argued discussion of whether exempt organizations should be allowed to participate in the formulation of public policy, see Chisolm, *Exempt Organization Advocacy: Matching the Rules to the Rationales*, 63 IND. L.J. 201 (1987). In this article Professor Chisolm notes that the rules limiting system-change advocacy have been devised in "patchwork fashion . . . with no attempt to relate the pieces to a common theoretical foundation." *Id.* at 299. The redrawing of the tax rules that she advocates would reflect more accurately the underlying rationales of the rules, screen out undesired effects, and limit administrative discretion so that the rules would apply evenhandedly. Professor Chisolm has also offered a thorough and judicious treatment of the problems posed by the restraints on political activity by exempt organizations. *See* Chisolm, *Politics and Charity: A Proposal for Peaceful Coexistence*, 58 GEO. WASH. L. REV. 308 (1990); Chisolm, *Sinking the Think Tanks Upstream: The Use and Misuse of Tax Exemption Law to Address the Use and Misuse of Tax-Exempt Organizations by Politicians*, 51 U. PITT. L. REV. 577 (1990); Chisolm & Young, *Introduction, Symposium: What is Charity? Implications for Law and Policy*, 39 CASE W. RES. 653 (1989).

129. The buzzword for this kind of analysis is "strict scrutiny." Whether a reviewing court employs this standard of review or the less strict standard of rationality is, of course, itself a constitutional choice often determined by peeking at the merits of the policy under review. For a valiant attempt to make sense of these standards, see Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

130. For a thorough analysis of this problem as it relates to grants under the spending power, see Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103 (1987). *See also* Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989); *Unconstitutional Conditions Symposium*, 26 SAN DIEGO L. REV. 175 (1989).

sion that religious organizations are free to engage in political speech if they choose to do so, but they must then forego the considerable benefit of tax-exempt status. This was the view adopted by the United States Court of Appeals for the Tenth Circuit in *Christian Echoes National Ministry, Inc. v. United States.*[131] The *Christian Echoes* court suggested that the rationale for such a view was that the federal treasury should not subsidize attempts to influence legislation or to affect a political campaign.[132]

This rationale, however, is seriously undercut by several other provisions in the tax code that were clearly designed to provide a tax benefit for various political activities. For example, I.R.C. § 527 exempts political action committees from income tax on funds used to influence the election of candidates for public office, and until the Tax Reform Act of 1986, I.R.C. § 41 extended a tax credit for contributions to candidates for public office.

Nevertheless, under the *Christian Echoes* rationale, religious organizations are put to the hard choice of speaking out on political issues and paying taxes, or remaining silent and retaining their tax-exempt status. On this view of the law, they have no constitutional right to free speech and tax exemption at the same time. The next section of this Article analyzes this view under the doctrine of unconstitutional conditions. For now, it is enough to note that the Supreme Court did not review the *Christian Echoes* decision, so it did not set a nationally binding precedent.[133]

Neither as a matter of religious principle nor as a requirement of constitutional law may religious bodies claim entitlement to the best of all possible tax worlds. There are several important reasons, however, why the major premise adopted in *Christian Echoes* should not be readily granted.

First, the subsidization theory proves too much. The government may not, of course, purchase one's constitutional rights by extending a grant under the spending power.[134] For example, it may not condition receipt of food stamps on forfeiture of membership in the political party of one's choice. In the leading decision directly relating this teaching to tax benefits, *Speiser v. Randall,*[135] the Court stated:

> It is settled that speech can be effectively limited by exercise of the taxing power. . . . To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech.[136]

As *First Unitarian Church v. County of Los Angeles*[137] (a companion case to

131. 470 F.2d 849 (10th Cir. 1972).

132. *Id.* at 854.

133. Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849 (10th Cir. 1972), *cert. denied,* 414 U.S. 864 (1973).

134. *See, e.g.,* Garvey, *The Powers and the Duties of Government,* 26 SAN DIEGO L. REV. 209 (1989) (symposium issue: unconstitutional conditions).

135. 357 U.S. 513 (1958).

136. *Id.* at 518.

137. 357 U.S. 545 (1958).

Speiser) indicates, the same reasoning applies to religious organizations as to individuals.

Second, although the view of income tax exemption as a subsidy purports to be grounded in the recent case of *Regan v. Taxation With Representation* ("*TWR*"),[138] it ignores other precedential authority. In *Walz v. Tax Commission*, the Supreme Court sustained tax exemption for property used exclusively for religious worship, and expressly repudiated the view that exemption was an impermissible subsidy.[139]

> Granting tax exemptions to churches necessarily operates to afford an indirect economic benefit . . . [but] the grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or employees "on the public payroll."[140]

It is highly significant, moreover, that the *Walz* Court likewise expressly adverted to the reality that "[a]dherents of particular faiths and individual churches frequently take strong positions on public issues including . . . vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right."[141]

Third, the reliance upon the *TWR* case is itself misplaced. It is true that thirteen years after *Walz*, the Court in *TWR* treated tax-exempt status as though it were a subsidy.[142] In this respect, the Court inched toward the position espoused by the *Christian Echoes* court. *TWR*, however, did not involve a religious body attempting to communicate its religious message on matters of public concern, and the Court even cited *Walz* without questioning its precedential value.[143]

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138. 461 U.S. 540 (1983).

139. 397 U.S. 664 (1970).

140. *Id.* at 674-75.

141. *Id.* at 670.

142. Regan v. Taxation With Representation, 461 U.S. 540, 544 (1983).

143. *Id.* at 544 n.5. The Court most recently addressed the meaning of *Walz* in Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 109 S. Ct. 890 (1989). The case produced four separate opinions. A plurality opinion authored by Justice Brennan struck down a tax exemption for religious publications as too narrow to pass muster under the no-establishment clause. *Id.* at 899. The plurality interpreted the property tax exemption in *Walz* as permissible because it included many other nonprofit groups which contributed to intellectual pluralism in the community. *Id.* at 898-99 (plurality opinion).

Justice Scalia wrote a dissent arguing that the plurality opinion relied on Justice Brennan's concurrence in *Walz*, rather than the majority opinion in *Walz*. *Id.* at 909-12 (Scalia, J., dissenting). The dissenters contended that a tax exemption for religious publications was a permissible accommodation of religion. *Id.* at 912 ("The [*Walz*] Court did not approve an exemption for charities that happened to benefit religion; it approved an exemption for religion *as* an exemption for religion." (emphasis in original)).

Justice Blackmun, joined by Justice O'Connor, concurred in the judgment of the plurality. This concurrence did not join the debate over the meaning of *Walz*. Instead, these two Justices sug-

There is another reason why *TWR* is not directly controlling on the validity of restraints on the activities of religious organizations relating to politics. With a nod to *Speiser v. Randall*, the *TWR* Court agreed that "the government may not deny a benefit to a person because he exercises a constitutional right."[144] In other words, the Court agreed that the government may not penalize a taxpayer's exercise of free speech rights. Looking at the economic impact of the deductibility of contributions to an exempt organization for the purpose of influencing legislation, the Court held that the rules governing a section 501(c)(3) organization are not an *invalid penalty*, but merely the *denial of a subsidy*. The Court reached this result because I.R.C. § 501 contains a "saving" feature, namely, section 501(c)(4). Under this provision, TWR could organize a 501(c)(4) affiliate, completely under its control, to carry on its political activities. Under this arrangement, the section 501(c)(3) entity remains exempt from taxation of its income, but may not engage in lobbying or electioneering. The section 501(c)(4) entity is also tax-exempt and is free to engage in political activities, but contributions to a section 501(c)(4) entity are not deductible from the gross income of the contributor/taxpayer.

Without claiming that there is a constitutional right to the deductibility of contributions to religious organizations, I simply note that this "saving feature" of section 501(c)(4) is inapplicable to religious organizations. As I suggested above, when religious organizations "attempt to influence legislation," they are typically engaging in religious activity, speaking to the moral aspects of political issues. To quote again from the Presbyterian statement cited above:

> Such witness flows directly from fundamental faith and is integral to its free exercise. It is essential to the church's identity and mission, and to the moral authority of its pronouncements, that it speak as "church" through its religious structures and leaders. No church can be restricted to speaking on political issues solely through functionaries employed by a political affiliate without violating its faith and calling. Any attempt to segregate a church's political speech from its moral and religious speech fundamentally misunderstands the nature of church speech on political issues. . . . [S]peaking on the moral implications of political issues is a core religious function, protected by the free exercise clause . . . .[145]

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gested that the tax exemption violated the no-establishment clause because it did not apply to atheistic publications. *Id.* at 907 (Blackmun, J., concurring in the judgment). Justice White concurred in the judgment, deciding that the tax exemption is a content-based discrimination that violates the press clause of the first amendment. *Id.* at 905.

Even though Justices Brennan, Marshall, and Stevens fundamentally disagreed with Justices Scalia and Kennedy, and Chief Justice Rehnquist, over the correct interpretation of *Walz*, the *Texas Monthly* case supports tax exemptions for churches in two ways. First, the opinion demonstrates that *Walz* remains good law. Second, even the plurality's reading of *Walz* supports a tax exemption for churches because I.R.C. § 501(c)(3) is far more analogous to the broad exemption for nonprofit groups upheld in *Walz* than the narrow exemption struck down in *Texas Monthly*.

144. *See* Regan v. Taxation With Representation, 461 U.S. 540, 545 (1983).

145. GOD ALONE IS LORD OF THE CONSCIENCE, *supra* note 3, at 36.

In any event, section 501(c)(4) is of no practical use to a preacher who cannot be required to announce at the beginning of a sermon whether he is speaking for a 501(c)(3) church or a 501(c)(4) clone, let alone to switch birettas or yarmulkes in the midst of such a sermon.

Fourth, the tax expenditure theory should not be applied to religious bodies for the very reason that, under the no-establishment clause, religion is not normally a legitimate function of governmental planning or financial support.[146]

Fifth, the legislative history of the original income tax legislation supports the conclusion that the intent of Congress was simply to exclude the income of religious and charitable organizations from the base of taxable income.[147]

C. *Free Exercise Analysis*

It is well settled that religious bodies are afforded additional constitutional protection precisely because of their religious character. The protection of the free exercise clause may be invoked only by persons or groups whose sincerely held *religious* tenets are burdened by governmental action.[148] In *Thomas v. Review Board*,[149] the Court reemphasized its teaching on impermissible burdens on the free exercise of religion:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his belief, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.[150]

The use of the taxing power to inhibit the freedom of religious organizations to announce their message on public policy matters creates just such a burden for many, if not most, religious bodies. For example, the congressional testimony cited above[151] clearly reflects a widespread conviction that participation by religious organizations in legislative matters is required as a matter of religious faith and conviction. This testimony thus demonstrates conclusively that, for many religious bodies, what looks like "political speech" to outsiders is a form of religious ministry for members of the religious body. Hence, a significant burden on this ministry is tantamount to a prima facie violation of the free exercise clause. As Justice Brennan put it in *Sherbert*, "To condition the availability of benefits upon [a religious claimant's] willingness to violate a

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146. *See, e.g.*, Aguilar v. Felton, 473 U.S. 402 (1985); Everson v. Board of Educ., 330 U.S. 1 (1947).

147. *See* Bittker & Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299 (1976); Bittker, *Churches, Taxes and the Constitution*, 78 YALE L.J. 1287 (1969).

148. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963).

149. 450 U.S. 707 (1981).

150. *Id.* at 717-18.

151. *See supra* notes 84-88 and accompanying text.

cardinal principle of . . . religious faith effectively penalizes the free exercise of . . . constitutional liberties."[152] As I have suggested above, under the ever expanding IRS regulations, religious bodies are now subjected to Hobson's choices: either to forego the advantage of exemption or to accept exempt status and thereby forfeit certain political freedoms that may be at the heart of their religious commitments. It was just that sort of false choice between valuable and desirable goals that the Court prohibited in *Sherbert*.

Under standard free exercise analysis, the government might nonetheless prevail in a direct challenge to this statute if it could show that it has utilized the least restrictive means of achieving a truly *compelling governmental interest*.[153] It is difficult to imagine any legitimate governmental interest within a representative democracy in favor of limiting the effectiveness of those who wish to speak about legislative proposals that affect the common weal. Perhaps the interest is one of "neutrality"[154] grounded in the no-establishment principle, according to which the government merely declines to provide financial support to religious groups for their activities relating to politics (note the centrality of the view that exemption is a subsidy).

Whatever interests may underlie the restrictions on political campaigning and lobbying found in I.R.C. § 501(c)(3), as I noted above in my comments on the legislative history of this provision, Congress has not articulated them.[155] To the contrary, as a direct result of the testimony by various representatives of religious bodies cited above, Congress expressly declined to give its approval or disapproval[156] to the *Christian Echoes* case, the only case in which a federal court of appeals attempted to formulate for Congress a rationale supporting these restrictions as applied to a religious organization.[157] Nor has any court found these interests to be truly "compelling" or of "paramount importance."[158]

The restrictions on political speech in section 501(c)(3) are likewise deficient because they are by no means the *alternative least restrictive* of the free

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152. 347 U.S. 398, 406 (1964).

153. *See, e.g.*, Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Thomas v. Review Bd., 450 U.S. 707, 718-19 (1981); Sherbert v. Verner, 374 U.S. 398, 406-09 (1963).

154. For a richly nuanced discussion of the concept of "neutrality" in religion clause jurisprudence, see Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990).

155. As I noted in Section I of this Article, no hearings were held in the House Ways and Means Committee or the Senate Finance Committee before Congress adopted the restraint on lobbying imposed in the 1934 statute or in the Johnson amendment in 1954 banning political campaign activity by exempt organizations.

156. "It is the intent of Congress that enactment of this section [501(h)] is not to be regarded in any way as an approval or disapproval of the decision of the Court of Appeals for the Tenth Circuit in Christian Echoes National Ministry, Inc. v. United States, 470 F.2d 849 (10th Cir. 1972) or of the reasoning in any of the opinions leading to that decision." Tax Reform Act of 1976, Pub. L. No. 84-455, § 1307(b)(3), 90 Stat. 1722.

157. Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1973).

158. Thomas v. Collins, 323 U.S. 516 (1945).

exercise and free speech rights of exempt organizations. It is difficult to imagine a restriction more total than the "absolute prohibition" on *any* participation by a 501(c)(3) organization in a political campaign, whether on behalf of or in opposition to a candidate for public office.[159]

Although I recognize that the constitutionality of the tax statute and regulations governing the activities of exempt religious organizations is subtle and complicated, the reasons I have sketched here have persuaded me that it ill accords with free exercise or free speech jurisprudence to restrain the civil liberties of religious organizations in the way the tax code purports to do. As was suggested by the extensive congressional testimony referred to above, the activities of these religious organizations are almost invariably motivated by deeply held religious convictions. Exempt religious organizations by no means agree with one another about many of the issues on today's political agenda, but they tend to agree strongly that they should have a perfect right to address the underlying moral aspects of these divisive political issues.[160]

The ways in which they might do so represent a continuum with a range of options from undeniably protected speech (such as legislative testimony in response to a committee invitation) to imaginable but highly improbable acts (such as direct coercion of political decisions by ecclesiastical potentates). As I indicated above, long before the Internal Revenue Code there has been a continuous and extensive historical practice in our society that has accorded religion a significant role in American politics.[161] In my view, the prudential deci-

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159. The Service's interpretation of § 501(c)(3) creates an environment in which "churches must act at their peril as they attempt to walk the obscure line between loss of exemption and faithfulness to the obligation to speak out on the moral dimension of important social issues." Caron & Dessingue, *supra* note 92, at 178.

160. GOD ALONE IS LORD OF THE CONSCIENCE, *supra* note 3, at 48-49. The author states:

> Participation in public life implies both support for and criticism of the public order. Religious bodies and people of faith hold to a wide variety of convictions, ideas, and values that make important contributions to the shape and strength of public life. That life has been shaped by individuals and groups that have sought to create new forms, sustain traditional ones, challenge existing ideologies and reform or resist unjust institutions. Participation is thus viewed by the government sometimes as a blessing and at other times as a threat. It is not surprising that many, particularly those who hold power, often prefer less participation by citizens and groups in the public arena, including those motivated by religious convictions, or at least wish that such participation be limited to a supportive role.
>
> The participation of church bodies and believers in public life has seldom gone uncriticized or unchallenged and that is perhaps more true today than ever. Religious groups have participated vigorously on both sides of public policy debates on Central America and abortion, in the face of internal criticism and public challenges, both legal and rhetorical.

Id.

161. As Dean Kelley, the executive for religious and civil liberty of the National Council of Churches, has observed:

> Churches are bound by their sense of mission, their consecrated obedience to God, to speak out on issues where the well-being of persons is at stake, to proclaim what they believe is the right and moral course for the whole society and what will benefit everyone, not just themselves or their members. Churches were doing this sort of thing

sion as to where to draw the line along this continuum is more properly made by the speakers rather than by the government.

The free exercise precedents upon which I rely here are those which established that restraints on religious freedom are permissible only if the government can show that the denial of accommodation of the religious interest is required by a truly compelling governmental interest that cannot be served by less restrictive means. That line of authority began in *Sherbert v. Verner*.[162] The claim can be made that *Sherbert* has been limited to its facts in the recent decision in *Employment Division, Department of Human Resources v. Smith*, where five Justices abandoned the compelling interest standard and ruled that "an individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[163] Notwithstanding the severe blow to effective judicial protection that the *Smith* case represents, the discussion in this Article of the problems posed to religious organizations by the restraints found in I.R.C. § 501(c)(3) may be taken to offer reasons why Congress ought to liberate religious organizations from those restraints of the tax code. This approach to the problem, moreover, is not entirely inconsistent with the view of Justice Scalia, who wrote in *Smith*:

> Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes that the negative protection accorded to the press in the first amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.[164]

Although I profoundly disagree[165] with Justice Scalia about the degree of "negative protection" that the first amendment affords to religious faith and practice,[166] I quite agree that, when the judiciary has so narrow a view of

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before there were legislatures or lobbies, and they will continue to do so—despite whatever odds or obstacles—as long as there are churches.

D. KELLEY, WHY CHURCHES SHOULD NOT PAY TAXES 86 (1977).

162. 374 U.S. 398 (1963).

163. 110 S. Ct. 1595, 1600 (1990) (rejecting legitimacy of claim for unemployment compensation benefit by Native American terminated because of sacramental use of peyote).

164. *Id.* at 1606.

165. I was one of scores of law professors who signed the unsuccessful petition for rehearing in this case. Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595, *reh'g denied*, 110 S. Ct. 2605 (1990). *See* Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief That Was Never Filed*, 8 J.L. & RELIG. ___ (1990).

166. One reason for my disagreement with Justice Scalia is my view that the judiciary was intended from the beginning to check the excesses of governmental power claimed by the political branches. *See, e.g.*, McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1449-1503 (1990). Another reason is that history has repeatedly demonstrated that the political branches of government cannot safely be trusted to secure the rights of unpopular minorities against ugly majoritarian impulses. *See, e.g.*, G. MYERS, HISTORY OF BIGOTRY IN THE UNITED STATES (H. Christman ed. 1960). Justice Scalia himself acknowl-

constitutional liberty, it is appropriate to turn to the political branches for more effective protection. That, in fact, is what the religious community has done in the wake of *Smith*. Within weeks after the decision was announced, the Religious Freedom Restoration Act of 1990 was introduced in Congress to create a federal statutory claim to freedom of religious exercise at least as secure as that afforded under judicial doctrine before *Smith*.[167] Although it is premature to suggest that this legislation will be enacted promptly, at least it is safe to state that the rumors of the demise of the compelling governmental interest standard for protecting religious liberty are, to use Mark Twain's phrase, "greatly exaggerated."

VII. WHO MAY ENFORCE THE TAX CODE'S RESTRAINTS ON POLITICAL ACTIVITIES OF RELIGIOUS ORGANIZATIONS?

The question of who may enforce the tax code's restraints on the political activities of religious organizations was brought to court in 1980. A coalition of organizations that provide abortion services, as well as a group of individual plaintiffs in their capacities as voters or as members of the clergy, sued the Secretary of the Treasury and the United States Catholic Conference.[168] Known as the *Abortion Rights Mobilization* ("*ARM*") case because of the name of the lead plaintiff, this lawsuit lasted over a decade before it came to an end in 1990.[169] The relief sought in this lawsuit was that the federal court would order the IRS to revoke the tax-exempt status of the United States Catholic Conference and the National Conference of Catholic Bishops, the civil and canonical entities under which the hierarchy of the Roman Catholic Church in this country is structured. The basis for the complaint was that various church officials had made pronouncements relating to abortion, including alleged statements urging the faithful not to vote for particular candidates.[170]

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edges, in a grossly understated way, the nature of the difficulty: "It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in . . . . " *Smith*, 110 S. Ct. at 1606.

167. H.R. 5377, 101st Cong., 2d Sess. (1990). Similar legislation will also be introduced in the Senate.

168. For an account of the plaintiffs' perspectives in this case, see L. LADER, POLITICS, POWER AND THE CHURCH (1987).

169. Abortion Rights Mobilization, Inc. v. Regan, 544 F. Supp. 471 (S.D.N.Y.), *certification denied*, 552 F. Supp. 364 (S.D.N.Y. 1982); Abortion Rights Mobilization, Inc. v. Regan, 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), *aff'd sub nom*, *In re* United States Catholic Conference, 824 F.2d 156 (2d Cir. 1987), *rev'd sub nom.* United States Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72 (1988) (remanding for determination of standing of plaintiffs), *on remand*, 885 F.2d 1020 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1946 (1990).

170. *See* Plaintiffs' Amended Complaint ¶¶ 19-28 at 6-9, Abortion Rights Mobilization, Inc. v. Regan, 544 F. Supp. 471 (S.D.N.Y. 1982). The plaintiffs alleged that pastors had endorsed candidates, collected money for right to life activities, and had distributed leaflets on abortion within parish bulletins, all allegedly because of a Pastoral Plan for Pro-Life Activities adopted by the NCCB in 1975. This document called for pastoral, educational, and public policy initiatives to

After years of costly litigation, the Supreme Court ruled unanimously in 1988 that the church was at least entitled to challenge the jurisdiction of the court that had imposed coercive fines in the amount of $100,000 a day on the church for its refusal to hand over massive amounts of sensitive internal documents to outsiders.[171] In 1989, the United States Court of Appeals for the Second Circuit dismissed the *ARM* case for lack of standing.[172] The plaintiffs then sought review in the Supreme Court, but the Court denied the writ of certiorari.[173]

The suit's potential consequences for religious organizations were severe.[174] The major legal barrier to such lawsuits is the technical and often conflicting rules of standing to sue.[175] It is not necessary to discuss the intricacies of this area of the law, but three basic concepts about standing must be appreciated in order to grasp the significance of the *ARM* case.

The first major concept about standing is that it serves as a restraint on judicial power.[176] For example, taxpayers do not generally have enough of a stake in the outcome of a lawsuit to challenge congressional acts with which they disagree.[177] If the rule were otherwise, virtually every piece of legislation would be subject to challenge in federal court by a disgruntled taxpayer, an outcome that would give the judiciary much greater authority over public policy than our system of separated and limited powers contemplates.[178] After the

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change attitudes and the law relating to abortion.

171. United States Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72 (1988) (remanding for determination of standing of plaintiffs).

172. *In re* United States Catholic Conference v. Abortion Rights Mobilization, 885 F.2d 1020 (2d Cir 1989), *cert. denied*, 110 S. Ct. 1946 (1990).

173. *Id.*

174. Contrary to the view in Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970), that the first amendment needs "play in the joints" in order to function smoothly, the view of the plaintiffs called for inflexibility and rigidity. This seems apparent by their conduct of the litigation, which sought vast amounts of sensitive internal religious records. It likewise seemed to be the stated purpose of the suit, which was to give any opponent of the teachings of a religious body access to federal court to seek an injunction to compel the revocation of that church's exemption from the payment of federal income tax, resulting in a series of cascading events flowing from the loss of that status. With the loss of exempt status under I.R.C. § 501(c)(3), a religious body would not only have to pay taxes on all net income, but all contributions to the church would no longer be deductible by the contributing taxpayer who itemizes. I.R.C. § 170(c)(2)(D). It would also have consequences for the administration of federal estate tax, I.R.C. §§ 2055(a)(2) and 2106(a)(2)(A)(ii), and federal gift tax, I.R.C. § 2522(a)(2). In addition, most of the states have parallel provisions in their tax codes which incorporate I.R.C. § 501(c)(3) by reference, for purposes of determining the exemption of a religious body from payment of a wide variety of state and local taxes. Some states, moreover, predicate their regulatory authority over an entity seeking charitable contributions on the entity's federal tax-exempt status, conferring, for example, an exemption from annual reporting requirements to groups which are exempt under § 501(c)(3).

175. *Compare* Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464 (1982) *with* Flast v. Cohen, 392 U.S. 83 (1968). For a further discussion of the tension between these cases, see *infra* note 181.

176. E. CHEMERINSKY, FEDERAL JURISDICTION § 2.3.1, at 49-50 (1989).

177. Frothingham v. Mellon, 262 U.S. 447 (1923).

178. In Flast v. Cohen, 392 U.S. 83 (1968), the Court acknowledged that the standing require-

outpouring of public outrage against the Court's sensible rulings on school prayer in the 1960s,[179] however, the Court modified the general rule on taxpayer standing in *Flast v. Cohen,*[180] allowing a taxpayer to sue to prohibit a congressional *expenditure* that seems to violate the no-establishment provision of the religion clause.[181]

Another major concept is that the limitation on judicial power that is relevant to the *ARM* case is not simply a policy of judicial self-restraint that arises out of prudential concerns, but is required by the text of the federal constitution. Article III limits the jurisdiction of federal courts to "cases or controversies." According to a leading decision construing this provision, *Simon v. Eastern Kentucky Welfare Rights Organization,*[182] a plaintiff suing in federal court must demonstrate actual or threatened injury that can fairly be "traced to the challenged action," and that "is likely to be redressed by a favorable decision."[183] William Simon was sued in his official capacity as Secretary of the Treasury because he had removed from the tax regulations the requirement that exempt hospitals provide below-cost health care to indigents. The suit sought either restoration of below-cost health care or revocation of the tax-exempt status of third party organizations that provided health care. The Supreme Court dismissed the case because it found no causal link between the Revenue Ruling and a reduction in services to the indigents on whose behalf the welfare rights organization was suing. Justice Powell wrote that "[i]t is purely speculative whether the denials of service specified in the complaint fairly could be traced to petitioners' encouragement or instead result from decisions made by the hospitals without regard to the tax

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ment limits the jurisdiction of federal courts "to those disputes which confine federal courts to a role consistent with a system of *separated powers* and which are traditionally thought to be capable of resolution through the judicial process," *id.* at 97, but stated that standing did not, "by its own force, raise separation of powers problems." *Id.* at 100. After some hints in the 1970s that this theme was significant in standing doctrine, *see, e.g.,* Warth v. Seldin, 422 U.S. 490, 498-500 (1975); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220-27 (1974), the Court adopted the position in Allen v. Wright, 468 U.S. 737, 750 (1984), that separation of powers is the "single basic idea" on which the standing doctrine is built.

179. Abington Township School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962). For an account of the popular reaction to these decisions, see generally K. DOLBEARE & P. HAMMOND, THE SCHOOL PRAYER DECISIONS: FROM COURT POLICY TO LOCAL PRACTICE (1971); W. K. MUIR, PRAYER IN THE PUBLIC SCHOOLS: LAW AND ATTITUDE CHANGE (1967).

180. 392 U.S. 83 (1968).

181. The *Flast* Court held that the plaintiff must show both a Congressional expenditure under the taxing and spending clause of the Constitution and a "nexus" to a specific constitutional limit on the taxing and spending power. *Id.* at 102. The *Flast* exception to the general prohibition of taxpayers' suits is quite narrow. *See* Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 478-80 (1982) (*Flast* does not apply to actions by executive agency or to Congressional exercise of power under the property clause). For criticism of the distinctions drawn in *Valley Forge,* see E. CHEMERINSKY, *supra* note 176, § 2.3.5, at 82; L. TRIBE, AMERICAN CONSTITUTIONAL LAW 128 (2d ed. 1988).

182. 426 U.S. 26 (1976).

183. *Id.* at 38, 41.

implications."[184]

Allen v. Wright[185] is another standing decision that is crucial to the understanding of the *ARM* case. In fact, it is in many respects quite similar. In *Allen*, the plaintiffs attempted to compel the Commissioner of Internal Revenue to revoke the federal tax-exempt status of private schools that maintained a policy of racial discrimination in student admissions.[186] Despite the fact that the IRS had issued clear administrative rules governing this matter, the Court refused to allow taxpayers to bring suit in federal court to enforce those guidelines.[187] Justice O'Connor wrote that even if a plaintiff has sustained an injury, standing is still deficient where "the injury alleged is not fairly traceable to the Government's conduct . . . challenge[d] as unlawful."[188] As in *Simon*, the *Allen* Court reasoned that it was "entirely speculative whether withdrawal of the tax exemption of racially discriminatory schools would have any impact on the ability of [the plaintiffs'] children to receive a desegregated education."[189]

The third concept of standing useful to the analysis of the *ARM* case is that although Congress may not confer standing where the Constitution forbids it, it may confer standing where merely prudential considerations may have led federal judges to deny standing.[190] Although the *ARM* plaintiffs did not claim statutory standing, the basic posture that they maintained throughout the litigation was that of a private attorney-general seeking to compel enforcement of the tax law against a third party. Far from conferring statutory standing on private parties like the *ARM* plaintiffs, however, Congress has given several indications in the tax code that support the opposite conclusion.[191] In short, Congress plainly intended the administration of the code, including the granting and revocation of exempt status under section 501(c)(3), to be within the discretion of the federal officials in the IRS over whom Congress has a great deal of control through the oversight process, rather than within the boundless imagination of plaintiffs seeking to enforce their notions of tax equity in the

184. *Id.* at 42-43.

185. 468 U.S. 737 (1984).

186. *Id.* at 746-47.

187. *Id.* at 747.

188. *Id.* at 757.

189. *Id.* at 758.

190. E. CHEMERINSKY, *supra* note 176, § 2.3.1, at 52.

191. In the Anti-Injunction Act, I.R.C. § 7421(A), Congress prohibited suits to restrain assessment or collection of any tax, whether brought by a taxpayer or, as here, by a third party. Congress has delegated the administration and enforcement of the tax laws exclusively to the Secretary and the Commissioner. I.R.C. § 7801(a). In addition, Congress gave to the federal respondents the power to "prescribe all needful rules and regulations for the enforcement of" those laws. I.R.C. § 7805(a). And Congress reserved for itself the task of overseeing the enforcement of the revenue laws by creating a Joint Committee on Taxation to investigate the administration, operation, and effects of the tax system. I.R.C. §§ 8001-8023. These provisions reflect congressional intent to operate the tax system within the legislative and executive branches. Congress, moreover, has expressly mandated that the IRS maintain the confidentiality of tax records, I.R.C. § 6103, and out of concern for the delicate character of religious freedom, Congress has expressly limited the power of the IRS to conduct audits of church bodies. I.R.C. § 7611.

federal courts.[192]

One of the reasons why Congress has entrusted delicate decisions concerning the exempt status of religious organizations to officials in the IRS is that they take an oath of office to support the constitutional limits on their own authority. Private litigants with their own agenda are under no such obligation to take into account the protections of the first amendment. If the *ARM* case is any indication, the likelihood that disgruntled third parties will be sensitive to the free exercise and free speech concerns of religious organizations they oppose is slim. To the contrary, the probability that religious organizations will become the target of third parties hostile to their religious perspective is high.

With this much of an introduction to the law of standing, it is possible to apply these principles to the *ARM* case. Judge Robert Carter, the judge who presided over the case at the trial level, denied *taxpayer* standing to the plaintiffs, but ruled that they had standing, either as *voters*[193] or as members of the *clergy*[194] to challenge the tax-exempt status of a major religious denomination. The basis for this ruling was that, by failing to revoke the church's exempt status, the IRS had allegedly "denigrated" the plaintiffs' religious beliefs and "frustrated" their ministry by giving "tacit government endorsement of the Roman Catholic Church view of abortion."[195]

A. Voter Standing

Ignoring the dictates of *Simon* and *Allen,* Judge Carter conferred standing on the plaintiffs in their capacity as voters on the view that they had somehow been disadvantaged by the "preferential treatment" of the church by the IRS. The fallacious premise for this view is that taxed contributions translate into less voting power than nontaxed contributions. This analysis is flawed for two reasons. First, the plaintiffs experienced no cognizable *injury* in their capacity as voters. The actual voting power of each individual plaintiff at the polling place is not in the least restricted by campaign activities, whether conducted by taxed or tax-exempt organizations. Unlike the diluted political strength of the voters who sued successfully in *Baker v. Carr,*[196] the major redistricting case of the Warren Court era, the votes of the plaintiffs in the *ARM* case are

192. Even when suits to compel the executive branch to undertake enforcement committed to its discretion are "premised on allegations of several instances of violations of law, [they] are rarely if ever appropriate for federal-court adjudication." Allen v. Wright, 468 U.S. 737, 759-60 (1984). Noting that an agency decision regarding enforcement proceedings "has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed,'" Heckler v. Chaney, 470 U.S. 821, 832 (1985) (citing U.S. CONST. art. II, § 3), the Court has emphasized that executive agency decisions *not to enforce* are characteristically unsuitable for judicial resolution because this discretionary choice "often involves a complicated balancing of a number of factors which are peculiarly within its expertise." *Id.* at 831.

193. Abortion Rights Mobilization, Inc. v. Regan, 544 F. Supp. 471, 480-82 (S.D.N.Y. 1982).

194. *Id.* at 478-79.

195. *Id.* at 480.

196. 369 U.S. 186, 208 (1962).

no less significant than that of other voters.

Second, even if it were assumed that the *ARM* plaintiffs had suffered some palpable injury to their rights of franchise, the injury was not *caused* by the actions of the government, as it was in *Baker v. Carr* through the refusal of the Tennessee legislature to redraw voting district lines for over six decades. The injury claimed by the *ARM* plaintiffs is the purported "added influence" that the Catholic Church has because of deductible contributions which it may spend on campaigns opposing abortion. This claimed injury is actually traceable neither to the IRS nor even to the church itself, but to third party taxpayers who choose voluntarily to make charitable contributions to the church. It is purely conjectural to believe that taxing these charitable gifts will diminish in any significant way the voluntary giving to that church.[197] It is still more speculative to imagine that taxing these gifts would decrease in any significant way that church's efforts to influence abortion policy in this country, for the church's campaign against abortion is grounded in sincerely held religious beliefs. Because the claimed injury to voting rights is not a cognizable injury that is traceable to governmental action or redressable by a court order, it is insufficient to confer standing on private parties in their capacity as voters to challenge the exempt status of a religious organization.

The remedy sought by the plaintiffs as voters, moreover, does not advance the first amendment goal of affording more voices to be heard in our democracy. To the contrary, it seeks to penalize those who espouse a viewpoint on a public controversy different from their own. It would thus have the effect of diminishing the flow of information to voters and to elected representatives. Allowing voters to resort to the courts to revoke the exempt status of a religious body because of its dissemination of views on matters of public concern has the inevitable effect of chilling the expression of moral views that clearly relate to public policy choices, even if the voter-plaintiffs stoutly maintain that they are not opposed to dissemination of opposing viewpoints.[198] Although Dean Ely and others have advanced sound arguments for allowing voters greater access to the judiciary in order to ensure *fuller participation* in the political process by all,[199] it makes no sense to expand the power of the nonpolitical branch to issue rulings that have the effect of chilling or *diminishing the pluralistic character of debate* on matters of public concern. For this reason as well, the conclusion that the *ARM* plaintiffs had standing as voters to challenge the exempt status of the church was flawed.

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197. The hypothetical character of the plaintiffs' claim is underscored by the fact that the majority of taxpayers (60.8% in tax year 1985) do not itemize charitable contributions, but prefer to take the standard deduction. IRS STATISTICS OF INCOME DIVISION BULLETIN 1 (Winter 1986-1987). With the increase of the standard deduction in the Tax Reform Act of 1986, tax analysts expect a further decrease in the number of taxpayers who itemize.

198. The ramifications of the view espoused by the *ARM* plaintiffs are potentially broad, affecting the exempt status of nonreligious charitable organizations that engage in controversial activities.

199. *See, e.g.*, J. ELY, DEMOCRACY AND DISTRUST 105-25 (1980).

B. Clergy Standing

Judge Carter also conferred standing on the individual plaintiffs in *ARM* who were members of the clergy. He did so on the view that the activities of the church violated the rights of these clergy plaintiffs secured under the establishment clause. This conclusion is erroneous for three reasons. First, as the Supreme Court made clear in *Valley Forge Christian College v. Americans United for Separation of Church and State,*[200] the mere fact that a plaintiff seeks relief under the establishment clause does not mean that the normal requirements for standing are diminished. Important as the prohibition against governmental establishment of religion is in our society, it nonetheless remains true that not "all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions."[201]

Second, as I mentioned above, a plaintiff must show direct and palpable injury caused by the illegal conduct of the defendant, not mere psychological distress produced because one's view of the constitutional order has been offended. Thus, in *Valley Forge,* the Court held that the plaintiffs lacked standing because they "fail[ed] to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees."[202] Similarly, in *Allen,* the Supreme Court denied standing to black parents who claimed that they suffered "stigmatic" injury because of the tax-exempt status of segregated private schools, on the view that the alleged injury was too abstract to fulfill standing requirements.[203]

Mere mechanical pleadings raising claims of abstract stigmatic injury are not enough to expose a not-for-profit religious organization to costly litigation initiated by its ideological adversaries. The claimed injury to the clergy in this case was as intangible as the "psychological" injury found insufficient to confer standing in *Valley Forge* and the "abstract stigmatic" injury addressed in *Allen.* The extent of the "injury" to these members of the clergy is easy to assert, but difficult if not impossible to prove or disprove. It is hard to imagine how the ability of the clergy plaintiffs to minister to their flocks could be helped in any significant way by the outcome of this litigation. They were not in the position of an entity that had lost its exempt status and had gone to court seeking restoration of that status. Rather, they went to court seeking the revocation of the exempt status of a third party.

Third, the substantive theory of the plaintiffs' argument in *ARM* was based on the view that the restrictions imposed by I.R.C. § 501(c)(3) on activities of religious organizations relating to politics are required by the first amendment.[204] It is contrary to the clear teaching of the *Walz* case to suppose that

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200. 454 U.S. 464 (1982).

201. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227 (1974).

202. Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 485 (1982) (emphasis in original).

203. Allen v. Wright, 468 U.S. 737, 754-56 (1984).

204. Plaintiffs' Amended Complaint, ¶¶ 16, 17, Abortion Rights Mobilization, Inc. v. Regan,

the grant of tax-exempt status to a religious body constitutes, as the district court imagined, impermissible "government endorsement of the Roman Catholic Church view of abortion" or "official approval of an orthodoxy."[205] And it is equally fanciful to suppose that the Secretary of the Treasury and the Commissioner of the IRS impliedly "denigrated" the religious beliefs of the plaintiffs who are members of the clergy or have in any way "frustrated" their ministry by leaving the Catholics alone. Although the plaintiffs who are clergy members may subjectively feel that their beliefs are "denigrated" by the tax-exempt status of the Catholic Church, that is not enough to establish standing under the Court's teaching in either *Simon* or *Allen*. It is equally speculative to conclude, as the district court did, that the revocation of the tax-exempt status of a religious body necessarily marks its decline in influence. This belief ignores the myriad factors that influence the moral vitality and decline of a religious community.[206]

Like others who either favor or oppose abortion (with many shades of grey in between those two stark alternatives), the *ARM* plaintiffs have first amendment protection in advocating their views. Those who supported the Catholic Church in the *ARM* case included Jews and Christians who agree with the Catholic Church's official teaching on abortion, as well as Jews and Christians who emphatically do not agree with that teaching.[207] This diversity among religious bodies demonstrates, at the very least, that the moral teaching of various religious bodies on abortion has not been contingent upon the teaching of the Catholic Church on this matter, let alone on the even more attenuated question of whether that church enjoys tax-exempt status. As Judge Dooling wrote in the Hyde Amendment case:

> [I]t is clear that the healthy working of our political order cannot safely forego the political action of the churches, or discourage it. The reliance, as always, must be on giving an alert and critical hearing to every informed voice, and the spokesmen of religious institutions must not be discouraged nor inhibited by the fear that their support of legislation, or explicit lobbying for such legislation, will result in its being constitutionally suspect.[208]

For the reasons that I have presented here, I am convinced that if the task

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544 F. Supp. 471 (S.D.N.Y. 1982).

205. 544 F. Supp. 471, 480 (S.D.N.Y. 1982).

206. *See, e.g.*, D. KELLEY, WHY CONSERVATIVE CHURCHES ARE GROWING (1977).

207. For example, in joining an amicus curiae brief filed in the Supreme Court in the *Abortion Rights Mobilization* case, the Stated Clerk of the Presbyterian Church (U.S.A.) noted:

> The policies established by the General Assembly of the Presbyterian Church (U.S.A.) are not in agreement with the views of the petitioners [United States Catholic Conference] with regard to matters of abortion rights and pro-life issues, but are in substantial agreement with the views on constitutional rights and religious liberty expressed in this brief.

Brief Amicus Curiae of National Council of Churches, No. 87-416, at App. 2, United States Catholic Conference v. Abortion Rights Mobilization, Inc., 484 U.S. 975 (1987).

208. McRae v. Califano, 491 F. Supp. 630, 741 (E.D.N.Y.), *rev'd on other grounds, sub nom.* Harris v. McRae, 448 U.S. 294, *reh'g denied*, 448 U.S. 917 (1980).

of revocation of the exempt status of a religious organization because of its activities relating to politics is to be exercised at all, it should be by the IRS rather than by federal judges acting at the behest of the opponents of the religious organization.[209] If the appellate court had not repudiated the standing rule adopted by Judge Carter in the *ARM* case, it could easily have opened up the floodgates to litigation against churches by those hostile to their mission or ideas.[210]

The potential for mischief of this sort, moreover, is compounded by the suggestion in *Bob Jones University v. United States*,[211] that a religious organization may lose its exempt status by failing to conform with "public policy,"[212] or by failing to "be in harmony with the public interest."[213] The district court's approach to standing in *ARM*, moreover, is not limited to religious not-for-profit organizations, but could readily affect exempt charitable organizations that are secular in character. For example, a member of the Ku Klux Klan who is a registered voter could sue the Secretary of the Treasury to revoke the exempt status of the NAACP Legal Defense and Education Fund if the civil rights education fund were to participate in voter education deemed impermissible under the restrictive regulations on voter education discussed in Part II of this Article. Similarly, opponents and proponents of gun control could use the courts, rather than the halls of Congress and other legislative chambers, to carry on their debates. Even if their suits were ultimately dismissed on the merits, they would have at least succeeded in obtaining valuable information about their opponents that would otherwise be unavailable to them.

Finally, even if lawsuits such as the *ARM* case are eventually decided on the merits in favor of the religious body attacked by private parties in the court, significant harm to religious freedom may result, as the *ARM* case itself illustrates, from subjecting the religious body to inquiries which violate the legitimate autonomy of the religious body. The cost of defending such suits, moreover, represents a significant diversion of funds earmarked for charitable

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209. I do not deny that there is some room for meaningful judicial review of agency determinations. For example, a different case would be presented if the IRS had wrongfully denied exempt status to a religious organization because of the administration of the statute with "an evil eye and an unequal hand." Yick Wo v. Hopkins, 118 U.S. 356 (1886); *see also* Larson v. Valente, 456 U.S. 228 (1982) (invalidating state charitable solicitation statute that was purposefully designed to treat an unpopular religious group unequally).

210. *See, e.g.*, Khalaf v. Regan, 85-1 U.S. Tax Cas. (CCH) ¶ 9269 (D.D.C. 1985), *aff'd*, No. 85-5274 (D.C. Cir. Sept. 19, 1986) (dismissing on standing principles effort of anti-Zionist organization to revoke exempt status of Jewish charitable organizations because of their support of Israel); American Soc'y of Travel Agents, Inc. v. Blumenthal, 566 F.2d 145 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 947 (1978) (dismissing on standing principles attack on exempt status of American Jewish Congress by business competitors).

211. 461 U.S. 574 (1983).

212. *Id.* at 586.

213. *Id.* at 592. *But see id.* at 606-12 (Powell, J., concurring) (rejecting suggestion that "primary function of exempt organizations is to act on behalf of the Government in carrying out governmentally approved policies").

works. Religious bodies do not normally construe the biblical command to feed the hungry[214] to refer primarily to lawyers. At the very least, such diversion of funds cannot be justified on the basis of protecting litigants whose tax liability is not at issue, and will not be affected by the outcome of the litigation.

VIII. CONCLUSION: THE PROSPECT OF REPEAL OF THE RESTRAINTS IN THE TAX CODE ON THE ACTIVITIES OF RELIGIOUS BODIES RELATING TO POLITICS

I have discussed elsewhere that Lutherans and Baptists were willing to mount a legal challenge to the tax regulations governing an "integrated auxiliary of a church."[215] They prevailed in the claim that the regulation interfered with the church's understanding of its ministry and mission. It is conceivable that some religious organization may plan similar test-case litigation to challenge the constitutionality of the restraints imposed on exempt religious organizations that are described in this Article. For example, the General Assembly of the Presbyterian Church (U.S.A.) affirmed the following proposition in 1988:

> We oppose attempts by government to limit or deny religious participation in public life by statute or regulation, including Internal Revenue Service regulations on the amount or percentage of money used to influence legislation, and prohibition of church intervention in political campaigns. We will join with others, as occasion permits, to seek repeal of such regulations and statutes, or a definitive ruling by the Supreme Court on their constitutionality.[216]

If litigation is filed seeking a definitive ruling on the constitutionality of I.R.C. § 501(c)(3) and the IRS regulations promulgated under it, arguments along the lines sketched in this Article will undoubtedly be offered to the Court.

It is by no means clear, however, that such litigation is likely. For one thing, the costs of litigation can be severe. Furthermore, the stakes—including potential loss of exempt status for the litigant—are very high. Three tendencies in the present Court suggest that there is at least a very good possibility that the offending statute and regulations would be sustained. First, the Court has indicated in *TWR* that it has drifted toward acceptance of the view that an exemption is a subsidy.[217] Second, the Court has not been very generous with free exercise claims outside of the narrow fields of unemployment compensation benefits for sabbatarians and exemptions from military duty for conscientious objectors.[218] Third, a majority of the Court has a self-restrained view of

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214. *E.g.*, *Isaiah* 58:7; *Matthew* 25:35.

215. *See* Gaffney, *Governmental Definition of Religion: The Rise and Fall of the IRS Regulations on an "Integrated Auxiliary of a Church,"* 25 VAL. U.L. REV. ____ (1991).

216. GOD ALONE IS LORD OF THE CONSCIENCE, *supra* note 3, at 52.

217. Regan v. Taxation With Representation, 461 U.S. 540, 544 (1983).

218. The unemployment compensation cases are: Frazee v. Illinois Dep't of Employment Sec., 109 S. Ct. 1514 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987);

its constitutional mission, according to which great deference is given to the determinations of the coordinate political branches. Almost an extreme example of this tendency was the Court's willingness in *Goldman v. Weinberger* to allow the military to expel an Orthodox Jew who insisted on wearing a yarmulke under the normal uniform cap.[219] In light of considerations like these, there is a certain wisdom in the Presbyterian statement's putting the option of seeking a definitive ruling from the Supreme Court last.

Perhaps the first path to explore is the administrative path. Ever since the "integrated auxiliary" episode, IRS officials and religious leaders have institutionalized contact with one another that enables both the regulators and the regulated to communicate their needs clearly and effectively. This channel may continue to be explored so that the more offensive of the Revenue Rulings may be revoked by the Service without the need for costly and protracted litigation, such as that the churches engaged in as plaintiffs in the contest over the "integrated auxiliary" issue or as a target for a revocation action brought by private parties in the *ARM* case.

But at some point in the conversation, the most cordial official in the executive branch is bound to say, "My hands are tied by the statute." At that point the forum clearly must be shifted to the legislative branch. There are, however, some problems with initiating much of a dialogue with Congress on the subject at the present time. In general, Congress rarely looks back on a policy

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Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963). There have been some victories for free exercise claimants outside of this area. *See, e.g.,* Wisconsin v. Yoder, 406 U.S. 205 (1972). The cases in which free exercise claims have been rejected have been considerable. *See, e.g.,* Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595 (1990); Jimmy Swaggart Ministries v. Board of Equalization, 110 S. Ct. 688 (1990); Hernandez v. Comm'r, 109 S. Ct. 2136 (1989); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); Bowen v. Roy, 476 U.S. 693 (1986); Goldman v. Weinberger, 475 U.S. 503 (1986) (effect nullified by subsequent legislation); Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290 (1985); Bob Jones Univ. v. United States, 461 U.S. 574 (1983); United States v. Lee, 455 U.S. 252 (1982).

In *Lee* the federal government prevailed against a challenge to the imposition of Social Security tax on Amish employers whose employees did not participate in Social Security benefits because of religious principle. United States v. Lee, 455 U.S. 252, 260-61 (1982). For the view that the *Lee* Court "weaken[ed] both aspects of the required state showing," see L. TRIBE, *supra* note 181, at 1260-61. As a result, the interest of the government in maintaining a fiscally "sound" tax system, or a "fair" one, has been elevated virtually to the level of a "compelling" interest that overrides any religious claims, including the claim to an immunity from sales and use tax for distribution of religious literature to members of one's own religious organization. Jimmy Swaggart Ministries v. Board of Equalization, 110 S. Ct. 688, 695-96 (1990).

In the context of conscientious objection to military service, see Gillette v. United States and Negre v. Larsen, 401 U.S. 437 (1971), where the Court rejected a free exercise objection to mandatory participation in war on the view that differentiating among claims of selective conscientious objectors would impose too heavy a burden of administrative inconvenience on the government. That result misses the point that the purpose of the free exercise clause is to prevent the government from imposing excessive burdens on religious claimants. One can scarcely imagine a heavier burden on a sincere pacifist than to be compelled either to kill in the name of the nation-state or to go to jail for refusing to do so.

219. 475 U.S. 503 (1986).

designed to further incumbency in office. In particular, it has not demonstrated any willingness to reconsider the wisdom of the section 501(c)(3) restraints. To the contrary, some members of Congress have even affirmed the efforts of the IRS to expand controls over religious organizations, typically because of alleged "abuses" of the exempt status that are deemed violations of the "wall of separation of church and state." Will Rogers used to say that one of the problems with asking Congress to do something for you is that it might write a law. As the churches found out with the tax code amendments enacted in 1934 and 1954, personal pique can become public policy pretty swiftly, without hearings or debate, and without even a hint that the churches which will bear the brunt of the regulation had anything to do with the provoking "problem" that the "legislation" was designed to fix.

Despite all these potentially ill omens for repeal of section 501(c)(3), there are some indications that the time may be ripe to explore just that possibility. For one thing, the climate for discussion of this change is better now than it was five years ago. This is due in no small measure to the efforts of the Williamsburg Charter Foundation to open up a new dialogue about the role of religion in public life. The charter document, which has been published in the Congressional Record,[220] was reviewed carefully by politicians on both sides of the aisle in the Senate and the House. The leadership of both parties committed themselves to a fresh understanding that "the No Establishment Clause separates Church from State but not religion from politics or public life,"[221] and that religious bodies, no less than secular organizations and individuals, should enjoy the full benefit of civil liberties in this country.

Long before the recent efforts of the Williamsburg Charter Foundation, the tendency of Congress to accept its own constitutional responsibility to secure religious freedom is illustrated in several statutes that grant more by way of accommodation of religious interests than the judiciary has thought to be required under the free exercise clause.[222] For example, the Court did not have the last word on the issue raised in the *Goldman* case; Congress did. After the Court issued its ruling in *Goldman*, religious organizations, primarily Jewish agencies, prevailed upon Congress to enact legislation enabling members of the military to wear unobtrusive religious symbols, including yarmulkes, along with their military uniform.[223] I have also referred above to the prospect that, in response to the *Smith* case, Congress may enact legislation that would restore the compelling state interest standard to adjudication of claims of deprivation of religious freedom.

For these reasons, Congress may prove to be more receptive than the courts to an effective presentation of the claim that the section 501(c)(3) restraints

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220. 101st Cong., 1st Sess., 135 CONG. REC. H8707 (1989).

221. *The Williamsburg Charter: A Celebration and Reaffirmation of the Religious Liberty Clauses*, *supra* note 38, at ____.

222. For a thoughtful discussion of this theme, see McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1.

223. *See* 10 U.S.C. § 774 (1988).

are unconstitutional, or at least to the view that the restraints are unwise and unnecessary. If this analysis is correct, religious organizations might engage in new efforts to communicate their needs to the legislative branch now that the threat of third-party litigation presented in the *ARM* case has been laid to rest. At least it may be said that seeking repeal of the offending statutes and regulations is less costly and less risky than litigation.

If American religious bodies choose to take this path, they should, of course, stress, as they did in previous testimony, that for many religious communities participation in activities relating to politics—including both lobbying and electioneering—is a core religious function protected under the free exercise guarantee. In addition, they should remind Congress of the long history of participation of religious groups in American politics, a much more venerable tradition than the recent history of restraints on lobbying activities found in the tax code since 1934, and on electioneering activities since 1954. In the words of Professor Tribe:

> American courts have not thought the separation of church and state to require that religion be totally oblivious to government or politics; church and religious groups in the United States have long exerted powerful political pressures on state and national legislatures, on subjects as diverse as slavery, gambling, drinking, prostitution, marriage, and education. To view such religious activity as suspect, or to regard its political results as automatically tainted, might be inconsistent with first amendment freedoms of religious and political expression—and might not even succeed in keeping religious controversy out of public life, given the "political ruptures caused by the alienation of segments of the religious community."[224]

Finally, after the *Abortion Rights Mobilization* case, religious leaders might clarify for members of Congress that it is bad enough that the government might, through its tax regulations, diminish the courage of religious leaders to clarify for their congregations and for public policy makers the moral implications of a wide variety of controversial matters of public policy. Worse yet is the threat posed by litigation brought by private parties seeking to use the courts to still the voice of a religious body on a matter of public controversy. In the first situation, the religious freedom of the churches falls within the regulatory power of the state. In the second situation, it is prey to the animosity of hostile outsiders who are unfettered by an oath of office to uphold the Constitution.

In the words of the Williamsburg Charter, "the No Establishment Clause separates Church from State but not religion from politics or public life."[225]

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224. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 866-867 (1st ed. 1978), *citing* 77 HARV. L. REV. 1357 (1964). In the second edition to his treatise, *supra* note 181, at 1282, Tribe modestly includes only the truncated form of this passage that Justice Brennan cited in McDaniel v. Paty, 435 U.S. 618, 641 n.25 (1978). For my part, I would have preferred it if Tribe had kept the last sentence in his second edition, but had eliminated the tentative character of the auxiliary verb, "might," from both clauses.

225. *The Williamsburg Charter: A Celebration and Reaffirmation of the Religious Liberty*

Or as Chief Justice Burger wrote in the *Walz* case, "Adherents of particular faiths and individual churches frequently take strong positions on public issues including . . . vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right."[226] That right should not be diminished or discouraged through the tax code.

Clauses, supra note 38, at ____.

226. Walz v. Tax Comm'n, 397 U.S. 664, 670 (1970).