RELIGIOUS ORGANIZATIONS PARTICIPATING IN POLITICAL CAMPAIGNS: HAVE THE LIMITS BEEN EXCEEDED?

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HISTORICAL OVERVIEW

In recent years, the participation of religious organizations and churches in political campaign activities has given rise to some serious concern among citizens, governmental agencies and the courts about the propriety of such actions. Since any kind of political activity on the part of these groups contravenes the law, it is fitting to evaluate several of the key legal considerations since only a scanty historical backdrop exists.

The participation by religious persons and organizations in political campaigns is deeply rooted in American history.[1] Faced with a new land and seemingly endless frontier, religious leaders and their followers could not rely upon centuries old social, political and economic institutions to buttress and perpetuate the church. It was imperative, therefore, for churches to actively participate in community development in order to survive and continue to thrive.

In that past era of seemingly less complex and more secular lifestyles, the social and cultural landscape presented unique opportunities for religious activism. Since the immigration from Europe had created a social disorganization and anomie, "the belonging vacuum" and "the need for community identity" was filled by the churches.[2]

With westward expansion intensifying the need for increased Christian unity, entrepreneurial church leaders took the initiative to expand their

'Assistant Professor of Commerciai Law, University of Louisville ‘ALLEN D.HERTZJCE, REPRESENTING GOD IN WASHINGTON (The University of Tennessee Press, 1988), p. 23.

[2]ANDREW GREELEY, THE DENOMINATIONAL SOCIETY (Scott Foresman, 1972), pJ.

memberships by evangelizing the frontier.[3] A spirit of competitiveness unfolded in this fertile ground with the emergence of religious dissidents and nonconformists, often challenging complacency and orthodoxy and creating new forms of religious practice through direct community involvement. The frontier set the foundation for American religious practice and its direct participation in community and forthcoming governmental affairs.[4]

When society at large says today that there is unfolding a new shape to the relationship of religious institutions and political activity, they have already concluded the subject is not new. Whereas religious groups fully believe that religion must refer to a sovereignty that transcends the authority of the state,[5] the resulting tension between religion and the state is dynamic and should not be, and cannot be, resolved by a neat geometrical formula. Alternatively, in a democratic society where freedom to worship exists, political activity and the churches' proper roles within it continue as a subject of much discussion.[6]

The events of rccent times, principally the perceived general moral decay, suggest that political campaign matters are far from settled. Ever increasing pressure and competitiveness between the political parties on the critical issues of today will likely engender much more political campaigning by churches wishing to announce their position on: abortion, education, and sexuality. In addition, such issues as the continued tax exempt status of Christian and parochial schools, which are regulated by the U.S. Department of Labor, are also a part of the churches political agenda.

THE EVOLUTION OF CHURCH TAX EXEMPTION

Tax exemption for charitable religious organizations, which was first enacted in 1894[7] and subsequently re-enacted in the Tax Act of 1913,* had as its purpose tax exempt status; to permit groups to operate exclusively for charitable and religious purposes, perpetuating the public good through these beneficial activities.[9] Although there was no restriction on political activity prior to 1934, clearly involvement in political activity was grounds for denial of tax exempt status, as provided in Treas. § Reg. 45, art. 517 (1919).

[5]M. at l.
'Id. at 1.

'richard John neuhaus, Christian faith & public policy (Auxsburx Publishing House, 1977), pp. 11 & 12.

**Id.* at 1, 27.

[7]Act of Aug. 27,1984, ch. 349 }32, 28 Stat. 556.

'Act of Oct. 3,1913, ch. 16, {II G(a), 38 Slat. 172,1.R.C J501.

*H. R. Rep. No. 1860, 75th Cong, 3d Sess. 19 (1939).

The first formal limitation on political activity of any kind did not appear until the Revenue Act of 1934 was passed.[10] This legislation contained a specific prohibition against "substantial amounts of lobbying activity or carrying on propaganda". The purpose of this prohibition was to prevent the use of charities as mechanisms through which private business interests could voice political views.[11]

The campaign intervention provision now incorporated in section 501(c) (3)[12] of the Internal Revenue Code was proposed in 1954 by then Senator Lyndon B. Johnson as a floor amendment and became law after only minimal debate.[13] The passage of this amendment did little, if anything, to clarify the law. The maneuvering by Senator Johnson was apparently done for political reasons. In effect, the provision was seemingly passed to emphasize governmental neutrality while restating the objective that charitable and religious activity must be exclusively dedicated to their stated exempt purpose.

With the passage of the Revenue Act of 1962,[u] Congress engaged in somewhat of an "about-face" on the matter of neutrality. For example, it revised section 162(c) of the Internal Revenue Code, expanding the deduction of direct lobbying expenses by businesses. This meant that expenses incurred by business persons for appearances before judicial, and executive officials were deductible. This departure from neutrality was not welcomed with "open-arms" by the religious community because tax equilibrium was now out of balance.[13]

The landscape was further confused in 1972 when Congress passed the Federal Election Campaign Act,[16] which permitted corporate and labor organizations to establish "political action groups". Through these organizational vehicles, "political action groups" could establish, administer and solicit voluntary contributions for political activity purposes with the sponsoring corporation or union paying the administrative expenses of the political action groups.[17]

The proliferation of federal legislation affecting the election process can only be viewed as suggested congressional consent to subsidize political conduct of businesses by way of public debate.[1'] Accordingly, conventional wisdom suggests that continued diminishment of the prohibition would unfold.

'"Revenue Act of 1934, ch. 277, 5S23(o)(2), 101 (6) 48 Sut. 690, 700; and I.R.C. 5501(c)(3) (1954).

"78 Cong. Rec. 5861 (1934).

'*I.R.C Î501 (c)(3) (1954).

'*100 Cong. Rec. 9604 (1954).

"Revenue Act of 1962, Pub. L. No. 87-834, 76 Stat. 960.

[u]*David Meets Goliath in the Legislative Arena: A Losing Battle for an Equal Charitable Voice,* 9 SAN DIEGO L. REV. 944, 952 n.46 (1972).

"Pub. L. No. 92-225, 86 Stat. 3 (1972).

[17]2 U.S.C J441b(b)(2)(c)(1976); 11 CF.R. {114.5.

"New York Time* Co. v. Sullivan, 376 U.S. 254, 270 (1964).

Yet the restraints remain on the voices of churches and other charitable organizations when the matter of political activity is posited as a vehicle to make their views known.[19]

Many religious leaders in America feel that section 501(c)(3) of the Internal Revenue Code violates or runs afoul of several of the freedoms guaranteed in the First Amendment to the Constitution.[20] They argue that tax law places them in the dilemma of fully exercising the rights afforded by the First Amendment at the sacrifice of their tax exempt status.[21] This status, they contend, puts in jeopardy their ability to accomplish their religious and moral objectives and adversely impacts their financial well being.[22]

The demise of the Federal Department of the Treasury's neutrality policy has prompted a troubled and confused landscape. The section 501(c)(3) limitation on the right of tax-exempt organizations to express their views in the political process seems to offend the First Amendment freedoms[23] since practically universal consensus suggests that a major purpose of the First Amendment was to protect free discussion of governmental affairs. This of course includes discussions of candidates,[24] but the course of history yet restricts the menu of participation.

In *Buckley v. Valeo,* 424 U.S. 1 (1976), which invalidated the Federal Election Campaign Acts, the Supreme Court stated "...that advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy for the passage or defeat of legislation."[25] The Court went on to state that:

> discussion of public issues and debate on the qualification of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order to assure (the) unfettered interchange of ideas for bringing about political and social change desired by people.[26]

''Commissioner v. American United Inc., 416 U.S. 752 (1974).

^*Conflicts Bel*WMH *the Fint Amendment Religion Clauses and the Internal Revenue Politically Active Religious Organizations and Racially Discriminatory Private Schools* 61 WASH. U.L.Q. 503, 504-05 (1983).

[n]*Id.*

"Lobby Reform Legislation: Hearing on S.774, S. 851, S.2068, S.2167, and S.2477 Before the Senate Comm, on Government Operations, 94th Cong., 1st Sess 749-52 (1976)

»Williams v. Rhodes, 393 U.S.23, 32 (1968).

"Mills v. Alabama, 384 U.S. 214, 218 (1966).

[25]Revenue Act of 1934, ch. 277, §§23(0), 101(b), 48 Stat. 690 700

»Id.

Confronted with a somewhat different factual pattern, the Supreme Court came to a different disposition in *Regan* v. *Taxation With Representation,* 461 U.S. 540 (1983). This case resulted from the Internal Revenue Service's denial of tax exempt status to an organization which proclaimed that it would engage in substantial congressional lobbying activity.[27] The Court stated that section 501 (c)(3) of the Internal Revenue Code did not violate the First Amendment and that Congress is not compelled to subsidize the legislative activity of an organization.[24] Alternatively, the Court maintained that such an organization could become exempt as a social welfare organization under section 501(c)(4) of the Internal Revenue Code.[29]

The Supreme Court has addressed other cases related to the issue of political activity. In *Walz v. Tax Commissioner,* 397 U.S. 664 (1970), the Court held that a church has the right to take positions on political issues including "...vigorous advocacy of legal and constitutional positions".[10] Further, the Supreme Court held in *McDaniel* v. *Paty,* 435 U.S. 618 (1978) that while one purpose of the establishment clause is prevention of political divisiveness along religious lines, this purpose does not suggest that religious political participation has a less preferred status than political participation by other organizations in general.[31]

Only once was a religious organization's tax exempt status revoked because of political activity. In *Christian Echoes National Ministry, Inc.* v. *United States,* 470 F.2d 849 (10th Cir. 1972), cert, denied, 414 U.S. 864 (1973), the Court upheld the campaign restriction contained in section 501(c)(3) of the Internal Revenue Code. However, it did not conclude or suggest that religious organizations are constitutionally prevented from participation in political activity.[32] The pertinent facts of this case are:

> Christian Echoes was a religious organization founded to disseminate conservative Christian principles through radio and television broadcasts and literature. Publications and broadcasts appealed to the public to react to a wide variety of issues in specific ways, to include: (1) write their Congressmen in order to influence political decisions; (2) work in politics at the precinct level; (3) support a constitutional amendment restoring prayer in the public

^*Church Law ami Tax Report,* Vol. II, No. 3, (May/June 1988). Published by Christian Ministry Resources.

»*Id.*

»*Id.*

**Id.* at 20,

519. [n]*Id.* at

20, 519.

[n]*Religion and Political Campaigns: A Proposal to Revise Section 501 (c)(3) of the Internal Revenue Code,*

> schools; (4) demand that Congress limit foreign aid spending;
> (S) cut off diplomatic relations with communist countries; (6) reduce the federal payroll and balance the federal budget;
> (7) abolish the federal income tax; (8) withdraw from the United Nations; and (9) restore stringent immigration laws.
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> In 1966, the IRS notified the organization that its exemption was being revoked for three reasons, including the fact it had directly and indirectly intervened in political campaigns on behalf of candidates for public office. This federal appeals court ultimately, upheld the action of the Internal Revenue Service.[55]

In responding to the activities of Christian Echoes, the Tenth Circuit Court of Appeals in broadly construing the meaning of the prohibition against political campaign activity held that:

1. Tax exemption is a privilege, or grace, rather than a right and is properly limited by section 50(l)(c)(3) of the Internal Revenue Code.[54]
2. An organization whose tax exempt status is revoked because of its efforts to influence legislation and participation in political campaigns forfeits the right to reinstatement of its tax exempt status.[55]

The Court also found that Christian Echoes had politically attacked several candidates and political officeholders viewed as being "too liberal" and had supported those of a more conservative persuasion.[56] Further, the activities of Christian Echoes were intended to change the composition and profile of government.[57] Therefore, the demonstrated activity did not fall within the intent of Congress to grant and maintain tax exempt status.[5]*

The *Christian Echoes* case was appealed to the United States Supreme Court which refused to review the matter.[59] Thus, the highest court in the country has yet to directly address the issue of whether or not the prohibition against political campaign activity by religious organizations is proper and constitutionally sound.

"Id.
"470 F. 2d 849 (10th Or. 1972), cert, denied,
414 U.S. 864 (19731 *"Id.*
"Id. at 852.
"Id. at 856.
"Id. at 857.
"Id. at 27,9.

The Internal Revenue Service has and continues to be non-descriptive to some extent, in defining a church.[40] The reluctance hinges upon the potential harm a rigid definition might cause due to the varied complexion and character of religious organizations. Further, there are potential political consequences because state laws regarding definition differ in many instances.[41] This has resulted in the application of a "facts and circumstances test" since the term *church* is not reducible to a precise definition.[42] However, to be a church for tax exempt purposes, the Internal Revenue Service requires that an organization meet at least some of the following criteria:

"1. A distinct legal existence;
2. A recognized creed and form of worship;
3. A definite and distinct ecclesiastical government;
4. A formal code of doctrine and discipline;
5. A distinct religious history;
6. A membership not associated with any other church or denomination;
7. A complete organization of ordained ministers ministering to their congregations and selected after completing prescribed courses of study;
8. A liturgy of its own;
9. Established places of worship;
10. Regular congregations;
11. Regular religious services;
12. Sunday schools for the religious instruction of the young; and
13. Schools for the preparation of its ministers."[43]

In order for a church to acquire and maintain its tax exempt status, it must also comply with the requirements of section 501(c)(3) of the Internal Revenue Code as it applies to political campaign activity, which reads:

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

"RICHARD R. HAM MAR, PASTOR CHURCH A LAW (Gospel Publishing House, 1983), p. 120.
"Id.

[41]*Id.* at 122.
"Internal Revenue Manual 321.3. Also Revenue Ruling 59-129, 1959-1 GB. 58.

> net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

The non-involvement restriction by churches in political campaigns includes the publishing or distribution of statements in any campaign on behalf of or in opposition to any candidate for political office. In defining a candidate for political office, Treas. Reg. { 1.501(c)(3)-l(c)(3)(iii) characterizes the person as one:

> who offers himself, or is proposed by others, as a contestant for an elective public office whether such office be national, state or local. Activities which constitute participation or intervention in a political campaign on behalf of or in opposition to a candidate include, but are not limited to, the publication or distribution of written or printed statements or the making of oral statements on behalf of or in opposition to such a candidate.

The prohibition against political campaign activity has a very broad and inclusive definition. The prohibition appears absolute since neither the statute nor the regulations make reference to any requirement less than absolute. Therefore, as a technical matter, a church can potentially lose its tax exempt status by becoming involved in political campaign activity based solely on one occurrence.[44] This invariably prompts the conclusion that any forms of financial support for any candidate for public office would most certainly constitute participation in a political campaign.

The cost of losing an organization's exempt status is dramatic since it can never be regained. Consequently, since section 501(a) of the Internal Revenue Code exempts all organizations classified as "exempt, charitable entities from federal income taxation," a number of positive associated benefits would be forfeited as well, including:

1. In addition to the exemption from the payment of federal income tax, organizations recognized as exempt under section 501(c)(3) may

**W. at 40, 340.

enjoy collateral tax exemption under some state and local income, property, sales, use or other forms of taxation.[45]

2. Contributions to organizations recognized as exempt under section 501(c)(3) are deductible as charitable contributions on the individual or corporate donor's federal income tax return.[4]*

3. Services performed for an organization described in section 501(c)(3) may be exempt from social security taxes, unemployment taxes, and certain excise taxes.[47]

4. Religious organizations are among those listed under United States Postal Service regulations as being eligible to mail at preferred postal rates. The regulations state that exemption from federal income taxes will be considered as evidence of qualification for preferred postal rates but will not be controlling.[41]

5. Organizations recognized as exempt under section 501(c)(3) are able to offer employees the benefit of special taxation of annuity provisions under section 403(b) of the code.[49]

THE PUZZLING HORIZON

Even though tax law prohibits churches with tax exemptions from endorsing or actively supporting candidates for public office, history profoundly demonstrates that protestant, Christian fundamentalists, Jewish, and many black churches have operated in the grey areas of this prohibition,[50] prompting the exhortations by many church leaders, both liberal and conservative, for a change in tax law to allow such participation.[51] This permissive involvement would only parallel what their evangelical counterparts enjoy in terms of direct political participation in European countries.[52]

However, some members of the more conservative religious idealogy openly oppose the idea of any political participation.[53] They see the dangers to be potentially injurious to the churches and our political system because of the natural human gravity toward religious absolutism. Evidence of this concern has been best manifested in the South where involvement by fundamentalist churches in political campaigns has produced some bitterly

"*Id.* at 40, 350.

"*Id.* at 40, 350.

"*Id.* at 40, 350.

"*Id.* at 40, 350.

"*Id.* at 40, 350.

"A. JAMES REJCHLEY. RELIGION IN AMERICAN PUBLIC LIFE (The Brookings Institution, 1985), p. 356.

J*Id.*

»*Id.*

n*Id.*

polarized local communities.[54] For example, the "moral report card" issued by some of the conservative members of the religious community has condemned members of Congress with liberal voting records.[55] This public policy stance by these conservative church groups has caused other church groups as well as groups outside the church to view them negatively.[54]

There have been and continue to be some meritorious reasons for active participation by religious organizations in all elements of the political process. Particularly, the role assumed by the "black church" - churches advancing the cause of the disenfranchised - is particularly difficult to criticize at all. The black clergy have been forced, out of necessity, into the role of being political advocates because social leadership was indeed scarce in their communities.[37] In many respects, the role of the black clergy in the political process resembles that of the ancient Hebrew prophets,[58] giving a voice and meaning to issues of social concern when they otherwise would have not been heard. But as other institutions continue to expand in providing political leadership for minorities, the role of the "black clergy" should decline.[59]

Today, the church has taken on a more significant and "broader" role including nursery or day care, housing for the elderly, drug clinics, broadcasting, educational programs, and lay ministries. These activities raise new concerns because they seem to go well beyond the churches' traditional role of nurturing spiritual and moral values.

Although the tax exemption prohibition against participation in political campaigns appears absolute, certain activities engaged in by churches that touch on political and legislative matters have been deemed to be outside the statutory prohibitions.[60] The nature of the involvement and whether it is on behalf of, or in opposition to, a candidate is the standard used by the Internal Revenue Service to determine prohibited conduct.

Clearly the right to participate in the political process is a fundamental constitutional liberty. This liberty extends to churches and other religious organizations to no lesser degree than to secular institutions and private citizens.

The liberty does, indeed, have some degree of limitations when it comes to churches and religious organizations. Exempt organizations definitely are prohibited from making statements (oral or written) supporting or opposing any candidate for public office.[61] Therefore, such organizations may not

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»*Id.*

[a]*Id.*
»*Id.*
"*Id.* at 357.
»*Id.* at 357.
»*Id.* at 357.
*Id. at 40. pp. 340-41.
«*Id.* at 12.

encourage votes for or against any candidate for public office.[62] This restriction applies to every means of communication used by an exempt organization, including sermons, newspapers or distributed filled-in sample ballots.[63]

Exempt organizations, moreover, are prohibited from indirectly supporting or opposing a particular candidate by labeling that person as proabortion or anti-peace or some other label.[64] In particular, the Internal Revenue Service has taken the position that non-partisan rating of elected judicial candidates or "approved", "not approved", or "approved as highly qualified", on the basis of experience, professional ability, and character represented involvement in prohibited political activity by an exempt organization.[65]

Exempt organizations are also prohibited from providing financial support to any candidate, political action committee, or any political party.[66] In addition, it may not provide any other form of campaign support, including free volunteers or mailing lists.[67] This restriction or limitation further prohibits the solicitation of financial support for or against any particular candidate or political party, such as the prohibition against the taking of collection during church service or the use of church letterhead to solicit contributions.[6]*

In order to get involved in political activity, some religious organizations have formed "political action groups" (PAGS) specifically for that purpose. Generally, an exempt organization may not establish or support a PAG, but the Internal Revenue Service has recently made a modest accommodation by permitting limited political activity by PAGS, specifically restricted to supporting candidates for nonelective public office, such as a judge or cabinet officer.[69] In defining the exceptions, the Internal Revenue Service requires the exempt organization to establish a separate segregated fund to carry on such activity.[70]

Due to the firmness of the limitation on political activity, many exempt organizations have developed creative and appropriate alternatives that permit some degree of participation in the political process, such as voter education.

"Rev. Rul. 67-71, 1967-1 CB. 125.

"Rev. Rule. 78-248,1978-1 CB. 154, amplified by Rev. Rul. 80-282, 1980-2 CB. 178.

"Christian Echoes National Ministry Inc. v. United States, 470 F.2d 849 (10th Cir. 1972), cert, denied, 414 U.S. 864 (1972).

"G.CM. 39441; but see Association of the Bar of the City of New York v. Commissioner, 89 T.C No. 42 (September 17, 1987), in which the opposite conclusion was reached.

"*Id.* at 12.

"*Id.* at 12.

"*Id.* at 12.

*G.CM. 39696 (January 22,1988).

"*Id.*

Voter education activity consists of the distribution during an election campaign of pamphlets, newsletters and other material which normally include the candidates' voting records, statements on issues and the results of candidate polls or questionnaires. Whether such distribution is properly permissible depends largely upon the intent and format of the publications and the maimer of distribution.

The Internal Revenue Service has made its position quite plain on this matter. It has held that during an election campaign, an exempt organization may distribute the voting records of all members of the legislature on a variety of issues and subjects, provided the structure and content of the material is not biased.[71] Although the term of bias has not been defined by the Internal Revenue Service, material would most likely be considered biased if (1) it indicated or implied that a legislator agreed or disagreed with the organization's position; or (2) that the organization agrees or disagreed with the legislator's vote.[72]

There are, however, an extremely limited number of circumstances where the presentation of a biased voting record would not be considered as political campaign activity. The Internal Revenue Service lists the following criteria for exception to the rule: (1) it must not identify candidate for re-election; (2) distribution must not be timed to coincide with any elections, but rather be one of normal routine of distribution of voting records; (3) distribution must not be targeted to areas where elections are occurring; and (4) the distribution must be restricted to a limited group such as the membership of the organization.[73]

An exempt organization may poll candidates or have them respond to questionnaires and yet not exceed the scope of neutral and acceptable activity. It is only when the results of the polls or questionnaire are used will the question of political activity arise. If properly handled, however, candidate questionnaire results may be distributed to the general public as a voter's guide during an election campaign, if: (1) the poll or questionnaire is not biased; that is, it does not pose questions designed to make the candidate appear to acceptable or unacceptable to the organization or its members; (2) the poll or questionnaire covers a wide range of issues selected on the basis of importance to the electorate as a whole; and (3) the results of the poll or questionnaire are reported in an accurate and unbiased manner.[74]

A number of exempt organizations and churches have involved themselves in the neutral and permissible activity of voter registration drives. Both the Interna] Revenue Service and the Federal Election Commission[75]

[71] Rev. Rul. 78-248-1 CB. 154, Situation 1.

[a]*Id.*

''Rev. Rul. 80-282,1980-2 CB. 178.

"Rev. Rul. 78-248, 1978-1 CB. 154, Situation 2.

''Sec. 11 CF.R. } 114.4(c) (4) (1988).

permit an exempt organization to sponsor such activity designed to encourage citizens to exercise their right to vote, provided no bias is indicated for or against a candidate. If, however, any form of preference is given, it would render the activity other than neutral, eg., by distribution of partisan literature, or providing rides to the polling places, or assistance to votes supporting a particular candidate or party. The Federal Election Commission guidelines are even more stringent, requiring that all material prepared for distribution to the general public in connection with a voter registration drive must include the full names of all sponsors.[76]

Other activity is considered neutral and equally permissible by exempt organizations, including public forums, debates, or lectures in which candidates for elective office may explain their views and positions on issues to the public. The sponsoring organizations may not, however, indicate their views on any issue, comment on the response of any candidate, or in any other way show bias or preference for any candidate.[77] Alternatively, the moderator should at the beginning and end of the forum state, unequivocally, that the views of the candidate are not the views of the organization and that no endorsement of any kind is being given by the organizations.[78]

The activity conducted by exempt college and university organizations has raised some unique questions and equally unique responses from the Internal Revenue Service. The best evidence of this other than customary accommodation is the determination that certain student political activity will not be imputed to the involved educational institution. For example, a student newspaper may publish student endorsements of political candidates, even if the university provides faculty advisors, office space, and financial support for the newspaper, provided the institution does not control the editorial policy.[79] The Internal Revenue Service has characterized this student activity as critical to furthering the educational process.*[0]

A college or university may also choose to include in its curriculum a political science course that excuses students from class to participate in political campaigns. If the institution does not influence the students' choices of candidates or control their campaign activity, the institution's position remains neutral since student conduct in political campaign activity is considered educational.*[1]

Another special situation involves the operation of broadcasting stations by exempt organizations. An exempt organization may present religious educational programs by providing free air time if the FCC requirements are

"Sec. 11 CF.R. 5114.4(c) (5)

"Rev. Rul. *66-256*,1966-2 CB.
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"Rev. Rul. 72-512, 1972-2

met.[81] All programs, however, should contain a statement indicating: "the views expressed are solely those of the candidates and not the station; the station endorses no candidate or viewpoint; the presentation is a public service; and that equal opportunity will be available to all legally qualified candidates."[83]

THE TAXATION HYPOTHETICAL

The prohibited political campaign activity comprised in section 501(c)(3) of the Internal Revenue Code has been interpreted to be absolute.[84] Any activity which violates the absolute prohibition may result in the revocation of an organization's exempt status[83] and consequent loss of deductible contributions for its contributors.[86]

An organization that engages in prohibited political campaign activity, but does not lose its tax exempt status will normally be required to pay a special tax or penalty.*[7] The definition of political activity under the penalty provision is much broader than the definition in section 501(c)(3) with the prohibited activities defined as "the functions of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any federal, state or local public office or office in a political organization."[88]

If an organization knowingly wishes to engage in prohibited political activity, it may avoid the applications of the penalty tax by forming a separate segregated fund from which expenditure for political activities are to be made.[i9]But an exempt organization may not use its own corporate funds for political campaign activity and expect to avoid the special penalty tax.[90]

If an exempt organization's expenditure makes it subject to the special penalty tax, it must include in its gross yearly income an amount equal to the lesser of its net investment income for the year or the aggregate amount so expended for political campaign activities.[91] However, an exempt organization will not be taxed on any revenue it receives from its members for political activity if the funds are promptly transferred to the unrelated organization that solicited them.[92]

"Rev. Rul. 74-574, 1974-2 CB. 160 (See also 47 U.S.CA. {315(a) °*Id.*
"Exempt Organizations Handbook (IRM 7751) {394.
"Treas. Reg. {601.201(n)(6)(i).
"I.R.C {170(c).
"I.R.C ¡527(b).
"I.R.C ¡527(e)(2).
"I.R.C ¡527(f)(3).
"Id. at 87.
"I.R.C ¡527(f)(1).
"Priv. Ltr. Rul. 7903079.

In the event an exempt organization is compelled to pay the special penalty tax, the consequences are quite significant. The tax penalty is the highest corporate rate provided under the Internal Revenue Code, meaning 34 *%,n* a result that should sound a clear and convincing alarm to the exempt religious community in the United States.

Because conduct by exempt religious organizations violates the prohibitions against political campaign activity, some higher degree of insightful analysis is warranted. The thrust of the analysis is geared to reflect the potential revenue generation that could inure to the general treasury of the United States.

For the purpose of illustration, assume that a modest 20% of the churches in our nation fall within the ambits of the section 527(f) penalty provision. Further, assume that political campaign activity amounted to 5% of the gross revenue of churches and related organizations. With the 1989 reported contributions by 42 international religious denominations resulting in $15,765,112,942 being excluded from federal income taxation,[94] 5% of that amount would total $788,255,642. When applying the 34% mandated by section 11(b) to that amount, the tax revenues to the general treasury could be hypothetically enhanced by approximately $268,006,918 if the special penalty tax were imposed.

The Revenue Act of 1987 imposed additional penalties for violations of the political campaign activity restriction,[99] including a two-tier excise tax on exempt organizations and their management for political campaign expenditure made in violation of section 501(c)(3). The exempt organization is initially subject to a 10% tax on each political expenditure,[96] which may be imposed in addition to revocation of exemption. If the exempt organization fails to positively respond and correct the expenditures (recover expenditures), an additional tax may be imposed equal to 100% of the prohibited expenditure.[97] The initial penalty tax may be abated, but the exempt organization must demonstrate that the political expenditures were not willful or flagrant, and the required corrections have been made.[96]

A further tax (first tier) may be levied in the sum of *2Yi%* on a political expenditure, unless the violation is not willful, or is made with reasonable judgement.[99] But if the manager, upon notice, refuses to agree to the required corrections, an additional 50% tax (second tier) will be imposed.[100]

”I.R.C 811(b).

“c. JACQUET. JR, YEARBOOK OF AMERICAN & CANADIAN CHURCHES (Abingdon Press, 1989), pp. 268-69.

“I R C $4955.

"I.R.C 54955(a)(1).

"I.R.C 54955(b)(1).

*I.RC 54955.

**I.R.C 54955(a)(2).

[100]I.RC 54955(b)(2).

The maximum amount of tax a manager may be liable for is $5,000 on the first tier and $10,000 on the second tier.[101] A manager is defined as an officer, director or trustee, or any other person with comparable responsibilities, and also includes an employee of the organization with authority or responsibility for the political expenditures.[102]

The Act has other sanctions that may be imposed upon exempt organizations making flagrant political expenditures. The Internal Revenue Service may seek an immediate determination and assessment of income and excise taxes due on account of the flagrant political expenditures.[1]" The Internal Revenue Service may also institute action in the United States District Court seeking injunctive relief to bar further political expenditures.[104] The Internal Revenue Service, however, must first notify the exempt organization of its intention to seek an injunction, unless the prohibited expenditures are terminated. Clear evidence must exist that injunctive relief would be appropriate to prevent further political expenditures.[105]

This abbreviated analysis warrants more than just passing consideration. There is significant potential to generate revenue to mitigate against the present and anticipated national budget deficits. The only question is whether our country will be comfortable in seeing religious organizations being subject to penalties and sanctions, a question that obviously requires much thought and is without a simple solution.

THE POLICY AND PROCESS ALTERNATIVES

The religious community in the United States remains in a struggle and debate about its freedom and role as defined by law.[106] The First Amendment rights of speech and free exercise are not absolute,[107] nor is the tax exempt status of churches.[10]* Rather, it is a matter of legislative grace.[109] The restrictions on political campaign activity by tax exempt organizations and churches in no way abridges any institutional guarantees or rights.[110]

'"I.R.C §4955(c)(2).
'"I.R.C 54955(f)(2).
'"I.R.C 56852.
'"I.R-C 57409(a)(1).
'®I.R.C 57409(a)(2).
mId. at 50, 350.
""*Id* at 40, 339. *mId.* at 40, 339.
'•id. at 40, 341.
"^Taxation With Representation v. United Stales, 585 F. 2d 1219 (4th Cir 1978) cert denied, 441 US. 905 (1979).

The limitations imposed by section 501(c)(3) and the relevant regulations and revenue rulings have struck a delicate balance between acceptable and unacceptable political involvement.[111] The proposition which has unfolded is that of "advocacy" versus "access". Advocacy is where the religious organization engages in direct participation similar to the activity referred to earlier in *Christian Echoes*.[112] This kind of activity runs afoul of the acceptable involvement standard and leaves the religious organization open to possible loss of tax exempt status and other applicable penalties and sanctions.[1,3]

On the other end of the spectrum is the access posture. This approach is designed to facilitate public debate by the candidates on the issues and matters of importance to the general public.[114] This process does not permit the formal endorsement of any candidate or any form of advocacy by the religious organization,[115] which shares information through which the public becomes aware of the issues and the candidates.[116]

The access approach is, indeed, a safe harbor for religious organizations to meaningfully inform and influence their memberships' political participation. Yet, a precise and intelligible standard of conduct and activity regarding political involvement by exempt, religious organizations remains open to definition by the United States Supreme Court.[117] Until then several general guidelines which should be followed as a measure of safe participation are:

1. No candidate for elective public office should be endorsed, directly or indirectly, whether through a sermon, church newsletter, sample ballot, etc. Statements supporting or opposing a candidate should be avoided. Further, no inflammatory or derogatory comments should be made when mentioning a candidate's name.[118]
2. No form of financial or other kind of support should be provided to a candidate for elective office, including support for a political action committee or political party. Similarly, no volunteers should be provided, nor should mailing lists, free publicity or free use of facilities be granted unless they are made available to all candidates and parties on a equal basis.[119]

'"THOMAS. VIEWS OF THE WALL. REPORT FROM THE CAPITAL. September, 1988 at 6.
[111] *I<L*
[u] *ld.*
[A] *Id.*
[M] *Id.*
'"Hammar. Church Law **4** tax report, Vol II, No. 4, p. 4. [m] *U.* at 111.
"•«. at 111.
"*M. at 111.

3. No campaign literature should be distributed on the premises. Nor should individual church members be granted permission to distribute such literature, except where there is a public forum or debate and all candidates are given an equal opportunity to participate.[120]
4. There must never be formal support for a political action group (PAG), inducing its organization or establishment. The individual church members may be involved in a PAG, but no form of support can come from the church.[121]

Appropriate and proper political involvement can best be summarized in one statement: It is proper to talk about issues but not about individual candidates or parties.

THE POLICY ABATEMENT RECOMMENDATION

Despite the absolute prohibitions mandated by IRC § 501(c)(3), no church has ever lost its exemption due to its participation in political activity, although the violations are numerous. Only one religious organization, reported not to be a church, has lost its exempt status due, in part, to improper political campaign activity.[122]

The hesitation on the part of the Internal Revenue Service to react and enforce the prohibition on unacceptable political activity is notable in Pat Robertson and Reverend Jesse Jackson's recent presidential campaigns. The campaign of Pat Robertson was actively supported by a para-church organization known as the Freedom Council. While this organization has been subject to investigation, nothing in terms of official sanctions have been imposed. On the other hand, the "Super Sunday Fund Raiser" of Rev. Jackson has elicited no reaction from the Internal Revenue Service.[123]

Even if there were no prohibitions on political campaign activity by the Internal Revenue Code, churches would be well advised to be careful in their position on this issue. The problem is that those churches which attempt to accomplish secular political goals have often created dissension within the church at large and the loss of spiritual credibility as well.[124]

Despite the IRS's lackluster enforcement effort and the seeming incompatibility of political activity with the ultimate spiritual objective of churches, the formal policy of no participation is meaningless and confusing. While history is full of examples of the role of churches in the formulation of sound societal rules and morals, there remains the need for a sound

*W. at ill. [ia]W. at 116. [m]*Id.* at 116. [ia]*Id.* at 111.

governmental and constitutional policy on the matter of acceptable political participation. Nothing should impede its positive development by way of open debate and broad based participation. Until this process is complete and a sound and applicable policy is in place, the better approach is to abate the imposition of any governmental sanctions. Not only will the events that unfold during this interim period be useful to policy formulation but our exempt and religious organizations will be removed from the contradiction of the present situation.

CONCLUSION

From the beginning of American history, religion and democracy have been inextricably intertwined. Despite the many changes in human behavior and the institutions forming our government, economy, politics, and social forums, the relationship between the religious community and government has not lost its vigor and vitality.

From the standpoint of the public good, the most important service churches offer to our society is the nurturing of spiritual values that serve to enhance capitalism and give direction to democracy and the world. This national strength has contributed immensely to the development of moral content on significant issues that confront our society.

In some sense, then, churches have been involved too deeply in the "hurly burly" of political campaign activity. However, had the churches remained silent on issues such as civil rights, nuclear war, and abortion the loss of moral credibility could have been devastating since the critical questions might not otherwise have been raised.

The prospects for human dignity and demonstrative democracy, projecting beyond the boundaries of our country to the world community, would have lost substantially more luster and human impact without religious participation. Since the facts of the law remain, the question "Have the limits been succeeded?" is still valid.