

**CONFLICTS BETWEEN THE FIRST AMENDMENT
RELIGION CLAUSES AND THE INTERNAL
REVENUE CODE: POLITICALLY ACTIVE
RELIGIOUS ORGANIZATIONS AND
RACIALLY DISCRIMINATORY
PRIVATE SCHOOLS**

Sections 501(a) and 501(c)(3) of the Internal Revenue Code¹ exempt from income taxation² institutions³ “organized and operated exclusively for religious, charitable, scientific . . . or educational purposes”⁴ Organizations exempt under these provisions, however, are precluded from engaging in substantial political activity under section 501(c)(3).⁵ In addition, the Internal Revenue Service (IRS) has construed this provision as giving it the authority to revoke the tax exempt status of private schools with racially discriminatory admissions policies.⁶ The political activity restrictions of sections 501(c)(3) have been

1. I.R.C. § 501(a), (c)(3) (1976).

2. *Id.* § 501(a). Contributions to organizations exempt from taxation under § 501(c)(3) are tax deductible for estate, gift, or income tax purposes. *Id.* §§ 170(c)(2), 2055(a), 2106(a)(2)(A)(ii), 2522(a)(2), (b)(2). Organizations qualifying for exemption under § 501(c)(3) are also exempt from federal social security taxes and federal unemployment taxes. *Id.* §§ 3121(b)(8)(B), 3306(c)(8). Exemption under these provisions does not extend to civic or social welfare organizations, *id.* § 501(c)(4), labor organizations, *id.* § 501(c)(5), business organizations, *id.* § 501(c)(6), pleasure and recreation organizations, *id.* § 501(c)(7), or fraternal orders, *id.* § 501(c)(8).

3. The number of active entities (individual and group) on the Internal Revenue Service exempt organizations master file under § 501(c) increased from 673,000 in 1974 to 824,536 in 1979. C.I.R. ANN. REP. 41 (1975); C.I.R. ANN. REP. 25 (1979). Of the 1979 total, 304,315 are exempt under § 501(c)(3), and 127,254 under § 501(c)(4) (applying to civic and social welfare organizations) C.I.R. ANN. REP. 70 (1979). In 1979, the Internal Revenue Service approved 24,892 applications for exemption under § 501(c)(3), and 2,594 under § 501(c)(4). *Id.* at 96.

4. I.R.C. § 501(c)(3) (1976).

5. *Id.* The section provides:

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

Id. (emphasis added). Language substantially identical to § 501(c)(3) is found in §§ 170(c)(2), 2055(a)(2), 2522(a)(2).

6. Rev. Rul. 71-447, 1971-2 C.B. 230. See *Tax-Exempt Status of Private Schools: Hearings*

challenged by church⁷ leaders⁸ and commentators⁹ as excessive restraints on the rights of religious organizations to participate in politics.¹⁰ Furthermore, the IRS interpretation of section 501(c)(3) as limiting qualification for tax exempt status to private schools that do not discriminate on the basis of race continues to receive considerable opposition.¹¹ Consequently, numerous attacks in recent years have

Before the Subcomm. on Oversight of the House Comm. on Ways and Means, (pt. 1), 96th Cong., 1st Sess. 3 (1979) (opening statement of Jerome Kurtz, Commissioner of Internal Revenue); 291-92 (statement of William B. Ball) [hereinafter cited as *Status Hearings* (pt. 1)].

7. The Internal Revenue Code includes in the definition of "church," both conventions and associations of churches. See I.R.C. §§ 170(b)(1)(A)(i), 508(c)(1)(A) (1976). In addition, it distinguishes between the integrated and nonintegrated auxiliaries of religious organizations. *Id.* §§ 508(c)(1)(A), 6033(a)(2)(A)(i), 6043(b)(1). Regulations promulgated by the Department of Treasury indicate that in order to qualify as an integrated auxiliary, an organization must be tax exempt under § 501(c)(3), affiliated with a church, and engaged in exclusively religious activity. Treas. Reg. § 1.6033-2(g)(5)(i) (1977). Examples of integrated auxiliaries include youth groups, men's or women's organizations, and religious schools. Nonintegrated auxiliaries include universities, retirement homes, orphanages, and church-affiliated hospitals. *Id.*

For a discussion of the problems involved in defining "church" in the Code, see Whelan, "Church" in the Internal Revenue Code: The Definitional Problems, 45 *FORDHAM L. REV.* 885 (1977). See also Schwarz, *Limiting Religious Tax Exemptions: When Should the Church Render Unto Caesar?*, 29 *U. FLA. L. REV.* 50, 64-67 (1976).

8. See generally D. KELLEY, *WHY CHURCHES SHOULD NOT PAY TAXES* (1977); Whelan, *Government and the Church, AMERICA*, Dec. 16, 1978, at 451. See also *Influencing Legislation by Public Charities: Hearings on H.R. 13500 Before the House Comm. on Ways and Means*, 94 Cong., 2d Sess., 63-64, 75-76, 90-91 (1976) (statement of various church organizations) [hereinafter cited as *Hearings on H.R. 13500*]. Some church leaders question the appropriateness of involvement by religious organizations in political activity. Richard John Neuhaus, a highly regarded member of the Lutheran Church, stated that religious leaders "don't really understand the ethical and philosophical traditions of democracy or how to bring about change in a pluralistic society." *A Tide of Born-Again Politics*, *NEWSWEEK*, Sept. 15, 1980, at 28 [hereinafter cited as *Born-Again Politics*]. See also Note, *Religion and Political Campaigns: A Proposal to Revise Section 501(c)(3) of the Internal Revenue Code*, 49 *FORDHAM L. REV.* 536 (1981).

9. Burns, *Constitutional Aspects of Church Taxation*, 9 *COLUM. J.L. SOC. PROBS.* 646 (1973); Conable, *Tax Impact on Charitable Organizations*, 24 *CATH. LAW.* 251 (1979); Whelan, *supra* note 7; Note, *supra* note 8; Comment, *Church Lobbying: The Legitimacy of the Controls*, 16 *HOUS. L. REV.* 480 (1979).

10. See, e.g., Clark, *The Limitations on Political Activities: A Discordant Note in the Law of Charities*, 46 *VA. L. REV.* 439 (1960); Fogel, *To the I.R.S., 'Tis Better to Give than to Lobby'*, 61 *A.B.A.J.* 960 (1975); Troyer, *Charities, Law-Making, and the Constitution: The Validity of the Restrictions on Influencing Legislation*, 31 *N.Y.U. INST.* 1415 (1973); Note, *supra* note 8; Note, *The Revenue Code and A Charity's Politics*, 73 *YALE L.J.* 661 (1964).

11. In 1978, the IRS announced a proposed revenue procedure designed to make its policy of denying or withdrawing the tax exempt status of racially discriminatory private schools more effectively enforceable. Prop. Rev. Proc., 43 Fed. Reg. 37,296 (1978). The proposed procedure generated tremendous public reaction necessitating over four days of public hearings. Wash. Post, Dec. 6, 1978, § A, at 25, col. 1. See also *Status Hearings* (pt. 1), *supra* note 6, at 294-95 (statement of William B. Ball); *id.* at 511 (statement of Rev. Dr. Charles V. Bergstrom); *id.* at 912 (statement

been levelled against the IRS for employing section 501(c)(3) as a means of regulating the actions and policies of tax exempt organizations.¹²

The competing interests are clear. On the one hand, religious organizations resist any attempt to restrict political activity as an unconstitutional interference with the free exercise of religion.¹³ Similarly, private school administrators argue that using tax exemptions to eliminate racial discrimination violates both religion clauses of the first amendment.¹⁴ On the other hand, increasingly expansive political activity by religious organizations has renewed the legal and constitutional demands for strict separation¹⁵ of church and state.¹⁶ The IRS

of Mark I. Klein). See generally Neuberger & Crumplar, *Tax Exempt Religious Schools Under Attack: Conflicting Goal of Religious Freedom and Racial Integration*, 48 *FORDHAM L. REV.* 229, 232 (1979); Sanders, *Exemptions for Private Schools Threatened by Service's Latest Controversial Guidelines*, 52 *J. TAX'N* 234, 234 (1979).

12. See *infra* notes 215-17, 246-47, 284-88 & 315-19 and accompanying text.

13. See *infra* notes 110-30 and accompanying text. Parts I and II of this Note examine the constitutional validity of the Internal Revenue Code's political activity restrictions under the first amendment religion clauses. It should be noted, however, that section 501(c)(3) has also been attacked under the freedom of speech component of the first amendment and under the equal protection clause of the fifth amendment. In 1982, the United States Court of Appeals for the District of Columbia Circuit, sitting en banc, held that the Code's lobbying restrictions were unconstitutional. The court rejected the first amendment claim, but held that section 501(c)(3) violated the equal protection clause because veteran's organizations exempt under section 501(c)(19) were not subjected to the same restrictions on lobbying activity as organizations exempt under section 501(c)(3). See *Taxation with Representation v. Regan*, 676 F.2d 715 (D.C. Cir. 1982) (involving a nonprofit "public interest" organization denied exemption by the IRS because it intended to engage in substantial lobbying efforts). In a unanimous decision, the Supreme Court reversed, and held that section 501(c)(3) violates neither the free speech guarantee of the first amendment nor the equal protection clause of the fifth amendment. See *Regan v. Taxation with Representation*, 103 S. Ct. 1997 (1983). Writing for the Court, Justice Rehnquist disposed of the first amendment challenge by relying on *Cammarano v. United States*, 358 U.S. 498 (1959) (first amendment does not require Congress to subsidize lobbying activities by allowing business expense deductions, see *infra* text accompanying notes 129-30). Justice Rehnquist stated that "Congress has not infringed any First Amendment rights or regulated any First Amendment activity. Congress has simply chosen not to pay for [Taxation with Representation]'s lobbying." 103 S. Ct. at 2001. In addition, the Court rejected the court of appeal's argument that section 501(c)(3) should be subjected to strict scrutiny because first amendment rights were "affected." The Court stated that strict scrutiny was inappropriate because "[t]he sections of the Internal Revenue Code here at issue do not employ any suspect classification." *Id.* Thus, the Court upheld section 501(c)(3) as bearing a "rational relation to a legitimate governmental purpose." *Id.*

14. See, e.g., *Status Hearings (pt. 1)*, *supra* note 6, at 293-95 (statement of William B. Ball); *id.* at 396 (statement of W. Wayne Allen); *id.* at 503 (statement of George Reed); *id.* at 505-06 (statement of Martin B. Cowan). See also *Bob Jones Univ. v. United States*, 639 F.2d 147, 153-55 (4th Cir. 1980), *cert. granted*, 102 S. Ct. 386 (1981) (No. 81-3).

15. The "wall of separation" was a phrase coined by President Jefferson in a letter written to the Danbury Baptist Association of Connecticut:

also argues that racially discriminatory schools do not qualify as "charitable" organizations because they violate the clear policy against racial discrimination¹⁷ embodied in the thirteenth,¹⁸ fourteenth,¹⁹ and fifteenth²⁰ amendments, and in the Supreme Court's decision in *Brown v. Board of Education*.²¹ Part I of this Note examines the constitutional significance of the church in politics and the first amendment as a possible limitation on the Internal Revenue Code's political activity restrictions.²² Part II examines the Code restrictions on political activity by exempt organizations,²³ and evaluates the appropriateness of these restrictions as a means of regulation.²⁴ Finally, Part III examines the growing controversy over the IRS policy on racially discriminatory pri-

Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church and State.

Reply to the Danbury Baptist Ass'n, *quoted in* *Braunfeld v. Brown*, 366 U.S. 599, 604 (1961) (emphasis added). See *Reynolds v. United States*, 98 U.S. 145, 164 (1878). See generally L. PFEFFER, *CHURCH, STATE, AND FREEDOM* 119-121 (1953).

16. Cf. *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 212 (1948) ("the First Amendment has created a wall of separation between Church and State which must be kept high and impregnable"); *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947) ("the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'"); *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (quoting Jefferson's letter).

17. Rev. Rul. 71-447, 1971-2 C.B. 230. See *Status Hearings (pt. 1)*, *supra* note 6, at 3 (statement of Jerome Kurtz, Commissioner of Internal Revenue); *id.* at 370-71 (statement of Professor Laurence H. Tribe, Harvard Law School); *infra* notes 219-83 and accompanying text. See also *Green v. Connally*, 330 F. Supp. 1150, 1161 (D.D.C.), *aff'd mem. sub nom. Coit v. Green*, 404 U.S. 997 (1971); *Green v. Kennedy*, 309 F. Supp. 1127, 1136-37 (D.D.C. 1970) (per curiam), *appeal dismissed for want of jurisdiction sub nom. Coit v. Green*, 400 U.S. 986 (1971).

18. U.S. CONST. amend. XIII. Section 1 of the thirteenth amendment provides that: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." *Id.* § 1. Section 2 grants Congress the power to enforce § 1. *Id.* § 2. See also *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968).

19. U.S. CONST. amend. XIV. The fourteenth amendment provides in part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.* § 1.

20. U.S. CONST. amend. XV. The fifteenth amendment prohibits the denial of the right to vote on the basis of race. *Id.* § 1. See The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified in scattered sections of 42 U.S.C.).

21. 347 U.S. 483 (1954). The Court in *Brown* held that racial segregation in public schools was unconstitutional under the fourteenth amendment. *Id.* at 495.

22. See *infra* notes 26-130 and accompanying text.

23. See *infra* notes 131-207 and accompanying text.

24. See *infra* notes 208-12 and accompanying text.

vate schools and evaluates recent political and legislative developments challenging its authority to enforce that policy.²⁵

INTRODUCTION

Freedom of religion is a fundamental right guaranteed by the first amendment, which prohibits Congress from passing any law "respecting an establishment of religion, or prohibiting the free exercise thereof" ²⁶ The Supreme Court has attempted to "find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."²⁷ Although government²⁸ may neither establish nor interfere with religion, restraints on first amendment rights are permitted if the government advances an interest of such vital importance²⁹ that the restraints are justified.³⁰ Nevertheless, constitutional limitations on church-state relations, derived from the first amendment, continue to be a source of conflict.³¹ Denial of tax exemptions as a means of regulating church political activity³² and private school admissions policies³³ has been vehemently attacked as violative of both the establishment and free exercise clauses.

I. THE CONSTITUTIONAL SIGNIFICANCE OF THE CHURCH IN POLITICS

Opposition to politically active religious groups³⁴ is premised on an

25. See *infra* notes 213-326 and accompanying text.

26. U.S. CONST. amend. I.

27. *Walz v. Tax Comm'n*, 397 U.S. 664, 668-69 (1970).

28. The first amendment was made applicable to the states through the fourteenth amendment. *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (establishment clause); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (free exercise clause); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (same). Cf. *Abington School Dist. v. Schempp*, 374 U.S. 203, 230-304 (1963) (Brennan, J., concurring) (arguing that the incorporation of the Bill of Rights cannot include the incorporation of the establishment clause because no individual right is involved). See generally N. DORSEN, P. BENDER & B. NEUBORNE, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 1176 n.2 (1976).

29. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

30. *Gillette v. United States*, 401 U.S. 437, 461-62 (1971).

31. See *infra* notes 61-130 and accompanying text.

32. See *infra* notes 131-212 and accompanying text.

33. See *infra* notes 213-326 and accompanying text.

34. Attempts by some states to bar the clergy from holding political office represent early opposition to the involvement of religion in secular government. See L. PFEFFER, *supra* note 15, at 193-95. When the United States Constitution was adopted, 13 state constitutions contained provisions barring clergymen from holding office. During the nineteenth century, all but two

historical view of religion as limited to the spiritual life of the individual.³⁵ The involvement of religious organizations in the political pro-

states, Tennessee and Maryland, discontinued the clergy-disqualification provisions. TENN. CONST. art. IX, § 1; MD. CONST. art. III, § 11. See 1 A. STOKES, *CHURCH AND STATE IN THE UNITED STATES* 622 (1950); L. PFEFFER, *supra* note 15, at 193-94.

In 1974, the United States District Court for the District of Maryland held the Maryland provision prohibiting the clergy from holding office in the state legislature unconstitutional. The court rejected the state's argument that such a provision insured separation of church and state, and held that the restriction violated the first amendment free exercise clause as applied to the states through the fourteenth amendment. *Kirkley v. Maryland*, 381 F. Supp. 327, 331 (D. Md. 1974).

In 1978, the Supreme Court held that the provision of the Tennessee constitution disqualifying ministers from serving as legislators violated the first amendment free exercise clause. The Court found that the provision conditioned a minister's right to exercise his religion on the surrendering of his right to hold political office. The Court stated that "the American experience provides no persuasive support for the fear that clergymen in public office will be less careful of anti-establishment interests or less faithful to their oaths of civil office than their unordained counterparts." *McDaniel v. Paty*, 435 U.S. 618, 629 (1978) (footnote omitted).

During the pre-Civil War years, there were frequent violent outbursts against the participation of churches and clergy in the antislavery movement. See *infra* note 46 and accompanying text. Stephen Douglas voiced such opposition when he stated:

The sovereign right of the people to manage their own affairs, in conformity with the Constitution of their own making, recedes and disappears when placed in subordination to the authority of a body of men, claiming, by virtue of their offices as ministers, to be a divinely-appointed institution for the declaration and enforcement of God's will upon earth.

L. EVERSELE, *CHURCH LOBBYING IN THE NATION'S CAPITOL* 6 (1951). See generally L. RICHARDS, "GENTLEMEN OF PROPERTY AND STANDING": ANTI-ABOLITION MOBS IN JACKSONIAN AMERICA (1970).

The Catholic Church continues to face vehement opposition to its extensive political activity against abortion. In 1977, the National Association of Women Religious, an organization of Catholic nuns, argued that Catholic Church efforts to pass a constitutional amendment banning abortion would result in an "imposition of one [moral] view on the rest of society." See F. JAFFE, B. LINDHEIM & P. LEE, *ABORTION POLITICS* 74 (1981) [hereinafter cited as *ABORTION POLITICS*]. See also *Abortion—Part I: Hearings Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 624 (1974) [hereinafter cited as *Abortion—Part I*]. The following statement by Roman Catholics for the Right to Choose supports this concern:

We are all Catholics, and many of us are totally opposed to abortion for ourselves. But we feel very strongly that we have no moral right to make this decision for others.

.
This Subcommittee will hear much testimony from representatives of our church. They will speak with deep conviction about the sanctity of the pre-viable fetus. But we believe they will neglect some of the equally important consequences of fusing our particular scale of values as the basis for secular law.

Id.

35. Jefferson's *Notes on Religion* sets forth the proposition that religion's primary concern is with the relationship between "man and his God." See L. PFEFFER, *supra* note 15, at 94.

The clergy-disqualification provision in the first New York constitution reflects this premise:

And whereas the ministers of the gospel are by their profession, dedicated to the service of God and the care of souls, and ought not to be delivered from the great duties of their function; therefore, no minister of the gospel or priest of any denomination whatsoever,

cess, however, has long been a reality in American society.³⁶ Moreover, the last several decades have witnessed a more expansive involvement by religious and quasi-religious³⁷ organizations in politics.³⁸ The Roman Catholic Church's active opposition³⁹ to the liberal-

shall at any time hereafter, under any pretence or deception whatever, be eligible to, or capable of holding any civil or military office or place within this State.

N.Y. CONST. of 1777, art. XXXIX.

36. See *infra* note 46. See generally M. ABERNATHY, CIVIL LIBERTIES UNDER THE CONSTITUTION 249 (1968); R. DRINAN, RELIGION, THE COURTS, AND PUBLIC POLICY 3-7 (1963); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 866-67 (1978).

37. A quasi-religious organization might be characterized as having a basically religious perspective with a stated, or actual, secular purpose of active participation in politics. If its operation involves substantial political activity, it is considered an "action" organization under the Internal Revenue Code and disqualified from exemption as a religious, charitable or scientific organization. I.R.C. § 501(c)(3) (1976). The determination of whether an organization is an action organization must be made in light of all its activities, the surrounding circumstances, and the articles of organization. Treas. Reg. § 1.501(c)(3)-1(c)(3)(iv) (1954). The following cases involved organizations denied exemption because of substantial political activity: *Haswell v. United States*, 500 F.2d 1133 (Ct. Cl. 1974), *cert. denied*, 429 U.S. 1107 (1975); *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1973). See Rev. Rul. 74-117, 1974-1 C.B. 128; Rev. Rul. 67-293, 1967-2 C.B. 185; Rev. Rul. 67-71, 1967-1 C.B. 125. *But see* Rev. Rul. 76-456, 1976-47 I.R.B. 11; Rev. Rul. 64-195, 1964-2 C.B. 138. See also *infra* notes 143-68 and accompanying text.

38. Twenty-eight states liberalized existing criminal abortion laws prior to the Supreme Court decisions in *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973). Most of the reformed laws were based on the American Law Institute's proposed model law. The proposed law suggested legalizing abortion: (1) for purposes of saving the mother's life; (2) for avoiding "serious impairment of the mother's health (including mental health)"; (3) when pregnancy resulted from rape or incest; and (4) when there was a strong possibility that the fetus was defective. See J. SALTMAN & S. ZIMERING, ABORTION TODAY 76-81 (1973).

The 1967 proposed legislation in Arizona is representative of reform efforts prior to *Roe v. Wade* and *Doe v. Bolton*:

Therapeutic abortion may be performed in a licensed hospital by a duly licensed physician, only upon approval of a therapeutic abortion committee of the hospital appointed by the hospital, for those patients who seek it when one of the following conditions exist(s):

1. There is a substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother.
2. There is substantial risk that the child would be born with grave physical or mental defect.
3. The pregnancy resulted from rape or incest.

D. O'NEIL, CHURCH LOBBYING IN A WESTERN STATE 26 (1970). For an analysis of the Catholic Church's lobbying efforts in opposition to the liberalization of the Arizona criminal abortion statute, see D. O'NEIL, *supra*, at 32-44. For a general discussion of the political activity involved in reform legislation, see J. SALTMAN & S. ZIMERING, *supra*, at 69-81. For a discussion of the political process involved in reforming Hawaii's criminal abortion statute, see P. STEINHOF & M. DIAMOND, ABORTION POLITICS (1977).

39. See L. PFEFFER, *supra* note 15, at 201-02. See also *infra* notes 39-60 and accompanying text.

ization of state abortion legislation;⁴⁰ its efforts to ban abortion by amending the Constitution,⁴¹ especially in the wake of the Supreme Court's decisions in *Roe v. Wade*⁴² and *Doe v. Bolton*;⁴³ and its massive

40. See ABORTION POLITICS, *supra* note 34. The Bishop's Committee for Pro-Life Activities was established in 1972 in response to the liberalization of state abortion laws. See *supra* note 40 and accompanying text. Its principal goal was to inform the public of the Catholic Church's antiabortion stance, and to organize the political opposition to liberalizing reform legislation. ABORTION POLITICS, *supra* note 34, at 74.

41. See generally 1 ABORTION IN A CHANGING WORLD 34-57 (R. Hall ed. 1970); ABORTION POLITICS, *supra* note 34, at 87-94; D. O'NEIL, *supra* note 38, at 27-31. The Catholic Church position is that there can be no justification for the termination of an unborn fetus. The moral basis for this view is that human life is sacred; that it exists before birth; and that abortion violates the legal and moral prohibition against killing. Although the Church at one time imposed a more lenient penalty for abortion of an "unformed" fetus—one that is without a soul—it now refuses to recognize any penalty less than excommunication for the woman undergoing the abortion and for the person performing it. The only possible exception is for an unintended abortion resulting from attempts to save a woman's life. See D. CALLAHAN, ABORTION (1970); Noonan, *Abortion and the Catholic Church: A Summary History*, 12 NAT. L.F. 85 (1967); Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973).

The National Conference of Catholic Bishops' *Declaration on Abortion* states that "[t]he child in the womb is human. Abortion is an unjust destruction of a human life and morally that is murder." NATIONAL CONFERENCE OF CATHOLIC BISHOPS, DECLARATION ON ABORTION (1974), reprinted in *Abortion—Part I*, *supra* note 34, at 181. See also O'Donnell, *Abortion, II (Moral Aspects)*, in 1 NEW CATHOLIC ENCYCLOPEDIA 28 (1967) ("The moral malice of abortion is found simply in the fact that it is a directly intended and totally indefensible destruction of innocent human life."). The Second Vatican Council stated the Catholic Church view of "abortion and infanticide [as] unspeakable crimes." See 1 ABORTION IN A CHANGING WORLD, *supra*.

The National Committee for a Human Life Amendment was established shortly after the Supreme Court decisions in *Roe v. Wade* and *Doe v. Bolton*. Its goal as a lobbying group is to effect the passage of a constitutional amendment giving an unborn fetus legal rights from the time of conception. See *Abortion—Part I*, *supra* note 34. Of four proposed amendments, none were reported out of subcommittee. In explaining the failure of the amended proposals, Senator Bayh, Chairman of the Subcommittee on Constitutional Amendments, stated:

The simple and irrefutable fact is that [abortion] is not an issue that can be properly or effectively dealt with in a constitutional context.

. . . By amending the Constitution to establish one view as to when life begins at a time when there is no clear agreement among various religious denominations or among people in general, appears to me to be a serious misreading of the nature of the Constitution itself.

. . . It is precisely in areas that are so intimate, where public attitudes are deeply divided, both morally and religiously, that private choice can be defended as our Constitution's way of reconciling the irreconcilable without dangerously embroiling church and state in one another's affairs.

121 CONG. REC. 29,057 (1975).

42. 410 U.S. 113 (1973). The Supreme Court held that a Texas criminal abortion statute was unconstitutional on the grounds that it violated a woman's right to privacy under the fourteenth amendment due process clause. *Id.* at 153. Although the state has important interests in regulating abortion, it may not regulate during the first trimester of pregnancy. The state has no compelling interest in interfering with a physician-patient decision during this period. *Id.* at 163.

The state's interest in regulation begins with the second trimester of pregnancy, to the extent

lobbying and campaign activity,⁴⁴ indicate the reality of the church as a

that it "reasonably relates to the preservation and protection of maternal health." *Id.* The state's interest becomes compelling at the point of viability, and can go so far as to prohibit abortion, except when the life or health of the woman is endangered. The woman's right to have an abortion, therefore, is not absolute. *Id.* at 163-64.

43. 410 U.S. 179 (1973). In the companion case to *Roe v. Wade*, the Court held unconstitutional a Georgia statute requiring abortions to be performed only in privately accredited hospitals, after approval by the hospital staff abortion committee, and after confirmation by two licensed and independent physicians. *Id.* at 195, 199-200. The Court outlined the responsibilities of the physician when a woman requests an abortion as follows:

[T]he medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment.

Id. at 193.

44. In 1975 the National Conference of Catholic Bishops endorsed a detailed analysis of the political action necessary to pass an antiabortion amendment and enact restrictive state and federal abortion legislation. See ABORTION POLITICS, *supra* note 34, at 73-80. This analysis called for extensive grass roots lobbying activity, as well as a national political movement to effect passage of a constitutional amendment. It also emphasized that "the task of [the] church-fostered pro-life groups is essentially political, that is, to organize people to help persuade the elected representatives . . . [to] pass . . . a constitutional amendment." See NATIONAL CONFERENCE OF CATHOLIC BISHOPS, PASTORAL PLAN FOR PRO-LIFE ACTIVITIES (1975), *quoted in* ABORTION POLITICS, *supra* note 34, at 75.

The National Right to Life Committee, while disclaiming affiliation with the Catholic Church, has its roots in the Catholic antiabortion movement. It functions primarily as an umbrella group for the many local Right to Life organizations. Its objective is to pass a human life amendment. The group has recently come into conflict with the hierarchy of the Catholic Church because of its increasing identification with Christian fundamentalist political lobbying organizations. It established the Life Amendment Political Action Committee (LAPAC) to defeat moderate Congressmen in the 1980 election campaigns who opposed the proposed amendment. See ABORTION POLITICS, *supra* note 34, at 121-22.

Repeated unsuccessful efforts to amend the Constitution caused the National Right to Life Committee to call for a constitutional convention. The Constitution provides, in article V:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress

U.S. CONST. art. V (emphasis added). The calling of a convention to amend the Constitution has never been used, ostensibly because two thirds of the states have never agreed to do so. For a discussion of the difficulties involved in the constitutional convention approach, see Note, *Proposed Legislation on the Convention Method of Amending the United States Constitution*, 85 HARV. L. REV. 1612 (1972). See also Gilliam, *Constitutional Convention: Precedents, Problems, and Proposals*, 16 ST. LOUIS U.L.J. 46 (1971).

Substantial concern has been expressed about holding a constitutional convention, primarily because no statutory procedures or standards exist that would govern the convention. Further, it is unclear whether, once the convention is called, it could be limited to the single proposed amendment. See *Procedures for Calling Constitutional Conventions Upon Application by States: Hearings*

"constant presence"⁴⁵ in politics. In addition, the emergence⁴⁶ of

on *S.2307 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 61-63 (1967) (statement of Alexander M. Bickel). See generally Black, *The Proposed Amendment of Article V: A Threatened Disaster*, 72 *YALE L.J.* 957 (1963); Bonfield, *Proposing Constitutional Amendments by Convention: Some Problems*, 39 *NOTRE DAME LAW.* 659 (1964); Corwin & Ramsey, *The Constitutional Law of Constitutional Amendment*, 26 *NOTRE DAME LAW.* 185 (1951); Feerick, *Amending the Constitution Through a Convention*, 60 *A.B.A.J.* 285 (1974). See also *Fortson v. Toombs*, 379 U.S. 621 (1965); *Coleman v. Miller*, 307 U.S. 433 (1939); *Leser v. Garnett*, 258 U.S. 130 (1922); *Dillon v. Gloss*, 256 U.S. 368 (1921); *Hawke v. Smith*, 253 U.S. 221 (1920); *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1878).

The Catholic hierarchy opposes calling a constitutional convention to amend the Constitution. See *ABORTION POLITICS*, *supra* note 34, at 120.

The abortion issue became particularly controversial in the 1980 presidential campaign after Archbishop Humberto Cardinal Medeiros of Boston sent a letter on church stationery to all Massachusetts Catholic congregations. The letter stated that elected officials responsible for legalizing abortion, and those who elected them, "cannot separate themselves totally from that guilt which accompanies this horrendous crime and deadly sin. If you are for true freedom . . . you will vote to save 'our children, born and unborn.'" Lewis, *Religion and Politics*, *N.Y. Times*, Sept. 18, 1980, § A, at 31, col. 2. The criticism resulting from this letter pushed abortion to the forefront of election issues. See *The Archbishop and Abortion*, *N.Y. Times*, Sept. 19, 1980, § A, at 26, col. 1. The Catholic hierarchy remained firm in its opposition to abortion, but retreated from the position that a candidate's stand on the issue should be the determinative voting criterion. See *ADMINISTRATIVE BOARD, U.S. CATHOLIC CONFERENCE, POLITICAL RESPONSIBILITY: CHOICES FOR THE 1980s*, reprinted in 9 *ORIGINS* 349 (1979).

45. L. PFEFFER, *supra* note 15, at 202. See also *infra* note 46. The effectiveness of the Catholic Church's national lobbying power is evident from the following description:

Every time the Senate conferees make a compromise offer, Mr. Gallagher [lobbyist for the National Committee for a Human Life Amendment] quietly walks to the conference table to tell a staff aide to the 11 House conferees whether the proposal is acceptable to the bishops. His recommendations invariably are followed.

Tolchin, *On Abortion, the Houses Still Remain Miles Apart*, *N.Y. Times*, Nov. 27, 1977, § 4, at 4, col. 3.

46. Professor Pfeffer has discerned three principal patterns of church involvement in politics: (1) the church responds to what it considers a moral deficiency in society, but in a relatively disorganized manner; (2) the church again responds to a single moral issue, but in an organized and well-planned effort; and (3) the church responds to a single moral issue, but is permanently involved in politics in the sense that it is prepared to act whenever it feels called upon to do so. See L. PFEFFER, *supra* note 15, at 201-02. The first two historical patterns of church political activity have evolved into a far more expansive involvement, represented most recently by the Catholic response to the abortion issue, an example of Pfeffer's third category. See *supra* note 38-45 and accompanying text. The phenomenon of Christian fundamentalist political activity, which has emerged since Pfeffer developed his categories, adds support to his view of the church as a "constant presence" in politics. Current political activity by religious organizations and the concern with maintaining separation must, however, be viewed in the context of historical involvement by churches in politics. It is clear that although the intensity with which these groups have become involved is not unprecedented, the broad scope of involvement is a relatively recent development.

The antislavery movement provides an early example of the first pattern of involvement by the church in political action for social change. In 1688, a group of Pennsylvania Quakers formally condemned the practice of slaveholding. The Quakers' moral condemnation was based on the

view that the grace of God elevated all men, regardless of color, to a common level of equality. To hold slaves was, in addition, incongruous with the freedom the Quakers had sought and gained by immigrating to America. The first formal denunciation of slavery was, however, unsuccessful in its attempt to persuade other Quakers to free their slaves. *See generally* T. DRAKE, *QUAKERS AND SLAVERY IN AMERICA* (1950); J. STEWART, *HOLY WARRIORS* (1976).

During the years prior to the American Revolution, a substantial increase in opposition to slavery took place, most notably among the Quakers, Baptists and Methodists. *See generally* D. DUMOND, *ANTISLAVERY 26-34* (1961); S. JAMES, *A PEOPLE AMONG PEOPLES 268-334* (1963); D. MATTHEWS, *SLAVERY AND METHODISM 3-29* (1965); W. POOLE, *ANTI-SLAVERY OPINIONS BEFORE THE YEAR 1800*, at 43-58 (1873). Slavery came to be viewed as a complete contradiction to the goals and underlying principles of the American Revolution. Thus, Madison, Hamilton, Paine, Franklin, and Jefferson advocated emancipation. By 1804, every Northern state had passed emancipation laws. For a collection of the views on slavery held by prominent figures in the American Revolution, see G. LIVERMORE, *AN HISTORICAL RESEARCH RESPECTING THE OPINIONS OF THE FOUNDERS OF THE REPUBLIC ON NEGROES AS SLAVES, AS CITIZENS, AND AS SOLDIERS* (1862). *See generally* M. DILLON, *THE ABOLITIONISTS* (1974); D. MACLEOD, *SLAVERY, RACE AND THE AMERICAN REVOLUTION* (1974); D. ROBINSON, *SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS, 1765-1820* (1971).

The church's active participation in the anti-slavery movement did not end with the start of the Civil War. *See generally* 2 A. STOKES, *CHURCH AND STATE IN THE UNITED STATES 246* (1950) (religious activity during the Reconstruction period).

The movement's most active participants viewed the struggle as a reaffirmation of their Christian identity. *See generally* B. THOMAS, *THEODORE WELD* (1950). Abolitionists during the nineteenth century viewed the movement as an attempt to reconcile and redeem all mankind through Christian brotherhood. "In slaveholding [the abolitionists] discovered the ultimate source of the moral collapse which so deeply disturbed them." J. STEWART, *supra*, at 48. The spokesmen of the movement grounded their activism on principles derived from the Bible. *See, e.g.*, A. BARNES, *THE CHURCH AND SLAVERY 42* (1857) ("the *spirit* of the New Testament is against slavery, and the principles of the New Testament, if fairly applied, would abolish it."); G. CHEEVER, *GOD AGAINST SLAVERY 93* (1857) ("That the system of slavery is sinful in the sight of God, is capable of demonstration by several distinct lines of proof."); D. CHRISTY, *PULPIT POLITICS 78* (1862) ("The horrors of slavery . . . , and the public mind awakened to its moral turpitude, the future mode of action was to show that, being a heinous sin, slaveholding ought not to be connived at in the church.").

William Lloyd Garrison, founder of the American Anti-Slavery Society, wrote in the Society's "Declaration of Sentiments":

[T]hose laws which are now in force, admitting the right of slavery, are therefore, before God, utterly null and void; being an audacious usurpation of the Divine prerogative, a daring infringement on the law of nature, a base overthrow of the very foundations of the social compact . . . , and a presumptuous transgression of all the holy commandments

See R. WALLCUT, *SELECTIONS FROM THE WRITINGS AND SPEECHES OF WILLIAM LLOYD GARRISON 68-69* (1968). *See also* R. NYE, *WILLIAM LLOYD GARRISON AND THE HUMANITARIAN REFORMERS* (1955).

The American Anti-Slavery Society was first organized in Boston in 1832, and had its first national convention in 1833. The convention members were Quakers, Evangelicals, Congregationalists, and Unitarians. The platform adopted included a demand for immediate and unconditional emancipation. The more conservative abolitionists claimed that the American public was not prepared for immediate emancipation, and favored a gradual process. Nevertheless, the Society became the source of the politicization of the antislavery movement, and within three years

had established 500 local antislavery societies. The massive petition drives organized by the Society, intended to "disrupt" national politics and raise antislavery as a political issue in Washington, were so successful that in 1836 the House of Representatives passed the famous gag rule prohibiting floor debate on antislavery petitions. See generally R. NYE, *FETTERED FREEDOM* (1964); Bretz, *The Economic Background of the Liberty Party*, in 34 *AM. HIST. REV.* 250 (1929). The gag rule provided the abolitionists with further support in their struggle against the antiabolitionist Northern Democrats and Whigs. The Society argued that the gag rule was an indication of congressional willingness to infringe constitutionally guaranteed rights of freedom of speech, freedom of the press and freedom to petition. See generally S. BEMIS, *JOHN QUINCY ADAMS AND THE UNION* (1956); McPherson, *The Fight Against the Gag Rule: Joshua Leavitt and Antislavery Insurgency in the Whig Party, 1839-1842*, 48 *J. NEGRO HIST.* 177 (1963).

The transformation of the movement into a political pressure group did not, however, diminish the moral and religious principles underlying the opposition to slavery. It remained a religious movement, and the eventual split in the Society was based on political strategy, not on religious principles. See generally T. DRAKE, *supra*, at 133-66; J. STEWART, *supra*, at 50-96.

The second of Professor Pfeffer's patterns of church involvement in politics is illustrated by the prohibition movement, the early success of which was the result of a highly organized church lobbying effort. The Anti-Saloon League developed out of a mass meeting of the Oberlin Temperance Alliance in 1874. Archbishop John Ireland and Rev. A.J. Kynett, chairman of the Permanent Committee on Prohibition and Temperance of the Methodist Church, began the movement for a national league in 1894. It was formed and organized at a national convention in Washington, D.C. A majority of the delegates to the first convention were clergy, and practically all of the officers were religious leaders. See H. ASBURY, *supra* note 34, at 96-100. See generally P. ODEGARD, *PRESSURE POLITICS* (1928).

The Anti-Saloon League claimed to be the "Church in action against the saloon." It came to be known as the "real agency through which the church was directing its fight against the liquor traffic." E. CHERRINGTON, *HISTORY OF THE ANTI-SALOON LEAGUE* (1913), quoted in H. ASBURY, *supra* note 34, at 96. It coordinated and centralized the local church temperance groups. See D. COLVIN, *supra* note 34, at 380-406; J. TIMBERLAKE, *PROHIBITION AND THE PROGRESSIVE MOVEMENT, 1900-1920*, at 125-49 (1963). The League was attacked for being a religious political organization, but refused to deny its political purposes and methods. On the contrary, it boasted of being the most effective political organization in the world after the eighteenth amendment was ratified. H. ASBURY, *supra* note 34, at 100-01, 127-37; D. COLVIN, *supra* note 34, at 380-85. See also L. PFEFFER, *supra* note 15, at 200. The League was successful in passing prohibition laws in 33 states, Alaska, Puerto Rico and the District of Columbia prior to ratification of the eighteenth amendment. Through the League's lobbying efforts, Congress passed the Webb-Kenyon Act over the veto of President Taft. The Act, although limited in its effect, gave the states, rather than the federal government, control over laws governing interstate commerce in alcohol. Cf. *Clark Distilling Co. v. Western Md. Ry. Co.*, 242 U.S. 311 (1917) (upholding the constitutionality of the Webb-Kenyon Act).

In the 1914 elections, the League was responsible for gaining nearly a two-thirds majority of prohibitionists in the House of Representatives. When the eighteenth amendment was passed by the House in 1917, there was a six year limitation for ratification. Bishop Cannon, Jr., then chairman of the League's National Legislative Committee, stated that the amendment would be ratified within two years. In fact, it took only 13 months to ratify. Cf. *Rhode Island v. Palmer*, 253 U.S. 350 (1920) (upholding the constitutionality of the eighteenth amendment).

The League was largely responsible for inducing Congress to pass the National Prohibition Act (the Volstead Act) over the veto of President Wilson. Cf. *Jacob Ruppert v. Caffey*, 251 U.S. 264 (1921) (upholding the constitutionality of the Volstead Act). See generally D. COLVIN, *supra* note 34, at 430-51; J. TIMBERLAKE, *supra*, at 149-84. Although unsuccessful in its efforts to prevent

Christian fundamentalist groups⁴⁷ in the political arena departs significantly from historical patterns of church political activity.⁴⁸ The activities of these groups⁴⁹ often take the form of partisan support of political candidates based on a defined ideology and agenda.⁵⁰ The confluence of religious goals and the political acumen of fundamentalist organizers⁵¹ has developed into a highly effective lobbying and campaign

repeal of the prohibition amendment, *see* H. ASBURY, *supra* note 34, at 141-323, the League coordinated a highly organized, nonpartisan, single issue campaign for social reform. L. PFEFFER, *supra* note 15, at 202.

47. Historically, fundamentalists have viewed their task as divorced from political involvement. Religion was viewed as a private matter of the individual, separate and distinct from the world of politics. Involvement in politics occurred only when issues central to religion were at stake. Thus, fundamentalists were active in opposing the teaching of Darwin's theory of evolution in the schools and legislative and judicial restrictions on prayer in the schools. *See* Wood, *Religious Fundamentalism and the New Right*, 22 J. CHURCH & ST. 409, 417 (1980).

48. Three important Christian fundamentalist organizations emerged in 1979. The Religious Roundtable, Moral Majority, and Christian Voice were organized to mobilize Christians into an effective political movement. *See* Wood, *supra* note 47, at 413-17; *Born-Again Politics*, *supra* note 8, at 31-36.

49. Unlike church political activity in the prohibition, antislavery and antiabortion movements, Christian fundamentalist political activity has not developed as a response to a single, compelling issue. Christian fundamentalist organizations during the 1980 election campaign outlined a general political agenda opposing abortion, the proposed Equal Rights Amendment, school busing, pornography, the strategic arms limitation treaty, rights of homosexuals, and sex education in the schools. Further, they actively supported prayer in public schools, the teaching of creationism, capital punishment, community censorship of textbooks, and a stronger national defense. The organizations openly endorsed specific candidates, and were distinctly partisan in their efforts to defeat targeted officeholders. Christian Voice rated all members of Congress on the "morality" of their voting records. Moral Majority recruited and trained individuals to run for political office on a "pro-God, pro-family" platform. *See* Chandler, *The New Religious Right: Worshiping a Past That Never Was*, 42 CHRISTIANITY & CRISIS 20 (1982); Wood, *supra* note 47, at 413-17; *Born-Again Politics*, *supra* note 8, at 28-36.

50. One commentator stated that the political activity of fundamentalist organizations is in marked contrast to the tradition of mainline religious denominations—Catholic, Protestant, and Jewish—which have, by and large, generally seen their role in the political process to be one of advocacy of ideas in the formulation of public policy and not the advancement of partisan politics or the election of particular candidates. Wood, *supra* note 47, at 418.

51. Political organizations closely linked to the fundamentalists' activity include the Conservative Caucus, the Heritage Foundation, the American Conservative Union, and the National Conservative Political Action Committee (NCPAC). The most influential and powerful of the fundamentalist leaders are Jerry Falwell, co-founder of Moral Majority and a television evangelist who claims a viewing audience of 25 million people; Pat Robertson, co-founder of Moral Majority and president of his own religious television network; and James Robison, co-founder of the Religious Roundtable and a television evangelist who co-sponsored and assembled 18,000 people for a "public affairs briefing" for presidential candidate Ronald Reagan. The political counterparts to the fundamentalist religious leaders include Paul Weyrich, a veteran political organizer and head of the Committee for the Survival of a Free Congress and a Washington-based candidate training school; Howard Phillips, head of the lobbying organization, Conservative Caucus, and co-founder

effort functioning on local, state and national levels.⁵² The goal of this effort is to defeat candidates⁵³ and change policies⁵⁴ that are inconsistent with perceived "moral absolutes."⁵⁵ The recent divergence of political activity by religious organizations from historical patterns of involvement has been challenged as incompatible with the principles underlying the first amendment.⁵⁶ Commentators are primarily concerned with perceived attempts by fundamentalists to "Christianize the government."⁵⁷ They argue that by ignoring the pluralism guaranteed

of Moral Majority; John Dolan, head of NCPAC, an organization claiming responsibility for the defeat of Senators Bayh, McGovern, and Church in the 1980 elections; Edward McAteer, co-founder of the Religious Roundtable and formerly associated with the Conservative Caucus; and Richard Viguerie, a direct mail expert largely responsible for successful fund-raising programs for the religious organizations. See Chandler, *supra* note 49, at 24; *Born-Again Politics*, *supra* note 8, at 31. For a detailed discussion of the organizations and leadership involved in the "new religious right," see P. SHRIVER, *THE BIBLE VOTE 5-41* (1981).

52. In Alaska, for example, fundamentalists succeeded in efforts to control state and local party organizations and thereafter nominated their own candidates for political office. Herbers, *Ultraconservative Evangelicals A Surging New Force in Politics*, N.Y. Times, Aug. 17, 1980, § 1, at 1, col. 3. In Florida, a fundamentalist minister who succeeded in getting the members of his church to take over the local Democratic committee said: "We're running for everything from dogcatcher to senator." *Born-Again Politics*, *supra* note 8, at 29.

53. See *supra* note 49 and accompanying text.

54. See *supra* notes 49-50 and accompanying text.

55. Wood, *supra* note 47, at 418. One commentator stated that "[t]he ethic of the new religious right is not an ethic of moral struggle and decision but of divine command and human obedience or disobedience." Thomas, *The New Religious Right: Worshiping a Place That Isn't God*, 42 CHRISTIANITY & CRISIS 26 (1982).

56. Patricia Harris, as Secretary of the Department of Health and Human Services, stated that the increased political activism of fundamentalist religious groups was:

At best exclusionary and at worst a dangerous, intolerant and polarizing influence in our political system. Our democracy has functioned because, as a rule, we have sought out common ground, shared values and beliefs, rather than an orthodoxy espoused by any particular group. That consensus orientation is profoundly threatened by those who advocate a "Christian Crusade" or want our leadership narrowed to include only "pro-Christian" public officials.

Fundamentalists' Activity in Politics Called a Danger, N.Y. Times, Sept. 25, 1980, § B, at 10, col. 6.

Ira Glasser, president of the American Civil Liberties Union, called the increasing involvement of Christian fundamentalist groups in the political process "an exceptional threat" to civil rights and liberties. *Threat to Civil Liberties Seen*, N.Y. Times, Nov. 26, 1980, § A, at 17, col. 2.

The National Association of Evangelicals, a conservative Christian organization which reflects the traditional fundamentalist view in its distrust of political involvement, see *supra* note 47, criticized the new fundamentalist groups' claim that certain political views are the only ones authenticated by the Bible. The organization viewed the result of such a claim as an attempt to form a quasi-political Christian party. Briggs, *Evangelicals Debate Their Role in Battling Secularism*, N.Y. Times, Jan. 27, 1981, § A, at 12, col. 4. See *infra* note 74 and accompanying text.

57. See *Religious Rally on Mall in the Capital Draws Support and Criticism*, N.Y. Times, April 27, 1980, § 1, at 64, col. 3. The phrase came from a statement issued by 20 religious organizations denouncing a "Washington for Jesus" rally organized by fundamentalists in 1980. A spokesman

by the Constitution,⁵⁸ religious organizations threaten to impose a particular view of morality on society.⁵⁹ These attempts, in turn, threaten the first amendment's mandate of separation of church and state.⁶⁰

for the National Council of Churches called the rally an "arrogant" attempt to insist that one group's position on a political issue is Christian while all others are not. *Id.* See also Thomas, *supra* note 55, at 28:

The spirit of the new religious right is one of a "heteronomous" reaction to a spiritually indifferent "autonomous" culture. Secular humanism is its true enemy and foil, and a divinely commanded order of social and personal life is its chief weapon. Where autonomous values are relativistic, heteronomy brings back normative absolutism. Where autonomy relies upon the creativity of reason, heteronomy demands that reason be subordinated to primal revelation. Where the autonomous consciousness subjects all things to objective investigation, heteronomy protects its sacred forms from rational inquiry.

. . . The heteronomy of the new religious right is not just an overzealous commitment to morality; it is an attack on human freedom and responsibility.

Id.

58. See generally P. KAUPER, RELIGION AND THE CONSTITUTION 80-86 (1964); L. PFEFFER, *supra* note 15, at 192.

59. Professor Kauper warned of the resulting dangers if one group attempts to impose its moral view on society:

It is not the business of the churches . . . to seek to make a Christian state out of the nation or to Christianize the law. State, government, and law are necessarily secular in character . . . Churches transgress their proper function when they attempt to impose their own peculiar moral beliefs derived from religious insight upon others who do not share these beliefs and insights. *It is imperative that in our pluralistic society no church seek the sanction of law for its own moral conception unless they are translatable into moral values and social policy appropriate to the purposes of the secular community.*

. . . .
 . . . The notion that churches must stay out of politics is valid only insofar as it expresses the idea that the church must not identify itself with the state, use its influence as a political force to control the action of government, or use the force of numbers to impose its moral views on the community.

P. KAUPER, *supra* note 58, at 83-84 (emphasis added).

60. As one commentator has noted:

The current resurgence of religious fervor belies Justice Powell's confident assertion that religious extremism no longer poses any threat to our democratic institutions. Recent alliances between fundamentalist religious factions and right wing political groups may be interpreted as just such a threat. The danger does not lie in the participation of these factions in the political process, but rather in their use of the political process to further their own group's beliefs and practices.

Note, *Rebuilding the Wall: The Case for a Return to the Strict Interpretation of the Establishment Clause*, 81 COLUM. L. REV. 1463, 1475 (1981) (referring to Justice Powell's concurring and dissenting opinion in *Wolman v. Walter*, 433 U.S. 229, 263 (1977)) (footnotes omitted).

Professor Tribe stated that the country's "civil peace" is endangered if religious factions develop an intolerance of each other. Briggs, *Debate is Growing on Legalities of Religious Activism*, N.Y. Times, Oct. 3, 1980, § A, at 22, col. 1. See also L. PFEFFER, *supra* note 15, at 192.

Another commentator, addressing the emergence of fundamentalism in politics, stated:

[In the fundamentalist's] reaction to a secular and morally permissive society . . . there are specific cultural and religious forms which are the direct will of God, and to question them is to rebel against Deity.

. . . .

The Supreme Court's analysis of the first amendment religion clauses frequently begins with an inquiry into the framers' intentions.⁶¹ The significance of historical intent lies in the "human values"⁶² that served as the underpinnings of the religion clauses.⁶³ The Court has

[Fundamentalist politics] represents not just a violation of pluralism but a purging of the heart and core of the Christian faith. . . . [W]hile such a religious form has a legitimate claim to a certain truth and power, it is a force which can only be destructive in its realization.

Thomas, *supra* note 55, at 29.

61. See *Walz v. Tax Comm'n*, 397 U.S. 664, 700-16 (1970) (Douglas, J., dissenting); *Abington School Dist. v. Schempp*, 374 U.S. 203, 212-14 (1963); *Engel v. Vitale*, 370 U.S. 421, 424-30 (1960); *McGowan v. Maryland*, 366 U.S. 420, 459-543 (1961) (Frankfurter, J., concurring); *Zorach v. Clauson*, 343 U.S. 306, 318-19 (1952) (Black, J., dissenting); *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 214-16, 244-48 (1948) (Frankfurter, J., separate opinion; Reed, J., dissenting); *Everson v. Board of Educ.*, 330 U.S. 1, 8-16 (1947); *Murdock v. Pennsylvania*, 319 U.S. 105, 121-28 (1943) (Reed, J., dissenting); *Reynolds v. United States*, 98 U.S. 145, 162-64 (1878). For a discussion of the Court's interpretation of historical evidence in deciding first amendment cases, see P. KAUPER, *supra* note 58, at 45-53; L. PFEFFER, *supra* note 15, at 109-14; Kauper, *Everson v. Board of Education: A Product of the Judicial Will*, 15 ARIZ. L. REV. 307, 317-19 (1973). See generally M. MALBIN, *RELIGION AND POLITICS* (1978).

For critical analyses of the Court's interpretation of constitutional history, see C. ANTIEAU, A. DOWNEY, & E. ROBERTS, *FREEDOM FROM FEDERAL ESTABLISHMENT* 140 (1964); M. HOWE, *THE GARDEN AND THE WILDERNESS* 1-31 (1965); W. KATZ, *RELIGION AND AMERICAN CONSTITUTIONS* 9 (1964); Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROBS. 3 (1949); Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502 (1964).

Professor Tribe has identified three principal views on the meaning of the religion clauses which were debated during the framing of the Constitution. L. TRIBE, *supra* note 36, at 816-17. The "evangelical view," developed by Roger Williams of Rhode Island, required separation of church and state for the protection of the churches from government interference. *Id.* at 816. The "Jeffersonian view" was that separation was required for the protection of the state from church interference. "[I]t was Jefferson's conviction that only the complete separation of religion from politics would eliminate the formal influence of religious institutions and provide for a free choice among political views." *Id.* at 817. Finally, the "Madisonian view" was that both religion and government needed and benefited from complete noninterference from the other. *Id.* See generally R. ERNST, *THE POLITICAL THOUGHT OF ROGER WILLIAMS* (1929); R. MORGAN & J. EDMUND, *ROGER WILLIAMS, THE CHURCH AND THE STATE* (1967); sources cited *infra* notes 62-64.

62. L. TRIBE, *supra* note 36, at 816. Another commentator has stated:

[A]ttempts to resolve twentieth century church-state problems by asking ourselves how the entire pantheon of the founding fathers would have resolved them will prove futile. . . .

. . . [T]he proper objective of an historical search should be the determination of the "historic purpose of the First Amendment." In other words, the Court, in giving content to the first amendment should attempt to incorporate the human purposes and values underlying it.

Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Developments*, 80 HARV. L. REV. 1381, 1383-84 (1967) (quoting Jones, *Church-State Relations: Our Constitutional Heritage*, in *RELIGION AND CONTEMPORARY SOCIETY* 156, 173 (H. Stahmer ed. 1963)). See also Summers, *The Sources and Limits of Religious Freedom*, 41 ILL. L. REV. 53, 55-58 (1946).

63. See *Abington School Dist. v. Schempp*, 374 U.S. 203, 237 (1963) (Brennan, J., concur-

frequently focused on Madison's⁶⁴ and Jefferson's⁶⁵ views that a strict separation of church and state must be maintained.⁶⁶ Maintaining strict separation, however, has not been a consistently applied priority, especially in recent years.⁶⁷ The immediate concern, however, is the extent to which Madison and Jefferson envisioned separation as entailing exclusion of religion from politics. The Court's interpretation of the historical values⁶⁸ supports its position that separation does not require churches or the clergy to stand apart from politics.

In *Walz v. Tax Commission*,⁶⁹ the Court held that churches have the right to take positions on political issues, including the "vigorous advocacy of legal or constitutional positions."⁷⁰ The Court in *McDaniel v. Paty*⁷¹ stated that although one purpose of the establishment clause is prevention of political divisiveness along religious lines, this purpose does not imply that religious political participation has a less preferred status than political participation in general.⁷² Thus, the extent to

ring) ("too literal [a] quest for the advice of the Founding Fathers [is] misdirected . . . [because] the historical record is at best ambiguous. . ."). See also R. MORGAN, *THE SUPREME COURT AND RELIGION* 186 (1972); Giannela, *supra* note 62, at 1383-84.

[T]he establishment clause embodies a concept of church and state which takes on precise meaning only in light of prevailing assumptions as to the appropriate sphere of action for each institution.

. . . As the social, political, and economic milieu evolves, so must the content given the first amendment.

Id.

64. See, e.g., *Flast v. Cohen*, 392 U.S. 83, 103 (1968) ("the leading architect of the religion clauses of the First Amendment"); *Everson v. Board of Educ.*, 330 U.S. 1, 33-34 (1947) (Rutledge, J., dissenting) ("[i]n the documents of the times, particularly of Madison, . . . is to be found irrefutable confirmation of the Amendment's sweeping content"). But see *Walz v. Tax Comm'n*, 397 U.S. 664, 684 n.5 (1970) (Brennan, J., concurring) (views of Madison and Jefferson not representative of other authors of the amendment); 2 A. STOKES, *CHURCH AND STATE IN THE UNITED STATES* 546-48 (1950) (no evidence that final wording of the amendment was more the result of Madison's efforts than others).

65. See, e.g., cases cited *supra* note 16.

66. See *supra* notes 15-16 and accompanying text. See generally N. DORSEN, P. BENDER & B. NEUBORNE, *supra* note 26, at 1170 nn.2-4; M. HOWE, *supra* note 61.

67. For an excellent analysis of the need to return to a strictly neutral separation of church and state, see Note, *supra* note 60, at 1473 (arguing that "[r]ecent establishment clause decisions have given little practical guidance to legislatures and lower courts and have not provided a basic set of consistent, sound philosophical principles with which to justify legal relationships between church and state.")

68. See, e.g., cases cited *supra* note 61.

69. 397 U.S. 664 (1970).

70. *Id.* at 670.

71. 435 U.S. 618 (1978).

72. *Id.* at 640 (Brennan, J., concurring). See also P. KAUPER, *supra* note 58, at 84-85; L. PFEFFER, *supra* note 15, at 192; L. TRIBE, *supra* note 36, at 866.

which religious political activity results in divisiveness must be balanced against the churches' right to engage in political activity.

In a society that values religious pluralism,⁷³ attempts by any religion to impose its own moral values on the rest of society threaten to create political divisiveness along religious lines.⁷⁴ A church's insistence on measuring secular law and candidates for office by their conformity to its particular conception of morality⁷⁵ demands that society choose one set of values over all others.⁷⁶ The Supreme Court recognized this danger and incorporated it into its test⁷⁷ for establishment clause cases.⁷⁸

A. *The Establishment Clause*

In *Lemon v. Kurtzman*,⁷⁹ the Court promulgated a three-part test for establishment clause analysis: government regulation must have a secular purpose;⁸⁰ its primary effect must "be one that neither advances nor inhibits religion;"⁸¹ and its result must not excessively entangle

73. See generally P. KAUPER, *supra* note 58, at 3-12, 82; M. MARTY, *THE NEW SHAPE OF AMERICAN RELIGION* 1-5 (1959); L. TRIBE, *supra* note 36, at 834.

74. See *supra* notes 56-60 and accompanying text. The increased political activity of fundamentalist organizations prompted a challenge from a group of 13 religious denominations. They argued that fundamentalists' use of morality as a measure of political candidates "represents ideological preferences rather than the breadth of responsible Christian positions. . . . There is no justification in a pluralistic and democratic society for demands for conformity along religious or ideological lines." *Religious Leaders Fault Policies of Evangelical Political Groups*, N.Y. Times, Oct. 21, 1980, at B6, col. 1.

Rabbi Alexander Schindler, president of the Union of American Hebrew Congregations, expressed a similar concern:

[Jerry Falwell's] exclusivist emphasis on a "Christian Bill of Rights" and a "Christian America" . . . create[s] a divisive climate of opinion hostile to religious tolerance. Such a climate . . . is bad for civil liberties, human rights, social justice, interfaith understanding and mutual respect among Americans.

N.Y. Times, Dec. 9, 1980, at A26, col. 4.

75. See P. KAUPER, *supra* note 58, at 83-85.

76. See *supra* notes 56-60 and accompanying text.

77. See *infra* notes 80-82 and accompanying text.

78. See *infra* notes 87-109 and accompanying text.

79. 403 U.S. 602 (1971).

80. *Id.* at 612. See, e.g., *Stone v. Graham*, 449 U.S. 39, 40-41 (1980); *Roemer v. Maryland Bd. of Pub. Works*, 426 U.S. 736, 747 (1976); *Meek v. Pittenger*, 421 U.S. 349, 358-59 (1975); *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 773 (1973); *Hunt v. McNair*, 413 U.S. 734, 741 (1973); *Tilton v. Richardson*, 403 U.S. 672, 678 (1971); *Epperson v. Arkansas*, 393 U.S. 97, 107 (1968); *Abington School Dist. v. Schempp*, 374 U.S. 203, 222 (1963).

81. 403 U.S. at 612. See, e.g., *Hunt v. McNair*, 413 U.S. 734, 741 (1973); *Abington School Dist. v. Schempp*, 374 U.S. 203, 222 (1963); *McGowan v. Maryland*, 366 U.S. 420, 430-31 (1961).

government with religion.⁸² The third element of this test is central to the discussion of church political activity.

The excessive entanglement test adopts Madison's view that both religion and government benefit from mutual noninterference.⁸³ The Court in *Lemon* recognized two aspects of entanglement: administrative entanglement⁸⁴ and political divisiveness.⁸⁵ Administrative entanglement refers to the interaction between religion and government on an institutional level. Avoidance of such entanglement protects religion from excessive governmental interference.⁸⁶ The second element of entanglement analysis is designed to protect government from political divisiveness along religious lines⁸⁷ resulting from excessive church political activity.⁸⁸

The Court has considered⁸⁹ striking down legislation on political di-

82. 403 U.S. at 613. See, e.g., *Roemer v. Maryland Bd. of Pub. Works*, 426 U.S. 736, 761-67 (1976); *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 773 (1973); *Walz v. Tax Comm'n*, 397 U.S. 664, 694 (1970) (Harlan, J., concurring).

Certain members of the Court have argued that the excessive entanglement aspect of the test is superfluous because the secular effect limitation is sufficient to prevent excessive entanglement. See *Roemer v. Maryland Bd. of Pub. Works*, 426 U.S. 736, 769 (1976) (White, J., concurring); *Lemon v. Kurtzman*, 403 U.S. 602, 665-71 (1971) (White, J., concurring in part and dissenting in part). See generally *L. TRIBE, supra* note 36, at 865.

83. See *supra* note 61 and accompanying text.

84. 403 U.S. at 616. See also *Walz v. Tax Comm'n*, 397 U.S. 664, 674-75 (1970).

85. *Id.* at 623.

86. *Id.* at 616. See *Walz v. Tax Comm'n*, 397 U.S. 664 (1970). In his concurring opinion in *Walz*, Justice Harlan recognized that most cases can be decided under the administrative entanglement aspect of the test, thereby preventing "the most egregious and hence divisive kinds of state involvement in religious matters." *Id.* at 695.

87. 403 U.S. at 623-24. See *Board of Educ. v. Allen*, 392 U.S. 236, 249 (1968) (Harlan, J., concurring); *Abington School Dist. v. Schempp*, 374 U.S. 203, 307 (1963) (Goldberg, J., concurring).

The source of the political divisiveness aspect of the test is Justice Harlan's concurring opinion in *Walz*, 397 U.S. at 695. Justice Harlan stated that "history cautions that political fragmentation on sectarian lines must be guarded against." *Id.* (citing Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1692 (1969)). Justice Burger added weight to this observation by stating in *Lemon*, that "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect." 403 U.S. at 622. For a sharp criticism of the Court's use of the political divisiveness test, see Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U.L.J. 205 (1980).

88. 403 U.S. at 623-24. In *Lemon*, the Court struck down several forms of public funding of parochial schools in part because of the political divisiveness of such aid. See also *Meek v. Pittenger*, 421 U.S. 349, 365-66 & n.15 (1975); *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 794-98 (1973); *Engel v. Vitale*, 370 U.S. 421, 430-35 (1960).

89. See *infra* note 93 and accompanying text.

visiveness grounds in two areas:⁹⁰ first, in the area of public funding of nonpublic schools, or of their students;⁹¹ and second, in the area of restrictive abortion statutes.⁹² A finding of political divisiveness, however, has not been the sole ground for decision in any of these cases.⁹³ The Court is troubled by the possible implications of the test.⁹⁴ Political divisiveness is not sufficient to strike down legislation when the role of religion is limited to taking a position on political issues and persuading others to adopt that position.⁹⁵ It may be sufficient,⁹⁶ however,

90. See generally Gaffney, *supra* note 87, at 225.

91. See, e.g., cases cited *supra* note 80.

92. See, e.g., Harris v. McRae, 448 U.S. 297, 318-20 (1980). See *infra* notes 101-08 and accompanying text.

93. L. TRIBE, *supra* note 36, at 868. In *Lemon v. Kurtzman*, 403 U.S. at 606-22, the Court relied primarily on administrative entanglement to strike down Rhode Island and Pennsylvania statutes providing public funds to parochial elementary and secondary schools. *Id.* In *Committee for Pub. Educ. v. Nyquist*, 413 U.S. at 783-94, the Court struck down a New York statute establishing financial aid programs for private schools. Although the Court recognized the importance of the potential political divisiveness of the statute, it relied on the statute's primary effect of "advanc[ing] religion." *Id.* at 798. In *Meek v. Pittenger*, 421 U.S. at 372, Justice Stewart's opinion placed equal emphasis on the administrative entanglement and political divisiveness aspects in striking down one part of a Pennsylvania statute authorizing aid to nonpublic schools. *Id.* One year later, however, the Court in *Roemer v. Maryland Bd. of Pub. Works*, 426 U.S. at 766, refused to strike down a Maryland statute that authorized similar aid to private schools. Although the nature of the aid program was similar to those struck down in *Lemon* and *Nyquist*, the institutions aided were private colleges as opposed to private elementary or secondary schools. *Id.* Finally, in *Wolman v. Walter*, 433 U.S. 229 (1977), the Court again relied on the administrative entanglement that would result from an Ohio statute granting aid to parochial schools. *Id.* at 254. Justice Brennan placed greater emphasis on the potential divisiveness of the program. He stated that "[the divisive political potential] suffices *without more* to require the conclusion that the Ohio statute in its entirety offends the First Amendment's prohibition against laws 'respecting an establishment of religion.'" *Id.* at 256 (Brennan, J., concurring in part and dissenting in part) (emphasis added).

94. See, e.g., *McDaniel v. Paty*, 435 U.S. 618, 640-42 (1978) (Brennan, J., concurring):

That 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.

[G]overnment may not as a goal promote "safe thinking" with respect to religion and fence out from political participation those, such as ministers, whom it regards as over-involved in religion. Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally.

Id. (footnote omitted).

95. L. TRIBE, *supra* note 36, at 867. See also L. PFEFFER, GOD, CAESAR, AND THE CONSTITUTION 55-63 (1975). Justice Burger supported this conclusion in *Walz*, 397 U.S. at 670:

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. No perfect or absolute separation is really possible; the very existence of the Religion Clauses is an involvement of sorts—one that seeks to mark boundaries to avoid excessive entanglement.

when religion seeks institutional power or economic benefits.⁹⁷

The Court in *Committee for Public Education v. Nyquist*⁹⁸ refused to base its decision solely on the potential political divisiveness of the statute.⁹⁹ Nevertheless, it recognized political divisiveness as an important "warning signal."¹⁰⁰ In *Harris v. McRae*,¹⁰¹ the Court rejected a claim that the Hyde amendment, which prohibits federal fund reimbursement for abortions under the Medicaid program,¹⁰² violated the establishment clause because it developed from the political activity and religious tenets of the Catholic Church.¹⁰³ The *McRae* Court confronted an extremely divisive issue,¹⁰⁴ but refused to find divisiveness along religious lines dispositive.¹⁰⁵ Rather, the Court held the Hyde amendment constitutional,¹⁰⁶ and based its decision on the implicit guarantee of equal protection in the fifth amendment due process clause.¹⁰⁷ The *McRae* decision implies that political divisiveness is of secondary concern to other first amendment rights. Whether the test will be applied as anything more than a warning signal remains unclear.¹⁰⁸ Nevertheless, the Court has not abandoned it as a potential

Id.

96. L. TRIBE, *supra* note 36, at 867-69.

97. *Id.* Professor Tribe has indicated at least one other basis for triggering the political divisiveness test:

However religious may be the wellsprings of the view that murder and mutilation are wrong . . . discussions about public policy in this area can readily avoid open confrontation with controverted religious premises. *But a controversy may be so structured in a particular social and historical context that no attempt to resolve it in a public forum can avoid explicit confrontation with the religious differences that ultimately divide the disputants. . . .*

Tribe, *supra* note 41, at 23 n.106 (emphasis added).

98. 413 U.S. 756 (1973).

99. *Id.* at 783-94. See *supra* note 95 and accompanying text.

100. *Id.* at 794.

101. 448 U.S. 297 (1980).

102. The Hyde amendment is a rider attached annually to the appropriations bill for the Department of Health and Human Services. The 1980 version provides:

[N]one of the funds provided by this joint resolution shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service.

Pub. L. No. 96-123, § 109, 93 Stat. 923 (1979). See generally 59 WASH. U.L.Q. 247 (1981).

103. 448 U.S. at 319-20.

104. See *supra* notes 39-45 and accompanying text.

105. 448 U.S. at 326.

106. *Id.* at 318-20.

107. See 59 WASH. U.L.Q. 247, 250 (1981).

108. See generally Gaffney, *supra* note 87, at 224-32.

basis for decision.¹⁰⁹

B. *The Free Exercise Clause*

Religious organizations have also attacked congressional restrictions on church political activity as unconstitutional infringements on the free exercise of religion.¹¹⁰ The Supreme Court has never decided the issue.¹¹¹ Until it does, elimination, or substantial liberalization, of the Code restrictions on political activity would pose a direct challenge to the historical mandate of maintaining separation of church and state.

The Supreme Court's free exercise decisions distinguish governmental interference with an individual's belief from interference with an individual's conduct.¹¹² Interference with religious belief is absolutely prohibited,¹¹³ whereas religious conduct may be regulated upon a

109. One commentator advocates complete abandonment of the political divisiveness test. See Gaffney, *supra* note 87. But see L. TRIBE, *supra* note 36, at 867-69; Tribe, *supra* note 41, at 23 n.106.

110. See *Hearings on H.R. 13500*, *supra* note 8, at 63-64, 75-76, 90-91 (statements of various religious leaders on the conflict between free exercise of religion and political activity restrictions). The following statement is representative of this concern:

Because some churches define their religious missions as including obligations to speak out on and attempt to influence public affairs, we hold that to do so is a part of their constitutionally protected religious liberty. The state may not deny or limit that right. *Neither may it require that a church give up its rights to the "free exercise" of religion under the First Amendment to be eligible to gain a statutory privilege (e.g. tax exemption).*

Id. at 64 (statement of James E. Wood, Jr.) (emphasis added).

Religious and charitable organizations also attacked the political activity restrictions of section 501(c)(4) of the Code because of the imbalance resulting from allowing businesses and organizations representing them the right to conduct legislative activity with tax deductible funds under § 162(e). *Id.* at 30, 37 (statement of Elvis J. Stahr). Section 162(e) allows businesses to promote their interests with tax deductible funds, while charitable interests are not similarly treated. Business expenditures under § 162(e) are, however, deductible only when incurred for purposes of affecting legislation that is "of direct interest to the taxpayer" or to "an organization of which he is a member." Furthermore, there is no provision allowing deductions for expenditures incurred for purposes of grass roots lobbying. *Id.* at 14 (statement of William M. Goldstein, Deputy Assistant Secretary of the Treasury). The Tax Reform Act of 1976 specifically allows electing organizations to engage in lobbying, with a provision directly applicable to grass roots lobbying. See I.R.C. §§ 501(h)(1), 4911(d) (1976). See *infra* notes 173-83 and accompanying text.

111. See *infra* note 211 and accompanying text.

112. See, e.g., *In re Summers*, 325 U.S. 561, 570-73 (1945) (sustaining refusal by Illinois courts to admit to the bar a candidate because he was a conscientious objector); *Prince v. Massachusetts*, 321 U.S. 158, 166-70 (1944) (sustaining statute banning distribution of religious literature by minor Jehovah's Witnesses); *Reynolds v. United States*, 98 U.S. 145, 166-67 (1878) (sustaining conviction of a Mormon under antipolygamy laws). See generally L. PFEFFER, *supra* note 15, at 529-43; Gianella, *supra* note 62, at 1386-95.

113. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *In re Jenison*, 375 U.S. 14 (1963) (per curiam); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *West Virginia Bd. of Educ. v. Barnette*, 319

showing of a compelling state interest.¹¹⁴ For a free exercise claim to succeed, however, a showing of government coercion to surrender religious belief or forego religious conduct is necessary.¹¹⁵ The Court's decisions have evolved into a balancing test between "[religious] freedoms and an exercise of state authority."¹¹⁶ This balancing of interests has resulted in arguably inconsistent decisions.¹¹⁷ The Court clearly

U.S. 624 (1943). *Cf.* *Torcaso v. Watkins*, 367 U.S. 488 (1961) (declaring unconstitutional a statute requiring public officeholders to acknowledge a belief in God).

114. *See, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963); *Gallagher v. Crown Kasher Mkt.*, 366 U.S. 617, 627 (1961); *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961); *McGowan v. Maryland*, 366 U.S. 420, 442 (1961); *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944); *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941); *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940); *Reynolds v. United States*, 93 U.S. 145, 166 (1878).

115. The Court identified this aspect of the free exercise clause in *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963):

Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion. . . . [A] violation of the Free Exercise Clause is predicated on coercion

Id. at 223.

116. *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944). *See also* *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). One commentator stated that: "[T]he first amendment demands a balancing test—where the interest of the state incidentally giving rise to interference with religious liberty is minor and the religious interest burdened is substantial, the historic purpose of the free exercise clause would suggest that the state be compelled to grant an exception." Gianella, *supra* note 62, at 1389-90.

117. In *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the Court struck down a statute prohibiting religious organizations from soliciting without prior approval and determination of the bona fides of the organization. *Id.* at 307. Significantly, the *Cantwell* Court recognized the state's interest in regulating religious conduct, since the absolute freedom of belief does not require a corresponding absolute freedom of religiously motivated conduct. *Id.* at 306. The Court stated that:

Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. . . . [A] state may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment.

Id. at 304 (footnotes omitted).

In *Braunfeld v. Brown*, 366 U.S. 599 (1961), a group of Orthodox Jewish merchants challenged Sunday closing laws on the grounds that they infringed their free exercise rights. The Court refused to strike down the statutes, relying on the compelling state interest in prescribing a uniform day of rest. Chief Justice Warren based his majority opinion on the legitimate exercise of state authority in legislating a general, nondiscriminatory law that advances the state's secular purpose and goals. Such legislation is "valid despite its indirect burden on religious observance." *Id.* at 607. The reasoning of the *Braunfeld* opinion was criticized in *Sherbert v. Verner*, 374 U.S. 398, 417-18 (1963) (Stewart, J., concurring). *See also* Comment, *Religion in Politics and the Income Tax Exemption*, 42 *FORDHAM L. REV.* 397, 411 n.102 (1973).

In *Sherbert v. Verner*, 374 U.S. 398 (1963), a Seventh-Day Adventist was denied unemployment

requires, however, that a state's interest must be "of the highest order and . . . not otherwise served"¹¹⁸ to lawfully interfere with conduct grounded on religious belief.¹¹⁹

Despite this requirement, economic regulations will often be upheld as constitutional even though they conflict with religiously motivated conduct.¹²⁰ In 1943, the Supreme Court held that a municipal ordinance imposing a flat license tax on all persons canvassing or soliciting was unconstitutional when applied to Jehovah's Witnesses distributing and soliciting contributions for religious literature.¹²¹ Nevertheless, the Court distinguished the flat license tax from income or property tax,¹²² thereby preventing the case from being read as a broad prohibition on any form of taxation that conflicts with religious conduct.¹²³ Further-

compensation because she refused to take a position that would have required her to work on Saturday, in violation of her religious beliefs. The Court held that this denial violated the free exercise clause because there was no compelling state interest to justify the state action. *Id.* at 406-09. The Court indicated that the coercive result of the statute forced the appellant to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Id.* at 404. Thus, absent a compelling state interest, the coercion resulting from governmental interference with the individual's religious precepts was an unconstitutional infringement of the first amendment. *Id.* at 406-09.

Similarly, in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court held that a uniform state compulsory school attendance law could not be enforced against the Amish because their religion prevented compliance. *Id.* at 234-36. The Amish believe that allowing their children to attend public school after the eighth grade endangers the child's, and parents', hopes for salvation. They premise their belief on the need for separation from secular society; the emphasis on a life of "goodness" rather than intellect; and the importance of manual labor and community to a developing child. *Id.* at 211-13. The Court found that the state's interest in compelling school attendance beyond the eighth grade was not "absolute to the exclusion or subordination of all other interests." *Id.* at 215.

118. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

119. *Id.*

120. *See, e.g.*, *United States v. Kissinger*, 250 F.2d 940, 943 (3d Cir. 1958) ("[T]he enforcement of a reasonable nondiscriminatory regulation of conduct by governmental authority to preserve peace, tranquility and a *sound economic order* does not violate the First Amendment merely because it may inhibit conduct on the part of individuals which is sincerely claimed by them to be religiously motivated.") (emphasis added); *Muste v. Commissioner*, 35 T.C. 913, 918-19 (1961) ("We think it clear that, within the intendment of the first amendment, the Internal Revenue Code, in imposing the income tax and requiring the filing of returns and the payment of the tax, is not to be considered as restricting an individual's free exercise of this religion.")

121. *Murdock v. Pennsylvania*, 319 U.S. 105, 116-17 (1943).

122. *Id.* at 112.

123. *See, e.g.*, *Muste v. Commissioner*, 35 T.C. 913 (1961). The court in *Muste* stated: "It is clear [from *Murdock*] . . . that a taxing statute is not contrary to the provisions of the first amendment unless it directly restricts the free exercise by an individual of his religion." *Id.* at 918 (footnote omitted). *Cf.* *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961) ("To strike down, without

more, in *Walz v. Tax Commission*,¹²⁴ the Court refused to hold that the free exercise clause required property tax exemption.¹²⁵

The Internal Revenue Code restricts the conduct of tax exempt religious organizations by limiting the extent to which they may participate in politics. The economic regulation of religiously motivated conduct ought to be sustained if confronted by a free exercise clause attack. Such an attack would require a showing that the religious organization's interest in unrestricted political involvement¹²⁶ outweighs the government's interest in maintaining a "sound economic order" and the separation of church and state.¹²⁷ The Tenth Circuit and the

the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature." See also *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943) ("[T]he problem of drawing a line between a purely commercial activity and a religious one will at times be difficult."). Justice Reed, in his dissenting opinion to *Murdock*, stated:

Nor do we understand that the Court now maintains that the Federal Constitution frees press or religion of any tax except such occupational taxes as those here levied. Income taxes, ad valorem taxes, even occupational taxes are presumably valid, save only a license tax on sales of religious books. . . . It has never been thought before that freedom from taxation was a perquisite attaching to the privileges of the First Amendment. The National Government grants exemptions to ministers and churches because it wishes to do so, not because the Constitution compels.

Id. at 129-30 (Reed, J., dissenting). Justice Frankfurter also recognized the importance of delimiting the extent of the majority opinion:

[A] tax measure is not invalid under the federal Constitution merely because it falls upon persons engaged in activities of a religious nature.

There is nothing in the Constitution which exempts persons engaged in religious activities from sharing equally in the costs of benefits to all, including themselves, provided by government.

Id. at 135, 140 (Frankfurter, J., dissenting).

124. 397 U.S. 664 (1970).

125. Briefs amici curiae filed in *Walz* by the National Council of Churches of Christ and the Synagogue Council of America maintained that the Constitution requires tax exemption for church property.

[P]roperty used for religious purposes, including the house of worship, the religious sanctuary, and all that is contained therein are so intimately connected with religious exercise that to levy a direct tax upon the value of such property would constitute a tax on the exercise of religion, having the same effect as that tax upon the itinerate evangelist which the Court found unconstitutional in *Murdock*.

Brief Amici Curiae of the Synagogue Council of America and its Constituents at 11, *Walz v. Tax Comm'n*, 397 U.S. 664 (1970), quoted in Pfeffer, *Freedom and/or Separation: The Constitutional Dilemma of the First Amendment*, 64 MINN. L. REV. 561, 571-72 (1980). See also D. KELLEY, *supra* note 8.

126. See *supra* notes 112-15 and accompanying text.

127. See *United States v. Kissinger*, 250 F.2d 940 (3d Cir. 1958). See *supra* notes 114-16 and accompanying text.

Court of Claims have indicated that the government's interest in preventing state subsidization of political activity by exempt organizations is compelling.¹²⁸ In addition, the Supreme Court in *Cammarano v. United States*¹²⁹ held that statutory reliance on political activity as grounds for denying tax deductions for contributions to an exempt organization does not offend the first amendment.¹³⁰ The Code restrictions, therefore, probably would survive a free exercise attack and thereby strengthen efforts to maintain separation of church and state under the establishment clause.

II. GOVERNMENT REGULATION OF CHURCH POLITICAL ACTIVITY

The government grants tax exemptions to religious organizations because they provide a valuable benefit to the public by promoting the social and moral welfare of society.¹³¹ The Revenue Act of 1894¹³² contained the first provision granting tax exemptions to religious organizations. A similar provision has been incorporated into every subsequent revenue act.¹³³ In *Walz v. Tax Commission*,¹³⁴ the Supreme

128. See *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849 (10th Cir. 1972), ("overwhelming and compelling"), cert. denied, 414 U.S. 864 (1973); *Haswell v. United States*, 500 F.2d 1133 (Ct. Cl. 1974) ("compelling"), cert. denied, 419 U.S. 1107 (1975).

129. 358 U.S. 498 (1959).

130. *Id.* at 506.

131. See, e.g., *Walz v. Tax Comm'n*, 397 U.S. 664, 673 (1970) ("The State has an affirmative policy that considers these groups as beneficial and stabilizing influences in community life and finds this [exempt] classification useful, desirable, and in the public interest."); *Trinidad v. Sagrada Orden de Predicadores*, 263 U.S. 578, 581 (1924) ("Evidently the exemption is made in recognition of the benefit which the public derives from corporate activities of the class named, and is intended to aid them when not conducted for private gain."); *St. Louis Union Trust Co. v. United States*, 374 F.2d 427, 432 (8th Cir. 1967) ("One stated reason for a deduction or exemption of this kind is that the favored entity performs a public service and benefits the public or relieves it of a burden which otherwise belongs to it."); *Duffy v. Birmingham*, 190 F.2d 738, 740 (8th Cir. 1951) ("The reason underlying the exemption granted . . . to organizations organized and operated for charitable purposes is that the exempted taxpayer performs a public service."); *McGlotten v. Connally*, 338 F. Supp. 448, 456 (D.D.C. 1972) ("the Government relieves itself of the burden of meeting public needs which in the absence of charitable activity would fall on the shoulders of the Government"). See also H.R. REP. No. 1860, 75th Cong., 3d Sess. 19 (1939).

132. Act of Aug. 27, 1894, ch. 349, § 32, 28 Stat. 556. The 1894 Act was held unconstitutional in *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895).

133. The current version of the following revenue acts is at I.R.C. § 501(c)(3) (1976). Int. Rev. Code of 1939, ch. 1, § 101(6), 53 Stat. 33; Act of May 28, 1938, ch. 289, § 101(6), 52 Stat. 481; Act of June 22, 1936, ch. 690, § 101(6), 49 Stat. 1674; Act of May 10, 1934, ch. 277, § 103(6), 47 Stat. 193; Act of May 29, 1928, ch. 852, § 103(6), 45 Stat. 813; Act of Feb. 26, 1926, ch. 27, § 231(6), 44 Stat. 40; Act of June 2, 1924, ch. 234, § 231(6), 43 Stat. 282; Act of Nov. 23, 1921, ch. 136, § 231(6), 42 Stat. 253; Act of Feb. 24, 1918, ch. 18, § 231(6), 40 Stat. 1076; Act of Sept. 8, 1916, ch. 463,

Court held that tax exemptions for religious organizations were constitutional.¹³⁵ The Court upheld a New York statute granting a tax exemption for property used exclusively for religious purposes.¹³⁶ No excessive entanglement of government with religion resulted from the exemption.¹³⁷

The Internal Revenue Code of 1934¹³⁸ contained the first political activity restrictions. The provision was intended to prohibit tax exempt organizations from "influenc[ing] legislation and carry[ing] on propaganda."¹³⁹ In 1954, the Code was amended to include a restriction on exempt organizations intervening in campaign activities.¹⁴⁰ The provision prohibits all tax exempt religious and charitable groups from intervening in election campaigns.¹⁴¹ This prohibition was not changed by the 1976 Tax Reform Act.¹⁴² The 1976 Act did, however, substantially alter the restrictions on permissible lobbying by exempt organizations.

§ 11(a)(6), 39 Stat. 766; Act of Oct. 3, 1913, ch. 16, II, par.G(a), 38 Stat. 172; Act of Aug. 5, 1909, ch. 6, § 38, 36 Stat. 113.

The provision exempting "charitable, religious and educational" organizations, Act of Aug. 27, 1894, ch. 349, § 32, 28 Stat. 556, was amended to include "scientific" organizations in the Act of Oct. 3, 1913, ch. 16, II, para.G(a), 38 Stat. 172; organizations formed for the "prevention of cruelty to children or animals" in the Act of Feb. 24, 1918, ch. 18, § 231(6), 40 Stat. 1076; "literary" organizations in the Act of Nov. 23, 1921, ch. 136, § 231(6), 42 Stat. 253; and organizations whose purpose is "testing for public safety" in I.R.C. § 501(c)(3) (1954). See generally McGovern, *The Exemption Provisions of Subchapter F*, 29 TAX LAW. 523, 528-29 (1976).

134. 397 U.S. 664, 676-80 (1970).

135. *Id.*

136. The challenged New York statute provided: "Real property owned by a corporation or association organized exclusively for . . . religious . . . purposes . . . and used exclusively for carrying out thereupon one or more of such purposes . . . shall be exempt from taxation as provided in this section." N.Y. REAL PROP. TAX LAW § 421(a)(a) (Consol. 1958). The Court upheld the statute on the grounds that granting tax exemptions to churches involves less governmental entanglement than taxing would. 397 U.S. at 674. The legislative purpose of the exemption was not to establish or sponsor religion, but simply a desire by the state to avoid inhibiting valuable organizations. *Id.* at 672. Thus, the Court found that tax exemption for church property was not an unconstitutional establishment of religion. *Id.* at 678.

137. 397 U.S. at 674.

138. Act of May 10, 1934, ch. 277, §§ 23(o)(2), 101(6), 48 Stat. 680, 690, 700. This provision was later incorporated into the Internal Revenue Code of 1954. See I.R.C. § 501(c)(3) (1976).

139. 78 CONG. REC. 5959 (1934) (remarks of Senator Harrison). See Comment, *supra* note 9, at 488 & n.56.

140. I.R.C. § 501(c)(3) (1976). See Note, *supra* note 8, at 547-48.

141. I.R.C. § 501(c)(3) (1976). See *infra* notes 189-91 and accompanying text.

142. The Tax Reform Act of 1976 amended the restriction on attempts to influence legislation by adding § 501(h), but left unchanged the restriction on campaign involvement. Pub. L. No. 94-455, 90 Stat. 1520 (1976) (codified at I.R.C. § 501(h) (1976)).

Prior to the addition of section 501(h),¹⁴³ churches and charitable organizations had difficulty determining what constituted substantial lobbying activity under section 501(c)(3).¹⁴⁴ The 1976 Act clarified the ambiguity of the "substantiality test" by providing guidelines for exempt organizations to determine the limits of permissible lobbying.¹⁴⁵ Nevertheless, section 501(c)(3) still conditions tax exemption on an organization's limiting its political activity.¹⁴⁶ This provision continues to face criticism by commentators and religious groups because of the chilling effect it has on church political activity.¹⁴⁷ It has also been attacked because of inherent ambiguities and constitutional problems with the restriction.¹⁴⁸ Nevertheless, amending or eliminating the present Code limitations is unnecessary because of the increased flexibility and clarifications in the 1976 Tax Reform Act.¹⁴⁹

A. Lobbying Restrictions

Prior to the 1976 Act, judicial interpretation of the political activity restrictions in the Code focused on the requirement that the organization be organized and operated "exclusively" for¹⁵⁰ exempt pur-

143. I.R.C. § 501(h) (1976). See *infra* notes 174-83 and accompanying text.

144. See, e.g., "Americans United," Inc. v. Walters, 477 F.2d 1169 (D.C. Cir. 1973), *rev'd on other grounds sub nom.* Commissioner v. "Americans United," Inc., 416 U.S. 752 (1974); Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1973). See also Clark, *supra* note 10; Note, *supra* note 8; Comment, *Tax Subsidies for Political Participation*, 31 TAX LAW. 461 (1978). For a discussion of the interpretation and history of the substantiality test, see Caplin & Timbie, *Legislative Activities of Public Charities*, 39 L. & CONTEMP. PROBS. 183 (1978). See also *infra* note 174 and accompanying text.

145. See *infra* notes 174-83 and accompanying text.

146. The organization's tax exempt status is also subject to the "exclusive purpose" requirement of § 501(c)(3). See *infra* notes 150-58 and accompanying text.

147. See *Hearings on H.R. 13500*, *supra* note 8, at 63-64, 75-76, 90-91 (statements by leaders of various religious organizations). See also D. KELLEY, *supra* note 8.

148. See *supra* note 13 and accompanying text.

149. See *infra* notes 208-12 and accompanying text.

150. I.R.C. § 501(c)(3) (1976). The exclusive purpose requirement does not require that the organization's sole purpose be religious or charitable. Rather, the provision requires the articles of organization to limit the purposes of the organization to one or more exempt purposes, and to prohibit the organization from engaging in substantial extra-exempt purpose activities. Thus, the provision's use of the term "exclusively" should be read as "substantially" or "primarily." See *Treas. Reg. § 1.501(c)(3)-1(b)* (1954). Cf. *Better Business Bureau v. United States*, 326 U.S. 279 (1945); *Trinidad v. Sagrada Orden de Predicadores*, 263 U.S. 578 (1924); *St. Louis Union Trust Co. v. United States*, 374 F.2d 427 (8th Cir. 1967); *Stevens Bros. Found. v. Commissioner*, 324 F.2d 633 (8th Cir. 1963); *Seasongood v. Commissioner*, 227 F.2d 907 (6th Cir. 1955); *Roche's Beach, Inc. v. Commissioner*, 96 F.2d 776 (2d Cir. 1938); *Fides Publishers Ass'n. v. United States*, 263 F. Supp. 924 (N.D. Ind. 1967); *Scripture Press Found. v. United States*, 285 F.2d 800 (Ct. Cl.

poses,¹⁵¹ or on the requirement that “no substantial part of the

1961), *cert. denied*, 368 U.S. 985 (1962). *See generally* B. HOPKINS, *THE LAW OF TAX EXEMPT ORGANIZATIONS* 152-54 (3d ed. 1979); P. TREUSCH & N. SUGARMAN, *TAX-EXEMPT CHARITABLE ORGANIZATIONS* 64-65 (1979).

If an organization's articles of organization indicate purposes outside the specified permissible purposes of § 501(c)(3), it will not pass the “organizational” test. This remains true even if the actual operation of the organization is limited to exempt purposes. *Treas. Reg. § 1.501(c)(3)-1(b)(1)(iv)* (1954). *See infra* note 151. Only a “creating document” is used to determine if the “organizational” test is satisfied. *See* INTERNAL REVENUE SERVICE, *EXEMPT ORGANIZATIONS HANDBOOK* 322(4) (1981). *See also* *Universal Oil Prods. Co. v. Campbell*, 181 F.2d 451 (7th Cir. 1950); *Sun-Herald Corp. v. Duggan*, 160 F.2d 475 (2d Cir. 1947); *Roche's Beach Inc. v. Commissioner*, 96 F.2d 776 (2d Cir. 1938); *Center on Corporate Responsibility v. Schultz*, 368 F. Supp. 863 (D.D.C. 1973); *Lewis v. United States*, 189 F. Supp. 950 (D. Wyo. 1961); *Samuel Friedman Found. v. United States*, 144 F. Supp. 74 (D.N.J. 1956); *Forest Press, Inc.*, 22 T.C. 265 (1954).

The Internal Revenue Code also requires that the organization be “operated” exclusively for exempt purposes. The “operational” test under the regulations requires that the organization: engage primarily in exempt purpose activities; not allow any part of its net earnings to inure to the benefit of private individuals; and not be an action organization. *Treas. Reg. § 1.501(c)(3)-1(c)(3)(i)* (1954). *See supra* note 37. *See also* *Old Dominion Box Co. v. United States*, 477 F.2d 340 (4th Cir.) (earnings inured to private benefit), *cert. denied*, 414 U.S. 910 (1973); *Stevens Bros. Found. v. Commissioner*, 324 F.2d 633 (8th Cir. 1963) (operation not exclusively for exempt purposes), *cert. denied*, 376 U.S. 969 (1964); *Kenner v. Commissioner*, 318 F.2d 632 (7th Cir. 1963) (same); *Scholarship Endowment Found. v. Nicholas*, 106 F.2d 552 (10th Cir. 1939) (same); *Founding Church of Scientology v. United States*, 412 F.2d 1197 (Ct. Cl. 1969) (same), *cert. denied*, 397 U.S. 1009 (1970); *American Inst. for Economic Research v. United States*, 302 F.2d 934 (Ct. Cl. 1962) (same), *cert. denied*, 372 U.S. 976 (1963); *Hofer v. United States*, 64 Ct. Cl. 672 (1928) (earnings inured to private benefit); *Rev. Rul. 69-279*, 1969-1 C.B. 152 (same); *Rev. Rul. 60-351*, 1960-2 C.B. 169 (same). *But see* *Commissioner v. Teich*, 407 F.2d 815 (7th Cir. 1969) (per curiam); *Francis Edward McGillick Found. v. Commissioner*, 278 F.2d 643 (3d Cir. 1960); *Commissioner v. Orton Ceramic Found.*, 173 F.2d 483 (6th Cir. 1949); *Lewis v. United States*, 189 F. Supp. 950 (D. Wyo. 1961); *Rev. Rul. 76-91*, 1976-1 C.B. 149; *Rev. Rul. 71-29*, 1971-1 C.B. 150; *Rev. Rul. 69-39*, 1969-1 C.B. 148; *Rev. Rul. 67-4*, 1967-1 C.B. 121.

151. I.R.C. § 501(c)(3) (1976). The organization must be organized and operated exclusively for one or more of the following exempt purposes: religious, charitable, scientific, literary, educational, prevention of cruelty to children or animals, fostering national or international sports competition (but only if no part of the organization's activities involve the provision of athletic facilities or equipment), or testing for public safety. *Id.* *See* *Treas. Reg. § 1.501(c)(3)-1(d)* (1954). Courts and the Internal Revenue Service are reluctant to inquire into the type of religion, and particularly the worthiness or desirability of the religious organization's purposes. The Board of Tax Appeals stated:

Religion is not confined to a sect or a ritual. The symbols of religion to one are anathema to another. . . . Congress left open the door of tax exemption to all corporations meeting the test, the restriction being not as to the species of religion, charity, science or education under which they may operate, but as to the use of its profits and the exclusive purpose of its existence.

Unity School of Christianity, 4 B.T.A. 61, 70 (1926). *See* *Elisian Guild, Inc. v. United States*, 412 F.2d 121 (1st Cir. 1969); *Swallow v. United States*, 325 F.2d 97 (10th Cir. 1963); *Universal Life Church, Inc. v. United States*, 372 F. Supp. 770 (E.D. Cal. 1974); *Golden Rule Ass'n*, 41 T.C. 719 (1964); *Saint Germain Found.*, 26 T.C. 648 (1956); *A.A. Allen Revivals, Inc.*, 22 T.C.M. 1435 (1963); *Rev. Rul. 75-434*, 1975-2 I.R.B. 9; *Rev. Rul. 74-575*, 1974-2 C.B. 161; *Rev. Rul. 71-580*,

activities" be aimed at influencing legislation or interfering with political campaigns.¹⁵² In *Slee v. Commissioner*,¹⁵³ the Second Circuit applied the "exclusive purpose¹⁵⁴ test"¹⁵⁵ to determine whether a contribution made to the American Birth Control League¹⁵⁶ was tax deductible as a charitable contribution. The Court found that the purpose for organizing the League was charitable,¹⁵⁷ but that contributions made to it were not tax deductible because its political activity was not ancillary to its primary purpose. The Court determined that the political activity engaged in was general, and therefore the League was not organized exclusively for charitable purposes.¹⁵⁸

In *Girard Trust Co. v. Commissioner*,¹⁵⁹ the Third Circuit used a more flexible approach to the exclusive purpose problem and held that a bequest to the Board of Temperance, Prohibition and Public Morals of the Methodist Episcopal Church¹⁶⁰ was a tax deductible contribution

1971-2 C.B. 235; Rev. Rul. 68-72, 1968-1 C.B. 250. *But see* Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1973); Parker v. Commissioner, 365 F.2d 792 (8th Cir. 1966), *cert. denied*, 385 U.S. 1026 (1967); Riker v. Commissioner, 244 F.2d 220 (9th Cir.), *cert. denied*, 355 U.S. 839 (1957); Fides Publishers Ass'n v. United States, 263 F. Supp. 924 (N.D. Ind. 1967).

152. I.R.C. § 501(c)(3) (1976). *See infra* notes 163-69 and accompanying text.

153. 42 F.2d 184 (2d Cir. 1930).

154. *Id.* at 184.

155. The applicable statute in *Slee* was § 214(a)(11)(B) of the Internal Revenue Act of 1921, and § 214(a)(10) of the Revenue Acts of 1924 and 1926. *See supra* note 133.

156. The American Birth Control League was organized to study "the relationship of controlled and uncontrolled procreation to national and world problems." 42 F.2d at 184. The League also ran a free clinic in New York and engaged in attempts to change existing laws concerning birth control. *Id.* at 184-85.

157. *Id.* at 185.

158. *Id.* Judge Hand stated that "[p]olitical agitation as such, is outside the statute, however innocent the aim. . . . Controversies of that sort must be conducted without public subvention; the Treasury stands aside from them." *Id.* *See also* Alfred A. Cook, 30 B.T.A. 292 (1934) (City Club of New York held not a tax deductible charitable organization because it advocated legislation for better municipal government); Bertha Poole Weyl, 18 B.T.A. 1092 (1930) (Massachusetts Anti-Saloon League held not a tax deductible charitable organization because it was involved in partisan political propaganda); Jos. M. Price, 12 B.T.A. 1186 (1928) (New York City Bar Association held not a tax deductible charitable organization because it conducted a grand jury investigation into administration of bankruptcy laws); Herbert E. Fales, 9 B.T.A. 828 (1926) (Massachusetts Anti-Cigarette League held not a tax deductible charitable organization because it was involved in partisan political propaganda). *But see* Old Colony Trust Co. v. Welch, 25 F. Supp. 45 (D. Mass. 1938) (New England Anti-Vivisection Society held a tax deductible charitable organization because political activities of the group were incidental to its primary exempt purpose).

159. 122 F.2d 108 (3d Cir. 1941).

160. The Board was formed to "promote the cause of temperance by every legitimate means; to prevent the improper use of drugs and narcotics; to render aid to such causes as . . . tend to advance the public welfare." *Id.* at 109.

to a charitable organization.¹⁶¹ The court stated that although the Board was engaged in political activity, the source of such activity was clearly a religious belief and was central to the purposes for organization.¹⁶²

Judicial interpretations of the substantiality test, as in the exclusive purpose test, failed to provide guidelines on the acceptable limits of political activity for exempt organizations. In 1955, the Sixth Circuit held that the political activity of the Hamilton County Good Government League was not substantial because it did not exceed five percent of the League's total activities.¹⁶³ The court did not explain the choice of the five percent figure as the appropriate limit. In *Christian Echoes National Ministry, Inc. v. United States*,¹⁶⁴ the Tenth Circuit rejected the use of a percentage test in favor of balancing the political activities with the objectives and circumstances of the organization.¹⁶⁵ In *United States v. Haswell*,¹⁶⁶ the Court of Claims applied the balancing test of *Christian Echoes*,¹⁶⁷ considering both the percentage of the organiza-

161. *Id.* at 110-11.

162. *Id.* at 110. Judge Clark argued in dissent that:

[T]here is a faint odor of harm in the use of money to present only one side of any proposition. To paraphrase [Voltaire], it may place the Lord on the side of the heaviest money-bags. Although, therefore, one may not object, he may assuredly refrain from encouraging—either by way of offering the state's help in enforcement or in subvention.

Id. at 114 (Clark, J., dissenting).

163. *Seasongood v. Commissioner*, 227 F.2d 907 (6th Cir. 1955).

164. 470 F.2d 849 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1973).

165. *Id.* at 855. *Christian Echoes* involved a suit by a nonprofit religious organization for refund of Federal Insurance Contribution Act (FICA) taxes. The organization's tax exempt status was revoked by the Internal Revenue Service for three reasons: it did not satisfy the § 501(c)(3) exclusive purpose requirement; it engaged in substantial lobbying activity; and it was involved in political campaign activity. The district court ruled that *Christian Echoes* was entitled to reinstatement of its tax exempt status. The Court of Appeals for the Tenth Circuit reversed. *Id.* at 858. The court held that the lobbying activity of the organization was "substantial" when balanced with the "objectives and circumstances" of the group. *Id.* at 855-56. Furthermore, the involvement of the organization in political campaign efforts supported the decision by the Internal Revenue Service to revoke its tax exempt status. *Id.* at 856.

166. 500 F.2d 1133 (Ct. Cl. 1974), *cert. denied*, 419 U.S. 1107 (1975). *Haswell* involved a taxpayer suit for refund of income taxes on the theory that contributions to the National Association of Railroad Passengers (NARP) were tax deductible under § 170(c)(2). The court, in applying the *Christian Echoes* rationale, held that the organization's political activities constituted a substantial part of its total efforts when balanced with its objectives and purposes. *Id.* at 1147. The court found that the dollar amounts spent by NARP on legislative efforts indicated that "its purposes no longer accord with conceptions traditionally associated with a common-law charity. . . . The legislative program was a primary objective in NARP's total operations for preservation of railroad passenger service and is on an equal footing with its educational and litigative efforts." *Id.*

167. *Id.* at 1142.

tion's expenditures for lobbying activity¹⁶⁸ and the purpose of the organization's operation.

Judicial interpretation of the Code restrictions on political activity has created ambiguity on two levels: first, whether the exclusive purpose or the substantiality test is determinative; and second, if the latter, what constitutes substantial participation.¹⁶⁹ Commentators have suggested complete elimination of the Code restrictions on lobbying activity,¹⁷⁰ or taxation of exempt organizations for lobbying expenditures while permitting partisan campaign activity.¹⁷¹ These commentators posit as reasons for the proposed changes continued confusion by exempt organizations and the potential misuse of the Internal Revenue Service's investigative power.¹⁷² The 1976 Act,¹⁷³ however, clarified the interpretive problems confronting the courts, especially in regard to the substantiality test.¹⁷⁴ Under section 501(h), electing¹⁷⁵ organizations may participate in lobbying activities if they do not exceed the

168. *Id.* at 1146.

169. See generally Note, *Lobbying by Section 501(c)(3) Organizations Under the Tax Reform Act of 1976: A Proposal for Change*, 30 TAX LAW. 214, 217-20 (1976). See *supra* notes 150-68 and accompanying text.

170. See Comment, *supra* note 9, at 502.

171. See Note, *supra* note 8, at 555. See also Note, *supra* note 169, at 236-38.

172. See *supra* notes 150-68 and accompanying text. The district court in *Christian Echoes* found that the Internal Revenue Service violated the fifth amendment due process clause by arbitrarily selecting *Christian Echoes* as an "example." The court found, in addition, that the Internal Revenue Service violated its own procedural rules in its investigation of the organization and used the § 501(c)(3) restrictions as an "oppressive tool." *Christian Echoes Nat'l Ministry, Inc. v. United States*, 28 A.F.T.R. 2d ¶ 71-5260, -5943 to -5946.

173. Pub. L. No. 94-455, 90 Stat. 1520 (1976) (codified in scattered sections of I.R.C.).

174. The legislative history identifies the ambiguity and indicates the purpose behind the § 501(h) provision:

[N]either Treasury regulations nor court decisions have given enough detailed meaning to the statutory language to permit most charitable organizations to know approximately where the limits are between what is permitted by the statute and what is forbidden by it.

.....
The committee amendment is designed to set relatively specific expenditure limits to replace the uncertain standards of present law, to provide a more rational relationship between the sanctions and the violations of standards, and to make it more practical to properly enforce the law.

S. REP. NO. 938-pt. II, 94th Cong., 2d Sess. 80, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 4030, 4104.

175. The Tax Reform Act of 1976 allows eligible exempt organizations to elect to replace the substantiality test with the percentage limitations on influencing legislation under § 501(h) and § 4911. S. REP. NO. 938-pt. II, *supra* note 174, at 4105. See *infra* notes 176-83 and accompanying text.

An organization may elect to have its legislative activities measured by the new test at any time before the end of the taxable year and have the rules apply for that year. H.R. REP. NO. 1210,

maximum yearly limit of \$1,000,000.¹⁷⁶ The new section also contains a separate provision for “grass roots expenditures,”¹⁷⁷ which limits electing organizations to twenty-five percent of the nontaxable lobbying amount.¹⁷⁸ The amount that exceeds the limitation on expenditures is subject to a twenty-five percent excise tax.¹⁷⁹ An electing organization will only lose its exempt status if, over a four year period, its expenditures exceed 150% of the applicable limitations.¹⁸⁰ The new

94th Cong., 2d Sess. 9 n.2 (1976). Nonelecting or ineligible organizations remain subject to the substantiality text. See *infra* notes 184-87 and accompanying text.

The 1976 Act made § 501(h) elective in part because the new percentage limitations require more detailed recordkeeping and disclosure requirements under § 6033(b)(8) than did the former law. H.R. REP. NO. 1210, *supra*, at 15. See also Montgomery, *Lobbying by Public Charities Under the Tax Reform Act of 1976*, 51 TAXES 449, 450 n.8 (1978).

176. The percentage limitations of § 4911 provide that an organization's permitted yearly expenditures for lobbying—lobbying nontaxable amount—is the lesser of \$1,000,000 or:

If the proposed expenditures are —	The lobbying nontaxable amount is —
Not over \$500,000	20% of the exempt purpose expenditures.
Over \$500,000 but not over \$1,000,000	\$100,000, plus 15% of the excess of the exempt purpose expenditures over \$500,000.
Over \$1,000,000 but not over \$1,500,000	\$175,000, plus 10% of the excess of the exempt purpose expenditures over \$1,000,000.
Over \$1,500,000	\$225,000, plus 5% of the excess of the exempt purpose expenditures over \$1,500,000.

I.R.C. § 4911(c)(2) (1976). The “exempt purpose expenditure” is the total amount paid or incurred to accomplish the exempt purposes described in § 170(c)(2)(B). This includes administrative and lobbying expenses, whether or not for exempt purposes, but not fundraising expenses.

I.R.C. § 4911(c)(1)(A), (B), (C) (1976). See also S. REP. NO. 938-pt. II, *supra* note 174.

177. “Grass roots expenditures” are those used to “influence legislation through an attempt to affect the opinions of the general public or any segment thereof.” I.R.C. § 491(d)(1)(A) (1976).

178. I.R.C. § 4911(c)(4) (1976).

179. I.R.C. § 4911(a) (1976).

180. H.R. REP. NO. 1210, *supra* note 175, at 9 n.2; S. REP. NO. 938-pt. II, *supra* note 174, at 4105-06. Loss of tax exemption results if “normally” an organization's lobbying expenditures, or grass roots expenditures, exceed 150% of the permissible overall expenditures. “Normally” means the average over a four year period. An organization's lobbying expenditures normally exceeds 150% of the permissible amount if the sum of its lobbying expenditures for the four years immediately preceding is greater than 150% of the sum of the permissible expenditures for the same four years. S. REP. NO. 938-pt. II, *supra* note 174, at 4106 n.3.

Electing organizations that lose their tax exempt status as a result of excessive lobbying will not be eligible for exemption on their own income as a § 501(c)(4) social welfare organization. S. REP. NO. 938-pt. II, *supra* note 174, at 4107-08. Prior to the 1976 Act, the Treasury Department regulations allowed an organization that lost its exempt status under § 501(c)(3) because of excessive lobbying to qualify for income tax exemption under § 501(c)(4). Treas. Reg. § 1.501(c)(3)-1(c)(3)(v) (1954). The purpose for the added sanction against organizations involved in excessive lobbying was that

provisions clarify the substantiality test, and give electing organizations greater potential for lobbying than the courts had given.¹⁸¹ Furthermore, the four year period in which the determination will be made permits increased flexibility in expenditures.¹⁸² Nevertheless, the 1976 Act did not alter the exclusive purpose test; electing organizations must continue to limit their lobbying activities to purposes consistent with this restriction.¹⁸³

Congress disqualified churches from the percentage expenditure provisions¹⁸⁴ because of the churches' free exercise challenge to political activity restrictions.¹⁸⁵ Churches were, in addition, reluctant to subject

a number of organizations that [had] . . . shifted to section 501(c)(4) [had] created related organizations to carry on their charitable activities, to qualify for exemption under section 501(c)(3), and to qualify to receive deductible charitable contributions. If the original organization [had] built up a substantial endowment during its years of section 501(c)(3) status, it could then carry on its "excessive" lobbying activities financed by the income it receive[d] from its tax-deducting endowment. As a result, although there may have been some inconvenience and administrative confusion during the changeover period, it was possible in such a case for the lobbying rules to be violated without any significant tax consequences.

S. REP. NO. 938-pt. II, *supra* note 174, at 4105 n.1.

181. *Cf.* *Seasongood v. Commissioner*, 227 F.2d 907 (6th Cir. 1955) ("something less than 50% of the time and effort" held not substantial).

182. *See* Note, *supra* note 169, at 235 n.114. *See also* Comment, *supra* note 9, at 492. Section 4911(d)(1) defines "influencing legislation." *See supra* note 177 and accompanying text. In addition to grass roots lobbying, the Act includes direct lobbying in its definition of "influencing legislation":

"[A]ny attempt to influence any legislation through communication with any member or employee of a legislative body, or with any government official or employee who may participate in the formulation of the legislation."

I.R.C. § 4911(d)(1) (1976). "Legislation" refers to actions taken on Acts, bills and resolutions by Congress, state legislatures, local governments, or by the public in a referendum, constitutional amendment, or similar proceedings. I.R.C. § 4911(e)(2) (1976). "Action" refers only to the introduction, enactment, amendment, repeal, or defeat of legislation. I.R.C. § 4911(e)(3) (1976).

Section 4911(d)(2) lists available exceptions. Activities that are excluded from "influencing legislation" are: supplying the results of nonpartisan study or research; providing technical advice to a governmental body that has requested it; and appearing before, or communicating to, a legislative body when a decision is pending that might directly affect the organization's tax exempt status or its power and duties. *Id.*

183. *See* Comment, *supra* note 9, at 495; Comment, *supra* note 144, at 478.

184. *See supra* notes 110-11 and accompanying text.

185. I.R.C. § 501(h)(5) (1976). The Tax Reform Act of 1976 does not affect church organizations because religious leaders requested exclusion from the electing provisions. They argued that restrictions on political activity are unconstitutional as applied to churches and "integrated auxiliary[ies] of a church or of a convention or association of churches." *See* H.R. REP. NO. 1210, *supra* note 175, at 15; S. REP. NO. 938-pt. II, *supra* note 174, at 4108; STAFF OF JOINT COMM. ON INTERNAL REVENUE TAXATION, 94TH CONG., 2D SESS., SUMMARY OF ISSUES: H.R. 13500 "LOBBYING" BY CHARITIES 6 (Comm. Print 1976). Thus, § 501(h)(4) limits the eligible electing organizations to § 501(c)(3) organizations subject to: § 170(b)(1)(A)(ii) (educational organizations);

themselves to Internal Revenue Service scrutiny by filing detailed information returns, a further requirement under the 1976 Act.¹⁸⁶ The problem with the disqualifying provision is that churches and nonelecting organizations will still be subject to the judicial interpretation of the ambiguous substantiality test.¹⁸⁷

B. Political Campaigns

The prohibition of exempt organization involvement in political campaigns under section 501(c)(3) remained unchanged by the 1976 Tax Reform Act.¹⁸⁸ Under this provision, tax exempt organizations under section 501(a) are prohibited from participating or intervening in a candidate's¹⁸⁹ campaign for political office.¹⁹⁰ This proscription includes the publication or distribution of statements by exempt organi-

§ 170(b)(1)(A)(iii) (medical research organizations and hospitals); § 170(b)(1)(A)(iv) (organizations supported by charitable contributions); and § 509(a)(3), (4) (organizations supported by public charities).

Congress isolated churches from the effect of the 1976 Act by refusing to approve or disapprove of the decision in *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849 (10th Cir. 1972) (holding political activities restrictions constitutional), *cert. denied*, 414 U.S. 864 (1973); by excluding churches from the sanction prohibiting exempt organizations from becoming § 501(c)(4) organizations upon loss of exempt status, *see* § 504(c); by adopting a no comment position on definitions by the Department of Treasury on affiliated church organizations, *see* S. REP. No. 938-pt. II, *supra* note 174, at 4109; and by excluding churches from the provision prohibiting donor deductions of out-of-pocket lobbying expenditures, *see* § 170(f)(6). *See Washburn, New Tax Act Defines "Substantial" Lobbying—But Charities Must Elect to be Covered*, 55 TAXES 291, 292 n.5 (1979). *See generally* Schwarz, *supra* note 7.

186. *Hearings on H.R. 13500, supra* note 8, at 90-91 (statement of James L. Robinson). Religious and charitable organizations consistently objected to the substantiality test on the grounds that the Internal Revenue Service was discriminatory and inconsistent in its enforcement. *See Legislative Activity by Certain Types of Exempt Organizations: Hearings on H.R. 13720 and Related Bills Before the House Comm. on Ways and Means*, 92d Cong., 2d Sess. (1972). *See also* Montgomery, *supra* note 175, at 450 n.6.

The 1976 Act amended the § 6033 requirement that exempt organizations file a yearly information report. Under amended § 6033(b)(8), electing organizations must file an information return, indicate the amount of its lobbying expenditures, both overall and grass roots, and indicate the permissible nontaxable amount of expenditures, both overall and grass roots. If the electing organization is a member of an affiliated group, it must provide this information for both itself and the entire group. I.R.C. § 6033(b)(8) (1976). *See also* Comment, *supra* note 9, at 494-95 n.102.

187. I.R.C. § 501(h)(7) (1976). *See* Note, *supra* note 169, at 215.

188. *See supra* note 142 and accompanying text.

189. A candidate for political office is "an individual who offers himself, or is proposed by others, as a contestant for an elective public office, whether such office be national, state, or local." *Treas. Reg.* § 1.501(c)(3)-1(c)(3)(iii) (1954).

190. I.R.C. § 501(c)(3) (1976).

zation on "behalf of or in opposition to . . . candidate[s]."¹⁹¹

In *Christian Echoes*,¹⁹² the Tenth Circuit broadly construed the meaning of the prohibition against political campaign activity.¹⁹³ The court held that the political activity of the religious organization, which included attempts to influence legislation¹⁹⁴ and participation in political campaigns,¹⁹⁵ precluded the reinstatement of tax exempt status to the organization.¹⁹⁶ The extent of the political involvement by the organization was found to be "substantial and continuous" rather than an incidental part of the organization's general activity.¹⁹⁷ The court's decision was based primarily on the organization's attempts to influence legislation, but it also addressed the issue of the organization's participation in political campaign activity. The court found that the organization had attacked several candidates and officeholders who were considered too "liberal" and had supported others considered to be "Christian conservative statesmen."¹⁹⁸ The court stated that this activity indicated an intent to change the "composition" of the government,¹⁹⁹ and was therefore contrary to the type of activity in which Congress intended exempt organizations to participate.²⁰⁰

191. Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (1954). For a discussion of the definitional problems in the campaign activity prohibition, see Comment, *supra* note 9, at 496-97.

192. 470 F.2d 849 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1973).

193. *Id.* at 856. The court relied on the limiting language of the regulations:

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.

Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (1954). See *infra* notes 198-200 and accompanying text.

194. 470 F.2d at 854-56. The court criticized the district court's narrow construction of the statutory language. *Id.* at 854. The *Christian Echoes* publication contained numerous attempts to influence legislation. The absence of specific legislation did not remove it from the statutory limitation. The court listed 22 specific instances of "influencing" activity. Among these were appeals to readers to write their Congressmen for: retention of the House Committee on Un-American Activities; cutting off diplomatic relations with communist countries; abolishing federal income taxes; and withdrawing from the United Nations. *Id.* at 855.

195. *Id.* at 856. See *infra* notes 198-200 and accompanying text.

196. *Id.*

197. *Id.*

198. *Id.* at 852. *Christian Echoes* levelled vehement attacks against President Kennedy and Senators Fulbright and Humphrey, and supported Senators Thurmond and Goldwater. *Id.* at 856.

199. *Id.* at 856.

200. The statutory proscription on political campaign activity is couched in absolute terms. The *Christian Echoes* court interpreted the facts of the case in light of the absolute proscription in § 501(c)(3). The Internal Revenue Service, however, has not applied such a literal construction. Organizations have successfully argued that support of, or an attack on, a candidate for political

The Tenth Circuit's broad interpretation of the Code provision has been criticized because the holding implies that all officeholders are candidates.²⁰¹ Exempt organizations would be prohibited from criticizing political positions taken by "candidates" while they were in office.²⁰² Nevertheless, the opinion reflects the underlying policy of the Code provisions that religious and charitable organizations may not participate in partisan political activity.²⁰³ The criticism of the *Christian Echoes* decision²⁰⁴ also reflects a concern that the electioneering prohibition infringes the constitutional right of freedom of speech.²⁰⁵ The Supreme Court has indicated that the first amendment free speech guarantees protect both individual members of society and organizations.²⁰⁶ Therefore, in every case the strong policies underlying the Code provisions must be balanced against free speech protection.²⁰⁷

office was outside the context of a "political campaign." See, e.g., Rev. Rul. 74-574, 1974-2 C.B. 160, Rev. Rul. 72-512, 1972-2 C.B. 246. Other organizations have successfully argued that the activity was only to elevate the ethical standards of political campaigns. See, e.g., Rev. Rul. 74-574, 1974-2 C.B. 160; Rev. Rul. 66-258, 1966-2 C.B. 213. See generally P. TREUSCH & N. SUGARMAN, *supra* note 150, at 167-76.

201. See, e.g., Comment, *supra* note 9, at 498.

202. *Id.*

203. The *Christian Echoes* court argued that the legislative history of the Code restrictions required withdrawal of the organization's tax exempt status:

The Congressional purposes evidenced by the 1934 and 1954 amendments are clearly constitutionally justified in keeping with the separation and neutrality principles particularly applicable in these cases and, more succinctly, the principle that government shall not subsidize, directly or indirectly, those organizations whose substantial activities are directed toward the accomplishment of legislative goals or the election or defeat of particular candidates.

470 F.2d at 857. See also *Cammarano v. United States*, 358 U.S. 498, 508 (1959); *Slee v. Commissioner*, 42 F.2d 184, 184 (2d Cir. 1930); *Haswell v. United States*, 500 F.2d 1133, 1148 (Ct. Cl. 1974), *cert. denied*, 419 U.S. 1107 (1975).

204. See, e.g., Note, *supra* note 8, at 555; Comment, *supra* note 9, at 511-12.

205. See, e.g., Note, *supra* note 8, at 551.

206. See *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980); *Friedman v. Rogers*, 440 U.S. 1 (1979); *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978); *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). See also Comment, *Political Speech of Charitable Organizations Under the Internal Revenue Code*, 41 U. CHI. L. REV. 352 (1974); Note, *supra* note 8, at 551 & n.80.

207. The court in *Christian Echoes* compared the limitations on freedom of speech by exempt organizations to the Hatch Political Activity Act (Hatch Act) restrictions on state and federal employees. See 5 U.S.C. § 7324 (1976). The court stated the analogy as follows:

In light of the fact that tax exemption is a privilege, a matter of grace rather than right, we hold that the limitations contained in Section 501(c)(3) withholding exemption from nonprofit corporations do not deprive *Christian Echoes* of its constitutionally guaranteed right of free speech. The taxpayer may engage in all such activities without restraint, subject, however, to withholding of the exemption or, in the alternative, the taxpayer

The provisions of the Internal Revenue Code restricting political involvement by religious organizations indicate congressional efforts²⁰⁸ to give effect to the historical and judicial understanding of the first amendment as requiring separation of church and state.²⁰⁹ Courts have had difficulty interpreting the language of the Code with respect to the limitations on legislative lobbying and political campaigning. These problems of interpretation do not, however, require the complete elimination of the provisions.²¹⁰ The 1976 Tax Reform Act provides sufficient clarity to exempt organizations and the courts. The free exercise arguments raised by churches²¹¹ must eventually be decided by the Supreme Court. Until then, the Internal Revenue Code provisions pro-

may refrain from such activities and obtain the privilege of exemption. The parallel to the "Hatch Act" prohibitions . . . is clear: The taxpayer may opt to enter an area of federal employment subject to the restraints and limitations upon his First Amendment rights. Conversely, he may opt not to receive employment funds at the public trough in the areas covered by the restraints and thus exercise his First Amendment rights unfettered.

470 F.2d at 857. The court implied that limitations placed on the right to freedom of speech are justified by a compelling state interest. *See supra* note 203 and accompanying text. *See also* Haswell v. United States, 500 F.2d 1133, 1150 (Ct. Cl. 1974) ("Congressional interest in prevention of the use of tax funds to support lobbying is compelling."), *cert. denied*, 419 U.S. 1107 (1975). *See generally* Note, *supra* note 169, at 224-25.

208. *See* 115 CONG. REC. 38,887 (1967) (remarks of Representative Blackburn) ("the basic reason for [the Internal Revenue Code restrictions] is that all groups within the political arena should work under the same set of handicaps. To allow churches involved in political propaganda a special tax-exempt status is to subsidize political activities by these groups.").

209. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 625 (1971) ("government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government."). *See also* Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 212 (1948) (the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."). For a discussion of Madison's view of the meaning of the religion clauses, *see supra* note 61 and accompanying text.

210. *But see* Comment, *supra* note 9, at 534.

211. *See supra* notes 110-30 and accompanying text. The Supreme Court was prevented from a direct ruling on the constitutionality of the political activity restrictions because of procedural difficulties in *Bob Jones Univ. v. Simon*, 416 U.S. 725 (1974), and *Commissioner v. "American United", Inc.*, 416 U.S. 752 (1974). *But see* *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1973); *Haswell v. United States*, 500 F.2d 1133 (Ct. Cl. 1974), *cert. denied*, 419 U.S. 1107 (1975).

Church leaders have also argued that predicating tax exemption on political noninvolvement violates the establishment clause. They argue that political activity restrictions "establish" religious organizations that are silent on public issues by granting them tax exemptions, while denying, or threatening to deny, exemption to those organizations that are active in politics. *See, e.g.*, *Hearings on H.R. 13500, supra* note 8, at 82 (statement of William P. Thompson). *See also* D. KELLEY, *supra* note 8, at 79-82.

vide needed restrictions on church political activity.²¹²

III. THE TAX EXEMPT STATUS OF RACIALLY DISCRIMINATORY PRIVATE SCHOOLS

The conflict between the first amendment religion clauses and the Internal Revenue Code has become increasingly controversial in recent years because of the IRS's continuing attack on private schools that discriminate on the basis of race. Since 1970, the IRS has denied or withdrawn tax exempt status of private schools with racially discriminatory admissions policies.²¹³ In 1975, the IRS extended the policy to religious schools which claimed that their religious beliefs required racial discrimination.²¹⁴ The schools immediately challenged this position in the courts,²¹⁵ resulting in severe criticism of the IRS policy.²¹⁶ In addition, IRS procedures for determining the racial policies of private sectarian and nonsectarian schools have raised serious first amendment religion clause questions.²¹⁷ Nevertheless, this Note argues that there is substantial support for the IRS position and that the use of tax exemption is a proper means for enforcing a clear federal policy against racial discrimination.²¹⁸

212. See *supra* notes 131-49.

213. IRS News Release (July 10, 1970), [1970] 7 STAND. FED. TAX REP. (CCH) ¶ 6790. Cf. IRS News Release (July 19, 1970), [1970] 7 STAND. FED. TAX REP. (CCH) ¶ 6814 ("applicable to all private schools, whether church related or not"). See *Green v. Kennedy*, 309 F. Supp. 1127 (D.D.C.), *appeal dismissed sub nom. Cannon v. Green*, 398 U.S. 956 (1970), *permanent injunction issued sub nom. Green v. Connally*, 330 F. Supp. 1150 (D.D.C.), *aff'd mem. sub nom. Coit v. Green*, 404 U.S. 997 (1971); Rev. Rul. 71-447, 1971-2 C.B. 230; *Tax-Exempt Status of Private Schools: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means* (pt. 2), 96th Cong., 1st Sess. 1306-07 (1979) (statement of Randolph V. Thrower) [hereinafter cited as *Status Hearings* (pt. 2)]; Laycock, *Tax Exemptions for Racially Discriminatory Religious Schools*, 60 TEX. L. REV. 259, 259 nn.5-6 (1982).

214. Rev. Rul. 75-231, 1975-1 C.B. 158. See Note, *The Judicial Role in Attacking Racial Discrimination in Tax-Exempt Private Schools*, 93 HARV. L. REV. 378, 380 n.14 (1979).

215. See *Bob Jones Univ. v. United States*, 639 F.2d 147 (4th Cir. 1980), *cert. granted*, 102 S. Ct. 386 (1981) (No. 81-3).

216. See *Administration's Change in Federal Policy Regarding the Tax Status of Racially Discriminatory Private Schools: Hearing Before the House Comm. on Ways and Means*, 97th Cong., 2d Sess. 143 (1982) (statement of Edward Schmults, Deputy Attorney General, Department of Justice); *id.* at 173 (statement of Richard T. McNamar, Deputy Secretary, Department of Treasury); *id.* at 243 (statement of Roscoe L. Egger, Jr., Commissioner of Internal Revenue) [hereinafter cited as *Administration's Change in Policy Hearing*].

217. See *infra* notes 243-49 and accompanying text.

218. See *infra* text accompanying notes 251-83. See also *Bob Jones Univ. v. United States*, 639 F.2d 147, 151 (4th Cir. 1980), *cert. granted*, 102 S. Ct. 386 (1981) (No. 81-3); *Green v. Connally*, 330 F. Supp. 1150, 1164-65 (D.D.C.), *aff'd mem. sub nom. Coit v. Green*, 404 U.S. 997

A. Development of Current IRS Policies Concerning Racially Discriminatory Schools

In 1970 the IRS reversed its earlier policy that all private schools, regardless of segregationist attitudes, were charitable organizations under section 501(c)(3).²¹⁹ The decision to define more clearly the government's position resulted from a class action suit brought by black students and their parents in Mississippi challenging the IRS's pre-1970 policy.²²⁰ In *Green v. Connelly*,²²¹ a three-judge federal district court upheld the IRS's newly articulated position²²² that it would refuse to grant tax exempt status to all private schools practicing racial discrimination.²²³ In ordering the IRS to withdraw tax exemptions from segregationist schools in Mississippi,²²⁴ the district court argued that a declared federal policy against racial discrimination "overrides any as-

(1971); *Administration's Change in Policy Hearing*, *supra* note 214, at 12 (statement of Laurence H. Tribe); *id.* at 115-17 (statement of Jerome Kurtz, former Commissioner of Internal Revenue); *id.* at 270 (statement of John S. Nolan, Chairman, Section on Taxation, American Bar Association).

219. In 1965, the IRS suspended action on applications for tax exemptions by racially discriminatory schools, but in 1967 returned to its earlier position of approving all such applications. *Green v. Kennedy*, 309 F. Supp. 1127, 1130-31 (1970); *Status Hearings (pt. 1)*, *supra* note 6, at 3 (opening statement of Jerome Kurtz, Commissioner of Internal Revenue) (citing IRS News Release, Aug. 2, 1967). See *supra* note 213 and accompanying text. See generally Note, *supra* note 214, at 379-80 & n.5 (explaining the IRS return to its earlier position).

220. *Green v. Connally*, 330 F. Supp. 1150 (D.D.C.), *aff'd mem. sub nom. Coit v. Green*, 404 U.S. 997 (1971). See Weithorn, *The Latest Phenomenon: Government Subsidization of Racial Discrimination*, 14 TAX NOTES 299, 299 (1982) ("no sharply defined governmental policy against racial discrimination practiced by private schools").

221. 330 F. Supp. 1150 (D.D.C.), *aff'd mem. sub nom. Coit v. Green*, 404 U.S. 997 (1971).

222. See IRS News Release (July 10, 1970), [1970] 7 STAND. FED. TAX REP. (CCH) ¶ 6790. The IRS issued its press release during litigation in *Green v. Connally*. The timing of this policy reversal became important in subsequent litigation because the Supreme Court stated in dictum that its affirmance of *Green* lacked "the precedential weight of a case involving a truly adversary controversy." See *Bob Jones Univ. v. Simon*, 416 U.S. 725, 740 n.11 (1974) (denying request to enjoin IRS from revoking tax exempt status of Bob Jones University, see *infra* notes 289-314 and accompanying text). See generally Neuberger & Crumplar, *supra* note 11, at 240 n.77 (outlining the *Green* decision that ratified the new IRS position).

223. 330 F. Supp. at 1161-62.

224. *Id.* at 1173-76. The *Green* court specifically ordered the IRS to deny tax exemptions to racially discriminatory schools in Mississippi, *id.* at 1179, and required applicants thereafter to publicize in the community a policy of nondiscrimination, *id.* at 1179-80. See *infra* notes 232-34 and accompanying text (discussing IRS formalization of the *Green* order in Rev. Rul. 71-447, 1971-2 C.B. 230). The *Green* court's permanent injunction is still in effect, see *infra* notes 264-67 and accompanying text. *Administration's Change in Policy Hearing*, *supra* note 216, at 116 (statement of Jerome Kurtz, former Commissioner of Internal Revenue). See *id.* at 270 (statement of John S. Nolan, Chairman, Section of Taxation, American Bar Association) ("it cannot be seriously asserted that there is any doubt about the power and duty under the law as it exists today").

sertion of value in practicing private racial discrimination, whether ascribed to philosophical pluralism or divine inspiration for racial segregation."²²⁵ The court, in support of this argument, cited the thirteenth amendment,²²⁶ the Civil Rights Act of 1964,²²⁷ and several landmark Supreme Court decisions.²²⁸ Relying on this clear federal policy and the common law of charitable trusts,²²⁹ the court concluded that its construction of the relevant Code provisions and its grant of a permanent injunction avoided the frustration of federal policy.²³⁰ The Supreme Court affirmed *Green* without opinion.²³¹

In 1971, the IRS extended and "formalized" the effect of *Green*²³² by issuing a revenue ruling²³³ requiring nondiscriminatory admissions policies for all private schools seeking qualification for tax exemption.²³⁴ This ruling was expanded in 1972 when the IRS issued a reve-

225. 330 F. Supp. at 1163.

226. U.S. CONST. amend. XIII. See *supra* note 18.

227. Pub. L. No. 88-352, 78 Stat. 241 (codified in scattered sections of 42 U.S.C.). 42 U.S.C. § 2000d (1976) provides:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

228. See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483 (1954). See also *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

229. 330 F. Supp. at 1159-64. For a detailed discussion of the charitable trust doctrine and the public policy argument relied on in *Green* and its progeny, see *infra* notes 253-83 and accompanying text. See generally *Simon, The Tax-Exempt Status of Racially Discriminatory Religious Schools*, 36 TAX L. REV. 477, 485-500 (1981).

230. 330 F. Supp. at 1164.

231. *Coit v. Green*, 404 U.S. 997 (1971) (mem.), *aff'g* 330 F. Supp. 1150 (D.D.C. 1971).

232. The *Green* court's order applied only to schools in Mississippi. 330 F. Supp. at 1176. The court stated, however, that the IRS "would be within its authority in including similar requirements for all schools of the nation." *Id.* Further, the court stated: "[t]o obviate any possible confusion the court is not to be misunderstood as laying down a special rule for schools located in Mississippi." *Id.* at 1174.

233. Rev. Rul. 71-447, 1971-2 C.B. 230.

234. *Id.* Revenue Ruling 71-447 provides in part:

A "racially nondiscriminatory policy as to students" is defined as meaning that the school admits the students of any race to *all the rights, privileges, programs, and activities generally accorded or made available to students at that school* and that the school does not discriminate on the basis of race in administration of its educational policies, admissions policies, scholarship and loan programs, and athletic and other school-administered programs.

Id. (emphasis added). See also *Status Hearings (pt. 2)*, *supra* note 213, at 1307. The ruling expressly adopted the *Green* court's position on the law of charitable trusts:

[R]acial discrimination in education is contrary to Federal public policy. Therefore, a school not having a racially nondiscriminatory policy as to students is not "charitable" within the common law concepts reflected in sections 170 and 501(c)(3) of the Code and

nue procedure²³⁵ that provided guidelines for private schools in publicizing their nondiscriminatory policies.²³⁶ Nevertheless, civil rights groups attacked the IRS for failing to sufficiently enforce and clarify guidelines for determining whether private schools discriminated on the basis of race.²³⁷ In response to this criticism, the IRS issued new guidelines requiring more detailed publication of nondiscriminatory policies.²³⁸ In the same year, religious schools claiming that racial discrimination was required by the tenets of their religious beliefs were brought within the IRS requirements.²³⁹

In 1976, the plaintiffs in *Green* reopened the case and charged the IRS with failing to effectively enforce the order issued by the court.²⁴⁰ In a separate action, black parents and their children filed a class action suit before the same court,²⁴¹ charging the IRS with violating section

in other relevant Federal statutes and accordingly does not qualify as an organization exempt from Federal income tax.

Rev. Rul. 71-447, 1971-2 C.B. 230, 231.

235. Rev. Proc. 72-54, 1972-2 C.B. 834.

236. *Id.*

237. 3 U.S. COMM'N ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—1974: TO ENSURE EQUAL EDUCATIONAL OPPORTUNITY 183-85 (1975). The report of the Commission on Civil Rights indicated that there were "serious and pervasive deficiencies in the [IRS]'s approach to nondiscrimination enforcement. . . ." See *Status Hearings (pt. 2)*, *supra* note 213, at 736 (statement of Arthur S. Flemming, Chairman, United States Commission on Civil Rights). See also Sanders, *supra* note 11, at 234.

238. Rev. Proc. 75-50, 1975-2 C.B. 587. This revenue procedure superceded the 1972 procedures, and required all tax exempt private schools to adopt formal nondiscriminatory policies; to publish these policies annually; to include them in all school catalogs and brochures; and to keep detailed records on the maintenance of these policies. *Id.* Nevertheless, the guidelines were attacked for failing to ensure *actual* nondiscrimination by schools who, following the guidelines, were willing to maintain a *formal* policy of nondiscrimination. *Administration's Change in Policy Hearing*, *supra* note 216, at 26 (statement of Michael I. Sanders); Note, *supra* note 214, at 381. In the hearings on the 1978 proposed revenue procedure, the Commissioner of Internal Revenue admitted the need for stronger rules. See *Status Hearings (pt. 1)*, *supra* note 6, at 5 (statement of Jerome Kurtz). See also Note, *supra* note 214, at 381.

239. Rev. Rul. 75-231, 1975-1 C.B. 158.

240. *Green v. Simon*, No. 1355-69 (D.D.C., filed July 23, 1976) (later docketed as *Green v. Miller*).

241. *Wright v. Simon*, No. 76-1426 (D.D.C., filed July 30, 1976) (later docketed as *Wright v. Miller*). In 1977, the *Green* and *Wright* cases were consolidated. *Green v. Miller*, No. 1355-69 (D.D.C. April 5, 1977). The district court dismissed the *Wright* component as nonjusticiable in 1979, see *Wright v. Miller*, 480 F. Supp. 790 (D.D.C. 1979), but six months later the same court granted the relief requested by plaintiffs in the *Green* component, see *Green v. Miller*, No. 1355-69 (D.D.C. May 5, 1980). The *Wright* plaintiffs then appealed the dismissal. See *Wright v. Regan*, 656 F.2d 820 (1981) (plaintiffs had standing to sue). See generally Note, *supra* note 214, at 381-82 nn.17-19 (discussing the disposition of the *Wright* decision). For a discussion of the history of the *Green* and *Wright* cases, see generally *Wright v. Regan*, 656 F.2d 820, 823-26 (1981).

501(c)(3), the Civil Rights Acts of 1866 and 1964, and the fifth and fourteenth amendments.²⁴² In response to these actions, the IRS issued a proposed revenue procedure in 1978²⁴³ that promulgated specific and rigid guidelines for determining when a presumption of discrimination existed.²⁴⁴ It also stated that in "appropriate" cases the guidelines

242. See *Wright v. Miller*, 480 F. Supp. 790, 792 (1979).

243. Prop. Rev. Proc., 43 Fed. Reg. 37,296 (1978), reprinted in *Status Hearings (pt. 1)*, supra note 6, at 25-38. The IRS issued the proposed procedure in order to invite public comment. The result was a series of hearings before the House Subcommittee on Oversight, at which over 250 witnesses testified. The IRS received over 125,000 written responses critical of the proposed procedure. See *Status Hearings (pt. 1)*, supra note 6; *Status Hearings (pt. 2)*, supra note 213; see also *Administration's Change in Policy Hearing*, supra note 216, at 26 (statement of Michael I. Sanders); Wash. Post, Dec. 6, 1978, § A, at 25, col. 1.

244. Prop. Rev. Proc., 43 Fed. Reg. 37,296 (1978), reprinted in *Status Hearings (pt. 1)*, supra note 6, at 25-38. The proposed procedure established means to determine which schools, although conforming to the technical requirements of Rev. Proc. 75-50, were nonetheless discriminatory in fact. See supra note 238. See also *Neuberger & Crumplar*, supra note 11, at 232. The proposed procedure identified two classes of schools that would be considered presumptively unqualified for tax exemption, absent strong evidence in rebuttal, because of their discriminatory admissions policies. First, schools that had been adjudicated to be discriminatory in a state or federal court ("adjudicated schools"); and second, schools that had an insignificant number of minority students and which were formed or expanded at or about the time of public school desegregation in the community ("reviewable schools"). 43 Fed. Reg. 37,296, at 37,297-98, reprinted in *Status Hearings (pt. 1)*, supra note 6, at 31-32. These two classes of schools could rebut the prima facie presumption of discrimination by either showing that there were a significant number of minority students ("20 percent of the percentage of the minority school age population in the community") or by showing that they were in good faith operating on a nondiscriminatory basis. *Id.* at 37,298, reprinted in *Status Hearings (pt. 1)*, supra note 6, at 31-33. Proof of good faith nondiscrimination required a showing of four out of the following five factors:

1. Availability of and granting of scholarships or other financial assistance on a significant basis to minority students.
2. Active and vigorous minority recruitment programs, such as contacting prospective minority students and organizations from which prospective minority students could be identified.
3. An increasing percentage of minority student enrollment.
4. Employment of minority teachers or professional staff.
5. Other substantial evidence of good faith, including evidence of a combination of lesser activities, such as—
 - (a) Continued and meaningful advertising programs beyond the requirements of Revenue Procedure 75-50, or contacts with minority leaders inviting applications from minority students.
 - (b) Significant efforts to recruit minority teachers.
 - (c) Participation with integrated schools in sports, music, and other events or activities.
 - (d) Making school facilities available to outside, integrated civic or charitable groups.
 - (e) Special minority-oriented curriculum or orientation programs.
 - (f) Minority participation in the founding of the school or current minority board members.

would apply to colleges and universities.²⁴⁵ Criticism²⁴⁶ that arose regarding these guidelines forced the IRS to issue a revised proposed revenue procedure in 1979.²⁴⁷ Under this revised version, the IRS eliminated the mechanical tests for determining the existence of discrimination in favor of a test based on the particular circumstances of each case.²⁴⁸ The revised version substantially altered the criteria for reviewing schools and changed the prima facie case with respect to both adjudicated and reviewable schools.²⁴⁹ Nevertheless, the position adopted by the IRS after the decision in *Green* remained essentially

Id. at 37,298, reprinted in *Status Hearings (pt. 1)*, *supra* note 6, at 33. See generally Sanders, *supra* note 11, at 236-37.

245. *Id.* at 37,297, reprinted in *Status Hearings (pt. 1)*, *supra* note 6, at 26. The proposed procedure would also apply to church related schools described in Rev. Rul. 75-231, 1975-1 C.B. 158. *Id.*

246. See *supra* notes 11 & 243.

247. Prop. Rev. Proc., 44 Fed. Reg. 9,451, corrected at 44 Fed. Reg. 11,021, reprinted in *Status Hearings (pt. 1)*, *supra* note 6, at 41-51 [hereinafter cited as *Revised Procedure*].

248. See IRS News Release (Feb. 9, 1979), reprinted in *Status Hearings (pt. 1)*, *supra* note 6, at 39 (the new procedure gives greater weight to each school's particular circumstances than did the earlier proposal).

249. *Revised Procedure*, *supra* note 247, at 9,452-53, corrected at 11,021, reprinted in *Status Hearings (pt. 1)*, *supra* note 6, at 48-51. The revised procedure defined a "reviewable school" as one meeting all the following tests:

- (i) formed or substantially expanded at the time of public school desegregation in the community served by the school; (ii) which does not have significant minority student enrollment; and, (iii) whose creation or substantial expansion was related in fact to public school desegregation in the community.

Id. at 9,452, corrected at 11,021, reprinted in *Status Hearings (pt. 1)*, *supra* note 6, at 43. The revised procedure also does not place the burden of proof of nondiscrimination on reviewable schools, thereby eliminating the prima facie approach of the 1978 proposed procedure. It also eliminated the good faith requirement of satisfying four out of five nondiscrimination factors, see *supra* note 244. Further, the revised procedure applied only to primary and secondary schools, thereby eliminating the "appropriate case" provision of the 1978 procedure, see *supra* note 244. Finally, the revised procedure changed the mechanical tests for adjudicated schools to a case-by-case approach, thereby allowing an adjudicated discriminatory school to qualify for tax exemption if it can show, "on all the relevant facts and circumstances," that "(a) the school currently has significant minority enrollment [defined in far more flexible terms than in the 1978 procedure] or, (b) the school has undertaken actions or programs reasonably designed to attract minority students on a continuing basis." *Id.* at 9,454, corrected at 11,021, reprinted in *Status Hearings (pt. 1)*, *supra* note 6, at 48. The revised procedure, therefore, retains the "safe harbor" of the 1978 version for private schools. It contains the following example:

[I]f 50 percent of the school age population in the community is minority, and the school enrolls 200 students, a school would not be "reviewable" if it had at least 20 minority students. (20 percent x 50 percent = 10 percent. 10 percent x 200 students = 20 students).

Id. at 9,453, corrected at 11,021, reprinted in *Status Hearings (pt. 1)*, *supra* note 6, at 44. Nevertheless, the revised proposed procedure made "rebuttal of an unfavorable presumption . . . consider-

ably easier." Cohen, *Exempt Status for Segregated Schools: Does the Constitution Permit Lower Standards for Tax Benefits than for Direct Grants?*, 17 TAX NOTES 259, 264 (1982).

For a detailed discussion of the revised proposed procedure, see Neuberger & Crumplar, *supra* note 11. See also *Status Hearings (pt. 1)*, *supra* note 6, at 354-57 (statement of Martin D. Ginsburg, Association of the Bar of the City of New York); Drake, *Tax Status of Private Segregated Schools: The New Revenue Procedure*, 20 WM. & MARY L. REV. 463, 484-97 (1979); Sanders, *supra* note 11, at 237-38.

Despite the increased flexibility of the revised version, the public reaction was unfavorable. See, e.g., *Status Hearings (pt. 1)*, *supra* note 6, at 388 (statement of W. Wayne Allen) ("horrible example of bureaucratic overkill"); *id.* at 460 (statement of Robert J. Billings) ("utterly and completely void of statutory authority"); *Status Hearings (pt. 2)*, *supra* note 211, at 581 (statement of W.M. Gravatt, Jr.) ("usurp[ation of] the legislative powers of Congress"); *id.* at 727 (statement of Senator Orrin G. Hatch) ("arbitrary, capricious, and amoral"); *id.* at 930 (statement of James W. Denink) ("[u]nreasonable discrimination against nonpublic schools"). See also Neuberger & Crumplar, *supra* note 11, at 232 & n.26 ("most, if not all of the opposition . . . concerned the method by which the IRS sought to implement its policy and the fear of the future consequences of that implementation") (footnote omitted). But see *Administration's Change in Policy Hearing*, *supra* note 216:

[T]here is no doubt whatever that the denial of tax exemptions and deductions for racially discriminatory private schools reflects no mere policy preference by IRS officials; such denial is, instead, the direct result of definitive federal court orders requiring the Executive Branch to stop granting tax exemptions to private schools that discriminate on the basis of race and tax deductions to those individuals whose contributions help keep such schools afloat. Every federal appellate court to consider the issue since 1971 has reached the same conclusion—namely, that the "policy" now denounced by the Administration as lacking legal foundation is, in truth, a rule of law mandated by the Internal Revenue Code, properly construed.

Id. at 12 (statement of Laurence H. Tribe) (footnote omitted).

Neither of the proposed procedures was adopted by Congress. After hearings in both the House, see *Status Hearings (pt. 1)*, *supra* note 6; *Status Hearings (pt. 2)*, *supra* note 213, and the Senate, see *Hearings Before the Subcomm. on Taxation and Debt Management Generally of the Senate Comm. on Finance*, 96th Cong., 1st Sess. (1979), Congress withheld all funds for IRS enforcement or formulation of procedures to withhold tax exemption of private schools. Two riders were attached to the Treasury, Postal Service, and General Government Appropriations Act of 1980, Pub. L. No. 96-74, 93 Stat. 559 (1979). The first, introduced by Representative Ashbrook, provided that:

None of the funds made available pursuant to the provisions of this Act shall be used to formulate or carry out any rule, policy, procedure, guideline, regulation, standard, or measure which would cause the loss of tax-exempt status to private, religious, or church-operated schools under section 501(c)(3) of the Internal Revenue Code of 1954 unless in effect prior to August 22, 1978.

Id. § 103, 93 Stat. 559, 562 (1979). This amendment effectively forced the IRS to rely solely on Rev. Proc. 75-50, 1975-2 C.B. 58 as an enforcement mechanism. For a discussion of the ineffectiveness of this procedure, see *supra* note 238. The second, introduced by Representative Dornan, provided that: "None of the funds available under this Act may be used to carry out [either the 1978 proposed revenue procedure or the 1979 revised proposed procedure], or parts thereof." Pub. L. No. 96-74, § 615, 93 Stat. 559, 577 (1979). Both the Ashbrook and Dornan amendments remained in effect through fiscal 1982 and several months of fiscal 1983. Continuing Appropriations For Fiscal Year 1983, Pub. L. No. 97-276, ___ Stat. ___ (1982). See Cohen, *supra*, at 264 n.70. See also Simon, *supra* note 229, at 481 n.21; Note, *supra* note 214, at 383-84 & nn.29-33. For a discussion of the use of riders to appropriations legislation as a means of limiting agency power,

unchanged until 1982.²⁵⁰

B. *Judicial Analysis: Green v. Connally*

Three theories have been identified in support of the IRS position denying tax exemptions to discriminatory schools.²⁵¹ All three theories can be traced to Judge Leventhal's opinion in *Green*.²⁵²

1. *The Charitable Trust and Public Benefits Theories*

Section 501(c)(3) exempts from income taxation "religious, charitable, . . . or educational" organizations.²⁵³ Neither the Code nor the Treasury Regulations adequately define "charitable," but clearly it is not to be used "in a street . . . sense (such as, . . . benevolence to the poor and suffering)."²⁵⁴ The *Green* court analogized the use of the term in the Code to the common law of charitable trusts,²⁵⁵ thereby implicating the inherent requirement that a charitable trust provide some benefit to the public.²⁵⁶ The rationale for providing preferred treatment to charitable trusts²⁵⁷ is that they provide a public benefit.²⁵⁸ A fortiori, a trust could not be considered charitable if it was illegal or contrary to

see generally Parnell, *Congressional Interference in Agency Enforcement: The IRS Experience*, 89 YALE L.J. 1360 (1980).

250. For a detailed discussion of the *Green* decision, see *infra* notes 252-73 and accompanying text. Although Congress withheld funds for IRS enforcement of the 1978 and 1979 proposed procedures, see *supra* note 249, it did not do so for Rev. Proc. 75-50, 1975-2 C.B. 158. Nevertheless, IRS enforcement under the 1975 procedure has been ineffective. See *supra* note 238 and accompanying text. See also Cohen, *supra* note 249, at 263 ("While there is no consensus as to the total number of segregated private schools, even the lowest estimate indicates that only a tiny fraction have been denied exemptions.").

251. See Simon, *supra* note 229, at 483-500 & n.26 (distinguishing between "public policy" and "public benefits" theories). See also *Bob Jones Univ. v. United States*, 639 F.2d 147 (1980), cert. granted, 102 S. Ct. 386 (1981) (No. 81-3); *Status Hearings (pt. 1)*, *supra* note 6, at 33-37 (statement of Michael I. Sanders).

252. 330 F. Supp. at 1157-61 (charitable trust and public benefits theories, see *infra* notes 253-59 and accompanying text), 1161-63 (public policy theory, see *infra* notes 260-73 and accompanying text).

253. I.R.C. § 501(c)(3) (1976).

254. 330 F. Supp. at 1157 (citing Reiling, *What is a Charitable Trust?*, 44 A.B.A.J. 525, 527 (1958)). See Treas. Reg. § 1.501(c)(3)-1(d)(2) (1954) ("The term 'charitable' is used in section 501(c)(3) in its generally accepted legal sense . . .").

255. 330 F. Supp. at 1157-61.

256. *Id.* (citing *Ould v. Washington Hosp. for Foundlings*, 95 U.S. 303, 311 (1877)). See 4 G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 411, at 318. See also *Duffy v. Birmingham*, 190 F.2d 738, 740 (8th Cir. 1951); RESTATEMENT (SECOND) OF TRUSTS § 368 comment b (1969).

257. See Sanders, *supra* note 11, at 235 & n.5 ("benefits designed to protect [trusts'] existence").

public policy,²⁵⁹ and thus would not qualify as a charitable organization under section 501(c)(3).

2. *The Public Policy Theory*

The *Green* court also relied in part on the public policy doctrine recognized by the Supreme Court in *Tank Truck Rentals, Inc. v. Commissioner*.²⁶⁰ In *Tank Truck*, the Court held that a trucking company could not deduct fines paid for violations of state maximum weight laws as "ordinary and necessary" business expenses under the Internal Revenue Code.²⁶¹ The Court stated that allowing the deduction would "frustrate sharply defined national or state policies proscribing particular types of conduct."²⁶² The Court reasoned that the public policy doctrine allowed the courts the flexibility to "accommodate both the congressional intent to tax only net income, and the presumption against congressional intent to encourage violation of declared public policy."²⁶³

Applying this theory, the court in *Green* balanced the congressional intent to exempt educational organizations from income taxation against the declared federal policy of nondiscrimination.²⁶⁴ The Court

258. 330 F. Supp. at 1158. See *Girard Trust Co. v. Commissioner*, 122 F.2d 108 (1941) (discussed *supra* notes 159-62 and accompanying text). See generally Sanders, *supra* note 11, at 235.

259. 330 F. Supp. at 1159-60 (quoting RESTATEMENT (SECOND) OF TRUSTS § 377 comment c (1959)). The *Green* court stated: "This public policy doctrine operates as a necessary exception to or qualifier of the precept that in general trusts for education are considered to be for the benefit of the community. Otherwise, for example, Fagin's school for pickpockets would qualify for a charitable trust." 330 F. Supp. at 1160. The court's analogy to Fagin's school of pickpockets was discussed in oral argument before the Supreme Court in *Bob Jones Univ. v. United States*, 50 U.S.L.W. 3278 (U.S. Oct. 13, 1981):

Justice Stevens asked whether the IRS would not have the discretion to deny tax-exempt status to a school whose primary purpose was to train pickpockets.

"A school for pickpockets is not organized exclusively for educational purposes," McNairy [counsel for Goldsboro Christian Schools] replied.

"Why not?" Justice Stevens asked.

"It's organized for criminal purposes," McNairy replied.

"It's still teaching something, isn't it?" Justice Stevens retorted amidst a ripple of laughter.

Id. at 3296.

260. 356 U.S. 30 (1958).

261. *Id.* at 37. See I.R.C. § 23(a)(1)(A) (1939) (current version at I.R.C. § 162(a) (1976)).

262. 356 U.S. at 33.

263. *Id.* at 35.

264. 330 F. Supp. at 1163-64. The court stated:

The Internal Revenue Code provisions on charitable exemptions and deductions must be construed to avoid frustrations of Federal policy. Under the conditions of today they can no longer be construed so as to provide to private schools operating on a racially

found that the policy against racial discrimination outweighed congressional intent to benefit educational institutions²⁶⁵ and thereby upheld the IRS denial of tax exempt status to discriminatory schools.²⁶⁶ The Supreme Court affirmed *Green*,²⁶⁷ but because the IRS had changed its position during the course of litigation, the Court later stated in dictum that *Green* "lacks the precedential weight of a case involving a truly adversary controversy."²⁶⁸ Nevertheless, the decision in *Green* is consistent with subsequent cases decided by the Supreme Court²⁶⁹ and reflects an incisive analysis of both *Tank Truck* and the common law of charitable trusts. That *Green* was correctly decided is reflected also in Congress' subsequent addition of section 501(i) to the Internal Revenue Code.²⁷⁰ Under this provision, racially discriminatory social clubs²⁷¹ are denied tax exempt status. Congress, by enacting section 501(i), expressly overruled that part of *McGlotten v. Connally*²⁷² that held that racially discriminatory social clubs were entitled to tax exempt status

discriminatory premise the support of the exemptions and deductions which Federal tax law affords to charitable organizations and their sponsors.

Id. See Sanders, *supra* note 11, at 235.

265. 330 F. Supp. at 1162-63.

266. *Id.* at 1164. See *supra* note 264.

267. *Coit v. Green*, 404 U.S. 997 (1971) (mem.), *aff'g* 330 F. Supp. 1150 (D.D.C. 1971).

268. *Bob Jones Univ. v. Simon*, 416 U.S. 725, 740 n.11 (1974). For a discussion of this footnote, see *Status Hearings (pt. 1)*, *supra* note 6, at 367 (statement of Laurence H. Tribe) ("in Supreme Court decisions subsequent to the affirmance in *Green*, . . . the Court has made plain that the holding of *Green* was correct as a matter of Federal constitutional law"). See also Cohen, *supra* note 249, at 261 n.43 ("The characterization of *Green* as 'non-adversarial' is erroneous."); Sanders, *supra* note 11, at 235 ("The meaning of this [footnote] is unclear, since the defendant-intervenors opposed plaintiff's contentions before both the lower court and the Supreme Court."). Interestingly, in *Norwood v. Harrison*, 413 U.S. 455 (1973), the Supreme Court cited its affirmance in *Green* as support for its statement that "[t]his Court has consistently affirmed decisions enjoining State tuition grants to students attending racially discriminatory private schools." *Id.* at 463 & n.6. See *Status Hearings (pt. 1)*, *supra* note 6, at 367 (statement of Laurence H. Tribe).

269. See, e.g., *Runyon v. McCrary*, 427 U.S. 160 (1976); *Norwood v. Harrison*, 413 U.S. 455 (1973). See also Sanders, *supra* note 11, at 235 & nn.9 & 11.

270. I.R.C. § 501(i) (Supp. V 1981). It would be difficult to argue that Congress was not approving the *Green* decision by enacting this provision. See, e.g., *Wright v. Regan*, 656 F.2d 820, 834 n.40 (1981) ("Congress appears to agree with the *Green* court"); S. REP. NO. 1318, 94th Cong., 2d Sess. 8 n.5 (1976), reprinted in 1976 U.S. CODE CONG. & AD. NEWS 6051, 6058 n.5; *Administration's Change in Policy Hearings*, *supra* note 214, at 12 (statement of Laurence H. Tribe); *id.* at 21 (statement of Albert J. Rosenthal); *id.* at 273 (statement of Archibald Cox). See also Note, *supra* note 214, at 389 ("Congress' failure to repeal explicitly any of the IRS publications guidelines adopted before August 1978 [see *supra* note 249] suggests agreement with the *Green* court.").

271. Social clubs are exempt under I.R.C. § 501(c)(7) (1976 & Supp. V 1981).

272. 338 F. Supp. 448, 457-59 (D.D.C. 1972).

under section 501(c)(7).²⁷³

Several decisions subsequent to *Green* add support to the policies underlying the IRS efforts to eliminate racial discrimination in private schools. In *Norwood v. Harrison*,²⁷⁴ the Supreme Court held, without dissent,²⁷⁵ that economic benefit in the form of a textbook loan program could not be extended to racially discriminatory schools even if the program applied to all private schools.²⁷⁶ In *Runyon v. McCrary*,²⁷⁷ the parents of black children filed suit against private nonsectarian schools for violations of section 1981.²⁷⁸ The parents alleged that their children were denied admission solely because of their race,²⁷⁹ and sought declaratory and injunctive relief and damages.²⁸⁰ The Court held that racially discriminatory admissions policies violate section 1981²⁸¹ and thereby recognized the clear federal policy against racial discrimination in education.²⁸² Furthermore, the Court held that a section 1981 violation exists in these circumstances regardless whether the school receives federal or state aid.²⁸³

273. *Id.* See S. REP. NO. 1318, *supra* note 270, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 6051.

274. 413 U.S. 455 (1973).

275. Justices Douglas and Brennan concurred in the result. *Id.* at 471.

276. *Id.* at 462-63. See Comment, *The Tax-Exempt Status of Sectarian Educational Institutions that Discriminate on the Basis of Race*, 65 IOWA L. REV. 258, 269 n.97 (1979).

277. 427 U.S. 160 (1976).

278. *Id.* Section 1981 provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981 (1976). For a general discussion of section 1981 applicability to racially discriminatory schools, see Note, *Section 1981 Liability for Racially Discriminatory Sectarian Schools*, 38 WASH. & LEE L. REV. 1237 (1981); Note, *Freedom of Religion as a Defense to a § 1981 Action Against a Racially Discriminatory Private School*, 53 NOTRE DAME LAW. 107 (1977).

279. 427 U.S. at 164-65.

280. *Id.* at 164.

281. *Id.* at 172.

282. See, e.g., Sanders, *supra* note 11, at 236; Note, *supra* note 278, at 1239 n.11. See also *Status Hearings (pt. 1)*, *supra* note 6, at 5 (statement of Jerome Kurtz, Commissioner of Internal Revenue) ("The *Runyon* decision amplifies the strong public policy against racial discrimination in private schools. . . .").

283. 427 U.S. at 173 ("§ 1981, like § 1982, reaches private conduct"). See also *Status Hearings (pt. 1)*, *supra* note 6, at 5 (statement of Jerome Kurtz, Commissioner of Internal Revenue). Cf. *Prince Edward School Found. v. United States*, No. 79-1622 (D.C. Cir. June 30, 1980) (upholding withdrawal of tax-exempt status of racially discriminatory private school), *cert. denied*, 450 U.S. 944 (1981); *Goldsboro Christian Schools, Inc. v. United States*, 436 F. Supp. 1314 (E.D.N.C. 1977) (same), *aff'd mem.*, 644 F.2d 879 (4th Cir.), *cert. granted*, 102 S. Ct. 386 (1981) (No. 81-1); Brum-

C. *Racially Discriminatory Religious Schools*

The conflict between the IRS and segregationist religious schools has a long and convoluted history.²⁸⁴ The controversy raises significant questions about the scope of the IRS's authority and the constitutionality of revoking the tax exempt status of discriminatory religious schools.²⁸⁵ On the one hand, the IRS argues that religious schools are not excepted from the nondiscrimination requirements of *Green* and subsequent IRS rulings.²⁸⁶ Religious schools, on the other hand, argue that a nondiscrimination policy as applied to schools with a sincerely held religious belief in separation of the races interferes with the free exercise of these beliefs.²⁸⁷ In addition, discriminatory schools argue that by withdrawing their tax exemptions the government establishes those religions which do not practice racial discrimination.²⁸⁸

Bob Jones University has been actively engaged in litigation over these issues for almost ten years.²⁸⁹ The school claims that its discrimi-

field v. Dodd, 425 F. Supp. 528 (E.D. La. 1976) (discriminatory private schools unqualified for state financial support).

284. See *supra* notes 213-83 and accompanying text. See also 51 U.S.L.W. 3295 (1982).

285. See, e.g., Bob Jones Univ. v. United States, 639 F.2d 147 (4th Cir. 1980), *rev'g* 468 F. Supp. 890 (D.S.C. 1978), *cert. granted*, 102 S. Ct. 386 (1981) (No. 81-3). See also *supra* note 14. See generally Laycock, *supra* note 213, at 261-66.

286. 639 F.2d at 150.

287. See generally *Administration's Change in Policy Hearing*, *supra* note 216 (statements of various churches, church leaders, and church-related school administrators); *Status Hearings (pt. I)*, *supra* note 6 (same).

288. See, e.g., 639 F.2d at 153-54. See also *infra* notes 309-12 and accompanying text.

289. Bob Jones University first filed suit against the United States in 1971 in an effort to enjoin the IRS from withdrawing its tax exempt status. Bob Jones Univ. v. Connally, 341 F. Supp. 277 (1971), *rev'd*, 472 F.2d 903 (4th Cir. 1973), *aff'd*, 416 U.S. 725 (1974).

Bob Jones University was founded in 1927, and moved to its present South Carolina location in the late 1940s. It is a Christian fundamentalist religious and education institution, although it is not affiliated with a religious denomination. 639 F.2d at 149. The school's Certificate of Incorporation states the purposes of the institution as follows:

The general nature and object of the corporation shall be to conduct an institution of learning for the general education of youth in the essentials of culture and in the arts and sciences, giving special emphasis to the Christian religion and the ethics revealed in the Holy Scriptures, combating all atheistic, agnostic, pagan and so-called scientific adulterations of the Gospel, unqualifiedly affirming and teaching the inspiration of the Bible (both Old and New Testaments); the creation of man by the direct act of God; the incarnation and virgin birth of our Lord and Saviour, Jesus Christ; His identification as the Son of God; His vicarious atonement for the sins of mankind by the shedding of His blood on the Cross; the resurrection of His body from the tomb; His power to save men from sin; the new birth through the regeneration by the Holy Spirit; and the gift of eternal life by the grace of God.

Id. at 148 n.1. The school maintains a strict fundamentalist approach to education, requiring all teachers to be "born again" Christians, and prospective students undergo close scrutiny of their

natory policies are mandated by the Bible,²⁹⁰ and therefore uniformly denied admission to blacks until 1971.²⁹¹ Thereafter, until 1975, Bob Jones University denied admission only to unmarried blacks because the IRS was investigating the admissions policies to determine if the university's tax exemption should be revoked. In 1975, the school filed suit to enjoin the IRS from revoking its exempt status.²⁹² The Supreme Court denied the request for injunctive relief,²⁹³ thus prompting the university to again change its policy to prohibiting interracial dating and marriage of its students.²⁹⁴ The IRS revoked Bob Jones University's tax exempt status in 1976, which was made retroactively effective,²⁹⁵ and after paying twenty-one dollars in FUTA (Federal Unemployment Tax Act) taxes, Bob Jones University filed suit for a refund.²⁹⁶ The United States District Court for the District of South Carolina held that the IRS did not have the authority to revoke the university's tax exemption, and that by so doing the IRS violated the school's first amendment rights.²⁹⁷ On appeal, the Fourth Circuit in

religious belief upon application to the school. 468 F. Supp. 890, 894 (D.S.C. 1978). The school also strictly regulates student activities:

The institution does not permit dancing, card playing, the use of tobacco, movie-going, and other such forms of indulgences in which wordly [sic] young people often engage; no student will release information of any kind to any local newspaper, radio station, or television station without first checking with the University Public Relations Director; students are expected to refrain from singing, playing, and, as far as possible, from "tuning-in" on the radio or playing on the record player jazz, rock-and-roll, folk rock, or any other types of questionable music; and, no young man may walk a girl on campus unless both of them have a legitimate reason for going in the same direction.

Id.

290. *Id.* at 895.

291. 639 F.2d at 149.

292. *Bob Jones Univ. v. Simon*, 416 U.S. 725 (1974).

293. *Id.* at 746.

294. 639 F.2d at 149. Bob Jones University changed its policies after the Supreme Court, in *Runyon v. McCrary*, 427 U.S. 160 (1976), prohibited racial discrimination by private schools. See *supra* notes 278-83 and accompanying text. The school's post-*Runyon* rules contained the following provisions:

There is to be no interracial dating.

1. Students who are partners in an interracial marriage will be expelled.
2. Students who are members of or affiliated with any group or organization which holds as one of its goals or advocates interracial marriage will be expelled.
3. Students who date outside their own race will be expelled.
4. Students who espouse, promote, or encourage others to violate the University's dating rules and regulations will be expelled.

639 F.2d at 149 (emphasis in original).

295. 468 F. Supp. at 893.

296. *Id.* The government counterclaimed for approximately \$490,000 in unpaid taxes from December 1, 1970, to December 31, 1975. *Id.*

297. *Id.* at 907. The district court's conclusion was based in large part on its finding that Bob

Bob Jones University v. United States reversed, and held that the IRS had authority under the Internal Revenue Code to revoke Bob Jones University's tax exemption.²⁹⁸ In addition, the court held that revocation of a racially discriminatory religious school's tax exempt status does not violate either religion clause of the first amendment.²⁹⁹ The Fourth Circuit argued that both the purpose and history of section 501(c)(3) supported the IRS action,³⁰⁰ and confirmed the *Green* "syllogism" derived from the common law of charitable trusts.³⁰¹ Further, the court found that Bob Jones University's racial policies violated the declared public policy against racial discrimination,³⁰² and the more specific policy against public subsidization of discrimination in education.³⁰³ The court recognized the need for a "prophylactic rule to prevent [indirect public] support"³⁰⁴ of racial discrimination, even when sincerely held religious belief was posited as the reason for the discriminatory practice.³⁰⁵ Relying on the balancing test of *Wisconsin v.*

Jones University was primarily a religious, as opposed to educational, institution. *Id.* at 897. The court, addressing the school's post-1975 rules prohibiting interracial dating and marriage, concluded that these rules were based on seriously held religious beliefs, and therefore revocation of the school's tax exemption violated the free exercise clause of the first amendment. *Id.* at 898. Further, the district court held that by revoking the tax exempt status of discriminatory schools, the IRS established schools more "in tune with federal public policy." *Id.* at 900. Finally, the court held that, despite the decision in *Green*, the IRS interpretation of section 501(c)(3) was incorrect because the word "charitable" in the statute was not intended to modify the other categories, *see supra* note 5. In other words, the court held that in order to qualify for tax exemption under section 501(c)(3), an organization need not satisfy the charitable trust requirement of conformity to declared public policy. *Id.* at 901-04. For an excellent critique of the district court's opinion, and its "unprecedented" absolute protection of religious freedom, *see Comment, supra* note 276. The Fourth Circuit dismissed as "simplistic" the district court's argument that section 501(c)(3) does not require conformity to the federal policy against racial discrimination. *See* 639 F.2d at 151.

298. *Id.* at 152, 155, *rev'g* 468 F. Supp. 890 (D.S.C. 1978). The court stated that the university's post-1975 policies, *see supra* note 291, were racially discriminatory. 639 F.2d at 152 (citing *Loving v. Virginia*, 388 U.S. 1 (1967) and *McLaughlin v. Florida*, 379 U.S. 184 (1964)).

299. 639 F.2d at 153-54 (free exercise, *see infra* notes 304-08 and accompanying text), 154-55 (establishment, *see infra* notes 309-13 and accompanying text).

300. 639 F.2d at 151 (quoting H.R. REP. NO. 1820, 75th Cong., 3d Sess. 19 (1939)).

301. 639 F.2d at 151. *See* H.R. REP. NO. 1820, *supra* note 300. The term "*Green* syllogism" derives from oral argument before the Supreme Court by counsel for Bob Jones University. The syllogism is described as follows: "Major premise: organizations that violate public policy cannot be tax-exempt. Minor premise: racial discrimination is against public policy. Conclusion: organizations that practice racial discrimination cannot be tax-exempt." *See* 51 U.S.L.W. 3295 (1982).

302. 639 F.2d at 151.

303. *Id.*

304. *Id.* at 152-53.

305. *Id.*

Yoder,³⁰⁶ the court held that the compelling governmental interest in eliminating all forms of racial discrimination³⁰⁷ outweighed the burden placed on the university's religious practices.³⁰⁸ Finally, the court rejected the district court's holding that the government effectively establishes religions that do not discriminate on the basis of race by denying tax exemptions to those that do.³⁰⁹ The district court had earlier held that this undermines the second prong of the *Lemon* test for establishment clause cases.³¹⁰ The Fourth Circuit, although recognizing the principle of government neutrality in matters of religion,³¹¹ nevertheless argued that this principle does not prevent the government "from enforcing its most fundamental constitutional and societal values by means of a uniform policy, *neutrally applied*."³¹² Thus, the court recognized that the governmental interest in nondiscrimination is so compelling that religious beliefs which are in conflict must "yield in [its] favor."³¹³

In 1981 the Supreme Court agreed to review *Bob Jones*.³¹⁴ The

306. 406 U.S. 205, 214 (1972). See *supra* notes 117-18 and accompanying text.

307. 639 F.2d at 153.

308. *Id.* at 153-54. The court noted that although "[a] law which penalizes a person indirectly for practicing his belief may violate the Free Exercise Clause . . . [t]he indirect nature of the 'penalty' is, . . . a factor to be considered in the balance." *Id.* at 153 n.8 (citation omitted).

309. *Id.* at 154-55. See *supra* note 297 (discussion of district court opinion).

310. 468 F. Supp. at 900. For a discussion of the Supreme Court decision in *Lemon*, see *supra* notes 79-88 and accompanying text. See also *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 773 (1973); *Tilton v. Richardson*, 403 U.S. 672, 678 (1971).

311. 639 F.2d at 154 (citing *Gillette v. United States*, 401 U.S. 437 (1971) and *Walz v. Tax Comm'n*, 397 U.S. 664 (1970)).

312. 639 F.2d at 154. See, e.g., *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Reynolds v. United States*, 98 U.S. 145 (1878). See also *supra* notes 110-25 and accompanying text.

313. 639 F.2d at 154. The court stated that its ruling would not excessively entangle the government with religion: "[T]he only inquiry is whether the school maintains racially neutral policies. And, the uniform application of the rule to all religiously operated schools avoids the necessity for a potentially entangling inquiry into whether a racially restrictive practice is the result of sincere religious belief." *Id.* at 155 (emphasis in original). Accord *Goldsboro Christian Schools, Inc. v. United States*, 436 F. Supp. 1314 (E.D.N.C. 1977), *aff'd per curiam by unpublished order* No. 80-1473 (4th Cir. Feb. 24, 1981), *cert. granted*, 102 S. Ct. 386 (1981) (No. 81-1).

314. 102 S. Ct. 386 (1981). The Supreme Court consolidated *Bob Jones* with *Goldsboro Christian Schools, Inc. v. United States*, 436 F. Supp. 1314 (E.D.N.C. 1977), *aff'd per curiam by unpublished order* No. 80-1473 (4th Cir. Feb. 24, 1981), *cert. granted*, 102 S. Ct. 386 (1981) (No. 81-1).

The Justice Department originally asked the Supreme Court to affirm the Fourth Circuit decision in *Bob Jones* and the district court decision in *Goldsboro*, stating in its petition that "the Federal Government's commitment to the eradication of racial discrimination in education [is] manifested both in the Constitution and in many Federal statutes and the national policy prohibit-

events of the months following the Court's grant of certiorari, however, threatened to undermine the government's eleven year policy against exempting racially discriminatory schools. On January 8, 1982, the Reagan administration publicly announced a reversal in policy.³¹⁵ First, the Department of Treasury announced that it had no authority to deny tax exemptions to racially discriminatory schools, and would therefore begin to grant exemptions to these schools.³¹⁶ Second, the Office of the Solicitor General filed a memorandum requesting the Supreme Court to vacate as moot the judgments of the Fourth Circuit.³¹⁷ In effect, the government confessed error,³¹⁸ opened the floodgates to new applications for exemption, and permitted reapplication by over 100 racially discriminatory schools which had previously lost their exempt status.³¹⁹

Responding to heated public reaction to these announcements,³²⁰ the Reagan administration retreated by announcing its intention to seek legislation giving the IRS express authority to deny tax exemptions to

ing public subsidy of racially discriminatory educational institutions, whether public or private." See United States Petition for Writ of Certiorari, *Bob Jones University v. United States*, 639 F.2d 147 (4th Cir. 1980), cert. granted, 102 S. Ct. 386 (1981), quoted in Weithorn, *supra* note 220, at 300. The government's position changed substantially in 1982 when the Reagan administration attempted to reverse the long-standing IRS policy of denying tax exemptions to racially discriminatory schools. See *infra* notes 315-26 and accompanying text.

315. U.S. Dept. of Treasury Press Release, Jan. 8, 1982, reprinted in *Administration's Change in Policy Hearing*, *supra* note 216, at 607.

316. *Id.*

317. Respondent's Memorandum in Support of Motion to Vacate as Moot, *Bob Jones University v. United States*, cert. granted, 102 S. Ct. 386 (1981), reprinted in *Administration's Change in Policy Hearing*, *supra* note 216, at 612-14. The memorandum stated:

Since the filing of our Brief acquiescing in the granting of certiorari in these cases, the Department of the Treasury has initiated the necessary steps to grant petitioner Goldsboro Christian Schools tax-exempt status under Section 501(c)(3) of the Code, and to refund to it federal social security and unemployment taxes in dispute. Similarly, the Treasury Department has initiated the necessary steps to reinstate tax-exempt status under Section 501(c)(3) of the Code to petitioner Bob Jones University, and will refund to it federal social security and unemployment taxes in dispute. Finally, the Treasury Department has commenced the process necessary to revoke forthwith the pertinent Revenue Rulings that were relied upon to deny petitioners tax-exempt status under the Code.

Id. (footnote omitted).

318. See *id.* A draft memorandum was prepared but never filed expressly confessing error. See *Administration's Change in Policy Hearing*, *supra* note 216, at 603.

319. See Weithorn, *supra* note 220, at 300.

320. See, e.g., Lewis, *Shucks, It's Only the Law*, N.Y. Times, Jan. 21, 1982, at A23, col. 3; Kraft, *A Con Job*, Wash. Post, Jan. 21, 1982, at A19, col. 1; Wolfman, *Law, Cut on a Bias*, N.Y. Times, Jan. 19, 1982, at A27, col. 1. See also Cohen, *supra* note 249, at 259 n.5.

discriminatory schools.³²¹ The President's proposed legislation was introduced in the Senate as S.2024³²² on January 28, 1982, but "lan-

321. Presidential Press Release, Jan. 12, 1982, *reprinted in Administration's Change in Policy Hearing, supra* note 216, at 620.

322. S. 2024, 97th Cong., 2d Sess., 128 CONG. REC. S100-01 (daily ed. Jan. 28, 1982). The proposed bill provided:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. DENIAL OF TAX EXEMPTIONS TO ORGANIZATIONS MAINTAINING SCHOOLS WITH RACIALLY DISCRIMINATORY POLICIES.

Section 501 of the Internal Revenue Code of 1954 (relating to exemption from tax) is amended by redesignating subsection (j) as subsection (k) and inserting a new subsection (j) reading as follows:

"(j) ORGANIZATIONS MAINTAINING SCHOOLS WITH RACIALLY DISCRIMINATORY POLICIES.—

"(1) IN GENERAL.—An organization that normally maintains a regular faculty and curriculum (other than an exclusively religious curriculum) and normally has a regularly enrolled body of students in attendance at the place where its educational activities are regularly carried on shall not be deemed to be described in subsection (c)(3), and shall not be exempt from tax under subsection (a), if such organization has a racially discriminatory policy.

"(2) DEFINITIONS.—For the purposes of this subsection—

"(i) An organization has a 'racially discriminatory policy' if it refuses to admit students of all races to the rights, privileges, programs, and activities generally accorded or made available to students by that organization, or if the organization refuses to administer its educational policies, admissions policies, scholarship and loan programs, athletic programs, or other programs administered by such organization in a manner that does not discriminate on the basis of race. The term 'racially discriminatory policy' does not include an admissions policy of a school, or a program of religious training or worship of a school, that is limited, or grants preferences or priorities, to members of a particular religious organization or belief: *Provided*, That no such policy, program, preference, or priority is based upon race or upon a belief that requires discrimination on the basis of race.

"(ii) The term 'race' shall include color or national origin."

SEC. 2. DENIAL OF DEDUCTIONS FOR CONTRIBUTIONS TO ORGANIZATIONS MAINTAINING SCHOOLS WITH RACIALLY DISCRIMINATORY POLICIES.

(a) Section 170 of the Internal Revenue Code of 1954 (relating to allowance of deductions for certain charitable, etc., contributions and gifts) is amended by adding at the end of subsection (f) a new paragraph (7) reading as follows:

"(7) DENIAL OF DEDUCTIONS FOR CONTRIBUTIONS TO ORGANIZATIONS MAINTAINING SCHOOLS WITH RACIALLY DISCRIMINATORY POLICIES.—No deduction shall be allowed under this section for any contribution to or for the use of an organization described in section 501(j)(1) that has a racially discriminatory policy as defined in section 501(j)(2)."

(b) Section 642 of such Code (relating to special rules for credits and deductions) is amended by adding at the end of subsection (c) a new paragraph (7) reading as follows:

"(7) DENIAL OF DEDUCTIONS FOR CONTRIBUTIONS TO ORGANIZATIONS MAINTAINING SCHOOLS WITH RACIALLY DISCRIMINATORY POLICIES.—No deduction shall be allowed under this section for any contribution to or for the use of an organization described in section 501(j)(1) that has a racially discriminatory policy as defined in section 501(j)(2)."

(c) Section 2055 of such Code (relating to the allowance of estate tax deductions for

guished"³²³ in Congress. Three weeks later, the United States Court of Appeals for the District of Columbia Circuit issued a temporary injunction, in *Wright v. Regan*,³²⁴ barring the IRS from granting tax exemptions to any racially discriminatory schools.³²⁵ This order eliminated the mootness question in *Bob Jones*, and the government again requested the Supreme Court to decide the issue.³²⁶ The Court will thus have the opportunity to put to rest the erroneous argument that the federal government's compelling and clearly articulated interest in eliminating all vestiges of racial discrimination can accommodate indirect public economic support for private schools that practice racial discrimination. The Court should recognize that section 501(c)(3) of the Internal Revenue Code provides a mandate for the IRS to revoke tax exemptions as a means for preventing continued racial discrimination by private schools. Finally, the Court should find that this congressional mandate precludes the need for legislation granting express authority to the IRS to revoke tax exemptions in these cases.

CONCLUSION

The Internal Revenue Service employs section 501(c)(3) of the Internal Revenue Code to regulate certain actions and policies of tax exempt organizations. In recent years, the IRS has come under attack for withdrawing tax exemptions as a means of restricting the degree of church involvement in politics and as a means of eliminating racial discrimination by private schools. These challenges to the authority of the IRS are unwarranted. Although the Supreme Court has recognized that neither religion nor government can be completely divorced from

transfers for public, charitable, and religious uses) is amended by adding at the end of subsection (e) a new paragraph (4) reading as follows:

"(4) No deduction shall be allowed under this section for any transfer to or for the use of an organization described in section 501(j)(1) that has a racially discriminatory policy as defined in section 501(j)(2)."

(d) Section 2522 of such Code (relating to charitable and similar gifts) is amended by adding at the end of subsection (c) a new paragraph (3) reading as follows:

"(3) No deduction shall be allowed under this section for any gift to or for the use or [sic] an organization described in section 501(j)(1) that has a racially discriminatory policy as defined in section 501(j)(2)."

SEC. 4. EFFECTIVE DATE

The amendments made by this Act shall apply after July 9, 1970.

Id.

323. See 50 U.S.L.W. 3295 (1982).

324. No. 80-1124 (D.C. Cir. Feb. 18, 1982).

325. *Id.*

326. See Cohen, *supra* note 249, at 259.

the other,³²⁷ it has developed means whereby it can judge an appropriate degree of involvement. The Court's limited application of the political divisiveness test does not derogate the underlying policy reasons for restricting religious involvement in politics. Congress codified the governmental interest in separation of church and state in this area by including the political activity restrictions in the Internal Revenue Code. These restrictions limit the extent to which religious organizations may participate in politics, and are an effective and proper means for doing so. Elimination of the Code restrictions would weaken the already threatened wall of separation between church and state.

Similarly, proper construction of section 501(c)(3) requires tax exempt organizations to conform to the declared federal policy against racial discrimination. "There is a compelling as well as a reasonable government interest in the interdiction of racial discrimination which stands on highest constitutional ground"³²⁸ Private schools that discriminate on the basis of race violate this policy. They are not, therefore, "charitable" organizations and should be denied the indirect economic support that is an inherent element of tax exemption. The Supreme Court is presently considering the issue, and should affirm the Fourth Circuit's decision in *Bob Jones University v. United States*.³²⁹ A contrary ruling would have a deleterious effect on society's necessary and vital commitment to eliminating all forms of racial discrimination.

[On May 24, 1983, the Supreme Court affirmed the Fourth Circuit's decision in *Bob Jones University v. United States*. The Court held that racially discriminatory private schools are not charitable organizations and do not qualify for tax exemption under section 501(c)(3) of the Internal Revenue Code. Chief Justice Burger, writing for the majority, grounded his opinion on the common law standards underlying the Code's use of the term "charitable," thereby expressly affirming the policy adopted by the IRS in 1970 and embodied in Revenue Ruling 71-447. Applying the public benefit and public policy theories, Chief Justice Burger stated that "[i]t would be wholly incompatible with the concepts underlying tax exemption to grant the benefit of tax-exempt status to racially discriminatory educational entities," The Court

327. See *Lemon v. Kurtzman*, 403 U.S. 602, 605 (1971).

328. *Green v. Connally*, 330 F. Supp. 1150, 1167 (D.D.C.), *aff'd mem. sub nom. Coit v. Green*, 404 U.S. 997 (1971).

329. 639 F.2d 147 (4th Cir. 1980), *cert. granted*, 102 S. Ct. 386 (1981).

also rejected the claim that a nondiscrimination policy applied to schools with a sincerely held religious belief in racial separation violates the free exercise clause of the first amendment. The Court held that the government's compelling interest in eliminating racial discrimination in education justified "whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs."

In addition, the Court recognized that the IRS has the authority to determine whether an organization is charitable under section 501(c)(3), and to deny or revoke an organization's tax exempt status if "there is no doubt that the organization's activities violate fundamental public policy." The Court determined that the various congressional hearings, debates and revisions to the Internal Revenue Code—particularly the enactment of section 501(i) denying tax exemptions to racially discriminatory private social clubs—affirmatively manifested Congress' acquiescence in the IRS interpretation of section 501(c)(3). This finding of congressional "ratification by implication" obviated the need for specific legislation granting the IRS authority to apply Revenue Ruling 71-447.

Justice Powell, concurring in part and concurring in the judgment, and Justice Rehnquist, dissenting, expressed serious concern with the Court's acknowledgement of arguably broad IRS authority to define public policy in determining qualification for tax exemption. In addition, Justice Rehnquist argued that despite the declared federal policy against racial discrimination in education, the IRS and the courts exceed their authority by injecting a public policy requirement into section 501(c)(3).]

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