E. INFLUENCING PUBLIC POLICY

One of the most significant outreach activities of religious bodies is their undertaking to influence public policy, usually (in the United States) through attempting to affect or effect legislation. As was stated earlier,[1] there are very few religious bodies in the Western world that do not have some kind of intentionality toward the world outside their walls. In a democracy, one of the chief manifestations of that intentionality is an urge to shape the civil laws of the commonwealth so that they conduce more clearly toward the religious body's vision of the Good Life, the Will of God, the Kingdom of Heaven, the Ideal Society, the Reign of Virtue or the Natural Law. The *content* of that vision differs from one religious body to another, but the impulse to impress it upon the environing world is strong and nearly universal. It may not always be wisely, graciously or successfully expressed, but the impulse is as characteristic of, and legitimate to, the religious enterprise as evangelism, solicitation, or service (previously discussed). But, like those other activities, it is not always welcomed by the environing world. In fact, the resistance to religious efforts to influence public policy erupts into visible controversy with remarkable regularity.

On the front page of the New York *Times* for September 8, 1981, appeared two stories which posed contrasting approaches to this propensity. One was headed RELIGIOUS LEADERS OBJECTING TO NUCLEAR ARMS and described the outspoken efforts by a number of leading clergy in the U.S. to reverse the decision of the Reagan administration to develop the neutron bomb. The other article announced that President Anwar el-Sadat of Egypt had deposed the Coptic Pope Shenouda III and taken over supervision of 40,000 Moslem mosques in an effort to insure that religious leaders of both Christianity and Islam refrained from mixing "politics" with religion. In August 1984 the New York *Times* carried several stories about a controversy between Governor Mario Cuomo of New York and Archbishop John O'Connor over the proper role of religion in affecting the policies and statements of political leaders and the proper practice for political leaders in effectuating their religious convictions in public policy.

Perhaps no more typical and pungent expression has been given to the resistance to "political" activity by religious bodies than a statement by Senator Barry Goldwater in September 1981, opposing the pressures of the "Moral Majority," a fundamentalist group appealing to both Protestants and Roman Catholics to support a conservative political agenda. The conservative senator did not simply say that he

1. See Introduction to this volume.

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disagreed with the views of the "Moral Majority"; he denounced them for "undermining the basic American principle of separation of church and state by using the `muscle of religion towards political ends."' His aides commented that he had been "chomping [*sic*] at the bit" to issue his statement since the Rev. Jerry Falwell had denounced his nominee for the Supreme Court, Sandra Day O'Connor.[2] In a breakfast meeting with reporters, Goldwater remarked that the birth of the "Moral Majority" was "a direct reaction to years of increasing social activism by the liberal side of the religious house," and accused the National Council of Churches of "engaging in activities that went far beyond religious concerns."[3] Goldwater's prepared statement included the following classic lines:

> I'm frankly sick and tired of the political preachers across this country telling me as a citizen that if I want to be a moral person, I must believe in "A," "B," "C," and "D." Just who do they think they are? And from where do they presume to claim the right to dictate their moral beliefs to me?
>
> And I am even more angry as a legislator who must endure the threats of every religious group who thinks it has some God-granted right to control my vote on every roll call in the Senate.
>
> And the religious factions will go on imposing their will on others unless the decent people connected to them recognize that religion has no place in public policy.
>
> They must learn to make their views known without trying to make their views the only alternatives.
>
> The great decisions of Government cannot be dictated by the concerns of religious factions....
>
> We have succeeded for 205 years in keeping the affairs of state separate from the uncompromising idealism of religious groups and we mustn't stop now.

(Note the use of the words "dictate," "control," and "impose," attributing remarkable powers to the religious speakers.)

Senator Goldwater's attitude was not unique to him. It is reflected from time to time in every parish in the land. Whenever the preacher speaks from the pulpit on any subject specific enough to be readily understood and close enough to home that his hearers could actually *do* something about it, he is apt to incur the immemorial reproach: "Now you've quit preaching and gone to meddling." The implication is that religious exhortations that call for changes in the secular status quo—local, national or global—are somehow in poor taste, if not downright out of place and obnoxious. The point is not that the preacher is mistaken, misinformed or wrong-headed, but that the pulpit is not the place to comment on "real" issues that directly affect people's accustomed ways of acting and even their livelihood.

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2. *Religious News Service*, Sept. 15, 1981, p. 7.

3. *N.Y. Times*, Sept. 16, 1982, p. 9. The first quotation is from Mr. Goldwater; the second is the reporter's paraphrase. The quoted material that follows is also from that article.

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On the municipal, state or national levels, religious leaders and church bodies regularly incur the same sort of resentments for their expressions of criticisms of social, economic or political conditions, not because they are thought to be incorrect so much as because they are thought to be inappropriate, impertinent, or presumptuous. Often the clergy are reproached for commenting on matters outside the area of their "expertise," which critique may sometimes be justified, but comes with little grace from secular sages and statesmen whose management of economic, political and international affairs is not distinguished by extraordinary wisdom or total absence of error. If justice and the well-being of humankind are everybody's business in a democracy, then why should people motivated by religion be excluded from that common responsibility? And why should those who seem able to abide with equinimity the most self-seeking and rapacious voices in the public arena express such outrage about a few religious voices that are usually not seeking their own advancement but the benefit of the whole society, particularly of the voiceless and the oppressed? Yet upon the latter do the strictures fall.

l. *Holy Spirit Association v. Tax Commission* (1981)

A case in point arose in New York City in the late 1970s. The Tax Commission of that city refused to grant a tax exemption for certain properties owned by the Unification Church headed by Sun Myung Moon. The Appellate Division of the Supreme Court upheld that denial, declining to be deceived by the fact that "religious and nonreligious themes are inextricably intertwined" in the church's doctrines.

> [D]espite the religious content of the doctrine, and the leitmotif of religion with which the eclectic teachings are tinged, the doctrine, to the extent that it analyzes and instructs on politics and economics, has substantial secular elements. The mere use of religious terminology in connection with politics and economics will not obscure the traditionally nonreligious nature of these fields. [The church], by undertaking an adventure in semantics, is attempting to cloak politics and economics with the blanket of religious dogma. Given the equally strong roles that politics, economics and religion play in [the church's] doctrine, we do not agree with and we reject the referee's finding that [the church's] primary purpose is religious.[4]

Not confining itself to matters of doctrine, the court looked into the activities of leaders and members of the Unification Church:

> The training and activities of the church members serve as further evidence that religion is not petitioner's primary purpose, but only one of several discrete purposes. The training manual... contains explicit and numerous instructions on equal amounts of political, economic and religious matters and does not differentiate between the religious and

4. 81 App. Div. 2d at 75 (1981).

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> secular spheres. All secular acts are to be done in the name of God... While church members denied political and economic involvement, they conceded in testimony that their beliefs led them to view politics, economics and religion as an integrated unit....
>
> The emphasis upon politics and economics in the church doctrine and training program, the fact that church leaders often hold positions in nonreligious affiliated organizations and that church members apparently can be and are deployed in any number of religious and nonreligious activities demonstrate that the Unification Church is deeply involved in nonreligious activities. These activities are substantial enough to support the finding that petitioner is not organized or conducted primarily for religious purposes.

The court did not allow itself to be distracted by the contention that other religious bodies are equally engaged in activities that fuse religious and political purposes (or rather implement religious purposes in the political realm[5]) even though this contention was advanced by the lone dissenter on the bench, Justice Sandler. But the majority rejected his view, *infra*.

> ... The Referee was not directed to determine the propriety of issuing tax exemptions to other organizations, but was to ascertain whether the Tax Commission properly found that the Unification Church was not entitled to such exemptions. Therefore, the Referee was not required to inquire into the activities of other exempt religious groups. We reject also Justice Sandler's contention that the Unification Church is "indisputably religious in character, constituting a religious creed analogous to that of several well-known Protestant churches,"... His dissent fails to document, with any illustrations, a religious organization or institution afforded tax exemption where political or economic activity or belief can be found in its dogma. We recognize that many churches and synagogues through their ministries espouse political and economic opinions, in instances where it is believed that expressions of such opinions are required.
>
> The expression of such opinions, however, are collateral to doctrinal beliefs. We could not, nor would we, preclude the expression of such opinions. The Constitution (First Amendment) perpetually protects the expression of political and economic beliefs whether from a speaker on the sidewalk or a preacher in the pulpit. In any event, this appeal does not raise an issue of freedom of speech.
>
> The dissent argues further that petitioner should be afforded exemption... because "many religious institutions...have been engaged directly in more systematic and substantial social and political action than... petitioner." A brief answer may be found in the responsibility Which devolves upon the Tax Commission to constantly re-examine tax exempt status to determine whether or not such immunity from taxation should continue.

5. See Proverbs 3:6: "In all thy ways, acknowledge him, and he shall direct thy paths" AV.

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With this none-too-subtle suggestion to the Tax Commission to clamp down on any other religious organizations misguidedly mingling religion and politics, the Appellate Division upheld the Tax Commission's decision with respect to the Unification Church and lent its weight to the contention that political purposes cannot also be religious purposes and that the two should be kept apart—except for incidental and "collateral" exercises of "free speech" by preachers expressing "opinion" (rather than "beliefs"?) about political and economic matters—a distinction that to the lay mind seems obscure.

Underlying this court's approach—and that of Senator Goldwater and other critics of "political" activities of religious bodies—are several remarkable assumptions:

1. That "religion" and "politics" are two categories that can be readily distinguished;

2. That they are mutually exclusive, and should be kept that way; and

3. That characterizing a subject or statement as "political" thereby excludes it from the purview of religion. Most religious traditions could not accede to any of these assumptions.

The ultimate outcome of *Holy Spirit Association v. Tax Commission* will be discussed below,[6] but first it is important to review a bit of history to see whether Justice Sandler was in error in failing to "document, with any illustrations, a religious organization or institution afforded tax exemption where political or economic activity or belief can be found in its dogma." Quite to the contrary, he had assumed—perhaps mistakenly—that it was common knowledge that many religious bodies have direct and central concerns with matters others may consider "political" or "economic." His error was not in his assertion but in his assumption that his fellow judges possessed that rudimentary degree of historical knowledge. The contention that religious bodies or their spokespersons should not address themselves in a serious, substantial and effective way to issues of public policy that may be characterized as "political" or "economic" can be advanced only by those who are thoroughly unacquainted with (a) American history, (b) biblical theology, and (c) constitutional jurisprudence. Those three areas are discussed below.

2. In Search of the Golden Era

When people criticize religious groups and their leaders for meddling in politics, it is often with a more-in-sorrow-than-in-anger reproachfulness, as though all had been well until the present, when, because of the misguided impulsiveness of idealistic zealots, the public peace has been disrupted, the era of good feeling ended, the rules of the game violated and the civic compact broken.

A slightly longer perspective is offered by some of the "oldest inhabitants," like Senator Goldwater, who recall that the current disturbance was preceded by "years

6. See below at E6.

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of increasing social activism by the liberal side of the religious house."[7] Indeed, one remembers the late Senator Hubert Humphrey remarking long ago that the Civil Rights Act of 1964 would never have been passed if it had not been for the energetic and well-organized support of the churches and synagogues.[8]

To a society that forgets its past as quickly and completely as it discards yesterday's newspaper, every current event comes as something of a surprise. This does not prevent people from cherishing a largely mythical vision of what they suppose the past to have been. And many people seem to suppose that there was, until very recently, a laudable situation in which the churches applied themselves to their psalters and the synagogues to their scrolls and left the running of the world's real, temporal affairs to those who understand such things (and—they usually do not add—have made such a glorious mess of them!). And they long to return to that halcyon era, that Golden Age, when the Churches Minded Their Own Business! A cursory acquaintance with history would lead one to inquire when that fabled era could have been.

a. Prohibition of Alcoholic Beverages. Upon examination of the early 1900s, churches are found agitating for national prohibition. This episode in American history is usually cited as Exhibit A to demonstrate the pernicious effects of social engineering on the part of churches. It was the culmination of decades of agitation against the saloon, and it enlisted the enthusiastic support of millions of American church people, not alone Methodists and Baptists. It resulted in 1918 in the adoption of the Eighteenth Amendment to the Constitution, outlawing the manufacture, sale or transportation of beverage alcohol in the United States, a remarkable achievement of zealous church efforts spearheaded by the Anti-Saloon League, whose narrowly focused intensity has become the byword for "single-issue politics."

As a result of what some have called a deliberately contrived strategy of nonenforcement and clandestine bootlegging, the measure became increasingly unpopular and was repealed in 1933. It has been characterized by Sydney Ahlstrom as the last rallying of a nearly monolithic Protestant hegemony.[9] There has been no definitive study of its shortcomings and successes, and the worst that could properly be said of it is that it was unwise and intemperate. Ahlstrom suggested that a moderate reform and regulation of liquor sales might have been more effective.

In any event, it was brought about entirely legally, by the regular means provided for amending the Constitution. It was no sudden, surprise stroke but a gradual and increasing tide, as thirty-three states voted liquor out prior to 1919, so that most of the nation was dry before the Amendment was adopted. The tactics of the

7. *N.Y. Times*, Sept. 16, 1981, p. B9, Col. 1.

8. Letter from Senator Hubert H. Humphrey to James A. Hamilton, Deputy General Secretary of the National Council of Churches.

9. Ahlstrom, Sydney E., *A Religious History of the American People* (New Haven: Yale Univ. Press, 1972), p. 872.

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Anti-Saloon League have been called vicious, hypocritical and unscrupulous, but those are labels applied by frustrated opponents, not by objective historians like Ahlstrom. "It had but one aim: to get dry laws, the drier the better.... [I]t had no diversionary purposes and cared little or nothing about a politician's morals or political principles so long as he voted dry. It used hard-driving, tough-minded methods, and they worked."[10]

But it would not have worked if millions of church people and others had not backed it with their votes because they believed in its purposes. (Their successors should not now be heard to complain that the "Right-to-Lifers" are using the same tactics against *them*.) Prohibition may have been a misguided enterprise, but it is not incumbent upon religious bodies to be always wise, right or adroit. Their counsels—though claiming divine inspiration—should be subject to the same debate and testing as those coming into the civic arena from any other source. Preachers have the same right to offer their views on political issues as any other citizens, and they can be given the same credence that their parishioners give them—which is usually not very much.

b. The Defeat of Tammany Hall. On the other hand, they may sometimes be both right and effective. One recalls the struggle of the Rev. Charles H. Parkhurst against the corruption represented by Tammany Hall, in which the latter adjured the former that "he should confine his activities to preaching the Gospel and keep out of politics," notwithstanding which, he produced from his pulpit 284 affidavits documenting corruption that persuaded a grand jury to vote a presentment against the police department, the beginning of the end of rule by Tammany Hall.[11] Even greater credit is given to Parkhurst by a writer in the New York *Times* a century later:

> On Valentine's Day in 1892 an obscure minister delivered a sermon that changed the fate of New York City. The jeremiad by the Rev. Dr. Charles H. Parkhurst inspired a campaign that unmasked New York's first major police scandal, that contributed to the creation of a five-borough city and that placed Theodore Roosevelt on the road to the Presidency.... "Parkhurst proved that one just man could singlehandedly defeat a powerful and evil machine like Tammany Hall and reform an entire police department."[12] The Republican-controlled legislature — persuaded that Dr. Parkhurst's crusade had weakened Tammany Hall and would prevent it from dominating an enlarged city — approved the consolidation in 1898 of Manhattan with Brooklyn, Queens, the Bronx and Staten Island.[13]

10. Ibid., p. 870.

11. Stokes, A. P., *Church and State in the United States* (New York: Harper & Bros. 1950), v. II, pp. 304-306.

12. Reppetto, *The Blue Parade* [a history of the nation's police forces], (New York: Macmillan/Free Press, 1978).

13. "Taking on Tammany 100 Years Ago," *N.Y. Times*, Feb. 14, 1992.

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c. Abolition of Slavery. Going back to the middle of the nineteenth century does not discover the fabled Golden Era. The churches were already far into decades of struggle against slavery. They were among the first groups in this country to oppose it. In 1790, Methodists in Baltimore asserted that "slavery is contrary to the laws of God," but it was not until 1844 that the Methodist Church seriously attempted to require its members to emancipate any slaves they owned—a move that split the Methodist Church in that year into North and South branches.[14]

In the North, church leaders and members became increasingly active in the antislavery movement, some of them, like Elijah P. Lovejoy, a Presbyterian editor of antislavery views in Illinois, being martyred for their convictions. A Methodist minister in Northfield, Massachusetts, was arrested for vagrancy while leading prayer for an antislavery society. He was discharged, but rearrested on similar charges a few months later while preaching in his pulpit, tried the same day, and sentenced to three months' hard labor. "[A]n analysis of the delegates to the New England Anti-Slavery Society meeting of 1835 shows that two-thirds were ministers, and of these about two-thirds were Methodists...."[15]

Churches not only sent thousands of petitions to Congress to eliminate slavery,[16] but when all reference to slavery in the House of Representatives was silenced by the "Pinckney Gag,"[17] they turned to other modes of influencing public policy. Hundreds of antislavery families were persuaded by the churches to move to Kansas to make sure it did not become a slave state. Hundreds of families remaining in the North assisted slaves escaping from the South to reach Canada via the famed "Underground Railway" operating in defiance of the Fugitive Slave Law.[18]

Oberlin College, under the leadership of the evangelist Charles G. Finney and his protege and convert, Theodore Weld, turned out hundreds of abolition evangelists as graduates, who spread across the northern Midwest preaching the Gospel of Christ and abolition. In the mid-1800s three great denominations—Methodists, Baptists and Presbyterians—divided into North and South bodies, a schism that Henry Clay and other national leaders felt contributed substantially to the rupture of the Civil War. (Churches in the South were no less active in *defending* the institution of slavery.)

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14. See discussion of *Smith v. Swormstedt*, 57 U.S. 288 (1845) at IF1.

15. Stokes, A.P. and Leo Pfeffer, *Church and State in the United States* (New York: Harper & Row, 1964), p. 287.

16. Stokes, *supra*, called this crusade to bombard Congress with petitions bearing thousands of names "[t]he greatest piece of organized propaganda that had ever up to that time been attempted in the United States." v. II, p. 155.

17. A rule adopted by the House of Representatives in 1840, to the effect that "all petitions relating... to the subject of slavery or the abolition of slavery, shall, without being either printed or referred, be laid on the table, and... no further action shall be had thereon." Stokes, *supra*, vol. II, p. 154. See also, Miller, W.L., *Arguing About Slavery* (New York: Knopf, 1996), ch. 25, esp. p. 305.

18. See discussion of the "Underground Railway" at IVB1.

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The struggle to abolish slavery in the United States was by no means only a church-led effort, but the churches were in the forefront from the beginning and provided not only moral determination but many of the leaders and followers of more broad-based organizations, such as the American Anti-Slavery Society. Anson Phelps Stokes devoted many pages to the details of the churches' part in the long, hard effort, which finally ended in Civil War.[19] Suffice it here to note a few characteristics of that struggle:

1. It was the longest, widest, deepest, bitterest moral struggle in which the churches have been engaged in this country, culminating in a civil war.

2. The strains and traumas, the scars and animosities of that struggle have not yet disappeared from American society.

3. Churches on both sides of the issue were vehement in declaring (opposing) views of what God and the Bible required.

4. The "Pinckney Gag" symbolized and entrenched the inability or unwillingness of Congress to reach a political solution, thus allowing the opposing forces to build up until they broke out in violence.

5. The churches, finding petitions and pleas ineffective, turned to colonization (of Liberia and then of Kansas), civil disobedience, and eventually justification of violence and warfare.[20]

6. Churches with a European history of establishment (Lutheran and Episcopalian) did not take as active a role in "political" issues and did not suffer complete North-South schism.

7. As always, many church members were not involved in the struggle, and some actively resented its intrusion.

An important sidelight on the relative weight to be accorded the interventions of religious leaders is afforded by the comment attributed to Abraham Lincoln, one of the nation's greatest—and humblest—lay theologians:

> I am approached with the most opposite opinions and advice, and that by religious men, who are equally certain that they represent the divine will. I am sure that either the one or the other class is mistaken in that belief, and perhaps in some respects both. I hope it will not be irreverent for me to say that if it is probable that God would reveal his will to others, on a point so connected with my duty, it might be supposed he would reveal it directly to me; for unless I am more deceived in myself than I often am, it is my earnest desire to know the will of Providence in this matter. *And if I can learn what it is I will do it!* These are not, however, the days of miracles, and I suppose it will be granted that I am not to expect a direct revelation. I

19. Stokes, *supra*, v. II, ch. XV, pp. 121-249.

20. When Henry Ward Beecher was attending a meeting at which a deacon was raising money to supply weapons for a company to take part in the (Kansas) crusade, Beecher declared that a Sharpe's rifle was a greater moral agency in this struggle than the Bible—an incident from which sprang the popular sobriquet for rifles: "Beecher's bibles." Stokes, *supra*, v. II, p. 201.

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> must study the plain physical facts of the case, ascertain what is possible, and learn what appears to be wise and right. The subject is difficult, and good men do not agree.[21]

(Senator Goldwater could have benefited from this observation, which recognized that citizens have differing views on important issues of public policy, and some may even think they know better than elected officials what God wants, but they cannot take the place of the elected official, who must exercise his or her own best judgment on such matters.)

d. The Elimination of Duelling. Perhaps the Golden Era was at the beginning of the nineteenth century? Not even then was there quiet on the ecclesiastical front. One of the earliest efforts by the churches in America to affect public policy occurred in the early 1800s and is virtually forgotten today, even by church historians. Yet it was an important early paradigm of church action to eradicate a social evil. The elimination of duelling is noteworthy for several reasons:

1. It was led almost entirely by clergymen.

2. The main thrust was supplied by *churches acting corporately* rather than by citizen groups in which church members participated.

3. It was not a conventionally "religious" issue, as the contemporaneous "Sunday mail" controversy (discussed below) was.

4. Its means of effecting reform was by changing the law (rather than by ameliorative person-to-person social service or founding an institution).

5. It was totally successful, eliminating duelling so thoroughly that it is scarcely remembered, let alone practiced.

6. It came at a time when the habits of thought characteristic of "establishment" had largely disappeared, yet while duelling was still generally accepted as a chivalrous way of resolving disputes thought to involve a "gentleman's" "honor."

7. It was precipitated by a catalytic public event, the killing of Alexander Hamilton by Aaron Burr in a duel in 1804.

Though there had been occasional opposition to duelling in the seventeenth century, and Washington, Franklin and Jefferson had denounced it, it continued to flourish in those regions where the European aristocratic traditions were still observed. In an oration commemorating Hamilton's death, the Rev. John M. Mason, one of the foremost preachers in the country, denounced duelling as a sin that should be treated also as a crime, like murder, rather than condoned. Also in 1804, Timothy Dwight, the influential clergyman who was president of Yale, preached in the college chapel a sermon on "The Folly, Guilt and Mischief of Duelling," which was repreached and reprinted several times thereafter. Other preachers followed suit until one of the greatest of that era, Lyman Beecher, on New Year's Day in 1906, urged citizens to refuse to vote for any duellist, and church assemblies and synods began a

21. Quoted in Wolf, Wm. J., *The Almost Chosen People* (Garden City, N.Y.: Doubleday, 1959), p. 22 (emphasis in original).

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growing drumfire of resolutions and other deliverances to legislatures to outlaw the practice. Connecticut was first to include conviction for duelling, along with bribery, forgery and other offenses, as disqualifications for voting.

Things took longer in the South, where the cavalier tradition was stronger. Antiduelling societies began to grow there from 1825 on, and John England, the Roman Catholic Bishop of Charleston, South Carolina, was one of its most active sponsors and preached a sermon in 1827 "On the Origin and History of Duelling" that took some fortitude in the heartland of so-called chivalry. Duelling was not eliminated in South Carolina until the Reconstruction constitution of 1868. Within the next decade or so, antiduelling provisions were written, not just in the statutes, but in the constitutions of twenty-six states. In other state constitutions, it is not even mentioned, since—by the time they were adopted—duelling had completely disappeared![22]

This episode represents one of the most clear-cut examples of nationwide, intentional, corporate activity by churches to change the law of the land, activity that was ultimately totally effective—and no one suggested that it had any bearing on the churches' tax exemption!—perhaps setting a deceptive example for later efforts at social reform.

e. The Sunday Mails Controversy. At about the same time, a remarkably opposite result was attained on another issue. In 1810 Congress required post offices to be open on any day on which a shipment of mail arrived. Immediately protests began to inundate Congress, including memorials and petitions from church bodies, which continued to flow in for twenty years. Controversy seemed to focus, not on whether it was necessary for mail to arrive on Sunday, but on whether government should accede to "sectarian" pressures. A Senate committee recommended that the Sunday mails go on, several state legislatures supported this view, and a growing chorus of secular voices expressed agreement. The "Sunday mails" continued for decades, until post offices began to close on Sundays, perhaps more for reasons of labor costs than an access of piety. This was an effort on which the churches *lost* resoundingly, but it remains another example—even though unsuccessful—of churchly effort to reform society.

f. The Struggle Against Lotteries. Another forgotten struggle in American history was the mid-nineteenth-century effort to get rid of lotteries. In colonial times, lotteries were widely used to raise money for worthy causes, including colleges and churches, e.g., Harvard, Yale and Princeton (then the College of New Jersey), Episcopal and Presbyterian churches in Pennsylvania, and (in 1775) the First Baptist Church of Providence, Rhode Island. In 1761 Faneuil Hall in Boston was rebuilt after a fire with the help of a lottery.

It was not until after the turn of the eighteenth century that the churches began to question the lottery as a means of raising money. Again, it was the Rev. John M.

22. Stokes, *supra*, v. II, pp. 5-12, from which most of this section is derived.

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Mason, then a professor at Union Theological Seminary, who launched the struggle with a series of influential papers entitled "Consideration of Lots." In Pennsylvania in 1834 clergymen led in the establishment of a Society for the Suppression of Lotteries. An important book by Job Roberts Tyson, *Brief Survey of the Great Extent and Evil Tendencies of the Lottery System as Existing in the United States*, detailed the bad moral and public effects of lotteries in the twenty states where they were legal.

As a result of agitation in which churches were prominent, lotteries were suppressed by law in New York and Massachusetts in 1833, Connecticut in 1834, Maryland shortly afterward, and Virginia in 1850. Federal law banned lotteries from the mails in 1890 (and nominally still does). But the most titanic struggle was to eliminate the notorious Louisiana lottery, chartered for twenty-five years in 1868, and during that period said to have drawn $300 million to New Orleans from the entire country. The Louisiana legislature is said to have been "in the pocket" of the lottery interests, and a heroic uphill campaign, led by clergymen of national stature, such as the Rev. Lyman Abbott, Bishop Phillips Brooks and the Rev. Dr. Everett Hale, was needed to persuade Louisianians to end its franchise.

The lottery then moved out of Louisiana. Since tickets could not be distributed by mail, they were transported by railroads and express companies to all parts of the nation. A movement was started by church forces to secure a national antilottery law. It was launched by an appeal signed by thirty-eight bishops of the Episcopal Church, twenty-seven college and university presidents, Cardinal Gibbons and three archibishops, the governors of eight states and other dignitaries. A bill to make it a federal crime to import, transmit through the mails or transfer across state lines any lottery or gambling tickets or advertisements was passed unanimously by the Senate in 1894, but was bottled up in the House.

> There followed a national mail campaign which was extraordinary for its time. Religious newspaper subscription rolls, church registers, college catalogs, and other lists were secured, and about twenty thousand documents a week were sent out, all concentrated on securing favorable action in the House. The religious press of the country was particularly active, all religious papers with as many as five thousand subscribers being sent documents wrapped and stamped, with the request that they be forwarded to the leading men and women on their lists. Effort was particularly concentrated on the clergy of nine states whose Representatives in Congress were not favorable.[23]

The Lottery Act passed the next year (1895).

The record of crime and corruption accompanying many of the lotteries was a grim one. Because the state or other legitimate institutions obtained (proportionately minor) revenues for worthy purposes, and because large sums of money that

23. Stokes and Pfeffer, *supra*, p. 305.

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remained in the hands of the lottery operators were available to assist members of legislatures in the hour of need, lotteries were very difficult to control or eliminate. Now, with the pioneering example of New Hampshire, state after state is getting back into the lottery business again, and Indian tribes are finding an economic bonanza in casinos. (Those who do not learn from history are doomed to repeat it!)

g. Fomenting the American Revolution. Perhaps the Golden Era when the churches behaved themselves was back before there was a First Amendment to encourage the "free exercise of religion," a Supreme Court to interpret it or a Congress to be petitioned for redress of grievances—before the beginning of the republic and the burgeoning ideas of popular democracy. Not even then. In the colonial period, the churches and their leaders were stirring up seditious notions against (or loyalist sentiments in favor of) the rulership of King George III of Great Britain.

One of the early and formative struggles was the controversy over whether Anglican bishops should be installed in the colonies.[24]

> In the 1760's the question of bishops was sharply debated. Jonathan Mayhew was one of the most prominent and forceful opponents, warning that if bishops came, freedom in the colonies would be seriously delimited. Missionaries of the S.P.G. (Society for the Propagation of the Gospel in Foreign Parts) were quite naturally in the vanguard of the campaign for bishops, but they heightened the alarm of others by arguing that such dignitaries would link the colonies more closely with the mother country. The agitation over bishops intensified colonial resistance to the hated Stamp Act (1976), for it was argued that if Parliament could fix a tax without reference to colonial assemblies, it could also establish the church and send bishops. The debate broadened as conventions of Episcopal clergy campaigned for bishops and were countered by joint Congregational-Presbyterian conferences held annually from 1766 to the outbreak of war. The feelings aroused by the controversy over episcopacy thus played a considerable role in the intensification of the revolutionary spirit.[25]

Though this may seem an ecclesiastical issue, it was an intensely political one when bishops of the Established Church sat in the House of Lords and exercised other significant civil powers. *It was against that kind of ecclesiastical role in civil affairs that the no-establishment clause was directed, not against citizen action by persons who happen also be church members.*

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24. See Bridenbaugh, Carl, *Mitre and Sceptre: Transatlantic Faiths, Ideas, Personalities and Politics, 1689-1775* (New York: Oxford Univ. Press, 1962), for a blow-by-blow description of this struggle.

25. Handy, Robert T., *A History of the Churches in the United States and Canada* (New York: Oxford Univ. Press, 1977), p. 137.

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One of the major factors in precipitating the American Revolution was the political effect—and intent—of much of the (non-Anglican) preaching in the American colonies. Edwin Scott Gaustad noted:

> In Lexington on April 19, 1775, shortly after dawn the shot was fired. Before it was heard round the world, it echoed in the pulpits of New England, the meeting-houses of the Middle colonies, the parishes in the South. "The authority of a tyrant is of itself null and void," pronounced Massachusetts' Samuel West in an election sermon in May, 1776. And in Virginia, the presbytery of Hanover memorialized the (colonial) Assembly on October 24, 1776, to this effect: we "are governed by the same sentiments which [created] the United States of America, and are determined that nothing in our power and influence shall be wanting to give success to their common cause...." Churchmen of every major persuasion joined in the battle for independence.[26]

The religious institutions, promulgations and experiences of the colonists indeed were instrumental in preparing them to demand, and obtain, their independence. As John Adams observed in retrospect:

> What do we mean by the American Revolution? Do we mean the American war? The Revolution was effected before the war commenced. The Revolution was in the minds and hearts of the people, *a change in their religious sentiments, of their duties and obligations*.[27]

In other words, churches—and religious movements like the Great Awakening—helped to shape the American nation and its outlook and institutions during the century before it came into actuality.[28] So the political activism of religion antedates the republic itself, and indeed extends back, back into the dim recesses of history. Some minds may think that the fact that religious traditions may *indirectly influence culture* does not bear on the controversy over whether religious bodies can *directly intervene in the political process*. But that is a hindsight distinction apparent to the modern mind that was not seen in the colonial era (and before), when the religious role was fully and formatively involved in the life of the society of its time. Distinctions of "religious" versus "political," "secular" versus "ecclesiastical," "civic" versus "spiritual"—more fully developed as they are in the modern experience—should not be projected back anachronistically on an earlier era. Then the religious

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26. Gaustad, E.S., *A Religious History of America* (New York: Harper & Row, 1966), p. 118. The "election sermon" was a quaint New England custom, since fallen into desuetude, in which a local clergyman addressed the populace on Election Day, often from the rostrum of the town hall or even the chamber of the legislature. (From such roots, presumably, sprang the custom in the early days of the Republic, of church services for members of Congress conducted on Sundays in the Hall of the House of Representatives. Stokes, *supra*, v. I, p. 499.)

27. John Adams, Letter to Hezekiah Niles, 1818, emphasis added.

28. This thesis is explored at greater length in Kelley, Dean M., "Religion in the American Revolution," *Christianity & Crisis*, v. 34, no. 10, June 10, 1974, pp. 123-8.

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community was intermingled, if not coterminous, with the political. Even to say that each influenced the other is to suggest a dichotomy that miscontrues the situation. They were two aspects of a single community.

Only with the coming of a new insight and its embodiment in the fundamental law of the new nation—that membership in the political community should be independent of membership in the religious community—did attention begin to focus on the appropriate role of religious convictions, commitments, allegiances in the political process. That conundrum is not made easier by the fact that—as in the earlier era—the same people are involved in both "communities," and they do not always change "hats" when they move from the one to the other, nor—some would say—can they or should they. It is with that conundrum that this section wrestles, and there are still several steps to take in that process. The historical evidence above will be followed by a view of the religious "mandate" and a survey of the constitutional, statutory and judicial analysis of the issue.

3. The Biblical and Theological Mandate

Even in the eighth century before Christ there was religious "intermeddling" in the affairs of the political world. Amaziah, the priest of Bethel, complained to the king, Jeroboam, that an upstart preacher from the South (Judah) was troubling the Northern Kingdom (Israel) and criticizing the king. Amaziah himself told Amos to go away. "O seer, go, flee away, to the land of Judah, and eat bread there, and prophesy there; but never again prophesy at Bethel, for it is the king's sanctuary, and it is a temple of the kingdom."[29]

But Amos did not take this advice. He went on troubling Israel, speaking on behalf of God:

> I hate, I despise your feasts, and I take no delight in your solemn assemblies;
> Take away from me the noise of your songs, to the melody of your harps I will not listen.
> But let *justice* roll down like waters and *righteousness* like an everflowing stream.[30]

Amos and three of his (more-or-less) contemporaries, Micah, Hosea and Isaiah, led humankind over one of the greatest watersheds in human history. Prior to their time, it was believed that a person's obligations to God or the gods were discharged by offering sacrifices; the bigger, the better. But these four prophets proclaimed, to everyone's astonishment, that God is not interested in sacrifices and ceremonies, but in *how human beings treat each other!* Isaiah, speaking for God, put it thus:

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29. Amos 7:12-13, RSV.
30. Amos 5:21-24, RSV, emphasis added.

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> Your new moons and your appointed feasts my soul hates; they have become a burden to me, and I am weary of bearing them;
> Wash yourselves; make yourselves clean; remove the evil of your doings from before my eyes;
> Cease to do evil; learn to do good;
> Seek *justice*; correct *oppression*;
> Defend the fatherless; plead for the widow.[31]

And Micah proclaimed: "He has showed you, O man, what is good; and what does the Lord require of you but to do *justice* and to love kindness, and to walk humbly with your God.[32] And religious leaders have hardly given the secular order a quiet day since!

Centuries later, Jesus reminded his hearers, heirs of those prophets, of their shortcomings: "Woe to you, Pharisees, for you tithe mint and rue and every herb, (but) neglect *justice* and the love of God."[33] Responding to human suffering, need and oppression is cited in the Gospel as a mark of Messiah. Quoting Isaiah, Jesus said: "`The Spirit of the Lord is upon me, because he has anointed me to preach good news to the poor. He has sent me to proclaim release to the captives and recovering of sight to the blind, to set at liberty those who are oppressed, to proclaim the acceptable year of the Lord....' Today this Scripture has been fulfilled in your hearing."[34]
Following which, he was "run out of town."

Not having learned his lesson, he later drove the money changers out of the Great Temple in Jerusalem, thus cutting off the lucrative trade that benefited the priests as well as the merchants. Then he had indeed "quit preaching and gone to meddling"! He was immediately had up before the authorities on the local equivalent of "sedition," "blasphemy," "inciting to riot" and "disturbing the peace," and more-or-less quietly put out of the way—or so the authorities thought. He was not as easily gotten rid of, and he and his followers have been "turning the world upside down" ever since.

From the scriptural injunctions cited above, many have concluded across the years that the pursuit of *justice* is not an extra, an "incidental," a deviation or an idiosyncrasy, but a religious obligation of all faithful Jews and Christians. And justice is not a trait of individuals, but of *societies*. It is a product of laws and structures, customs and relationships. That product cannot be attained without affecting those social constructs. There is no way, then, that Jews or Christians can be true to their faith without troubling Israel to remedy injustice. And that means nothing less than intermeddling in the political realm, and doing so (for Christians at least) not as individuals in dispersion, but often corporately as the Church, the Body of Christ,

31. Isaiah 1:14, 16-17, RSV, emphasis added.
32. Micah 6:8, RSV, emphasis added.
33. Luke 11:42, RSV, emphasis added.
34. Luke 4:21, RSV.

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interposing itself against "the principalities and powers of this present darkness,"[35] not as a wielder of temporal power, an imitation of those principalities, but as a contrasting model, a judgment and rebuke, a healing and a hope, through all the ages.

(An exception to this mandate might seem to be the Presbyterians, who are adjured by the Westminster Confession to comport themselves more circumspectly: "Synods and councils [of the church] are not to meddle with civil affairs which concern the commonwealth, unless by way of humble petition in cases extraordinary...."[36] This solemn injunction from the civil-war-ridden England of 1646 is the "exception that proves the rule" because of its very incongruity with the conduct of Presbyterians in the United States and of virtually all Christians throughout the world across twenty centuries. But perhaps Presbyterians are so much given to [not-very-humble] petitions because they find so many cases "extraordinary.")

The biblical and theological mandate, then, at least for Jews and Christians, is that they must—as a religious duty—concern themselves with the welfare of human beings and the just ordering of human society.

4. A Violation of "Separation of Church and State"?

It may be—as the foregoing pages suggest—that religious bodies feel themselves under some compulsion to intermeddle in political affairs and that they have indulged themselves in that propensity throughout American history—and been indulged in it by the civil authorities. But does that mean that such behavior is consonant with the constitutional ideal of "separation of church and state"? Or is it one of those "cultural lags" like prayer in public schools[37] that may be a long-accepted practice until the Supreme Court is presented with a case that squarely challenges its constitutionality, whereupon it is struck down?

The Supreme Court of the United States has addressed the question of the "political" activities of religious bodies and their leaders in several contexts, none of which deliverances is "on all fours" with the assertions by Senator Goldwater and others that such conduct is a violation of the separation of church and state. That is, some are merely dicta and others are directed at related, but arguably distinguishable, situations.

a. The *Everson* "No Aid" Dictum. The rationale for the Goldwater view is that the First Amendment's first clause ("Congress shall make no law respecting an establishment of religion...") operates to form a "wall of separation between church and state" that requires government to refrain from interfering in the internal affairs of churches and, conversely, *churches to refrain from intervening in governmental affairs*. So far as it goes, that sounds plausible enough. But what does it mean?

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35. Ephesians 6:12, RSV.

36. *The Westminster Confession*, § IV, ch. XXXi.

37. See discussion of state-mandated prayer in public schools at IIIC2.

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The phrase "separation of church and state," we are continually reminded, does not occur in the Constitution. Courts have occasionally used it, with greater or lesser enthusiasm, to interpret what the First Amendment's no-establishment clause requires. It is a quotation from Thomas Jefferson and is therefore considered to express the understanding of one of the Founders, the chief author of the Declaration of Independence and an articulate exponent of one particular interpretation of what church-state relations ought to be: the strict-separationist interpretation. It is worth remembering that the phrase comes from the following context:

> 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.[38]

This famous quotation is from a letter Jefferson wrote on January 1, 1802, while he was president of the United States. He wrote it in reply to an address from a committee of the Danbury Baptist Association of Connecticut urging him to set aside a day of fasting, prayer or thanksgiving. The Danbury Baptist Association was a church, but Jefferson did not imply in his letter that there was anything improper or inappropriate or contrary to the principle of "separation of church and state" he was expounding for a church body to write to the president expressing its views on what they considered a public issue. He responded to them as he would to any group of citizens who assembled to petition their government for redress of grievances—which is what they were and what they were doing—two rights also protected by the First Amendment.

That phrase was engrafted into constitutional law by the U.S. Supreme Court in its second extensive exposition of the no-establishment clause of the First Amendment.[39] In its famous "no aid" formula, the court in 1947 spelled out the meaning of that clause in *Everson v. Board of Education*,[40] repeating it four times subsequently, word for word, in *McCollum v. Board of Education* (1948),[41] *McGowan v. Maryland* (1961),[42] *Torcaso v. Watkins* (by a unanimous court,)[43] and *Allegheny County v. ACLU* (1989).[44]

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38. Stokes, *supra*, v. I, p. 335.

39. The first substantial treatment of the Establishment Clause, *Reynolds v. U.S.*, 98 U.S. 145 (1878), refers to and quotes Jefferson's letter to the Danbury Baptists, but does not utilize the "separation" theme in its exposition.

40. 330 U.S. 1 (1947), discussed at IIID2.

41. 333 U.S. 203 (1948), discussed at IIIC1a.

42. 366 U.S. 420 (1961), discussed at IVA7a.

43. 367 U.S. 488 (1961), discussed at VB2.

44. 492 U.S. 573 (1989), discussed at VE2i.

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> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion....
>
> Neither a state nor the Federal government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and state."

Within that formula appear the words, "and *vice versa*," that might seem to give some credence to the critics of religious activism in matters of public policy. But the court has never further construed that phrase or applied it in deciding any cases brought before it, even when it might have seemed highly pertinent—as will be seen. It seems to be a kind of "make-weight" added to the formula for the sake of symmetry, or the participation referred to means to take part in an authoritative, formal and systemic way, as the bishops of the Church of England do in the House of Lords, not simply as any and all citizens are free to do: by voting, writing to members of Congress, urging others to do so, or seeking by persuasion and example to sway the decisions which shape the course of the commonwealth toward that which they believe to be right and moral for all.

In any event, the phrase "and vice versa"—in fact, the entire sentence in which it occurs, though repeated four times—in no instance was material to the outcome of the five cases in which it was used, and thus is quintessentially *dictum*, a judicial view that may be informative but is not itself determinative of the law.

b. The *Walz* Dictum. The *Everson* dictum may be balanced by dictum on the other side. In a more recent case, *Walz v. Tax Commission*, Chief Justice Burger, writing for a nearly unanimous court, said:

> Adherents of particular faiths and individual churches frequently take strong positions on public issues including, as this case reveals in the several briefs amici, vigorous advocacy of legal and constitutional positions. *Of course, churches as much as secular bodies and private citizens have that right*.[45]

That decision upheld the property-tax exemption of churches in New York state, but the quoted sentences had no bearing on the outcome and so are not law. The Supreme Court has never held as a matter of *law* that it is improper or a violation of the separation of church and state for religious leaders (or followers) to preach, teach,

45. 397 U.S. at 670 (1970), (Justice Douglas alone dissenting, on grounds not pertinent to this point), discussed at VC6b(3).

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persuade, organize or mobilize citizen support for (or against) public policies, or even for (or against) candidates for political office. Whether such activity on the part of tax-exempt organizations can have adverse *tax* consequences is a further question discussed below.[46]

c. *Harris v. McRae* (1980). In this country it may be argued that any and all citizens can seek to effectuate in civil law their views on morality, however misguided or inappropriate those views may be, even if they are derived in whole or in part from religious doctrine. That question was raised in a recent case challenging the constitutionality of a congressional action banning Medicaid reimbursement for abortions because it had allegedly been the product of the mobilization of political pressure by religious groups opposed to abortion. If church support for a legislative enactment would render that enactment unconstitutional, religious activism would become the "kiss of death" for legislation, and the moral outreach of religious bodies would be effectively halted. (Yet some religious groups were very vocal in their support of this challenge to the "Hyde Amendments," and indeed some activist religious leaders were among the plaintiffs who brought the suit—a virtually suicidal stance for religious activism if their establishment-clause argument were to be accepted by the courts.)

Fortunately, neither the trial court nor the Supreme Court accepted the establishment-clause argument. Judge Dooling, the district court judge, wrote:

> It is clear that the healthy working of our political order cannot safely forego the political action of the churches, or discourage it. The reliance, as always, must be on giving an alert and critical hearing to every informed voice, and the spokesmen of religious institutions must not be discouraged or inhibited by the fear that their support of legislation, or explicit lobbying for such legislation, will result in its being constitutionally suspect.[47]

Judge Dooling held the statute unconstitutional because it disadvantaged poor women and infringed on their free exercise of religion, but the Supreme Court reversed. By a 5-4 majority, the court reaffirmed its view that the "liberty" of which persons may not be deprived without due process of law included a woman's decision to terminate her pregnancy. The court agreed with the lower court that "the Hyde Amendment does not run afoul of the Establishment Clause."

> It does not follow that a statute violates the Establishment Clause because it "happens to coincide or harmonize with the tenets of some or all religions"....[48] That the Judaeo-Christian religions oppose stealing does not

46. See §§ f, g, h, below and VC6c.

47. *McRae v. Califano*, rev'd on other grounds *sub nom. Harris v. McRae*, *infra*.

48. Citing *McGowan v. Maryland*, 366 U.S. 420, a Sunday-closing-law case (discussed at IVA7a) that held Sunday-closing laws not to be an establishment of religion simply because they coincided with some religious teachings.

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> mean that a state or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny.[49]

But it eliminated the Free Exercise issue that had been a collateral ground for Judge Dooling's holding the statute unconstitutional because none of the plaintiffs who had standing to raise that issue had done so, and none of those who raised the issue were, or expected to be, pregnant or were eligible for Medicaid.

d. *Slee v. Commissioner* (1930). The curious connection between attempting to influence legislation and the federal tax laws perhaps began with a 1930 case in the Second Circuit Court of Appeals. One Noah Slee had made a number of contributions over the years to the American Birth Control League, which he deducted from his income tax. The Commissioner of Internal Revenue disallowed these deductions on the ground that the League was not a charitable organization because one of its purposes was to work for the repeal of laws banning sale and use of contraceptives. Judge Learned Hand, writing for a unanimous court, upheld the commissioner, saying, "Political agitation as such is outside the statute, however innocent the aim, though it adds nothing to dub it propaganda, a polemical word used to decry the publicity of the other side. Controversies of that sort must be conducted without public subvention; the Treasury stands aside from them."[50] Judge Hand made clear that it was not the subject matter of the League's work but the effort to affect legislation that rendered it ineligible for deductible contributions.

e. Amending the Internal Revenue Code. As though to vindicate Judge Hand's interpretation of the statute, Congress in 1934 amended the Internal Revenue Code to make clear that any nonprofit organization otherwise entitled to tax exemption and deductibility would be disqualified if any "substantial" part of its activities was "carrying on propaganda, or otherwise attempting, to influence legislation."[51] Twenty years later it amended the statute again to add a complete prohibition against intervening in elections (without any margin of insubstantiality). The combined restriction now reads, "No substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distribution of statements), any political campaign on behalf of any candidate for public office."[52]

Twenty-two years later, in the Tax Reform Act of 1976, Congress added a new Section 501(h) permitting certain nonprofit organizations to *elect* to come under a definition of "substantial" that would permit them to do a limited amount of direct-interest lobbying and an even smaller amount of grass-roots lobbying, the

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49. *Harris v. McRae*, 448 U.S. 297 (1980).

50. *Slee v. Commissioner of Internal Revenue*, 42 F.2d 184 (CA2 1930).

51. I.R.C. §§ 501(c)(3) and 170(c)(2)(D). A more detailed discussion of the legislative history—and the significance for religious bodies may be found in Kelley, D.M., *Why Churches Should Not Pay Taxes* (New York: Harper & Row, 1971), ch.6, pp. 70ff.

52. IRC § 501(c)(3).

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amount being proportionate to their total expenditures on a sliding scale, so that small organizations could spend a larger proportion than big ones. Religious bodies were not permitted to elect to be covered by Section 501(h), and this was *at their own request*, since those churches that took an interest in legislation felt they had a constitutional right to engage in lobbying (as the Supreme Court had intimated in *dicta* in *Walz v. Commissioner*[53]) without restrictions in the tax code.

Nonprofit organizations wishing to do more lobbying than is permitted under Sections 501(c)(3) or 501(h) could obtain exemptions under Section 501(c)(4) as "action organizations." Their income then was not taxed, but they were not entitled to tax-deductible contributions. Some Section 501(c)(3) organizations have Section 501(c)(4) subsidiaries to do their lobbying (or vice versa), but there has been some controversy over the degree to which one organization could control the other.[54]

f. *Girard Trust v. Commissioner* (1941). The tax consequences of a *religious* body's attempting to influence legislation were considered in a decision of the Third Circuit Court of Appeals in 1941. The Commissioner of Internal Revenue had denied a deduction from federal estate tax of a bequest by Ida Simpson, daughter of Methodist bishop Matthew Simpson, to the Board of Temperance of the Methodist Episcopal Church. The deduction was disallowed by the commissioner because the Board of Temperance was engaged in attempts to influence legislation, which the commissioner considered to be a noncharitable activity. In effect, he was enforcing the stricture added to the Internal Revenue Code in 1934 defining as nondeductible any bequest to an organization a "substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation," but Ida Simpson died in 1933, before that amendment came into effect, so the court was considering whether legislative lobbying disqualified the Board of Temperance as a recipient of a deductible bequest under the original (1926) statute. Judge Goodrich wrote for the majority:

> Religion includes a way of life as well as beliefs upon the nature of the world, and admonitions to be "Doers of the word and not hearers only" (James 1:22) and "Go ye, therefore, and teach all nations..." (Matthew 28:19) are as old as the Christian church. The step from acceptance by the believer to his seeking to influence others in the same direction is a perfectly natural one, and it is found in countless religious groups. The next step, equally natural, is to secure the sanction of organized society for or against outward practices thought to be essential. Thus we had Sunday observance laws long before prohibition of alcohol became an important issue. The advocacy of such regulation before party committees and legislative bodies is a part of the achievement of the desired results in a

53. See discussion at § b above and in Kelley, *Why Churches Should Not Pay Taxes, supra,* pp. 77-83.

54. See further discussion of this point in Justice Blackmun's dissent in *Regan v. Taxation With Representation*, at § h below.

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> democracy. The safeguards against its undue extension lie in counter-pressures by groups who think differently and the constitutional protection, applied by courts, to check that which interferes with freedom of religion for any.
>
> * * *
>
> Surely a church would not lose its exemption as a religious institution if, pending a proposal to repeal Sunday observance laws, the congregation held a meeting on church property and authorized a committee to appear before a legislative body to protest against the repeal.... The activities of the Board [of Temperance] fell within the type which have been regarded as religious by the Methodist Church for a century and a half. A limitation, if any, upon the deduction granted in general terms of bequests to religious bodies is for Congress to make and Congress has *since* made it in the 1934 statute. Such limitation not having been imposed by legislation [at the time of the bequest], it is not for a court or administrative officer to impose it.[55]

The court's confident view of a congregation's right to protest the repeal of Sunday observance laws without losing its tax exemption might appear a bit oversanguine in view of the 1934 amendment and subsequent developments, but it represented a high-water mark of the view that traditional legislative advocacy activities by churches are part of the free exercise of religion and should not affect their tax status.

The lone dissenter, Judge Clark, took a different view that relied heavily upon English precedents pertaining to charitable trusts:

> By the English view, a trust is not charitable if the attainment of its purpose involves a change in existing law. The best known judicial expression thereof is by Lord Parker.... "a trust for the attainment of political objects has always been held invalid [as charitable?] not because it is illegal, for everyone is at liberty to advocate or promote by any lawful means a change in the law, but because the court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift."[56]

There was some cogency in this observation, which gains greater pertinence in light of two 1983 decisions of the Supreme Court to be discussed below, but one must wonder whether in the American setting it is any more incumbent upon civil courts to determine the substantive degree of "public benefit" in a proposed legislative change than it is for them to determine the merits of change in religious doctrines under the "implied trust" theory that was also popular in British courts but disallowed in this country.[57] It is at least conceivable that voluntary contributions to

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55. *Girard Trust Co. v. Commissioner*, 122 F.2d 108, 110-111 (CA3 1941), emphasis added.
56. Ibid., Clark dissent at 113, quoting *Re Scowcroft*; *Ormrod v. Wilkinson*, ([1898] 2 Ch. 638).
57. See *Presbyterian Church v. Hull Church*, (1969), discussed at IB5.

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nonprofit organizations for the promotion of *any* legislative changes might be considered of "public benefit" and therefore "charitable," that is, that the advancement of public dialogue about public issues itself constitutes the public benefit, not the substantive merits or demerits of the points of view advanced.

Judge Clark's solution to the problem, however, somewhat marred the *laissez faire* rationale of Lord Parker. "Let the state establish its own policy on such matters without help from volunteers among the population. And furthermore, let those who compose the voice of the state, the members of the legislative body, do so without being subject to even permissible `lobbying.'"[58] So much for mere citizens presumptuously trying to interfere as "volunteers" in the state's efforts to formulate "its own policy"! Does one sense here a certain impatience with the turbulent workings of democracy?

g. *Christian Echoes National Ministry v. U.S.* (1972). In 1972 the Tenth Circuit Court of Appeals reached a conclusion diametrically opposite that of *Girard Trust*, perhaps because of the amendment of the statute in the interim. Billy James Hargis, a vehemently anti-Communist evangelist in Tulsa, Oklahoma, had his tax exemption revoked because of his criticism of the policies of the Kennedy administration.[59]

The Tenth Circuit upheld the revocation of Hargis' tax exemption, saying:

> 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 [which engage in lobbying] 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 may refrain from such activities and obtain the privilege of exemption.[60]

Thus exempt organizations, and religious organizations in particular, were told by the court that they must choose between lobbying and tax exemption.

h. *Regan v. Taxation with Representation* (1983). In 1983 the U.S. Supreme Court was apparently ready to rule on some of the issues raised by *Christian Echoes*, but it did so in a case involving a nonreligious nonprofit organization, Taxation with Representation of Washington (TWR), which had been denied tax exemption under Section 501(c)(3) because it proposed to lobby for reform of the tax laws. TWR contended that conditioning tax exemption upon abandoning the right to "assemble and petition Congress for redress of grievances" was unconstitutional under several of the Supreme Court's earlier decisions, but the Supreme Court disagreed in an opinion written by Justice Rehnquist.

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58. *Girard Trust*, *supra*, Clark dissent, at 114.

59. See discussion in Kelley, *Why Churches Should Not Pay Taxes*, *supra*, pp.79ff.

60. *Christian Echoes National Ministry v. U.S.*, 470 F.2d at 857 (CA10 1972), discussed at VC6c(1).

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> Both tax exemptions and tax-deductibility are a form of *subsidy* that is administered through the tax system. A tax exemption has much the same effect as a *cash grant* to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to *cash grants* of the amount of a portion of the individual's contributions. The system Congress has enacted provides this kind of *subsidy* to non profit civil welfare organizations generally, and an additional *subsidy* to those charitable organizations that do not engage in substantial lobbying. In short, Congress chose not to *subsidize* lobbying as extensively as it chose to *subsidize* other activities that non profit organizations undertake to promote the public welfare.[61]

The court then observed that TWR's freedom of speech was not really impaired by the limitations on its 501(c)(3) exemption because it could always set up a Section 501(c)(4)[62] subsidiary to do its lobbying, so long as it did not use deductible contributions for that purpose. And, in any event, Congress is not obliged to "subsidize" TWR's freedom of speech! "The issue in this case is not whether TWR must be permitted to lobby, but whether Congress is required to provide it with public money with which to lobby.... we hold that it is not."

Of course, if tax exemption is not defined as a "subsidy," then Congress is not providing a nonprofit organization with "public money." In its earlier *Walz* decision, the Court had held that property-tax exemption of *churches* was *not* a subsidy, saying: "Obviously a direct money subsidy would be a relationship pregnant with involvement..., but *that is not this case*.... The grant of a tax exemption is not sponsorship since the *government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state*."[63] That had seemed a fairly solid statement on which religious organizations at least could rely, but what was its significance after *TWR*?

In a concurring opinion in *TWR*, Justice Blackmun, joined by Justices Brennan and Marshall, pointed out an important implication of *TWR*:

> If viewed in isolation, the lobbying restriction contained in Section 501 (c)(3) violates the principle, reaffirmed today..., "that the government may not deny a benefit to a person because he exercises a constitutional right." Section 501(c)(3) does not merely deny a subsidy for lobbying activities...; it deprives an otherwise eligible organization of its tax-exempt status and its eligibility to receive tax-deductible contributions for all its activities, whenever one of those activities is "substantial lobbying." Because

61. *Regan v. Taxation With Representation*, 461 U.S. 540 (1983), emphasis added. In a brief ten-page opinion, Justice Rehnquist used the term "subsidy" or synonyms like "grants" or "largesse" 31 times!

62. Section 501(c)(4) exempts from income taxation "social welfare organizations," which are permitted to lobby, *but they do not enjoy deductibility of contributions*.

63. *Walz v. Tax Commission*, 397 U.S. 644 (1970), discussed at VC6b(3), emphasis added.

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> lobbying is protected by the First Amendment,... Section 501(c)(3) therefore denies a significant benefit to organizations choosing to exercise their constitutional rights.
>
> The constitutional defect that would inhere in section 501(c)(3) alone is avoided by Section 501(c)(4). As the court notes... TWR may use its present Section 501(c)(3) organization for its nonlobbying activities and may create a Section 501(c)(4) affiliate to pursue its charitable goals through lobbying. The [latter] would not be eligible to receive tax-deductible contributions....
>
> Any significant restriction on this channel of communication [via the Section 501(c)(4) subsidiary], however, would negate the saving effect of Section 501(c)(4). It must be remembered that Section 501(c)(3) organizations retain their constitutional right to speak and to petition the Government. Should the IRS attempt to limit the control these organizations exercise over the lobbying of their Section 501(c)(4) affiliates, the First Amendment problems would be insurmountable. It hardly answers one person's objection to a restriction on his speech that another person, outside his control, may speak for him.[64]

This decision represented a significant redefining of tax exemption, with consequences that will be far-reaching and are only beginning to unfold.[65]

i. Should Churches Set Up Lobbying Subsidiaries? Because of the implications of this decision, some religious groups wondered if they should set up lobbying subsidiaries under Section 501(c)(4) using nondeductible contributions. [The Friends Committee on National Legislation, for instance, has always been a Section 501(c)(4) organization, and is not a subsidiary of any other body, whether Section 501(c)(3) or otherwise, because its founders wanted to lobby without worrying about tax consequences.] Other religious bodies have been reluctant to set up such subsidiaries because of the implication that lobbying is somehow less religious or less respectable than their other activities. They resist splitting their mission into "low-road" and "high-road" segments, lest such differentiation contribute to the notion that mixing in politics is not quite "nice," particularly for a religious group.

Furthermore, many religious bodies do not consider their efforts to influence public policy to be "lobbying" in the sense sought to be regulated by restrictions in the tax code and by statutes requiring registration and disclosure of professional lobbyists. Such lobbyists are usually employed by industries or other special-interest groups to advance their own self-interest, whereas religious bodies view their concerns as generally not self-interested but directed toward the common good.

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64. *TWR*, *supra*, Blackmun concurrence. This case is discussed further at VC6c(3).

65. See discussion of the Court's shift from a "tax-base" rationale of tax exemption (*Walz*) to a "tax-expenditure" rationale (*TWR*, *BJU*) in Kelley, D.M., "Tax Exemption and the Free Exercise of Religion" in Wood, J.E., *Religion and the State* (Waco, Texas: Baylor University Press, 1985), pp. 323-358. This transition was confirmed in *Jimmy Swaggart Ministries v. Bd. of Equalization of California*, 493 U.S. 378 (1990), discussed at VC6b(5).

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Consequently, some religious groups oppose lobby-disclosure requirements and resist complying with them. The New York State Council of Churches, for instance, has refused to register with the New York State Lobbying Commission and was prepared to litigate the issue, but has thus far avoided a confrontation because its legislative activities are not extensive enough to reach the threshold of the law, even though it maintains a full-time staff person in Albany to acquaint the legislators with the views of its member churches on legislative issues. The federal lobbying disclosure act was amended in 1995 to tighten up its all-too-loose loopholes, but religious bodies were exempted from its requirements.[66]

j. The "Political Divisiveness" Dictum. In several decisions, the U.S. Supreme Court has used language that may give encouragement to those who contend that churches should not "interfere" in "governmental affairs." In discussing the "excessive entanglement" between government and religion that might result from public funding of parochial schools, the court introduced a corollary consideration to the effect that such aid might encourage political divisiveness along religious lines.

> Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. The potential divisiveness of such conflict is a threat to the normal political process.... The history of many countries attests to the hazards of religion's intruding into the political arena or of political power intruding into the legitimate and free exercise of religious belief.
>
> Of course, as the Court noted in *Walz*, "[a]dherents of particular faiths and individual churches frequently take strong positions on public issues." We could not expect otherwise, for religious values pervade the fabric of our national life. But in *Walz* we dealt with a status under state tax laws for the benefit of all religious groups. Here we are confronted with successive and very likely permanent annual appropriations that benefit relatively few religious groups. Political fragmentation and divisiveness on religious lines are thus likely to be intensified.[67]

The assertion by Chief Justice Burger, author of this opinion, that "political divisiveness along religious lines was one of the principal evils against which the First Amendment was designed to protect" was an almost verbatim adaptation of a sentence by Harvard Law Professor Paul Freund quoted by Justice John Marshall

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66. P.L. 104-65, "The Lobbying Disclosure Act of 1995," contains a proviso stating: "The term `lobbying contact' does not include a communication that is... (xviii) made by— (I) a church, its integrated auciliary, or a convention or association of churches that is exempt from filing a Federal income tax return under paragraph 2(A)(i) of section 6033(a) of Title 26, or (II) a religious order that is exempt... under paragraph (2)(A)(iii) of such section 6033(a)."

67. *Lemon v. Kurtzman*, 403 U.S. 602 (1971), discussed at IIID5.

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Harlan in his concurring opinion in *Walz v. Tax Commission*.[68] That assertion, according to Edward McGlynn Gaffney, was simply unsupported by any historical evidence whatever:

> Burger did not cite any primary sources for his opinion. There is no reference [to] the annals of the first Congress, or to the writings of Thomas Jefferson... Neither is there reference to the writings of James Madison, who shepherded the first amendment and the other provisions of the Bill of Rights through Congress.... I submit that the reason neither Freund nor Burger alluded to any such historical materials is that these materials do not support the view first proposed by Freund and then mistakenly followed by Burger.[69]

Whether history supports Chief Justice Burger's assertion or not, it is still on the law books, and may cause mischief in the future unless rectified. But one can clearly distinguish two situations to which the court has spoken:

1. Citizens gathered in churches press the government for financial aid for their chosen mode of religious education (or at least for its secular aspects); the court has said such aid cannot be given, partly because it would lead to interreligious strife, though it did not imply that it is improper for such citizens to seek such aid but only for the legislature to grant it.

2. Citizens gathered in churches press the government to adopt certain policies for the good of the nation, from which they or their churches will not benefit pecuniarily any more than anyone else; the court has not said there is anything improper about that. Instead, it said, "we could not expect otherwise, for religious values pervade the fabric in our national life."

In neither instance, then, is it improper for citizens gathered in churches to press the government for outcomes they consider desirable public policy. Though it has been often referred to, the "political divisiveness" charge has never been grounds for a holding of the court and is therefore dictum rather than law, as Justice O'Connor has suggested: "In my view, political divisiveness along religious lines should not be an independent test of constitutionality. Although several of our cases have discussed

68. "...[H]istory cautions that political fragmentation on sectarian lines must be guarded against." 397 U.S. at 695, quoting Freund, "Public Aid to Parochial Schools," 82 *Harvard L. Rev.* 1680 (1969).

69. Gaffney, E.M., "Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy," 24 *St.Louis Univ. L.J.* 205 at 214-5 (1980). This article showed Sen. Goldwater's characterization of James Madison's views to be incorrect. Goldwater claimed that Madison thought religious "factions" should not participate in politics (*vide* sources cited at nn. 2,3 *supra*), but Madison's actual view was quite otherwise: both religious and non-religious factions were to be permitted to flourish, and they would serve as mutual correctives; the public good would be protected by their very multiplicity (*vide Federalist 10* and *Federalist 51*).

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[it], we have never relied on divisiveness as an independent ground for holding a government practice unconstitutional."[70]

k. *Mc Daniel v. Paty* (1978). The court has explicitly addressed the more extreme question of whether clergypersons may themselves run for and hold public office, a question on which the Founders were at odds. At first, Jefferson had been of the opinion—along with the legislatures of several of the early states—that clergypersons should be disqualified from serving in public office, but eventually James Madison persuaded him that clergypersons should not be deprived by law of their rights as citizens to run for public office and to serve if elected. Eventually this view prevailed in most states as well. The last to change were Maryland and Tennessee, where bars against clergypersons were struck down by the courts as unconstitutional in 1974 and 1978, respectively.

In the latter instance, the Supreme Court of the United States unanimously struck down the bar to officeholding by clergy in Tennessee; at least, the eight justices participating agreed in the result, though an opinion written by Chief Justice Burger was joined only by Justices Powell, Rehnquist and Stevens. Justice Brennan wrote a concurrence which was joined by Justice Marshall. Justices Stewart and White each wrote separate opinions concurring in the judgment only. Justice Blackmun took no part in the consideration or decision of the case.

The chief justice devoted several pages to a review of the history of exclusion of clergy from political office, and recognized that at one time that policy enjoyed support by some of the founders and several of the states. But he concluded: "Tennessee has failed to demonstrate that its views of the dangers of clergy participation in the political process have not lost whatever validity they may once have enjoyed..... [T]he American experience provides no persuasive support for the fear that clergymen in public office will be less careful of antiestablishment interests or less faithful to their oaths of civil office than their unordained counterparts."[71]

Though the state had insisted that its ban on clergy in political office did not burden anyone's religious belief and restricted religious action only "in the law making processes of government—where religious action is prohibited by the establishment clause," the plurality opinion did not agree.

> [T]he right to the free exercise of religion unquestionably encompasses the right to preach, proselyte, and perform other similar religious functions, or, in other words, to be a minister.... Yet under the clergy disqualification provision, McDaniel cannot exercise both [free exercise and citizenship] rights simultaneously because the State has conditioned the exercise of one on the surrender of the other.... In so doing, Tennessee has encroached upon McDaniel's right to the free exercise of religion.

70. *Lynch v. Donnelly*, 465 U.S. 668 (1984), O'Connor, J., concurring.
71. *McDaniel v. Paty*, 435 U.S. 618 (1978).

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Justice Brennan placed his views of the case in the broader context of citizens' rights to political participation without regard to their religious commitments or professions, giving an excellent rebuttal to criticisms of the kind voiced by Senator Goldwater several years later:

> 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.... The mere fact that a purpose of the Establishment Clause is to reduce or eliminate religious divisiveness or strife, does not place religious discussion, association, or political participation in a status less preferred than rights of discussion, association and political participation generally.... The State's goal of preventing sectarian bickering and strife may not be accomplished by regulating religious speech and political association. The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities.... Government may not inquire into the religious beliefs and motivations of office holders—it may not remove them from office merely for making public statements regarding religion, nor question whether their legislative actions stem from religious conviction....
>
> *In short, government 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 overinvolved in religion. Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally....*[72]

To this disquisition Justice Brennan added in the margin a quotation from Laurence Tribe's *American Constitutional Law*.

> In much the same spirit, American courts have not thought the separation of church and state to require that religion be totally oblivious to government or politics; church and religious groups in the United States have long exerted powerful political pressures on state and national legislatures, on subjects as diverse as slavery, war, gambling, drinking, prostitution, marriage, and education. To view such religious activity as suspect, or to regard its political results as automatically tainted, might be inconsistent with first amendment freedoms of religious and political expression--and might not even succeed in keeping religious controversy out of public life, given the political ruptures caused by the alienation of segments of the religious community.[73]

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72. Ibid., Brennan concurrence, emphasis added.

73. Ibid., n. 25, quoting Tribe, L., *American Constitutional Law* § 10-4, 1st ed. (Mineola, N.Y.: Fndn. Press, 1978), pp. 866-867 (citations omitted). *McDaniel v. Paty* is also discussed at VB6.

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If clergypersons ordained to full-time service in the church cannot be deprived of their rights as citizens, how much less can ordinary church members be deprived of their rights as citizens to assemble together and petition their government just because they do so as a church?

l. ***Abortion Rights Mobilization v. Baker*** **(1982).** In 1980, in an effort to "take some of the heat off pro-choice candidates,"[74] a suit was filed in federal district court in Manhattan by Abortion Rights Mobilization, Inc. (ARM), its founder and president, Lawrence Lader, and a wide array of other persons and groups against the Secretary of the Treasury and the Commissioner of Internal Revenue seeking to compel them to revoke the tax exemption of the U.S. Catholic Conference and the National Conference of Catholic Bishops because of the Roman Catholic Church's alleged activities constituting "a nationwide plan to change abortion laws by... lobbying and participating in partisan political campaigns on behalf of candidates supporting the... Church's position on abortion...."[75] In a subsequent amended complaint, the two Roman Catholic bodies were joined as parties defendant.

Two years earlier, a plan for a similar suit against the tax exemption of the Roman Catholic Church had been presented by former U.S. Attorney General Ramsey Clark and his law partner Melvin Wulf, former legal director of the American Civil Liberties Union, to a group of about thirty representatives of organizations interested in abortion rights convened at the headquarters of the National Organization of Women in New York City with a view to giving their assessments of the advisability of filing such a suit. The responses of those present was typified by Harriet Pilpel, general counsel for the Planned Parenthood Federation, who said, "Such a suit would simply drive the other churches into the arms of the Roman Catholic Church in support of its right to preach and lobby for what it believes," and the director of the Alan Guttmacher Institute, who said, "If you file such a suit, the Institute will be obliged to enter a friend-of-the-court brief in opposition to it," presumably for the same reason. Very few spoke in favor of such a suit aside from Lawrence Lader, its initiator, and so the idea was dropped. But in 1980 it emerged again in virtually the same form with a group of plaintiffs (that did not include Planned Parenthood or the Guttmacher Institute) represented by another law firm.

Every so often someone files suit attacking someone else's tax exemption, and the Roman Catholic Church has been the target of several such attacks, but usually such suits are dismissed for plaintiffs' lack of standing to tell the Internal Revenue Service how to evaluate a third party's tax status. Somewhat to the parties' surprise, the "ARM" suit was not dismissed. Judge Robert L. Carter dismissed a number of plaintiffs for lack of standing and the Roman Catholic Church bodies as defendants,

74. Statement by Lawrence Lader to author and three other persons, Edith Tiger, Dean H. Lewis and Maryon H. Kelley, Sept. 26, 1980.

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

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but denied the motions to dismiss. He did find that some plaintiffs had standing to maintain the action:

> The clergy plaintiffs and the Women's Center for Reproductive Health... have disclosed... compelling and personalized injuries flowing from the tacit government endorsement of the Roman Catholic position on abortion sufficient to confer standing on them to complain of the alleged establishment clause violations. The clergy plaintiffs have devoted their lives to religious communities and beliefs that are denigrated by government favoritism to a different theology. They provide spiritual leadership to and care for the spiritual needs of their congregations. As part of these duties they must counsel those in their care in accordance with religious laws that command consideration of abortion as the morally required response to pregnancy. The Women's Center provides guidance to women in decision-making on issues pertaining to family life, including childbearing. It was founded by Reverend Lutz along with others to put the principles of the Presbyterian Church into effect. As with the clergy plaintiffs, the Women's Center's religiously inspired mission is denigrated by government endorsement of a theology contrary to its guiding principles.
>
> Tacit government endorsement of the Roman Catholic Church view of abortion hampers and frustrates these plaintiffs' ministries. The government need not silence these plaintiffs to cause discrete spiritual injury because official approval of an orthodoxy antithetical to their spiritual mission diminishes their position in the community, encumbers their calling in life, and obstructs their ability to communicate effectively their religious message....
>
> * * *
>
> The granting of a uniquely favored tax status to one religious entity is an unequivocal statement of preference that gilds the image of that religion and tarnishes all others. A decree ordering the termination of this illegal practice and restoring all sects to equal footing will redress this injury.

The court also held that twenty individual plaintiffs and three organizations (including ARM) had standing to challenge the Treasury's inaction because of its alleged effect upon their rights as voters, since they claimed that "arbitrary government action diluted the strength of voters in one group at the expense of those in another." Recalling the reapportionment cases, such as *Baker v. Carr*,[76] in which the Supreme Court redressed the inequalities in the number of voters electing different members of Congress, the court opined:

> Plaintiffs... do not demand a discontinuation of the church's political activity, nor do they seek, through the court, to prevent the election of anti-abortion candidates. Plaintiffs claim that allegedly unconstitutional government conduct and illegal private conduct has distorted the electoral

76. 369 U.S. 186 (1962).

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> and legislative process by creating a system in which members of the public have greater incentive to donate funds to the Roman Catholic Church than to politically active abortion rights groups and in which each dollar contributed to the church is worth more than one given to non-exempt organizations.... They complain of arbitrary government interference that disfavors them in the process of selecting representatives.

The court gave the following rationale for dismissing the Roman Catholic Church as a defendant:

> [The complaint] fails to state a claim against the church defendants because they are incapable of violating the first amendment and they have breached no duty imposed by the [Internal Revenue] Code and to plaintiffs.
>
> The constitutional prohibition against establishment of religion prohibits government activities that enhance the status of one theology over all others or the status of religious beliefs and organizations generally over non-religion. As all other protections afforded by the Bill of Rights, this stricture does not restrict purely private corporate action.... Therefore, no action can proceed against the church defendants based on their abridgement of plaintiffs' first amendment guaranteed rights.... The Code imposes no duty upon the church to gain pre-clearance from the IRS before embarking on activities that might trench upon the Section 501(c)(3) prohibitions against political activity. If the church does engage in these proscribed endeavors, then it is liable to revocation of its exemption, but as long as it holds that exemption, it cannot be said to have violated the code.

On February 26, 1986, Judge Carter ordered the U.S. Catholic Conference (USCC) and the National Conference of Catholic Bishops (NCCB) to comply with a discovery order he had issued in the previous year, turning over to the plaintiffs documents requested by them to determine the extent of political action by the church to oppose pro-choice candidates. On March 6, 1986, counsel for the Catholic bishops replied by letter, stating that the bishops "have asked me to advise the Court that they cannot, in conscience, comply with the subpoenas in question. I wish to emphasize that [their] decision is made, not out of disrespect for or in defiance of this Court's authority, nor out of fear of confronting the merits of the claims made by the plaintiffs. Rather, that decision was made because of [their] long-held view that the constitutional questions that permeate this case should be resolved by a full appellate review before the case proceeds to adjudication on the merits."[77]

Judge Carter was not persuaded, and on May 8, 1986, he ordered the Catholic bishops to comply forthwith or pay a fine of *$50,000 per day per each organization*, USCC and NCCB. The church obtained a stay from the Second Circuit Court of

77. Letter from Charles H. Wilson of Williams & Connolly to Judge Robert Carter, March 6, 1986.

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Appeals pending its consideration of an expedited appeal challenging the trial court's jurisdiction to hear a third-party complaint about the church's tax status.

m. ***U.S. Catholic Conference v. Abortion Rights Mobilization, Inc.*** **(1987).** The Second Circuit Court of Appeals rendered its decision on the merits of the lower court's jurisdiction to order disclosure and punish contempt for failure to comply with that order on June 4, 1987, almost one year after the case was argued before it. The majority, in a somewhat technical opinion by Judge Jon O. Newman, held that "[a] lack of subject-matter jurisdiction does not disable the district court from exercising all judicial power." The appellants, after all, were not parties to the underlying action but merely witnesses, and "[w]ith respect to jurisdiction over the underlying action... the witness may make only the limited challenge as to whether there exists a colorable basis for exercising subject matter jurisdiction." The court then announced that because plaintiffs had asserted "personal, direct injury... arising from the federal defendants' failure to enforce the political action limitations... [that] placed [them] at a competitive disadvantage with the Catholic Church in the arena of public advocacy on important public issues," the lower court "had at least colorable basis for the exercise of subject matter jurisdiction over the plaintiffs' suit." Judge Amalya Kearse concurred.

Judge Richard Cardamone dissented, contending that "[i]t has been established law for over 100 years that a district court must have subject matter jurisdiction over the suit before it may issue a valid contempt order. When it acts in excess of its jurisdiction, the order punishing a person for contempt is void." He also argued that a witness whose interests are directly at stake may resist a court order in order to obtain immediate review of the court's authority to issue that order, since—not being a party—the witness cannot otherwise appeal. The appellate court also had a duty—wholly independent of the standing of the parties or the rights of the witness-contemnor—to examine the authority of the lower court to take the challenged action.[78] The church immediately appealed to the Supreme Court, and numerous other religious bodies supported its petition with briefs *amicus curiae*.[79]

n. Review by the Supreme Court (1988). The Supreme Court of the United States granted *certiorari* and ruled in an opinion delivered by Justice Kennedy.

> We hold that a nonparty witness can challenge the court's lack of subject-matter jurisdiction in defense of a civil contempt citation, notwithstanding the absence of a final judgment in the underlying action.... [T]he subpoena power of a court cannot be more extensive than its jurisdiction.... [This rule] rests...on the central principle of a free society that courts have finite

78. *U.S. Catholic Conference v. Abortion Rights Mobilization*, 824 F.2d 156 (CA2 1987), Cardamone dissent.

79. Among the various *amici*—fulfilling Harriet Pilpel's prediction, *supra*—were the following: American Jewish Congress, Baptist Joint Committee on Public Affairs, Catholic League for Religious and Civil Rights, Christian Legal Society, Church of Jesus Christ of Latter-day Saints, Lutheran Church—Missouri Synod, National Association of Evangelicals and National Council of Churches.

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> bounds of authority... which exist to protect citizens from the very wrong asserted here, the excessive use of judicial power. The courts, no less than the political branches of government, must respect the limits of their authority.[80]

Justice Marshall alone dissented, saying he would have affirmed the opinion of Judge Newman. The case was remanded to the Second Circuit to determine whether the District Court had subject-matter jurisdiction.

o. *U.S. Catholic Conference v. Abortion Rights Mobilization, Inc.* (1989). On remand the Court of Appeals for the Second Circuit—represented by the same panel of Judges Newman, Kearse and Cardamone—heard argument December 5, 1988, and rendered a decision on the following September 6 per Judge Cardamone, the dissenter in the earlier decision.

> In *Allen v. Wright*, the Supreme Court made clear that standing is not merely a prudential inquiry into whether a court should exercise jurisdiction, but is rooted in Article III's "case" or "controversy" requirement and reflects separation of powers principles. Thus, when a plaintiff lacks standing to bring suit, a court has no subject matter jurisdiction over the case. Deceptively simple to state, standing entails a complex three-pronged inquiry. First, plaintiffs must show that they have suffered an injury in fact that is both concrete in nature and particularized to them. Second, the injury must be fairly traceable to defendants' conduct. Third, the injury must be redressable by removal of defendants' conduct.[81]

The court reviewed the claims of injury of the several classes of plaintiffs. The district court had found that the clergy plaintiffs and the religiously affiliated Women's Center for Reproductive Rights had standing under the Establishment Clause because they were "denigrated by government favoritism to a different theology," and that the IRS "hampers and frustrates these plaintiffs' ministries." Said the appellate court, "The appropriateness of this holding turns on whether the stigma plaintiffs allege is a cognizable injury in fact. We think the district court erred by translating plaintiffs' genuine motivation to sue into a personalized injury in fact." The court explained further:

> The Establishment Clause does not exempt clergy or lay persons from Article III's standing requirements. Here, the clergy plaintiffs have not been injured in a sufficiently personal way to distinguish themselves from other citizens who are generally aggrieved by a claimed constitutional violation. For that reason, they lack standing.... The primary injury of which they complain is their discomfiture at watching the government

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80. *U.S. Catholic Conference v. Abortion Rights Mobilization*, 487 U.S. 72 (1988).

81. *U.S. Catholic Conference v. Abortion Rights Mobilization, Inc.*, 885 F.2d 1020, 1023-1024 (2d Cir. 1989) (citations omitted), *cert. denied sub nom. Abortion Rights Mobilization, Inc. v. U.S. Catholic Conference*, 495 U.S. 918 (1990).

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> allegedly fail to enforce the law with respect to a third party.... This injury can hardly be called personalized to the clergy plaintiffs. They can point to no illegal government conduct directly affecting their own ministries. Thus, the injury the clergy complain of could be asserted by any member of the public who disagrees with the views of the Catholic Church and the IRS in granting it a tax exemption.

Then followed a discussion of the standing of taxpayer plaintiffs.

> The taxpayer plaintiffs allege that they are "harmed because the government's subsidy of the... Church's illegal political activities is the equivalent of a government expenditure to establish a religion in violation of the First Amendment".... In essence, they complain that not only is the government making illegal use of tax revenue but also that they, as taxpayers, are forced to contribute to the government's asserted subsidy of the Catholic Church.

The court noted that the "basic rule is that taxpayers do not have standing to challenge how the government spends tax revenue." It recognized that an exception to that rule had been made for challenges under the Establishment Clause to the federal taxing and spending power by *Flast v. Cohen*,[82] but that exception seemed sharply delimited by *Valley Forge Christian College v. Americans United*,[83] at least until *Bowen v. Kendrick*[84] revitalized it. Since the application of the tax-exemption rules of Section 501(c)(3) was solely an exercise of the Executive Branch in enforcing the law, the court found no "nexus between plaintiffs' allegations and Congress' exercise of its taxing and spending powers" sufficient to confer taxpayer standing.

A third group of plaintiffs claimed standing as voters, whose right to vote was impaired and diminished by the IRS' refusal to revoke the tax exemption of the Catholic Church. The court viewed this claim as having nothing to do with voting.

> It is undisputed that the instant plaintiffs do not allege that their vote has been diluted or that voting district lines have been gerrymandered to favor the Church or that anyone has "stuffed the ballot box" with votes for Church-backed candidates or that anyone has prevented them from voting. In short, plaintiffs do not allege the particularized and objectively ascertainable injury in fact that sustained standing in the malapportionment cases.

But the court then created a fourth category of possible standing, "competitive advocate standing." Plaintiffs claimed that their chance of electoral success was diminished because they did not receive the advantage that the church received from the government's alleged nonenforcement of the Internal Revenue Code. The

82. 392 U.S. 83 (1968), discussed at IIID4.
83. 454 U.S. 464 (1982), discussed at IIID8c.
84. 487 U.S. 589 (1988), discussed at § D2d above.

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government thus—plaintiffs contended— created an uneven playing field, tilted in favor of the church, and affording uneven footing in the political arena. Said the appellate court, "The fatal flaw in the argument is that plaintiffs are not players in that arena or on that field... since by their own admission they choose not to match the Church's alleged electioneering with their own. Therefore, they are not competitors."

> Like the claims of the clergy plaintiffs, the instant competitor claims lack particularized injury in fact. By asserting that an advantage to one competitor adversely handicaps the others, plaintiffs have not pleaded that they were personally denied equal treatment.... [Since] we hold that plaintiffs have not pleaded a direct injury in fact, we need not decide whether the two other standing requirements of traceability and redressability have been met.... In sum, we hold that none of the plaintiffs has standing, that the district court therefore did not have subject matter jurisdiction, that the contempt adjudication must be vacated, and that the order denying the motion to dismiss the case must be reversed and the plaintiffs' complaint dismissed.

Judge Kearse joined Judge Cardamone in this opinion.

Judge Newman, who had written the opinion for the majority in the earlier decision by the Second Circuit in this case, filed a spirited dissent.

> The Court today rules that tax-exempt organizations advocating the right to an abortion have no standing to challenge the actions of the Internal Revenue Service in failing to enforce against the Catholic Church the statutory requirement that prohibits tax-exempt organizations from "participat[ing] in, or interven[ing] in... any political campaign...." The Court reaches this result by concluding that the "pro-choice" organizations are not competitors of the Catholic Church in the political arena on the subject of abortion. Because I believe that conclusion is incorrect— indeed, that it is contrary to the undisputed facts of the abortion controversy in Twentieth Century America, I respectfully dissent.
>
> The majority begins its analysis by labeling the issue that divides us as "Competitive Advocate Standing." I think that is an admirable designation. The majority then recognizes that standing is frequently recognized for those who seek to challenge the lawfulness of governmental actions that inure to the benefit of their competitors. The majority then concludes that the competitor standing rule of these cases does not apply to the tax-exempt pro-choice organizations that are plaintiffs in this suit because they do not intervene in political campaigns.
>
> That conclusion rests on a needlessly narrow view of both the realities of American political life and the contours of the doctrine of competitive advocate standing. To be an advocate in the political arena in this country, organizations and their members need not intervene in the campaign of any particular candidate for public office. Political advocacy takes many

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forms. To promote their views, a few people run for office. Others support candidates. But most Americans advocate their side of public issues by standing up for that they believe through a wide range of activities beyond the formal processes of electoral politics. They speak to their friends and neighbors; they participate in community activities; they devote their time, their energy, and sometimes their money to their causes. All who engage in these activities are competing in the arena of public advocacy with those who choose to support differing points of view by various forms of advocacy, including backing like-minded candidates.

The competition necessary to confer competitor standing need not be in the identical activity of one's economic or philosophical opponent. When the *Texas Monthly* challenged the tax exemption of religious magazines,[85] it did not wish to compete in the precise activity of publishing religious magazines. It wished to compete in the broader field of magazine publishing, and it was accorded standing to challenge the economic benefit of a tax exemption conferred upon the competitive publisher of a religious magazine. So here, plaintiffs Abortion Rights Mobilization, Inc. and the National Women's Health Network, Inc. do not wish to compete in the political arena with the Catholic Church on the issue of abortion by the precise technique of supporting candidates for public office. Instead, they have chosen to compete in advocating their side of the abortion issue by distributing information on the availability of abortions, by speaking, writing, and marching, and by championing in countless other ways the cause of abortion rights.

If the words are to have any meaning at all, these plaintiffs are indisputably "competitive advocates" of the Catholic Church on the issue of abortion.

The majority reckons with the argument that the plaintiff... organizations might qualify as competitive advocates if they "simply advocate the pro-choice cause and stop short of supporting candidates." The argument is dismissed by the assertion that the strongly held beliefs of the plaintiffs "are not a substitute for injury in fact." Of course, they are not. But no one claims they are. The injury in fact is the competitive disadvantage the plaintiff organizations are obliged to endure when, accepting at this stage the allegations of the complaint, the Catholic Church is permitted to violate the tax laws by using tax-exempt donations to support the "anti-abortion" side of the national debate, while the plaintiff organizations must confine their advocacy of the "pro-choice" side to those insubstantial lobbying activities that the tax laws permit. If the allegations of the complaint are true, and plaintiffs seek only the opportunity to prove them, the plaintiff organizations are seriously injured both in the eyes of the law and in the real world of political advocacy by the significant advantage currently being enjoyed by the Catholic Church as a result of governmental action that violates the tax laws. According to the complaint, the Catholic Church is using its tax-free funds to support

85. *Texas Monthly v. Bullock*, 489 U.S. 1 (1989), discussed at VC6b(4).

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> political candidates who oppose the right to an abortion; the plaintiff 501(c)(3) organizations, abiding by the terms of the tax law, are limited to other forms of advocacy. Both sides are competing in the arena of public advocacy, but governmental action is tolerating a law violation that enables one side to promote its cause with a significant technique denied to the other side. That should be sufficient to permit the claim of law violation to be litigated.
>
> In the majority's view, the plaintiff... organizations and the Catholic Church are not competitors in the arena of public advocacy because the plaintiffs "choose not to match the Church's alleged electioneering with their own." That makes it sound as if the plaintiff... organizations have simply decided as a matter of personal preference that they do not want to match the Church's alleged electioneering. But the decision to forgo electioneering is not a matter of personal preference, it is obedience to a requirement of an act of Congress. I fail to understand why any person or organization, seeking to challenge a violation of federal law, should be denied access to a federal court for the reason that it is obeying the law.[86]

One may resonate to Judge Newman's critique of the majority's rather lame argument, yet welcome the result that put an end to the ten-year struggle. To those who believe that lobbying and electioneering should have no effect on a nonprofit organization's tax status (whether it be religious or not) and is an unconstitutional condition upon the exercise of the rights of assembly and petition (despite the Supreme Court's holding to the contrary in *Regan v. Taxation With Representation*[87]), the remedy is not to enforce such conditions on churches in common with nonreligious nonprofits, but to remove the burden from both. Those who feel that the Catholic Church was getting away with lawbreaking will see it another way, but that church was prepared to show—if the matter ever came to trial—that it had not engaged in support or opposition to candidates for public office, at least not on any national basis. There was indeed a national Pastoral Plan to oppose abortion on moral and religious grounds, but it did not espouse a concerted effort at electioneering.

Some local Catholic groups may have gotten carried away with enthusiasm for the cause, but in many instances the electioneering may have been the imputation of others. For instance, Cardinal Madeiros of Boston sent a pastoral letter to be read to congregations throughout his diocese on the Sunday before election in 1980 adjuring all to cast their votes in accordance with the teachings of the faith, etc. The next day the Boston *Globe* announced, CARDINAL OPPOSES BARNEY FRANK. Supposedly someone in the headquarters of the Archdiocese replied to an inquiry from the *Globe* that the Cardinal did indeed have in mind the candidacy of Barney Frank, an outspoken advocate of abortion rights running to fill the seat vacated by Rep. Robert F. Drinan, S.J. And supposedly everyone in the Catholic Church in

86. *U.S. Catholic Conference v. Abortion Rights Mobilization*, *supra*, Newman dissent.
87. 461 U.S. 540 (1983), discussed at VC6c(2),(3).

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Boston knew that that was what he meant (in which case, why did he need to preach a sermon on it?). But that is the sort of fact question that would have been put to a jury if the issue came to trial: did Cardinal Madeiros really have Barney Frank in mind when he preached that sermon (which mentioned no names)?

Do we want juries trying to read the minds of preachers? And who was doing the electioneering, the cardinal or the Boston *Globe*? And did the actions of one cardinal, if found to be in violation of § 501(c)(3) of the Internal Revenue Code, implicate the entire Roman Catholic Church in the United States—whose tax exemption as a whole was challenged by the plaintiffs? Other churches agreed with the Roman Catholic Church that critics of the church ought not be entitled to ransack the internal archives of the church and analyze the mental processes of its preachers to impugn its tax status. (After all, Barney Frank was elected anyway, whatever the cardinal's intentions.)

Although the plaintiffs insisted that they were not challenging the right of a church to expound its views—even at election time—but only its supporting or opposing candidates, this type of lawsuit could have a chilling effect on religious bodies' efforts to implement their ethical teachings in the public-policy arena. If such a suit were ever to come to trial, other religious bodies might well be expected to band together to defend the right of any church—even one with which they might disagree on a particular issue—to preach and teach and attempt to persuade its members and the general public of the merits of its views without losing its tax exemption. Indeed, if tax exemption were to be denied any church for any cause, one could contend that it should be denied a church that *failed* to proclaim its religious vision for the nation and *neglected* to try to effectuate it in public policy! That is what religious bodies are called to do, and that is one important way in which they serve the public interest, as Judge Dooling and Justice Brennan intimated. True governmental neutrality in such matters would be best served by the policy that a church's proclamation of its views on public issues has no bearing on its tax exemption.

5. Religion and Candidates or Officeholders

Some may think that the foregoing material deals with the *easy* questions; that no one challenges the right of religious bodies and their leaders to speak out on issues of public policy. That right was conceded by the plaintiffs in *Abortion Rights Mobilization, supra*, it is true, but it is by no means conceded by all, as has been shown in the foregoing as well, from Judge Clark's dissent in *Girard Trust, supra*, to the New York City Tax Commission's views in *Holy Spirit Association*, with which this section begins—and ends.

It is still a live battlefield, though the definitive principles have been set and will eventually prevail. The harder questions, however, are still very much in dispute, and they cluster around the role of religion in the choice and conduct of the nation's

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political leadership. All too often political campaigns are marred by imputations that a candidate's religious affiliation and/or convictions unfits him or her for election to public office. The evangelical faith of Jimmy Carter, it was alleged by some, was a factor that could not be trusted in the White House. The same thing was said about John F. Kennedy's Roman Catholic faith in 1960, as it was about Al Smith's in 1928.

Legally the question was answered by Article VI of the Constitution when it was adopted in 1787 (before the First Amendment was added): "*No religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.*" The meaning of that provision is that no one can be barred *by law* from (federal) public office because that person is a Catholic, a Protestant, a Jew, a Hindu, an atheist or anything else. This command has been so thoroughly understood and accepted that the Supreme Court has never had occasion to apply it in the entire history of the nation.[88] But whether such a person will be nominated or elected is another matter that rests with the preferences and prejudices of each individual voter—and what the delegates to the political nominating caucuses and conventions suppose those preferences and prejudices to be.

To be true to the spirit of Article VI, the voters should not let themselves be swayed solely or chiefly by whether they like or dislike, trust or mistrust, the religious faith of a candidate for office, but should decide their vote on the candidate's record, character, and statements on the (public) issues. But what if the candidate makes statements about the public issues that reflect religious ideas or convictions? Should the public want someone running the nation's affairs who is influenced by religious convictions? More to the point, should the public want someone running the nation's affairs who is *not* influenced by religious convictions? Between those two ways of posing the problem lies a great gulf within which vast hosts of cultural adversaries grapple with divergent definitions of the nation's course and the proper effect of religious commitments on an officeholder's handling of the difficult decisions that arise in shaping that course.

a. Sundry Voices of 1984. In the years of a presidential election, these questions seem to come to the fore, and the prominent voices addressing them seem often to be talking past each other. In 1984, for example, the following diverse counsels were heard and amplified by the press:

Archbishop John J. O'Connor: I question whether Catholics can in good conscience vote for candidates who did not work for the legal elimination of abortion.

Geraldine Ferraro (Democratic candidate for vice president): I am personally against abortion, but do not believe that my views as a Catholic should be imposed

88. See further discussion of the Religious Test Clause in connection with *Anderson v. Laird* at VD1d. The record of the several states is not as laudable. Several had restrictions barring nonChristians or nonProtestants from office (see the account of the struggle to enfranchise Jews in Maryland in Stokes, *supra*, v. I, pp. 865ff.). Others had provisions excluding clergy from elected office; see discussion of *McDaniel v. Paty* at § 4k above.

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by law on others. Even Catholics are not agreed on what should be done by law about abortion.

Archbishop Bernard Law: The church's position is monolithic on abortion. Some Catholics may not be faithful to that position, but the church's position is unambiguous, consistent and monolithic.

Mario Cuomo (Governor of New York, speaking at Notre Dame University, September 13, 1984): The Catholic public official lives the political truth most Catholics through most of American history have accepted and insisted on: the truth that to assure our freedom we must assure others the same freedom, even if occasionally it produces conduct by them which we would hold to be sinful. We know that the price of seeking to force our beliefs on others is that they might some day force theirs on us.

Archbishop James Malone (then President of the National Conference of Catholic Bishops): To say that one's personal morality does not affect one's duty as a public official is logically untenable.

Bishop Paul Moore (Episcopal Diocese of New York): A Roman Catholic officeholder, or an Episcopalian or a Jewish officeholder, has a primary religious duty to uphold the Constitution and the laws of the land, even if his own religious belief is against that. His primary duty is to carry out his oath to uphold the Constitution of the United States.

President Ronald Reagan: Government involves morality, and morality is based on religion. People who do not recognize that are intolerant of religion.

Walter Mondale (Democratic candidate for the presidency): American religion has always been intensely private... between the individual and God, and no one's religion should become an issue in the campaign.

Henry Hyde (R—Ill., speaking at Notre Dame University, September 24, 1984): No more than any other citizen can we expect a president to put his conscience into the closet during his or her term in office.... To drive religiously based values out of the public arena is the *real* threat to pluralism.... At the extreme we have the sort of Catholic politician of whom it's been said that "his religion is so private he won't even impose it on himself."

It is worth quoting further from Congressman Hyde (subsequently chairman of the House Judiciary Committee) on this subject, since he may have helped to correct some widespread misconceptions, or at least clarified some issues.

> In the first... place, we are not arguing about the creation of a theocracy, or anything remotely approaching it. While there may be those on one end of the debate who would like to see the United States formally declare itself a "Christian nation,"—just as there are those at the other end of the spectrum who would like to see the assumptions and judgments contained in the Humanist Manifestos achieve a constitutional, foundational status in our society—the vast majority of those arguing about the role of religious values in public policy do not want a theocracy

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in America; do not want one expression of the Judaeo-Christian tradition (or any other religious tradition) raised up by government in preference to others, do not want to see religious institutions have a formal role in our political process. Any efforts along these lines would not only threaten the integrity of our political process; they would threaten the integrity of the Church....

When the Church becomes too immediately identified with any particular partisan organization or agenda, it has lost a measure of its crucial capacity to be a sign of unity in a broken world.... Preserving the integrity of the Church should be, conversely, not only a matter of concern for believers, but for all who care about democracy. The Churches have played an extremely important role as bridge-builders in our diverse society, and we have every bit as much need of that bridge-building today as in previous generations. A Church that becomes identified as the "Democratic Party at prayer," a charge laid against some liberal Protestant denominations, or as "the Republican Party at prayer," a charge laid against some evangelical Protestant denominations, is a Church that is risking one of its essential societal roles: that of being ground on which we can gather, not as partisans but as men and women of goodwill, to consider our differences in the context of our common humanity....

The Constitutional separation of church and state is thus a question of institutional distinctiveness and integrity. It was never intended to rule religiously-based values out of order in the public arena. Yet that is precisely what some among us would do: disqualify an argument or a public policy from constitutional consideration if its roots are "religious".... Any appeal to a religiously-based value to buttress an argument for this or that public policy option was thus a "violation of the separation of church and state"....

The principled resistance to "imposing one's religious views" on a pluralistic society is a favorite ploy of the "I'm personally opposed to abortion but..." school of politician. Their dilemma is that they want to retain their Catholic credentials but realize that in today's Democratic Party to be upwardly mobile is to be very liberal and to be very liberal is to be a feminist and to be a feminist is to be for abortion....

Another way of expressing one's reluctance to impose one's values on society is to require a consensus before supporting any change in the law. You will note that this is a highly selective requirement applying only to abortion legislation. No consensus was demanded before adopting the Civil Rights Act of 1964 or Fair Housing legislation—these were right and their proponents helped *create* a consensus by advocacy and example and by understanding that the law itself can be an excellent teacher. No, when the cause was the abolition of slavery or the codification of civil rights the moral thing to do was to push for the change and to help achieve the consensus which followed. The whole notion of morality by consensus is a

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> curious one. I've often thought that if Jesus had taken a poll He would never have preached the Gospel.[89]

b. Some Insights on Vocation, Calling and Talent. Presidents—and lesser magistrates—are not without historic guidance in how to comport themselves between the imperatives of their religious duty and the requirements of their public trust in office. The English language has in it several common terms—"calling," "vocation" and "talent"—that are used quite casually by all. But they derive from important insights found in the New Testament that are summed up in the doctrine of Christian vocation—or rather, the Christian doctrine of *everyone's* vocation. The very term "vocation" refers to the idea that God *calls* each person to a particular task or line of service in the world (*vocatio*): "[L]et everyone lead the life which the Lord has assigned him, and in which God has called him.... [I]n whatever state each was called, there let him remain with God."[90]

Through more than a millennium of Christian history, the doctrine of *vocatio* was interpreted to mean a call to *leave* the mundane world and take up an eremitic life in isolation or a cenobitic life in monastery or convent. Some were permitted to "return" from their cave or cloister to the "world" as pastors or other parish functionaries—even today called "secular" priests in the Roman Catholic Church, from *saeculum*, the present age. God's calling—and special favor—thus was identified with full-time service in and to the church. That concept finds an echo in the very word for "church"—*ecclesia*—from the Greek *ekklesia*, an assembly of citizens summoned by the crier, the legislative assembly, from *ek-kaleo*, to call forth, to call out. Thus the church was the collection of those who had been called forth out of the world to make up the assembly of the saved.

But a new note was struck with the Protestant Reformation. Martin Luther announced a revolutionary doctrine when he asserted that a Christian could serve God as acceptably in the *world* as in the church! One did not have to abandon one's home, family and friends to find one's Christian *vocatio*. *Bleib' in deinem Stand*, he said; remain in your station. But he said more than that. He drew on another insight from the Gospel—that each person was given by God certain unique gifts or *talents* (from the Greek *talanton*, a weight of gold or silver amounting to a large sum of money). That insight is found in the Parable of the Talents, which relates that a man going on a journey called his servants and entrusted to one of them five talents, to another two, and to a third only one—"*to each according to his ability*." The first two traded with their money and doubled it. The third "went and dug in the ground

89. Hyde, Henry J., "Keeping God in the Closet: Some Thoughts on the Exorcism of Religious Values from Public Life," Thomas White Center on Law and Government, Law School of Notre Dame University, September 24, 1984—one week after Governor Cuomo spoke in the same forum. The text of Rep. Hyde's speech also appeared in *Notre Dame Journal of Law, Ethics & Public Policy,* Vol. I (1984), pp. 33-51. Reprinted with permission.

90. I Cor. 7:17, 24, RSV.

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and hid his master's money." When the master returned he was pleased with the work of the first two servants, saying, "Well done, good and faithful servant; you have been faithful over a little, I will set you over much; enter into the joy of your master." The third servant was rebuked for failure to employ his talent in his master's service; his talent was given to the one who had ten; and he was cast into the outer darkness where men will weep and gnash their teeth.[91] That meaning has been engraved in English usage by John Milton's *Sonnet on His Blindness*:

> ...And *that one talent which is death to hide*
> Lodged with me useless, though my soul more bent
> *To serve therewith my Maker*, and present
> My true account, *lest He returning chide*.... (1652?)

Each person—according to this concept—has an obligation to serve God and humankind in the world with that unique talent in a way that no one else can. And one might *change one's station* to apply one's unique talents where they might be better suited—even in government!

> Therefore, should you see that there is a lack of hangmen, beadles, judges, lords, or princes, and find that you are qualified, you should offer your services and seek the place, that necessary government may by no means be despised and become inefficient or perish.[92]

There are two important and complementary aspects of this concept of vocation. One is that it frees one to serve God in the field of one's aptitude and choosing. The other is that one is not entitled to defy or depart from the generally accepted canons of one's station. A Christian, for instance, who is called to be a plumber is not called to be a *preacher* with a Stillson wrench but to be the *best plumber* he can be, according to what a plumber's needed task in the world is understood and expected to be. That does not mean he cannot innovate; indeed he should if able, but only in ways designed to improve the plumber's ability to do the work of plumbing. (And if he sees another role or station that offers a wider field of service or one better suited to his unique abilities, he is free to move to it.)

c. The Example of Abraham Lincoln. Transposing this concept to the political realm, the holder of political office has a unique contribution to make in that position, but he is not free to define his own role without reference to what that position requires and the responsibility that he has undertaken to fulfill it. Abraham Lincoln had an admirable grasp of this tension between the individual's abilities or insights and the responsibilities of public office.

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91. Matt. 25:14-30, RSV.
92. Luther, M., *On Secular Authority*.

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> I am naturally anti-slavery. If slavery is not wrong, nothing is wrong. I cannot remember when I did not so think, and feel. And yet I have never understood that the Presidency conferred upon me an unrestricted right to act officially upon this judgment and feeling.... I have done no official act in deference to my abstract judgment and feeling on slavery.[93]

He spelled this out more fully in response to an "open letter" by Horace Greeley, modestly entitled "A Prayer of Twenty Million," demanding immediate emancipation of the slaves.

> My paramount object in this struggle is to save the Union, and it is not either to save or to destroy slavery. If I could save the Union without freeing *any* slave, I would do it; and if I could save it by freeing *all* the slaves, I would do it; and if I could save it by freeing some and leaving others alone, I would also do that. What I do about slavery, and the colored race, I do because I believe it helps to save the Union; and what I forbear, I forbear because I do not believe it would help to save the Union. I shall do less whenever I shall believe what I am doing hurts the cause, and I shall do more whenever I shall believe doing more will help the cause. I shall try to correct errors when shown to be errors; and I shall adopt new views so fast as they shall appear to be true views. I have here stated my purpose according to my view of my *official* duty; and I intend no modification of my oft-expressed *personal* wish that all men everywhere could be free.[94]

It was only when his personal convictions coincided with the (secular) good of the nation that he would act upon them. Meanwhile he could try to persuade the electorate and his fellow magistrates of what that good should be, as he did in submitting the idea of the Emancipation Proclamation to his cabinet. All of them disapproved of it, so he put it aside for a while, until it was more clearly consonant with the nation's needs—which eventually it was. When he issued it, he followed the third option in his letter to Greeley: he freed the slaves in the territories still in rebellion (where his writ did not run), but not in the areas already conquered (where it did), so that the effect was more moral and psychological than actual. Still, it won immense approbation in England and on the Continent, even among workers in textile mills idled by the embargo on cotton from the Confederacy.[95] And it helped to pave the way for the Thirteenth Amendment, which outlawed slavery throughout the nation.

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93. *Collected Works of Abraham Lincoln* (New Brunswick, N.J.: Rutgers Univ. Press, 1953), Vol. VII, pp. 281-283.

94. Letter to the Editor of the *Tribune*, August 22, 1862; emphasis in original.

95. Thomas, Benj. F., *Abraham Lincoln* (New York: Knopf, 1952), p. 360.

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It may also happen that those who occupy positions of political responsibility may seem less receptive to divine guidance than Lincoln believed he was, or may be more receptive to mundane influences or more concerned for the short-term advantage than the long-term good, or for the party's interest than the public's. Citizens' groups—including religious ones (which often have a broader base and longer provenance than other interests in the commonwealth)—may need to try to counteract—or reinforce—those pressures by exerting their own views and interests. The public servant confident of his or her own vocation will be secure enough to hearken to these counsels and weigh them against others without being swept away by them, and then determine by study of "the plain, physical facts of the case... what appears to be wise and right."

d. Further Guidelines. A corollary of the idea of vocation is that outside observers are not in as good a position to understand those "plain, physical facts" and what they indicate to be "wise and right" at the time as is the incumbent—the person upon whose shoulders and in whose unique vocation the actual responsibility for decision rests. No one else is at the intersection of the competing cross-pressures or in a situation to weigh as well their relative merits. As Lincoln put it, "I hope it will not be irreverent for me to say that if it is probable that God would reveal his will to others, on a point so connected with my duty, it might be supposed that he would reveal it directly to me; for unless I am more deceived in myself than I often am, it is my earnest desire to know the will of Providence in this matter. And if I can learn what it is I will do it!"[96]

A set of guidelines on these issues was adopted by the Executive Committee of the National Council of Churches for use in churches, which included the following advice:

> The Constitution forbids any religious test for public office. Therefore, a candidate's religious affiliation cannot disqualify him or her for election or appointment to public office in the United States. By the same token, a candidate's religion should not be show-cased as though it were a qualification or credential for public office.
>
> How the candidate, if elected, will use the powers of public office with respect to issues of concern to his or her religious group is often a troubling question. It is not adequately dealt with by saying that the office-holder's religion is a personal matter and has no bearing on her or his public acts, since that tends to privatize or trivialize religion. A candidate and office-holder is entitled to express religious views when appropriate to the situation and when not imputed to the office or the government nor clothed with official force or authority. But the office-holder's personal views on religion (or anything else) should not be the basis for official decisions or actions unless justified on their merits by the requirements of the common good and the responsibilities of the office....

96. Wolf, *supra*, p. 22, emphasis in original.

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> This understanding of an office-holder's responsibility accords well with the Christian doctrine of vocation, which suggests that a Christian in public office is not called by God to use the powers of that office to obtain advantage for Christianity or its teachings, but to be the *best* officer possible according to the civil canons of that office as set forth in the Constitution and the laws. And if a conflict should arise between official responsibilities and conscience, the proper course is for the office-holder to resign rather than to betray either.
>
> This view of the proper role of religion does not require the office-holder to be silent about his or her religious views when pertinent; far from it. The office-holder should seek in every way to advance what he or she believes the common good requires, and if that understanding of the common good derives in whole or in part from religious teaching or doctrine, all the better! But others are not obliged to agree. Public policy proposals consonant with the office-holder's religious convictions should be neither accepted nor rejected for that reason, but should be debated on their secular merits and effects, like any others. If they do commend themselves to a majority as desirable public policy and are enacted into law, they are no more "imposed" on others than are any other laws duly enacted by the will of the majority.
>
> What the office-holder should *not* do is to use the powers of office to advance the institutional interests of his or her faith-group at the expense of others or of religion at the expense of non-adherents of religion. Likewise, the office-holder should not seek to implement in public policy the doctrinal teachings or tenets of her or his religion unless and to the extent they coincide with the secular common good. And candidates, though entitled to express their religious views while campaigning, should be wary of the temptation, if elected, to consider that they have somehow gained a "mandate" to advance those views as public policy without explicit authorization of the electorate. The office-holder (or candidate) should also avoid stigmatizing critics or opponents as irreligious or sinful just because they disagree.
>
> By and large, the Presidents of the United States through more than two centuries of history have observed these principles in practice, and in this respect have set a good example for public servants at all levels.[97]

6. *Holy Spirit Association v. Tax Commission* (concl.)

The case with which this section began was appealed to the New York Court of Appeals, the state's highest court, where it was argued on behalf of the Unification Church by Laurence Tribe of the Harvard Law School. The Tax Commission's denial of exemption and the Appellate Division's upholding of that denial were opposed in briefs *amicus curiae* by the National Council of Churches and the New York State

97. "Guidelines on Relating Religion and Politics," unanimously adopted by the Executive Committee of the National Council of Churches, September 14, 1984.

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Council of Churches; the National Association of Evangelicals, the Christian Legal Society, and the Catholic League for Religious and Civil Rights; the American Civil Liberties Union and the New York Civil Liberties Union; and the American Jewish Congress. The opinion for a unanimous court was written by Judge Hugh R. Jones, who while in private practice before elevation to the bench had been chancellor of the Central New York diocese of the Episcopal Church and was thus somewhat conversant with the concerns of religious bodies.

At the outset Judge Jones noted that the court did not need to determine whether the Unification Church had religious purposes and teachings, since that had been conceded by the Tax Commission, the Special Referee and the Appellate Division. It had to decide a narrower question: "Is the Church, many of whose beliefs and activities are religious, organized and conducted primarily for religious purposes?"

> This, as understood by the Tax Commission and the Appellate Division, turns on whether the Church is engaged in so many or such significant nonreligious activities as to warrant the conclusion that its purpose is not primarily religious. More specifically the issue is whether the activities which have been found to be "political" and "economic" are for the purposes of [the] statute to be classified as secular rather than religious.
>
> When, as here, particular purposes and activities of a religious organization are claimed to be other than religious, the civil authorities may engage in but two inquiries: Does the religious organization assert that the challenged purposes and activities are religious, and is that assertion bona fide? Neither the courts nor the administrative agencies of the State... may go behind the declared content of religious beliefs any more than they may examine their validity.[98]

There followed quotations from *Watson v. Jones*[99] ("The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect,..."), *West Virginia Board of Education v. Barnette*[100] ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion....") and *U.S. v. Ballard*[101] ("Men may believe what they cannot prove. They may not be put to the proof of their religious beliefs... When the triers of fact undertake that task, they enter a forbidden domain.")

> We are not here concerned with whether the legislature has authority, should it choose to do so, to deny exemption to an organization whose purpose is primarily religious but which as part of its religious program devotes a substantial portion of its activities to political objectives. It

98. *Holy Spirit Assn. v. Tax Commission*, 55 N.Y.2d 512 (1982) at 521.
99. 13 Wall. 679 (1872), discussed at IB1.
100. 319 U.S. 624, quoting from pp. 640-642, discussed at IVA6b.
101. 322 U.S. 78, discussed at § B6a above.

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> suffices for our present purposes to note that [the N.Y. statute in question] includes no such provision.

Turning to the first of the two questions open to a civil court, Judge Jones quoted a page and a half of the church's description of its beliefs, including the assertion that "In Unification doctrine, every temporal sphere—political, cultural, and economic—is a battleground for the forces of God and the forces of Satan," and concluded: "There can be no doubt on the record before us that the Church has amply demonstrated that it does indeed assert that those beliefs and activities which the Tax Commission and the Appellate Division have found to be political and economic are of the essence of its religious doctrine and program."

On the second question, the court found that "No serious question can be raised on the record before us that the Church has demonstrated the sincerity and the bona fides of its assertions that in its view the political beliefs and activities of the Church and its members and the efforts which they devote to fund-raising and recruitment are at the core of its religious beliefs," since the court below had in effect conceded as much. The error of the Tax Commission, the Special Referee and the Appellate Division was

> that each asserted the right of civil authorities to examine the creed and theology of the Church and to factor out what in its or his considered judgment are the peripheral political and economic aspects, in contradistinction to what was acknowledged to be the essentially religious component. Each then took the view that beliefs and activities which could be... described... as "political" and "economic" were by that fact precluded from being classified as "religious."

At this point the court observed in the margin

> 6. If such categorization were to be undertaken, we note that substantial arguments are advanced that traditional theology has always mandated religious action in social, political and economic matters. Numerous illustrations are cited of essentially religious concern and activity in areas of political and economic action in Judeo-Christian history. The point is made that virtually all of the recognized religions and denominations in America today address political and economic issues within their basic theology [citing the several briefs *amicus curiae*]. As reiterated, however, it is not for the courts to make judgments with reference to these substantive matters.

The court's conclusion followed:

> [I]t is not the province of civil authorities to indulge in such distillation as to what is to be denominated religious and what political or economic. It is for religious bodies themselves, rather than courts or administrative agencies, to define, by their teachings and activities, what their religion is.

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> The courts are obliged to accept such characterization of the activities of such bodies, including that of the Church in the case before us, unless it is found to be insincere or sham.
>
> Applying this principle, we conclude that on the record before us, as a matter of law, the primary purpose of the Church... is religious and that the determination of the Tax Commission to the contrary is both arbitrary and capricious and affected by error of law.

This decision by New York's highest court was certainly a vindication for the Unification Church and for the several *amici* who had opposed the views of the lower civil tribunals. A religious body could not be disqualified for tax exemption on the basis of a civil authority's defining some of its activities as "political" or "economic" or otherwise nonreligious in contradiction to the religious body's own self-definition. One might wonder whether there is a limit to what a religious body might unilaterally declare to be religious activity. Would a brothel or a drug-ring become "religious" because its proprietors declared it so? There are two boundaries to this seemingly open-ended holding. One is the matter of *sincerity*: is it really a religion or just a facade or sham to cloak activities that would otherwise be illicit or subject to state licensing or control?

Second, even if an activity is sincerely believed to be religious by its perpetrators, the state can still control, prohibit or punish it if acting in furtherance of a compelling state interest that can be served in no less restrictive way. That was the stricture erected by the Supreme Court in *Sherbert v. Verner* (1963), slighted by it in *Oregon v. Smith* (1990), and re-erected by Congress in the Religious Freedom Restoration Act (1993).[102]

The Court of Appeals was dealing here with a prior question, an important definitional threshold: the religious body, in the first instance, is entitled to define its own religious activities.[103] That does not leave society without recourse, but affords a basic initial leeway for religious bodies to exercise self-determination about this important aspect of their nature: how they shall engage in outreach to the world outside their doors.

ADDENDUM

The clergy might take some encouragement from the fact that they are not the only ones accused of "meddling in politics." When Alexander Hamilton was seeking support for his excise tax on whiskey in 1790, he obtained the endorsement of the Philadelphia College of Physicians.

> These medical doctors and teachers enthusiastically supported his efforts to reform the "morals and manners" of whiskey consumers. The

102. These are discussed in the Introduction to Volume I and in locations cited there.

103. See discussion of defining "religion" at VF as well as discussion of sham religions at VC6c(12).

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physicians offered their combined professional opinion that "a great proportion of the most obstinate, painful and mortal disorders which affect the human body are produced by distilled spirits...."

Opponents of the excise in Congress were outraged at the physicians' "interference." They believed that these medical men had no business instructing Congress how to perform its duties, and no right telling the American people how to conduct their lives. Congressman Jackson of Georgia argued that this sort of advice, if heeded, could quickly get out of hand. Next thing they knew, House members would be told by the doctors to legislate against mushrooms; and "they might petition Congress to pass a law interdicting the use of ketchup because some ignorant persons had been poisoned by eating mushrooms."[104]

104 . Slaughter, Thomas P., *The Whiskey Rebellion* (New York: Oxford Univ. Press, 1986), pp. 100-101, quoting Gales, *Debates*, II, 1790.

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